STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

ESTATE OF KEVIN WIEMER AND
ANGELA Y. WIEMER,

Plaintiffs-Respondents,

SECURA INSURANCE COMPANY,

Involuntary-Plaintiff-Respondent,

v.

Case No.: 22-AP-1346
Cir. Ct. Case: 22-CV-0021

ZEELAND FARM SERVICES, INC.,

Defendant-Co-Appellant,

ATLANTIC CARRIERS, INC.,
BLACKHOOF TRUCKING LLC,
SCOTTSDALE INDEMNITY COMPANY,

Defendants-Appellants,

ABC INSURANCE COMPANY AND
DEF INSURANCE COMPANY,

Defendants.

AN APPEAL FROM THE CIRCUIT COURT FOR RUSK COUNTY
THE HONORABLE STEVEN P. ANDERSON, PRESIDING

REPLY BRIEF OF DEFENDANTS-APPELLANTS

HENNESSY & ROACH, P.C.
Attorneys for Defendants-Appellants
Atlantic Carriers, Inc.,
Blackhoof Trucking LLC,
Scottsdale Indemnity Company

CHARLES W. KRAMER
State Bar No. 1021504
1110 North Market Street, 3rd Floor
Milwaukee, WI 53202
(414) 514-1319
ckramer@hennessyroach.com

TABLE OF CONTENTS

TABLE OF CONTENTS 3

TABLE OF AUTHORITIES 4

ARGUMENT. 6

I. JUDGMENT ON THE PLEADINGS / SUMMARY JUDGMENT WAS APPROPRIATE BECAUSE MR. WIEMER'S AMENDED COMPLAINT AND THE FACTS SHOW THAT HIS DEATH AROSE FROM AN ACCIDENT INVOLVING A MOTOR VEHICLE. 6

II. MR. WIEMER'S ACCIDENT, WHEN HE FELL INTO A SEMITRAILER WHILE UNLOADING IT AND WAS SMOTHERED BY ITS CARGO, INVOLVED A MOTOR VEHICLE. 14

III. THE CIRCUIT COURT CORRECTLY CONCLUDED THAT THE ATTACHED TRACTOR TRAILER INTO WHICH MR. WIEMER FELL AND DIED WAS A MOTOR VEHICLE UNDER WIS. STAT. §893.54. 19

IV. WIS. STAT. §893.54(2M) BARS MR. WIEMER'S CLAIMS BECAUSE THEY "ARISE FROM AN ACCIDENT." 24

CONCLUSION 26

CERTIFICATION OF FORM AND LENGTH 27

TABLE OF AUTHORITIES

Cases

Allstate Ins. Co. v. Truck Ins. Exch.,
63 Wis. 2d 148, 216 N.W.2d 205 (1974) 8
Amery Motor Co. v. Corey,
46 Wis. 2d 291, 297, 174 N.W.2d 540, 543 (1970). 7, 8
Blasing v. Zurich Am. Ins. Co.,
2014 WI 73, 356 Wis. 2d 63, 850 N.W.2d 138 14
Burg ex rel. Weichert v. Cincinnati Cas. Ins. Co.,
2002 WI 76, 254 Wis. 2d 36, 645 N.W.2d 880 ..... 7, 8
Dep't of Revenue v. Trudell Trailer Sales, Inc.,
104 Wis. 2d 39, 310 N.W.2d 612 (1981) 15
Heifetz v. Johnson,
61 Wis. 2d 111, 211 N.W.2d 834 (1973) 10
Komorowski v. Kozicki,
45 Wis. 2d 95, 172 N.W.2d 329 (1969) 15
Lukaszewicz v. Concrete Rsch., Inc.,
43 Wis. 2d 335, 168 N.W.2d 581 (1969) 7, 14
Meharg v. Alabama Power Co.,
78 So. 909 (Ala. 1918) 6
Rice v. Gruetzmacher,
27 Wis. 2d 46, 133 N.W.2d 401 (1965) 13
Rood v. Selective Ins. Co. of S.C.,
2022 WI App 50, 404 Wis. 2d 512, 980 N.W.2d 282..... 13
Seider v. O'Connell,
2000 WI 76, 236 Wis. 2d 211, 612 N.W.2d 659. 10
Smedley v. Milwaukee Auto. Ins. Co.,
12 Wis. 2d 460, 107 N.W.2d 625 (1961) 14
State ex rel. Cynthia M.S. v. Michael F.C.,
181 Wis. 2d 618, 511 N.W.2d 868 (1994). 11
Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue,
2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21 7

Statutes

Wis. Stat. §340.01 ..... 11, 12
Wis. Stat. §340.01(35) 12
Wis. Stat. §340.01(71) 12
Wis. Stat. §340.01(8) 12
Wis. Stat. §350.01(9r) 8
Wis. Stat. §802.08 6
Wis. Stat. §893.54(2m) ..... passim
Wis. Stat. 340.01(32) 12

Other Authorities

Antonin Scalia, *The Rule of Law As A Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989). 11

ARGUMENT

I. JUDGMENT ON THE PLEADINGS / SUMMARY JUDGMENT WAS APPROPRIATE BECAUSE MR. WIEMER'S AMENDED COMPLAINT AND THE FACTS SHOW THAT HIS DEATH AROSE FROM AN ACCIDENT INVOLVING A MOTOR VEHICLE.

Mr. Wiemer argues that his Amended Complaint states a cause of action for negligence against the Defendants.[1] However, Mr. Wiemer's Amended Complaint does more than that. His Amended Complaint also alleges that he died more than two years before the filing date stamped on its face. This establishes a complete defense to his claims – running of the statute of limitations. For this reason, the complaint, taken as a whole, fails to state a cause of action upon which relief may be granted.[2]

Likewise, Mr. Wiemer argues that this case has disputed facts.[3] It does. But only *material* disputed facts will stop summary judgment.[4] The facts material to the statute of limitations are few and undisputed: Mr. Wiemer filed this action thirty months and two days after he died. He died in the process of unloading a "bridged" twenty-five-ton load of corn gluten that had been delivered by semi-tractor trailer from Clinton, Iowa to Sheldon, Wisconsin. He died after falling into the trailer-trailer when its corn gluten cargo smothered him. The only question is whether

---

[1] Resp. Br. at 13-15, 48-49.

[2] *Meharg v. Alabama Power Co.*, 78 So. 909, 910 (Ala. 1918) (If the Complaint "states what might be a good cause of action, and then sets up facts which would be a complete defense to same, it would fail to state a cause of action.").

[3] Resp. Br. at 16-17.

[4] Wis. Stat. §802.08 (*emphasis added*).

Wis. Stat. §893.54(2m) applies. That is a question of law.[5] Summary judgment was appropriate in the Circuit Court. Reversal with instruction to grant summary judgment is appropriate here.

II. MR. WIEMER'S ACCIDENT WHEN HE FELL INTO A SEMITRAILER WHILE UNLOADING IT AND WAS SMOTHERED BY ITS CARGO, INVOLVED A MOTOR VEHICLE.

Mr. Wiemer argues that the case does not "'involv[e]' a motor vehicle because when he died, no "one was 'operating' the trailer, tractor or combination thereof."[6] But by helping to unload the trailer, Mr. Wiemer, himself, was operating it. The Wisconsin Supreme Court holds: "Persons actively engaged in loading and unloading the automobile in the commonly accepted meaning of those words are considered to be using or operating the automobile."[7] It noted in another case,

> operating a truck for loading and unloading must mean more than driving the truck to the premises. One cannot drive a truck while it is being loaded or unloaded. We think the word 'operating' in the statute in connection with loading and unloading of an automobile means participating in the loading and unloading activity.[8]

Trying to argue that he was not "operating" the truck just before he died, Mr. Wiemer cites to *Burg*.[9]. *Burg* does not support his argument. First, *Burg* simply does not construe the word "involve," the

---

[5] *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶ 12, 382 Wis. 2d 496, 517, 914 N.W.2d 21

[6] Resp. Br. At 20.

[7] *Amery Motor Co. v. Corey*, 46 Wis. 2d 291, 297, 174 N.W.2d 540, 543 (1970).

[8] *Lukaszewicz v. Concrete Rsch., Inc.*, 43 Wis. 2d 335, 343–44, 168 N.W.2d 581, 586 (1969).

[9] *Burg ex rel. Weichert v. Cincinnati Cas. Ins. Co.*, 2002 WI 76, 254 Wis. 2d 36, 645 N.W.2d 880.

key word in Wis. Stat. §893.54(2m). *Burg* does construe "operate." But *Burg* involved a specific statutory definition of "operate" which required:

> "the exercise of physical control over the speed or direction of a snowmobile or the physical manipulation or activation of any of the controls of a snowmobile necessary to put it in motion." Wis. Stat. §350.01(9r).[10]

Under this definition, because Burg was simply sitting on the snowmobile, he was not operating it.

Here, Wis. Stat. §893.54(2m) does not contain the restrictive definition of "operate" in *Burg*. Unlike Mr. Burg, Mr. Wiemer was not simply sitting on the trailer. He had climbed on it and was using a pole to break the corn gluten bridge. He was actively trying to unload the corn gluten. That, under the loading and unloading cases, is using the trailer. In those cases, the courts have given a "persuasive"[11] and "commonly accepted meaning"[12] of the terms. But those terms, "operation" and "use," are narrower than "involve" which is at issue here. Certainly, if one is operating or using a vehicle, it is involved. Mr. Wiemer's accident "involved" a motor vehicle when he tried to unload it, fell into it and was smothered by its cargo.

---

[10] *Id.* at ¶4.

[11] *Allstate Ins. Co. v. Truck Ins. Exch.*, 63 Wis. 2d 148, 156, 216 N.W.2d 205, 209 (1974) ("While most loading and unloading cases in Wisconsin are construing those terms as they are found in automobile policies, nonetheless, those cases are persuasive in defining the general meaning of those terms.").

[12] *Amery Motor Co.*, 46 Wis. 2d at 297. Mr. Wiemer argues that insurance cases should not apply because they interpret a policy rather than a statute. Resp. Br. at 25. However, the difference exists only if the terms is ambiguous. Since the courts have given "use" and "operate" a "commonly accepted" meaning there is no difference in interpretation.

Asserting that his death did not involve a motor vehicle, Mr. Wiemer also argues that his "death did not originate from an accident 'requiring' or 'necessitating' a motor vehicle."[13] Of course, even under Mr. Wiemer's own definition of "involve," "require" and "necessitate" are not the only two ways of arriving at "involve."[14] Another way to "involve" include "to have an effect on – involvement" and "to have as part of itself : include."[15] The trailer certainly "ha[d] an effect on" Mr. Wiemer. It was the object he fell into, whose cargo collapsed on and smothered him.

Even accepting Mr. Wiemer's limited definition, his death required the presence of the semitrailer. It is his theory that, without the gravity-fed semitrailer, he would be alive today. Without the semitrailer, there would have been no corn gluten to unload. Without the semitrailer there would have been nothing for him to climb on and fall into. Without the semitrailer, there would have been no bridged cargo of corn gluten for him to fall through and smother him. Under Mr. Wiemer's own theory, the presence of the semitrailer was a substantial factor in and necessary to his cause of death. The semitrailer was "involved" in it.

Mr. Wiemer also looks to the legislative history to determine the meaning of "involving."[16] Yet, he then argues that "involving" is unambiguous.[17] He also recognizes that the "legislative history provides

---

[13] Resp. Br. at 24.

[14] *Id.*

[15] *Id.*

[16] Resp. Br. at 22.

[17] Resp. Br. at 19.

little guidance in interpreting 'involving,' as it is used in Wis. Stat. §893.54(2m)."[18] So, his appeal to legislative history is both improper and useless.[19] It can be safely ignored.

Finally, in the guise of construing "involving," Mr. Wiemer argues that the statute of limitations should not apply to his action because "in no way has the policy behind Chapter 893 been frustrated."[20] But it has. One of the purposes of the statute is to ensure "that the claim will be processed in a timely manner."[21] Accordingly, a time limit for filing was set at twenty-four months. But Mr. Wiemer filed his claim thirty months, two days after his death. He was too late.

Mr. Wiemer also ignores the effect of the statute of limitations. Here, the running of the statute of limitations not only extinguishes a plaintiff's right to sue, but it also creates a right for a defendant not to be sued. This right not to be sued is "as of high dignity as regards judicial remedies as any other right."[22] Mr. Wiemer's theory violates the Atlantic Defendants' right "of high dignity" not to be sued after the running of the statute.

Mr. Wiemer's argument ignores another point of statute of limitations, how they work. Unlike laches, statutes of limitations

---

[18] Resp. Br. at 22.

[19] *Seider v. O'Connell*, 2000 WI 76, ¶50, 236 Wis. 2d 211, 235, 612 N.W.2d 659, 671 ("resort to legislative history is not appropriate in the absence of a finding of ambiguity.").

[20] Resp. Br. At 23.

[21] Resp. Br. at 22.

[22] *Heifetz v. Johnson*, 61 Wis. 2d 111, 115, 211 N.W.2d 834, 836–37 (1973)

"establish 'bright line' time constraints which courts cannot freely ignore."[23] By setting a bright line rule, the legislature makes it easy to determine when a case will or will not be time-barred. "Predictability . . . is a needful characteristic of any law worthy of the name."[24] The statute of limitations should predictably apply to Mr. Wiemer's claims. Regardless of the quantity of evidence available, his ability to sue for wrongful death ended two years after that death.

Mr. Wiemer died when he climbed on the back of a tractor-trailer, fell into it and was smothered by its cargo. Contrary to the conclusion of the Circuit Court, his accident "involved" a motor vehicle. Wis. Stat. §893.54(2m) bars his claims. The Circuit Court should be reversed.

III. THE CIRCUIT CORRECTLY COURT CORRECTLY CONCLUDED THAT THE ATTACHED TRACTOR TRAILER INTO WHICH MR. WIEMER FELL AND DIED WAS A MOTOR VEHICLE UNDER WIS. STAT. §893.54.

The Circuit Court correctly concluded that the tractor-trailer Mr. Wiemer fell into was a motor vehicle under Wis. Stat. §893.54(2m). Mr. Wiemer challenges that conclusion making several inconsistent arguments. At one point, he argues that trailers are not part of motor vehicles at all because Wis. Stat. §340.01 includes a separate definition for "trailer."[25] At another, he argues that the instant trailer was not a

[23] *State ex rel. Cynthia M.S. v. Michael F.C.*, 181 Wis. 2d 618, 631–32, 511 N.W.2d 868, 874 (1994).

[24] Antonin Scalia, *The Rule of Law As A Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989).

[25] Resp. Br. at 30-31.

motor vehicle because it was not powered or in transit.[26] His arguments both misconstrue the definitions in Wis. Stat. §340.01 and ignore that unloading is part of the use of a motor vehicle. They must be rejected.

Mr. Wiemer argues that the definition of vehicle which includes "including a combination of 2 or more vehicles . . . which is self-propelled"[27] does not include trailers because there is a separate definition of "trailer" in Wis. Stat. §340.01(71). His argument must fail. The definition of motor vehicle Wis. Stat. §340.01(35) is unambiguous and includes a "combination" of vehicles which, as a whole, is self-propelled. The definition of "trailer" in Wis. Stat. §340.01(71) does not except trailers from being motor vehicles. Rather, the statue anticipates that trailers would be used in "combination": a "trailer" is "designed for . . . being drawn by a motor vehicle."[28] Other statutes share this recognition. Under Wis. Stat. §340.01(35), a motor vehicle includes a "commercial motor vehicle" under Wis. Stat. §340.01(8). That definition specifically contemplates that "commercial vehicle" would include a "towed unit."[29]

Not only does Mr. Wiemer's argument contravene the language of the statutes, but it also leads to absurd results. For example, Wis. Stat. §340.01(32) defines "motorcycle." Under Mr. Wiemer's logic, the separate definition of "motorcycle" would mean that motorcycles would

[26] *Id.* at 35.

[27] Wis. Stat. §340.01(35).

[28] Wis. Stat. §340.01(71).

[29] *Id.*

not be "motor vehicles." Such a result contravenes good sense and must be rejected.

Mr. Wiemer argues that the tractor-trailer combination was not a motor vehicle because when he died, the combination was stationary and off road.[30] Admittedly, both *Rice*[31] and *Rood*[32] except from "motor vehicle" those vehicles which are not primarily designed for use on the highways when offroad. But the corollary to *Rice* and *Rood* is that motor vehicles which are primarily designed for use on highways remain motor vehicles whether on the highway or not. Under those cases, a riding lawn mower is a "motor vehicle" only when driven on the highway, yet a Ford F-150 remains a motor vehicle even when driven across a farm field.

The semitractor-trailer here had just transported 25 tons of corn gluten 296 miles from Clinton, Iowa to Sheldon, Wisconsin over the highways of both states when Mr. Wiemer fell into it.[33] Indeed, he contends that the trailer was improperly designed to transport the corn gluten.[34] Right or wrong, the design and purpose of the tractor-trailer Mr. Wiemer fell into was to transport property across highways. It remained a motor vehicle even when it left the highway to deliver its cargo in Sheldon.

---

[30] Resp. Br. at 35.

[31] *Rice v. Gruetzmacher*, 27 Wis. 2d 46, 51, 133 N.W.2d 401, 404 (1965).

[32] *Rood v. Selective Ins. Co. of S.C.*, 2022 WI App 50, 404 Wis. 2d 512, 980 N.W.2d 282.

[33] A-App. at 40; R29:7.

[34] Resp. Supp. App. at 4.

Although the tractor-trailer was stationary and had its motor off when Mr. Wiemer fell, that does not "unmotorize" it. Under the law, "[o]ne does not have to be driving or operating an automobile to be using it."[35] Practically, "[o]ne cannot drive a truck while it is being loaded or unloaded."[36] In these days of $5.00 per gallon diesel and global warming concerns, it is unsurprising that a truck driver would turn off a semi tractor-trailer's motor while it was being unloaded. But having the engine turned off does make it disappear. Under the law, the tractor-trailer into which Mr. Weimer fell was a single motor vehicle.

Mr. Wiemer attempts to bolster his argument that the trailer lost its status as a motor vehicle by citing to language in *Smedley*:

> The test under the statutes is whether at the time of the accident the unit is being used, managed, controlled or operated as a motor vehicle in the ordinary meaning of those words.[37]

But at the time of his accident, he was unloading the tractor-trailer. This is its use.[38] His appeal to *Smedley* does not help his cause.

In his argument, Mr. Wiemer asks whether an accident when unloading a boat or a house from a trailer would involve a motor vehicle.[39] The answer must be, "yes." A trailer is useless without something to tow it. The purpose of the trip in both hypotheticals was

---

[35] *Blasing v. Zurich Am. Ins. Co.*, 2014 WI 73, ¶ 37, 356 Wis. 2d 63, 76, 850 N.W.2d 138, 145

[36] *Lukaszewicz,* 43 Wis. 2d at 343–44.

[37] *Smedley v. Milwaukee Auto. Ins. Co.*, 12 Wis. 2d 460, 467, 107 N.W.2d 625, 628 (1961)

[38] *Lukaszewicz, supra.*

[39] Resp. Br. at 41.

transporting property. That transport is incomplete until the property is unloaded from the trailer and put in its new location: "unloading does not cease until the items of cargo have reached the final point of delivery toward which the transportation of the cargo by automobile was a part."[40]

Mr. Wiemer also argues that a trailer cannot be a motor vehicle under Wis. Stat. §893.54(2m) because the statute does not apply to parts of motor vehicles. But that leads to absurd results eviscerating the statute. Mr. Wiemer's construction would allow a party to escape the effects of Wis. Stat. §893.54(2m) because only the front bumper of a car hit him. Indeed, if every part of a motor vehicle had to be involved in an accident under Wis. Stat. §893.54(2m), the statute would never apply. His construction of the statute is absurd and should be rejected.

Moreover, courts have rejected the argument that a semitrailer can be functionally separated from a tractor. In *Trudell Trailer Sales, Inc.*,[41] the Court decided whether semi-trailers could be considered "truck bodies" for the purposes of a tax statute. The Court held:

> This court decides that "truck body," as used in the statute, includes a semitrailer . . . A semitrailer is built to and does carry the cargo. Without it or some other unit to carry the load, a tractor, which is the power unit, serves little or no purpose. When the two pieces of equipment are joined, the semitrailer is the "truck body," and it fits that definition and purpose when constructed and sold. No basis exists for distinguishing that type of truck body from one with a self-contained motor.[42]

---

[40] *Komorowski v. Kozicki*, 45 Wis. 2d 95, 101, 172 N.W.2d 329, 332 (1969).

[41] *Dep't of Revenue v. Trudell Trailer Sales, Inc.*, 104 Wis. 2d 39, 41–42, 310 N.W.2d 612, 614 (1981)

[42] *Id.* at 41–42.

Here, Mr. Wiemer died in the act of unloading an attached tractor trailer combination. The Circuit Court correctly concluded that the tractor trailer combination was a single motor vehicle for purposes of Wis. Stat. §893.54(2m).

IV. WIS. STAT. §893.54(2M) BARS MR. WIEMER'S CLAIMS BECAUSE THEY "ARISE FROM AN ACCIDENT."

Mr. Wiemer argues that the Atlantic Defendants do not accurately quote the statute in this part of their brief.[43] Regrettably, he is right. While the Atlantic Defendants cited the statute as "arising out of," the statutory language is "arising from." This was a mistake and not meant to mislead. The Atlantic Defendants apologize to the Court and the parties for making it. However, both "from" and "out of" connote origin. The Atlantic Defendants stand by their arguments that Mr. Wiemer's claims originate from an accident whether they "arise from" or "arise out of."

Other than pointing out the variant wording, Mr. Wiemer never shows how his claims do not "arise from" an accident. He even argues: "Mr. Wiemer died as a direct and proximate result of Defendant's negligence."[44] But that merely establishes that his claims "arise from an accident."[45] Wis. Stat. §893.54(2m) now bars his claims. The Circuit Court should be reversed.

---

[43] Resp. Br. at 48-51.

[44] Resp. Br. at 49.

[45] *State v. Balistreri*, 106 Wis. 2d 741, 759, 317 N.W.2d 493, 502 (1982) (Intent and negligence are mutually exclusive.).

CONCLUSION

For the above reasons and those previously cited, the Order of the Circuit Court denying summary judgment should be reversed and the case remanded with instructions to enter summary judgment in favor of the Atlantic Defendants and to dismiss the case against them.

Dated: December 21, 2022

HENNESSY & ROACH, P.C.
Attorneys for Defendants-Appellants,
Atlantic Carriers, Inc., Scottsdale Indemnity Company, and Blackhoof Trucking LLC

Charles W. Kramer

Electronically Signed By:
CHARLES W. KRAMER
State Bar No. 1021504

POST OFFICE ADDRESS:
1110 N. Market Street, 3rd Floor
Milwaukee, WI 53202
(414) 273-3133 - Telephone
(414) 273-3131 - Facsimile
Email: ckramer@hennessyroach.com

CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stats. §§809.19(8)(b), (bm) and (c) for a brief. The length of this brief is 2,976 words.

Dated: December 21, 2022

HENNESSY & ROACH, P.C.
Attorneys for Defendants-Appellants, Atlantic Carriers, Inc., Scottsdale Indemnity Company, and Blackhoof Trucking LLC

Charles W. Kramer

Electronically Signed By:
CHARLES W. KRAMER
State Bar No. 1021504

POST OFFICE ADDRESS:
1110 N. Market Street, 3rd Floor
Milwaukee, WI 53202
(414) 273-3133 - Telephone
(414) 273-3131 - Facsimile
Email: ckramer@hennessyroach.com