From: Don Drinko
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Gallagher Sharp Shop Talk: Workers' Compensation

Question: When an employee is injured in a portion of the employer's premises that is open to the public, can the employer still be sued for negligence?

The concept of employer immunity for injuries sustained by employees in the course and scope of employment is a basic tenet of the workers' compensation system. See *R.C.§4123.74.* Starting with *Guy v. Arthur H. Thomas Co.*, 55 Ohio St.2d 183 (1978), the Supreme Court of Ohio carved out a narrow exception to this concept in situations where an employer also maintains an "unrelated and independent" relationship. This "dual capacity" doctrine has been refined over the years, but questions remain. Recently, the Eighth District Court of Appeals was presented with a case involving a maintenance employee who fell in a public elevator, and whether the act of maintaining the elevator invoked the "dual capacity" doctrine.

Rivers v. Otis Elevator, 2013-Ohio-3917, arose from a fall by a housekeeper at a hospital caused by a malfunctioning elevator. There was no dispute that the housekeeper was working when she fell, and she filed a workers' compensation claim with the hospital, which was certified, and approximately $65,000 in benefits were paid. She later filed suit against the elevator company and the hospital alleging a failure to properly maintain the elevator, and that in having the elevator open to the public the hospital had acted in a "dual capacity." The employer filed a counterclaim for workers' compensation subrogation. The employee subsequently settled with the elevator company for $15,000, and added an intentional tort claim against the hospital. The hospital moved for summary judgment, and the trial court granted the employer's motion, disposing of plaintiff's claim and awarding the employer its full subrogation because the employee had settled without informing the employer. This resulted in an appeal as of right to the Eighth District Court of Appeals.

The Eighth District affirmed the trial court's findings *in toto*, concluding that the act of maintaining a public elevator is <u>not</u> a valid basis for asserting the "dual capacity" doctrine. The court noted that the Supreme Court has failed to extend the "dual capacity" doctrine to several analogous situations, including a police officer injured due to a street defect (*Freese v. Consol. Rail Corp.*), a greenhouse employee sprayed with a pesticide that the employer also sold to the public (*Bakonyi v. Ralston Purina Co.*), and a truck driver injured when a tire the employer manufactured was alleged to be defective (*Schump v. Firestone Tire & Rubber Co.*). The Eighth District also noted that the housekeeper's comparison of employees and the general public was misplaced – the proper inquiry is the nature of the employer's relation to the employee. The employee was not a patient or visitor at the hospital, and her injuries were due to her "employment use" of the elevator. The housekeeper's reference to earlier cases (*Mercer* and *Simpkins*) was misplaced, as those cases had been overruled. The Court also affirmed summary judgment on the intentional tort and subrogation claims.

Rivers affirms that the "dual capacity" doctrine has been sufficiently limited to only situations where an employer maintains a separate and distinct relationship with an employee – such as doctor/patient or vendor/customer. The relationship to analyze is whether there are multiple

roles between the employer and the employee. If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers' compensation issues, please feel free to contact me.

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