STATE OF MICHIGAN

COURT OF APPEALS

WANDA MONTGOMERY,

Plaintiff-Appellee,

v

BRAD JACOBSON,

Defendant-Appellant.

UNPUBLISHED
December 20, 1996

No. 183037
LC No. 94-472794-NO

Before: Michael J. Kelly, P.J., and Hood and H.D. Soet*, JJ.

PER CURIAM.

We granted defendant's application for leave to appeal the trial court's denial of defendant's motions for summary disposition and reconsideration in this premises liability action. We reverse.

Plaintiff was injured at defendant's home. Defendant was hosting a "team building" outing, which was initiated, sponsored, and paid for by the parties' employer, Electronic Data Systems, Inc. (EDS). Rather than seek worker's compensation benefits from EDS, plaintiff brought an action in circuit court against defendant. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10) on the ground that there existed no question of fact regarding whether plaintiff's injuries were within the scope of her employment, and therefore her claim fell within the coverage of the Worker's Compensation Disability Act, MCL 418.101 *et seq.*; MSA 17.237(101) *et seq*, and the exclusive jurisdiction of the bureau of worker's compensation. The trial court denied this motion and defendant's motion for reconsideration. Because the matter was mediated for less than $10,000, it was remanded to district court.

The facts of this case require a determination of whether plaintiff's injury arose out of and in the course of her employment. The Worker's Disability Compensation Act provides the exclusive remedy for co-employee negligence. MCL 418.827; MSA 17.237(827); *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 189; ___ NW2d ___ (1996). Circuit courts have no jurisdiction to determine whether a defendant was the plaintiff's employer or co-employee and thus able to invoke the exclusive remedy provision. *Sewell v Clearing Machine Corp*, 419 Mich 56, 62; 347 NW2d 447 (1984). However,

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* Circuit judge, sitting on the Court of Appeals by assignment.

once it is determined that the plaintiff was an employee or co-employee of the defendant, the bureau of worker's compensation has exclusive jurisdiction to decide whether injuries suffered by an employee arose out of and in the course of employment. MCL 418.841(1); MSA 17.237(841)(1); *Szydlowski v General Motors Corp*, 397 Mich 356, 359; 245 NW2d 26 (1976). Morever, as this Court has instructed:

> "[A]s a general rule the question whether an injury arose out of and in the course of employment is a question to be resolved in the first instance by the bureau. However, there is an exception 'where it is obvious that the cause of action is not based on the employer/employee relationship.' The question whether plaintiff's injury arose out of and in the course of his employment may be a question of law or one primarily of fact, or a mixed question of law and fact. Thus, where the facts are undisputed, the question is one of law for the courts to decide." [*Zarka v Burger King*, 206 Mich App 409, 411; 522 NW2d 650 (1994), citations omitted.]

In the instant case, the parties agree that plaintiff and defendant were co-employees. Thus, the sole issue is whether plaintiff's injury arose out of and in the course of her employment. The Worker's Disability Compensation Act, MCL 418.301(3); MSA 17.237(301)(3), provides that

> [a]n employee going to or from his or her work, while on the premises where the employee's work is to be performed, and within a reasonable time before and after his or her working hours, is presumed to be in the course of his or her employment. Notwithstanding this presumption, an injury incurred in the pursuit of an activity the major purpose of which is social or recreational is not covered under this act.

This Court has adopted the test set forth in 1A Larson, Workmen's Compensation Law, § 22.00, p 5-82, to determine whether attendance at recreational or social activities is within the scope of employment, *Allison v Pepsi-Cola Bottling Co*, 183 Mich App 101, 108-109; 454 NW2d 162 (1990); *Bayerl v Badger Mfg Co*, 169 Mich App 444, 449; 426 NW2d 436 (1988):

> Recreational or social activities are within the course of employment when
>
> (1) They occur on the premises during a lunch or recreation period as a regular incident of the employment; or
>
> (2) The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or
>
> (3) The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.

We find that because there were questions of fact relating to resolution of the issue, the matter should have been resolved by the bureau of worker's compensation. Although plaintiff stated that there was no written requirement of attendance, but rather that it was only "politically" required, defendant stated that attendance was impliedly required. All but one team member, one who apparently took a vacation day, attended the event. The employees traveled to defendant's house during working hours, and were paid their wages for the day, although the function extended beyond the normal working day time period. There also existed a question regarding the employer's true intent of the function and whether it extended beyond improvement of employee morale so that it was deriving some direct benefit from the function. There also exists a question whether and to what extent that the team members discussed work-related matters in addition to the recreational activities enjoyed by them. While plaintiff stated that the intent of the function was to allow the team members to work better together and get to know one another better, defendant indicated that the purpose of the event was for "team building," the meaning of which was not presented to the trial court. Resolution of these questions and application of the Larson factors was the responsibility of the bureau of worker's compensation. We therefore conclude that defendant's motion should have been granted.

Defendant also argues that the trial court erred in denying his motion for summary disposition on the basis of the "dual capacity doctrine." This doctrine is an exception to the exclusive remedy provision of the Worker's Compensation Disability Act and allows an employee to state a cause of action in tort against her employer where the employer occupies a second capacity that confers upon it obligations independent of those imposed on it as an employer. In order for the doctrine to apply, the employer's second persona must be so completely independent from and unrelated to its status as an employer that the law recognizes it as a separate legal person. *Howard v White*, 447 Mich 396, 398-400; 523 NW2d 220 (1992). This Court has applied the dual capacity doctrine to the co-employee scenario. *Miller v Massullo*, 172 Mich App 752, 758-759; 432 NW2d 429 (1980); *Robards v Estate of Kantzler*, 98 Mich App 414, 419-420; 296 NW2d 265 (1980). If, however, both employees were acting in the course of their employment at the time the injury occurred, co-employee immunity is preserved. MCL 418.827(1); MSA 17.237(827)(1); *Miller*, *supra* at 759; *Robards*, *supra* at 419. Plaintiff could not have demonstrated at trial that defendant's hosting of the team outing at his home was unrelated to the parties' common employment for EDS. We therefore find that the trial court erred in ruling that the dual capacity doctrine applied.

Reversed.

/s/ Harold Hood
/s/ H. David Soet

Judge Michael J. Kelly concurs in result only.