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WORKERS' COMPENSATION—SUPERVISORY EMPLOYEES ARE IMMUNE FROM TORT ACTIONS. *Simmons First National Bank v. Thompson*, 285 Ark. 275, 686 S.W.2d 415 (1985).

Employees and representatives of deceased employees brought a tort action for personal injuries and wrongful death against supervisory employees of International Paper Company. Separate crews at the paper mill had allowed different chemicals to enter the mill's sewer system. Two chemicals intermingled in the sewer system and combined to form a poisonous gas. The gas escaped through an open grate sewer covering, resulting in the deaths of two employees and injury to other employees. Plaintiffs alleged that the mill manager, the pulp mill superintendent, the superintendent of engineering, and the supervisor of safety negligently failed to discharge their duty to make the premises safe.

The Jefferson County Circuit Court granted defendants' motion for summary judgment on the ground that Arkansas's workers' compensation statute provides immunity for personal liability to supervisory employees. The court reasoned that workers' compensation is an exclusive remedy against an employer and that supervisory employees are protected by this same immunity. Thus, the circuit court concluded that plaintiffs were entitled only to workers' compensation awards.

The Arkansas Supreme Court, in a case of first impression, affirmed the circuit court. The supreme court looked to both Professor Larson and other jurisdictions for guidance. Larson contends that workers' compensation should be the exclusive remedy for accidents arising out of employment and involving people engaged in the same employment.¹ The court followed this viewpoint and the majority of recent decisions in other jurisdictions and held that supervisory employees are immune under workers' compensation laws for failure to provide a safe work place. *Simmons First National Bank v. Thompson*, 285 Ark. 275, 686 S.W.2d 415 (1985).

Historically, the increase of industrial injuries and the decrease in available remedies at the end of the nineteenth century set the stage for a radical change in the employer's liability for injuries incurred by his employees.² Prior to the enactment of workers' compensation statutes, the common law compelled workers to accept dangerous employment at

1. See 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 1.20 (1985).
2. *Id.* § 5.20.

their own risk or face possible starvation.³ Employers relied on the common law defenses of the fellow servant rule, assumption of the risk, and contributory negligence to escape liability.⁴

Various policies led to the enactment of workers' compensation statutes in the United States at the end of the nineteenth century and well into the twentieth century.⁵ Casualties and serious injuries had become inherent features of industrial development.⁶ In addition, it was recognized that the industrial employer closely controlled the work place and made most of the decisions concerning safety.⁷ It became obvious that the burden of increased industrial accidents must be borne by some segment of society.⁸ Since consumers benefited the most from industrialized products, they were the most appropriate group to bear this burden.⁹ The employers' position in the market system allowed them to easily transfer the cost of industrial injury and death to the consumer.¹⁰ Furthermore, for economic efficiency, a simple, prompt, cheap, and non-litigious procedure seemed desirable.¹¹ The most logical solution to these policy concerns was a workers' compensation system.¹²

By 1910, the movement for workers' compensation statutes had grown in the United States.¹³ Workers' compensation became firmly entrenched in our legal system by 1916 when the United States Supreme Court upheld the constitutionality of New York's workers' compensation statute.¹⁴ By 1920, all but eight states had enacted workers' compensation laws, and all the states had workers' compensation laws by 1949.¹⁵

The typical workers' compensation statute provides benefits regardless of fault to employees who suffer injury arising "out of and in the course of" employment.¹⁶ In exchange for assured but modest compensation, employees waive their common law right to sue their

3. W. PROSSER & W. KEETON, *THE LAW OF TORTS* § 80 (5th ed. 1984).

4. A. LARSON, *supra* note 1, § 4.30.

5. Wambaugh, *Workmen's Compensation Acts: Their Theory and Their Constitutionality*, 25 HARV. L. REV. 129 (1911).

6. *Id.*

7. *Id.*

8. A. LARSON, *supra* note 1, § 2.20.

9. *Id.*

10. Wambaugh, *supra* note 5, at 131.

11. *Id.* at 131-32.

12. Wambaugh, *supra* note 5.

13. A. LARSON, *supra* note 1, § 5.20.

14. *New York Central R.R. v. White*, 243 U.S. 188 (1916).

15. A. LARSON, *supra* note 1, § 5.30.

16. A. LARSON, *supra* note 1, § 1.10.

employer.¹⁷

In conjunction with workers' compensation statutes, some states, including Arkansas, enacted third-party statutes that allow an employee injured during the course of employment to sue persons other than the employer.¹⁸ In states with third-party statutes, determining who qualifies as a third party can be a critical issue.¹⁹

Most courts have treated coemployees as third parties under these statutes.²⁰ In *King v. Cardin*,²¹ the Arkansas Supreme Court held that a negligent coemployee qualified as a third person under the state's third-party statute,²² and therefore was liable for injuries he negligently caused to a fellow employee.²³ The court reasoned that Arkansas' workers' compensation statute²⁴ is an exclusive remedy, but that it only bars suits against the employer.²⁵ As a general rule, only express statutory language can pre-empt common law rights,²⁶ but a few jurisdictions interpret similar workers' compensation statutes as immunizing coemployees as well as employers.²⁷ Since a laborer probably has no resources other than those derived from his own employment, suits against coemployees are often futile.²⁸ Suing supervisory employees appears to be a viable option.

The courts take three basic approaches to the personal liability of supervisory employees.²⁹ In *Brown v. Estess*,³⁰ the Mississippi Supreme Court held that the employer's workers' compensation immunity extends to both coemployees and supervisory employees as long as the

17. *Id.*

18. Ehrhardt, *The Third Party Action—Expanding the Circle of Immunity: Coemployees*, 48 *MISS. L.J.* 87, 93 (1977). The Arkansas statute is *ARK. STAT. ANN.* § 81-1340 (1976).

19. Comment, *Third Party Actions Under the Alabama Workmen's Compensation Act*, 26 *ALA. L. REV.* 701, 709 (1974).

20. Ehrhardt, *supra* note 18, at 94.

21. 229 Ark. 929, 319 S.W.2d 214 (1959).

22. *Id.* at 933, 319 S.W.2d at 218.

23. *Id.*

24. *ARK. STAT. ANN.* § 81-1304 (1976) provides: "The rights and remedies herein granted to an employee . . . on account of injury or death, shall be exclusive of all other rights and remedies of such employee . . . to recover damages from such employer on account of such injury or death"

25. 229 Ark. at 933, 319 S.W.2d at 218.

26. *Marquez v. Rapid Harvest Co.*, 1 *ARIZ. APP.* 562, 563-64, 405 P.2d 814, 816-17 (1965); *Frantz v. McBee Co.*, 77 *SO. 2D* 796, 798 (Fla. 1955).

27. *See, e.g., White v. Ponzoso*, 77 *IDAHO* 276, 291 P.2d 843 (1955) (coemployee was the employer's agent; therefore, the coemployee shared the employer's immunity).

28. Ehrhardt, *supra* note 18, at 103.

29. *State ex rel. Badami v. Gaertner*, 630 S.W.2d 175 (Mo. App. 1982).

30. 374 *SO. 2D* 241 (Miss. 1979).

negligent employee acts within the scope of employment.³¹ The case involved a wrongful death suit against a board of directors and a general manager for their negligence in allowing an employee to suffocate to death in a soybean bin. The court reasoned that employees should not bear the burden of work-related accidents, but that the employer should pass the cost along to the consumer.³² The court in *Brown* chose to follow the purpose and social philosophy of workers' compensation and make workers' compensation the exclusive remedy against the employer or any of its employees.³³ The court stated that holding employees liable for another employee's injury would defeat the purpose of the statute. It would place the cost of employment accidents on employees rather than on the consumer.³⁴

A New Jersey court followed a second approach and relied on the reasoning of the Restatement of Agency in determining supervisory employee immunity. In *Miller v. Muscarelle*,³⁵ a construction worker was killed when a conveyor collapsed at a work site. The administratrix brought suit against the foreman, construction manager, and president of the company for wrongful death. The Superior Court of New Jersey held that supervisory employees were personally liable for injury to other employees only if the supervisory employees breached a specific duty that their employer had assigned to them.³⁶ The court reasoned that if supervisory employees do not breach their duty to their employer, then they act as agents and share their employer's immunity.³⁷

A "capacity" theory provides the basis for a third approach to the liability of supervisory employees.³⁸ In *Kerrigan v. Errett*,³⁹ the Supreme Court of Iowa held that a supervisory employee who breaches a personal duty to an employee, as opposed to a duty of employment, becomes liable for personal injuries.⁴⁰ Thus, a supervisor acting in the capacity of a coemployee assumes personal liability for injury to other employees.⁴¹ But when a supervisor negligently performs the employer's

31. *Id.* at 242-43.

32. *Id.* at 242; *see also* *Madison v. Pierce*, 156 Mont. 209, 478 P.2d 860 (1970).

33. *Brown*, 374 So. 2d at 242.

34. *Id.* at 243.

35. 67 N.J. Super. 305, 170 A.2d 437 (1961) (citing RESTATEMENT (SECOND) OF AGENCY §§ 350-59 (1958)).

36. *Miller*, 67 N.J. Super. at 333, 170 A.2d at 452.

37. *Id.* at 329-30, 170 A.2d at 450.

38. *Gaertner*, 630 S.W.2d at 179.

39. 256 N.W.2d 394 (Iowa 1977).

40. *Id.* at 397 (citing *Canter v. Koehring Co.*, 283 So. 2d 716, 721 (La. 1973)).

41. *See Laffin v. Chemical Supply Co.*, 77 Wis. 2d 353, 253 N.W.2d 51 (1977).

duty, he receives immunity.⁴² For example, in *Pitrowski v. Taylor*,⁴³ the case was remanded to determine whether a supervisor breached a personal duty when a piece of steel fell from a forklift operated by the supervisor and caused injury to an employee. Similarly, in *Wilson v. Hasvold*,⁴⁴ a president of a construction company breached a personal duty when he negligently operated a caterpillar tractor.

Often, courts using the "capacity" theory describe employers' duties as nondelegable.⁴⁵ For example, the duty of the employer to use diligence in selecting competent employees constitutes a nondelegable duty.⁴⁶ In *Blumhardt v. Hartung*,⁴⁷ the Supreme Court of South Dakota held that a supervisory employee is immune from personal liability for actions within his corporate responsibility.⁴⁸ Similarly, other courts have held that the duty to provide safe working conditions and general supervision is also a nondelegable duty of the employer, and therefore, supervisory employees are immune from tort liability for breaching that duty.⁴⁹

The Arkansas Supreme Court addressed the issue of supervisory immunity in *Simmons First National Bank v. Thompson*.⁵⁰ The court prefaced its decision by noting that the issue of supervisory immunity under workers' compensation is one of first impression in Arkansas.⁵¹ The court noted that other states with third-party statutes similar to Arkansas' consider a coemployee a third party.⁵² Previously, the court had denied immunity for a fellow employee in *King v. Cardin*⁵³ on the basis that a coemployee qualifies as a third party under the Arkansas statute. However, the court ruled in *Neal v. Oliver*,⁵⁴ that an employer is not subject to liability as a third party even though he is also the manager and supervisor of the business he owns. The court in *Simmons First National Bank* pointed out that the liability of supervisory em-

42. *Id.*

43. 55 Wis. 2d 615, 201 N.W.2d 52 (1972).

44. 86 S.D. 286, 194 N.W.2d 251 (1972).

45. *See, e.g.*, *Athas v. Hill*, 54 Md. App. 293, 458 A.2d 859 (1983).

46. *Id.*

47. 283 N.W.2d 229 (S.D. 1979).

48. *Id.* at 232.

49. *Laffin v. Chemical Supply Co.*, 77 Wis. 2d 353, 253 N.W.2d 51 (1977); *Kruse v. Schieve*, 61 Wis. 2d 421, 213 N.W.2d 64 (1973), *appeal after remand*, 72 Wis. 2d 126, 240 N.W.2d 159 (1976).

50. 285 Ark. 275, 686 S.W.2d 415 (1985).

51. *Id.* at 276, 686 S.W.2d at 416.

52. *Id.* at 277, 686 S.W.2d at 417.

53. 229 Ark. at 933, 319 S.W.2d at 218.

54. 246 Ark. 377, 438 S.W.2d 313 (1969).

ployees falls somewhere between situations covered by the *King* and *Neal* decisions.⁵⁵

The court reasoned that Professor Larson would deny liability in *Simmons First National Bank*.⁵⁶ According to Larson, errors in workers' compensation cases usually arise when courts fail to realize that workers' compensation is not a tort action.⁵⁷ The test for liability should be whether the injury is "work-connected."⁵⁸ The court pointed to the fact that even though states have not expanded immunity to the extent Professor Larson advocates, a majority of jurisdictions have reached Larson's conclusion with regard to immunity for supervisory employees.⁵⁹ Since employers are immune from liability for negligently failing to provide a safe work place, the court reasoned that the same immunity should extend to supervisory employees when their general duties involve providing a safe work place.⁶⁰

The court stated several policy reasons for its decision. If supervisory employees are held personally liable, then they will demand that their employer provide indemnification.⁶¹ As a result, the employer will, in essence, have no immunity.⁶² The court said the purpose of workers' compensation is to shift the cost of work-related injuries to the consumer.⁶³ Workers gave up the unlimited damages available in a fault system in exchange for limited recovery based on "no fault."⁶⁴ The court concluded that plaintiffs in *Simmons First National Bank* were attempting to recover against their supervisors on the basis of fault while retaining their right to assured recovery under workers' compensation.⁶⁵ Therefore, the court held against the plaintiffs and granted immunity to the supervisory employees.⁶⁶

Simmons First National Bank is the first case in which the Arkansas Supreme Court has held that the workers' compensation statute provides immunity to supervisory employees. The court refused to hold supervisory employees liable in tort for their failure to provide a safe work place. Nevertheless, even after *Simmons First National Bank*,

55. 285 Ark. at 277, 686 S.W.2d at 417.

56. *Id.*

57. A. LARSON, *supra* note 1, § 1.20.

58. *Id.* § 2.10.

59. 285 Ark. at 278, 686 S.W.2d at 417.

60. *Id.*

61. *Id.* (citing *State ex rel. Badami v. Gaertner*, 630 S.W.2d 175 (Mo. App. 1982)).

62. *Id.*

63. 285 Ark. at 278-79, 686 S.W.2d at 417.

64. *Id.* at 279, 686 S.W.2d at 417.

65. *Id.* at 279, 686 S.W.2d at 417-18.

66. *Id.* at 279, 686 S.W.2d at 418.

the boundaries of supervisory employee immunity remain unclear. As the court stated, Larson's policy arguments support supervisory immunity in all work-related accidents. Moreover, Larson's policy arguments also support coemployee immunity. However, the court impliedly rejected Larson's view on liability of coemployees and reaffirmed that coemployees could be personally liable.⁶⁷

The court also relied on cases from other jurisdictions that have adopted the "capacity theory" of supervisory liability.⁶⁸ The "capacity theory" gives supervisory employees immunity for negligent acts they commit in their roles as supervisors. Whether the court will extend immunity to a supervisor performing in the capacity of a coemployee is still an open question.

The policy arguments in *Simmons First National Bank* could also be used to support supervisory employee immunity when the supervisor is acting as a coemployee as well. On the other hand, the court may continue to follow the majority of decisions and rely on the capacity theory. If Arkansas fully adopts the "capacity theory," a supervisory employee could be held personally liable for negligent acts performed in the capacity of a coemployee. It would seem inherently unfair to treat supervisory employees and coemployees differently for the same negligent act.

Hank Jackson

67. *Id.* at 279, 686 S.W.2d at 417.

68. *Id.*

