

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 15, 2007

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP1719

Cir. Ct. No. 2002CV2630

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

MICHELE D. GRABOW AND COLE O'BRIEN,

PLAINTIFFS-APPELLANTS,

WISCONSIN CARPENTER'S HEALTH CARE FUND,

INVOLUNTARY-PLAINTIFF,

v.

**DOUGLAS W. WILSON, MILLENNIUM FARMS THOROUGHBREDS, LLC
AND MARKEL INSURANCE COMPANY,**

DEFENDANTS-RESPONDENTS,

AMERICAN FAMILY INSURANCE COMPANY,

DEFENDANT.

APPEAL from an order of the circuit court for Dane County:
ROBERT A. DECHAMBEAU, Judge. *Reversed and cause remanded.*

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Michelle Grabow and Cole O’Brien appeal from an order dismissing their personal injury claim against Douglas Wilson, Millennium Farms Thoroughbreds, LLC, and their insurer. The court dismissed the action on the respondents’ summary judgment motion. The issue is whether there is a material fact dispute on liability. We conclude that material facts are disputed, and therefore reverse.

¶2 Wilson owned Millennium and employed Taylor Welty to manage it as a horse farm. While Welty was building additional horse stables, O’Brien, then seven, was seriously injured on the construction site. He and Grabow, his mother, sued for damages. They alleged that Wilson and Millennium were liable because Welty was their employee when his negligence caused O’Brien’s injuries.

¶3 Wilson and Millennium moved for summary judgment arguing that Welty acted outside the scope of his employment while building the stables, thus exempting them from liability. Principally, they presented evidence that Welty was pursuing the project without Wilson’s knowledge or permission. They presented other evidence allowing the inference that Welty was building the additional stables for himself, because he was planning to buy the farm from Wilson. This evidence included Wilson’s averment that Welty built the stables using money he secretly diverted from another project. The trial court concluded that the only reasonable inference available from the evidence was that Welty acted outside the scope of his employment. The resulting order dismissing the complaint is the subject of this appeal.

¶4 We review a grant or denial of summary judgment independently, applying the same methodology as the circuit court. *Green Spring Farms v.*

Kersten, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). In doing so we view the facts in the light most favorable to the nonmoving party. *State Bank of La Crosse v. Elsen*, 128 Wis. 2d 508, 511-12, 383 N.W.2d 916 (Ct. App. 1986). Summary judgment is proper only when there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2005-06).¹

¶5 An employer may be vicariously liable for the negligent acts of his or her employees while they are acting within the scope of their employment. *Shannon v. City of Milwaukee*, 94 Wis. 2d 364, 370, 289 N.W.2d 564 (1980). WISCONSIN JI—CIVIL 4035 defines the scope of employment as follows:

A servant is within the scope of his or her employment when he or she is performing work or rendering services he or she was engaged to perform and render within the time and space limits of his or her authority and is actuated by a purpose to serve his or her master in doing what he or she is doing. He or she is within the scope of his or her employment when he or she is performing work or rendering services in obedience to the express orders or direction of his or her master, or doing that which is warranted within the terms of his or her express or implied authority, considering the nature of the services required, the instructions which he or she has received, and the circumstances under which his or her work is being done or the services are being rendered.

¶6 The employee’s conduct is not within the scope of employment when “different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.” *Scott v. Min-Aqua Bats Water Ski Club, Inc.*, 79 Wis. 2d 316, 321, 255 N.W.2d 536 (1977).

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

We consider the employee's intent when determining whether his or her conduct was within the scope of employment. *Olson v. Connerly*, 156 Wis. 2d 488, 498-99, 457 N.W.2d 479 (1990). An employee acts within the scope of employment if at least partially motivated to serve the employer. *Id.*

¶7 A factual dispute exists as to whether building the stalls fell within the scope of Welty's authorized activities as the farm manager. Wilson described his view of Welty's responsibilities in the following manner:

He had the authority to run the farm, buy the feed, clean the stalls. All the labor was his responsibility. All the feed was his responsibility. Take care of the horses completely Calling the vet, the farrier, just take care of the animals. Keep the property neat and clean. Paperwork, he was supposed to handle all of that.

¶8 Welty's employment contract provided that his duties included:

boarding operation, feed ordering, stall maintenance, monitoring veterinarian care, oversee maintenance of all out buildings, fencing repairs, and development of pasture areas. Management of Millennium Farms livestock training, care, preparing brood mares for breeding, stud selection, fouling, monitoring veterinarian care, pre-training racing stock, training TB for pleasure riding. Buying and selling of all livestock. Preparing all futurity/derby horses for racetrack trainers. Registration of all livestock, derby, futurity selections, and record keeping. Attending all selected livestock sales. Transportation of livestock with Millenniums truck and trailers. Overseeing all financial affairs of operation, paying of all regular operational bills for farm. Development of farm/livestock business, and Millennium's website/s. Financial/business reports

¶9 Other than one visit from Wilson per month, Welty essentially performed his duties without oversight. Given the comprehensive range of his responsibilities and the minimal supervision he received, one could reasonably infer that Welty had a very broad grant of authority to manage the farm as he saw

fit, both explicitly by contract and implicitly by practice. In Wilson's words he was to "run the farm" and "take care of the horses completely." Consequently, one could reasonably infer that Welty had authority to add stables, even if Wilson would have denied permission for the project if asked. An employee with implied authority may act within the scope of employment, even though the employee's conduct is contrary to the employer's express instructions or stated policies. *State v. Steenberg Homes, Inc.*, 223 Wis. 2d 511, 520, 589 N.W.2d 668 (Ct. App. 1998). A reasonable fact finder could determine that to be the case here.

¶10 A dispute also remained whether Welty acted solely for his own purposes, or at least partially for his employers. One could reasonably infer, based on the undisputed fact that he was negotiating to buy Millennium at the time, that he wanted to improve the property solely for his benefit, at Wilson's expense. However, one could also reasonably infer that Welty was at least partially motivated to benefit Wilson. For one thing, he was only in negotiations to buy the property, nothing was settled and there was no offer to purchase or other binding contract. Any benefit to Welty was contingent on a completed sale. Additionally, Wilson acknowledged that he and Welty discussed "the fact that [Millennium] needed more stables and more housing." If there was agreement on Millennium's present need for stables, one could reasonably infer that Welty was at least partly motivated to build the stables to meet that need even if he personally might benefit from the project.

¶11 Because the scope of Welty's employment remains an unresolved question of material fact, we remand for further proceedings on the complaint.

By the Court.—Order reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE
809.23(1)(b)5.

