STATE OF MICHIGAN

COURT OF APPEALS

JOEL F. LABEAU,

Plaintiff-Appellant,

v

RICHARD D. FIGULA,

Defendant-Appellee.

UNPUBLISHED
November 27, 2001

No. 223754
Livingston Circuit Court
LC No. 96-015064-NI

Before: O'Connell, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's October 29, 1999, order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff was injured in an automobile accident on September 24, 1993, while traveling to a job site in a van provided by his employer, Steve's Plumbing & Heating, Inc. The van was driven by Brian Bouchard,[1] a fellow employee. Defendant, an employee and officer of the company, purchased the vehicle with company funds in December 1992. The vehicle was titled in defendant's name "d/b/a Steve's Plumbing & Heating."

As relevant to this appeal, the trial court initially granted partial summary disposition in favor of defendant on September 24, 1997. Although the trial court noted that the accident occurred while plaintiff, defendant, and Bouchard were in the course of their employment, the trial court nonetheless concluded that defendant was liable pursuant to the owner's liability statute. MCL 257.401(1). After defendant appealed, this Court vacated the trial court's order and remanded for reconsideration of defendant's motion for summary disposition. *LaBeau v Bouchard*, unpublished order of the Court of Appeals, issued February 17, 1998 (Docket No. 206829). This Court provided the trial court with the following guidance in reconsidering defendant's motion for summary disposition.

> [A] claim against an alleged owner that is also a coemployee turns on whether or not the coemployee was acting in the course of his employment either when he

[1] Bouchard was originally a party to this action, but was dismissed pursuant to the parties' stipulation on May 4, 2000.

> allowed the vehicle to be used by another or when the accident occurred. If the alleged owner/coemployee was acting in the course of his employment, the claim against him is precluded by the Worker's Disability Compensation Act. If he was not acting within the course of his employment, he may be liable pursuant to the owner's liability statute.

Defendant renewed his motion for summary disposition pursuant to MCR 2.116(C)(10) on September 3, 1999. On reconsideration, the lower court determined that defendant was engaged in the course of his employment when plaintiff was injured. Accordingly, the trial court granted summary disposition in favor of defendant pursuant to MCR 2.116(C)(10).

We review de novo a trial court's decision regarding a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the complaint's factual support. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). We review the record evidence and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party and determine whether a genuine issue of material fact exists to warrant trial. *Id.*

On appeal, plaintiff claims that summary disposition was improperly granted and that the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*., does not shield defendant from tort liability because there was no connection between defendant's employment and plaintiff's injury. According to plaintiff, "a coemployee must be part of the injury-causing event to be entitled to immunity under the [WDCA]." We disagree.

In *Threet v Pinkston*, 20 Mich App 39; 173 NW2d 731 (1969), this Court rejected the identical argument plaintiff raises in the instant case. In *Threet*, one of the plaintiffs was injured when he was struck by a car driven by a coemployee in their employer's parking lot. The plaintiffs attempted to sue the defendant, a fellow employee who was the owner of the vehicle. Specifically, the plaintiffs argued that the worker's compensation act did not immunize the defendant from tort liability pursuant to the owner's liability statute because he was not "an active tortfeasor" in the accident. *Id*. at 41. According to the record, the defendant had already reported to work when his son hit the plaintiff with the defendant's car in the parking lot. *Id.* at 40.

A review of *Threet* indicates that, similar to the present case, the defendant was not actively involved in the accident giving rise to the plaintiff's injury. On the basis of a plain reading of the predecessor to MCL 418.827(1), this Court rejected the plaintiffs' argument that the defendant was liable in tort. MCL 418.827(1) provides in pertinent part:

> Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person *other than a natural person in the same employ* or the employer to pay damages in respect thereof, the acceptance of compensation benefits or the taking of proceedings to enforce compensation payments shall not act as an election of remedies but the injured employee or his or her dependants or personal representatives may also proceed to enforce the liability of the third party for damages in accordance with this section. [Emphasis supplied.]

The plain language of what is commonly referred to as the third-party tortfeasor statute precludes an individual from maintaining a suit in tort against a fellow employee. *Dixon v Sype*, 92 Mich App 144, 146; 284 NW2d 514 (1979). In *Threet*, this Court observed the following with regard to the plain language of the statute.

> The statute speaks not of common-law legal liability nor of an active tortfeasor. It speaks plainly of "under circumstances creating a legal liability in some person other than a natural person in the same employ". We may not attempt to rewrite the statute, nor may we read into it restrictions at variance with its plain language and clear meaning. [*Id.* at 41 (citations omitted).]

Consequently, plaintiff's argument, though somewhat novel, has been soundly rejected by this Court. See also *Wilson v Al-Huribi*, 55 Mich App 95, 98-98; 222 NW2d 49 (1974). The evidence presented in this case demonstrates that defendant was engaged in the course of his employment at the time of plaintiff's injury. For instance, defendant testified in his deposition that he was at work when plaintiff was injured. Barbara Butcher, another employee, likewise testified in her deposition that defendant was at work when plaintiff was injured. Because plaintiff was injured while defendant was in the course of his employment, MCL 418.827(1) acts as a statutory bar to plaintiff's tort claim against defendant. *Wilson, supra* at 97-98.[2]

Likewise, we reject plaintiff's claim that the dual-capacity is applicable under these circumstances. "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 worker's compensation benefits." *Miller v Massullo*, 172 Mich App 752, 757; 432 NW2d 429 (1988). The doctrine is only applicable where the fellow employee has a "second identity 'completely removed and distinct from his status as employe[e].' " *Atkinson v Detroit*, 222 Mich App 7, 13; 564 NW2d 473 (1997), quoting *Wells v Firestone Tire & Rubber Co*, 421 Mich 641, 653; 364 NW2d 670 (1984). This judicial exception to the exclusive remedy provision of the WDCA is intended to apply only in extraordinary circumstances. *Herbolsheimer v SMS Holding Co, Inc*, 239 Mich App 236, 246; 608 NW2d 487 (2000). However, this Court has applied the doctrine in the employee/coemployee situation. *Miller, supra* at 758.

After a review of the record, we are not convinced that the present case is one where "the relationship between the cause of action and the plaintiff's employment is no more than incidental." *Herbolsheimer, supra* at 246. There is no evidence that defendant had a separate identity or relationship with plaintiff aside from that of coemployee to the extent that plaintiff may pursue a tort remedy against defendant. For example, there is nothing in the record to indicate that defendant leased the van to Steve's Plumbing and Heating, Inc. *Robards v Estate of Kantzler*, 98 Mich App 414, 419; 296 NW2d 265 (1980); *Miller, supra* at 760. During his deposition, defendant testified that he purchased the van plaintiff was injured in on behalf of his

[2] Given our conclusion that *Threet* controls the instant case and that there need not be a causal relationship between defendant's employment activities and plaintiff's injury, we also reject plaintiff's suggestion that we should employ the economic realities test to determine whether defendant controlled plaintiff's employment activities.

employer, and that he used company funds to complete the purchase. Thus, the present case is not one where plaintiff could show at trial "that defendant's act of leasing the vehicle to his employer was independent of, and not related to, the common employment of both, and thereby defeat defendant's claim of immunity under the Worker's Disability Compensation Act." *Id*. at 760 (citations omitted). Accordingly, the dual-capacity doctrine is not applicable.

Affirmed.

/s/ Peter D. O'Connell
/s/ David H. Sawyer
/s/ Michael R. Smolenski