

From: Don Drinko

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Gallagher Sharp Shop Talk: Workers' Compensation

Question: Can a default judgment which establishes that an employee was not acting in the "course and scope" of employment be binding upon an injured party in a separate case?

A determination that an employee was or was not acting in the "course and scope" of employment can have consequences beyond workers' compensation. Recently, the Ohio Court of Appeals, Second Appellate District, was presented with a procedural question arising from an automobile accident which illustrates this principle. The court was asked to determine whether an injured party can be bound by a determination in a completely separate case, in which it was not a party, that an employee was not acting in the "course and scope" of his employment.

The case, *Star-Ex, Inc. v. Higgs*, 189 Ohio App. 3d 172, 2010-Ohio-3332, involved an employee, who was involved in a motor vehicle accident which injured another party. That party and his wife sued both the employee and his employer under a negligence theory. In response, the employer and its insurer filed a separate declaratory judgment action against the employee seeking a finding that he was not acting in the "course and scope" of his employment at the time of the accident, and therefore was not entitled to coverage. (This suit did not name the injured plaintiff as a party.) The employee defaulted, and judgment was entered in favor of the employer and insurer. More than one (1) year later, the injured plaintiffs moved to intervene in the declaratory judgment action and to vacate the default judgment. The trial court granted this request, and the insurer and employer appealed.

The Second District reversed, concluding that while the trial court did not err in vacating the judgment, the injured parties should not have been permitted to intervene in the first place because the declaratory judgment was not binding on them. The court discussed at length the requirements for a party to be allowed to intervene under Civil Rule 24, the court focused on whether the declaratory judgment would "as a practical matter, impair or impede the movant's ability to protect his or her interest." The court analyzed the provisions of R.C. 2721.12 and 3929.06 in finding that the default determination would not be binding upon the injured parties in their own lawsuit, primarily because the action was not between a policyholder and the insurer. The court remanded the case back to the trial court for it to reinstate its default judgment.

Star-Ex, Inc. is a procedural case, but it illustrates that determinations of "course and scope" can affect several areas of the law in addition to workers' compensation. The default judgment obtained by the carrier in *Star-Ex, Inc.* was largely worthless because it did not include the injured parties, and probably should have been consolidated with the tort case. If you have any specific question, or would like to discuss this or any other workers' compensations issue, you can contact me or Adam Sadowski from our Toledo office.

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