

STATE OF MICHIGAN
COURT OF APPEALS

MARK ANTHONY MAHER and DEBRA LYNN
MAHER,

UNPUBLISHED
July 16, 1999

Plaintiffs-Appellants,

v

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

SHULMAN & KAUFMAN, INC., and DAN
GITRE,

Defendants-Appellees,

and

JOHN DOE, D.D.S.

Defendant.

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

GAGE, J. (dissenting).

I respectfully dissent from the majority's reversal of the trial court's dismissal of plaintiffs' claims on the basis that the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA) barred these claims. Specifically, I disagree with the majority's conclusion that it is obvious that the cause of action in this case is not based on the employer-employee relationship.

While courts possess jurisdiction to determine whether a plaintiff is a defendant's employee or fellow employee, the Bureau of Worker's Disability Compensation generally has exclusive jurisdiction to decide whether injuries suffered by an employee were in the course of employment. *Sewell v Clearing Machine Corp*, 419 Mich App 56, 62; 347 NW2d 447 (1984). An exception exists, however, where it is obvious that the cause of action is not based on the employer-employee relationship. *Zarka v Burger King*, 206 Mich App 409, 411; 522 NW2d 650 (1994). Where the facts are undisputed, the question whether the employee's injuries were in the course of employment is a question of law for the courts to decide. *Id.*

On consideration of the circumstances of this case, I believe a rational mind would draw a causal connection between the conditions of plaintiff's employment and his resulting injury. *Appleford v Kimmel*, 297 Mich 8, 12; 296 NW 861 (1941). As the majority notes, in compensation for certain employment services, plaintiff received from defendant Shulman & Kaufman a dental prosthesis. Defendant Gitre, another employee of Shulman & Kaufman, made the prosthesis and placed it in plaintiff's mouth. As reflected within the allegations of plaintiff's complaint, plaintiff's subsequent injury arose directly from this prosthesis, not from the pizza plaintiff happened to be consuming when the prosthesis broke loose. But for plaintiff's employment with defendant Shulman & Kaufman and their provision of the dental prosthesis in exchange for plaintiff's services, plaintiff would never have swallowed the prosthesis and suffered the resulting injuries. *Nemeth v Michigan Building Components*, 390 Mich 734, 736; 213 NW2d 144 (1973) (If the employment is the occasion of the injury, even though not the proximate cause, compensation should be paid); *Strausser v Thumb Auto Parts*, 198 Mich App 584, 591-592; NW2d (1993). If defendants did indeed negligently fit plaintiff with the prosthesis or provide plaintiff with a defective prosthesis, the happenstance that plaintiff's injury occurred away from the work place should not be deemed to preclude a conclusion that the injury arose from plaintiff's employment; the defective prosthesis supplied by defendants could have dislodged at any time. Furthermore, the mere fact that plaintiff's injury occurred after working hours and in the course of a nonwork-related activity does not mandate a conclusion that the injury happened outside the scope of plaintiff's employment. *Nemeth, supra* at 736-738; *Bayerl v Badger Mfg Co*, 169 Mich App 444, 449; 426 NW2d 736 (1988) (explaining that recreational or social activities may fall within the scope of employment when 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). Given the facts of this case, I would conclude that a reasonable person could have contemplated the occurrence of plaintiff's injury "as a result of the exposure occasioned by the nature of the employment," and that therefore a genuine issue exists whether the injury arose out of plaintiff's employment. *Appleford, supra*.

In light of my conclusion that it does not appear obvious that plaintiff's injury arose outside the employer-employee context, I would affirm the trial court's conclusion that the exclusive remedy provision bars plaintiff's claims. Thus, I would remand to the Worker's Compensation Bureau for a definitive determination whether plaintiff's injury arose from his employment relationship with defendants. *Sewell, supra*.

/s/ Hilda R. Gage