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Gallagher Sharp Shop Talk: Workers' Compensation

QUESTION: When an employee is injured by another employee and applies for and receives workers' compensation benefits, does the "fellow servant doctrine" preclude suite against the fellow employee?

Like many other states, Ohio recognizes the concept of immunity between fellow employees. R.C. 4123.741, also known as the "fellow servant doctrine," provides that no employee of any employer "shall be liable to respond in damages at common law or by statute for any injury.....received or contracted by any other employee of such employer in the course of and arising out of the latter employee's employment....on the condition that such injury...is found to be compensable under sections 4123.01 to 4123.94, inclusive, of the Revised Code." R.C. 4123.741. Recently, the Ohio Court of Appeals, Ninth Appellate District, was presented with a case involving an employee who was injured by another employee in a parking lot, and whether the fact that a claim was allowed precluded a lawsuit against the fellow employee as a matter of law.

The pertinent facts of *Alexander v. Boston*, 2015-Ohio-1799, were undisputed. The claimant (Alexander) left his employer's building and was eating lunch in his car parked adjacent to the building when he was injured. Specifically, a fellow employee (Boston) was driving his car in the parking lot when he struck Alexander and injured his foot and leg. Alexander filed a workers' compensation claim and was granted benefits. Subsequently, Alexander filed suit against Boston seeking damages for negligence. Counsel for Boston asserted as an affirmative defense that he was immune from suit under the "fellow servant immunity" doctrine. Boston filed a motion for summary judgment alluding to the fact that Alexander had sought and received workers compensation benefits as the sole basis for his argument. Alexander opposed the motion, arguing that there were issues of fact as to whether Boston was acting in the course and scope of his employment at the time of the injury. The trial court awarded summary judgment, prompting an appeal to the Ninth District.

The Ninth District reversed the award of summary judgment and remanded the case for trial. The Appellate Court first noted that the facts were not in dispute, and it was only answering the question of whether the trial court properly applied the law to the facts. The Court discussed *Kaiser v. Strall*, the seminal Supreme Court of Ohio case on the subject of fellow-servant liability, as well as the two iterations of *Donnelly v. Herron* which refined the Court's position that both the injured employee and the co-employee must be "in the service of" the employer at the time of the injurious action for the "fellow servant immunity" doctrine to apply. In the case at bar, Boston contended that the accident took place in the "zone of employment" (e.g. not in a bar fight after work) and the claimant sought and received benefits, and argued that the inquiry should end there. The Court agreed with Alexander that *Donnelly II* required a further inquiry as to whether Boston was "in service of" the employer at the time of the accident, whether Boston's conduct arose out of and occurred in the course of his employment, and whether the parties were in the "zone of employment" at the time of the injury. The compensability of Alexander's injuries, while required, was not the only requirement for the doctrine to occur. Because the trial

court appeared to only consider compensability without regard to Boston's conduct, the trial court erred in granting judgment as a matter of law.

Alexander is a formal application and confirmation of *Donnelly II*, which itself arguably extends the requirements of the "fellow servant immunity" doctrine beyond the scope of the statute. However, it is a sensible application of the law to the facts of this case because the trial court based its decision solely on the issue of whether a compensable claim was filed.

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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