

An Exception to Exclusive Remedy Doctrine When the Employer Has Capacity Separate from the Role as Employer

Generally, when an employee is injured in the course of his or her employment, the benefits payable under the Pennsylvania Workers' Compensation Act serve as the sole remedy for the employee against the employer. One exception to this exclusive remedy doctrine occurs if the employer stands in a capacity separate and distinct from the role as employer.

The Pennsylvania Supreme Court has allowed the doctrine to prevail in only one case in which an employee of a hospital became ill at work and was directed to the emergency room because the employee health clinic was not open. While in the emergency room the employee was injured when a foot rest of an x-ray table broke loose. The employee was permitted to proceed against the employer hospital in a civil tort action since the employee was no different than a member of the general public and owed the same level of care. The hospital was acting in its capacity as a healthcare provider and not as an employer when the employee was injured. In addition, the employee was not in the course of employment while seeking treatment in the emergency room. The incident did not occur in the course of employment but was rather an event extraneous to same.

The Superior Court of Pennsylvania has narrowly construed the dual capacity doctrine and has expressed the view that it does not favor this exception to the exclusive remedy doctrine which protects the employer from civil suit when a work related injury occurs. This was recently reinforced by the Superior Court in *Zachary Neidert v. Albert Charlie, III*, Nos. 1903 & 2841 EDA 2015 (Pa. Super. 2016), Filed June 29, 2016. In this case, the employee managed Riley's Pub which was owned by Brooke Derek, Inc., Charlie, III being the sole stock holder. The employee, Neidert, alleged that Charlie, III was not immune from suit on the theory that Charlie, III stood in a dual capacity to the employee (Neidert) as the building's owner and in complete control of the pub and building. There was no contest that the employee was in the course of employment when injured, was paid workers' compensation benefits and resolved the case for a lump sum payment.

The Superior Court affirmed the grant of a motion for involuntary non-suit after trial on the basis that Charlie III was immune as an employer and co-employee. The employee did not prove that Charlie, III acted in a dual capacity as a building owner and landlord. The evidence presented focused on the acts of Charlie, III as a business proprietor not as an owner of the building or the landlord. Employees injured in the course of employment by an employer's actions as a business proprietor have a remedy under the Workers' Compensation Act, but may not sue the employer in a tort action. Otherwise, every time an employee was injured by a condition of the premises, a direct action against the employer would be allowed. The Act specifically states that injuries which occur from a condition of the premises are compensable if the employee's presence was required by the nature of the employment. The Court also noted that there was no dispute that the employee was injured in the course of employment; in such cases the dual capacity doctrine does not apply.

The quoted discussion by the trial court states that the owner, Charlie, III, was the co-employee/boss of employee, Neidert. He was actively engaged in running the Pub. Normally a civil action alleging dual capacity is filed against an employer and not a co-employee, but in this instance the trial court determined that Charlie, III was the actual operator of the Pub and everything that needed to be done in connection with the Pub was performed by him. The trial court concluded that Charlie, III exercised ultimate, overall control of the bar operation and the building at the same time. The Superior Court agreed with this conclusion based on the facts of this case. Charlie, III was in essence the actual operator of the pub, despite corporate

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ownership by Brooke Derek, Inc., and therefore entitled to immunity as an employer and co-employee.

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