

STATE OF MICHIGAN
COURT OF APPEALS

JOSEPH ALLEN BARNARD,

Plaintiff-Appellant,

UNPUBLISHED
September 13, 1996

v

No. 172752
LC No. 93-450786-NO

PHILIP and JOYCE TRYZOS,

Defendants-Cross
Plaintiffs-Cross
Defendants-Appellees,

and
OTTO TRZOS CO., INC.,

Defendant-Appellee,

and
ERB LUMBER COMPANY, INC.,

Defendant-Cross
Plaintiff-Cross
Defendant-Appellee,

and
SCHULTZ, SNYDER & STEELE LUMBER
COMPANY,

Defendant-Cross
Defendant-Appellee.

Before: Gribbs, P.J., and Marilyn Kelly and White, JJ.

PER CURIAM.

Plaintiff appeals the circuit court orders granting summary disposition to defendants. Plaintiff, an employee of defendant Otto A. Trzos Co., was injured while unloading lumber from a truck that was parked on property owned by defendants Philip and Joyce Trzos. At the time of the accident, defendants Philip and Joyce Trzos were in the process of building a new home. Defendants Erb Lumber and Schultz, Snyder & Steele Lumber Company(lumber suppliers) were involved in providing the lumber. We affirm.

Plaintiff's brief on appeal does not individually address each of plaintiff's claims. However, the essence of plaintiff's claim appears to be that the trial court erred in dismissing plaintiff's negligence claims against his employer and a coemployee as being subject to the exclusive remedy of the workers' compensation disability act, and erred in dismissing plaintiff's claims against defendants property owners and defendants lumber suppliers because of a lack of duty.

The trial court properly granted summary disposition in favor of plaintiff's employer, defendant Otto A. Trzos Company, Inc. Plaintiff argues that he was acting outside the scope of his employment at the time of the accident and that his employer violated various duties in requiring him to perform the work. An injured employee's exclusive remedy against his employer is for workers' compensation unless the claim is one of intentional tort. MCL 418.131(1); MSA 17.237(131)(1). *Benson v Callahan Mining Corp*, 191 Mich App 443, 446; 479 NW2d 12 (1991). Although the circuit court has jurisdiction to decide whether a plaintiff is an employee for workers' compensation purposes, the workers' compensation board has exclusive jurisdiction to determine whether an injury was suffered in the course of plaintiff's employment. *Sewell v Clearing Machine Corp*, 419 Mich 56, 62; 347 NW2d 447 (1984). Here, plaintiff contends that there was an issue of fact concerning the "exact nature of [the] employment relationship" and raises queries regarding who was actually plaintiff's "employer". Nonetheless, plaintiff's claim revolves around the issue of whether he was acting within the scope of his employment. Because the circuit court lacked jurisdiction to resolve this issue, summary disposition was properly granted as to defendant Otto A. Trzos Co.

Plaintiff also argues that summary disposition was improper as to defendant Philip Trzos. Under the workers' compensation disability act, personal injury claims involving coemployees are barred if both employees were acting in the course of their employment at the time of the injury. *Whaley v McClain*, 158 Mich App 533, 536; 405 NW2d 187 (1987). The trial court in this case concluded that both plaintiff and defendant Philip Trzos were employees of Otto A. Trzos at the time of the accident, and that defendant Philip Trzos was plaintiff's supervisor. We find no error.

As plaintiff argues on appeal, a coemployee can, under certain circumstances, be exempt from the immunity provisions of the workers' compensation disability act. The dual-capacity doctrine has been recognized by our courts as "an exception to the general immunity granted to employers from actions by employees in exchange for the employee's right to recover workers' compensation benefits." *Miller v Massullo*, 172 Mich App 752, 757; 432 NW2d 429 (1988). However, the dual-capacity

doctrine does not arise when both employees were acting in the course of their employment at the time the injury occurred. *Id.* at 759. MCL 418.827(1); MSA 17.237(827)(1).

Here, there was evidence that defendant Philip Trzos was plaintiff's supervisor, and that he was authorized to direct employees to do all manner of "odd jobs, short jobs." Plaintiff was employed as a "gofer", and his job was to do "whatever people asked him to." Although plaintiff testified that he did not think work at defendant Philip Trzos' house should be part of his job, he went without question when told to do so, and was paid by defendant Otto A. Trzos Co. for the work he did there. Because an action against a coemployee is barred if both employees were acting in the course of their employment at the time of the injury, the trial court did not err in granting summary disposition to defendant Philip Trzos. *Whaley v McClain*, 158 Mich App 533, 536;405

Plaintiff also argues that the trial court improperly dismissed plaintiff's claim against defendant Joyce Trzos. We do not agree. Defendant Joyce Trzos denied that she was a general contractor of the building project and plaintiff has failed to produce any evidence contradicting her assertion. Nor has plaintiff argued that the trial court erred in its factual determination that there was no evidence that defendant Joyce Trzos knew or should have known that there was a dangerous condition in the load of lumber. Accordingly, we find these issues to be abandoned. *Froling v Carpenter*, 203 Mich App 368, 373; 512 NW2d 6 (1994).

Finally, plaintiff argues that the trial court improperly granted summary disposition to defendants lumber suppliers. Plaintiff concedes that "generally the courts have held that a supplier does not have any duties on delivering his goods to the designated spot." Although plaintiff argues that a duty should be found in this case, he cites no authority in support of the existence of a legal duty. We decline to search for authority in support of plaintiff's position. *Winiemko v Valenti*, 203 Mich App 411, 419; 513 NW2d 181 (1994). In any event, we find no duty exists under the circumstances of this case. Summary disposition was properly granted as to defendants lumber suppliers.

Affirmed.

/s/ Roman S. Gibbs

/s/ Marilyn Kelly

/s/ Helene N. White