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Workmen's Compensation--Third Party Suits-- Employer Indemnification

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non-liability.²³ Second, the municipal tort-feasor is better able to bear the loss than the innocent victim.²⁴

The majority in *Hack* carefully avoided basing Ohio's position on public policy and instead chose the weaker argument of sovereign immunity. It would be presumptuous to assume that the court was inviting argument on municipal immunity. It is doubtful, however, that a basic change will be made so long as the court is ruling in a case where it is able to declare a particular municipal function proprietary. Thus, it becomes evident that a fact situation presenting a definite governmental function, properly argued, will be necessary to bring about a change.

The *Avellone*²⁵ case expresses the current Ohio trend of expanding liability. Eight states have already abandoned municipal immunity. In this light, perhaps *Hack* marks the beginning in the almost certain battle ahead to permit recovery in suits against municipalities. Archaic and illogical legalisms should not mark Ohio as a state that rewards the negligent with impunity and denies recovery to the innocent.²⁶

HARRY T. QUICK

**WORKMEN'S COMPENSATION — THIRD PARTY SUITS —
EMPLOYER INDEMNIFICATION**

Fischer Constr. Co. v. Stroud, 175 Ohio St.
31, 141 N.E.2d 164 (1963).

While plaintiff construction company's employee was flagging down traffic on a highway where plaintiff was working, a vehicle negligently driven by defendant's agent fatally struck the employee.¹ Allowance of the claim for the employee's death by the State Industrial Commission resulted in a change of plaintiff's merit rating as an employer.² Accordingly, plaintiff's rate of premiums paid into the State Insurance Fund was increased in compliance with Ohio's merit rating system.³ In an action against the negligent third party, plaintiff sued for reimbursement of the increased premiums.

The court of appeals affirmed an order of the trial court which sustained defendant's demurrer because the petition failed to state a cause of action. Granting a motion to certify, the Ohio Supreme Court affirmed the court of appeals, holding that:

23. *Hack v. City of Salem*, 174 Ohio St. 383, 394, 189 N.E.2d 857, 864 (1963). For a collection of acts which constitute proprietary functions and acts constituting governmental functions, see the chart compiled by Judge Gibson, 174 Ohio St. 383, 400-02, 189 N.E.2d 857, 866-67 (1963).

24. *Id.* at 397, 189 N.E.2d at 868.

25. 165 Ohio St. 467, 135 N.E.2d 410 (1956).

26. It must be noted that Judge Gibson limits his view to municipal corporations. See his syllabus in *Hack v. City of Salem*, 174 Ohio St. 383, 399, 189 N.E.2d 857, 869 (1963).

[A]n employer cannot recover from *any source* any sum to reimburse him for an increased amount paid as a premium under the Workmen's Compensation Act due to the death of an employee, although such death was caused by the act of a third party.⁴

The question of whether an employer can recover increased premium payments⁵ from a third party who causes the increase is not one of first impression in Ohio. In *Truscon Steel Co. v. Trumbull Cliffs Furnace Co.*,⁶ plaintiff, a self-insurer, compensated its employee for injuries received as a result of the third-party defendant's independent negligence.⁷ In denying recovery, the court stated:

An employee, whether self-insured or *otherwise*, cannot recover from *any source any* sum to reimburse an amount paid under the Workmen's Compensation Law to injured employees, whether the injury results from the negligence of some third party, or otherwise.⁸

The court also relied on the provision of the Ohio Workmen's Compensation Act which declares indemnity contracts void.⁹ Although the *Truscon* case did not involve the specific issue of an employer's loss through increased premium payments, a literal interpretation of its broad

1. Fischer Constr. Co. v. Stroud, 175 Ohio St. 31, 191 N.E.2d 164 (1963).

2. Plaintiff alleged such change would increase premiums \$27,515 over a five year period. Such increased premiums can be "positively" determined by an actuary as was done in *Midvale Coal Co. v. Cardox Corp.*, 152 Ohio St. 437, 89 N.E.2d 673 (1949), *aff'd on rehearing*, 157 Ohio St. 526, 106 N.E.2d 556 (1952).

3. OHIO REV. CODE § 4123.34. This section requires the Industrial Commission to classify occupations according to risk and establish a rating based on the classification. In addition, each employer within a classification is given a merit rating based on his individual accident record. The individual employer's premium will vary according to his merit rating which may be above the average for the particular occupation. This provision was passed pursuant to OHIO CONST. art. II, § 55, and upheld in *State ex rel. Zone Cab Corp. v. Industrial Comm'n*, 132 Ohio St. 156, 5 N.E.2d 477 (1936).

Section 4123.35 of the Ohio Revised Code requires each employer to pay into the State Insurance Fund the amount of premiums fixed by the Commission for that employer's occupation together with any increased premium.

4. Fischer Constr. Co. v. Stroud, 175 Ohio St. 31, 34, 191 N.E.2d 164, 166 (1963). (Emphasis added.)

5. Subrogation was not involved in the instant case because the injured employee had not been paid by the employer. Rather, plaintiff sought to recover damages to itself caused by defendant's negligence. Even in a subrogation action, an Ohio employer may not recover from a third party because Ohio has no subrogation provision. It generally is recognized that an employer may not recover without such a provision. 3 SCHNBIDER, WORKMEN'S COMPENSATION TEXT 179 (3d ed. 1943).

6. 120 Ohio St. 394, 166 N.E. 368 (1929); *accord*, *Cleveland, Columbus & Cincinnati Highway, Inc. v. Bookmyer*, 67 Ohio App. 476, 37 N.E.2d 393 (1941).

7. The negligence did not result in a breach of contract or implied warranty between the third party and the employer.

8. *Truscon Steel Co. v. Trumbull Cliffs Furnace Co.*, 120 Ohio St. 394, 166 N.E. 368 (1929). (Emphasis added.)

9. OHIO REV. CODE § 4123.82 (formerly OHIO GEN. CODE of 1910 § 1465-101). Concerning section 4123.82 of the Ohio Revised Code, the *Truscon* court further stated: "Nothing could be clearer than that the legislature, by the provisions of this section, indicated its intention to prevent the reimbursement of the employer for any amount paid pursuant to the

language would allow the court's statement to encompass any loss to an employer caused by a third person, whatever the form.

Nevertheless, there have been occasions where an employer has recovered increased premiums paid into the State Insurance Fund from a negligent third party. In *Midvale Coal Co. v. Cardox Corp.*,¹⁰ the court permitted recovery where the negligence of the third party constituted a breach of an express contract made with the employer of the injured employee.¹¹ Distinguishing the *Truscon* case, the court carefully noted that the language in section 4123.34 of the Ohio Revised Code applied only to insurance or indemnification contracts.¹² In the *Midvale* case, such a contract was not present. Furthermore, in *Midvale* the court pointed out that the defendant was under a duty to avoid injuring the plaintiff's employee, while a similar duty did not exist in the *Truscon* case. The broad language of *Truscon* was limited by holding it applicable only to that particular fact situation.¹³ Thus, the court acknowledged that an employer can recover only where a contractual duty is involved.

The court in the instant case, *Fischer Constr. Co. v. Stroud*,¹⁴ recognized that recovery in *Midvale* was permitted for a breach of contract and not for a negligent act as in *Truscon*. Not content with these differing results, however, the *Fischer* court overruled *Midvale* and approved *Truscon*, stating that "the better rule under the law and statutes is the one laid down in the *Truscon* case."¹⁵ The only other ground for the court's decision was the "uncertain," "speculative," and "remote" nature of the damages involved. In the *Midvale* case, however, the court recognized that expert testimony by an actuary can "positively" determine damages.¹⁶ This would seem to weaken the reasoning of the *Fischer* court.

By following *Truscon*, the court in the *Fischer* case has tacitly approved its broad language. Thus, the contractual distinction established in *Midvale* no longer is effective. The *Fischer* decision places a blanket

provisions of the Workmen's Compensation Act to an injured employee." *Truscon Steel Co. v. Trumbull Cliffs Furnace Co.*, 120 Ohio St. 394, 397-98, 166 N.E. 368, 369 (1929); cf. *L. Guidice v. Harris*, 98 Ohio App. 230, 128 N.E.2d 842 (1954).

10. 152 Ohio St. 437, 89 N.E.2d 673 (1949), *aff'd on rehearing*, 157 Ohio St. 526, 106 N.E.2d 556 (1952); *accord*, *Bittner v. Boyajohn & Barr, Inc.*, 19 Ohio L. Abs. 325 (Ct. App. 1935); cf. *Decker Constr. Co. v. Mathis*, 122 N.E.2d 38 (Ohio C.P. 1953), where the court allowed recovery for breach of a duty owed to the employer arising out of an express contract. The court distinguished the independent negligence situation.

11. Defendant sold blasting equipment to plaintiff. The sales contract provided that the defendant "maintain such equipment in good serviceable condition. . . ." Plaintiff's employee was injured by an explosion caused by defendant's failure to inspect and service the blasting equipment. *Midvale Coal Co. v. Cardox Corp.*, 152 Ohio St. 437, 438, 89 N.E.2d 673, 674 (1949), *aff'd on rehearing*, 157 Ohio St. 526, 106 N.E.2d 556 (1952).

12. *Id.* at 444, 89 N.E.2d at 676-77.

13. See text at note 8 *supra*.

14. 175 Ohio St. 31, 191 N.E.2d 164 (1963).

15. *Id.* at 33, 191 N.E.2d at 166.

16. See note 3 *supra*.

prohibition on an employer's right of reimbursement from a negligent third party.

The holding of the *Fischer* case places the employer under the Ohio Workmen's Compensation Act at a distinct disadvantage in relation to employers under acts of other states. Except for West Virginia¹⁷ and Ohio, all states provide the employer with some vehicle for recovering both increased premiums and direct payments to employees from third party tort-feasors.¹⁸ In Minnesota, for example, although an employer was denied recovery of increased premiums paid into the State Insurance Fund, he could recover through subrogation.¹⁹ The court purportedly based its decision on remoteness of damages, but the underlying policy consideration was the subrogation provision in Minnesota's Workmen's Compensation Act.²⁰ Under this provision, the employer is subrogated to the employee's right and remedy against the negligent third party. Thus, allowing redress in a suit for increased premiums by the employer in his own right would have resulted in double recovery for the employer in opposition to the rule that subrogation provisions are exclusive.²¹ Such a result could not have occurred in Ohio, however, because Ohio has no subrogation provision in regard to this problem.

The *Midvale* case gave the Ohio employer his only opportunity for the justifiable reimbursement he deserves and for which the act fails to provide through the normal route of subrogation. The *Fischer* decision overruling the *Midvale* case combined with the effect of section 4123.34 of the Ohio Revised Code and the lack of a subrogation provision deprive the employer of any possible remedy.²² Indeed, the loss no longer falls on the party at fault.

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17. A federal district court, applying West Virginia substantive law, denied an employer recovery for increased premiums paid as a result of a third party's negligence. The court interpreted West Virginia law as precluding an employer from maintaining a suit for subrogation or indemnification. *Crab Orchard Improvement Co. v. Chesapeake & O. Ry.*, 115 F.2d 277 (4th Cir.), *cert. denied*, 312 U.S. 702 (1940).

18. "The Acts generally provide [that the] . . . employer . . . [is] subrogated to the latter's [employee's] right and remedy against the negligent third person, or they are entitled to be indemnified by such person, or the Act may give them the right to sue the third party in their own name. . . ." 3 SCHNEIDER, *WORKMEN'S COMPENSATION TEXT* 178 (3d ed. 1943).

19. *Northern State Contracting Co. v. Oakes*, 191 Minn. 88, 253 N.W. 371 (1934). A New Jersey case similarly denied recovery to an employer suing a negligent third party for reimbursement. The court held that the existence of a subrogation provision precluded the employer from suing in his own name. *United States Cas. Co. v. Hercules Powder Co.*, 4 N.J. 157, 72 A.2d 190 (1950). Authorities on Workmen's Compensation have approved both the Minnesota and New Jersey decisions. See, *e.g.*, 2 LARSON, *WORKMEN'S COMPENSATION LAW* §§ 77.20, 77.30 (3d ed. 1961).

20. MINN. REV. STAT. § 176.061 (1945).

21. 2 LARSON, *WORKMEN'S COMPENSATION LAW* 243-44 (3d ed. 1961).

22. This would seem to include "express indemnification contracts," which are becoming prevalent in the construction industry.