CO-EMPLOYEE IMMUNITY -- FACT OR FICTION?

Several recent Alabama Supreme Court decisions have expanded the situations in which employees may sue each other for injuries arising in the work place, and a June 30, 1992 Jefferson County Circuit Court decision -- on appeal at the writing of this article -- has held "invalid" the co-employee immunity creating provisions of Alabama's Worker's Compensation Act.

THE CIRCUIT COURT DECISION

In 1985, the Alabama Legislature passed Act No. 85-41, which amended and revised Alabama's Worker's Compensation Act. The 1985 Act re-established co-employee immunity, and contained other provisions granting workers important rights and benefits. For example, the 1985 Act (1) extended the statute of limitations for workers' compensation claims arising from accidents from one to two years, (2) substantially raised the minimum and maximum weekly workers' compensation benefits, and (3) extended and increased the temporary total benefits available to injured workers by eliminating the 300 week cap existing in prior law. The Act also sought to strengthen job security and work place safety by creating a cause of action for retaliatory discharge, and requiring employers to establish safety committees.

Undoubtedly, in an effort to chill attack on this comprehensive scheme of amendments and additions to Alabama's Worker's Compensation Act, the Legislature placed a reverse or non-severability provision in the 1985 Act. That section provides: "If any provision of this act shall be adjudged to be in invalid by any

court of competent jurisdiction, then this entire act shall be invalid and held for naught." Ala. Code § 25-5-17.

On June 30, 1992, Judge Roger M. Monroe ruled that § 12 of the 1985 Act ("The provisions of this act shall be applicable to Articles 4, 5, 6 and 7") was "invalid," and therefore, the entire Act was "invalid." His decision was premised on the assumption that § 12 did nothing, and consequently, was "invalid." In the case before Judge Monroe, the effect of his decision was to allow one employee to sue nine of his fellow employees for allegedly failing to properly train him in the use of heavy equipment.

However, if Judge Monroe's decision becomes "the law of the land," its impact would be far greater than just permitting co-employee lawsuits based on negligence and wantonness. For example, all retaliatory discharge cases and occupational injury cases filed more than one year after injury would be subject to immediate dismissal. All workers with pending cases or existing causes of actions would be limited to benefits at the much lower 1984 levels, and those employees receiving benefits under the 1985 Act could be compelled to reimburse their employers for overpayment. Moreover, the period of time during which employees could receive temporary benefits would revert to 300 weeks as it was in 1984.

In an effort to forestall the Court from turning back the clock to the chaotic days before the 1985 Act, business and labor, as well as the State of Alabama, have joined forces. The United Mine Workers of America, the United Paper Workers International Union, the Alabama AFL-CIO, the Business Council of Alabama, the

Alabama Department of Industrial Relations, and numerous others have filed amici brief with the Alabama Supreme Court urging reversal of Judge Monroe's decision. Whether their efforts are successful remains to be seen.

ERODING OF CO-EMPLOYEE IMMUNITY

Two recent decisions from the Alabama Supreme Court have expanded the types of cases employees may bring against each other. See Moore v. Reeves, 589 So. 2d 173 (Ala. 1991); Bailey v. Hogg, 547 So. 2d 498 (Ala. 1989). Consequently, even if the Alabama Supreme Court reverses the decision of Judge Monroe and preserves co-employee immunity, the number of co-employee lawsuits likely will continue to grow.

The 1985 amendments to Alabama's Worker's Compensation Act did not extend complete immunity to all employees. Rather, the 1985 Act granted employees a qualified immunity from all suits, except those based on "willful conduct." Ala. Code § 25-5-11(b). The Act then went on to define "willful conduct" to mean one of the following:

> (1) A purpose or intent or design to injure another . . . ; or
>
> (2) The willful and intentional removal from a machine of a safety guard or a safety device provided by the manufacturer of the machine with knowledge that injury or death would likely or probably result from such removal . . . ; or
>
> (3) The intoxication of any employee of the employer . . . ; or
>
> (4) Willful and intentional violation of a specific written safety rule of the employer after written notice to the violating employee . . .

Ala. Code § 25-5-11(c).

It is the second of these four definitions that the Court has construed in such a fashion as to expand the types of cases that employees may lawfully bring against each other. In Bailey v. Hogg, the question on appeal was: "Whether the failure to install an available safety guard can constitute willful conduct for purposes of the 1985 amendment to the Workman's Compensation Act?" Bailey, 547 So. 2d at 499. In answering the question in the affirmative, the Court stated: "We hold that the willful and intentional failure to install an available safety guard equates to the willful and intentional removal of a safety guard for the purposes of Ala. Code 1975, § 25-5-11(c)(2)."

In dissent, Justice Houston expressed dismay with how the Court could equate the statutory phrase "willful removal" with the non-statutory phrase "failure to install." He noted that the definition of "removal" is "the act of removing," while "install" means to "set in position and connect and adjust for use." The terms are not synonymous; they are in fact opposites.

In Moore v. Reeves, the Court was presented with another opportunity to circumscribe the legislatively established co-employee immunity doctrine. In Moore, a divided Court held that a security guard could maintain a claim against his supervisors for "willfully failing to maintain and/or repair a door closure mechanism." The Court felt that a "door closure mechanism" on a 1976 Plymouth was a "safety device," and the failure to repair that broken safety device -- the car door -- was the equivalent of

"removing" such a device. The Court reasoned that, "To hold otherwise would allow supervisory employees to neglect the maintenance and repair of safety equipment provided to protect co-employees from injury, which by its very nature is a clear violation of public policy." Moore, 589 So. 2d at 178-79.

In dissent, Justice Maddox, joined by Justice Steagall, accused the majority of ignoring the clear language and intent of the legislature by allowing through judicial construction, what the legislature sought to foreclose by direct legislation. Justice Maddox observed:

> By interpreting the statute as not barring this action under the facts of this case, I think that the majority takes what the legislature intended as a very narrow exception to co-employee immunity, and expands it so that the exception will swallow up the rule and, rightly or wrongly, the intent of the legislature, as expressed in Section 1 of the very Act this case construes, will have been completely ignored and disregarded.

Moore, 589 So. 2d at 181.

CONCLUSION

Co-employee immunity remains a hotly contested topic. Outright attacks on its validity are currently working their way through the appellate process, and recent Supreme Court decisions have eroded the qualified immunity the legislature granted all employees. It is now clear that in addition to the statutory cause of action for "removal of a safety device," causes of action also exist for the "failure to install" and "failure to repair" safety devices. One also should be mindful that the term "safety device" has been defined broad enough to include the car door on a 1976

Plymouth. The only sure limit on a lawyer's ability to plead a co-employee cause of action under the "willful removal" exception appears to be his imagination.