

## **CO-EMPLOYEE LIABILITY – IMMUNITY OR NOT?**

Traditionally, injury claims occurring on the job were governed by the Missouri Workers' Compensation Laws. Such laws historically provided immunity from civil negligence or lawsuits against both the injured employee's employer and against co-workers. Court decisions through the years had watered down the liability immunity protecting co-workers. In response to the erosion of the civil liability immunity protecting co-workers and restricting employees' injury claims to the workers' compensation system, in 2012 the Missouri legislature modified the workers' compensation statutory provision governing liability of co-workers.

R.S.Mo. § 287.120 was modified as follows:

Any employee of such employer shall not be liable for any injury or death for which compensation is recoverable under this Chapter and every employer and employees of such employer shall be released from all other liability whatsoever, whether to the employees or any other person, except that an employee shall not be released from liability for injury or death if the employee engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury.

This statutory provision identified those limited situations in which an employee could be held civilly liable for a co-worker's on-the-job injury. In other words, this provision identified conduct in which an injured worker would not be limited solely to recovery of workers' compensation benefits against an employer for an on-the-job injury.

Since enacting this revision to the workers' compensation provisions, the Missouri Supreme Court and appellate courts have had opportunities to analyze instances in which an injured worker can hold a co-worker liable for an on-the-job injury. The courts look at the cases

on an individual basis, and so there is not a lot of uniformity to identify those situations in which a co-worker could be held civilly liable for a co-worker's job-related injury.

In two Missouri Supreme Court cases from 2016, the court held that injured workers have always been able to sue fellow employees due to an injury, but only if the worker could show that the co-worker breached a duty that was "distinct from the employer's general duty to provide a safe place to work." While the court would allow civil suits against a co-worker, in these cases the court disallowed these claims finding plaintiffs had failed to show the defendant co-worker owed a duty to plaintiff separate and distinct from the employer's nondelegable duty to provide a safe workplace.

Then, earlier this year the Missouri Supreme Court was again confronted with the question of when co-workers can be held liable for injuries in the workplace. Two of these cases involved a worker injured from a co-worker's operation of a forklift and a case where an electrical lineman was injured when he fell from a platform while attempting to cut a power line that he had been told by his supervisor had been de-energized, but was not. In these current cases, the Missouri Supreme Court clarified that co-employees can only be held liable for injuries from workplace hazards that are not "reasonably foreseeable." A basic tenant of these opinions is that an employer has a duty to provide a safe workplace that cannot be delegated to an employee. In each of these cases, the Supreme Court found that the circumstances of the injury did not entitle the injured worker to hold a co-worker civilly responsible for the injury because each of the injuries was reasonably foreseeable. Under both of these situations, the allegedly negligent co-worker was found to have not breached any duty separate and distinct

from the employer's non-delegable duty to provide a reasonably safe workplace. So the civil negligence claim against the co-worker was barred.

One complicating factor with these 2018 decisions is that the court was addressing claims that occurred prior to the 2012 change to § 287.120. At this point, the Supreme Court has not addressed how the 2012 modifications to the workers' compensation statute impact the civil liability of co-workers. One would expect the new law to further limit situations in which co-workers can be liable for job related injuries. But, that may not be the case.

In September 2018, the Missouri Eastern District Court of Appeals threw some confusion into the issue. In this appellate court decision, a worker was injured when his co-worker removed a safety guard from a piece of machinery and then ordered the injured worker to clean the machine while it was still running and without the safety guard present. In this case, the 2012 version of § 287.120 applied since the injury occurred in 2013. In affirming the trial court judgment in favor of the plaintiff, the appellate court found that the co-worker committed an affirmative negligent act that purposely and dangerously caused his co-worker's injury. The court found that the supervisor employee engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury to the plaintiff eliminating co-worker civil immunity under this set of facts. It is not yet known whether the defendant will seek review by the Missouri Supreme Court or if the court would accept review.

Of the six lawsuits resolved by the Missouri Supreme Court in the last two years, none allowed a civil suit against a co-worker to proceed. Thus, there is reason to believe the Supreme Court may review this case, however, and the facts are fairly specific. In this case, the appellate

court determined they would be hard pressed to find an employer's nondelegable duties extended to the possibility that a supervisory employee, against logic and an employer's instructions and the machine's warnings, would dangerously modify a machine and then instruct the co-worker to work with the machine with the safety guard removed. If a co-worker could not be civilly liable under this set of circumstances, the court suggested it would be hard pressed to find any scenario in which a co-worker could be civilly liable even under the new language in the 2012 Act.

What the cases tell us:

- Co-employee immunity, while strengthened under the 2012 Act, will need to be addressed on a case-by-case basis.
- Plaintiffs will look to specifically identify and plead allegations that the co-worker engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury consistent with the 2012 workers' compensation statute.
- Since the plaintiff was already injured, presumably the co-worker did something to cause or increase the risk of injury, and so defendants will need to focus on the defendant's actions not being purposely and dangerously increasing the risk of injury.
- Plaintiffs will continue to look to impose civil liability on co-workers in order to seek recovery in addition to that afforded against the employer under workers' compensation laws.

- Employers should inform their employees that they may be civilly liable for co-workers' injuries and so workplace safety is not just the responsibility of the employer. Workers should pay attention to their actions and the safety of those working around them.

For more information about this topic, please contact Thomas Smith with Fox Smith, LLC, at 314-588-7003 or [tsmith@foxsmithlaw.com](mailto:tsmith@foxsmithlaw.com).