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## Sydenstricker v. Unipunch Products, Inc.: Contribution and Indemnity under Mandolidis Theory

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## ***SYDENSTRICKER v. UNIPUNCH PRODUCTS, INC.:* CONTRIBUTION AND INDEMNITY UNDER MANDOLIDIS THEORY**

Workmen's compensation was developed as a compromise system in which both the employer and employee surrendered certain benefits in return for others. Historically, the first workmen's compensation statutes had, as their primary objectives, prompt and predetermined benefits at adequate levels, relief from the uncertainty of recovery, elimination of costly litigation, and limited employer liability.<sup>1</sup> In effect, the employee relinquished his common law right to sue his employer in return for a prompt, though limited, sum of money. The employer gave up his common law defenses and accepted liability without fault in exchange for the elimination of the risk of a large tort award.<sup>2</sup> This absolute but limited liability, called the doctrine of exclusive remedy, became the basic principle upon which all of the various systems of workmen's compensation were founded.<sup>3</sup>

One of the most controversial questions in the area of workmen's compensation arises when an employee is injured due to the concurrent negligence of his employer and a third party. If an employee receives his statutory benefits from the employer and then recovers a large damages award from the third party, should the employer be liable to the third party under a theory of contribution? Most jurisdictions hold that a joint tortfeasor employer is immune from a third party contribution suit because he is initially immune from tort liability to his injured employee by virtue of the exclusive remedy doctrine.<sup>4</sup> A number of states,<sup>5</sup> however, provide exceptions to exclusivity for employer misconduct. West Virginia, for example, revokes an employer's immunity to lawsuit under circumstances of intentional employer misconduct which results in injury or death.<sup>6</sup> In the recent case of *Sydenstricker v. Unipunch Products, Inc.*,<sup>7</sup> the West Virginia Supreme Court of Appeals considered the effect of such an exception on the principles of contribution and indemnity, and concluded that third parties may bring actions against the employer when such misconduct is present.

*Sydenstricker* arose as the result of a certified question proposed by the United States District Court for the Southern District of West Virginia. The West Virginia Supreme Court of Appeals was asked to decide whether a manufacturer, who had been sued by an employee who was injured while using the manufacturer's product, could bring a third party action against the plaintiff's

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<sup>1</sup> Vieweg, *Erosion of the Exclusive Remedy Doctrine Actions Against the Employer*, 17 FORUM 422 (1981).

<sup>2</sup> Tomita, *The Exclusive Remedy of Workers' Compensation for Intentional Torts of the Employer: Johns-Manville v. Superior Court*, 18 CAL. W.L. REV. 27 (1981).

<sup>3</sup> Vieweg, *supra* note 1, at 422.

<sup>4</sup> A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 76.20 (1982).

<sup>5</sup> See Vieweg, *supra* note 1, at 427.

<sup>6</sup> *Mandolidis v. Elkins Industries, Inc.*, 246 S.E.2d 907 (W. Va. 1978).

<sup>7</sup> 288 S.E.2d 511 (W. Va. 1982).

employer under the theory of either implied indemnity or contribution.<sup>8</sup> The plaintiff employee alleged that certain products used by him were negligently designed, manufactured, and distributed.<sup>9</sup> The employee sued four defendants in their capacity as manufacturers of a product and its component parts. Two of these defendants, Unipunch Products, Inc. and Niagara Machine and Tool Works, brought separate third party complaints against the employer, Terrell Tool and Die Corporation. The two manufacturers asserted liability on Terrell's part for contribution and indemnity, alleging negligence and carelessness in: 1) failing to provide a safe place to work; 2) failing to adopt and furnish adequate safety devices; 3) misusing the product by disregarding written recommendations provided at the time of sale; 4) using the product beyond its capacity; and 5) modifying the product by adding a component part. Unipunch and Niagara alleged that these particular items constituted wilful, wanton, and reckless misconduct on the part of Terrell, thus excepting the employer from the doctrine of exclusive remedy.<sup>10</sup>

The West Virginia Supreme Court of Appeals, answering the certified question in the affirmative,<sup>11</sup> held that the deliberate intent exception contained in the West Virginia Workmen's Compensation Act<sup>12</sup> would permit manufacturers to bring a third party action against an employer under the theory of contribution. Such an action would be based upon allegations that the employer was guilty of wilful, wanton, and reckless misconduct or intentional acts toward the plaintiff employee. Thus, the right of a plaintiff to recover from an employer beyond the limits of workmen's compensation, as defined in *Mandolidis*, has been extended to third parties in actions for contribution or indemnity against the employer.

A logical result of *Sydenstricker* will be employer exposure to increased liability in work-related injuries. West Virginia has long recognized the doctrine of contribution.<sup>13</sup> Based on principles of equity and common or joint liability on the part of joint tortfeasors to an injured plaintiff, contribution calls for a fair and just division of losses. If one party pays more than his share of a common obligation, then that party may recover from the others the payment of their respective shares.<sup>14</sup> This right was later extended to allow a tortfeasor to bring in as a third party defendant a fellow joint tortfeasor to share by way of contribution in the verdict recovered by the plaintiff.<sup>15</sup>

In *Belcher v. J.H. Fletcher and Co.*,<sup>16</sup> however, the exclusive remedy doctrine was held to bar the contribution claim of a manufacturer against the em-

<sup>8</sup> *Id.* at 512.

<sup>9</sup> *Id.* at 514.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> W. VA. CODE § 23-4-2 (1981).

<sup>13</sup> *Payne v. Charleston Nat'l Bank*, 112 W. Va. 251, 252, 164 S.E. 252, 253 (1932); *Hutcherson v. Slate*, 105 W. Va. 184, 190, 142 S.E. 444, 447 (1928); *Buskirk v. Sanders*, 70 W. Va. 363, 370, 73 S.E. 937, 940 (1912).

<sup>14</sup> *Id.*

<sup>15</sup> *See Haynes v. City of Nitro*, 240 S.E.2d 544, 550 (W. Va. 1977).

<sup>16</sup> 498 F. Supp. 629, 631 (S.D. W. Va. 1980).

ployer. The district court reasoned that to allow recovery beyond the prescribed statutory limits would totally undermine the purpose of the Workmen's Compensation Act. That purpose, as defined by West Virginia case law, was to release both the employer and employee from the often burdensome common law rules of liability and damages.<sup>17</sup> Employers would be protected from the expense and unpredictability of litigation, while employees would be compensated for their injuries without the burdensome requirement of proving common law negligence. The legislative intent was to provide a simple, expeditious method of resolving disputed claims<sup>18</sup> by providing a statutory right to compensation. This right was substituted for a common law cause of action and all civil liability. All statutes are controlling, and all rights, remedies, and procedures are exclusive.<sup>19</sup> In effect, the intent of the interpreted statutes was to grant an employer who subscribed to the Workmen's Compensation fund immunity from any common law action and to provide the employee a statutory benefit scheme as an exclusive remedy.

But West Virginia is one of a few states that recognizes an exception to the exclusive remedy doctrine. This exception, outlined in West Virginia Code § 23-4-2 (1981), was substantially broadened in *Mandolidis*,<sup>20</sup> in which wilful, wanton, and reckless misconduct or a deliberate and intentional act were held to deprive an employer of his immunity from suit and subject him to liability beyond the limits of workmen's compensation. It is this deliberate intent basis upon which the court built the *Sydenstricker* decision; a basis upon which employers are already being subjected to additional litigation and increased liability.<sup>21</sup>

The problem of whether to allow contribution is one of the most significant issues arising out of job-related injuries.<sup>22</sup> The majority of jurisdictions hold that a joint tortfeasor employer is immune from a third party contribution suit because he is initially immune from tort liability to his injured employee. This point has been summarized by Professor Arthur Larson, the noted authority on workmen's compensation:

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<sup>17</sup> Jones v. Laird Foundation, Inc., 156 W. Va. 479, 489, 195 S.E.2d 821, 827 (1973) (Sprouse, J., concurring).

<sup>18</sup> Mitchell v. State Workmen's Compensation Comm'r, 256 S.E.2d 1, 9 (W. Va. 1979).

<sup>19</sup> Bailes v. State Workmen's Compensation Comm'r, 152 W. Va. 210, 212, 161 S.E.2d 261, 263 (1968).

<sup>20</sup> 246 S.E.2d at 914.

<sup>21</sup> See Note, *In Wake of Mandolidis: A Case Study of Recent Trials Brought Under the Mandolidis Theory*, 84 W. VA. L. REV. 893 (1982).

<sup>22</sup> Other jurisdictions have also struggled with this problem:

It is difficult to reconcile the statutes without producing an unfair result. It seems inequitable to hold that a third party is liable for an injured employee's total damages without a right to contribution when the employer may have been causally negligent, but the language of the [statute] compels this result. It would be equally inequitable to impose additional liability to a third party on the employer when the workmen's compensation statute imposes an absolute, though limited, liability on the part of the employer to an injured employee.

Note, *Employer Liability to Third Parties Under the Workmen's Compensation and Comparative Negligence Statutes*, 26 U. KAN. L. REV. 485, 492 (1978) (footnote omitted).

The great majority of jurisdictions have held that the employer whose concurring negligence contributed to the employee's injury cannot be sued or joined by the third party as a joint tortfeasor, whether under contribution statutes or at common law. The ground is a simple one: the employer is not jointly liable to the employee in tort; therefore he cannot be a joint tortfeasor.<sup>23</sup>

Before the advent of workmen's compensation systems, workers recovered compensatory damages in a rather small percentage of cases.<sup>24</sup> The employer could raise numerous defenses in a suit at common law; the absence of negligence, contributory negligence, assumption of risk, and the fellow servant rule<sup>25</sup> are a few that were commonly used. As industrialization increased, so did the number of industrial accidents. Since most of the wage losses were borne by the workers themselves, public opinion demanded a more equitable arrangement. As a result, legislatures passed workmen's compensation statutes to assure a minimum level of compensation without the requirement for litigation.<sup>26</sup> In return for accepting the idea of liability without fault, employers were granted immunity from lawsuits and limited liability.

Despite the strong sentiment for keeping the compensation system as it is now, an appealing argument can be made that the abolition of exclusive remedy requires a corresponding extension of employer liability in actions for contribution or indemnity. A recent upsurge in products liability lawsuits has seen the cost of liability insurance soar dramatically. The number of workplace injury cases has risen and ever larger damages awards are being recovered.<sup>27</sup> Strict liability and the abolition of many of the common law defenses available to manufacturers have unfairly increased the burden which they must bear.<sup>28</sup>

<sup>23</sup> Larson, *supra* note 4, at § 76.20.

<sup>24</sup> Comment, *The Exclusive Liability Provision in Workmen's Compensation: An Overly Harsh Penalty for Third Parties or a Necessary Shield for Negligent Employers?* 17 IDAHO L. REV. 583, 586 (1981).

<sup>25</sup> For an explanation of these defenses, see W. PROSSER, HANDBOOK OF THE LAW OF TORTS 416-27, 439-57, 525-37 (4th ed. 1971).

<sup>26</sup> Comment, *supra* note 24, at 587. An excerpt from former Governor Henry Drury Hatfield's speech to the legislature shows that West Virginia's experience with industrial accidents was similar to that throughout the country:

In harmony with the advance of civilization and our duty to our neighbor, a more humane system has grown up in the way of compensating workmen who are injured while engaged in the course of their employment. The burden in the past fell upon the employee first, but in the case of death, to those dependent upon him. As the law stood previous to the passage of the Workmen's Compensation law, the industry was indemnified by the insurance companies, and less than fifteen percent of the injured received any damages in case of litigation, and then, after a long drawn-out litigation, which resulted in practically nothing for the plaintiff. The injustice to the employee and waste of time and money to the tax-payer has excited the attention of public spirited men, and it has demonstrated that it would have been a saving of money for the tax-payer if a reasonable compensation had been paid out of the state treasury, thereby preventing court cost and injustice. . . .

Mandolidis, *supra* note 6, at 910 n.3.

<sup>27</sup> Weisgall, *Product Liability in the Workplace: The Effect of Workers' Compensation on the Rights and Liabilities of Third Parties*, 1977 WIS. L. REV. 1035, 1037 (1978).

<sup>28</sup> See Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

The extent of the problem is underscored by the fact that in a least fifty percent of industrial related accidents, an employer's negligence is present.<sup>29</sup> The obvious injustice inherent in forcing a third party to subsidize a system from which it receives little or no benefit merits attention.

In response to the problem, a trend is beginning to develop in the area of exclusive remedy. Several states have begun to allow contribution actions for a recovery beyond the statutory limits of workmen's compensation.<sup>30</sup> West Virginia, though not yet counted among the ranks of those who have extended liability and completely embraced the contribution doctrine in industrial accident litigation, may have taken the first step in its *Sydenstricker* decision. The court did not, however, completely derogate the long established principles of workmen's compensation. By tying third party contribution to the "deliberate intent" doctrine developed under *Mandolidis*, the court limited the manner in which liability could be extended.

But the manner in which the court construed the relevant statute<sup>31</sup> is more than a little confusing. The defendant employer argued that because the plaintiff employee did not elect to sue the employer under the deliberate intent theory, the manufacturer third party was foreclosed from such a contribution suit. The court refused to accept that position. "We do not read the statute so narrowly, particularly in light of the language that '[the employee, et al.] shall also have a cause of action against the employer as if this chapter had not been enacted.'"<sup>32</sup> The court interpreted the statutory language to place the deliberate intent injury entirely outside the protection of the Workmen's Compensation Act, regardless of the party seeking recovery. A closer look at the statute<sup>33</sup> in question, however, shows that the right of action belongs solely to employees, members of their immediate family and dependents. The tenuous extension of this language to include joint tortfeasors indicates the difficulty the court faced in justifying its position.

<sup>29</sup> Comment, *supra* note 24, at 589.

<sup>30</sup> North Carolina, California, Pennsylvania and Minnesota permit manufacturers or other third parties to recover from a negligent employer to the extent of the employer's workmen's compensation liability. In addition, Minnesota and Illinois have effectively abolished their "no-contribution" rules. Weisgall, *supra* note 26, at 1043-46.

Some of the reasons advanced for permitting recovery beyond statutory limits, generally, are:  
 1) An intentional act is not within the realm of "accidents" as contemplated by the compensation system;  
 2) violence on the part of the employer severs the employer-employee relationship; and  
 3) an intentional tort does not fall within the definition of work-related activity. Larson, *supra* note 4, at § 68.11.

<sup>31</sup> W. VA. CODE § 23-4-2 (1981).

<sup>32</sup> *Sydenstricker*, 288 S.E.2d at 518.

<sup>33</sup> The pertinent portion reads:

If injury or death results to any employee from the deliberate intention of his employer to produce such injury or death, *the employee, the widow, widower, child, or dependent of the employee* shall have the privilege to take under this chapter, and shall also have cause of action against the employer, as if this chapter had not been enacted, for any excess of damages over the amount received or receivable under this chapter.

W. VA. CODE § 23-4-2 (1981) (emphasis added).

While the recognized dilemma of third parties in the employment relationship is an appropriate object of concern, the court may have overlooked true legislative intent in developing its own "spirit of the law." Giving the same rights to third parties as the court gave to injured employees in *Mandolidis*, is a further extension of what is an already controversial decision. The argument that the entire workmen's compensation system may be eroded by such judicial activism is, accordingly, strengthened by *Sydenstricker*.

However, if *Mandolidis* is destined to become a permanent fixture in the case law of this state, *Sydenstricker* is an inevitable corollary. If the employer's immunity against civil actions is to be abrogated in certain special circumstances, that exception must apply to all parties who would have claims against the employer. One underlying premise of *Sydenstricker* may be the state's general policy of apportionment of fault through a comparative negligence system.<sup>34</sup> As the court has stated, a system of comparative negligence requires an apportionment of the total negligence among the various parties, including the plaintiff.<sup>35</sup> This would imply that *all* involved tortfeasors be included; if not in the original cause of action, then in an action for contribution or indemnity.

One aspect that has not been addressed by the court in its decision is whether an employer will be able to implead a third party manufacturer in workmen's compensation cases. By affirming its desire to fulfill the *Haynes* policy of equal distribution of the liability for a suffered loss, it seems logical for the court to extend the right of contribution to employers when the workplace injury also involves a manufacturer's negligence. If that is indeed the intent of the court, then a problem arises in comparing the standards applicable to joint tortfeasors in arriving at a determination of the degree of fault. Liability of an employer arises through intentional misconduct and the employer is permitted to offset receivable compensation benefits.<sup>36</sup> But the third party manufacturer faces strict liability in tort with no statutory policies defining the recoverable damages.<sup>37</sup> Therefore, in determining the relative amounts of negligence, confusion surrounds the choice of a standard of care. How will a jury compare wilful, wanton and reckless misconduct with strict liability in apportioning fault between an employer and a manufacturer? Will a manufacturer receive a proportionate share of an offset of benefits receivable? These questions remain unanswered and we must look to the court for further guidance.

In public policy areas, *Sydenstricker* has redeeming value. Workmen's compensation benefits have failed to keep pace with inflation and are arguably inadequate. Under the exclusive remedy doctrine, the injured employee's only option for recovery in addition to statutory benefits was a suit against a third party. In addition, the advent of strict liability placed manufacturers in a particularly vulnerable position. Thus, injured employees found it much easier to recover large tort awards against manufacturers. These manufacturers, who

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<sup>34</sup> See *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W. Va. 1979).

<sup>35</sup> *Id.* at 885.

<sup>36</sup> W. VA. CODE § 23-4-2 (1981).

<sup>37</sup> *Morningstar v. Black & Decker Mfg. Co.*, 253 S.E.2d 666 (W. Va. 1979).

may only be partially responsible for the injury, were largely subsidizing a compensation system from which they received no benefits. Exceptions to the exclusive remedy doctrine should apply to all parties involved with the employer. The basic premise of these exceptions is that the employer will find it profitable to improve the safety of the workplace. Because the employer is closest to the work situation, he has the better opportunity to control dangerous conditions and avoid unnecessary risks. By revoking exclusivity and allowing contribution, both a safer work environment and an equitable distribution of liability can be accomplished.

On the other hand, *Sydenstricker* ignores the underlying public policy of avoiding industrial accident litigation, much like its predecessor, *Mandolidis*. As Justice Neely noted in his dissent in *Mandolidis*:

While we may be outraged by the parsimony of the statutory compensation, we cannot be outraged at the theory of the compensation scheme, which while denying a claimant the advantage of a common law judgment when the employer is at fault, still has the employer pay even when the claimant is at fault.<sup>38</sup>

Every time an injury occurs that is not caused solely by employee negligence, lawsuits may be instituted in the hope of recovering extensive damages. Even if the employee chooses not to sue the employer, the employer may still be vulnerable to third party actions. As litigation increases, smaller companies may be more apt to settle nuisance suits to avoid the chance of a high tort award. The cost of these suits may deplete resources which were previously available for wages and plant modernization. Production costs will increase and be ultimately passed along to the consumer.<sup>39</sup> Businesses may seek to relocate in a more favorable economic climate. A careful look is needed to determine what results are desired and what methods are needed to achieve those results. If the exceptions to the workmen's compensation system are not carefully controlled, the system itself may cease to serve a useful purpose. Depending upon how it is applied in future decisions and the ultimate fate of *Mandolidis*, *Sydenstricker* could become either an important corollary to the policy of encouraging workplace safety or merely an undesirable erosion of the recognized value of an effective workmen's compensation system.

Perhaps an alternative is needed to the approach of *ad hoc* decisions on particular aspects of worker protection. If injured workers are currently receiving inadequate compensation, benefit levels should be increased, possibly with combined manufacturer and employer contributions into the system. Under this option, employee recovery would be absolutely limited to the terms of the statute, thus extending the doctrine of exclusive remedy to third party manufacturers.

A second option would be to eliminate workmen's compensation and leave employee recovery to the tort system. Since most of the historical reasons for

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<sup>38</sup> *Mandolidis v. Elkins Industries, Inc.*, 246 S.E.2d 907, 922 (W. Va. 1978) (Neely, J., dissenting).

<sup>39</sup> *Id.* at 393.



instituting workmen's compensation are no longer present, and employees may now effectively recover tort awards, the system may have outlived its usefulness. Particularly with the change in the statutory structure by first *Mandolidis* and now *Sydenstricker*, the system has become somewhat emasculated.

The decision to adopt either of the suggested options, or any other, should be left to the legislature for the best possible interpretation of public policy. Whatever the choice, it is clear that the courts will have to continue to look closely at workplace safety and employer culpability. This will be the situation, whether the court is continuing to reshape and redefine the existing statutes or whether it is called upon to apply and interpret a new legislative scheme.

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