Pardue v. Ruiz: An Extension of Tort Immunity

In *Pardue v. Ruiz*,[1] Adrian Ruiz suffered injury when he fell off a scaffold erected by his employer, the subcontractor. After receiving workers' compensation benefits from his employer, Ruiz brought an action against the vice-president and safety officer of the general contractor, Alton Pardue. Ruiz alleged Pardue negligently failed to inspect the construction premises as called for in the contract between the general and subcontractor. Pardue was not a party to the contract, nor did he assist in building the scaffolding. The trial court granted Pardue's motion for summary judgment and Ruiz appealed.[2] Relying on *Long v. Marvin M. Black Co.*[3] and Official Code of Georgia Annotated ("O.C.G.A.") section 34-9-11,[4] the Georgia Court of Appeals reversed.[5] Pursuant to *Long*, the court found that no immunity existed since Pardue and Ruiz were not "employees of the same employer" for the purposes of O.C.G.A. section 34-9-11.[6] Further, the court reasoned that the liability of the general contractor's employee to the employee of the subcontractor was not dependent upon whether his negligence was classified as active or passive, but on the fact that the principal's employee had no workers' compensation liability to justify tort immunity.[7] In striking down Pardue's argument that he acted as the alter ego of his employer, the court of appeals noted Pardue's "failure to act" in implementing his company's safety program. The court classified the omission as a "failure to act in his employment" and reasoned that Pardue's liability rises and falls on his actions, rather than his existence as safety officer.[8] However, the Supreme Court of Georgia reversed by

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1. 263 Ga. 146, 429 S.E.2d 912 (1993).
2. *Id.* at 146, 429 S.E.2d at 912.
3. 250 Ga. 621, 300 S.E.2d 150 (1983).
4. O.C.G.A. § 34-9-11 (1992) prohibits an injured employee from bringing an action against "an employee of the same employer."
5. Ruiz v. Pardue, 204 Ga. App. 566, 420 S.E.2d 1 (1992).
6. *Id.* at 566, 420 S.E.2d at 2.
7. *Id.* at 567, 420 S.E.2d at 2.
8. *Id.*

holding that "where negligence is based on a general non-delegable duty of the employer (such as supervision and safety), the supervisory employee shares in the immunity of the employer."[9]

In 1920, the Georgia legislature enacted the Georgia Workers' Compensation Act,[10] providing employees with an exclusive remedy against employers in the case of work-related injuries.[11] In 1924, the Georgia Supreme Court, in interpreting the exclusive remedy provision, held that the rights granted the employee under the act where exclusive only as against the employer and did not include third persons.[12] The court found no reason why a person, other than the employer, who is guilty of negligence and otherwise a stranger to the employment contract should benefit from the Workers' Compensation Act.[13] Since the remedy against the employer was exclusive, fellow employees being sued in tort attempted to take shelter under the employer's immunity. However, courts were hesitant to extend similar immunity to employees. For instance, in *Echols v. Chattooga Mercantile Co.*,[14] the Georgia Court of Appeals held that the exclusive remedy provision did not prevent a recovery against a corporate officer where the officer willfully assaults the employee.[15] The fact that the defendant alleged he acted as the alter ego of the employer did not prevent an action against him as an individual.[16] The court reasoned that the defendant and Chattooga Mercantile were not identical parties and that the law placed a duty not to harm the employee on both an individual and an employee.[17] Concentrating on the willfulness of the defendant's action, the court determined that "[t]he defendant . . . cannot with impunity batter a fellow employee and then take cover under the provisions of Georgia Code Annotated section 114-103 (now O.C.G.A. § 34-9-11)".[18] However, in the absence of a willful assault, courts soon began to accept the alter ego analysis, thereby extending the immunity of the statutory employer to third persons.[19] In *Mull v. Aetna Casualty & Surety Co.*,[20] the court

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9. Pardue v. Ruiz, 263 Ga. 146, 148, 429 S.E.2d 912, 914 (1993).
10. 1920 Ga. Laws 167.
11. O.C.G.A. § 34-9-11 (1992).
12. Athens Ry. & Elec. Co. v. Kinney, 160 Ga. 1, 127 S.E. 290 (1924).
13. *Id.* at 6, 127 S.E. at 292.
14. 74 Ga. App. 18, 38 S.E.2d 675 (1946).
15. *Id.* at 26, 38 S.E.2d at 680.
16. *Id.*
17. *Id.*
18. *Id.* at 24, 38 S.E.2d at 679.
19. *See* O.C.G.A. § 34-9-8(a) (1992) providing "a principal, intermediate, or subcontractor shall be liable for compensation to any employee while in the employ of any of his subcontractors engaged upon the subject matter of the contract to the same extent as the

of appeals held that a workers' compensation carrier and its agent were the alter ego of the employer within the statutory definition equating the insurance carrier to the employer and were therefore entitled to the employer's tort immunity.[21] Also, in *Yancy v. Green*,[22] the plaintiff brought action against the individual members of the school board after her husband died while working for the county board of education.[23] The court held that the mere allegation of willfulness on the part of the employer did not afford plaintiff a remedy.[24] In determining that the widow's exclusive remedy was under the Workers' Compensation Act, the court applied *Mull* and noted that the defendants were in fact the employers whose "tort consisted of an act of nonfeasance in their official capacities—failure to repair and furnish the plaintiff's husband with a safe place to work."[25] Although not an explicit extension of the "alter ego" exception, *Yancy* represents the expansion of immunity to those acting as the employer. Further, in *Cunningham v. Heard*,[26] an employee who had already collected workers' compensation benefits brought an action against the president of his employer. The injury in *Cunningham* occurred prior to 1974 when Georgia Code Annotated section 114-103[27] allowed an employee to bring a common law tort action against a fellow employee after receiving workers' compensation benefits from his employer. In determining whether the defendant was a "fellow employee" or "alter ego," the court applied *Yancy* and found that the defendant acted at all times in his capacity as representative of the company, thereby extending the defendant immunity.[28] The court distinguished the case from *Echols v. Chattooga Mercantile Co.*,[29] which involved "active, direct, individual action by the employer's officer specifically directed toward the employee."[30] The distinction recognized an extension of immunity to corporate officers in the absence of an affirmative breach of duty when officers act as the "alter ego" of the

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immediate employer."

20. 120 Ga. App. 791, 172 S.E.2d 147 (1969), *cert. dismissed*, 226 Ga. 462, 175 S.E.2d 552 (1970); *see also* O.C.G.A. § 34-9-11 (1992) (equating insurance carrier to employer).

21. 120 Ga. App. at 791, 172 S.E.2d at 148.

22. 129 Ga. App. 705, 201 S.E.2d 162 (1973).

23. *Id.* at 705, 201 S.E.2d at 162.

24. *Id.* at 706, 201 S.E.2d at 163.

25. *Id.* at 706-07, 201 S.E.2d at 163.

26. 134 Ga. App. 276, 214 S.E.2d 190 (1975) (although the injury here occurred before 1974, this case was decided after and likely influenced by the 1974 amendment to O.C.G.A. § 34-9-11, precluding an action by an injured employee against his employer).

27. GA. CODE ANN. § 114-103 (1990).

28. *Cunningham*, 134 Ga. App. at 277-78, 214 S.E.2d at 191.

29. 74 Ga. App. 18, 38 S.E.2d 675 (1946).

30. *Cunningham*, 134 Ga. App. at 277, 214 S.E.2d at 191.

employer. In 1978, the court of appeals solidified the "alter ego" exception and reaffirmed *Cunningham* by finding that "where it is conclusively shown that an executive of a corporation acts in his representative capacity as the alter ego of the corporation [sic] an employee injured in the course of his employment may not recover workmen's compensation benefits and then sue the executive of the corporation in tort."[31] However, the extension of immunity under the alter ego analysis has been narrowly confined to executive officers of the corporation and insurance carriers. For instance, in *Winslett v. Twin City Fire Insurance Co.*,[32] the plaintiff brought an action against the job superintendent, a co-employee. In denying the defendant's alter ego argument, the court observed that the holdings of *Yancy* and *Cunningham* derogate from the common law right to bring an action in tort and refused to extend their holdings beyond the facts of each case.[33] However, in 1974, the Georgia General Assembly amended O.C.G.A. section 34-9-11, effectively barring an injured worker from bringing an action against a fellow employee.[34] Hence, this amendment placed fellow employees outside the realm of third-party tortfeasors, who were subject to suit, and raised even more complex issues in determining the party against whom an injured worker could bring a common law action. However, this legislation did not discourage the creativity of injured workers, who continued to search for parties against whom a common law action would lie. For instance, in *Long v. Marvin M. Black Co.*,[35] an injured employee of an independent subcontractor received workers' compensation benefits from his immediate employer and then brought action against the general contractor and its employee.[36] The court held that although the general contractor was the statutory employer of the subcontractor's employees and thereby entitled to tort immunity,[37] the injured employee and the employee of the general contractor were not "employees of the same employer" for purposes of O.C.G.A. section 34-9-11.[38] The court focused on the General Assembly's use of the term

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31. Chambers v. Gibson, 145 Ga. App. 27, 28, 243 S.E.2d 309, 310 (1978); *see also* Stoker v. Wood, 161 Ga. App. 110, 289 S.E.2d 265 (1982).

32. 142 Ga. App. 653, 236 S.E.2d 898 (1977).

33. *Id.* at 653, 236 S.E.2d at 899.

34. 1974 Ga. Laws 1143.

35. 250 Ga. 621, 300 S.E.2d 150 (1983).

36. *Id.* at 623, 300 S.E.2d at 152 (where defendant-employee injured the plaintiff when he negligently discharged a nail gun).

37. *See* Wright Ass'n, Inc. v. Rieder, 247 Ga. 496, 277 S.E.2d 41 (1981) (holding that the general contractor is the statutory employer of the employees of the subcontractor).

38. *Long*, 250 Ga. 623, 300 S.E.2d at 151-52. *See, e.g.*, O.C.G.A. § 34-9-11 (1992) (providing that no action may be brought against "employees of the same employer").

"same employer," rather than "immediate," "intermediate," or "principal employer."[39] In denying immunity, the supreme court refused to expand "employee of the same employer" to include employees of a statutory employer which did not pay compensation benefits.[40] Hence, an injured employee of an independent subcontractor could bring an action in tort against the general's employee. Finally, *Paz v. Marvin M. Black Co.*[41] arose from the same accident and involved the same issue as *Pardue v. Ruiz*.[42] Adhering to the rationale in *Long*, the court of appeals determined that a supervising employee of the general contractor did not share in his employer's immunity when sued by the injured employee of the subcontractor.[43] Pardue, the supervising employee, argued that he acted in his representative capacity as alter ego of Marvin M. Black Company and therefore was entitled to the tort immunity of his employer. The court found that the liability of the general contractor's employees to the subcontractor's employees did not turn on whether their negligence was classified as "active" or "passive", but on whether the general's employees were themselves liable for workers' compensation benefits.[44] Therefore, the court found no *quid pro quo* to relieve the employee from liability for his own negligence.[45] However, the analysis in *Paz* is presently erroneous as a result of the supreme court's decision in *Pardue*.

In *Pardue v. Ruiz*,[46] the supreme court extended the immunity of the statutory employer (the general contractor) to the general contractor's safety officer under the "alter ego" analysis. As in *Paz*, Pardue argued that he acted at all times as the alter ego of the general contractor and therefore was entitled to the immunity of the statutory employer. In doing so, Pardue alleged that any breach on his behalf constituted an act of passive negligence rather than an affirmative breach of duty.[47] In upholding this distinction, the supreme court found that "where, as here, the duty breached by the supervisor is a nondelegable duty of general supervision or of providing a safe workplace, the employer shares in the employee's tort immunity."[48] In effect, the court recognized that "something beyond nonfeasance in the duty of general supervision is

39. *Long*, 250 Ga. at 623, 300 S.E.2d at 152.
40. *Id.*
41. 200 Ga. App. 607, 408 S.E.2d 807 (1991).
42. 263 Ga. 146, 429 S.E.2d 912 (1993).
43. *Paz*, 200 Ga. App. 607, 408 S.E.2d 807 (1991).
44. *Id.* at 608-09, 408 S.E.2d at 808-09.
45. *Id.* at 609, 408 S.E.2d at 809.
46. 263 Ga. 146, 429 S.E.2d 912 (1993).
47. *Id.* at 147, 429 S.E.2d at 913.
48. *Id.*

required to impose liability on an employee, because that is a duty owed by the employer to his employees."[49] In support of this finding, the supreme court focused on O.C.G.A. section 34-7-20[50] to establish the employer's nondelegable duty to provide a safe workplace.[51] Further, the court emphasized that in the contract with the subcontractor, Marvin M. Black Company, the general contractor, assumed the duty of supervising safety inspections and procedures. Although the contract designated Pardue as the general contractor's safety officer, he was not a party to the contract. Therefore, "Pardue's duty to supervise and inspect only arose in his capacity as the employer's representative."[52] Further, the court distinguished the case from *Long v. Marvin M. Black Co.*,[53] which involved the defendant's breach of a general duty of care derived from his status as an employee. In doing so, the court reasoned that Pardue's duty originated in the general contractor, Marvin M. Black Co.[54] In addition, the court stressed that after the adoption of the Workers' Compensation Act employees need not prove negligence on the part of the employer, who, in turn, cannot defend by proving lack of negligence, contributory negligence, or assumption of the risk. As a necessary *quid pro quo* for surrendering these defenses, the employer gained immunity from tort liability. The court reasoned that "the practical effect of denying immunity to an officer or supervisor would defeat this policy by practically mandating the company to indemnify such employees."[55] However, a supervising employee does not enjoy such immunity when he commits an affirmative act of negligence causing or increasing the risk of injury to another employee.[56] Therefore, since Pardue did not sign the contract and in no way undertook the supervisory duties as an individual, his duty arose only in his capacity as representative of Marvin M. Black. As a result, he is entitled to the immunity of the statutory employer.[57]

In effect, the Georgia Supreme Court's decision in *Pardue* adheres to the underlying principles and policies of the Workers' Compensation Act. As noted by one commentator, "The ultimate social philosophy behind compensation liability is belief in the wisdom of providing . . . financial and medical benefits for the victims of work-connected injuries . . . and

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49. *Id.*
50. O.C.G.A. § 34-7-20 (1992).
51. *Pardue*, 263 Ga. at 148, 429 S.E.2d at 914.
52. *Id.*
53. 250 Ga. 621, 300 S.E.2d 150 (1983).
54. *Pardue*, 263 Ga. at 148, 429 S.E.2d at 914.
55. *Id.*
56. *Id.*
57. *Id.*

allocating the burden of these payments to the most appropriate source, the consumer of the product."[58] Although the exclusive remedy provision provides for a common law action against third-party tortfeasors, progressive legislation and case law have provided certain exceptions to the third-party classification.[59] Barring an affirmative act of negligence, *Pardue* remains consistent with the evolution of the exclusive remedy provision. In essence, the injured employee must overcome another hurdle before obtaining a remedy outside the Workers' Compensation Act. Previously, an injured employee of the subcontractor needed only to find a breach of duty on behalf of the employee of the general contractor.[60] In the absence of an affirmative act of negligence, courts must now look to the source of the breached duty. The liability of these employees no longer turns on whether they are themselves liable for workers' compensation benefits. As a result, should the court find that negligence is based on a general non-delegable duty of the employer, employees, such as supervisors, share in the employer's immunity. Whether immunity under this analysis extends to employees below the supervisor remains to be seen. However, should such circumstances arise, a defendant can reasonably seek to benefit from the employer's immunity when negligence is based on a non-delegable duty of his employer. Regardless, by effectively carving out another exception to the third-party tortfeasor classification, the Supreme Court of Georgia has furthered the policy of allocating the burden of workers' compensation benefits to the consumer of the product.

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58. 1 LARSON, THE LAW OF WORKMEN'S COMPENSATION § 2.20.

59. *See* 1974 GA. LAWS 1143 (barring action against an employee of the same employer); Cunningham v. Heard, 134 Ga. App. 276, 214 S.E.2d 190 (1975) (extending tort immunity to corporate officers who act as the alter ego of their employer).

60. *See* Long v. Marvin M. Black Co., 250 Ga. 621, 623, 300 S.E.2d 150, 152 (1983) (holding that employees of the general and subcontractor are not "employees of the same employer" for the purposes of O.C.G.A. § 34-9-11).