Land & Water Law Review

Volume 10 | Issue 1 Article 9

1975

Torts - Workmen's Compensation - Liability of Fellow Employees under the Wyoming Workmen's Compensation Law - Markle v. Williamson

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CASE NOTES

TORTS—WORKMEN'S COMPENSATION—Liability of Fellow Employees Under the Wyoming Workmen's Compensation Law. Markle v. Williamson, 518 P.2d 621 (Wyo. 1974).

W. R. Williamson died as a result of a fire and explosion at the Texaco Refinery located at Casper, Wyoming. The appellee, Williamson's wife, filed a wrongful death action against Texaco, Inc., Ceco Corporation, and the appellant, Walter H. Markle. Markle and the deceased were employees of Texaco, covered under the Wyoming Workmen's Compensation Law, and acting within the scope of their employment at the time of the accident. Texaco's motion for summary judgment was granted on the ground that Wyoming's Workmen's Compensation Law precluded direct actions against a contributing employer.[1] Markle filed for summary judgment on the ground that the Wyoming Act also prohibited direct actions against a co-employee.[2] His motion was overruled, and the case went to trial on the theory that the ordinary negligence of Markle was the proximate cause of the deceased's death. The jury found against defendant Markle, and assessed damages of $100,000. On appeal to the Wyoming Supreme Court, Markle argued that co-employees were immune from suit by injured employees or the heirs of a deceased employee. The Wyoming Supreme Court affirmed the district court's decision, holding that the Wyoming Workmen's Compensation Law did not preclude the common-law right of one employee to sue a fellow employee, when both are working for a common employer and both are covered by workmen's compensation.[3]

1. WYO. STAT. § 27-50 (1957) provides: The right of each employee to compensation from such funds shall be in lieu of and shall take the place of any and all rights of action *against any employer* (emphasis added) contributing, as required by law to such fund in favor of any such person or persons by reason of any such injury or death.
2. WYO. STAT. § 27-54 (Supp. 1973) provides:
   > Where an employee coming under the provisions of this act receives any injury under circumstances creating a legal liability in *some person other than the employer* (emphasis added) to pay damages in respect thereof, the employee if engaged in extra-hazardous work for his employer at the time of the injury, shall not be deprived of any compensation which he would otherwise receive under this act. He may also pursue his remedy at law *against such third person* (emphasis added) except he shall not be entitled to a double recovery for the injury or injuries for which he has been paid compensation under this act or under orders of the district court.
3. Markle v. Williamson, 518 P.2d 621, 625 (Wyo. 1974).

The workmen's compensation statutes in a majority of the states extend immunity from common-law suit only to the employer.[4] A considerable minority, however, have expanded the employer's immunity to cover fellow employees.[5] Wyoming, for the past 35 years, has followed the minority rule. The foundation for Wyoming's Workmen's Compensation Law is found in *Zancannelli v. Central Coal & Coke Co.*,[6] where the Wyoming Supreme Court considered the Act's constitutionality. In concluding that the Act was intended to be in the nature of accident insurance, rather than compensation for negligence,[7] the court implied that the Act replaced common-law doctrines such as the fellow servant rule.[8] The court, several years later, in *In re Byrne*,[9] held that the fellow servant rule having thus been displaced, the Wyoming legislature could not have intended that fellow employees be liable for their negligence.[10] The court also found that if a literal reading of the applicable statute, which has since become Wyo. Stat. Section 27-54, gave rise to such liability then effect was to be given to the real intention of the legislature regardless of the letter of the law.[11] The *Byrne* decision has been followed in Wyoming as recently as 1973.[12]

LIABILITY OF FELLOW EMPLOYEES IN OTHER JURISDICTIONS

Given the variations in statutory language, the trend in judicial thinking on co-employee liability under workmen's compensation acts is difficult to compare across jurisdictions. Generally, those jurisdictions allowing co-employee liability have proceeded on theories which demand individual responsibility for negligence;[13] emphasize the contractual relationship between employer and employee as a bar to actions ini-

4. 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 72.10 (1974).
5. Annot., 21 A.L.R.3d 845, 849 (1968).
6. 25 Wyo. 511, 173 P. 981 (1918).
7. *Id.* at 989.
8. *Id.* at 984.
9. 53 Wyo. 519, 86 P.2d 1095 (1939).
10. *Id.* at 1101-02.
11. *Id.* at 1102.
12. Blackwell v. Pickett, 490 P.2d 347 (Wyo. 1973). In this case the court rendered no opinion, but simply announced that the lower court's decision, granting summary judgment to the defendant co-employee, was upheld by an evenly divided court.
13. Lees v. Dunkerly Bros., 103 L.T.R. (n.s.) 467 (H.L. 1910).

tiated by non-contributing employees;[14] or construe workmen's compensation statutes literally in the absence of an express showing of legislative intent.[15] Consideration of decisions in these majority jurisdictions will serve as a guide for analysis of the *Markle* decision's significance.

Louisiana provides a right of action against persons other than the employer.[16] This provision has been construed to allow recovery by the wife of a deceased employee against co-employees and officers of a corporate employer.[17] The court specifically limited the cause of action to a situation where the injury could be traced to a breach of legal obligation owed the plaintiff's deceased by the corporate officer, and precluded suits against corporate officers merely on the basis of their position in the corporation.[18] The Louisiana court has refused to extend co-employee liability to individual members of a partnership where the injured partner was covered by workman's compensation.[19] Finally, the court has concluded that corporate officers are subject to tort liability only if the injured employee shows the officer had personal knowledge of a dangerous condition, had authority to correct it, and failed to do so.[20] The Louisiana decisions indicate that recovery against fellow employees, including corporate officers, will be allowed; but traditional negligence requirements such as proximate cause and breach of duty must be satisfied.

Vermont's Workmen's Compensation Law also allows common law actions against persons other than the employer.[21] The Vermont Supreme Court has construed the statute to permit suits against supervisory personnel.[22] The court has

14. Hockett v. Chapman, 69 N.M. 324, 366 P.2d 850, 853 (1961).
15. *Id.* at 853. The Court indicated that Colorado, Oregon, Illinois, Texas, South Carolina, and Michigan have expressly granted immunity to co-employees under their workmen's compensation acts.
16. LA. REV. STAT. ANN. § 23:1101 (1964).
17. Adams v. Fidelity & Casualty Co., 107 So. 2d 496 (La. App. 1958).
18. *Id.* at 507-08. A more recent decision allowed recovery against a defendant who was the manager, director and principle stockholder in the corporate employer only where breach of duty was proven. Boudreaux v. Falco, 215 So. 2d 538 (La. App. 1968).
19. Cockerham v. Consolidated Underwriters, 262 So. 2d 119 (La. App. 1972).
20. Montgomery v. Otis Elevator Co., 472 F.2d 243 (5th Cir. 1973).
21. VT. STAT. ANN. tit. 21, § 624 (1967).
22. Herbert v. Layman, 125 Vt. 481, 218 A.2d 706 (1966).

limited the extent of this decision by holding that a corporate officer "can be held personally liable for only those tortious or negligent acts against the plaintiff in which he participated or cooperated, or specifically directed others to do."[23] Again the potentially broad doctrine of fellow employee liability is limited by application of traditional negligence theory.

Those jurisdictions which would grant immunity from suit to co-employees base their decisions on one of two theories. First, some courts have found that the purpose of workmen's compensation is to eliminate all claims for compensation arising between those engaged in a common course of employment.[24] Second, other courts have reasoned that the acts of an employee merge with those of the employer under either agency,[25] or enterprise liability and immunity[26] theories. Wyoming, in adopting the minority approach in *Byrne,* emphasized the first theory justifying co-employee immunity.[27]

BASIS FOR THE DECISION IN *Markle*

Without expressly overruling *In re Byrne,* the *Markle* decision rejected the very essence of the former decision. The court summarized its view of legislative intent and co-employee liability by the following:

> We find nothing in either the 1914 constitutional amendment or in §§ 27-54, 27-50 and 27-78 which expressly says that a co-employee shall be immune from suit. Having said the employer shall be immune, the legislature surely would have used similar language to say co-employees were immune—if it had so intended.[28]

The court chose to interpret the words "person other than the employer"[29] literally, rather than imply legislative intent

23. Steele v. Eaton, 130 Vt. 1, 285 A.2d 749, 751 (1971).
24. Bresnahan v. Barre, 286 Mass. 693, 190 N.E. 815, 817 (1934).
25. White v. Ponozzo, 77 Ida. 276, 291 P.2d 843, 845 (1955); Ginnis v. Southerland, 50 Wash. 2d 557, 313 P.2d 675, 676 (1957).
26. Madison v. Pierce, 156 Mt. 209, 478 P.2d 860 (1970).
27. In re Byrne, *supra* note 9, at 1100.
28. Markle v. Williamson, *supra* note 3, at 623.
29. WYO. STAT. § 27-54 (Supp. 1973).

as in the *Byrne* decision.[30] The emphasis of the decision is on the necessity for "clear and precise language before they permit common-law rights (such as the right to sue a co-worker) to be taken away."[31] Within this context, the court flatly rejected the merger of employee with employer under either agency, or enterprise liability and immunity theories.[32] The *Markle* court construed the pure contractual nature of the Wyoming Workmen's Compensation Law as logically denying immunity to co-employees.[33] The court buttressed its position by finding that the 1914 Amendment to the Wyoming Constitution art. 10, Section 4, authorizing workmen's compensation, preserved the common-law right of suit for injured employees or the heirs of a deceased employee.[34]

ANALYSIS OF THE *Markle* DECISION

The significance of the *Markle* decision rests on its potential benefit to the working man, and its impact on the Wyoming Workmen's Compensation Law. First, the ability of an injured employee to sue a negligent co-employee will provide a two-level approach to recovery: (1) Sure and immediate relief under workmen's compensation, and (2) placement of ultimate loss on those responsible for the injury under a common-law negligence suit.[35] Second, the decision should ideally result in a deterrent effect, leading to greater care and better safety practices.[36] Third, the *Markle* decision can provide more adequate compensation to the aggrieved party. The Wyoming Workmen's Compensation Law provides coverage for 66⅔% of lost earnings, with a maximum of $344 per month total award for temporary total disability.[37] The total benefit for permanent total disability is only $17,500,[38] and recovery for pain and suffering, and disfigurement is not allowed. Although the injured employee must

30. In re Byrne, *supra* note 9, at 1102.
31. Markle v. Williamson, *supra* note 3, at 624.
32. *Id.* at 624.
33. *Id.* at 624-25.
34. *Id.* at 625.
35. Herbert v. Layman, *supra* note 22, at 709.
36. McCoid, *The Third Person in the Compensation Picture: A Study of the Liabilities and Rights of Non-Employers*, 37 TEXAS L. REV. 388, 398 (1957).
37. WYO. STAT. § 27-79 (Supp. 1973).
38. WYO. STAT. § 27-85 (Supp. 1973).

return amounts received under workmen's compensation if he sustains recovery in a third-party suit,[39] he is still likely to be somewhat better off if co-employees can be held liable.

For all the advantages derived by an injured employee under the *Markle* decision, disadvantages to the employee and workmen's compensation in general may result. The decision places the burden of compensation on a less efficient risk bearer than does the Wyoming Workmen's Compensation Law.

Under workmen's compensation the loss incurred by injury or death is placed on the employer, who may then distribute this loss among the public at large. Under the *Markle* decision the loss is placed solely on the individual employee who is unable to distribute the loss, unless some type of indemnity insurance is provided for these situations.

On a more theoretical level, the *Markle* decision contains the seeds for potential destruction of the workmen's compensation concept. Many industrial accidents can be blamed on the failure of supervisors or management personnel to exercise their duty of care; presidents of corporations, stockholders, and managers become prime targets.[40] If co-employee liability can be extended to include these types of individuals as "persons other than the employer," little is left of employer immunity under workmen's compensation. Since the Wyoming Workmen's Compensation Law expressly includes corporate officers within its definition of "workmen,"[41] such an extension could conceivably leave only the corporate entity itself within workmen's compensation protection.

The previous analysis is not an unfounded criticism of the *Markle* decision, given similar developments in other jurisdictions which allow or have allowed co-employee liability in the past.[42] Consideration of these developments may

39. WYO. STAT. § 27-54 (Supp. 1973).
40. Marquez v. Rapid Harvest Co., 14 Ariz. App. 562, 405 P.2d 814, 823 (1965) (Molloy, J., dissenting).
41. WYO. STAT. § 27-49 (1957). The Section specifies that the term "workman" shall include "employee" and the term "employee" shall include "workman."
42. Ransom v. Haner, 174 F. Supp. 82 (D. Alaska 1959) (general superintendent and foreman). Boudreaux v. Falco, *supra* note 18 (stockholder and manager).

serve as a guide to future judicial and legislative deliberations. The West Virginia Court of Appeals expressly overruled a prior decision which provided for co-employee immunity,[43] and concluded, on grounds similar to those found in *Markle,* that a foreman could be sued for negligently causing injury to another employee while both were covered under workmen's compensation.[44] The following year the West Virginia legislature enacted legislation extending immunity to co-employees.[45]

In 1920, the Michigan Supreme Court held in *Webster v. Stewart,*[46] that a corporation vice-president could be sued under a workmen's compensation statute similar to that present in Wyoming. After further extensions, the Michigan legislature amended its statute to provide immunity for employers and those in the same employ.[47]

Alaskan courts allowed recovery by an injured employee against his superintendent and foreman in *Ransom v. Haner.*[48] Shortly thereafter, the Alaska legislature changed its statute to preclude suits against "the employer or a fellow employee."[49]

New Mexico allowed recovery by an injured employee against a negligent co-employee in *Hockett v. Chapman,*[50] a case cited by the majority in the *Markle* decision.[51] Liability was extended a year later to allow recovery by an injured employee's wife, for loss of consortium, against a fellow employee whose negligence was the proximate cause of her husband's paralysis.[52] In 1971, the New Mexico legislature amended its act to allow employee suits only "against any person other than his employer, or another employee of his

43. Hinkelman v. Wheeling Steel Corp., 114 W. Va. 269, 171 S.E. 538 (1933).
44. Tawney v. Kirkhart, 130 W. Va. 550, 44 S.E.2d 634, 641-42 (1947).
45. W. VA. CODE ANN. § 23-2-6a (1973). This change in legislative thinking is discussed in Bennett v. Buckner, 150 W. Va. 648, 149 S.E.2d 201, 204-05 (1966).
46. 210 Mich. 13, 177 N.W. 230 (1920).
47. MICH. COMP. LAWS ANN. § 413.15 (1967). The statute is discussed in Sergeant v. Kennedy, 352 Mich. 494, 90 N.W.2d 447 (1958).
48. *Supra* note 42, at 87.
49. ALASKA STAT. § 23.30.015 (1972).
50. Hockett v. Chapman, *supra* note 14.
51. Markle v. Williamson, *supra* note 3, at 623-24.
52. Roseberry v. Phillips Petroleum Co., 70 N.M. 19, 369 P.2d 403 (1962).

employer, including a management or supervisory employee."[53]

The Kansas court, construing a statute similar to the Wyoming Workmen's Compensation Law, allowed recovery against a negligent co-employee.[54] A year later the court broadened the scope of its prior decision by allowing recovery against the estate of a deceased employee's immediate supervisor.[55] In 1967, the Kansas legislature amended that state's workmen's compensation act to provide that an employee retained the right to sue only "some person other than the employer or any person in the same employ."[56]

The pattern seems clear; where the courts seek to broaden the scope of their co-employee liability doctrines, the legislatures tend to intervene by establishing co-employee immunity. The inevitable result of the *Markle* decision need not be legislative change. The benefits of *Markle* may still be accessible.

It is possible that the *Markle* court left itself sufficient leeway to supervise the applicability of its decision. The court speaks generally about the "negligent employee" to whom its decision applies. Although the definition of "workmen" under the Wyoming Workmen's Compensation Law includes corporate officers, it restricts the law's applicability to those "the business of which is classed as extra-hazardous in nature, provided such person or persons are actually subject to the hazards of such business in the regular performance of his or their duties."[57] The court may be able to restrict the application of the *Markle* decision to these types of individuals. Secondly, the court may be able to restrict *Markle* by strict application of traditional notions of proximate cause and breach of duty.[58]

CONCLUSION

The Wyoming Supreme Court, in *Markle v. Williamson*,[59] has held that co-employees are liable to suit for negligence

53. N.M. STAT. ANN. § 59-10-4 (1973).
54. Roda v. Williams, 195 Kan. 507, 407 P.2d 471 (1965).
55. Tully v. Gardner's Estate, 196 Kan. 137, 409 P.2d 782 (1966).
56. KAN. STAT. ANN. § 44-504 (1973).
57. WYO. STAT. § 27-49 (1957).
58. *See* text *supra* pp. 265-66.
59. Markle v. Williamson, *supra* note 3.

even though they are covered by the Wyoming Workmen's Compensation Law. In reversing the previously accepted rule of law in Wyoming, the court has enabled injured employees or the heirs of deceased employees to seek greater compensation. In doing so, the court has potentially compromised the effectiveness of workmen's compensation. Only future judicial deliberations will determine whether the benefits of the *Markle* decision for the working man can be balanced with the advantages of workmen's compensation coverage, or whether legislative change will be forthcoming.

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