Am I Liable for My Employee's Negligence? The Bullet Point: Volume 1, Issue 15

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McGlinchey's Commercial Law Bulletin is a biweekly update of recent, unique, and impactful cases in state and federal courts in the area of commercial litigation.

Quaye v. North Market Dev. Auth., Inc., 10th Dist. Franklin No. 15AP-1102, 2017-Ohio-7412.

This was an appeal of a trial court's decision finding the defendant not liable for a claim of negligence. Plaintiff worked for the defendant. He was cleaning in a closet when a coworker came in to change the light bulb above him. The bulb fell and crashed into the plaintiff's head, resulting in a large wound, concussion, and cervical sprain.

Plaintiff alleged his coworker was negligent and that his employer was liable under a theory of respondeat superior. After a bench trial, the trial court found for defendants, finding that the plaintiff failed to prove his coworker or employer acted negligently. The plaintiff appealed, and on appeal, the Tenth Appellate District affirmed. In so ruling, the court noted that the evidence conflicted on whether a duty was breached and whether the coworker's actions were the proximate cause of the injury.

The Bullet Point: In order to prove negligence, a party must establish the existence of a duty, a breach of that duty, and injury resulting proximately from the breach. A defendant's duty to a plaintiff depends on the relationship between the parties and the foreseeability of injury to someone in the plaintiff's position. Foreseeability exists when a "reasonably prudent person" would have anticipated that an injury was likely to occur from the performance or nonperformance of an act. Moreover, in order to be liable for negligence, the negligent act must have been the proximate cause of the injury. Proximate cause "is generally established where an original act is wrongful or negligent and, in a natural and continuous sequence, produces a result that would not have taken place without the act."

Business owners should also take note of the theory of respondeat superior, which dictates that an employer may be held liable for the negligent conduct of an employee acting within the scope of his or her employment.

That said, an employer is not liable for independent, self-serving acts of employees that, in no way, facilitate or promote the employer's business. In cases where an employee is involved with injuring a third party, employers must determine whether the acts of the employee were done while discharging their employment responsibilities. If not, respondeat superior may not apply.

Calvary Industries, Inc. v. Coral Chemical Co., 12th Dist. Butler No. CA2016-12-233, 2017-Ohio-7279.

This was an appeal of the trial court's decision to dismiss a lawsuit under the theory of "forum non conveniens." Coral, an Illinois company, had hired an individual named Rashimi Patel (Patel), who resided in Illinois, as an independent contractor. When his contract was up Patel went to work for Calvary Industries as an independent contractor. Calvary instructed Patel that he was not to utilize, share, or communicate any confidential, proprietary, or trade secrets he learned while employed by Coral.

Coral then filed sued against Patel in Illinois alleging breach of contract and other causes of action for working for a competitor, Calvary Industries. While that case was pending, Calvary Industries filed the present action in Ohio seeking a declaratory judgment that it could employ Patel. Coral moved to dismiss the complaint and the trial court agreed. Calvary Industries appealed and on appeal the Twelve Appellate District reversed, finding that the trial court failed to undertake the balancing act required to determine if dismissal under the theory of forum non conveniens was appropriate.

The Bullet Point: The doctrine of forum non conveniens permits a court to dismiss an action to further the ends of justice and to promote the convenience of the parties, even though jurisdiction and venue are proper in the court chosen by the plaintiff. In determining whether dismissal on the basis of forum non conveniens is proper, the trial court must consider the facts of each case, balancing the private interests of the litigants and the public interest involving the courts and citizens of the forum state.

Important private interests include: (1) the relative ease of access to sources of proof; (2) availability of compulsory process for attendance of unwilling witnesses; (3) the cost of obtaining attendance of willing witnesses; (4) the possibility of a view of the premises, if appropriate; and (5) all other practical problems that make trial of a case easy, expeditious, and inexpensive. The important public interests include: (1) the administrative difficulties and delay to other litigants caused by congested court calendars; (2) the imposition of jury duty upon the citizens of a community that has very little relation to the litigation; (3) a local interest in having localized controversies decided at home; and (4) the appropriateness of litigating a case in a forum familiar with the applicable law. However, it is important to note that while the exercise of forum non conveniens results in the dismissal, the plaintiff can refile the case in a different court, usually the one the original court recommends.

Dodeka LLC v. Keith, 11th Dist. Portage No. 2016-P-0043, 2017-Ohio-7449.

This was an appeal of a trial court's decision finding that the defendant was bound by the choice-of-law provisions contained in a credit card agreement. While the defendant was married, her husband took out a credit card. He continued to use it during their marriage and the defendant's name was on various account statements. The defendant then got divorced, and per the divorce decree, the defendant's husband was held responsible for the credit card debt. However, no steps were taken to remove defendant's name from the card statements and they continued to be mailed to her. Likewise, during this time, the credit card company would mail "amended" contracts to the defendant and her ex-husband.

At some point, the defendant's ex-husband stopped paying the credit card bill. He then filed for bankruptcy and the debt was discharged. Thereafter, the credit card holder began to pursue the wife for the balance owed on the credit card by the husband. At the time of final payment, the latest amended contract contained a choice-of-law provision indicating that North Dakota law applied. The debt was sold to a third party who filed suit against defendant, seeking, among other things, payment of its attorneys' fees. The defendant filed counterclaims, alleging that seeking attorney's fees was improper under Ohio law. Thereafter, the parties moved for summary judgment, and eventually judgment was entered in favor of the debt holder, finding that attorneys' fees were permissible under North Dakota law and the choice of law provision in the amended agreement applies. The defendant appealed. On appeal, the Eleventh Appellate District reversed, finding that there was no finding made that the defendant was a party to the amended agreement, which contained the choice-of law-provision. Why? That is the important part of what is going on in this case.

The Bullet Point: Choice-of-law provisions are contract terms that explain what state's law governs the transaction or the parties' relationship. These provisions are typically enforceable in a contract. However, in order for a choice of law provision to apply, it must be shown that the parties agreed to the contract and the provision.

Johnson v. Montgomery, Slip. Op. 2017-Ohio-7445.

This was a discretionary appeal to the Ohio Supreme Court regarding who is considered an "intoxicated person" under Ohio's Dram Shop Act, R.C. 4399.18. Under the Dram Shop Act, an injured person may sue a liquor-holder for an off-premises injury only when the permit holder or its employee served the intoxicated person knowing him/her to be intoxicated.

The court ultimately found that the definition of "intoxicated person" "includes not only patrons but also workers, independent contractors, and others served by the permit holder—Dram Shop Act applies to determine liability of permit holder who sold intoxicating beverages to an intoxicated worker or independent contractor whose intoxication caused an injury."

The Bullet Point: The Supreme Court's decision dramatically expands under what situation a liquor permit holder could be held liable for an injury to an individual caused by an "intoxicated person." "The Ohio Dram Shop Act, R.C. 4399.18, embodies [the] general, common-law rule that a person (or his representative) may not maintain a cause of action against a liquor permit holder for injury resulting from the acts of an intoxicated person." Rather, liability can only attach under the statute. Here, the court found that the plain meaning of the definition of "intoxicated persons" covered not only patrons but workers, employees, and independent contractors of the liquor permit holder.

Case Previews

Merit Mgmt. Grp. v. FTI Consulting, Inc., No. 16-784 (cert granted May 1, 2017).

Valley View Downs, LP (VVD) purchased the shares of a competing racetrack, Bedford Downs (BD), for $55 million. The exchange took place through Citizens Bank, the escrow agent, and VVD borrowed money from Credit Suisse and other lenders to pay for the shares.

FTI Consulting, as Trustee of a litigation trust that included VVD as a debtor, filed suit against Merit Management Group (MMG), a 30% shareholder in BD. FTI alleged that BD's transfer to VVD and thereafter MMG of roughly $16.5 million is avoidable under Bankruptcy Code sections 544, 548(a)(1)(b), and 550. Merit argued that the transfer was "made by or to (or for the benefit of)" an entity named in section 546(e) and therefore protected under the safe-harbor provision.

Below, the Seventh Circuit held that section 546(e) does not provide a safe harbor against the avoidance of transfers between non-named entities where a named entity, like Citizens Bank or Credit Suisse, merely acts as a conduit for the transfer.

The Preview Point: Does Bankruptcy Code section 546(e) prohibit the avoidance of a transfer made by or to a financial institution absent regard to whether the institution has a beneficial interest in the property transferred?

Oil States Energy Services LLC v. Green Energy Grp. LLC, No. 16-712 (cert granted June 12, 2017).

In 2012, Oil States Energy services LLC (OS), filed a patent infringement suit against Green Energy Group LLC (GEG). The district court found the two patents at issue to be distinct under the "ordinary meaning" standard. Subsequently, GEG filed for inter partes review. This a process under the Patent and Trademark Office by which one party asks the U.S. Patent Trial and Appeal Board to reconsider the PTO's issuance of an existing patent and invalidate it on the basis that it was anticipated by prior art or obvious.

The Preview Point: Whether inter partes review violates the constitution by extinguishing private property rights through a non-article III forum, absent a jury.

PEM Entities LLC v. Levin, No. 16-492 (cert granted June 27, 2017).

Province Grand Old Liberty LLC (Debtor) defaulted on the larger of two loans to finance an acquisition. The creditors and Debtor entered into a settlement agreement providing that Debtor would sell the $6,465,000 in debt to PEM Entities LLC (PEM) for only $1,242,000. Notwithstanding that the transaction affected the rights and property of PEM, PEM members did not participate in the negotiation in light of the “close” relationship between PEM and Debtor. In March of 2013, Debtor filed for bankruptcy, listing PEM’s claim at $7,000,000. The creditors filed for summary judgment regarding the characterization of PEM’s debt as equity, rendering the $7,000,000 claim void.

Below, the bankruptcy court granted summary judgment in favor of the creditors. In conducting its analysis regarding the recharacterization, the bankruptcy court applied federal law rule of decision instead of North Carolina law, which would have recognized the debt as valid.

The Preview Point: Should bankruptcy courts apply federal or state law rule of decision in determining whether or not to recharacterize a claim in a bankruptcy as equity?