STATE OF MICHIGAN

COURT OF APPEALS

MARK ANTHONY MAHER and DEBRA LYNN MAHER,

Plaintiffs-Appellants,

v

SHULMAN & KAUFMAN, INC., and DAN GITRE,

Defendants-Appellees,

and

JOHN DOE, D.D.S.,

Defendant.

UNPUBLISHED
July 16, 1999

No. 204327
Wayne Circuit Court
LC No. 96-618175 NO

Before: Murphy, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendants' motion for summary disposition. Plaintiffs allege that plaintiff Mark Maher was injured after swallowing a dental partial plate made for him by defendant Dan Gitre. Plaintiffs filed a three-count complaint entitled "Dental Malpractice/Negligence; Products Liability; Loss of Consortium." Plaintiffs concede that the claims against John Doe, D.D.S., were properly dismissed. We reverse and remand.

Plaintiff Mark Maher performed general clerical duties for defendant Shulman & Kaufman, Inc. Shulman & Kaufman is in the business of manufacturing plates, partials, dentures, and other orthodontic implants for dentists for use on dental patients. Defendant Dan Gitre also worked for Shulman & Kaufman. Gitre is a nationally certified dental technician. Sometime during his employment with Shulman & Kaufman, Maher assumed the additional responsibility of delivering products to dentists. In compensation for these additional services, defendant Gitre made a dental prosthesis for Maher to fill a gap in his teeth. This was allegedly done after working hours. Sometime thereafter, while eating pizza

at his in-laws' home, the dental prosthesis became loose and Maher swallowed it. Maher was taken to the emergency room where the prosthesis was surgically removed from his stomach. Maher now claims to suffer from constant stomach problems as well as anxiety and depression.

Plaintiffs first argue that the trial court erred in determining that plaintiffs were required to comply with the statutory notice and affidavit requirements for malpractice actions. MCL 600.2912d; MSA 27A.2912(4), provides, in relevant part, as follows:

> (1) Subject to subsection (2), the plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169. The affidavit of merit shall certify that the health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice and shall contain a statement of each of the following:
>
> (a) The applicable standard of practice or care.
>
> (b) The health professional's opinion that the applicable standard of practice or care was breached *by the health professional or health facility receiving the notice*.
>
> (c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.
>
> (d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice. [emphasis supplied.]

MCL 600.2912b; MSA 27A.2912(2) provides, in relevant part, as follows:

> (1) Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against *a health professional or health facility* unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced. [Emphasis supplied.]

A plain reading of these statutes reveals that plaintiffs must comply with the notice and affidavit requirements only if they have asserted a claim of medical malpractice against "a health professional or a health facility."

In this case, the trial court dismissed Count I of plaintiffs' compliant, wherein plaintiffs alleged a claim of dental malpractice/negligence, because plaintiffs failed to comply with the notice and affidavit requirements set forth in MCL 600.2912d; MSA 27A.2912(4) and MCL 600.2912b; MSA 27A.2912(2). The trial court, however, did so because the count sounded in medical malpractice;

however, the trial court did not determine whether defendant Gitre is a "health professional" or whether defendant Shulman & Kaufman is a "health facility." Accordingly, we remand this case to the trial court to determine whether defendant Gitre is a "health professional" and whether defendant Shulman & Kaufman is a "health facility" as contemplated by MCL 600.2912d; MSA 27A.2912(4) and MCL 600.2912b; MSA 27A.2912(2). If on remand the trial court should decide these questions in favor of defendants, then summary disposition on the medical malpractice count should be granted in favor of defendants since plaintiffs failed to comply with the notice requirement, However, if on remand, the trial court should decide these questions in plaintiffs' favor, the trial court should permit plaintiffs to proceed against defendants under a theory of ordinary negligence since no medical malpractice claim would exist.

Plaintiffs next argue that the trial court erred in determining that plaintiffs' remaining products liability claim, and associated consortium claim, were barred by the exclusive-remedy provision of the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq.*; MSA 17.237(101) *et seq*. We agree.

Shulman & Kaufman brought its motion for summary disposition pursuant to MCR 2.116(C)(7), (8) and (10); however, because the parties and the court went beyond the pleadings to decide this issue, we will address the issue under MCR 2.116(C)(10). When determining whether a trial court properly granted summary disposition pursuant to MCR 2.116(C)(10), we review the record de novo to determine whether the prevailing parties were entitled to the judgment as a matter of law. *Westfield Cos v Grand Valley Health Plan*, 224 Mich App 385, 387-388; 568 NW2d 854 (1997).

We first address whether this issue was within the exclusive jurisdiction of the worker's compensation bureau. Whether a court had subject-matter jurisdiction is a question of law that we review de novo. *W A Foote Memorial Hosp v Dep't of Public Health*, 210 Mich App 516, 522; 534 NW2d 206 (1995).

In *Zarka v Burger King*, 206 Mich App 409, 411; 522 NW2d 650 (1994), this Court stated the following:

> Defendants are correct that as 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. *Buschbacher v Great Lakes Steel Corp*, 114 Mich App 833, 837; 319 NW2d 691 (1982). *However, there is an exception "where it is obvious that the cause of action is not based on the employer/employee relationship." Id.* at 838; see also *Genson v Bofors-Lakeway, Inc*, 122 Mich App 470, 477; 332 NW2d 507 (1983). 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. *Koschay v Barnett Pontiac, Inc*, 386 Mich 223, 225; 191 NW2d 334 (1971). Thus, where the facts are undisputed, the question is one of law for the court to decide. [Emphasis supplied.]

We conclude that because it is obvious that the cause of action in this case is not based on the employer/employee relationship, we need not defer to the jurisdiction of the worker's compensation bureau.

MCL 418.131(1); MSA 17.237(131)(1), in pertinent part, that "[t]he right to the recovery of benefits as provided in [the WDCA] shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease," while MCL 418.301(1); MSA 17.237(301)(1), provides, in relevant part, that "[a]n employee, who receives a personal injury arising out of and in the course of employment by an employer who is subject to [the WDCA] at the time of the injury, shall be paid compensation as provided in [the WDCA]." An employee is entitled to compensation where the nexus between the employment and the injury is sufficient to conclude that the injury was a circumstance of the employment. *Collier v J A Fredman, Inc*, 183 Mich App 156, 161; 454 NW2d 183 (1990). Further,

> 'It is sufficient to say that an injury is received "in the course of" the employment when it comes while the workman is doing the duty which he is employed to perform. It "arises out of" the employment, when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed, and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises "out of" the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workman would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origins in a risk connected with the employment, and to have flowed from that source as a rational consequence.' [*Appleford v Kimmel*, 297 Mich 8, 12-13, 296 NW 861 (1941), quoting *McNicol's Case*, 215 Mass 497, 102 NE 697 (1913); see also *Pearce v Michigan Home & Training School*, 231 Mich 536, 537-538, 204 NW 699 (1925).]

Although the principles discussed by our Supreme Court in *Appleford*, *supra*, have been applied to a wide variety of cases, we have found none that would support the trial court's conclusion that Maher's injury arose out of and in the course of his employment. See, generally, 4 Larson, Workmen's Compensation Law, § 14.00, p 4.1, *et seq*.

Defendant argues that *Nemeth v Michigan Bldg Components*, 390 Mich 734, 736-737; 213 NW2d 144 (1973), requires us to apply a "but for" test to determine whether the injury arose out of and in the course of plaintiff's employment. We disagree.

Nemeth did not expressly adopt such a test. *Nemeth* merely used the words "but for" in the course of its analysis of whether there was a sufficient nexus between the employment and the injury to bring the injury within the exclusive remedy provisions of the WDCA. We find that use of the words "but for" does not amount to the creation of a "but for" test.

The "but for" phrase also surfaced in *Strausser v Thumb Auto Parts, Inc*, 198 Mich App 584, 592; 599 NW2d 430 (1993). *Strausser* is a factually unique case in which the plaintiff was the sole stockholder of the defendant employer. The plaintiff decided to insulate a building that he owned and leased to the corporate defendant. The work was done after business hours and the plaintiff fell through the ceiling and seriously injured himself causing him to be unable to work. The magistrate found that the work was done "to reduce the corporation's heating bills and to render the building more comfortable for its customers and employees." *Id.*, 587. The magistrate awarded benefits and concluded that the injury was suffered while "carrying out a task that would significantly benefit defendant employer." *Id.*, 591. In affirming the award of benefits, the WCAC apparently relied upon the "but for" language of *Nemeth*. This Court reviewed the WCAC decision to determine whether there was competent, material, and substantial evidence in the whole record that would support the WCAB's findings. In so finding, this Court stated:

> The WCAC majority opinion does not contain a lengthy explanation of the legal reasoning it employed in affirming the award of benefits to plaintiff. However, its reliance on *Nemeth* indicates that it applied the rule of *Nemeth*, including that portion of the *Nemeth* opinion seized on by defendants that "but for" the employment relationship the injury would not have occurred. We conclude that this was not legal error. Plaintiff's injury, like that in *Nemeth*, arose out of the employment relationship and flowed from plaintiff's employment. *Id.* The record before us is susceptible of only one interpretation: that but for plaintiff's employment relationship with defendant Thumb Auto Parts, he would not have been insulating the ceiling and placing himself in the position of peril that resulted in his injury. [*Strausser, supra* at 592.]

Given the unique facts of *Strausser* and the limited standard of review applicable in that case, we do not conclude that *Strausser* adopted a "but for" test. In both *Strausser* and *Nemeth* the primary focus of the court was whether there existed a sufficient nexus between the employment and the plaintiff's injury to sustain an award of benefits. We believe that the proper focus in this case should also be upon the nexus, if any, between plaintiff's employment and his injury.

In this case, Maher suffered his injury while engaging in an activity wholly unrelated to defendant Shulman & Kaufman's interests. Although plaintiff received the partial that he swallowed as part of his compensation with defendant Shulman & Kaufman, we do not believe that this provides a sufficient causal connection to implicate the exclusive-remedy provision of the WDCA. The record in this case demonstrates that Maher was not injured at the work site or in the performance of any activity that could reasonably be associated with his employment relationship with defendant Shulman & Kaufman. Rather, as indicated above, Maher was injured while he was eating pizza at his in-laws' home, after defendant Gitre made the partial for him. On these facts, we conclude that the exclusive-remedy provision of the WDCA is not implicated.

In sum, we reverse and remand the trial court's decision to dismiss Count I of plaintiff's complaint. On remand, the trial court must determine whether defendant Shulman & Kaufman is a "health facility" and whether defendant Gitre is a "health professional" such that the procedures set forth in MCL 600.2912d; MSA 27A.2912(4) and MCL 600.2912b; MSA 27A.2912(2) are implicated. If on remand the trial court decides that plaintiffs were not required to comply with the notice and affidavit requirements, then the trial court should permit plaintiffs to proceed under a theory of ordinary negligence. We also reverse the trial court's decision to dismiss plaintiffs' remaining claims as barred by the exclusive-remedy provision of the WDCA. Plaintiffs can proceed in the trial court on these claims.

Reversed and remanded. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Brian K. Zahra