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WORKERS' COMPENSATION BULLETIN

Summer 2013

Temporary, Manual Disabling of a Safety Device Does Not Constitute "Removal" Under ALA. CODE § 25-5-11(c)(2)

In *Bates v. Riley*, 2013 WL 388171 (Ala. Civ. App. Feb. 1, 2013), an injured worker filed an action against a coworker alleging willful and intentional removal of a safety device. The Court of Civil Appeals held that the coworker's holding of a limit switch in order to keep a grinding machine from shutting off while it was being unclogged did not constitute "removal" of a safety device.

Bates and Riley worked for Dixie Pellets in Selma. Bates was a team leader for Dixie Pellets, and Riley was on his crew. At the Dixie Pellets plant, wood chips were used to make pellets. Pocket feeders were used to grind the chips down before they are compressed into pellets. The pocket feeders have magnets to prevent sparks that could create a fire in the plant. Riley testified that the magnets are cleaned "maybe once a shift" and that the machines routinely clogged. Each pocket feeder is equipped with a limit switch—a safety device on the magnet door of the feeder. When the magnet door is opened, the limit switch falls and shuts off the machine.

On April 23, 2009, a pocket feeder became clogged, and Bates began working to unclog the machine. Riley testified that the pocket feeder had already been shut off by the time he arrived to help Bates unclog the machine. Riley testified that he held the limit switch to keep the machine from shutting off completely because it took so long to restart the system and, on the day of the accident, they were pressed for production. Bates placed his hand in the machine, and the machine activated causing serious injuries.

Bates filed a complaint against Riley, alleging that Riley had caused his injuries by willfully and intentionally removing a safety device. At trial, Riley made an oral motion for a judgment as a matter of law after Bates presented his evidence and again at the close of all of the evidence. The trial court denied both motions. A jury returned a verdict in favor of Bates and awarded him $10,000 in damages. Bates filed a motion for new trial, challenging the sufficiency of the damages award. The trial court denied the motion. Bates filed a notice of appeal and Riley filed a notice of cross-appeal.

The Court of Civil Appeals first considered the cross-appeal filed by Riley. ALA. CODE § 25-5-11 addresses actions against third parties/co-workers for employment-related injuries resulting from willful conduct. In order to make a prima facie case under this Code section, the following four elements must be met: (a) the safety guard or device must be provided by the manufacturer of the machine; (b) the safety guard or device must be removed from the machine; (c) the removal of the safety guard or device must occur with knowledge that the injury will probably or likely result from the removal; and (d) the removal of the safety guard or device must not be part of a modification or an improvement that rendered the safety guard or device unnecessary or ineffective. Id. at *4 (citing *Harris v. Gill*, 585 So. 2d 831, 835 (Ala. 1991)).

In this case, Riley argued that the limit switch was not removed and its functionality was not affected. Therefore, the second element was not met, and he was entitled to a judgment as a matter of law. The Court agreed, holding that a coworker's holding of a limit switch in order to keep the machine from shutting off while it was being unclogged did not constitute "removal" of a safety device under ALA. CODE § 25-5-11. The Court declined to expand prior holdings to include the temporary, manual disabling of a safety device as recoverable. The Court stated, "[t]o do so would improperly expand the meaning of § 25-5-11(c)(2) to encompass something other than 'removal.'" The trial court's judgment was reversed.

Trial Court's Determination of Whether Employee Suffered Compensable Injury Given Great Deference

In *Ex parte Johns & Kirksey, Inc.*, 2013 WL 474282 (Ala. Civ. App. Feb. 8, 2013), Thomas C. Dodson brought a workers' compensation action against his employer, Johns & Kirksey, Inc., a metal-roofing and general contractor, alleging that he suffered a cumulative-trauma injury arising out of and in the course of his employment. In his complaint, Dodson alleged that he sustained a work-related injury to his lower back on November 4, 1996, while lifting a piece of structural steel. That injury was surgically repaired by Dr. Rick McKenzie on November 7, 1996. Dodson and his employer settled that claim, and medical benefits were left open.

After recuperating from the November 7, 1996, surgery, Dodson returned to work for the employer and performed his full duties which included manual labor. He alleged that he suffered cumulative-trauma injuries to his back and right leg as a result of performing manual labor.

The court set the case for a bench trial on February 29, 2010, that was limited to the issue of whether Dodson sustained a compensable injury. Following the trial, the court entered an order (1) determining that Dodson sustained a compensable cumulative-trauma injury, (2) awarding him medical benefits pursuant to ALA. CODE § 25-5-77, and (3) deferring the adjudication of the issue of whether Dodson was entitled to permanent-disability benefits until he reached maximum medical improvement. The employer filed a petition for writ of mandamus.

The employer initially indicated that its mandamus petition should be treated as an appeal because the trial court's order constituted a final judgment. A final judgment completely adjudicates all matters in controversy between the parties. The Court of Appeals stated that an order determining that an injury is compensable under the Act and awarding medical benefits only, without adjudicating the issue of whether the worker is entitled to disability benefits, does not constitute a final judgment because the order does not completely adjudicate the worker's claim under the Act. In this case, the trial court's order expressly deferred the adjudication of the disability issue. Therefore, the trial court's order was not a final judgment that supported an appeal. The order was, however, subject to mandamus review.

The employer argued that the trial court erred in determining that Dodson proved by clear and convincing evidence that he sustained a compensable cumulative-trauma injury. In its order, the trial court determined that Dodson performed "a significant amount of manual labor" and that his performance of that manual labor caused him to sustain a compensable cumulative-trauma injury. The employer argued that the trial court's determination was not supported by substantial evidence. At trial, conflicting evidence was presented regarding both how much manual labor Dodson performed as well as the nature of the manual labor. The Court stated,

> [W]e conclude that the trial court, based on its weighing of the competing evidence, reasonably could have determined that the employee had performed a substantial among of manual labor in the court of this employment with the employer from 2005 through February 2010; that the manual labor had involved lifting and repetitive bending, stooping, squatting, and kneeling; and that his performance of that manual labor had exposed him to a danger or risk materially in excess of that to which people are normally exposed in their everyday lives. Consequently, we conclude that the trial court, based on its weighing of the competing evidence, properly ruled that the manual labor performed by the employee was the legal cause of cumulative-trauma injury to his back.

Id. at 7.

Regarding the issue of whether the manual labor performed by Dodson was the medical cause of his back injury, the trial court based its decision on the deposition testimony of Dodson's treating physician, Dr. McKenzie, Dr. McKenzie's written medical record, and the transcript of the deposition testimony of Dr. Les Fowler, the physician selected by the employer's insurance carrier to perform an independent medical evaluation. Consistent with his medical record, Dr. McKenzie testified in his deposition that the manual labor contributed to Dodson's back injury. Likewise, Dr. Fowler testified in his deposition that the manual labor contributed to Dodson's condition. The Court held that the trial court, based on its weighing of the evidence, did not err in ruling that the manual labor performed by Dodson caused the cumulative-trauma injury from a medical standpoint. The Court, therefore, concluded that the employer failed to show that it had a clear legal right to a writ of mandamus, and the petition for writ of mandamus was denied.

The Importance of Pleading Judicial Estoppel as an Affirmative Defense

In *CVS/Caremark Corporation v. Washington*, 2013 WL 563345 (Ala. Civ. App. Feb. 15, 2013), the plaintiff, Washington, filed a workers' compensation claim against her employer, CVS, contending she was permanently and totally disabled as a result of an on-the-job injury to her shoulder and neck. Washington was employed as a packer and shipper in CVS's mail-order-pharmacy warehouse from 2002 to 2010. In February 2008, Washington injured her right shoulder when she fell over a pallet jack in the CVS warehouse. Following the incident, Washington returned to work with light duty restrictions. In July 2010, Washington informed her supervisor she would to have to quit work because she could not lift anything and she was in constant pain. Her supervisor informed her that the warehouse was scheduled to close in October 2010 and encouraged her to continue working until then so she could receive severance pay. Washington did so.

At trial, plaintiff's vocational expert testified that Washington was completely unable to work. Washington testified that she received unemployment compensation benefits since the CVS warehouse closed in October 2010. On cross-examination, Washington acknowledged that, in order to receive unemployment compensation benefits, she was required to complete a weekly-recertification of her eligibility for the benefits. In completing the recertification, Washington indicated to the State of Alabama (Department of Industrial Relations) that she was able to work.

In a post-trial brief, CVS argued that Washington's application for and receipt of unemployment compensation benefits was inconsistent with her permanent-total disability claim, and her permanent-total disability claim was, therefore, barred by the doctrine of judicial estoppel--the doctrine of judicial estoppel "applies to preclude a party from assuming a position in a legal proceeding inconsistent with one previously asserted." *Ex parte First Alabama Bank*, 883 So. 2d 1236, 1241 (Ala. 2003).

On August 29, 2011, the trial court entered a judgment holding that Washington was permanently and totally disabled. CVS filed a post-judgment motion asserting judicial estoppel, and Washington filed a motion to strike the judicial estoppel defense. The trial court granted Washington's motion to strike and denied CVS's post-judgment motion. CVS appealed.

The Court of Civil Appeals affirmed the trial court's decision holding that (1) CVS waived the defense of judicial estoppel because CVS failed to plead judicial estoppel as an affirmative defense, and CVS did not raise the issue of judicial estoppel at trial as its cross-examination of Washington did not clearly signal an intent to raise the unpleaded defense, and (2) sufficient evidence existed to support the trial court's finding of permanent-and-total disability. Importantly, the Court of Civil Appeals noted that, had CVS plead judicial estoppel as an affirmative defense, Washington would likely have been judicially estopped, by her representation to the Department of Industrial Relations, from receiving permanent-total-disability benefits under the Alabama Workers' Compensation Act.

This opinion emphasizes the importance of (1) pleading judicial estoppel as an affirmative defense in a workers' compensation case in which the plaintiff claims to be permanently and totally disabled, (2) obtaining a plaintiff's records from the Alabama Department of Industrial Relations (now the Alabama Department of Labor), and (3) questioning a plaintiff during his or her deposition about any applications for or receipt of unemployment benefits.

It should be noted, however, that in *White Tiger Graphics, Inc. v. Clemons*, 88 So. 3d 908 (Ala. 2012), the Alabama Court of Civil Appeals held that an employee was not judicially estopped to assert a permanent total disability during the same period the employee represented to the Department of Industrial Relations that he was ready, willing, and able to work in an effort to receive unemployment compensation benefits. The Court reasoned that there was not a fatal inconsistency between those two representations. Judge Moore, concurring specially, reasoned that the representation was inconsistent, but, because the legislature had sole authority to provide a remedy for that inconsistency and had not acted, the Court could not engraft a judicial estoppel defense onto the Act. The holding in *White Tiger* thus raised the question whether a court will, in fact, recognize the affirmative defense of judicial estoppel as a basis for denying permanent-total disability benefits.

Notice & Causation: Notice of Nature and Extent of Injury Not Required; Court Can Infer Medical Causation From Circumstantial Evidence

McAbee Construction, Inc. v. Allday, 2013 WL 1694480 (Ala. Civ. App. Apr. 19, 2013), a case out of Choctaw County, involved a claimant seeking permanent-total disability benefits for a lower back injury. The trial court awarded permanent-total disability benefits, and the Court of Civil Appeals affirmed the trial court's award.

Elvin Allday was employed as a boilermaker beginning in 1986 working for several different employers on various job sites. During his career, Allday sustained several work-related injuries, including a lower back injury in 1999 and shoulder injuries in 1992 and 1998, that necessitated four surgical procedures. Allday worked for McAbee Construction, Inc. for only five days—from June 5, 2006 through June 9, 2006. On June 7, 2006, Allday sustained an on-the-job injury. Allday finished his shift that day. The next morning, he reported the accident to the safety coordinator. The First Report of Injury reflects that Allday reported only shoulder and arm injuries and not a back injury at that time. Allday declined medical treatment and continued to work through June 9, 2006. On Monday, June 12, 2006, Allday telephoned the site superintendant and reported that, while driving home after his shift on Friday, his back began to hurt and the pain became even more severe over the weekend. Allday asked the superintendant to schedule an appointment for him with a physician.

Allday was seen by Dr. Andre Fontana, an orthopedic surgeon. An MRI was performed but it revealed no acute injury and no change from a previous MRI that was performed in 1999. Like the 1999 MRI, the 2006 MRI indicated degenerative changes in the lumbar spine including bulging discs at L4-5 and L5-S1 and bilateral stenosis at L5-S1. Nerve conduction studies also revealed that Allday was suffering from previously undiagnosed carpal-tunnel syndrome. Dr. Fontana treated Allday for a year. He then referred Allday to Dr. Tim Revels for a discussion of surgical options. Dr. James West provided a second opinion and also referred Allday to Dr. Chris Nicols, a pain management specialist. The pain management protocol proved to be unsuccessful, and Allday returned to Dr. West stating that he decided to have surgery. Dr. West performed a lumber fusion and laminectomy. Dr. West placed Allday at MMI on March 14, 2008, and stated he could return to work within the guidelines of a previously conducted FCE.

McAbee paid Allday's medical expenses and TTD benefits from June 20, 2006 until March 31, 2008. On February 13, 2008, Allday filed his complaint seeking permanent-total disability benefits. At trial, Allday testified that his pain was worse after the lumber surgery than it was before the surgery, and Dr. West's deposition testimony acknowledged that the surgery had not helped Allday. Allday also testified that his cognitive abilities were impaired by his daily pain medications. Allday's vocational expert, Patricia Russo, testified that Allday was 100 percent vocationally disabled. McAbee did not present any vocational testimony to refute Russo's testimony. Dr. Fontana testified that the back pain that Allday was experiencing could have been brought on even without a traumatic injury but that if Allday reported back pain to McAbee after the accident, he could state, to a reasonable degree of medical certainly, that there was a causative relation between the pain and the accident. The trial court determined that Allday was permanently and totally disabled and awarded benefits accordingly. McAbee appealed.

On appeal, McAbee argued that Allday's notice of injury was inadequate because he did not specify that he suffered a back injury. The Court stated that ALA. CODE § 25-5-78 requires an injured employee to give notice of the "accident" within five days after it occurs and that "[t]he claimant need not notify the employer of the exact nature of the injury that flows from the accident. . . . the employer need not acquire actual knowledge of the nature or extent of the injury in order to meet the statutory requirement." *McAbee*, 2013 WL 1694480 at *4-5 (citing TERRY A. MOORE, ALABAMA WORKERS' COMPENSATION § 22:12 (1998); *Ragland Brick Co. v. Campbell*, 409 So. 2d 443 (Ala. Civ. App. 1982) (although evidence was in dispute over whether employee notified employer that he injured his back in work-related fall, conflict was immaterial since notice of accident, not notice of injury, is all that is required)). Thus, the Court held that the trial court correctly concluded that Allday provided McAbee with adequate notice of the accident.

McAbee also argued that Allday's back problems predated his employment and had no causal relation to the on-the-job accident that occurred on June 7, 2006. McAbee noted that the 2006 MRI of Allday's lumbar spine was unchanged from the 1999 MRI, and, therefore, the degenerative disc disease and a 1999 back injury were the medical causes of Allday's current back problems. The Court stated:

> It is not necessary that the employment-related injury be the sole cause, or the dominant cause, of the disability, so long as it was a contributing cause. If the employee suffers from a latent preexisting condition that inevitably will produce injury or death, but the employment acts on the preexisting condition to hasten the appearance of symptoms or accelerate its injurious consequences, the employment will be considered the medical cause of the resulting injury.

Id. at *5 (quoting *Associated Grocers of the South, Inc. v. Goodwin*, 956 So. 2d 1102, 1110 (Ala. Civ. App. 2007)).

The Court further noted that Dr. Fontana attributed the medical cause of Allday's current back pain to the new injury because Allday's 1999 back injury resolved in a few months and Allday continued to work at a physically demanding job for seven years without complaining of back pain. The Court stated, "[a] trial court may infer medical causation from circumstantial evidence indicating that, before the accident, the worker was working normally with no disabling symptoms but that, immediately afterwards, those symptoms appeared and have persisted ever since." *Id.* citing *Boise Cascade Corp. v. Jackson*, 997 So. 2d 1042, 1047 (Ala. Civ. App. 2008)). Moreover, Dr. West stated that Allday's back pain was caused or exacerbated by the work-related accident. The expert testimony relating to medical causation was un-contradicted, and the Court held that the trial court's medical-causation finding was supported by substantial evidence.

This opinion is important as it illustrates (1) that a claimant must simply provide notice of the *accident*—notice of the nature or extent of the injury is not required, and (2) that a court can infer medical causation from circumstantial evidence when, despite a preexisting condition, a worker was working normally with no disabling symptoms before the accident at issue, but after the accident, those symptoms manifested and continued.

Last Injurious Exposure

In *Office Max, Inc. v. Academy, Ltd.*, 2013 WL 2130953 (Ala. Civ. App. May 17, 2013), Sandra Richey filed a workers compensation suit in July 2007 alleging that she suffered injuries to her knees and shoulders in 2002 and in 2005, respectively, while in the line and scope of her employment with Office Max. Office Max contended that the employee left her job and became employed by Academy, Ltd., and argued that Richey's subsequent employment caused or contributed to her injuries such that the "last injurious exposure rule" required Academy to be deemed responsible for providing workers' compensation benefits.

Office Max asserted a third-party claim against Academy alleging that Richey suffered a "re-injury" or an aggravation of her previous shoulder injury and, thus, Academy, rather than Office Max, should be liable for workers' compensation benefits. Academy moved for summary judgment on Office Max's third-party claim, contending that any injuries Richey might have sustained during her employment with Academy were merely recurrences of injuries originally sustained in the line and scope of her employment with Office Max. Richey also filed four motions to compel medical treatment. The trial court granted Academy's summary-judgment motion and Richey's fourth motion to compel medical treatment against Office Max. Office Max appealed.

On appeal, Academy argued that the employee did not start working for Academy until June 2007, and that her symptoms from her prior injuries in 2002 and 2005, which occurred while she was employed with Office Max, were unchanged. The Court of Civil Appeals defined the last injurious exposure rule: "Under the last injurious exposure rule, liability falls upon the carrier covering the risk at the time of the most recent injury bearing a causal relation to the disability. The trial court must determine whether the second injury is a new injury, and aggravation of a prior injury, or a recurrence of an old injury; this determination resolves the issue of which insurer is liable." *Id.* at *2 (citing *United States Fid. & Guar. Co. v. Stepp*, 642 So. 2d 712, 715 (Ala. Civ. App. 1994)).

Regarding the shoulder injury, Office Max presented evidence that Richey underwent surgery on her right shoulder and was assigned an 8% impairment rating to her right shoulder and 5% impairment rating to her body-as-a-whole in October 2007. In November 2008, Richey returned to her doctor complaining of "increasing symptoms" in her right shoulder while working in her new job hanging clothes. The doctor found another rotator cuff tear "basically in the area of the previous tear." Richey underwent an additional surgery in February 2009. After the surgery, Richey was assigned a 9% impairment rating to her right shoulder and 5% impairment rating to the body-as-a-whole. The doctor testified that Richey's right shoulder injury was aggravated by her employment with Academy. The Court of Civil Appeals found that the physician's testimony, coupled with the incremental increase in the employee's physical impairment rating, "amounts to substantial evidence that . . . would support a determination that the employee did not suffer a mere 'recurrence' of her previous rotator-cuff injury while working for Academy."

With respect to Richey's knee injury, the Court relied on a comparison of MRIs taken in 2006 and 2010. The earlier MRI (taken prior to her employment at Academy) showed no abnormalities, but the 2010 MRI showed a meniscus tear. Accordingly, the Court concluded that this medical evidence, along with Richey's testimony that her job duties during the two years preceding April 2010 aggravated her knee condition making it more painful, amounted to substantial evidence that she suffered an aggravation of her knee injury or a new injury during her employment with Academy.

The Court reversed the trial court's order granting summary judgment for Academy and reversed the order compelling Office Max to provide further medical treatment. The Court noted that substantial evidence in the record supported the proposition that Richey suffered aggravations of previous injuries or new injuries in the line and scope of her employment with Academy, and that evidence supported a judgment ordering Academy to be solely liable for Richey's workers' compensation benefits under the Act.

"Dependency" Under ALA. CODE § 25-5-11 Refers to a Plaintiff's Capacity, Not Standing

In *Ex parte Tyson Foods, Inc.*, 2013 WL 2278591 (Ala. May 24, 2013), the decedent, Allen Hayes, died in a workplace accident on April 15, 2008, while at the Tyson Foods' plant in Blount County. Hayes was working as a security guard for DSI Security Services and was hit by a forklift operated by a Tyson Foods' employee. His widow, Mildred Hayes, collected wrongful death benefits under the Alabama Workers' Compensation Act (the "Act") from DSI Services. On June 26, 2008, Reba Kirklin, the decedent's daughter, brought a third-party wrongful death claim under the Act against Tyson Foods. At the time Kirklin filed the wrongful death claim, she was over the age of 19.

Tyson Foods initially removed the case to federal court. Approximately three years later, in March 2011, the federal court remanded the case back to Blount County Circuit Court. Six months after remand, Tyson Foods filed a motion to dismiss and amended answer raising, for the first time, the argument that Kirklin was not a dependent (because she was over the age of 19) and therefore did not have standing to bring the action under ALA. CODE § 25-5-11. Kirklin responded by asking the trial court to substitute Mildred (the decedent's widow and sole dependent) as the proper plaintiff under ALA. R. CIV. P. 17(a). The circuit court denied Tyson Foods' motion to dismiss, struck its affirmative defenses of lack of standing and capacity, and allowed Mildred to be added as the proper plaintiff. Tyson Foods then petitioned the Alabama Supreme Court for a writ of mandamus directing the trial court to dismiss the action arguing that Kirklin lacked standing to file the action in the first instance, and thus the initial filing of the wrongful death action was a nullity and the substitution of Mildred could not relate back, as a matter of law.

Relying on its previous decision in *Alabama Power Co. v. White*, 377 So. 2d 930 (Ala. 1979), the Court held that dependency under ALA. CODE § 25-5-11 was a matter of *capacity*, not *standing*, and Tyson Foods waived any capacity defense by failing to raise it in its initial responsive pleading. In reaching this conclusion, the Court summarily dismissed contrary language in *Tucker v. Molden*, 761 So. 2d 996 (Ala. 2000), stating that dependency under § 25-5-11 was a matter of standing as dicta. The Court also concluded that the addition of Mildred as the proper plaintiff related back to the date of the original filing by operation of ALA. R. CIV. P. 15, because the substitution effected "no change in the claim as originally filed" and because Tyson Foods knew, or should have known, that a mistake was made in the identity of the proper plaintiff. Thus, the Court reasoned, Tyson Foods was not prejudiced by the amendment, and the two year statute of limitations did not bar the action because it related back to the original filing.

Tyson Foods does little to clarify the Alabama Supreme Court's confusing and seemingly contradictory cases discussing the legal concepts of capacity and standing. Nevertheless, the case clearly holds that the question of whether a plaintiff is a dependent for purposes of § 25-5-11 is one of capacity, not standing. Because dependency relates to capacity, and not standing, *Tyson Foods* arguably allows the substitution of a dependent - the proper plaintiff in a third-party wrongful death claim under § 25-5-11 - after the statute of limitations has expired.

Settling Third-Party Claims & Subrogation

In *Roblero v. Cox Pools of the Southeast, Inc.*, 2013 WL 3155020 (Ala. Civ. App. June 21, 2013), the claimant was injured in a motor-vehicle accident on May 10, 2010, while working within the line and scope of his employment with Cox Pools. While recovering from the injuries he suffered in the accident, Cox Pools paid him $20,608.83 in TTD benefits and $47,038.00 for his medical treatment.

The driver of the other vehicle was at fault in the accident, and that driver was uninsured. Cox Pools' uninsured-motorist insurance carrier, Penn National Insurance, insured the vehicle in which Roblero was riding at the time of the accident. Roblero made a claim for uninsured-motorist benefits with Penn National; that claim was settled for $30,000. Cox Pools' policy limit for uninsured coverage with Penn National was $3 million.

On January 30, 2012, after obtaining the uninsured motorist settlement, Roblero filed a complaint seeking workers' compensation benefits from Cox Pools. Roblero alleged that he sustained a permanent disability to his right shoulder and body as a whole as a result of the work-related accident. Cox Pools subsequently filed a motion for summary judgment asserting subrogation rights to the $30,000 that Roblero received in the settlement from Penn National. Cox Pools also sought a determination from the trial court that Roblero was estopped from recovering workers' compensation benefits for the same injuries for which he received a settlement from Penn National.

The trial court held that the money Roblero received from Penn National was subject to the subrogation rights of Cox Pools. The trial court also held that Roblero already recovered once for his work-related injuries and that, in settling the uninsured-motorist claim, Roblero gave up the opportunity "to be made whole up to the policy limits of $3,000,000." Therefore, the trial court determined that Roblero was estopped from seeking an additional recovery from Cox Pools through the Workers' Compensation Act. Accordingly, the trial court dismissed Roblero's workers' compensation action. Roblero appealed.

On appeal, the Alabama Court of Civil Appeals held that, under the Act, there is no prohibition against an employee's bringing simultaneous or successive actions against an employer for workers' compensation benefits and against a third party for damages. The Court stated, "In fact, the only prohibition in the Act is against retaining double recovery by requiring credit against sums owed by the employer or reimbursement to the employer from damages recovered." *Id.* at *4 (citing *Baggett v. Webb*, 248 So. 2d 275, 281 (Ala. Civ. App. 1971)). Thus, the Court held that Roblero had a legal right to settle his uninsured-motorist claim without notifying Cox Pools of the settlement, and Roblero also had a legal right to pursue his workers' compensation claim separately from his uninsured-motorist claim.

Regarding Cox Pools' claim for subrogation, Roblero did not argue on appeal that the trial court erred in determining that the uninsured-motorist settlement proceeds were subject to Cox Pools' subrogation rights. Instead, Roblero asserted that the trial court improperly grouped the "credit" which ALA. CODE § 25-5-11(a) provides for compensation benefits with the "subrogation" allowed against medical expenses. The Court, however, noted that Cox Pools already paid $47,038 toward Roblero's medical expenses which exceeded the amount of the uninsured-motorist settlement. Therefore, because the amount Cox Pools' already expended on medical benefits exceeded the total amount of proceeds Roblero received as a result of his third party claim, Cox Pools was entitled to subrogation of the entire amount of those proceeds. Accordingly, the Court affirmed the trial court's order with respect to Cox Pools' subrogation rights.

This case illustrates several important points. First, an employee is not prohibited from bringing simultaneous or successive actions against an employer for workers' compensation benefits and against a third party for damages, as doing so will not necessarily be considered an attempt at double recovery. Second, where the total amount of medical benefits expended by the employer exceeds the amount of recovery obtained by the employee in a third party action, the employer is entitled to subrogation of the entire amount of the recovery in the third party action. Lastly, in Alabama, an employee does not have to provide notice of a third party action or settlement thereof, nor does the employee have to obtain consent from the employer prior to settlement of the third party action.

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