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Stelly v. Overhead Door Co. of Baton Rouge: A Severe Hindrance to the Exclusive Remedy Rule of Worker's Compensation

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NOTE

Stelly v. Overhead Door Co. of Baton Rouge: A Severe Hindrance to the Exclusive Remedy Rule of Worker's Compensation

I. INTRODUCTION

In what may result in a severe blow to employers in Louisiana who lease their business premises, the Louisiana Supreme Court in *Stelly v. Overhead Door Co. of Baton Rouge*,[1] decided the issue of whether an employee injured at work by a defective condition of the building is prohibited by Louisiana Revised Statutes 23:1032, the worker's compensation exclusive remedy rule, from maintaining an unintentional tort action against an employer, when the employer contractually assumed the building owner's liability for vices and defects of the premises through a Louisiana Revised Statues 9:3221 clause in the lease agreement. This question was answered in the negative, thus the employee was allowed to maintain an action in tort against his employer, contrary to the overwhelming tradition of Louisiana courts in limiting employee's recovery to worker's compensation. On its face, the decision may appear to have limited effect, due to an amendment to Louisiana Revised Statutes 23:1032 which the court refused to apply retroactively. However, some of the court's language suggests that a situation such as this, when an employer contractually assumes a building owner's liability for premises defects, may very well continue to be an exception to the exclusivity rule. If so, one of the most significant policies underlying the Worker's Compensation Act will effectively be eliminated as to employers who lease their business premises. Aside from being in derogation of the Act, this result would be in contravention of previous decisions of Louisiana and non-Louisiana courts that have interpreted and usually rejected the so-called "dual capacity doctrine."[2] For these reasons and those that follow, it

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1. 646 So. 2d 905 (La. 1994).

2. This theory of recovery, sought by employees who attempt to sue their employers in tort despite the exclusive remedy rule of worker's compensation, states that if an employer occupies a status toward the employee in addition to merely the employment relationship and not directly related to same, then the employer owes a separate and distinct tort duty to the employee based on the additional status. For example, employees have attempted to sue their employers on the basis of products liability, the dual relationship being that of manufacturer/purchaser, and not simply the employment relationship. Malone and Johnson have given the following explanation of the doctrine:

> Some employers may employ workers in more than one capacity, and the question of compensation versus tort as a remedy may depend upon an examination of those capacities. The manufacturer of vacuum cleaners, for example, may employ an individual to clean the executive suite at night. Of course, the manufacturer's brand of vacuum cleaner would be used. If the employee is injured by a defect in the vacuum cleaner or negligence in its manufacture, may he sue the manufacturer (his employer) in tort?

is suggested that courts should limit the *Stelly* decision's future effect, or that the legislature should intevene to remedy the situation. If not, the main benefit of worker's compensation to employers, limited liability, could be essentially eliminated as to lessee-employers.

II. THE CASE

A. Facts and Procedural Background

The plaintiff, Joseph Stelly, worked for United Parcel Service (UPS) as a mechanic at its Opelousas office. The building was owned by Elvin Ortego, who had leased it to UPS. In the lease agreement there was a Louisiana Revised Statutes 9:3221 provision in which UPS expressly relieved Ortego of any liability arising from premises defects.[3] Stelly was injured at work while attempting to

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2 Wex S. Malone & H. Alston Johnson, Louisiana Civil Law Treatise, Worker's Compensation Law and Practice § 368, at 257 (1994). Louisiana courts have consistently denied the use of the dual capacity doctrine. *See id.* § III(A). Courts in other states that have recognized the doctrine insist that the dual capacity of the employer be completely unrelated to the employment relationship with the employee/plaintiff. For example, see Kimzey v. Interpace Corp., Inc., 694 P.2d 907 (Kan. App. 1985); Home Ins. Co. v. Jones & Lamson, Div. of Waterbury Farrell, 373 N.W.2d 249 (Mich. App. 1985); Pavlek v. Forbes Steel & Wire Corp., 517 A.2d 564 (Pa. Super. 1986); Jones v. Kaiser Industries Corp., 737 P.2d 771 (Cal. 1987); Windham v. Blount Int'l, Ltd., 423 So. 2d 194 (Ala. 1982); Salswedel v. Enerpharm, Ltd., 764 P.2d 499 (N.M. App. 1988); Hunsaker v. State, 870 P.2d 893 (Utah 1993); McGee v. Goodyear Atomic Corp., 659 N.E.2d 317 (Ohio App. 1995); and Dalton v. Community General Hosp., 655 N.E.2d 462 (Ill. App. 1995).

3. *Stelly*, 646 So. 2d at 908 n.3. The lease agreement's indemnity clause provided as follows:

> (a) Landlord will not be responsible for any damage to any person whomsoever, even those arising from defects which Landlord is required by his lease to repair, except in the case of Landlord's positive neglect or failure to take action toward the remedying of any such defects within a reasonable time after receipt of written notice of such defects and of the damage caused. Should Tenant fail promptly to notify Landlord in writing of any such defects, Tenant will become responsible for any damage resulting to Landlord or others.
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> (b) . . . . Pursuant to the provisions of Louisiana R.S. 9:3221, Tenant agrees to hold Landlord harmless from any responsibility whatsoever for damages to any person whomsoever or to any property of the Tenant or other arising from the condition, upkeep and maintenance of the leased premises, and Tenant expressly relieves Landlord of any and all liability for injuries or damages caused by any vice or defect of the leased premises to any occupant or to anyone in or on the premises or in or on any adjacent streets, sidewalks, curbs, parking areas, or other walks or areas adjacent to the leased premises. Tenant expressly assumes all such liability agreeing to indemnify Landlord and hold Landlord harmless from any liability whatsoever for any damages or injuries to any person or persons whomsoever or to the property of any person or persons whomsoever arising out of the occupancy, use, condition or state of repair of the leased premises, except as expressly set forth above.
>
> (c) Tenant will indemnify Landlord and hold Landlord harmless from all loss and expense of any kind which Landlord may sustain or which may be asserted against Landlord as the result of injuries to persons or property resulting or alleged to result from

raise an overhead door, one similar in appearance and operation to an ordinary garage door.[4] Stelly filed a worker's compensation claim against UPS and its worker's compensation insurer, Liberty Mutual, and subsequently received benefits. Stelly and his wife also filed tort suits against Ortego, Overhead Door Company of Baton Rouge, and Overhead Door Corporation. Ortego was sued as the owner of the allegedly defective premises; Overhead Door Company was sued as the manufacturer of the door. However, in addition to his receipt of worker's compensation benefits, Stelly amended his tort claim to add UPS as a defendant.

The tort claim against UPS was based on its contractual assumption, through the Louisiana Revised Statutes 9:3221 clause, of Ortego's liability for premises defects. The plaintiffs argued that because of this assumption of liability UPS was liable beyond mere worker's compensation benefits.[5] UPS argued that Louisiana Revised Statutes 23:1032 gave it tort immunity from any lawsuit by an employee other than those based on intentional acts.[6] The trial court granted the motion of UPS for summary judgment based on the exclusive remedy given by Louisiana's Worker's Compensation Act.[7]

B. Court of Appeal Decision

The plaintiffs appealed, arguing that when an "employer leases immovable property and assumes the landowner-lessor's responsibility for premises defects pursuant to La. R.S. 9:3221, the employer may be held liable both as employer for worker's compensation and in tort when the employee is injured at the work premises by reason of a defect in those premises."[8] The court of appeal first stated that "[o]ver the years Louisiana courts have consistently refused to recognize the tort liability of employers under *any* dual capacity theory or doctrine."[9] The reason for this refusal, according to the court, is the legislative compromise that was envisioned with the passage of the Worker's Compensation Act. That is, employers would be made liable for worker's compensation benefits to an employee injured on the job regardless of the level of the employer's fault, if any. In return, employers, in all circumstances, even their clear and unmistakable negligence, would not be answerable in damages other than such benefits in worker's compensation.[10] An exception to this exclusivity

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any fault or negligence of Tenant or of Tenant's agents or employees, or from the ownership, use, occupancy or maintenance of the leased premises.

Id.

4. *Id.* at n.4.

5. *Id.* at 908-09.

6. *Id.* at 909.

7. *Id.*

8. Stelly v. Overhead Door Co., 631 So. 2d 698, 700 (La. App. 3d Cir.), *rev'd*, 646 So. 2d 905 (1994).

9. *Id.* (emphasis in original).

10. *Id.*

rule arises when the basis of the tort suit is an alleged intentional act,[11] and is not applicable to the *Stelly* situation.

Pursuant to this well-established legislative compromise, the court found no reported case in Louisiana which allowed recovery against the employer under a dual capacity doctrine, other than *Ducote v. Albert*.[12] Even this decision was easily distinguishable, according to the court. *Ducote* involved an employee's malpractice action against a company physician. The Louisiana Supreme Court rejected the physician's claim of immunity in *Ducote*, based on the assertion that the compromise considerations between employers and employees, on which the Worker's Compensation Act rests, were not applicable to the malpractice of a company physician.[13] Such a risk of malpractice was not an inherent risk in the production process of the employer, as was envisioned by the legislature. To allow immunity would be to protect some physicians who were fortunate enough to join the ranks of an established employer at the expense and detriment of private practitioners who did not enjoy this luxury.[14] The court held the company doctor to be comparable to an independent contractor, and therefore expressly excluded from protection under the Louisiana Worker's Compensation Act.[15] Since the situation in *Stelly* involved merely an injury at work without the negligence of an actor such as the physician in *Ducote*, neither the independent contractor rule nor the dual capacity doctrine of *Ducote* was applicable, according to the court.

The court of appeal, having distinguished *Ducote*, then proceeded to discuss other Louisiana decisions which refused to allow recovery against an employer under a dual capacity theory. The court relied on *White v. Naquin*,[16] *Deagractias v. Chandler*,[17] and *Roberts v. Orpheum Corp.*,[18] all of which are discussed below, in agreeing with the trial court. Finally, the court noted that the dual capacity doctrine sought by the plaintiffs had been specifically rejected by the Louisiana Legislature in 1989.[19] Act Number 454 of 1989 amended Louisiana Revised Statutes 23:1032 to expressly exclude claims against employers "under any dual capacity theory or doctrine."[20] Although Stelly was injured prior to the 1990 effective date of the amendment, the court of appeal concluded that the consistent case law on the issue of dual capacity mandated retroactive application of what it believed was interpretive legislation.[21]

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11. La. R.S. 23:1032(B) (1985).
12. 521 So. 2d 399 (La. 1988).
13. *Stelly*, 631 So. 2d at 700 (citing *Ducote*, 521 So. 2d at 399).
14. *Id.*
15. Independent contractors are excluded from worker's compensation coverage in La. R.S. 23:1021(6) (1985).
16. 500 So. 2d 436 (La. App. 1st Cir. 1986).
17. 551 So. 2d 25 (La. App. 4th Cir. 1989).
18. 610 So. 2d 1097 (La. App. 4th Cir. 1992), *writ denied*, 616 So. 2d 682 (1993).
19. Stelly v. Overhead Door Co., 631 So. 2d 698, 702 (La. App. 3d Cir. 1994).
20. *Id.*
21. *Id.*

C. *Supreme Court Decision*

On the Stellys' application, the Louisiana Supreme Court granted certiorari to decide the following issues:

> [W]hether Act 454 of 1989 is interpretative legislation which applies retroactively to the facts of this case and, if not, whether the limitative effects of the pre-amendment version of LSA-R.S. 23:1032 can be interpreted to shield an employer that contractually assumes the liability of an otherwise liable third party, from an unintentional tort action by its injured employee.[22]

The supreme court, in an opinion written by Pro Tem Judge Felicia Toney Williams of the second circuit court of appeal, first recognized the compromise made between labor forces and employers under the Worker's Compensation Act. "The compromise obligates the employer to surrender its immunity against liability when it was without fault and, in return, the employee loses his right to recover full damages from the employer for his injury and accepts instead a limited sum for compensation."[23] The court then cited its own recent decision of *Roberts v. Sewerage and Water Board of New Orleans*[24] for an underlying premise which would eventually govern its decision in the case at issue: that a court should liberally construe the coverage provisions of the Worker's Compensation Act while narrowly construing the immunity provisions, and that "every presumption should be on the side of preserving the general tort or delictual rights of an injured worker against the actual wrongdoer."[25] Thus, already leaning in favor of the plaintiff, the court proceeded to reject the analysis of the court of appeal.

The court stated the nature of the dual capacity doctrine as follows:

> Louisiana's dual capacity theory or doctrine pertains to employers with multiple relationships, connections or involvement to the employee's injury and/or the cause of the injury, which ordinarily would result in liability being imposed upon the employer by operation of law in addition to the provisions of the Worker's Compensation Act. The dual capacity doctrine limits the injured employee's recovery to worker's compensation benefits, precluding the pursuit of their tort claims against their employer.[26]

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22. Stelly v. Overhead Door Co., 646 So. 2d 905, 909 (La. 1994).

23. *Id.* at 909-10 (citing 2 Malone & Johnson, *supra* note 2, § 361).

24. 634 So. 2d 341 (La. 1994).

25. *Stelly*, 646 So. 2d at 910 (citing *Roberts*, 634 So. 2d at 341). It should be noted that the *Roberts* decision involved the question of whether the New Orleans Sewerage and Water Board was liable as a "third person" in a tort action by an employee of another political subdivision, the city of New Orleans. This is quite different from a case like *Stelly* in which the plaintiff is attempting to sue the employer itself under a dual capacity theory.

26. *Stelly*, 646 So. 2d at 910. It seems as if Judge Williams made an oversight which should be pointed out. It is not the dual capacity doctrine itself which limits the employee's recovery to

The supreme court, however, unlike the third circuit, stated that the doctrine was not all-encompassing. According to the court, the doctrine has been used exclusively in situations where liability is imposed on an employer by operation of law due to some status that the employer incurs aside from being an employer, i.e., as an owner of a defective building, or a manufacturer of a defective product. In language that could potentially have serious and devastating future ramifications, the court stated that "[t]he dual capacity doctrine, however, has never encompassed *contractually assumed* liability. It has consistently been limited to situations involving *liability imposed by law* due to a legal capacity or status in addition to that of employer."[27] Thus, the court chose *not* to reject application of the dual capacity theory to the facts of the case, because the employer assumed the liability of a third party through a contract.[28] This decision was made despite the lack of any support from existing case law.

UPS argued that Louisiana Revised Statutes 23:1032 precluded a tort action *regardless* of the nature of the liability, statutory or contractual. In support of this claim, UPS asserted that the 1989 amendment showed the intent of the Louisiana Legislature to preclude *any* suit by an employee against an employer based on the dual capacity doctrine.[29]

Because of this assertion, the supreme court then discussed the issue of whether this legislation was procedural or interpretive, and thus applicable prospectively and retroactively, or whether it was substantive, and applicable prospectively only, pursuant to Louisiana Civil Code article 6. Judge Williams concluded that the amendment to Louisiana Revised Statutes 23:1032 was substantive and thus to be applied prospectively only:

> [T]he legislation is not interpretative or procedural as it does not establish the meaning of LSA-R.S. 23:1032, nor does it prescribe methods for enforcing the substantive rights and obligations already set forth in the statute. Rather, the enactment is a substantive law. It destroys rights or causes of actions [sic] by specifically barring any tort action brought under a dual capacity theory.[30]

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worker's compensation benefits, but rather the *rejection* of the dual capacity doctrine. The application of the doctrine would instead give the employee a separate right of action against the employer. As will be shown below, the overwhelming majority of Louisiana courts have refused to apply the doctrine. The supreme court in *Stelly* recognizes this line of decisions, citing Deagracias v. Chandler, 551 So. 2d 25 (La. App. 4th Cir. 1989); White v. Naquin, 500 So. 2d 436 (La. App. 1st Cir. 1986); and Wright v. Moore, 380 So. 2d 172 (La. App. 1st Cir. 1979), *writ denied*, 382 So. 2d 164 (1980). However, instead of following this consistent line of Louisiana case law, the *Stelly* court chose to allow an employee to assert a cause of action against his employer.

27. *Stelly*, 646 So. 2d at 911 (citing Knoll, J., dissenting in the court of appeal decision, 631 So. 2d at 702 (emphasis in original)). Ramifications discussed *infra*.

28. *Stelly*, 646 So. 2d at 911.

29. *Id.*

30. *Id.* at 912.

Somewhat contradictorily, the court stated in footnote 8 that "Louisiana courts have consistently rejected the dual capacity doctrine. . . . Thus, there was no confusion which necessitated a clarification of the law."[31] If the law was already clear in its rejection of actions based on a dual capacity of an employer, then there obviously could be no causes of action left to destroy by the 1989 amendment. Thus, rather than being a substantive change, it seems the amendment was more of an interpretive one, since it merely described the law ("interpreted" it) as the court concedes it existed at the time. Nonetheless, the court concluded the amending legislation was substantive and thus inapplicable to the facts at hand, even while recognizing the decision of *Putzeys v. Schreiber*,[32] which specifically held the 1989 amendment to be interpretive and thus applicable retroactively.

Proceeding on the premise that the pre-amendment version of Louisiana Revised Statutes 23:1032 would govern the facts of this case, the court then recognized an employee's statutory right, under Louisiana Revised Statutes 23:1101, to pursue an action in tort against third parties who may have been negligent or strictly liable.[33] The court stated that Louisiana Revised Statutes 23:1101 "reaffirms the concept that our Worker's Compensation Act seeks to insure the tortfeasor is held responsible for the damages he or she causes, and is not permitted to escape liability merely because the victim may be entitled to assert a claim for compensation from the employer."[34]

One such party who may be responsible to an injured employee is the owner of a building alleged to be defective. This liability was recognized by the court, arising from Louisiana Civil Code articles 660, 2317, 2322, and 2695.[35] The court also stated an exception to this premises liability: "A lessee may contractually assume the owner's responsibilities for the condition of the leased premises, including liability for any injuries resulting from defects in the premises pursuant to LSA-R.S. 9:3231."[36] Because of the Louisiana Revised Statutes 9:3221 provision in UPS' lease with Ortego, the court held that "UPS did not intend to restrict or exempt itself from liability for injuries caused to its own employees."[37] The court stated that the lease agreement had the effect of law between its parties, and made no limitations as to potential claimants. That is, the agreement did not exclude situations in which the injured party was an

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31. *Id.* at n.8.

32. 576 So. 2d 563 (La. App. 4th Cir.), *writ denied*, 578 So. 2d 932 (1991).

33. *Stelly*, 646 So. 2d at 912-13.

34. *Id.* at 913 (citing 2 Malone & Johnson, *supra* note 2, § 367, at 169).

35. *Stelly*, 646 So. 2d at 913.

36. *Id.* (Error in original opinion. The correct statute is La. R.S. 9:3221 (1985), which states as follows: "The owner of premises leased under a contract whereby the lessee assumes responsibility for their condition is not liable for injury caused by any defect therein to the lessee or anyone on the premises who derives his right to be thereon from the lessee, unless the owner knew or should have known of the defect or had received notice thereof and failed to remedy it within a reasonable time.").

37. *Stelly*, 646 So. 2d at 913.

employee of the lessee.[38] Despite the tort immunity given employers under the Worker's Compensation Act, the court stated that "there is no statutory prohibition against a third person and an employer contractually agreeing that the employer will hold the third person harmless."[39] The court found "no existing policy considerations which prohibit UPS, the employer, from contractually waiving its statutory immunity from tort suits such as this one filed by the Stellys."[40]

If it had given UPS the immunity it requested, the court stated that it would have in effect allowed Ortego, the building owner, to benefit indirectly from the statutory immunity of Louisiana Revised Statutes 23:1032. That is, Ortego "would enjoy the rights and benefits of ownership and, at the same time, have the ability to contract away the [sic] all the legal obligations and duties owed as a result of that ownership, without anyone acquiring the full range of legal obligations and duties in return."[41] Because the obligations to persons injured as a result of a defective building must be given to someone, according to the court, the obvious party was UPS, who contractually assumed Ortego's liability. The court recognized but refused to distinguish the case of *Roberts v. Orpheum Corp.*,[42] which involved virtually identical facts yet a contrary result.

Chief Justice Calogero dissented, arguing that Louisiana Revised Statutes 23:1032 precludes any and all claims against an employer under Louisiana Civil Code articles 660, 2317, and 2322, brought by an employee. According to the chief justice, the fact that Louisiana Revised Statutes 23:1032 "removes Ortego from the list of third party defendants available to the plaintiff does not lead to the conclusion that UPS, as indemnitor, is now deprived of the protections of Louisiana's worker's compensation scheme."[43] Justice Hall also dissented without assigning reasons.

III. ANALYSIS

*A. Pre-*Stelly *Case Law on the Relevant Issues*

Although Louisiana is obviously not bound by the common law rule of *stare decisis*, our courts have traditionally used previous decisions as persuasive authority, and have even employed the doctrine of *jurisprudence constante*, which states that "when, by repeated decisions in a long line of cases, a rule of law has been accepted and applied by the courts, these adjudications assume the dignity of *jurisprudence constante*; and the rule of law upon which they are

38. *Id.*
39. *Id.*
40. *Id.* at 913-14.
41. *Id.* at 914.
42. 610 So. 2d 1097 (La. App. 4th Cir. 1992), *writ denied*, 616 So. 2d 682 (1993).
43. *Stelly*, 646 So. 2d at 915.

based is entitled to great weight in subsequent decisions."[44] The pre-*Stelly* case law may not have achieved such a lofty status, but should have at least risen to the level of being persuasive to the Louisiana Supreme Court on the relevant issues. However, it seems as if the court chose instead to disregard the constant line of decisions by the Louisiana courts.

1. Interpretation of 1989 Amendment to Louisiana Revised Statutes 23:1032

As mentioned above, the reasoning of the majority on the issue of the retroactivity of the 1989 amendment to Louisiana Revised Statutes 23:1032 seemed somewhat self-contradictory and thus questionable. The fourth circuit court of appeal had previously discussed the amendment in *Putzeys v. Schreiber*,[45] a case which the supreme court chose not to address in *Stelly*. The facts of this case are not of great importance, but the interpretation of Louisiana Revised Statutes 23:1032 given by the court directly conflicts with the reasoning in *Stelly*. The *Putzeys* court stated that the 1989 amendment to the statute was intended to overrule *Ducote*, which "allow[ed] recovery against employers acting in a dual capacity."[46] Now, said the court, "[t]he amendment makes it clear that an employee's cause of action against his employer is under the Louisiana Workers' [sic] Compensation Act except for an intentional tort."[47] "An employer may not be held liable for damages under any *contractual* or 'dual capacity' theory."[48] The supreme court in *Stelly* seems to ignore this holding by the *Putzeys* court.

Also not addressed in *Stelly* was the *Putzeys* court's interpretation of the retroactivity of the amendment:

> As a general rule legislative acts apply prospectively. La. C.C. Art. 8. However, legislation which is interpretative of existing laws is applied retroactively. The amended version of R.S. 23:1032 *clarifies the term "exclusive remedy"* as used in that statute to include all claims for damages including those arising under a "dual capacity" theory. *Since the amendment does not establish new rights or obligations but merely clarifies existing law, it is retroactive.*[49]

This reasoning is very persuasive. Since the pre-amendment jurisprudence clearly rejected the dual capacity doctrine in all but limited factual scenarios like *Ducote*, the amendment itself did no more than clarify that law.[50] Only a party

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44. Johnson v. St. Paul Mercury Ins. Co., 236 So. 2d 216, 218 (La. 1970).
45. 576 So. 2d 563 (La. App. 4th Cir.), *writ denied*, 578 So. 2d 932 (1991).
46. *Putzeys*, 576 So. 2d at 566.
47. *Id.*
48. *Id.* (emphasis added).
49. *Id.* (citations omitted) (emphasis added).
50. *See infra* part III.A.2.

who could show he had a vested right, under *Ducote*, to sue his employer in tort should be exempt from the amendment. Such vested rights would be rare indeed. Since the pre-amendment jurisprudence did *not* recognize the dual capacity in a *Stelly*-type situation of contractual assumption of liability, such a plaintiff would not have a vested cause of action taken away by the amendment. Writs were denied by the Louisiana Supreme Court in the *Putzeys* case.

The Louisiana Legislature itself may have noticed this conflict of interpretations, for in 1995 Acts Number 432, it stated: "The provisions of this Act (La. R.S. 23:1032) shall be applied prospectively only." If indeed this was directed at the 1989 amendment, then anyone with a *Ducote* cause of action before the 1990 effective date would retain such action because the *Ducote* cause of action was the *only* cause of action recognized under the dual capacity theory in Louisiana. However, all other causes of action based on the dual capacity of the employer-defendant should still be without merit. Because the pre-amendment jurisprudence was very consistent in its rejection of the doctrine, as discussed below, such an action would be dismissed regardless of the date of its inception. As to these, non-*Ducote* actions, the amendment seems certainly to be merely interpretive in nature.

Regardless of the interpretation given Louisiana Revised Statutes 23:1032, it is contended that certain language of the *Stelly* court may be read as *never* precluding a tort suit against an employer when there has been a lease executed with a Louisiana Revised Statutes 9:3221 provision. This contention is discussed below, and shows the seriousness of the potential ramifications of the *Stelly* decision.

2. Dual Capacity Doctrine

The dual capacity doctrine has seen some acceptance in other states, usually when the employer-defendant occupies a status in addition to and completely unrelated to that of employer.[51] Louisiana courts, however, have been very persistent in refusing to apply the doctrine here, and the decision of the court to apply the dual capacity theory in *Stelly* came as such a surprise to many.

In several instances, plaintiff-employees have attempted to circumvent the exclusivity rule of worker's compensation by using a products liability theory against their employers. These attempts have resulted in consistent failure. In *Braud v. Dixie Machine Welding & Metal Works, Inc.*,[52] the fifth circuit court of appeal, in part, affirmed a summary judgment in favor of an employer, its sole shareholder and its insurer in an action by an employee who fell forty feet when a board broke. Part of the plaintiff's claim on appeal was that it was "unresolved as a matter of law whether an employer who is the manufacturer or supplier of a defective product may be liable both in tort and for compensation

51. *See supra* note 2.

52. 423 So. 2d 1243 (La. App. 5th Cir. 1982), *writ denied*, 430 So. 2d 77 (1983).

to its employee injured by the product."[53] The court rejected the assertion, stating that "[t]here is no cause of action in 'products liability' against one's employer for injury for which the employer owes workmen's compensation."[54]

In *Tomasich v. United States Fidelity & Guaranty Co.*,[55] the plaintiff sued his employer and its insurer on the basis that the defendant was the manufacturer and designer of equipment that caused his injuries. The trial court sustained the defendants' exception of no cause of action, and the plaintiff appealed, claiming that "under the doctrine of 'dual capacity,' an employer, normally shielded from tort liability by worker's compensation legislation, may become liable in tort to his employee if the employer has a second capacity conferring additional, independent obligations beyond those of an employer."[56] The plaintiff cited as authority a number of non-Louisiana decisions, but the court affirmed the trial judge's ruling, relying on its decision in *Atchison v. Archer-Daniels-Midland Co.*[57] The *Atchison* decision rejected a products liability action against an employer where the employer owed worker's compensation. The *Tomasich* court ultimately found "no Louisiana authority following the 'dual capacity' doctrine cited by the plaintiff."[58]

Deagracias v. Chandler[59] involved a plaintiff-employee who was injured while operating a backhoe on the job. He alleged that the bucket on the backhoe, which was manufactured by the defendant, failed and caused his injuries. The plaintiff sued under a products liability theory, alleging that Louisiana Revised Statutes 23:1032 excluded only ordinary tort liability, and not products liability. The fourth circuit court of appeals refused to extend the dual capacity grant from *Ducote*, and instead relied on "a long line of jurisprudence which directly holds that products liability actions are not exempt from the exclusivity of the worker's compensation statute."[60] The court held that the defendant was entitled to summary judgment.

Similarly, in *Smith v. AMF Tuboscope, Inc.*,[61] the first circuit refused to fashion a products liability exception to the exclusivity rule. Worker's compensation was the exclusive remedy of the plaintiff, notwithstanding his allegation that his employer designed and manufactured the machine that caused his injury.

Finally, in *Dauphine v. F.W. Woolworth Co.*,[62] the plaintiff bought shoes from her employer's store, and was injured at work when a heel broke. The

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53. *Braud*, 423 So. 2d at 1246.

54. *Id.* (citing Atchison v. Archer-Daniels-Midland Co., 360 So. 2d 599, 600 (La. App. 4th Cir.), *writ denied*, 362 So. 2d 1389 (1978)).

55. 415 So. 2d 1002 (La. App. 4th Cir.), *writ denied*, 420 So. 2d 446 (1982).

56. *Tomasich*, 415 So. 2d at 1002.

57. 360 So. 2d 599 (La. App. 4th Cir.), *writ denied*, 362 So. 2d 1389 (1978).

58. *Tomasich*, 415 So. 2d at 1003.

59. 551 So. 2d 25 (La. App. 4th Cir. 1989).

60. *Id.* at 26.

61. 442 So. 2d 679 (La. App. 1st Cir. 1983).

62. 451 So. 2d 1333 (La. App. 1st Cir. 1984).

court affirmed the dismissal of her products liability action, despite the plaintiff's claim that the exclusivity rule of Louisiana Revised Statutes 23:1032 was not applicable because this involved a buyer/seller relationship. "This is a suit for damages based upon fault, whether it be titled products liability or ordinary tort. Accordingly, we see no justification for appellants' claim that La. R.S. 23:1032 should not be applied."[63]

Aside from suits based on products liability, the dual capacity doctrine has also been asserted and rejected in other theories of recovery. In *White v. Naquin*,[64] the plaintiff, a school bus driver for the Ascension Parish School Board, received worker's compensation benefits from the school board when she was injured by a student who tripped her at East Ascension High School. The plaintiff subsequently sued the father of the student in tort, as well as his homeowner's insurer, who filed a third party demand against the school board for indemnification of any amounts for which they were held liable. The court affirmed a grant of summary judgment in favor of the school board, in part by rejecting the defendants' claim that the school board was liable not in its capacity as the plaintiff's employer but as *custodian of the student*. The court refused to apply the dual capacity doctrine, finding it to have "consistently been rejected by the courts of this state."[65]

In *Wright v. Moore*,[66] the plaintiff was an employee of the state through the Department of Health and Human Resources who was injured in a car accident while in the course and scope of her employment. She received worker's compensation benefits, and subsequently sued the state through the Department of Transportation and Development, alleging that the two departments were "two separate and distinct bodies corporate and that as an employee of one she [was] free to sue the other in tort as a separate entity."[67] The court disagreed; instead, the plaintiff's employer was held to be the state of Louisiana. The court refused to recognize the state as occupying the dual capacity of employer and tortfeasor. Thus, the state was not a "third person" under the Worker's Compensation Act amenable to a suit in negligence.

Hebert v. Gulf States Utilities Co.[68] involved a plaintiff who was injured when an angle iron he was holding came in contact with a high voltage electrical line, causing him to be burned. One of the defendants was both the landowner and the general contractor who hired the plaintiff's immediate employer to erect a building; thus, the landowner was the plaintiff's statutory employer for purposes of worker's compensation.[69] The plaintiff asserted that although this defendant may have been immune from tort suit in his capacity as statutory

63. *Id.* at 1334.
64. 500 So. 2d 436 (La. App. 1st Cir. 1986).
65. *Id.* at 438.
66. 380 So. 2d 172 (La. App. 1st Cir. 1979), *writ denied*, 382 So. 2d 164 (1980).
67. *Wright*, 380 So. 2d at 173.
68. 369 So. 2d 1104 (La. App. 1st Cir.), *writ denied*, 369 So. 2d 466 (1979).
69. *Hebert*, 369 So. 2d at 1106.

employer, he was liable in tort in his capacity as landowner under the dual capacity doctrine. In rejecting the plaintiff's claim, the first circuit stated as follows:

> It is apparent that if the landowner in the instant case were another person, a third person who violated legal obligations to the employee, that the employee could sue the third person in tort. Is the landowner to be held liable in tort for breach of legal obligations when he is also immune from tort actions because he is also the statutory employer of the employee? We find he cannot. We have reviewed extensively the dual capacity doctrine and find it is inapplicable. Even if the doctrine were viable in Louisiana, the allegations of fault against the landowner are really failure to furnish employee a safe place to work.
>
> We believe the adoption of the dual capacity doctrine in Louisiana should be made by the Legislature and not the Judiciary. We find the Legislature has already expressed strong policy considerations in formulating the workmen's compensation laws. We believe an abrogation of these policy considerations is best left to the legislative branch of government.[70]

As is obvious from the above discussion of Louisiana law, the only decision to explicitly accept the dual capacity theory was *Ducote v. Albert*,[71] and the Louisiana Supreme Court recently declared this case to have been legislatively overruled by the 1989 amendment to Louisiana Revised Statutes 23:1032.[72]

In *Wright v. State*,[73] the Louisiana Supreme Court discussed the viability of the dual capacity doctrine post-*Ducote*. The plaintiff was employed by the state, doing business as Medical Center of Louisiana at New Orleans. He developed a hernia while restraining a patient in the course of his duties as security guard and received worker's compensation benefits. Subsequently one of the physicians at his place of employment performed surgery to repair the condition. The surgery resulted in complications, which required two additional operations at a different facility. The plaintiff sued the Medical Center and the surgeons in medical malpractice. The defendants moved for summary judgment on the ground that the plaintiff's exclusive remedy, as an employee of the Medical Center, was in worker's compensation.

The supreme court discussed the *Ducote* decision, and noted that it had been legislatively overruled by the amendment to Louisiana Revised Statutes 23:1032 in 1989. Thus, if this case did involve an allegation of dual capacity, the plaintiff would have no cause of action. The court found, however, that this case did *not* present an issue of dual capacity in its true sense. A dual capacity

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70. *Id.* at 1107.
71. 521 So. 2d 399 (La. 1988). *See supra* notes 13-16 and accompanying text.
72. *See* Wright v. State, 639 So. 2d 258 (La. 1994).
73. 639 So. 2d 258 (La. 1994).

situation is presented where "an employer's second capacity is inextricably intertwined with his capacity as employer."[74] The court cited several "dual capacity cases where tort liability was *correctly prohibited*," involving "employers who occupied *dual roles with dual responsibilities* toward the employee at the time of the work-related accident."[75] Among these "correctly decided" cases was *Roberts v. Orpheum Corp.*,[76] which involved facts virtually identical to those in *Stelly*.

The injury in the *Wright* case, however, was not work-related, but was "a completely separate transaction."[77] The plaintiff was a patient at the time of the alleged negligence, not an employee. He was not required to be treated at the Medical Center, and the Medical Center owed "no employer-related obligations toward the plaintiff/patient."[78] Accordingly, the plaintiff was given an action in tort separate and apart from any benefits received under worker's compensation.

3. *Recent Cases With Facts Similar to* Stelly

Perhaps it is arguable that the facts in *Stelly* should not even trigger the dual capacity doctrine. The court stated that the doctrine "has never encompassed contractually assumed liability."[79] Because *Stelly* did involve contractually assumed liability, perhaps what the court was trying to say was that liability was based on a totally separate theory, such as indemnification, and that the dual capacity doctrine was not even a determinative factor. To accept this would mean that all the decisions discussed in Section III.A.2, above, that rejected the doctrine, would be irrelevant. Even accepting this proposition, the *Stelly* decision is *still* contrary to two recent cases involving similar facts and which did not turn on dual capacity.

The third circuit in 1994 decided the case of *Wallace v. Helmer Directional Drilling, Inc.*,[80] which involved the negligence and strict liability claims of an employee of a lessee against the non-employer owner-lessor of the premises where the injury occurred. The lease agreement included a Louisiana Revised Statutes 9:3221 clause. The court first held that the lower court's award of summary judgment in favor of the owner-lessor was erroneous because there was a material question of fact as to whether the owner-lessor "knew or should have known" of the alleged defect which would nullify the transfer of liability to the lessee under the Louisiana Revised Statutes 9:3221 provision.

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74. *Id.* at 260.

75. *Id.* (emphasis added).

76. 610 So. 2d 1097 (La. App. 4th Cir. 1992), *writ denied*, 616 So. 2d 682 (1993). *See infra* notes 85-89 and accompanying text for a complete discussion.

77. *Wright*, 639 So. 2d at 260.

78. *Id.*

79. Stelly v. Overhead Door Co., 646 So. 2d 905, 911 (La. 1994).

80. 641 So. 2d 624 (La. App. 3d Cir. 1994).

More importantly, the court also considered the issue of whether application of Louisiana Revised Statutes 9:3221 to this case would be *contra bonos mores*. That is, the plaintiff alleged that the lessor was improperly benefiting from Louisiana Revised Statutes 23:1032 by delegating to an immune employer its strict liability through Louisiana Revised Statutes 9:3221. "[B]ecause the worker's compensation laws provide the employer with immunity from tort suits filed by its employees, the employee is left without a remedy against the premises owner who may be truly at fault."[81] The court chose not to allow "such 'back door' tactics to defeat tort liability . . . ."[82] Noting that this situation was probably not envisioned by the legislature when Louisiana Revised Statutes 9:3221 was enacted in 1932, the court looked to the "balance between the interests of labor and those of industry,"[83] and concluded that to deny the plaintiff any recovery would tip the scales too far in favor of industry. The court held that

> when an employer deprives the employee of his or her strict liability action against the non-employer owner by use of La. R.S. 9:3221, the owner-lessor may not simultaneously shield itself with the immunity enjoyed by the employer-lessee. It remains liable to the injured employee for strict liability claims. The injured employee retains an independent cause of action against an owner-lessor who has attempted to transfer its delictual responsibility for premises defects to an employer-lessee.[84]

Thus, the *Wallace* court refused to allow a *non-employer lessor* to enjoy the tort immunity of the Worker's Compensation Act. The *Stelly* court, on the other hand, placed liability on the *employer-lessee*, sacrificing the purpose of the Worker's Compensation Act to the detriment of all employers who make the economic decision to rent rather than buy. Considering the underlying policy of the Worker's Compensation Act, to effectuate the legislatively envisioned compromise between industry and labor, the *Wallace* approach seems more correct.

Roberts v. Orpheum Corp.[85] conflicts with *Stelly* to an even greater degree. This fourth circuit decision is in direct accord with that of the third circuit court of appeal in *Stelly*,[86] but was apparently not considered by the supreme court in its ruling. In *Roberts*, the plaintiff was a member of the stage crew at the Orpheum Theater who was severely injured when he accidentally stepped into an empty elevator shaft. The building was owned by the Orpheum Corporation

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81. *Id.* at 629.
82. *Id.*
83. *Id.* at 630.
84. *Id.*
85. 610 So. 2d 1097 (La. App. 4th Cir. 1992), *writ denied*, 616 So. 2d 682 (1993).
86. 631 So. 2d 698 (La. App. 3d Cir.), *rev'd*, 646 So. 2d 905 (1994).

(Orpheum) and leased to the New Orleans Philharmonic Symphony Society (Symphony), the plaintiff's employer. Both parties were among the defendants in the plaintiff's tort suit, even though the plaintiff received worker's compensation benefits from Symphony.

The lease agreement between the Orpheum and Symphony included a Louisiana Revised Statutes 9:3221 provision in which Symphony "accepted the Leased Premises in their present condition, and assumed full responsibility for the Leased Premises, including, without limitation, all liability assumable by a tenant" under said statute.[87] Regarding the liability of the Orpheum (the non-employer lessor-owner), the court reversed a summary judgment in its favor. Although Orpheum proved the existence of the Louisiana Revised Statutes 9:3221 agreement, and that the injury occurred to someone on the premises with the permission of the lessee, it failed to establish that, as a matter of law, it did not know and should not have known of the defect in the premises. The matter was remanded to the trial court for this factual determination.

As for the summary judgment rendered in favor of Symphony (lessee-employer), the court *affirmed* the trial court. The plaintiff insisted "that his claim against the Symphony [was] not based upon the employer's direct commission of a tort, but rather its *contractual assumption of the liability of the owner of the building.*"[88] That is, the plaintiff sought an application by analogy of the dual capacity doctrine as it was used in *Ducote*. The court distinguished *Ducote*, however, with the following reasoning:

> The risk of harm in the workplace was precisely the same whether the employer was the owner or the lessee of the premises. Furthermore, this employer specifically had control over the cause of injury. And, had the Symphony not transferred ownership of the premises to the Orpheum Corporation less than four (4) months earlier, a claim of strict liability would not have been available to Roberts against the property owner, his employer.[89]

Finally, the court stated that since the lease was executed prior to the injury, the plaintiff had no property right of which he could be divested by the Louisiana Revised Statutes 9:3221 clause.

This decision provides strong reasoning in favor of releasing the employer-lessee from liability beyond worker's compensation, and was not sufficiently addressed by the majority in *Stelly*. Since the risk of injury was the same as to Roberts and Stelly regardless of the status of their respective employers, the "compromise" policy of the Worker's Compensation Act could easily have been maintained, as in the other rejections of the dual capacity doctrine by Louisiana courts. Unlike *Wallace*, however, the *Roberts* decision implies that the owner-

87. *Roberts*, 610 So. 2d at 1098-99.
88. *Id.* at 1101 (emphasis added).
89. *Id.*

lessor may also be shielded from liability, if on remand it proved that it did not know or should not have known of the alleged defect.

The *Wallace* court refused to eliminate the cause of action against the premises owner altogether. By perserving the action against the lessor, the court in *Roberts* and Chief Justice Calogero in *Stelly* had no problem with removing the owner-lessor from the list of potential defendants available to an injured employee.

The holdings and the rules of apparent general application from the decisions discussed above stand out as being directly contrary to the result in *Stelly*. Were these principles ignored? A few decisions in particular merit additional comment.

B. Rules from Pre-Stelly Case Law—Not Addressed in Stelly

The injury in *Hebert v. Gulf States Utilities Co.*[90] was alleged to have arisen out of the defendant-employer's ownership of the premises. Asserting the dual capacity of the defendant as landowner and employer, the plaintiff essentially based his claim on a strict liability theory. In refusing to apply the dual capacity doctrine, the court stated quite matter-of-factly that "the allegations of fault against the landowner are really *failure to furnish employee a safe place to work.*"[91] Similarly, the Stellys essentially alleged the failure of UPS to provide a safe workplace. UPS was sued as a landowner for having assumed Ortego's liability, and the allegations of strict liability were really no different than those in *Hebert*. It is almost as if UPS stepped into the shoes of the landowner Ortego, and became the landowner for purposes of tort liability. Not furnishing Stelly a safe place to work should have given rise to no more liability than worker's compensation benefits, as in *Hebert*.[92]

With this idea in mind, focus should now be placed on the result in *Wallace v. Helmer Directional Drilling, Inc.*[93] *Wallace* upheld the exclusivity rule—the rule that the employee has no recourse against the employer for negligence other than worker's compensation—even despite the existence of a Louisiana Revised Statutes 9:3221 provision in the defendant-employer's lease. Recognizing the importance of the legislative compromise underlying the Worker's Compensation Act, this court, unlike *Stelly*, shifted liability to the owner-lessor despite the indemnity agreement. By adopting this approach, the interests of the employers in the exclusivity rule could be upheld, as in *Hebert*, yet any perceived unfairness of depriving employees of tort defendants would be eliminated by shifting the cause of action back to the owner-lessor.

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90. 369 So. 2d 1104 (La. App. 1st Cir.), *writ denied*, 369 So. 2d 466 (1979).

91. *Hebert*, 369 So. 2d at 1107 (emphasis added).

92. Writs were denied by the Louisiana Supreme Court in Hebert v. Gulf State Utilities Co., 369 So. 2d 466 (La. 1979).

93. 641 So. 2d 624 (La. App. 3d Cir. 1994).

However, there is still the question of the unfairness to the owner-lessor, who affirmatively contracted for this indemnity and had an expectation of shifting his liability. This problem could be overcome by the owner-lessors adding a supplemental premium on top of the amount of the base rent, which could be used to directly purchase additional insurance on the property. Admittedly, this would essentially accomplish the same thing as would an acceptance of *Stelly* and requiring the employers to purchase the additional insurance. But, this way the stability of the exclusivity rule would be preserved, and the fundamental principles of worker's compensation would remain intact. Such an approach may even result eventually in courts holding Louisiana Revised Statutes 9:3221 clauses to be null ab initio when the lessee is an employer, and thus read out of the contracts. Lessors would be very likely to increase their rent and purchase insurance when faced with the possibility of having liability that can no longer be shifted to the lessee.

Another principle overlooked by the *Stelly* court was recognized by the supreme court in *Wright v. State.*[94] The plaintiff there, a hospital security guard, *was* given a cause of action against his employer, because the alleged medial malpractice of its surgeons was *completely unrelated* to the plaintiff's employment. Indeed, the negligence arose out of "a completely separate transaction."[95] However, in *Stelly*, the accident was *directly* related to the plaintiff's employment. Instead of adhering to the principle that the employee has *given up* all claims for all accidents occurring in the course and scope of employment, as did the *Wallace* and *Roberts* courts,[96] the court in *Stelly* belied years of worker's compensation interpretation.

Finally, the *Stelly* court completely disregarded *Roberts v. Orpheum Corp.*;[97] it mentioned the case merely in a *"but see"* manner without discussing its merits to any extent.[98] This was a case decided just two years earlier in which writs were also denied, based on very similar facts. The risk of injury due to premises defects was the same in *Roberts* as well as in *Stelly*, regardless of whether the employer was an owner or lessee of the building. This distinction, according to the *Roberts* court, did not rise to the level of creating an exception to the exclusivity rule.[99] Arguably, *Stelly* could essentially result in an unfair benefit given to employees whose employers happen to lease their places of business. These plaintiffs would not otherwise have had causes of action against their employers, and the others who do not enjoy this luxury would be deprived of this right.

Unlike *Wallace*, the *Roberts* court suggested that owner-lessors may also be relieved of liability if they did not know or should not have known of the alleged

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94. 639 So. 2d 258 (La. 1994).

95. *Id.* at 260.

96. *Wallace*, 641 So. 2d at 629-30; Roberts v. Orpheum Corp., 610 So. 2d 1097, 1100-01 (La. App. 4th Cir. 1992), *writ denied*, 616 So. 2d 682 (1993).

97. *Roberts*, 610 So. 2d at 1097.

98. *Stelly*, 646 So. 2d at 914.

99. *Roberts*, 610 So. 2d at 1101.

defect. The result would be an outright denial of two potential tort defendants. Now although this may be a bit more extreme than the suggested approach under the *Wallace* rationale,[100] it is still an acceptable alternative. It should not even be seen as unfair, because what must be remembered is that an employee *gives up* his rights in tort in exchange for an absolute recovery for all workplace injuries. This is a valuable consideration; employees receive some compensation for their injuries, even if there is absolutely no fault on the part of the employer or a co-employee. Losing another tort defendant, the lessor, is just another part of the price that employees would have to pay for the luxury of worker's compensation.

It should also be noted that such an approach, under Louisiana law, would unlikely violate the constitutional rights of employees. First, our courts have consistently upheld the constitutionality of Louisiana Revised Statutes 23:1032.[101] Also, our supreme court has stated the following:

> Where an injury has occurred for which the injured party has a cause of action, such cause of action is a vested property right which is protected by the guarantee of due process. However, where the injury has not yet occurred and the cause of action has not yet vested, the guarantee of due process does not forbid the creation of new causes of action *or the abolition of old ones to attain permissible legislative objectives.* Our jurisprudence has recognized the validity of legislative regulation of causes of action, including replacement and even abolition, that one person may have against another for personal injuries.[102]

This language supports the approaches suggested either under *Wallace* or *Roberts*. Causes of action can be abolished in advance, and there is no reason why those against employers and/or lessors should not be included.

C. Practical Problems Suggested by Stelly

The everyday concerns created by *Stelly* are obvious. Many employers, either because of necessity or economic benefit, choose to lease their buildings. Faced with yet another form of liability, many businesses could be forced to shut down

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100. That is, to deny lessors the right to shield themselves from liability, by preserving an employee's cause of action against them.

101. Redding v. Essex Crane Rental Corp. of Ala., 500 So. 2d 880, 885 (La. App. 1st Cir. 1986), *writ denied*, 501 So. 2d 774 (1987) ("Plaintiff's argument that LSA-R.S. 23:1032 violates due process is also without merit. Any right which they might otherwise have had was circumscribed by the legislature by means of the above provision long before their cause of action would have arisen by the death of their son. Thus, they have not been deprived of a vested property right." 500 So. 2d at 885) (citing Burnmaster v. Gravity Drainage Dist. No. 2 of the Parish of St. Charles, 366 So. 2d 1381 (La. 1978)). *See also* Lewis v. Exxon Corp., 417 So. 2d 1292 (La. App. 1st Cir. 1982), *rev'd on other grounds*, 441 So. 2d 192 (1983); Branch v. Aetna Casualty & Surety Co., 370 So. 2d 1270 (La. App. 3d Cir.), *writ denied*, 374 So. 2d 660 (1979); and Perez v. Continental Casualty Co., 367 So. 2d 1284 (La. App. 3d Cir.), *writ denied*, 369 So. 2d 157 (1979).

102. *Burnmaster*, 366 So. 2d at 1387 (citations omitted) (emphasis added).

because they cannot afford to purchase or build their own premises. Others who lease because of economic advantages will be forced either to purchase their own buildings or build, and potentially operate at unprofitable or less profitable levels. Businesses may even be forced to pass off the effects of this liability with higher prices to the consumers of their goods or services.

Moreover, in our ever-increasingly litigious society, the judicial system could very well experience an abundance of new lawsuits filed. This would further clog already overburdened dockets with cases that would otherwise be completed in the OWCA, without resort to the courts. This too is an undesirable consequence of the result in *Stelly*.

If *Stelly* is upheld, and its feared effects start to materialize, yet another problem that will surface will undoubtedly be insurance coverage. Businesses who, despite *Stelly,* continue to lease their premises, most likely with a Louisiana Revised Statutes 9:3221 provision, will be exposed to a much greater degree of risk than before. They will obviously want to minimize this risk through insurance. However, most will find that their comprehensive general liability policies have exclusions for bodily injuries sustained by employees in the course and scope of employment. This will force employers to obtain additional insurance. Even those policies that do not have these course and scope of employment exclusions may still exclude injuries for which the insured has contractually assumed liability. Businesses will be compelled to purchase such coverage, which essentially would be insuring them against strict liability. Obviously this will not come cheaply. Because of this increased risk of a greater form of liability, insurers will undoubtedly increase the premiums on such coverage, if it can even be found.

Finally, another problem with *Stelly* that is easily foreseeable is that its reasoning could also apply to any other type of indemnity agreement signed by the employer, not just those in building leases. That is, if the key element of the court's decision was the actual assumption of liability through contract, then what is to stop a court from allowing a tort suit against an employer by an employee based on a different kind of indemnity provision, even if this too would violate the exclusivity rule? For example, many businesses, especially those in industrial fields, enter into service contracts which include indemnity agreements protecting the vendor or service provider. If an employee is injured by the negligence of this vendor or service provider, even though he was clearly within the course and scope of his employment, he may have a *Stelly* cause of action. It is unlikely that the court envisioned such a widespread effect this decision could have. If the case is not legislatively overruled, it should at least be limited to its facts—situations involving the Louisiana Revised Statutes 9:3221 provisions in building leases.

D. Suggestions to Correct the Situation

The *Stelly* court refused to apply the 1989 amendment to Louisiana Revised Statutes 23:1032 retroactively. Perhaps the next time the court is presented with a *Stelly*-type issue on a post-1990 occurrence, it will hold that the wording of the amendment—"*any* dual capacity theory"—takes care of the situation by denying

a cause of action on contractually assumed liability. This holding would be ideal and would prevent the problems discussed above.[103]

However, due to the confusion created by reading the decision itself, such a result may not occur. In a sense, the retroactive/prospective application of the amendment seems irrelevant, because the court stated that "[t]he dual capacity doctrine . . . *has never encompassed contractually assumed liability.*"[104] This language suggests that contractually assumed liability is a whole different ballgame, completely distinct from dual capacity. If so, then *Stelly* causes of action will subsist beyond 1990 factual scenarios. In this case, legislative intervention would be necessary.

Such a situation occurred very recently when the Louisiana Legislature overturned a socially undesirable outcome given by the Louisiana Supreme Court. In *Billiot v. B.P. Oil Co.*,[105] the supreme court concluded that "the remedy exclusion rule of the worker's compensation act does not bar an employee from bringing suit against his or her employer for exemplary damages under Article 2315.3."[106] Almost immediately, the legislature responded with Acts 1995, No. 432, § 1, which amended Louisiana Revised Statutes 23:1032(A)(1)(a) to overrule *Billiot*. The provision now reads, in pertinent part, that worker's compensation benefits "shall be exclusive of all other rights, remedies, and claims for damages, including but not limited to *punitive or exemplary damages* . . ."[107]

Since the result in *Stelly* is likewise contrary to the legislative compromise of worker's compensation, the situation is appropriate for yet another amendment to Louisiana Revised Statutes 23:1032. After the *Billiot* decision, the legislature was obviously concerned about the extent of liability that could be imposed on employers. It is contended that the *Stelly* ramifications could be as severe or even worse than those of *Billiot*. *Stelly* would certainly produce more litigation

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103. Note that at least one decision post-*Stelly* has suggested that the cause of action allowed in *Stelly* would not subsist in cases where the accident occurred after January 1, 1990. In Harris v. Housing Authority of Mansfield, 665 So. 2d 712, 714 (La. App. 2d Cir. 1995), the court stated:

> *Prior to its amendment in 1989*, LSA-R.S. 23:1032 did not preclude an employee (or third-party) from maintaining an unintentional tort action against the employer where the employer had contractually assumed the liability of the third party. The incident in the instant case took place prior to Jan. 1, 1990, the effective date of the non-retroactive amendment; therefore, the pre-amendment version of LSA-R.S. 23:1032 governs this action.

Id. *Stelly* was distinguished, however, because the contractual language did not contain an express waiver of tort immunity or an assumption of liability. Also, the court in LeBlanc v. Continental Grain Co., Inc., 672 So. 2d 951 (La. App. 5th Cir. 1996), distinguished *Stelly* because the facts took place subsequent to the effective date of the amendment.

104. Stelly v. Overhead Door Co., 646 So. 2d 905, 911 (La. 1994) (emphasis added).

105. 645 So. 2d 604 (La. 1994).

106. *Id.* at 611. Louisiana Civil Code article 2315.3 allows the recovery of exemplary damages for any person injured by a defendant's wanton or reckless disregard for public safety in the storage, handling, or transportation of hazardous or toxic substances.

107. La. R.S. 23:1032 (Supp. 1995) (emphasis added).

and liability in terms of quantity of lawsuits, even though the punitive damages claims after *Billiot* may have resulted in higher amounts of awards. Employers can only hope that a similar amendment is passed to overrule *Stelly*.

As mentioned above, the *Stelly* decision could be similarly corrected by legislative intervention. Louisiana Revised Statutes 23:1032 could be further amended, preferably with expressly stated retroactivity, to exclude claims against employers "under any dual capacity theory or doctrine, or under any theory of contractually assumed liability." A reversal of *Billiot* was deemed warranted, so perhaps a corresponding reversal of *Stelly*, involving the same exclusivity rule, will also transpire.

IV. CONCLUSION

From the standpoint of employers and society in general, the *Stelly* opinion may prove disastrous. Several otherwise unnecessary steps may be required in order for employers to suppress this new source of liability, such as acquiring additional insurance, purchasing their own premises, or increasing the prices of their goods or services. Insurance rates in general may also be increased. Considering that the legislature originally intended employees to give up their tort rights against their employers, these results could have been avoided. One hopes, however, the effects of *Stelly* will be limited to pre-1990 occurrences. Otherwise, legislative intervention will be required to protect the interests of employers.

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