**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**June 20, 2018**

**Sheila T. Reiff**
**Clerk of Court of Appeals**



**Appeal No. 2017AP1636** **Cir. Ct. No. 2015CV1076**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT II**

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**JEANNE GLOWACKI,**

**PLAINTIFF-APPELLANT,**

**HARTFORD FIRE INSURANCE COMPANY AND STATE OF WISCONSIN GROUP INSURANCE BOARD,**

**SUBROGATED-PLAINTIFFS,**

**V.**

**LAKEVIEW NEUROREHAB CTR MIDWEST, INC.,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Racine County: EUGENE A. GASIORKIEWICZ, Judge. *Affirmed*.

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Jeanne Glowacki appeals from an order granting summary judgment in favor of Lakeview Neurorehab CTR Midwest, Inc. (Midwest). The circuit court granted summary judgment to Midwest on the basis that WIS. STAT. § 102.03(2) (2015-16), the exclusive remedy provision of Wisconsin's Worker's Compensation Act, precluded her claims as a matter of law.[1] As we agree that Midwest was Glowacki's employer, we affirm.

¶2 Midwest is a behavioral health hospital and residential treatment facility providing inpatient and outpatient treatment for people with brain injuries or neurobehavioral disorders. Glowacki is a clinical psychotherapist specializing in child and family therapy. Midwest hired her in November 2011 to provide psychotherapy services.

¶3 Midwest planned to expand its services in connection with a new behavioral health license it was getting. It thus created another entity, Lakeview Care Partners (Care Partners), which began working out of the same facility as Midwest. In January 2012, Glowacki and four Midwest co-employees were "reallocated" to Care Partners to provide the expanded services under the new license. Midwest changed its billing parameters for those services and paid the reallocated employees from Care Partners' payroll account. Midwest is owned by Lakeview Management, Inc. Care Partners is owned by Lakeview Care Partners

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless noted.

Management, Inc. At all times material in 2011 and 2012, the two Management entities were wholly owned by the same two individuals.

¶4 The reallocation changed nothing about Glowacki's job description, job performance requirements, benefits, retirement account, or accrued sick leave. She continued to work in the same office in the same building, continued to see and treat the same clients, and underwent no additional training. Her supervisor, her Midwest email signature, her November 7, 2011 date of hire with Midwest, and the policies and procedures to which she was subject were unchanged. Ninety percent of Glowacki's time or direct cost was allocated back to Midwest.

¶5 In April 2012, a patient physically attacked and seriously injured Glowacki. She filed an application for a hearing with the Worker's Compensation Division of the Department of Workforce Development (DWD), but later withdrew it and commenced a civil action against Midwest alleging negligence and a violation of the safe-place statute. Midwest moved for summary judgment on the basis that the exclusive remedy provision of the Worker's Compensation Act required dismissal of her claims. The circuit court agreed. Glowacki appeals.

¶6 When reviewing a summary judgment, we follow the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). ***Green Spring Farms*** is one of many cases reciting the familiar analysis; we need not repeat it. Suffice it to say that summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. ***Id.*** Our review is de novo. ***Finn v. Nachreiner Boie Art Factory***, 201 Wis. 2d 549, 555, 549 N.W.2d 273 (Ct. App. 1996).

¶7 Glowacki acknowledges that worker's compensation is an employee's sole remedy against an employer for an injury that occurs during the course of employment. She asserts, however, that at the time of injury she was an employee of Care Partners, not of Midwest. She asks this court to reverse the circuit court ruling so that she may restate her tort action against Midwest as a third party for the injury she suffered during her employment with Care Partners. *See* WIS. STAT. § 102.29(1)(a).

¶8 WISCONSIN STAT. § 102.03 provides that an employer shall be liable for worker compensation only where: (1) the employee sustains an injury; (2) at the time of the injury, the employee and the employer both are subject to the provisions of the Act; (3) at the time of the injury, the employee is performing service growing out of and incidental to his or her employment; (4) the employee's injury is not self-inflicted; and (5) the accident or disease that causes the employee's injury arises out of his or her employment. Sec. 102.03(1)(a)-(e). "Where such conditions [of liability] exist the right to the recovery of compensation under this chapter shall be the exclusive remedy against the employer … and the worker's compensation insurance carrier." Sec. 102.03(2). Whether a plaintiff's claim is subject to the Worker's Compensation Act's exclusive remedy provision is a question of law that we review de novo. ***Mudrovich v. Soto***, 2000 WI App 174, ¶8, 238 Wis. 2d 162, 617 N.W.2d 242.

¶9 An "employee" is any person "in the service of another under any contract of hire, express or implied ...." WIS. STAT. § 102.07(4)(a). The primary test for determining whether a person is "in the service of another,"—i.e., whether there is an employee-employer relationship—is "whether the alleged employer has a right to control the details of the work." ***Kress Packing Co. v. Kottwitz***, 61 Wis. 2d 175, 182, 212 N.W.2d 97 (1973); *see also* ***Acuity Mut. Ins. Co. v. Olivas***, 2007

WI 12, ¶¶87-88, 298 Wis. 2d 640, 726 N.W.2d 258. Four secondary factors also are to be considered: (1) direct evidence of the exercise of the right of control; (2) the method of payment of compensation; (3) the furnishing of equipment or tools for the performance of the work; and (4) the right to fire or terminate the employment relationship. ***Kress Packing***, 61 Wis. 2d at 182. Whether Glowacki was an employee of Midwest is a question of law to be determined by the application of well-defined rules to the facts. *See* ***id.*** at 177.

¶10 As to the right of control, Glowacki asserts that her employment was directed by Care Partners because her work was overseen by her immediate supervisor, Dr. Angela Sanders, who also had been reallocated. Simply because Glowacki sent her letter of resignation to Sanders and to Care Partner's HR department and that certain documents relating to Glowacki's worker's compensation benefits identified Care Partners as her employer is not determinative, however.

¶11 Jim Para-Cremer, Midwest's Administrator of Residential Services, directed the services provided by both Glowacki and Sanders. Glowacki provided nothing in opposition to summary judgment to establish that Sanders or anyone else at Care Partners had the authority to accept her resignation letter or to discharge her. Chris Slover, the owner and CEO of Midwest and Care Partners testified at deposition that, on Glowacki's reallocation to Care Partners, "her boss would be an employee of Midwest … and their supervisor all the way up the ladder, same CEO, same COO, same policies and procedures, same training." There is ample direct evidence that Midwest exercised the right to control the details of Glowacki's work.

¶12 As to how compensation was paid, it is true that Care Partners, not Midwest, issued Glowacki's paycheck after her reallocation to Care Partners. Nonetheless, Slover's deposition testimony, an exhibit to an affidavit filed in support of Midwest's summary judgment motion, indicates that Care Partners and its payroll account are only for revenue-enhancing purposes under the new license. He also testified that if Glowacki had a pay issue, she would have taken the matter to the same person before and after reallocation. Further, nothing in the record suggests that Midwest and Care Partners had separate worker's compensation insurance policies. This factor also weighs in Midwest's favor.

¶13 Glowacki argues that the third factor, the furnishing of equipment or tools for the performance of the work, is of but minor importance in the analysis because her education and expertise are her tools. We disagree. Before and after reallocation, the clinic facility, office, staff, and supplies used to conduct Glowacki's practice all were provided by Midwest.

¶14 The final factor, the right to fire and terminate the employment relationship, also favors Midwest. Glowacki's averments in her affidavit that Sanders, her direct supervisor, also was an "employee" of Care Partners and "had the authority to terminate my employment" are made without personal knowledge. We thus may disregard them. *See* ***Hopper v. City of Madison***, 79 Wis. 2d 120, 130, 256 N.W.2d 139 (1977). In addition, while Sanders certainly could have sought to have Glowacki discharged, the record establishes that Para-Cremer—a Midwest employee—held the ultimate authority to terminate the employment of either one of them. The ***Kress Packing*** factors thus militate in favor of concluding that Glowacki and Midwest had an employee-employer relationship when Glowacki was injured.

¶15 Glowacki next would have us delve into Midwest's reasons for establishing Care Partners and reallocating certain Midwest employees, even suggesting a possibly fraudulent motive. She asserts that Midwest created Care Partners as a legal entity separate from itself to realize financial benefits, and only now insists she really is an employee of Midwest so as to avoid legal responsibility and to confine her claim to worker's compensation. Citing ***Rauch v. Officine Curioni, S.P.A.***, 179 Wis. 2d 539, 508 N.W.2d 12 (Ct. App. 1993), she argues that Midwest, having accepted the advantages derived from the separate-entity arrangement, should not now—when the arrangement does not favor it—be allowed to shed that separate legal status.

¶16 Glowacki contends Midwest should be liable in tort without regard to the ***Kress Packing*** test under the "dual persona" doctrine, an exception to the exclusive remedy provision of the Worker's Compensation Act. *See* ***Henning v. General Motors Assembly Div.***, 143 Wis. 2d 1, 7, 419 N.W.2d 551 (1988). Under that doctrine, "an employer normally shielded from tort liability by the exclusive remedy principle may become liable in tort to his own employee if he occupies, in addition to his capacity as employer, a second capacity that confers on him obligations independent of those imposed on him as employer." ***Gerger v. Campbell***, 98 Wis. 2d 282, 287, 297 N.W.2d 183 (1980) (citation omitted). Said another way, "[a]n employer may become a third person, vulnerable to tort suit by an employee, if—and only if—he [or she] possesses a second persona so completely independent from and unrelated to his [or her] status as employer that by established standards the law recognizes it as a separate legal person." ***Rauch***, 179 Wis. 2d at 543 (citation omitted). The doctrine does not apply here.

¶17 In ***Rauch***, an employee of Badger Packaging Corporation was injured at work while operating a box-cutting machine. ***Id.*** at 541. The employer,

Badger's president, owned eighty-five percent of the corporate stock. ***Id.*** He created in his individual capacity an entity separate from Badger and then personally purchased the box-making machine and leased it to the corporation. *See* ***id.*** at 543-44. The court found that the president held a "dual persona" such that the Worker's Compensation Act did not shield him from liability. ***Id.*** at 541. By creating the separate entity to own and lease the machine and accepting the advantages of that arrangement, he could not shed the separate legal status when it worked to his disadvantage. ***Id.*** at 546.

¶18 First, we agree with Midwest that Glowacki did not adequately present to the trial court the "dual persona" doctrine as a separate theory of liability. Second, even if she had, it does not apply. The issue here is whether Glowacki was an employee of Midwest for purposes of the worker's compensation statute. Under ***Kress Packing***, she clearly was. There is no evidence that Midwest possessed a second persona so completely independent from, and unrelated to, its status as employer that the law would recognize it as a separate legal person.

*By the Court*.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.