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# APPEALS COURT RULES THAT EMPLOYER CAN BE PROPERLY NAMED AS A NON-PARTY AT FAULT

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The Michigan Court of Appeals, in the published Opinion of *Aaron Jay Kopp v. Mark Zigich and Renee Zigich*, Case No. 254155, ruled that the plaintiff's employer could be named as a non-party at fault by the defendant even though the plaintiff could not name the plaintiff's employer as a party defendant because of the exclusive remedy provision of the Worker's Disability Compensation Act.

The plaintiff was an employee of a company that sold and delivered hot tubs. While delivering a hot tub, the plaintiff allegedly slipped on dog feces at the customer's residence. The plaintiff sued the owner of the residence, alleging premises liability. The defendant filed a notice identifying the plaintiff's employer as a non-party at fault for failure to properly train the plaintiff in the delivery of hot tubs.

The trial court granted the plaintiff's motion to strike the notice of non-party at fault reasoning that a duty must exist before fault can be apportioned under the comparative fault statute MCL 600.2957 and 600.6304. The trial court reasoned that the plaintiff's employer did not owe the plaintiff a duty because the plaintiff's exclusive remedy against the employer (except for intentional torts) was under § 131 of the Worker's Compensation Act of 1969 (WDCA), MCL 418.101, et seq and, therefore, could not be named as a non-party at fault.

The Michigan Court of Appeals reversed the trial court. The appellate court held that a plain reading of MCL 600.2957(1) provides that:

> "the liability of each person shall be allocated under this section by the trier of fact and, subject to section 6304, in direct proportion to the person's percentage of fault." The finder of fact then determines the percentage of the total fault of each person who contributed to the injury, "regardless of whether the person was or could have been named as a party to the action."

The court held that a plain reading of the comparative fault statute does not require proof of a duty before fault can be apportioned and liability allocated. The statutes only require proof of proximate cause. The court held that the plaintiff's employer could be a proper non-party at fault even though the plaintiff's employer could not be sued for negligence in its training or failure to properly train the plaintiff because of the exclusive remedy provisions of the Worker's Disability Compensation Act.

Please note that the legal analysis, which the Court used to arrive at its conclusion, is contrary to an earlier published decision of the Michigan Court of Appeals. In *Jones v Enertel*, 254 Mich App 432; 656 NW2d 870 (2002), the Michigan Court of Appeals held that one who owes a plaintiff no duty (because of application of open and obvious danger doctrine) cannot be at fault and cannot be named as a non-party. The court observed that without a predicated legal duty, "fault" cannot exist as a matter of law since negligence or fault is the breach of a legal duty. Thus, the holding of *Jones* and the analysis in *Kopp* are contradictory.

Nonetheless, Plunkett & Cooney believes that the *Kopp* ruling reached the right result. We say that because the exclusive remedy immunity defense is not the same as a "no duty" defense. An immunity is a freedom from suit or liability, and protects the defendant in those cases that involve tortious behavior. Immunity necessarily implies that a duty exists and the duty has been breached. Thus, the fact that an employer is immune from tort liability to the injured party employee in no manner suggests that the employer may not be named as a non-party at fault.

In fact, this is precisely the result reached by the Michigan Court of Appeals in the case of *Papalas v Ford Motor Co*, Docket No. 249061, Order dated Aug. 29, 2003. In *Papalas, supra*, the court of appeals reversed a circuit court order striking a notice of non-party fault against the plaintiff's employer and held that "the trial court erred in ruling that plaintiff's employer . . . was not a proper non-party at fault under MCL 600.2957, due to plaintiff's inability to file a lawsuit against his employer."

It is the firm's view that the *Kopp* decision reaches the correct result (*i.e.,* that a plaintiff employer is a proper non-party at fault), notwithstanding the fact that the employer is immune from tort liability to the plaintiff.

The appellate court's, holding in this case, clarifies an area that has caused much confusion for the trial courts since the enactment of the comparative fault statute. Plaintiffs have routinely filed motions to dismiss non-party at fault filings against plaintiff's employers arguing that the plaintiff's employer cannot be named as a non-party at fault because the plaintiff's employer had no duty to the plaintiff based on the exclusive remedy provisions of the Worker's Disability Compensation Act.

The Michigan Court of Appeals has now clarified the issue and held that the plaintiff's employer can be named as a non-party at fault even though the plaintiff's employer could not be named by the plaintiff as a defendant. Clearly, defendants should not hesitate to file a notice of non-party at fault against plaintiff's employers when the cause of action arises out of a plaintiff performing his job function when proper training by the plaintiff's employer is an issue.

For a complete copy of the Michigan Court of Appeals ruling on *Aaron Jay Kopp v. Mark Zigich and Renee Zigich*, click here.

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