THIRD PARTY TORT REMEDIES FOR WORK-RELATED ACCIDENTS

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I. GENERAL RULE: "EMPLOYER" IMMUNE FROM ANY TORT LIABILITY TO ITS "EMPLOYEES"

The Pennsylvania Workers' Compensation Act ("the Act") provides the exclusive remedy for workers injured in the course of their employment. The Act contemplates a "no-fault" system of compensation for worker injuries. Employers are essentially strictly liable (liable without fault) for work related injuries suffered by employees in the course of employment. "Compensation" is limited primarily to indemnity benefits (weekly compensation payments, specific loss and/or scarring and disfigurement) and payment of medical expenses for medical treatment related to the work injury.

The exclusivity provision is set forth at 77 P.S. § 481(a), which provides:

> **The liability of an employer under this act shall be exclusive and in place of any and all other liability to such employees, his legal representative, husband or wife, parents, dependents, next of kin or anyone otherwise entitled to damages in any action at law or otherwise on account of any injury or death as defined in §301(c)(1) and (2) [77 P.S. §411(1), (2)] or occupational disease as defined in §108 [77 P.S. § 271].**

The terms "injury", "death", and "occupational disease are defined as those arising in the course of "employment" while the employee is actually engaged "in the furtherance of the business or affairs of the employer whether upon the employer's premises or elsewhere." 77 P.S. § 411. Consequently, if an "employer-employee" legal relationship exists, then the injured employee's remedies are defined and limited by the statute.

A. Exceptions/Extensions of Liability for an Employer's Negligence

The threshold issue in determining an employer's potential tort liability is whether an "employer-employee" relationship exists between the injured worker and the company against whom the action is brought. Absent an "employment relationship", the Act is inapplicable, and tort liability may exist. The exclusivity provision may apply to "statutory" employers but not to

those that hire truly independent contractors. See Patton v. Worthington Associates, Inc., 89 A.3d 643 (Pa. 2014); see also Gillingham v. Consol Energy, Inc., 51 A.3d 841 (Pa. Super. 2012).

1. Dual Capacity Doctrine

The dual capacity doctrine provides that "an employer normally shielded from tort liability by the exclusive remedy principle may become liable in tort to his own employee if he occupies, in addition to his capacity as employer, a second capacity that confers on him obligations independent of those imposed on him as an employer." Callender v. Goodyear Tire & Rubber Co., 564 A.2d 180, 185 (Pa. Super. 1989). The origin of this doctrine is found in Tatrai v. Presbyterian University Hospital, 439 A.2d 1162 (Pa. 1982). There, a hospital employee became ill during her shift, and was directed by her supervisor to go to the hospital emergency room ("ER"). While in the ER the table the employee was lying on broke, causing her to fall and be injured. The issue before the Pennsylvania Supreme Court was whether, given the plaintiff's concurrent status as a hospital employee and as a hospital patient at the time of injury, the Act's exclusivity provision barred her from pursuing an action at law against the hospital. In a plurality decision, five justices agreed that the plaintiff was entitled to pursue common law tort claims against the hospital but disagreed on the rationale.

The plurality's analysis focused primarily on whether the plaintiff's injury was compensable under the Act and thus subject to the "exclusive remedy" provisions in Section 303. The plurality's interpretation of Section 301 of the Act determined that only an "injury arising in the course of employment" was compensable and an injury can only arise in the course of employment in one of two situations: 1) while the employee is actually engaged in the furtherance of the business of the employer, regardless of the physical location of the injury or 2) while on the premises of the employer, even if not engaged in job-related duties at the time of the

event, so long as the employee's presence on premises was required by the employer's business. The plurality found that the plaintiff's "immediate purpose" for seeking treatment was "personal" in nature and thus her injury did not fit within the first category. The plurality also found plaintiff's injury did not fit within the second category, as her presence in the ER was purely "fortuitous"; arising solely for the purpose of seeking treatment of her illness rather than as a requirement of her employment or in furtherance of her employer's affairs. The plurality further emphasized that "[t]here is no reason to distinguish appellant from any other member of the public injured during the course of treatment. The risk of injury which appellant suffered was a risk to which any member of the general public receiving like treatment would have been subjected. The occurrence of the injury was not made more likely by the fact of her employment." Because the plaintiff did not suffer "an injury arising in the course of employment" (and thus an injury compensable under the Act), plaintiff was not barred from pursuing a common law action against the employer.

The dual capacity doctrine was articulated in the concurring opinion of Justice Roberts. In Justice Roberts's view, the key consideration was whether the plaintiff was injured in the course of receiving medical treatment in a facility that served the general public. Since the employer held itself out to the public as a provider of medical services, it owed a duty to all of its patients, including plaintiff. As Justice Roberts explained, "[t]here is no basis for distinguishing [plaintiff], a paying customer, from any other member of the public injured during the course of treatment. All were subjected to the same danger. All were entitled to like treatment under law."

The dual capacity doctrine was revisited in Buszichowski v. Bell Telephone Company of Pennsylvania, 469 A.2d 111 (Pa. 1984). Buszichowski involved a plaintiff who was injured in the course and scope of his employment with a telephone company and subsequently received

treatment for his injuries at a medical facility owned by his employer. Following treatment, the plaintiff's condition deteriorated, prompting him to file a personal injury lawsuit against his employer as well as against the doctors involved in his treatment. The defendants filed a motion for summary judgment claiming immunity under the exclusivity provisions under Section 303. The plaintiff argued that his employer was not acting as his employer at the time of his injury but was instead acting in its "dual capacity" as a health care provider by operating the medical facility where the tort was committed. The Pennsylvania Supreme Court rejected the plaintiff's argument, reasoning that, unlike in Tatrai, the medical treatment facility owned by the employer was not open to the general public, but was strictly limited to providing medical care for its own employees.

Since Buzichowski, appellate courts have shifted the analysis from whether the "employer occupies a second capacity, independent and unrelated to its status as employer, which confers independent obligations upon the employer" to exclusively whether the "*employee* was acting outside the course of his or her employment at the time of the injury." Snyder v. Pocono Med. Ctr., 656 A.2d 534 (Pa. Super. 1995)(citing to Lewis v. School Dist. of Philadelphia, 538 A.2d 862 (Pa. 1988) and Heath v. Church's Fried Chicken, Inc., 546 A.2d 1120 (Pa. 1988)) (emphasis supplied). Consequently, the "dual capacity" doctrine is inapplicable in cases where an employee has been injured while performing job-related duties or while present on the employer's premises as a condition of employment. See id. This is true even if, while in the course and scope of employment, the employee was injured by a defective product designed, manufactured or sold by his or her employer and even if said product was intended for use by the general public. Silvestri v. Strescon Indus., Inc., 458 A.2d 246 (Pa.Super.

1983); Pavlek v. Forbes Steel & Wire Corp., 517 A.2d 564 (Pa. Super. 1986); Callender v. Goodyear Tire & Rubber Co., 564 A.2d 180 (Pa. Super. 1989).

The only appellate decision to grant relief pursuant to the dual capacity doctrine was Wassermann v. Fifth & Reed Hospital, 660 A.2d 600 (1995). In that case, a hospital employee was injured during her lunch break in the hospital's cafeteria after pouring "vinegar" on her salad that was actually oven cleaning solution. The Superior Court, relying on Tatrai and Budzichowski, held that the plaintiff's claims were not barred by the Act's exclusivity provision because 1) plaintiff was not engaged in job-related duties at the time of injury; 2) plaintiff's presence in the cafeteria was not required by the nature of her employment; and 3) unlike the medical treatment facility in Budzichowski, the hospital's cafeteria was open to the public. In so holding, the Superior Court specifically noted that "the controlling factor [in Tatrai] was that the employee went to and was injured in the public emergency room which served the general public. Thus, there was no basis for distinguishing [Ms. Tatrai] from any other member of the public injured during the course of treatment." Wasserman, 660 A.2d at 606 (quoting Budzichowski, 469 A.2d at 114-15). In essence, Wasserman reaffirmed the viability of the dual capacity doctrine.

Indeed, the Eastern District Court of Pennsylvania found that the language used by the Supreme Court of Pennsylvania in the post-Wasserman case of Snyder v. Pocono Medical Center, 690 A.2d 1152 (Pa. 1997) indicated that Pennsylvania courts, at minimum, would "be willing to apply dual capacity in circumstances where the employer was truly acting in a completely separate dual capacity." Van Doren v. Coe Press Equip. Corp., 592 F.Supp.2d 776, 799 (E.D.Pa. 2008). However, despite the hope presented by cases such as Wasserman, Snyder, and Van Doren, many appellate court decisions demonstrate hostility to the doctrine that cannot

be ignored unless and until the Supreme Court of Pennsylvania declares otherwise. As such, injured workers and their attorneys must be prepared to bear a heavy burden to establish a right of recovery under the "dual capacity" doctrine—at least in cases where the employee is injured in the context of his or her employment.

2. Dual persona doctrine

Along a similar vein, the "dual persona" doctrine provides that "an employer could become a third person, vulnerable to a tort action by the employee, but only if the employer has a second identity, so completely independent and unrelated to its status as an employer, that the law would recognize the employer in its second capacity as a separate legal person." Soto v. Nabisco, 32 A.3d 787, 792 (Pa. Super. 2011). While an argument under this doctrine has yet to find success in a Pennsylvania state court, its viability has been recognized by federal courts applying Pennsylvania law. For example, in Thomeier v. Rhone-Poulenc, Inc., 928 F.Supp. 548 (W.D.Pa. 1996), a federal district court addressed a case in which an employee sued his employer for injuries sustained in the course and scope of employment but which were caused by the negligence of a third party. On a motion to dismiss, the employer raised the Workers' Compensation Act as a defense. However, the Court denied the motion, reasoning that, based on a review of cases from other jurisdictions, Pennsylvania state courts would not bar a claim by an injured employee alleging negligence of a third party merely because the third party subsequently merged with plaintiff's employer.

The Eastern District Court of Pennsylvania reached a similar result in Van Doren, supra. The court's rationale relied on case law from other jurisdictions as well as Pennsylvania case law on the "dual capacity" doctrine. The plaintiff in Van Doren suffered a double-arm amputation while using a straightener machine in the course and scope of his employment with Columbia

Lighting LCA, Inc. The prior owner of the machine had removed key safety features from the machine which rendered it defective. At some time prior to the accident, the plaintiff's employer merged with the prior owner of the machine and the machine was conveyed to plaintiff's employer. The plaintiff sued his employer as a successor-in-interest under the "dual persona" doctrine. The employer claimed immunity under the Act and accordingly filed a motion for summary judgment. In denying the motion, the federal court distinguished the "dual persona" doctrine from the "dual capacity" doctrine, explaining specifically that:

> **[M]ost courts that have adopted the dual persona doctrine in the merger context, including the Court of Appeals of New York and New Jersey Superior Court, have also expressly rejected the dual capacity doctrine and have emphasized the otherwise exclusive nature of the workers' compensation remedy. Like those courts, the Pennsylvania Superior Court has recognized that the dual persona doctrine is narrower and more conservative than the dual capacity doctrine [...] [U]nder the dual capacity doctrine, the focus is simply on whether the employer was acting in another capacity [...] Under the dual persona doctrine, on the other hand, the employer must have a persona so separate from his status as employer that the law recognizes it as a "separate legal person."**

The court further noted that the language used in Snyder signaled a "willingness to entertain the broader dual capacity doctrine" and thus it logically follows that the "Pennsylvania Supreme Court would be willing to apply the narrower, more conservative dual persona doctrine in the present case where the employer had an entirely different legal persona completely unrelated to employment as a successor in interest [...]" The court accordingly concluded that plaintiff was entitled to bring a third-party action against his employer in its capacity as a successor-in-interest to the prior owner of the machine under the "dual persona" doctrine.

3. Failure to provide or secure Workers' Compensation Insurance

When Pennsylvania first adopted a scheme of workers' compensation benefits, it was voluntary for employers. The premise for workers' compensation coverage was that it offered employers a limitation on damages or compensation they would have to pay to employees injured on the job, while permitting employees to recover without requiring proof of fault on behalf of employers. If an employer elected to "opt out" of the workers' compensation system, he or she remained subject to tort liability.

That changed, however, in 1974 when workers' compensation coverage became mandatory and the Act subjected non-complying employers to criminal and civil penalties. 77 P.S. § 501. Unless an employer receives a permit from the Department of Labor & Industry to self-insure its liability, it is required to obtain workers' compensation insurance coverage. It is a criminal misdemeanor for an employer not to have workers' compensation insurance. An employer also exposes itself to civil liability as noted in Section 501(d) which provides:

> **[W]hen any employer fails to secure the payment of compensation under the act as provided in § § 305 and 305.2 [77 P.S. § § 501; 411.2], the injured employee or his dependents may proceed either under this act or in a suit for damages at law as provided by Article II.**

While the Amendments have eliminated an employer's right to "opt out" of the workers' compensation system, Article II has remained intact to address occasions where either the employer has failed to secure workers' compensation coverage for its employees or the employer had secured coverage that lapsed prior to the employee's accident. In such situations, the Act provides the employee with two options: 1) accept the compensation to which the employee would be entitled under the Act or 2) proceed in an action for damages against the employer outside the provisions of the Act. Harleysville Ins. Co. v. Wozniak, 500 A.2d 872 (Pa.Super. 1985); Christman v. Dravo Corp., 466 A.2d 209 (Pa.Super. 1983)(interpreting identical provision

of the federal Longshoremen's and Harbor Workers' Compensation Act). Where an employee elects to pursue a civil action, he or she has the burden of proving negligence, causation, and damages; however, Article II in turn deprives the employer of three common law defenses: assumption of risk, contributory negligence, and the "fellow servant" defense, which provides that the plaintiff's injury was the result of negligence of a fellow employee. 77 P.S. § 41 et seq.; Wascavage v. Susquehanna Collieries Co., 23 A.2d 509 (1942); McGuire v. Hamler Coal Mining Co., 49 A.2d 396 (Pa. 1946); See Martin v. Recker, 552 A.2d 668 (1988).

The right to pursue an action for damages against an employer where workers' compensation benefits were not provided is not limited to the direct employer but also extends to the statutory employer. The term "statutory employer" is not a common law employer but rather a concept derived from Sections 203 and 302 of the Act. 77 P.S. §§ 52, 461. Section 203 addresses a statutory employer's immunity from tort liability and provides, in relevant part that:

> **An employer who permits the entry upon premises occupied by him or under his control of a laborer or an assistant hired by an employe or contractor, for the performance upon such premises of a part of the employer's regular business entrusted to such employe or contractor, shall be liable [under the Workers' Compensation Act] to such laborer or assistant in the same manner and to the same extent as to his own employe.**

77 P.S. § 52.

Section 302 further address the statutory employer's secondary liability for workers' compensation payments to an injured worker and reads, in relevant part:

> **A contractor who subcontracts all or any part of a contract and his insurer shall be liable for the payment of compensation to the employes of the subcontractor unless the subcontractor primarily liable for the payment of such compensation has secured its payment as provided for in this act.**

77 P.S. § 461.

An entity that meets the definition set forth in either or both of the foregoing sections is generally referred to as a "statutory employer." The legislature's purpose in creating such a status was remedial in nature, as it sought to ensure that injured workers received workers' compensation benefits in the event that the direct or common law employer defaulted. See Patton, supra. A statutory employer enjoys the same immunity from tort liability for work-related injuries that a common law employer does; this is true even if the statutory employer was not required to make any actual workers' compensation payments to the injured employee. Id. However, just as with a common law employer, the statutory employer's immunity can be pierced upon a showing that it does not have workers' compensation coverage or that coverage lapsed, subjecting it to tort liability and depriving it of the three common law defenses listed in Article II of the Act. Martin, 552 A.2d at 672. The status of "statutory employer" thus operates as a double-edged sword, as it protects entities secondarily liable for an employee's injuries while also subjecting it to tort liability if it does not meet its obligations in retaining workers' compensation coverage.

4. Employer's liability for intentional torts

Some states do permit an employee to maintain a cause of action in tort against an employer if the employer's actions amount to an intentional act of bringing about an injury to one of its employees. See e.g., Ohio Rev. Code § 2745.01. Pennsylvania is not there yet. In cases where an employee's injury is caused by the intentional act of a co-employee, Pennsylvania law permits the injured employee to pursue a common law action against the co-employee upon a showing that the act was 1) born out of pure personal animus unrelated to employment and 2) "not normally expected to be present in the workplace." Snyder v. Specialty Glass Products, Inc., 658 A.2d 366, 374 (Pa. Super. 1995). However, this "third party attack" or

"personal animus" exception does not extend to injuries caused by an intentional tort of the employer. Indeed, the Eastern District Court of Pennsylvania has observed that "[t]he employer's shield from tort liability on work-related injuries under [Section 303] is virtually impenetrable no matter how willful or wanton the employer's conduct." Uon v. Tanabe Intern. Co., 2010 WL 4861436 (E.D. Pa. 2010) (applying Pennsylvania law). The Supreme Court of Pennsylvania's decision in Poyser v. Newman & Co., 522 A.2d 548 (Pa. 1987) is particularly illustrative of this point.

In Poyser, the plaintiff pursued an action at law against his employer for injuries sustained while operating a machine that was designed and manufactured by the employer without key safety devices. The plaintiff alleged that his employer's "deliberate and wanton disregard for the safety of its workers" caused his injury. Specifically, the plaintiff claimed that the employer prohibited employees from using safety devices which would have reduced the risk of injury despite the employer's knowledge of the danger posed by the machine. The plaintiff also claimed that, approximately eleven days prior to his accident, the employer had concealed the machine to prevent OSHA inspectors from discovering that the machine did not comply with federal and state safety regulations. Despite the sheer egregiousness of the employer's reckless conduct, the Pennsylvania Supreme Court barred the plaintiff from bringing a common law action against the employer, reasoning that the plain language of the Act's exclusive remedy provisions prohibited an employee from pursuing an action at law against an employer for "*any* work-related injury."

Following Poyser, both the Supreme Court of Pennsylvania and the Superior Court of Pennsylvania continued to narrowly and strictly interpret the Act's exclusivity provisions so as to effectively give employers *carte blanche* to commit heinous intentional torts against employees

without consequence. See e.g., Barber v. Pittsburgh Corning Corp., 555 A.2d 766, 770 (Pa. 1989)(relying on Poyser in support of its holding that there is no exception to the exclusivity provisions of the Occupation Disease Act for an employer's intentional act of exposing employees to asbestos-related diseases); Vosburg v. Connolly, 591 A.2d 1128 (Pa. Super. 1990) (holding that the employer was not subject to common law action for attacking and severely injuring employee based on finding that the attack occurred on the employer's premises and related to an argument over employee's work performance). Notably, the Pennsylvania Supreme Court recognized an exception to the Act's exclusivity provision in the 1992 case Martin v. Lancaster Battery Co., 606 A.2d 444 (Pa. 1992). In Martin, the Court held that an employer was subject to tort liability for fraudulent misrepresentation that was 1) made directly to the injured employee and 2) led to the aggravation of the employee's pre-existing work-related injury. However, courts have refused to extend the exception articulated in Martin to other intentional torts resulting in an employee's injury, rendering it the only viable exception to an employer's immunity from intentional tort liability under the Pennsylvania Workers' Compensation Act to date. Winterberg v. Transp. Ins. Co., 72 F.3d 318 (3rd. Cir. 1995) (applying Pennsylvania law); Simmons v. Cmty. Educ. Ctrs., 2015 WL 1788712 (E.D. Pa. 2015)(applying Pennsylvania law); Uon, supra.; Kostryckyj v. Pentron Lab. Tech., LLC, 52 A.3d 333, 337-40 (Pa. Super. 2012).

5. The Equity Argument

The Pennsylvania Workers' Compensation Act was originally enacted in 1915 with the specific objective of protecting workers injured in the course of employment. The Act sets forth a no-fault insurance system that entitles workers to compensation for lost wages and medical expenses from their employer in exchange for waiving the right to sue the employer. The injured

worker may still proceed in a lawsuit against a negligent third party to recover non-economic damages, such as pain and suffering, which are not compensable under the Act. However, the injured worker's right to be "made whole" by the third party tortfeasor has, contrary to the humanitarian purpose of the Act, taken a backseat to the employer's or insurance carrier's right of subrogation against any recovery or settlement proceeds in a third-party civil action to the extent of workers' compensation paid. See 77 P.S. § 671; Risius v. W.C.A.B. (Penn State University), 922 A.2d 72 (Pa.Cmwlth 2007). This subrogation right, codified in Section 319 of the Act, provides, in relevant part, that:

> **Where the compensable injury is caused in whole or part by the act or omissions of a third party, the employer shall be subrogated to the right of the employee, his personal representative, his estate or his dependents, against such party to the extent of compensation payable under this Article by the employer..."**

77 P.S. sec. 671 (emphasis added).

As the Supreme Court of Pennsylvania has succinctly explained, "subrogation was an equitable device adopted at common law, which prevented double recovery and ensured that the party at fault, rather than an innocent party, be held responsible for the injury claimed." Thompson v. W.C.A.B. (USF&G Co.), 781 A.2d 1146, 1153 (Pa. 2001). While the common law right to subrogation was itself subject to equitable limitations, Pennsylvania courts have interpreted the mandatory language in Section 319 as setting forth an absolute and automatic statutory right to subrogation that is abrogable only by the employer; to this end, an employer's or insurance carrier's statutory right to subrogation under Section 319 is not subject to equitable challenges by the injured worker. See, e.g., Stout v. W.C.A.B. (Pennsbury Excavating, Inc.), 948 A.2d 926, 930 (Pa. Cmwlth. 2008); Dep't of Labor & Indus., Bureau of Workers' Comp. v. W.C.A.B. (In re Excelsior Ins.), 58 A.3d 18, 27 (Pa. 2012). Consequently, absent sufficient

evidence that the employer engaged in "deliberate, bad faith conduct to subvert claimant's third party action"—an impossibly high threshold for the claimant to meet, an employer or insurance carrier is entitled to unfettered subrogation rights over the third party recovery without regard to the nature of the damages, how the damages are itemized or classified by the judge or jury, whether the judgment includes compensation for losses other than medical expenses and lost wages, or the percentage of negligence attributable to the employer. See Superior Lawn Care v. W.C.A.B. (Hoffer), 878 A.2d 936, 941 (Pa.Cmwlth. 2005).

The absolute right to subrogation afforded to employers and carriers has blatantly proven, time and again, to be contrary to the "made whole" doctrine upon which the Act is premised, begging the question of why Pennsylvania courts have abandoned their "obligation to interpret the Act liberally to effectuate its humanitarian purpose ... and to resolve borderline interpretations in favor of the injured employee..." in favor of strict and narrow interpretation of Section 319. See Hoffman v. W.C.A.B. (Westmoreland Hosp.), 741 A.2d 1286, 1288 (Pa. 1999); Williams v. W.C.A.B. (City of Philadelphia), 850 A.2d 37, 40 (Pa. Cmwlth. 2004). Notably, at least eighteen other states reject that the "made whole" doctrine is so dispensable that the word "shall" can extinguish the doctrine's relevance completely in the workers' compensation realm. These states include: Alaska, Arizona, Arkansas, California, Colorado, Georgia, Idaho, Kansas, Kentucky, Louisiana, Minnesota, Massachusetts, Michigan, Montana, New Mexico, South Carolina, Texas, and Utah. Indeed, these states have found that while mandatory language in a workers' compensation statute may establish a statutory right to subrogation, the "made whole" doctrine necessarily mandates that this right be subject to some type of equitable limitation. For example, Arkansas's Workers' Compensation Statute sets forth a statutory right of subrogation in similar language as Section 319 of Pennsylvania's Act, providing, in relevant part, that:

> **An employer or carrier liable for compensation under this chapter for the injury or death of an employee *shall* have the right to maintain an action in tort against any third party responsible for the injury or death.**

Ark. Code Ann. § 11–9–410(b)(1). (emphasis added).

The Supreme Court of Arkansas has refused to interpret the term "shall" in the foregoing provision as establishing an absolute right to subrogation. General Accident Ins. Co. of America v. Jaynes, 33 S.W.3d 161 (Ark. 2000); South Cent. Arkansas Elec. Co-op. v. Buck, 117 S.W.3d 591 (Ark. 2003). Rather, the Court has interpreted the mandatory language in this section in the context of the "made whole" doctrine on which the workers' compensation statute is premised and found that the right to subrogation was secondary to the injured worker's right to be "made whole." Id. Under Arkansas's workers' compensation law, an employer cannot enforce its lien unless and after an insured has been made whole by a judgment or settlement against a third-party tortfeasor, so that an insured is wholly compensated for damages incurred as the result of a work-related accident but does not receive a double payment. See Caldwell v. TACC Corp., 423 F.3d 784, 788 (8th Cir. 2005)(citing to General Accident, supra); see also South Cent., supra. As was further explained by the Supreme Court of Arkansas:

> **An insured's right to subrogation takes precedence over that of an insurer, so the insured must be wholly compensated before an insurer's right to subrogation arises; therefore, the insurer's right to subrogation arises only in situations where the recovery by the insured exceeds his or her total amount of damages incurred [...] Thus [..] equity requires that an insured be made whole before the insurer's right to subrogation arises.**

South Cent., 117 S.W.3d at 595 (emphasis added).

Georgia has gone a step further by codifying the common law doctrine of subrogation and explicitly conditioning the right to subrogation on the injured worker's right to be made whole. Ga. Code Ann., § 34-9-11.1. Moreover, even where an injured worker has been made

whole by a third-party recovery, Georgia law does not permit the employer or carrier to subrogate any portion of the recovery which represents non-economic damages. Id.

While the Pennsylvania General Assembly may seek guidance from the Georgia General Assembly, the Pennsylvania Supreme Court has at least demonstrated in the recent case of Whitmoyer v. W.C.A.B., 186 A.3d 947 (Pa. 2018) its willingness to follow in the footsteps of the Arkansas Supreme Court. The issue before the Whitmoyer Court was whether the "future installments of compensation" language in Section 319 of the Act permitted an employer or carrier to assert a credit on the claimant's third party recovery for both future indemnity and future medical payments. In finding that an employer or carrier is limited solely to a credit on future indemnity benefits, the Court engaged in an extensive analysis of Section 319, which provides, in relevant part, that:

> **Any recovery against such third person in excess of the compensation theretofore paid by the employer shall be paid forthwith to the employee, (...) and shall be treated as an advance payment by the employer on account of any future installments of compensation.**

77 P.S. § 671.

In its analysis, the Whitmoyer court first noted that the term "compensation" is distinct from the term "installments of compensation" in Section 319. Specifically, the court noted that while the term "compensation" refers to both indemnity and medical benefits, the term "installments of compensation" was deliberately included as a more specific term than "compensation" and thus required a separate interpretation. The court first looked to Merriam-Webster's dictionary, which defined an "installment" as "one of the parts into which a debt is divided when payment is made at intervals." The court thereafter analyzed the term in the context of the "overall statutory scheme," including the language in various other sections of the Act, and found that the "legislature intended 'installments of compensation' to be limited to

compensation that is paid at 'periodical' intervals (e.g. weekly or bi-weekly) in the same way that an employee's wages were paid. Disability benefits, but not medical expenses, are payable in this manner." The Court further explained at length how the language in Sections 306, 308, 316, and 317 of the Act mandate such a finding.

The Whitmoyer Court departed from its previous practice of narrowly interpreting the language in Section 319 without regard to (and in contravention of) the Act's overarching humanitarian purpose. Indeed, the Whitmoyer Court repeatedly emphasized throughout its decision that the language in Section 319—just like any other section of the Act—must be "assessed in the context of the overall statutory scheme." Whitmoyer thus, at minimum, stands for the long-awaited proposition that the statutory right to subrogation in Section 319 is not impenetrable, regardless of the mandatory language contained therein.

6. "When the tort was committed" Argument

Arguments based on the "dual persona" doctrine have been successful in federal court cases applying Pennsylvania law. See Thomeier, supra.; see also Van Doren, supra. In the 2011 case Soto v. Nabisco, 32 A.3d 787 (Pa. Super. 2011), the Superior Court of Pennsylvania affirmed the viability of the "dual persona" doctrine but limited its application in certain cases where an entity becomes an employer by virtue of a merger agreement. Soto involved a plaintiff who was employed by Nabisco until approximately 2001, when "Nabisco merged into Kraft and ceased to exist as a separate company." Following the merger, the plaintiff became an employee of Kraft and was injured while operating a machine manufactured by Nabisco. However, because Nabisco no longer existed, the Plaintiff sought to pursue a third party tort claim against Kraft, its employer, under the dual capacity and dual persona doctrines.

The Court first rejected the plaintiff's "dual capacity argument" on the grounds that the subject machine was not available to the public but rather used solely for employees. The Court also noted that the only change following the merger between Nabisco and Kraft was that plaintiff's "paycheck now came from Kraft instead of Nabisco." The Court accordingly held that since the dual capacity doctrine would not have applied to Nabisco, it could not be applied to Kraft.

The Court's rejection of the "dual capacity" argument effectively answered the question of whether the plaintiff's "dual persona" argument would be successful. The plaintiff specifically alleged that Kraft's status as successor-in-interest to Nabisco, the manufacturer of the defective machine that caused the Plaintiff's work-related injury, subjected Kraft to third-party liability pursuant to the dual persona doctrine. The Court rejected the argument, noting that the purpose of the "dual persona" doctrine is to prevent an employer from asserting immunity under the Act "from obligations it inherited through corporate merger simply because of the immunity for its own negligence it possessed as the employer of the insured employee." However, the Court emphasized that the doctrine is "designed to preserve ***but not expand liability***" and thus, "if the plaintiff could not have sued the predecessor in tort if the merger had not occurred, they cannot sue the [successor] in tort [...] based on the idea that the dual persona doctrine should not be applied to allow a merger to increase, rather than preserve, inchoate liability." Accordingly, the Court found that "if Nabisco as the employer would have no third-party liability beyond workers' compensation, then Kraft as the successor employer should have no third-party liability under the circumstances of the case." As the Court further reasoned, "[d]eclining to apply the dual persona doctrine as an exception to the exclusivity of

Pennsylvania's [Workers' Compensation Act] in the present context, we ensure the preservation but prevent the expansion of liabilities or remedies."

The holding in Soto does not suggest hostility towards the "dual persona" doctrine. Rather, the limitation set forth in Soto was born out of the practical need to ensure that the application of the "dual persona" doctrine remains consistent with (and does not undermine) firmly-established case law regarding the "dual capacity" doctrine in the products liability context. See e.g. Pavlek, supra.; Callender, supra. Indeed, the holding in Soto is deliberately narrow in scope and leaves open the possibility that an employer may be subject to tort liability in its capacity as a successor-in-interest to an entity that is not immune from liability under the Act. See e.g. Van Doren, supra. Accordingly, just like the "dual capacity" doctrine, the "dual persona" doctrine is a viable, albeit limited, theory under Pennsylvania law available to an employee seeking to pursue an action at law against his or her employer for a work-related injury.

II. TORT CLAIM IS FOR WORK RELATED ACCIDENTS

A. Statutory Language

Third party claims are specifically recognized by the Pennsylvania Workers' Compensation Act:

> "(b) in the event injury or death to an employee is caused by a third party, then such employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to receive damages by reason thereof, may bring their action at law against such third party, but the employer, his insurance carrier, their servants, and agents, employees, representatives acting on their behalf or at their request shall not be liable to a third party for damages, contribution or indemnity in any action at law, or otherwise, unless liability for such damages, contribution or indemnity shall be expressly provided for in a writing

> contract entered into by the party alleged to be liable prior to the date of the occurrence which gave rise to the action."

77 P.S. §481(b).

III. OVERLOOKING THE "CASE WITHIN A CASE"

Most practitioners who handle workers' compensation cases often overlook an underlying third-party case. There are several reasons why a third party case may not be identified by a practitioner. First, a practitioner handling a workers' comp case may simply not understand or appreciate that an injured worker has rights and remedies outside of the Act. To some workers' comp practitioners the focus and battle may be as simple as whether the "injury" was in fact work related. For other practitioners the issue may be if the injury occurred "within the course and scope of the injured person's employment."

When a comp case is reviewed with an eye toward determining if there is a third party claim or a "case within a case", often times the analysis starts and stops with the injured employee's conduct. Because most employers hold and blame the employee as the cause of an accident, a practitioner may simply accept the findings of the employer's accident report as the analysis for whether there is a third party case. If the employer has determined that the employee was at fault for the accident for not following a company rule, policy or procedure, then logic would follow that there is no third party case. Just like fake news, this is "false logic."

To be successful in identifying potential third party claims, one has to look beyond what an injured worker did that may have caused or contributed to an accident. In most work related accidents, an injured employee was using some type or kind of equipment, machinery, tools or chemicals provided to them by their employers. Any evaluation of a work related accident must include the design, operation and use of the equipment, machinery and tools that the injured

employee was working with that may have contributed to the accident. The focus in any work related accident should not necessarily be on what the injured employee did or failed to do. Rather, the focus should be on if there was more than one cause or explanation for why an accident may have occurred.

While a worker does have a responsibility for his or her own safety and while an employer is also responsible for providing its employees with a safe work place free from recognized hazards, manufacturers and suppliers of equipment and machinery also share in a legal responsibility to the injured employee to make sure that their equipment is properly and safely designed for its intended and expected uses and misuses.

Consequently, in undertaking any analysis of a work related accident, one must evaluate whether there is any hazardous condition that created a risk of injury to employees that were using, operating or working with any equipment, machinery or tools provided to them by their employer. If it can be determined that the design of equipment and machinery and its set up and use led or contributed to an employee's accident, then there may be viable third party claim.

IV. MISCONCEPTIONS ABOUT WHAT IS NOT A THIRD-PARTY

- Injured employee was negligent
- Injured employee was careless
- Injured employee violated a safety policy or procedure of employer
- Injured employee was at fault
- Injured employee was inattentive
- Injured employee was rushing to get job done
- Accident caused by co-worker
- Employer did not properly train, instruct or supervise
- Employer was the cause of the accident
- Manufacturer of equipment is out of business

V. TYPES OF THIRD PARTY CLAIMS

A. (Product Liability Claims)

1. (Legal Definition Of A Defective Product)

RESTATEMENT (SECOND) OF TORTS § 402A

(a) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property if

1. the seller is engaged in the business of selling such a product, and

2. it is expected to and does reach the user or consumer without a substantial change in the condition in which it was sold.

(b) The rule stated in subsection (1) applies although

1. the seller has exercised all possible care in the preparation and sale of his product, and

2. the user or consumer had not bought the product from or entered into any contractual relation with the seller.

Tincher – Under Pennsylvania law in strict liability cases, a plaintiff may prove a product defective under either the "ordinary consumer's expectations" test or under a "risk-utility of the product" analysis. See Tincher v. Omega Flex, Inc., 104 A.3d 328 (Pa. 2018).

(a) Consumer Expectation Test – The product is in a defective condition if the danger is unknowable and unacceptable to the average or ordinary consumer.

(b) The Risk-Utility Standard is that a reasonable person would conclude that the probability and seriousness of harm caused by the product outweighs the burden or cost of taking precautions.

B. Type Of Product Liability Claims

(a) Design Defect - Generally this claim exists when the overall safety design of a product is being challenged. It is not limited exclusively to the particular product at issue, but applies to the model type of product involved in a worker's accident. The failure to provide safety devices, guards, features or controls in the design of the product when it was sold are common bases for claiming that the product was defectively designed. It will be important to

show that there was a safer design alternative for the type of equipment involved at the time it was sold.

(b) Manufacturing Defect - This particular type of claim is usually asserted when a particular product, did not comply with the design specifications of the same lot of products made by the same manufacturer. This type of claim is prevalent in accidents in which products break or fail upon normal use or component parts found in the product at issue are other than those specified.

(c) Malfunction - This type of claim arises when a product operates and functions in a manner other than expected or intended to function. Mechanical failures causing a machine to repeat a cycle (double trip) or failing to shut off when it is suppose to, are the usual fact patterns for these types of cases. It is important to eliminate secondary causes for the malfunction.

(d) Failure To Warn - Even a perfectly made product can still be defective for failure to provide warnings. A failure to warn case arises in three contexts.

(1) Lack of Warnings - in this context, a product is not supplied with any warnings or instructions to explain how the product is to be used properly or what dangers are associated with the product.

(2) Inadequate Warnings - In this situation, warnings are provided, but they are not proper, complete or sufficient enough to instruct the users on the proper use of the product or the dangers associated with the foreseeable uses of the product.

(3) Post-Sale/Pre-Accident Failure To Warn - After a product has been sold, but before a worker's accident, a manufacturer becomes aware of a specific defect that exists with the design of its product, but fails to communicate that information to the product owner.

C. NON-PRODUCT NEGLIGENCE CLAIMS

It is not always a piece of equipment, machine or tool that causes the worker's accident. Third party claims against entities other than manufacturers include the following:

(a) Safety/Risk Loss Control Consultants Performing Plant/Equipment Inspections - In some situations because of an OSHA inspection, increase in the number of accidents or in an effort to reduce workers compensation premiums, employers retain Safety Risk Loss Consultants to perform plant surveys and inspections to detect hazards and unsafe working conditions. Inspections may include making recommendations for what safety features or safety devices are needed on equipment to make it safe or OSHA compliant.

(b) Defective/Unsafe Property - Some employers lease rather than own the building where they conduct their business. In these circumstances, when a worker is injured due to defect on property, a claim may exist against the property owner. Examples include steps or staircases without handrails and unsafe walkways.

(c) Improper Facility Maintenance By Outside Contractor - Many employers will contract with outside contractors for facility maintenance inside the building or outside the building. This includes snow removal and building repair work.

(d) Improper Maintenance and Repair or Modification of Machinery and Equipment - Similar to facility maintenance, some employers will outsource to either a service company or the manufacturer for maintenance and repair work to equipment and machinery used by employees. If maintenance or repair work is improperly done, then the outside service company may be liable.

(e) Motor Vehicle Accidents Occurring During the Course and Scope of a Worker's Employment - This generally occurs when a workers either utilize the employer's vehicles or their own vehicle and are involved in an accident as a result of the carelessness of another driver, an unsafe road condition, or a design defect in the vehicle they were occupying.

(f) Other Subcontractors on Construction Sites - In many construction projects there are a number of subcontractors working on the job site at the same time. A worker's accident may be the result of the negligence of another subcontractor. Also, in some states, claims are permitted by a subcontractor's injured employee against the general contractor for not having a proper safety program in place or against the property owner for a property defect the owner created.

(g) Contractual Undertaking – In some cases, a company or entity who is not the injured worker's immediate employer will contract with the injured employee's employer or another entity in which services to be provided under the contract will have a safety benefit to the injured employee's place of employment or working conditions.

(h) Inter-Relationships Between Parent Corporations and Their Wholly Owned Subsidiary Companies – In some work related accidents, safety will be a shared responsibility between plaintiff's immediate employer and the parent corporation. Through inter-related company policies and procedures, the parent corporation may provide safety related services to its subsidiaries that may expose it to civil liability if carried out in a negligent matter.

(i) Purchase/Acquisition of Equipment From Entity Other Than a 402A Seller In some situations a worker will be injured on a piece of equipment that was supplied to his employer by an entity that previously owned the equipment but transferred it to the injured employee's employer for operation and use. If the entity that provided the equipment supplies it in a condition in which original factory safety component parts are missing, removed or inoperative, then the entity may be civilly liable.

VI. INVESTIGATING POTENTIAL THIRD-PARTY CLAIMS

(A) Product Inspection - If the product at issue is industrial equipment or machinery, then it will likely be located at the employer's premises. Arrangements should be

made through the employer or its workers' compensation carrier to conduct on-site inspection of the equipment, including photographing and videotaping of the equipment, testing and measurements, product identification (serial number and model number), and preservation of the product, if practical.

(B) Third-Party Investigation Done by Employer's Workers' Compensation Carrier Third Party Administrator - Should be contacted for the purpose of securing cooperation in your investigation of your client's accident. In the more serious accidents, the workers compensation insurance carrier or the TPA will have done an independent investigation to determine whether there exists a third-party case/subrogation interest. You should request a copy of any thirdparty investigation done by the workers' compensation insurance carrier and any statements they obtained.

(C) Document Requests From Employer - The employer will likely have significant information about the product and your client that may be extremely helpful in evaluating a potential thirdparty claim. The items you should request include:

(1) Accident investigation - incident reports, photographs, employee statements and remedial changes made to the product to make it safe;

(2) Personnel file on your client;

(3) Purchase information on the product (purchase orders, requisitions, proposals, bids, specifications, etc.);

(4) Maintenance, repair and service records in order to show the upkeep on the equipment or modifications and changes made to it;

(5) Service records from outside vendors or contractors that may have been hired to service, repair, install or modify the product;

(6) Loss control reports from consultants, insurance carriers and/or outside vendors or entities that furnished those services to determine whether there is a claim for negligent inspection;

(7) Technical information on the product such as drawings, blueprints, schematics and/or diagrams;

(8) Literature/materials provided with product such as operators, parts, service, maintenance, and instruction manuals.

(D) OSHA Request Pursuant to the Freedom of Information Act - OSHA may have conducted inspections before and in response to the accident, so you will need to obtain the OSHA investigative file and any OSHA violations issued.

(E) Research Corporate History of Manufacturer/Seller - This is accomplished by checking the manufacturer or product supplier's web site. Also, a Dunn & Bradstreet Report will provide you with information about the manufacturer.

(F) Safety Literature or Research - Obtain industry standards, governmental regulations (OSHA) and articles, books and literature on product safety.

(G) Technical Searches to Show Pre Sale Feasible Design Alternatives - This can be done through a number of services, which do technical or patent searches, or on your own through internet research.

(H) Prior Claims/Lawsuits – Search data bases such as Lexis, Verdict Search and court websites to see where, when and how many prior lawsuits the product manufacturer has been named as a defendant and for similar accidents involving the type of product involved in your client's accident.

(I) Consult With Expert - There are a number of resources available which can provide you with an expert if you do not know of one. The most common sources of referral include Lawyers Desk Reference (LDR), Technical Assistance Bureau, Inc. (TASA), AAJ Expert Witness Listserver, industry magazines, Lexis, expert data banks, Verdicts and Settlement Summaries and referrals from other attorneys.

(J) Network With Other Lawyers - Contact other lawyers you know that handle these types of cases to see if they have had cases against the same product manufacturer or also try state or nationwide list servers such as AAJ or PAJ for anyone handling a similar claim.

VII. THIRD-PARTY HYPOTHETICALS

- Worker trips over nail sticking up in floor of trailer.
- Worker gets hand caught in conveyor. Guard had been removed by another co-worker. Injured worker cited for failure to lock out/tag out machine before servicing it.
- Worker falls off back of box truck trying to climb into it.
- Processing equipment sold to employer thirty years ago with cage guard around equipment. Worker opens up the cage door and sticks a coat hanger into an auger hopper and stuck piece dislodges causing machine to cycle, amputating two of his fingers.

- School bus driver goes into convenience store to get a cup of coffee and trips over frozen horse manure.

- Worker operates press and reaches over guard and gets fingers crushed in point-of-operation of press on machine to remove buildup of material and arm gets pulled into in-running nip point of two rollers. Employer designed and built machine.

- Worker falls out of truck while unloading a treadmill.

- Equipment originally comes without a guard. Employer adds a guard. Worker reaches in to clear jam up and gets injured.

- Workers injured by machine at work. Employer responsible for servicing and maintaining equipment. Investigation determined that accident was preventable. Equipment manufacturer went out of business through bankruptcy.

VIII. PRACTICAL CONSIDERATIONS IN THIRD PARTY CASES

Too often an adversarial relationship is created between an injured employee's counsel and the workers' compensation insurance carrier or the third party administrator, especially if the injured worker is represented by that attorney in his worker's compensation claim. Their respective interests naturally conflict, particularly since the workers' compensation insurance carrier's subrogation rights out of any third party recover prioritize any money that the injured worker will receive out of a third party recovery. Consequently, the workers' compensation counsel is hesitant to cooperate with the workers' compensation insurance carrier in workers' compensation litigation cases. However, this approach may create obstacles in getting a third party case successfully resolved.

Instead, counsel should try to create a working relationship with the workers' compensation insurance carrier, recovery specialist or third party administrator on the claim. Counsel should request that the workers' compensation carrier substantiate and document any claim of subrogation entitlement. This includes requesting from the carrier not only a payment

ledger for all medical expenditures paid and indemnity benefits provided to the injured worker but also the supporting medical records and billing information. Counsel will produce this same documentation in discovery to the third-party defendants and their insurance carriers, thereby placing them on notice as to the subrogation interest asserted by the injured worker's employer.

Obviously, the amount of the subrogation lien is a major issue that needs to be addressed before attempting to resolve any third party claim. The workers' compensation carrier essentially stands in the shoes of the injured worker for any third-party recovery. If the injured worker tries to verdict his third party case and it results in a defense verdict, then there is no recovery by the workers' compensation carrier either. Consequently, counsel should make every effort to educate the workers' compensation insurance carrier on developments in the third party case. This includes sharing with the workers' compensation carrier any evidence obtained in the third party case that has a bearing on the liability in that case. Expert reports produced by third party defendants (both liability and damages) should be provided to the workers' compensation carrier. Likewise, any depositions that undermine the liability in the third party case should also be forwarded to the insurance carrier.

Providing the workers' compensation insurance carrier with information and documentation in the third-party lawsuit will allow the workers' compensation insurance carrier to make an "educated" decision on its subrogation lien when any efforts are underway to resolve the third-party lawsuit. Creating an open dialogue early in the third party case will enable counsel to develop a better understanding of the amount of recovery that will need to be made in the third party case to satisfy client expectations and the subrogation lien.