

WI COURT OF APPEALS SAYS PRACTITIONER WAS EMPLOYEE FOR PURPOSES OF WORKER'S COMP

A Wisconsin Court of Appeals decision this week addressed the appeal of a health care practitioner who had been physically attacked by a patient and seriously injured. The practitioner commenced a civil action against the behavioral health hospital in which she worked, alleging negligence and a violation of the Safe Place Statute. The hospital argued that, because the practitioner was an employee, the exclusive remedy against the hospital for her injuries was through worker's compensation. The court affirmed the circuit court decision, agreeing that the practitioner was an employee of the hospital, and thus, the claim was subject to the worker's compensation exclusive remedy provision.

The core question in this case was whether the practitioner was an employee of the hospital. While the case presented a unique set of facts regarding the relationship between the practitioner and the hospital and a separate licensed entity created by the hospital to which the practitioner was "reallocated," the court applied the traditional primary test for whether there is an employer-employee relationship described in the 1973 *Kress Packing* case: whether the alleged employer has a right to control the details of the work. The court also considered four secondary factors: (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 Co. v. Kottwitz*, 61 Wis. 2d 175, 182, 212 N.W.2d 97 (1973)). Applying the test and secondary factors, the court found the practitioner was an employee of the hospital for worker's compensation purposes, despite her argument that the separate licensed entity was her employer and not the hospital post her reallocation.

The court touched on the practitioner's argument that the hospital should be liable in tort without regard to the traditional test for whether there is an employer-employee relationship based on the "dual persona" doctrine. The dual persona doctrine provides an exception to the worker's compensation exclusive remedy provision. The court, in describing the doctrine, stated that "an employer normally shielded from tort liability by the exclusive remedy principle may become liable in tort to his own employees 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 an employer." The court found there was "no evidence the [hospital] 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."

While the court's decision will not be published, it can be helpful to consider the court's application of the *Kress Packing* test to determine whether an employer relationship existed in the contexts of affiliated legal entities. A copy of the decision, *Glowacki v. Lakeview Neurorehab Ctr Midwest, Inc.*, No. 32017 AP 1636, June 20, 2018, is available [here](#).

If you have any questions or would like additional information about this topic, please contact:

- **Sara MacCarthy** at (414) 721-0478 or smacCarthy@hallrender.com;
- **Laura Leitch** at (608) 770-9496 or lleitch@hallrender.com;
- **Stephane Fabus** at (414) 721-0904 or sfabus@hallrender.com;
- **James Junger** at (414) 721-0922 or jjunger@hallrender.com; or
- Your regular Hall Render attorney.

[1] *Kress Packing Co. v. Kottwitz*, 61 Wis. 2d 175, 182, 212 N.W.2d 97 (1973)