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# 1998 Survey of Rhode Island Law: Cases: Workers' Compensation Law

Roger I. Roots

*Roger Williams University School of Law*

Kevin B. Hylton

*Roger Williams University School of Law*

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**Workers' Compensation/Indemnification.** *Ferguson v. Marshall Contractors, Inc.*, 707 A.2d 660 (R.I. 1998). The exclusive-remedy provision of Rhode Island's Workers' Compensation Act bars suit for work-related injuries not only by an injured employee against his employer, but also by a third party against the employer of an injured employee who receives workers' compensation benefits. Only an express indemnification agreement between an employer and a third party can make the employer liable to the third party for injuries suffered by its workers'-compensation-drawing employee.

In *Ferguson v. Marshall Contractors*,<sup>1</sup> the Rhode Island Supreme Court found that the Workers' Compensation Act grants implicit immunity from indemnity actions from third parties, as well as from direct tort actions from employees.

#### FACTS AND TRAVEL

Daniel Ferguson (Ferguson), was employed by Ajax Construction Company (Ajax).<sup>2</sup> He worked for Ajax at a construction project in Dartmouth, Massachusetts, at which Ajax had subcontracted to provide steel construction services to Bennington Iron Works (Bennington) on a facility for the Titleist Golf Division of the Acushnet Company.<sup>3</sup> Bennington in turn was a sub-contractor of Marshall Contractors, Inc. (Marshall),<sup>4</sup> the general contractor of the project.<sup>5</sup>

During construction of the Titleist facility, Ferguson fell through an opening on a mezzanine deck and suffered severe bodily injuries.<sup>6</sup> He began collecting workers' compensation benefits through the policy of his employer.<sup>7</sup> His attorney also filed suit alleging negligence on the part of both the general contractor, Mar-

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1. 707 A.2d 660 (R.I. 1998).

2. *See id.* at 661.

3. *See id.*

4. Marshall did business as Algonquin Builders and the latter name was used recurrently in the Rhode Island Supreme Court's first opinion in the case. *See Ferguson v. Marshall Contractors, Inc.*, 644 A.2d 310 (R.I. 1994). By the time of the more recent decision, however, the court used the name Marshall Contractors almost exclusively, so this survey piece will utilize the same designation.

5. *See Ferguson*, 707 A.2d at 661.

6. *See Ferguson*, 644 A.2d at 310.

7. *See Ferguson*, 707 A.2d at 661.

shall, and the steel contractor, Bennington.<sup>8</sup> Marshall filed a cross-claim against Bennington for indemnity and contribution.<sup>9</sup>

At trial Bennington moved for, and was granted, a directed verdict after the presentation of Ferguson's evidence.<sup>10</sup> This left only Marshall as a defendant at the end of trial; and the jury found for the plaintiff, returning a verdict against Marshall in excess of \$1 million.<sup>11</sup>

The case first came before the Rhode Island Supreme Court when Marshall appealed the denial of its motion for new trial and the granting of a directed verdict in favor of Bennington.<sup>12</sup> After losing this appeal, Marshall filed a third-party complaint against Ajax on remand, seeking indemnification.<sup>13</sup>

Ajax moved for summary judgment<sup>14</sup> and a hearing justice granted Ajax's motion pursuant to Rule 54(b) of the Superior Court Rules of Civil Procedure.<sup>15</sup> The case then reached the Rhode Island Supreme Court again pursuant to Marshall's appeal of the judgment in favor of Ajax.<sup>16</sup>

#### ANALYSIS AND HOLDING

The outcome in *Ferguson* turned on both the exclusive-remedy provision of Rhode Island's workers' compensation statute and the principles of contract law. Rhode Island General Laws section 28-29-20 provides that a direct employer of an injured employee who collects workers' compensation benefits is immune from liability

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8. *See id.*

9. *See id.*

10. *See Ferguson*, 644 A.2d at 310 (finding that the granting of a directed verdict in favor of Bennington was justified because Ferguson presented no evidence that parties other than Marshall could have been responsible for conditions at the work site).

11. *See Ferguson*, 707 A.2d at 661.

12. *See id.* The appeal was denied in *Ferguson v. Marshall Contractors, Inc.*, 644 A.2d 310 (R.I. 1994). The Rhode Island Supreme Court rejected both of Marshall's claims, upholding the denial of the directed verdict both because no evidence that Bennington was responsible for the condition of the job-site was presented at trial and because Marshall had not objected to Bennington's motion at trial, and finding that the trial judge's denial of a new trial was justified on a review of the evidence. *See id.*

13. *See id.*

14. *See id.*

15. *See id.*

16. *See id.*

beyond that which is insured for through the program.<sup>17</sup> In 1992, in *Fish v. Burns Brothers Donut Shop, Inc.*,<sup>18</sup> the supreme court concluded that this exclusive-remedy provision generally bars suit for indemnification against any employer whose injured employee has drawn workers' compensation benefits. The drawing of workers' compensation thus acts as *res judicata* in regard to the issue of the employer's liability for injuries suffered by a workers'-compensation-drawing employee.

The Rhode Island Workers' Compensation Act establishes a statutory scheme whereby an employee is "provided with swift, though limited, relief for all injuries suffered on the job," in lieu of all other rights and remedies she might have.<sup>19</sup> The legislation thus serves the ends of social policy; Rhode Islanders avoid the demands of supporting public charges whom have been unsuccessful in tort claims against their employers for potentially more remunerative damages and the courts benefit from relief from the burden of proving liability.

Marshall justified its indemnification action by claiming it fell under the "contract" exception to the exclusive-remedy provision of Rhode Island's Workers' Compensation Act laid out by the Rhode Island Supreme Court in *Cosentino v. A.F. Lusi Construction Co.*<sup>20</sup> The *Cosentino* court determined that the state legislature's enactment of a workers' compensation program did not abolish the right of parties to contract around the statute.<sup>21</sup>

17. Section 28-29-20 reads in part:

The right to compensation for an injury under chapters 29-38 of this title, and the remedy therefor granted by those chapters, shall be in lieu of all rights and remedies as to that injury now existing, either at common law or otherwise against an employer, or its directors, officers, agents, or employees.

18. R.I. Gen. Laws § 28-29-20 (1956) (1994 Reenactment). 617 A.2d 874 (R.I. 1992).

19. *Iacampo v. Hasbro, Inc.*, 929 F. Supp. 562, 582 (D.R.I. 1996).

20. 485 A.2d 105, 108 (R.I. 1984) (finding that a general contractor *could* obtain indemnity from a subcontractor where an arms-length contract clause expressly provided, notwithstanding the provisions of the Workers' Compensation Act).

21. The court in *Cosentino* did not base the parties' right to contract around the workers' compensation statute on the constitution; instead it said that ". . . we perceive no reason why the expressed intent of the parties in a contract calling for [indemnification] should not be effectuated." *Id.* at 107. The court also distinguished an expressed contractual indemnification agreement by saying it is "not an action based upon the employee's injury but rather is an action for reimbursement based upon an expressed contractual obligation between the employer and a

Marshall relied on language in a written purchase order executed between Bennington and Ajax which provided for indemnification for Bennington or the owner of the property where the work was to be performed.<sup>22</sup> Marshall contended that it was a third-party beneficiary of the Bennington-Ajax order because it was the agent of the owner of the property (Titleist).<sup>23</sup> The court found that Marshall's claim was not sufficiently supported by contractual or other documents which indicated Titleist had conferred agency status on Marshall such that its indemnification rights vis-a-vis Ajax were conferred on Marshall.<sup>24</sup>

Marshall also pointed to its own contract with Bennington, which provided that Bennington would "indemnify and hold harmless the Contractor [Marshall] . . . from and against any and all claims, losses, damages, liabilities and the like" formed an um-

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third-party plaintiff. . . independent of any statutory duty the employer may owe an employee." *Id.* at 108. Some courts in other states have held that constitutional considerations serve to bar an outright prohibition of contractual indemnification agreements. *See, e.g.,* Miami Int'l Merchandise Mart, Inc. v. Gene Somers & Assoc., Inc., 506 So.2d 54 (Fla. Dist. Ct. App. 1987) (finding that Florida's exclusive remedy provision is unconstitutional to the extent it operates to immunize an employer from a contractual liability); *Carlson v. Smogard*, 215 N.W.2d 615 (Minn. 1974) (finding that a statutory preclusion of indemnity violates due process rights under the federal constitution and rights under a state constitutional guarantee of a remedy for injuries or wrongs).

Interestingly, it seems that the workers' compensation program is itself a contract in which the employee waives his right to maintain a common law action for his injuries against his employer, and the employer in turn is contractually deprived of certain common law defenses previously available to him. *See* *Mustapha v. Liberty Mut. Ins. Co.*, 268 F. Supp. 890 (D.R.I. 1967). Indeed, Rhode Island's workers' compensation program is not mandatory for employees but is deemed only to bind an employee to its provisions "if he or she shall not have given his or her employer at the time of his or her contract of hire notice in writing that he or she claims that right [of action at common law to recover damages for personal injuries] and within ten (10) days thereafter has filed a copy thereof with the director [of the program]." R.I. Gen. Laws § 28-29-17 (1956) (1994 Reenactment).

22. *See* *Ferguson*, 707 A.2d 660, 661-62 (R.I. 1998). Marshall also contended that the Bennington-Ajax agreement made the resolution of the case contingent on Vermont law because the agreement provided that "[t]he validity, interpretation, and performance of this order shall be governed by the law of the State in which this order is issued by Buyer." *Id.* at 663. Notwithstanding that the Bennington-Ajax purchase order was issued in Vermont, the court found that the choice-of-law provision was inapplicable because Marshall was a nonparty to the agreement and the indemnification issue was "not answered by the terms of that order or by any other agreement [between Marshall and Ajax]." *Id.*

23. *See id.* at 662.

24. *See id.* at 662-63.

rella agreement whose terms were incorporated in the later Bennington-Ajax agreement.<sup>25</sup> The court found that "no indemnification contract or other such agreement exists between Ajax and Marshall,"<sup>26</sup> and that even the incorporation of terms in the Ajax-Bennington purchase order could not serve to convert Ajax into an indemnitor of Marshall.<sup>27</sup>

#### CONCLUSION

In *Ferguson*, the Rhode Island Supreme Court determined that when an employee's direct employer has covered itself through workers' compensation, that employer is not liable through common law tort actions in the absence of expressed contractual intent to be bound. Such expressed intent must comply with fundamental rules of contract law, with an immunity-waiving employer clearly expressing its intent to be bound to indemnification to third parties.

Roger I. Roots

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25. *Id.* at 662.

26. *Id.*

27. *See id.*

**Workers' Compensation.** *Rison v. Air Filter Systems*, 707 A.2d 675 (R.I. 1998). If an employee recovers third party tort damages through settlement, and subsequently is awarded a specific benefits award under section 28-33-19, these specific benefits are subject to the section 28-35-58 suspension provision.

In *Rison v. Air Filter Systems*,<sup>1</sup> the Rhode Island Supreme Court determined that under sections 28-33-19 and 28-35-58 of the Rhode Island General Laws, an employee may receive both specific compensation from an employer based on workers' compensation and tort damages from a third-party.<sup>2</sup> However, section 28-35-58 provides a suspension mechanism under which an employer's duty to pay an employee for future workers' compensation may be suspended if the employee recovers from a third-party through a settlement or a judgment on a tort action.<sup>3</sup> In *Rison*, the court stated an employee who receives a specific compensation award from his employer, after recovering from a third-party tort settlement, will have the specific compensation award subjected to the section 28-35-58 suspension provision.<sup>4</sup>

#### FACTS AND TRAVEL

James Rison III (Rison) was employed as a sheet metal worker for Air Filter Systems, Inc. (Air Filter) in March of 1987.<sup>5</sup> On March 3, 1987, Rison sustained injuries while working for Air Filter.<sup>6</sup> As a result of a flash fire of glue, Rison suffered third-degree burns over fifty percent of his body.<sup>7</sup> Rison suffered permanent scarring to over seventy-eight percent of his body despite undergoing several surgical skin graft operations.<sup>8</sup> Rison lost between eleven and sixteen percent of the operation of his upper extremities and his skin was discolored and destroyed.<sup>9</sup>

On March 24, 1987, Rison began receiving indemnity payments at a "weekly comp rate" of \$244 per week as workers' com-

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1. 707 A.2d 675 (R.I. 1998).
  2. *Id.* at 679.
  3. *See id.*
  4. *Id.* at 684.
  5. *See id.* at 677.
  6. *See id.*
  7. *See id.*
  8. *See id.*
  9. *See id.*

pensation.<sup>10</sup> These weekly payments served to compensate Rison for the wages he lost due to his injury.<sup>11</sup>

On November 7, 1991, Rison filed a Workers' Compensation Court (WCC) petition requesting an extra specific-compensation award based on section 28-33-19 of the Workers' Compensation Act (WCA), for his loss of the use of his hands and the extensive bodily disfigurement.<sup>12</sup> This petition was never heard.<sup>13</sup>

On December 1, 1991, Rison engaged in a settlement with Stanley Bostitch Company (Bostitch).<sup>14</sup> Bostitch, according to Rison, was at least partially responsible for his injuries.<sup>15</sup> The settlement apparently was in excess of \$2.5 million.<sup>16</sup>

Rison reimbursed Air Filter for the weekly workers' compensation benefits at the amount of \$225,312.<sup>17</sup> After reimbursing Air Filter, Rison presented his petition for specific compensation to a WCC judge based on section 28-33-19.<sup>18</sup> The judge decided, based on all of the evidence, that Rison was entitled to the maximum statutory award of \$52,582 for his injuries.<sup>19</sup> The court considered whether under section 28-33-19, specific awards would be subject to the payment-suspension mechanism mentioned under section 28-35-58.<sup>20</sup> The court held the specific award was not subject to the suspension mechanism; however, Air Filter's duty to continue paying workers' compensation to Rison would be suspended as stated in section 28-35-58.<sup>21</sup> The court held "any award of specific compensation after a third-party settlement would be paid in full to the employee without any offset or consideration of the monies which have been paid to him by the third-party settlement."<sup>22</sup>

Air Filter appealed the WCC judge's decision to the WCC's Appellate Division,<sup>23</sup> stating it was entitled to set off the specific-

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10. *See id.*

11. *See id.*

12. *See id.*

13. *See id.*

14. *See id.*

15. *See id.*

16. *See id.*

17. *See id.*

18. *See id.*

19. *See id.*

20. *See id.*

21. *See id.*

22. *Id.* at 678.

23. *See id.*



compensation award with the settlement Rison received from its agreement with Bostitch.<sup>24</sup> The Appellate Division ruled in favor of Air Filter and stated specific compensation given under section 28-33-19 may be suspended by the rules stated in section 28-35-58.<sup>25</sup> Air Filter was not required to pay any of these specific-compensation directly to Rison.<sup>26</sup> Rather, the specific compensation award would suspend Air Filter's duty to pay future workers' compensation benefits to Rison.<sup>27</sup> Following the Appellate Division's ruling, Rison petitioned the Rhode Island Supreme Court for a writ of certiorari, and the petition was granted.<sup>28</sup>

#### BACKGROUND

The Rhode Island legislature enacted sections 28-35-58 and 28-33-19 to provide for the control of third-party suits and awards under workers' compensation statutes respectively.<sup>29</sup> In the event that a claimant gains a reward from a third party greater than the amount of support given to date to the claimant by its employer, the claimant's employer's responsibility to provide workers' compensation support may be suspended for a period of time dependent on the amount of the surplus award.<sup>30</sup>

Specifically, section 28-33-19 provides for the potential award a claimant may receive from his or her employer based on a workers' compensation action and a method for the determination of a proper compensation plan for the claimant.<sup>31</sup>

Section 28-3-58 allows claimants to bring third party suits to recover damages and at the same time bring suits for compensation against the employer.<sup>32</sup> This statute further states that the claimant who receives compensation and third party damage awards must reimburse the person who compensated the claimant based on workers' compensation award for compensation to the date of the receipt of damages and provides for a suspension of sec-

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24. *See id.*

25. *See id.*

26. *See id.*

27. *Id.*

28. *See id.*

29. *See id.* at 683.

30. *See id.* at 679.

31. *See id.* at 680.

32. *See id.* at 679.

tion 28-33-19 specific damages if the damages are awarded after a third party tort settlement.<sup>33</sup>

#### ANALYSIS AND HOLDING

In *Rison*, the Rhode Island Supreme Court held when an employee recovers damages from a third-party, and subsequently is awarded a specific benefits award under section 28-33-19, those specific benefits are subject to the section 28-35-58 suspension mechanism.<sup>34</sup> Thus, if an employee receives a specific-compensation award from his or her employer, that award "shall be credited against the excess settlement damages according to the provisions of section 28-35-58."<sup>35</sup> This crediting will reduce a suspension period, required by section 28-35-58, by a period of time to be determined based on the amount of the third-party damages settlement.<sup>36</sup>

The court presented the issue as "whether any specific benefits awarded to an employee under section 28-33-19 *after* the employee has received a third-party settlement of a tort claim are likewise subject to section 28-35-58's suspension mechanism."<sup>37</sup> The court noted that under section 28-35-58 a claimant may receive both damages and compensation.<sup>38</sup> However, "compensation accruing after the employee has obtained a third-party tort recovery via a settlement or a judgment [must] be suspended for a length of time."<sup>39</sup> The length of this suspension period is determined by looking at the employee's weekly compensation rate, benefits paid by the employer to date, and any excess from the third party settlement.<sup>40</sup> The court divided its analysis into two primary sections: first, whether the section 28-35-58 suspension mechanism was intended to include specific-benefits in the definition of "compensation," and second, if specific-benefits fit within the definition of compensation, whether the suspension mechanism should apply to these benefits.<sup>41</sup>

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33. *Id.*

34. *See id.* at 686.

35. *Id.*

36. *See id.*

37. *Id.* at 678-79.

38. *See id.* at 679.

39. *Id.*

40. *See id.*

41. *See id.*

The court addressed the first question and asked if specific benefits are a type of compensation under section 28-35-58.<sup>42</sup> The court held "compensation," as stated in section 28-35-58, "includes all types of compensation available under the WCA—except medical benefits, which are expressly exempted."<sup>43</sup> Rhode Island's highest court focused on the fact that this section "explicitly excludes medical expenses from the scope of its suspension-of-compensation mechanism."<sup>44</sup> Since the Legislature specifically excluded these medical expenses from the suspension, the court inferred that the Legislature would have mentioned section 28-33-19 benefits had it intended to exempt them from the section 28-35-58 suspension provision.<sup>45</sup>

The court found further support for its position that specific damages are included in the section 28-35-58 "compensation" definition by looking to section 28-33-19.<sup>46</sup> There, the court looked to the title of the section "additional compensation for specific injuries" and to the first sentence of the section which states that benefits "shall be paid in addition to all other compensation."<sup>47</sup> The court posited that these two sections, which allow for specific damages, suggest these benefits "are just another type of workers' compensation."<sup>48</sup> Thus, the usage of such "inclusive terms" suggests specific damages were intended by the Legislature to fall within the section 28-35-58 definition of compensation.<sup>49</sup> For these reasons the court held specific damages fall within the definition of compensation in section 28-35-58.

Next, the court considered whether specific compensation should be subject to the suspension mechanism of section 28-35-58.<sup>50</sup> The court looked to other states and their use of similar suspension provisions in workers' compensation contexts.<sup>51</sup> Rhode Island's Supreme Court held the General Assembly intended to have the suspension provision apply to specific damage awards.<sup>52</sup> The

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42. *See id.* at 681.

43. *Id.*

44. *Id.* at 682.

45. *See id.*

46. *See id.* at 681.

47. *See id.* at 682.

48. *Id.*

49. *See id.*

50. *See id.*

51. *See id.* at 683.

52. *See id.* at 685.

court supported this ruling by suggesting that the Legislature intended for two purposes to be realized through the use of section 28-35-58.<sup>53</sup> Specifically, it intended to create "no-fault liability on the employer's part to benefit and protect the employee" and to allow the employee to "pursue a recovery from alleged third-party tortfeasors either before or after collecting WCA benefits."<sup>54</sup> Since the court felt the Legislature's goals are achieved when specific damage awards are subjected to the section 28-35-58 provisions for suspension, the court approved the application of the suspension provision to these specific damage awards.<sup>55</sup>

#### CONCLUSION

The Rhode Island Supreme Court held that a claimant who receives specific-compensation awards subsequent to a recovery of a third party settlement must be immediately credited with any set-off against excess-settlement amounts obtained from a third party in form of reduction of suspension period. The result of the court's interpretation of sections 28-35-58 and 28-33-19 is an injured claimant who receives a settlement from a third party will not receive further workers' compensation payments from their employer in their lifetime. Although the claimant will be barred from recovery this will prevent from double recoveries by claimants in these positions.

Kevin B. Hylton

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53. *See id.* at 683-84.

54. *Id.*

55. *See id.* at 685.