STATE OF MICHIGAN

COURT OF APPEALS

CAROLYN A. SHERMAN and DANIEL K. SHERMAN,

Plaintiffs-Appellants,

v

BRONSON METHODIST HOSPITAL and TODD CRAFT, RN,

Defendants-Appellees.

UNPUBLISHED
August 11, 2000

No. 217862
Kalamazoo Circuit Court
LC No. 98-002038-NH

Before: Meter, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

Plaintiffs appeal by right from an order granting summary disposition to defendants under MCR 2.116(C)(7), on the ground that plaintiffs' medical malpractice action was barred by the exclusive remedy provision of the Workers Disability Compensation Act ["WDCA"]. See MCL 418.131; MSA 17.237(131). We affirm.

Plaintiff Carolyn Sherman ("plaintiff" herein) was a registered nurse employed in the cardiology department at defendant hospital. During a shift in January 1996, plaintiff accidentally poked herself in the finger with a needle that she had just used to administer insulin to a patient. At the end of her shift, and pursuant to hospital policy, plaintiff sought medical treatment for her injury in the hospital's emergency room, where defendant Craft drew blood from plaintiff. Plaintiff alleged that Craft performed the blood draw in a negligent manner and caused injury to her right wrist and arm. Plaintiff contended that the negligent blood draw caused reflex sympathetic dystrophy, chronic regional pain syndrome, fibromyalgia, depression, and myofascial pain syndrome, leaving her unable to do her job.

We review de novo a decision to grant summary disposition. *Weisman v U S Blades, Inc*, 217 Mich App 565, 566; 552 NW2d 484 (1996). Here, the trial court granted summary disposition under MCR 2.116(C)(7), apparently reasoning that the WDCA's exclusive remedy provision rendered defendants immune from suit. The applicable subrule, however, was MCR 2.116(C)(4), since the question was whether the circuit court lacked subject-matter jurisdiction over the claim. See *Herbolsheimer v SMS Holding Co*, 239 Mich App 236, 240; 608 NW2d 487 (2000). We will

therefore review this case under MCR 2.116(C)(4). See *Royce v Citizens Ins Co*, 219 Mich App 537, 541; 557 NW2d 144 (1996) ("[i]f summary disposition is granted under one subpart of the court rule when it was actually appropriate under another, the defect is not fatal and does not preclude appellate review as long as the record permits review under the correct subrule"). See also *Spiek v Transportation Dep't*, 456 Mich 331, 338 n 9; 572 NW2d 201 (1998) ("[w]here summary disposition is granted under the wrong rule, Michigan appellate courts . . . will review the order under the correct rule").[1]

The *Herbolsheimer* Court set forth the standard of review for summary disposition motions governed by MCR 2.116(C)(4) as follows:

> We review decisions on motions for summary disposition under MCR 2.116(C)(4) de novo to determine if the moving party was entitled to judgment as a matter of law, or whether the affidavits and other proofs show that there was no genuine issue of material fact. [*Herbolsheimer, supra* at 240.]

The WDCA's exclusive remedy provision, MCL 418.131; MSA 17.237(131), provides that an employee's exclusive remedy against his employer for a personal injury shall be worker's compensation benefits.[2] If, however, the employer was not acting as an employer at the time of the injury, then the "dual-persona" doctrine[3] might apply, allowing the employee to sue the employer regardless of the WDCA. See *Herbolsheimer, supra* at 241-243. Here, plaintiff contends that the

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[1] We note that our disposition of this case would remain the same even if we reviewed it under MCR 2.116(C)(7).

[2] An exception exists for intentional torts by the employer. MCL 418.131; MSA 17.237(131). This exception is inapplicable to the instant case.

[3] A similar form of this doctrine is referred to as the "dual-capacity" doctrine. See *Herbolsheimer, supra* at 241-243. The *Herbolsheimer* Court, however, indicated that Michigan recognizes the stricter standards of the "dual-persona" doctrine, see *id.* at 243, and explained the difference as follows:

> The difference in terminology marks the degree to which the additional relationship must be distinct from the employer-employee relationship. Stated more precisely, the dual-persona doctrine requires that any additional relationships between the employer and the employee be more distinct than simply an additional capacity on the part of the former. According to 6 Larson, Worker's Compensation Law, § 113.01[1], p 113-2, the dual-persona doctrine requires that the employer possess "a second persona so completely independent from and unrelated to its status as employer that by established standards the law recognizes that persona as a separate legal person." [*Herbolsheimer, supra* at 242-243.]

We note, however, that cases decided before *Herbolsheimer* have generally referred to the doctrine in Michigan as the "dual-capacity" doctrine.

dual-persona doctrine applied because at the time of the allegedly negligent blood draw, defendant hospital was acting not as her employer but rather as her health-care provider. We disagree that the dual-persona doctrine applied to this case.

In *Jones v Bouza*, 381 Mich 299, 300-301; 160 NW2d 881 (1968), the plaintiff visited his employer's full-time physician for hip, back, and side pain and subsequently sued the physician for malpractice. The Court held that worker's compensation was the plaintiff's sole remedy. *Id*. at 302-303. In *Fletcher v Harafajee*, 100 Mich App 440, 442; 299 NW2d 53 (1980), the plaintiff, a city of Flint police officer, was shot while on duty, was taken to a hospital owned by the city of Flint, and was treated negligently for her wounds. This Court held that the plaintiff could maintain a suit against the city hospital despite the WDCA, indicating that city, in treating plaintiff for her wounds, was not acting as her employer:

> Plaintiff did not receive the services of defendants only as a consequence of her employment. The medical center is not a facility intended for exclusive treatment of city employees. It was merely an unfortunate coincidence that it was utilized by plaintiff. [*Id*. at 445.]

Fletcher distinguished *Jones*, *supra* at 302-303, by noting that the physician in that case did not treat the general public but was employed exclusively to treat employees injured on the job. *Fletcher, supra* at 444.

Here, plaintiff contends that *Fletcher* is directly analogous to the instant case, and *Jones* similarly distinguishable, because (1) plaintiff sought treatment at her employer's emergency room only by coincidence and would have sought treatment at a different hospital if it had been open after her shift ended, and (2) her employer's emergency room did not exist solely to treat employees but was open to the general public.

We disagree that *Fletcher* allows a cause of action against the hospital in this case. The dispositive fact is that by seeking treatment for the needle poke, plaintiff was following her employer's policy, which expressly directed employees with puncture wounds to obtain a medical evaluation within twenty-four hours and to "contact Trauma & Emergency Center for after hours care." Accordingly, the terms of plaintiff's employment *directed her* to obtain medical treatment, and she was therefore acting as an employee at the time Craft drew her blood.[4] This simply was not a case where the employer had "'a second identity which is completely distinct and removed from [its] status as employer.'" *Howard v White*, 447 Mich 395, 401; 523 NW2d 220 (1994), quoting *Wells v Firestone Tire & Rubber Co*, 421 Mich 641, 653; 364 NW2d 670 (1984). Instead, the injury was a "circumstance of [plaintiff's] employment," see *Zarka v Burger King*, 206 Mich App 409, 414; 522 NW2d 650 (1994), and therefore her exclusive remedy against the hospital was worker's compensation. This holding accords with the *Herbolsheimer* Court's statement that the dual-persona doctrine should be applied "very narrowly and with extreme caution." *Herbolsheimer, supra* at 250.

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[4] We note that the documentary evidence shows that plaintiff did not punch out before going to the emergency room.

The question then becomes whether plaintiff could pursue her malpractice claim against defendant Craft. The answer to this question depends on whether defendant Craft was a co-employee of plaintiff for purposes of the WDCA. MCL 418.827(1); MSA 17.237(827)(1) preserves a common law right of action in tort, even where worker's compensation benefits are payable for the same injury, if the injury was caused by an individual other than "a natural person in the same employ . . . ." In *Fletcher, supra* at 445, this Court stated that "[t]o be co-employees within the purview of the act, fellow employees must be directly cooperating with each other in work which may be reasonably regarded as the same." Moreover, the plaintiff must be "pursuing or furthering the interests of her employer." *Id*. Here, both plaintiff and Craft were nurses at the hospital, and they were both cooperating in the same work and furthering the interests of the employer by checking plaintiff's blood in accordance with the employer's policy regarding puncture wounds. Accordingly, the WDCA barred plaintiff's cause of action against Craft.

Affirmed.

/s/ Patrick M. Meter
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell