Immunity, Duty And Non-Parties At Fault

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Executive Summary

The Michigan Court of Appeals recently held that a plaintiff's employer and co-worker may be assessed non-party fault by a fact-finder under Michigan's comparative fault statutes, even though both enjoy immunity from that plaintiff's negligence claims. In doing so, the Court made clear that immunity does not abolish duty and the availability of an immunity has no bearing on whether a duty exists. Therefore, persons with immunity from suit can still be non-parties at fault and a plaintiff's employer and co-employees can be assessed non-party fault

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In a significant victory for tort defendants, the Michigan Court of Appeals held that a plaintiff's employer and co-worker owed plaintiff a legal duty and may be assessed non-party fault under Michigan's comparative fault statutes, even though both enjoy immunity from that plaintiff's negligence claims. *Schmeling v Waste Management*, Nos. 292190/292740, 2011 WL 520539 (Mich Ct App, Feb 15, 2011)[1], applied the Michigan's Supreme Court's 2009 decision in *Romain v Frankenmuth Mut Ins Co*,[2] and found that availability of worker's compensation exclusive remedy immunity has no bearing on whether a duty exists in the employer/co-employee context. An employer and co-employee may be named as non-parties at fault under the comparative fault statutes.

Evolution of non-party fault

Among the most significant components of Michigan's 1995 tort reform legislation are the comparative fault provisions, MCL 600.2957(1) and 600.6304(1). Those require the allocation of fault to *all* persons who contributed to a plaintiff's damages, provided that a defendant presents evidence that would allow a reasonable person to conclude that another person's negligence constituted a proximate cause of a plaintiff's injury and subsequent damages. The so-called "non party fault" rules apply even when a person cannot be named as a party, which can significantly reduce or even eliminate a plaintiff's recovery.

Understandably, plaintiffs have worked to limit the effects of the non-party fault statutes. One example has been the effort to carve out a judicially-created exception to the non-party fault rules for employers and co-employees, each of whom enjoys statutory immunity from negligence claims under the Workers' Disability Compensation Act's (WDCA) exclusive remedy provision. Plaintiffs argued, with some success in trial courts, that, in a suit against a third party, it was unfair to allow a jury to assign fault to a plaintiff's non-party employer or co-worker because the plaintiff could not add them as party defendants or recover damages for their fault. They argued that the WDCA and the non-party fault statutes are in conflict, and since the WDCA existed first, its provisions prevailed and created an "employer/co-employee" exception to the general rules governing non-party fault.

Kopp v Zigich settles the "employer/co-employee" issue

Plaintiffs enjoyed some early success in gaining a judicially-created "employer/co-employee" exception to the non-party fault statutes, but in 2005 the Court of Appeals seemed to have settled the issue by rejecting such an exception in its published opinion in *Kopp v Zigich*.[3] *Kopp* involved an on-the-job injury where the defendant identified plaintiff's employer as a non-party at fault. The trial court granted plaintiff's motion to strike the notice of non-party fault, finding that the

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employer could not be identified as a non-party at fault because it owed no duty to plaintiff on account of the WDCA's exclusive remedy provision. The Court of Appeals reversed. The court held that the plain language of the non-party fault statute did not contain any exception for employers and co-employees and the statute did not require proof of a duty before fault could be apportioned to a non-party. Thus, it was settled: employers and co-employees could be identified as non-parties at fault.

Romain opens the door for plaintiffs

But then came *Romain v Frankenmuth Mutual*, in which the Michigan Supreme Court held that, before an entity could be named as a non-party at fault, it had to first be shown that the entity owed a legal duty to the plaintiff. Although *Romain* itself did not concern an employer/co-employee non-party issue, *Romain* specifically overruled the statement in *Kopp v Zigich* that there was no requirement that a person identified as a non-party at fault owe the plaintiff a legal duty in order to be assigned fault. *Romain* thus called into question the validity of the *Kopp* holding that employers and co-employees could be identified as non-parties at fault.

Romain also raised a question about the relationship between duty and immunity, potentially creating a significant number of exceptions to the non-party fault statutes. As a result, after *Romain*, plaintiffs began to argue that any person with immunity from a negligence claim (*e.g.*, employers, co-employees, parents, governmental actors) could not be named as a non-party at fault because there was no duty owed to the plaintiff. That "immunity equals no duty" argument proved successful in some trial courts, including the trial courts in *Schmeling* and in the published opinion in *Slager v Kid's Kourt, LLC*.[4]

Slager raises, but does not answer, the "duty-versus-immunity" question

In *Slager*, the Court of Appeals was squarely faced with the "duty-versus-immunity" question made possible by *Romain*. *Slager* concerned whether a plaintiff minor's parents owed a legal duty and could be assessed non-party fault under the comparative fault statutes despite their common law immunity from ordinary negligence. The trial judge held that the limited immunity enjoyed by the parents exempted them from any legal duties and, as a result, precluded any allocation of fault based on *Romain*. The Court of Appeals granted leave to appeal to decide the duty vs. immunity issue. But the question was skirted when a two-judge majority of the court found it unnecessary to decide the case on that basis, and affirmed the trial court on different grounds. Importantly, the majority explicitly did not affirm the trial court's reasoning or result on the "duty-vs-immunity" issue. The dissenting opinion in *Slager* did address that issue, stating:

> The majority does not answer the question decided by the trial court and briefed and argued by the parties (and on which we granted leave to appeal), ... With all due respect to my colleagues, I would address the issue decided below and addressed by the parties, and in doing so would hold that the existence of parental immunity does not foreclose an allocation of fault under the comparative fault statutes. [Dissent slip op at 1]

Just a few months later, the Court of Appeals was squarely confronted with the "duty-versus-immunity" question in *Schmeling*.

The court held that the plain language of the non-party fault statute did not contain any exception for employers and co-employees and the statute did not require proof of a duty before fault could be apportioned to a non-party. Thus, it was settled: employers and co-employees could be identified as non-parties at fault.

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Schmeling answers the "duty-vs-immunity" question

In *Schmeling*, the plaintiff was injured in a motor vehicle accident while a passenger in an ambulance his employer owned and his co-worker was driving. The defendants, a national waste disposal company and its driver, identified plaintiff's employer and co-worker, both of whom had already admitted fault with respect to the accident, as non-parties at fault.

Plaintiff moved to strike the defendants' notice, asserting that neither his employer nor his co-worker owed plaintiff a legal

duty of care, because each enjoyed immunity from suit on the basis of the exclusive remedy provision of the WDCA. The trial court agreed and granted the plaintiff's motion, relying on *Romain*. The defendants appealed the trial court's ruling.

On February 15, 2011, in its *per curiam* opinion, the *Schmeling* court did what the *Slager* majority did not: the Court of Appeals expressly rejected the "immunity equals no duty" argument. The Court of Appeals reversed, holding that there is a distinction between the existence of a legal duty and whether there is a remedy for a breach of duty, i.e., an immunity: "In other words, a person *can* owe a duty to a plaintiff even when the plaintiff cannot recover any remedy from that person."[5] Because the WDCA exclusive remedy statute addresses only the remedy available to an injured employee, and does not negate a duty owed by an employer and co-worker, the *Schmeling* court held that a plaintiff's employer and co-worker may be assessed non-party fault by a factfinder under Michigan's comparative fault statutes.

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Schmeling makes clear that there is a distinction between a legal duty and immunity from suit; the former can exist even when a person enjoys the latter. *Schmeling* has closed the door that the Michigan Supreme Court seemed to open with *Romain's* partial overruling of *Kopp*.

Summary – the Schmeling rules

Schmeling stands for two key points of law regarding the non-party fault statutes:

1. Immunity does not abolish duty in applying *Romain*
2. Employers and co-employees owe a duty and may be non-parties at fault.

Endnotes

1. The authors are counsel for the defendants in Schmeling. The defendants requested publication of the decision pursuant to MCR 7.215(D)(1), because the opinion construes Michigan's comparative fault statutes (MCL 600.2957(1) and 600.6304(1)(b)) in an important context that has not yet been the subject of a published – and precedentially binding – decision of the court since Romain, and because the opinion is the first to apply the principle of law announced in Romain v Frankenmuth Mut Ins Co, 483 Mich 18 (2009), in the "duty-versus-immunity" context. At the time this article is written, the issue of publication is still pending.
2. 483 Mich 18; 762 NW2d 911 (2009).
3. 268 Mich App 258, 707 NW2d 601 (2005).
4. No. 292856, ___ NW2d ___, ___ Mich App ___, 2010 WL 3811300; 2010 Mich App Lexis 1866 (Sept 30, 2010).
5. Schmeling, slip op. at 2 (emphasis in the original).