Exclusive Remedy Does Not Always Bar Suits Against Coworker

Most state workers compensation laws extend the exclusivity of the workers compensation remedy to bar not only tort claims against the employer but also tort claims against fellow employees. There are, of course, exceptions, and it is almost always the exceptions that get the attention.

Job Site or Gun Site?
A recent example is the Georgia Supreme Court case of Smith v. Ellis (2012). Smith and Ellis were employed by a homebuilding developer and were working in different subdivisions. Ellis had called Smith and told him he wanted to come the next day to the subdivision where Smith worked to pick up a tool from him for personal use. Ellis also planned to shoot some new guns, including an AR-15 semi-automatic rifle, in an undeveloped field in the subdivision. Ellis was firing his new rifle while Smith organized some work tools next to his truck. When Ellis tried to clear a jam in the rifle, he accidentally shot Smith in the right thigh. The bullet went through Smith’s right leg and into his left leg, causing serious injury.

Smith received workers compensation benefits as part of a “no liability” settlement with his employer and then sued Ellis for negligence. Georgia’s workers compensation law provides that “no employee shall be deprived of any right to bring an action against any third-party tortfeasor, other than an employee of the same employer.” Ordinarily, the workers compensation exclusive remedy would bar a suit against a coworker, but in the Smith v. Ellis case, the court ruled that a coworker acting outside the course and scope of employment would not be considered “an employee of the same employer.”

The court explained: “Unlike Smith, who was injured while in the subdivision where he was assigned, had been doing his job, and was still engaged in organizing his work tools next to his truck, Ellis had come that day to a different subdivision in a different city to borrow a tool for personal use and to shoot his new guns. Ellis had worked little if at all that morning, and after lunch he did no work and actually hid his presence from a supervisor. Moreover, Ellis injured Smith during an activity their employer did not condone, much less direct.”

Conclusion: Although Ellis was an employee, he was not “acting as any sort of employee of the company at the time of the shooting.”

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Lawyers tell their clients that easy cases never make their way to the Supreme Court. As a result, it is never supposed to be easy for a lawyer to predict the outcome of a case that gets appealed to the highest judicial levels. A recent case handled by the Supreme Court of Georgia, *Arby’s Restaurant Group, Inc. v. McRae* (Nov. 2012), may leave regular participants in the workers compensation system wondering about the validity of that maxim. What was so hard about that one? Aren’t workers compensation claimants deemed to have consented to the sharing of otherwise private medical information for purposes of a workers compensation claim? Yes, but there is a twist. First, the “yes” and then the “twist.” In the *McRae* case, the claimant’s treating physician issued a report stating that the claimant had reached maximum medical improvement and incurred a 65% permanent partial disability. After receiving the report, the employer wanted to arrange a meeting with the doctor without the claimant or her counsel present, an *ex parte* meeting. The claimant was opposed to such a meeting, and the physician refused to meet without her or her counsel.

The Georgia State Board of Workers’ Compensation ordered the claimant to sign a medical release to her treating physician “expressly authorizing [her treating physician] to meet privately with a representative (or representatives) of the Employer/Insurer and discuss or provide medical information about the Employee’s claim.” The claimant refused to sign it. The Georgia Supreme Court explained that, under Georgia workers compensation law, the claimant is deemed to have waived any privilege or confidentiality with respect to all “information and records” relating to the examination or treatment of the claimant related to the workers compensation claim.

The court also noted that HIPAA (Health Insurance Portability and Accountability Act) expressly authorizes the release of that information. When any of the following three triggers occurs, the employee’s medical privilege is waived:

- The employee submits a workers compensation claim
- The employee receives weekly income benefits
- The employer pays any medical expenses

So, yes, a workers compensation claimant is deemed to have consented to the sharing of medical information. The twist, at least in Georgia at the time of the *McRae* decision, is that the claimant cannot demand to be present or have her counsel present at a meeting during which her medical information may be shared. *Ex parte* meetings between her employer and her treating physician are permitted, and she cannot prohibit them. (Some states have laws expressly prohibiting *ex parte* communications.)

In a further twist, however, the treating physician apparently does not have to agree to conduct the meeting on an *ex parte* basis. The Georgia Supreme Court explained that while physicians may not refuse to release medical information, they “may agree to be interviewed only on the condition that their own counsel, or the employee or her counsel, is present; may request that the interview be audio- or video-recorded; and may share the substance of the interview with the employee and her counsel.”

Conclusion: Perhaps as a result of the *McRae* decision, when doctors are asked for an *ex parte* meeting to share medical information, instead of saying, “I’m sorry, but I can’t,” they will now simply say, “I’m sorry, but I won’t.”

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The Racketeer Influenced and Corrupt Organizations Act, known as RICO, has long issued a siren call to plaintiffs’ attorneys, beckoning with the potential for damage awards that are tripled. Defendants often feel pressured—some would say extorted—by RICO claims to reach settlements to avoid the litigation lottery. When RICO is brought into the workers compensation arena, employers and insurers face the added complication of having to deal with federal court litigation over workers compensation claims that are typically handled by attorneys and staff accustomed to state courts and state administrative agencies. Recently, RICO has reared its head in workers compensation.

Walmart in Colorado

Walmart Stores recently settled a RICO class action suit in Colorado. The plaintiffs in this case alleged that Walmart and its adjuster and health management company had interfered with the independent judgment of certain medical providers who treated injured Walmart employees in Colorado. Walmart and its adjuster paid $4 million to settle the suit, and the health management company’s insurer paid an additional $4 million. The defendants also agreed to provide training to their adjusters and marketing and sales personnel regarding medical treatment guidelines and the prohibition on the dictation of medical care.

Two Cases in Michigan

In Michigan, two recent Sixth Circuit Court of Appeals decisions allowed RICO claims to proceed. The case of Brown v. Cassens Transport Co. (2012) arose out of on-the-job injuries alleged to have been sustained by employees of a Michigan trucking company who claimed that their employer solicited fraudulent medical reports to deprive the employees of benefits under the Michigan workers compensation law. In its decision, a three-judge panel of the Sixth Circuit Court of Appeals cleared away several hurdles potentially standing in the way of a successful RICO claim in a workers compensation context.

First, although the court stopped short of declaring that RICO preempts the state workers compensation law, it did hold that the US Constitution’s Supremacy Clause would prevent Michigan from declaring the exclusive remedy of workers compensation benefits to be exclusive of a possible federal remedy like RICO. According to the court, “RICO provides a distinct cause of action.”

In addition, the court decided that the RICO requirement that there be an injury to “property” as opposed to a personal injury is met in the case of a workplace injury. The court explained that “the plaintiffs have alleged an injury to property because they allege the devaluation of either their expectancy of or claim for worker’s compensation benefits.” They went on to rule that “Michigan’s nondiscretionary worker’s compensation scheme creates a property interest in the expectancy of statutory benefits following notice to the employer of injury” and that “the plaintiffs’ claim for benefits is an independent property interest, the devaluation of which also creates an injury to property within the meaning of RICO.” In other words, said the court, “[w]hen a plaintiff’s personal injury is filtered through the [workers compensation law], it is converted into a property right.” The court also disposed of several other issues in sending the case back to the district court to proceed.

The RICO holding in Brown v. Cassens Transport Co. was followed up and reinforced by a subsequent Sixth Circuit decision in the case of Jackson v. Segwick Claims Management Services. In her opinion in the latter case, the judge concurred with the judgment on the grounds of the precedent of the earlier Brown case but expressed her disagreement with it:

“I suppose we may be entering an era when both sides to the worker’s compensation dispute sue each other under RICO, with the winner prevailing on the worker’s compensation dispute and obtaining RICO damages as well. I do not agree that Congress enacted RICO for this purpose and I think that the limitations on RICO claims—limitations that the lead opinion and the Brown precedent have painstakingly removed—were included to prevent this.”

Conclusion: Time will tell whether we are entering such an era.

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Violation of Safety Standards Does Not Always Defeat Exclusive Remedy

Three recent cases shed light on when an employer’s violation of safety standards may open the door to a tort suit by an injured employee. The exclusive remedy bar remains high in the context of those three cases.

**Nebraska**
The Nebraska case of *Teague v. Crossroads Cooperative Association* (2011) revolved around an employee who worked inside a grain bin, shoveling grain to the center of the bin’s conical base. He was pulled under the grain and suffocated when the grain removal auger caused the grain to begin to flow. The employer was charged by OSHA with a number of safety violations stemming from the incident and pled guilty in federal court for willful violations of safety provisions resulting in Mr. Teague’s death. Despite the employer’s willful violation of safety provisions, the Nebraska Court of Appeals upheld the dismissal of the employee’s estate’s tort claim, noting that “the Nebraska Supreme Court has clearly indicated that alleging intentional conduct on the part of the employer does not remove from the purview of the Act an action to recover for injuries sustained in the course and scope of employment.”

**Ohio**
Ohio and New Jersey have statutory exceptions to the exclusive remedy for “intentional” wrongs, but two recent cases from those jurisdictions demonstrate that showing an intentional wrong remains a high bar. In the case of *Wineberry v. North Star Painting Co.* (2012), the Ohio Court of Appeals dealt with the case of an employee who fell from a perch on scaffolding while sandblasting a beam and sandblasted himself on the arm. The scaffolding perch lacked guardrails. The court noted that the removal of safety equipment creates a rebuttable presumption of the employer’s intent to injure, and further stated that the failure to install safety equipment provided by the manufacturer is tantamount to removing safety equipment. In the case at hand, however, there was no evidence the guardrails were removed or that guardrails were provided by the manufacturer and never installed.

**New Jersey**
In New Jersey, the workers compensation remedy is exclusive, except for injuries resulting from an employer’s “intentional wrong.” New Jersey case law is clear that an employer’s deliberate intent to injure is not essential; instead, as the New Jersey Supreme Court said in *Van Dunk v. Reckson Associates Realty Corp.* (2012), “a substantial certainty that injury or death will result must be demonstrated,” a standard that the court called “formidable.” In that case, an employee had been injured when he entered a 20-foot-deep trench that collapsed on him. The trench had not been protected against cave-ins in accordance with OSHA requirements, and the employer had been fined by OSHA for having committed a willful violation of safety standards.

The New Jersey court explained that willful violation of an OSHA safety standard, by itself, does not constitute an intentional wrong and does “not equate to the more egregious circumstances involving intentional and persistent OSHA safety violations.” What distinguished earlier cases from *Van Dunk* is that “those cases all involved the employer’s affirmative action to remove a safety device from a machine, prior OSHA citations, deliberate deceit regarding the condition of the workplace, machine, or . . . the employee’s medical condition, knowledge of prior injury or accidents, and previous complaints from employees.”

The New Jersey court also expressed concern with a favorite strategy in litigation against businesses, which appeared to be given some weight in the lower court’s opinion—that the employer “disregarded plaintiff’s safety ‘to increase defendant’s profit and productivity.’” The New Jersey Supreme Court was concerned that “the broad language of the [lower court] panel could be used, inappropriately, to chasten any employer who acts with economic business motivation.” Noting that it had previously “used profit consideration language only to critique an employer’s long-term choice specifically to sacrifice employee safety for product-production efficiency,” the court “decline[d] to extend that limited relevance of a profit motive to the circumstances of this case.”

Conclusion: An employer’s effort to minimize expense and the delay that results in harm to an employee is not always evidence that the employer intended to harm the employee.

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