# Suits Against Co-Employees Can Avoid Exclusivity Bar of the Workers' Compensation Act

By MARK McGRATH

In enacting the North Carolina Workers' Compensation Act, the General Assembly, like legislatures across the country, gave much to workers of this state but also took much away. In exchange for guaranteeing limited compensation for work-related injuries, workers forfeited their right to seek full compensation for such injuries, including the right to seek compensation for pain and suffering and other non-pecuniary damages.

Until recently, injured North Carolina workers had two main avenues for stepping outside the exclusive remedy bar. The first was the third-party tort claim, a suit against a person or entity other than the employer. The other option was to pursue a claim under the benchmark case of Woodson v. Rowland 1 (or in cases involving co-employee negligence, Pleasant v. Johnson discussed infra), in which the Supreme Court opened the door for workers to step outside the exclusivity provision of the act and seek full compensation for work-related injuries when those injuries arise from egregious conduct on the part of the employer.

Those options have narrowed considerably in the last decade. In the years since Woodson, the Court of Appeals has drastically limited the viability of Woodson claims. Indeed, whether Woodson remains viable at all is a question that continues to dog those of us who regularly practice in this area of the law. Also, while third-party tort claims still offer some hope to injured workers, these suits face a number of hurdles, including potentially suit-busting subrogation liens.

In this three-part series we will analyze the exclusive remedy bar, explore exceptions to the act's exclusive remedy provisions, trace the history of third-party tort claims, and address the rise and fall of Woodson. The final installment will provide practice pointers for those who handle these challenging cases.

**THE EXCLUSIVE REMEDY PROVISION**

General Statute Sect. 97-10.1 provides that where "the employee and the employer are subject to and have complied with the provisions of [the act], then the rights and remedies herein granted to the employee, his dependents, next of kin, or personal representative shall exclude all other rights and remedies of the employee, his dependents, next of kin, or such representative as against the employer at common law or otherwise on account of such injury or death." Simply put, if you are injured on the job, your only recourse is to seek compensation under the act. Except in very limited circumstances, the act forever extinguished the right of workers to pursue tort claims against the employer.

**WHO IS SUBJECT TO THE EXCLUSIVE REMEDY BAR?**

The exclusive remedy bar covers not only the employee but "his dependents, next of kin or personal representative" as well. For example, a spouse's claim for loss of consortium is subject to the bar, as is a wrongful death action commenced by the personal representative of the employee's estate. It would appear that claims by family members for negligent infliction of emotional distress would also be barred by the Act.

**CO-EMPLOYEES AND THE PLEASANT CLAIM**

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It goes without saying that the exclusive remedy bar applies to the employer itself. Accordingly, where an employee is injured on the job, the employee's only recourse is to seek compensation under the act by way of the Industrial Commission.

Generally speaking, the bar also applies to co-employees. Accordingly, where a worker is injured by the negligence of a co-employee, the worker may not pursue a tort claim against the co-employee. Suit may be maintained against a co-employee when the injury arises out of willful, wanton or reckless negligence on the part of the co-employee. In order to survive a motion for summary judgment, a Pleasant claimant is required to demonstrate that the conduct of the co-employee (which includes supervisors) manifests "a reckless disregard for the rights and safety of others."

Put another way, an employee can pursue remedies against a co-employee only when the co-employee "intends" that the worker be injured or is "manifestly indifferent" to the safety of the worker.8 The rationale underlying the allowance of such claims is that co-employees "do not finance or otherwise directly participate in workers' compensation programs," while employers, on the other hand, do.

Pleasant claims may not be brought against officers or shareholders of the employer entity. In this scenario, Woodson would offer the only avenue for a recovery in tort.

**DEGREE OF NEGLIGENCE REQUIRED TO PREVAIL ON PLEASANT CLAIM**

In Pleasant, plaintiff sued his co-worker after the co-worker drove his truck into the plaintiff while attempting to scare him by making a close pass while blowing the truck's horn. The court held that the act does not "shield a co-employee from common law liability for willful, wanton and reckless conduct." As a basis for its decision, the court observed that

"[p]ermitting an injured worker to bring an action against a co-employee for an intentional tort places responsibility on the tortfeasor where it belongs. Since the commission of an intentional tort includes a constructive or actual intent to injure, allowing an injured co-worker to sue the tortfeasor serves a deterrent against future misconduct."

In reversing the decision of the trial court, the court held that the conduct of the co-employee in operating his truck was sufficiently reckless to survive a motion for directed verdict.

Given the ideological bent of the Court of Appeals in recent years, it is perhaps predictable that Pleasant claims have met with a less than receptive audience in that tribunal. Since Pleasant was decided, the Court of Appeals has affirmed the vast majority of the cases dismissed in favor of the defendant at the trial court level. Indeed, there does not appear to be a single post-Pleasant Court of Appeals case in which summary judgment in favor of a defendant has been reversed.

Even more remarkably, most of these decisions involve conduct that makes the horseplay at issue in Pleasant seem tame by comparison. See Dunleavy v. Yates Construction Company, Inc., 106 N.C. App. 146, 416 S.E.2d 193, rev. denied, 332 N.C. 343, 421 S.E.2d 146 (1992), appeal after remand, 114 N.C. App. 196, 442 S.E.2d 53 (1994)(summary judgment proper where co-employee forced employee to work in unfortified trench without protective equipment in violation of OSHA standards); Pinckney v. Van Damme, 116 N.C. App. 139, 447 S.E.2d 825)(1994)(JNOV proper where actor with history of similar incidents slashed stuntman's eye during filming of fight scene, resulting in blindness); Jones v. Willamette Industries, Inc., 120 N.C. App. 591, 463 S.E.2d 294 (1995), rev. denied, 342 N.C. 656, 467 S.E.

2d 714 (1996) (summary judgment proper where worker was crushed in confined space despite "serious" OSHA violation and similar previous incident); Echols v. Zarn, Inc., 116 N.C. App. 364, 448 S.E.2d 289 (1994), discretionary review allowed, 339 N.C. 737, 454 S.E.2d 649, affirmed, 342 N.C. 184, 463 S.E.2d 228 (1995)(summary judgment proper where co-employee ordered worker to bypass molding machine safety gate in violation of company safety rules); Pendergrass v. Card Care, Inc., 333 N.C. 233, 424 S.E.2d 391 (1993)(motion to dismiss was properly granted where co-employees directed worker to operate unguarded machine in violation of OSHA and industry standards); Abernethy v. Consolidated Freightways Corp. of Delaware, 321 N.C. 236, 362 S.E.2d 559 (1987)(summary judgment proper where co-employees operated forklift knowing that it had no brakes, resulting in injury to worker).

**SITUATIONS TO WHICH THE EXCLUSIVE REMEDY BAR DOES NOT APPLY**

The exclusive remedy bar applies only to conduct that is committed by the employer, its agents and employees in the course and scope of employment. For example, it was held that the bar did not apply to the case of an employee who was killed during a fishing trip that was organized and conducted by the employer.

Employing similar reasoning, it has been held that the act does not bar tort claims alleging intentional infliction of emotional distress12, sexual harassment, or a claim arising out of an assault committed by the employer.

**CONCLUSION**

The exclusive remedy bar established by the act is extremely broad and difficult to overcome. While narrow exceptions are available to claimants, they are difficult to navigate and confront serious problems at the appellate level.

In the next installment we will examine the tantalizing exception established by the Woodson case and trace the evolution of the Woodson doctrine from its promising inception to its lowly present state.