American Educational Institute, Inc.

CLAIMS LAW UPDATE

A SUPPLEMENT TO CLAIMS LAW COURSES IN CASUALTY, PROPERTY, WORKERS COMPENSATION, FRAUD INVESTIGATION AND AUTOMOBILE

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APPORTIONMENT OF NONPARTY EMPLOYER'S FAULT

[Comparative Negligence, Para. 3.01]

INTRODUCTION

While an employee who suffers an on-the-job injury is generally prohibited from suing his employer in tort, the employee can pursue a tort action against someone other than his employer or a co-employee. Historically, when an employee brought a tort action against a third party tortfeasor, that third party was not permitted to introduce evidence of the employer's fault as a means of reducing his exposure. There were a number of reasons for prohibiting a tortfeasor from doing so. Many courts rationalized that an employer is not a joint tortfeasor because the exclusive remedy defense of workers' compensation makes the employer immune from tort liability. Others held that there was no need to consider the employer's fault because of joint and several liability. Under that rule a tortfeasor is liable for all of the injured worker's recoverable damages even if a percentage of the damages was caused by the employer.

As states adopted comparative negligence statutes, many abandoned the common law rule of joint and several liability. As a result, courts in these states have begun to allow tortfeasors to produce evidence of an employer's fault even if the employer is not a party to the suit. Many states have apportionment statutes that clearly state whose fault will be considered, specifically including immune parties such as employers. Other state statutes are not as clear and are subject to judicial interpretation. Recent court decisions have considered this issue under the rules of several liability and modified joint and several liability (referred to as modified several liability in some jurisdictions).

SEVERAL LIABILITY

Many states have adopted the rule of several liability to limit the unfair burden of joint and several liability on a minimally liable tortfeasor. Under several liability a tortfeasor who is liable to a claimant is responsible for only his share of the claimant's damages. This means that a tortfeasor who was 25% at fault pays only 25% of the plaintiff's damages. This is true even though another party may be unable to pay his share of the damages or is not liable to the claimant for that share because, for example, he is an immune employer. In contrast to joint and several liability, a claimant

is less likely to recover full compensation under several liability because a state that has adopted several liability is more likely to allow an immune employer's fault to be considered in apportioning total fault.

In *Hall v. IKEA Property, Inc.,* 2016 U.S. Dist. LEXIS 151583 (E.D. Mich. 2016), the court addressed whether under Michigan law fault could be allocated to Hall's employer, J.W. Logistics. Hall was injured on IKEA's property while in the course of his employment. Hall sued IKEA, which filed a third party action against J.W. as a nonparty at fault, asking the court to allocate fault to Hall's employer. Hall amended his complaint to name J.W. as a defendant, but J.W. was granted summary judgment based on the exclusive remedy of workers' compensation. Hall then filed a motion to strike IKEA's nonparty at fault claim arguing that J.W. could not be considered an at fault party based on the court's ruling on J.W.'s summary judgment motion.

The court first looked to the Michigan apportionment statute, MCLS § 600.2957 (1). That statute provides that the liability of each person is to be allocated by the trier of fact "regardless of whether the person is, or could have been, named as a party to the action." Prior Michigan decisions held that an employer subject to the state's workers' compensation act and entitled to the protection of the exclusive remedy defense could be named as a nonparty at fault. The court found that "factfinders determine the percentage of fault of nonparties only to accurately determine the percentage of fault of named parties." The court concluded that IKEA could introduce evidence of J.W.'s role in causing Hall's injury for the purpose of determining IKEA's percentage of fault.

Because Michigan is a several liability state, it was important for the employer's fault to be considered so that the court could accurately determine IKEA's proportionate share and thus the extent of its liability for the claimant's damages. The fault of the employer, however, would not result in liability because of the exclusive remedy.

Plaintiffs don't want to have an employer's fault assessed because any fault assessed against the employer will reduce the party defendant's share of the total fault and diminish the plaintiff's recovery from that defendant.

In *Walker v. Tensor Machinery, Ltd.*, 779 SE2d 651 (Ga. 2015), Walker sued Tensor in federal court for negligent failure to warn after Walker suffered an on-the-job injury while using a machine Tensor had manufactured. Tensor gave notice under Georgia's apportionment statute, OCGA § 51-12-33 (c), that it intended to ask the court to assign some fault to the employer for Walker's injury. Walker filed a motion to exclude all evidence of fault on his employer's part based on the argument that the apportionment statute did not allow fault to be apportioned to a nonparty employer that was immune from liability under the workers' compensation statute. This prompted the federal court to certify a question to the state supreme court: Does the apportionment statute allow a jury to assess a percentage of fault to a nonparty employer even though the nonparty is immune under the workers' compensation statute?

In a previously decided case that did not involve a workers' compensation claim, *Zaldivar v. Prickett*, 774 SE2d 688 (Ga. 2015), the Georgia Supreme Court held that a nonparty's fault should be considered despite its immunity from liability. Accordingly, in *Walker*, the Georgia Supreme Court held that there was no reason to treat an immune nonparty employer differently than other immune nonparties. The court found that "an affirmative defense of immunity does not eliminate 'fault' or cut off proximate cause, it only bars liability notwithstanding that the 'fault' of the tortfeasor was a proximate cause" of the plaintiff's injury. The court explained:

> Other jurisdictions have recognized that it is accepted practice to include all tortfeasors in the apportionment question. This includes persons alleged to be negligent but not liable in damages to the injured party such as in the third-party cases

> arising in the workers' compensation area. More specifically, this rule is followed in jurisdictions that have apportionment schemes similar to that of OCGA § 51-12-33, in which, consistent with the analysis in *Zaldivar*, a meritorious affirmative "defense of immunity may cut off liability, but a tortfeasor is still a tortfeasor, and nothing about his defense or immunity" means that he was not at fault by his commission of a tort that was a proximate cause of the plaintiff's injury.

The court found that an employer's act or failure to act can still be considered negligent. Immunity under a workers' compensation statute does not make the employer non-negligent; it merely shields the employer from any liability for its negligent act or omission. It is not inconsistent to allocate fault to an employer while at the same time shielding it from liability for that fault. It is no detriment to an employer for its fault to be allocated as long as its immunity remains intact.

Walker argued that to allow allocation of the employer's fault would upset the balance between the interests of employers and employees that the legislature struck in the workers' compensation act. The court disagreed, finding that the balance was not upset at all since an employee plaintiff was still able to obtain workers' compensation benefits without having to prove the employer's fault and the employer remained immune from liability. The court explained:

> The result of immunizing employers from fault as well as from liability is that third parties pick up the tab for the employer's fault, potentially paying more than their share in order to make up for the excluded employer. ... The question becomes whether the injured plaintiff must see his potential recovery diminished by an assignment of fault to his immune employer or whether a third party defendant may be made to respond in damages in an amount that exceeds that defendant's proportionate share of fault in causing the injury. ... The more equitable result is to permit allocation of fault to the exempt employer. While this diminishes the injured party's ultimate recovery in the tort action, the injured party has already obtained or may, post verdict, seek recovery under the compensation law from his employer. This right of recovery under workers' compensation law is specifically intended to replace the previously-existing common law right of recovery against the employer in tort. To immunize employers from fault allocation in third-party tort suits would go against the spirit of the bargain between employers and employees that underlies workers' compensation; instead, the third party would pay the employer's cost of compensation, and the employee would have the possibility of recovering in tort for his employer's fault, since that would then be allocated to the third party. This certainly would benefit employers, and to some extent plaintiffs – but third parties should not be assessed to supplement our system of workers' compensation.

The court went on to quote a comment from the Restatement (Third) of Torts: Apportionment Liability § B19: "the adoption of several liability, coupled with the submission of the nonparty employer for assignment of comparative responsibility, as provided in the Section, ends the unfairness to independent tortfeasors. Each tortfeasor is only responsible for its comparative share of plaintiff's damages." The court concluded that there was no reason under the apportionment statute to treat immune employers differently than any other immune tortfeasor. Assessment of the employer's fault was permitted.

MODIFIED JOINT & SEVERAL/MODIFIED SEVERAL LIABILITY

A number of states combine elements of several liability and joint and several liability. Some states refer to the rule as modified joint and several liability. In these states joint and several applies

in general, but by statute a liable tortfeasor whose fault is below a stated percentage is only responsible for his several or proportionate share of damages. Some statutes modify the rule of several liability. In these states a liable tortfeasor is subject to several liability unless his fault exceeds a stated percentage, in which case the tortfeasor is jointly and severally liable. Regardless of the name of the statute the end result is the same. Whether joint and several or several liability applies depends on the percentage of fault attributed to a tortfeasor. And it is therefore just as important as it is under the rule of several liability to determine the fault of all those who contributed to the cause of the claimant's damages in order to fairly assess a liable tortfeasor's financial exposure.

In *Gaudreault v. Elite Line Services, LLC*, 22 F. Supp. 3d 966 (D. Minn. 2014), Gaudreault, a Delta Air Lines equipment service employee, sustained an on-the-job bodily injury and sued Elite, the company that provided airport operation and maintenance services to Delta. Gaudreault claimed that his injury was caused by Elite's negligence in failing to properly inspect, maintain, and repair the piece of equipment that fell on him and caused his injury.

Elite filed a motion seeking an order that, under Minnesota law, unless it was found to be more than 50% at fault it could not be held jointly and severally liable for any fault attributed to Delta. The parties disagreed over the scope of an amendment to the Minnesota Comparative Fault Act that states:

> When two or more persons are severally liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that the following persons are jointly and severally liable for the whole award:
>
> (1) a person whose fault is greater than 50%

Gaudreault argued that Delta could not be subject to the state's comparative fault act because under the workers' compensation act it could not be severally liable in tort to its employee. The court disagreed, pointing out that the state supreme court had previously made it clear that when it apportions negligence a jury must have the opportunity to consider the negligence of everyone involved, "whether or not they are parties to the lawsuit and whether or not they can be liable to the plaintiff or to other tortfeasors either by operation of law or because of a prior release." The court concluded that the fact Delta had no tort exposure to Gaudreault based on the workers' compensation act did not prohibit the application of the comparative fault act or bar consideration of Delta's proportionate fault. Only Elite could be held liable. Whether its liability would be joint and several or several would depend on the jury's determination of whether both Elite and Delta were at fault and, if both were at fault, their respective percentages of fault.

While some states, in an effort to eliminate the unfairness of holding a tortfeasor liable for more than his share of the total fault, have allowed evidence of an immune employer's fault, not all states follow this approach. For example, Montana Code Annotated § 27-1-703(6) provides:

> ***
>
> (c) Except for persons who have settled with or have been released by the claimant, comparisons of fault with any of the following persons is prohibited:
>
> (i) a person who is immune from liability to the claimant
>
> ***

The section of the Montana statute that specifically prohibits assessment of an immune employer's fault was recently challenged on constitutional grounds but its validity was upheld in

Gibbs v. Goldwind U.S.A., Inc., 2016 Mont. Dist. LEXIS 4 (Mont. 2016). In Montana, therefore, a tortfeasor is not entitled to have an immune employer's fault assessed.

CONCLUSION

There is a distinction between assessing fault and determining liability. One can be at fault because his negligence contributed to the cause of a claimant's injury, but may not necessarily be legally liable to the claimant. This often occurs in work accidents that involve injured employees. Although the employer may have contributed to the cause of the employee's injury, the employer is immune from legal liability due to the exclusive remedy defense of workers' compensation. While employers remain immune from legal liability, the trend is to allow consideration of an immune employer's fault in assessing the percentage of fault of a third party tortfeasor. It is important, however, to check the statutes and case law of the jurisdiction. At least one state, Montana, expressly prohibits the assessment of an employer's fault.