

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM F214059

**CARLOS HONEYSUCKLE,
DECEASED, EMPLOYEE**

CLAIMANT

**CURTIS H. STOUT, INC.,
EMPLOYER**

RESPONDENT NO. 1

**VALLEY VORGE
INSURANCE CO.,
INSURANCE CARRIER**

RESPONDENT NO. 2

**DEATH & PERMANENT TOTAL
DISABILITY TRUST FUND**

RESPONDENT NO. 3

MICHAEL S. MCCARTHY

RESPONDENT NO. 4

OPINION FILED MAY 18, 2007,

Pursuant to a hearing conducted February 20, 2007, before Administrative Law Judge Richard B. Calaway in Little Rock, Pulaski County, Arkansas, with

Mr. James Bruce McMath, Attorney at Law, Little Rock, Arkansas, appearing for the claimant,

Mr. Phil Hicky and Ms. Andrea Witcher Brock, Attorneys at Law, Forrest City, Arkansas, appearing for Respondent 4, and

Other counsel in attendance, not participating.

STATEMENT OF THE CASE

This is a jurisdictional dispute which turns on the application of the exclusive remedy provisions of the Workers' Compensation Act, specifically, Ark. Code Ann. §11-9-105(a). The central issue is whether the employer's exclusive remedy immunity from suit extends, in this case, to a deceased employee's supervisor, barring a wrongful death action which was filed in Pulaski County Circuit Court.

On December 5, 2002, the employee, Carlos Honeysuckle, was killed when an aircraft, owned and operated by Michael S. McCarthy, crashed in the Hot Springs area during the return flight from a business trip to Texas. Honeysuckle's survivors have prosecuted two claims as the result of his death; the first, a claim for workers' compensation benefits against Curtis H. Stout, Inc., and, the second, a wrongful death suit by Honeysuckle's Administratrix against Michael S. McCarthy and others in Pulaski County Circuit Court, the subject of the current proceeding. Pursuant to a writ of prohibition from the Arkansas Supreme Court, the Circuit Court case was transferred to the Commission for further proceedings, including a determination of subject matter jurisdiction.

The parties have compiled an ample record which includes a stipulation of facts, documentary evidence, deposition testimony, and scholarly briefs and arguments of counsel which were presented at a hearing February 20, 2007. As noted by the respondents, some matters included in the record relate to the merits of the tort claim but were, nevertheless, included for the sake of completeness on appeal. Respondent's objections will go to the weight to be given such evidence.

The record shows that the corporate employer, Curtis H. Stout, Inc., is in the business of selling industrial electrical components and has places of business in Arkansas, Tennessee, Mississippi, Louisiana, and other locations. Due to the nature of the business, travel was required of employees, such as Carl Honeysuckle and Michael McCarthy.

When this accident occurred, McCarthy was an instrument rated pilot, duly licensed to fly his aircraft, which was involved in the fatal crash. According to McCarthy's testimony, he was not a commercial pilot who could provide pilot services for hire, although he used his own aircraft in connection with the business of Curtis H. Stout, Inc., and was reimbursed on a cost of operation basis. Of course, he also used the aircraft for personal reasons, unrelated to the business.

It appears that a dispute had arisen with another sales representative of a supplier which also used Curtis H. Stout, Inc., as a sales representative, concerning money received from a mutual customer, Entergy in New Orleans. The dispute had been settled and Honeysuckle, as the new head of the utility sales division, and McCarthy, as president of the company, decided to meet with the other sales representative in order to complete negotiations, deliver a check, and discuss how to divide future sales commissions when both companies had input into the sale.

Although Curtis H. Stout, Inc., had a policy of reimbursing employees for travel, it left it to each employee to decide the manner of travel, such as commercial airline, personal vehicle, company vehicle, or personal aircraft, in the case of Mr. McCarthy. There was insufficient evidence of an undertaking on the part of Curtis H. Stout, Inc., to provide transportation for Honeysuckle and McCarthy on this occasion. Moreover, it did not seem to be a policy of Curtis H. Stout, Inc., to undertake to provide transportation for its traveling employees. As noted above, McCarthy had decided to take his own aircraft and Honeysuckle had decided to go with him. It is not clear how the parties reached the decision to travel in this way, and to include Mr. Honeysuckle, who was free to travel in any way that he wanted, consistent with the past policy of the employer, Curtis H. Stout, Inc.

The briefs of the parties reviewed the development of the exclusive remedy immunity enjoyed by employers and others. Of course, the workers' compensation system was legislation which required a constitutional amendment, since it was remedial of the common law and limited the existing rights of the parties, particularly the claimant. The amendment to the Arkansas Constitution permitted the enactment of a workers' compensation system to address the amount to be paid by "employers" for injuries or death suffered by employees and specifically provided that

otherwise “no law should limit the amount to be recovered for such injuries.” The first initiated Act provided that the employee’s remedies against the employer in the workers’ compensation system were exclusive of other rights and remedies of the employee to recover from the “employer”.

King v. Cardin, 229 Ark. 929 (1959) made it clear that the immunity from suit because of the exclusive remedy provision was available to the employer, but not to employees. Later, Neal v. Oliver, 246 Ark. 377 (1969) extended the employer’s exclusive remedy immunity to the president and general manager of a closely held family corporation when the plaintiff, in addition to collecting workers’ compensation benefits, also sued in tort, for failing to provide a safe place to work. Thereafter, the Workers’ Compensation Act was amended by Section 1 of Act 253 of 1979 to extend the exclusive remedy protection beyond the employer, so that it covered the employer, “or any principal, officer, director, stockholder, or partner acting in their capacity as an employer, ...” Over time, the pronoun “their,” obviously a reference to each party in the added group, and not merely a reference to “partner”, was changed to the singular “his” and later to the gender neutral “his or her.” The plural pronoun “their” was used again when the provision was amended by Section 4 of Act 796 of 1993, continuing the helpful, but grammatically questionable, reference to all of the singular parties, qualifying the right of each to claim employer immunity.

Later cases extended the employer’s immunity to supervisory employees if involved in discharging the employer’s duty to provide a safe place to work, Simmons First National Bank v. Thompson, 285 Ark. 275 (1985) and non-supervisory co-employees if responsible for providing a safe place to work. Allen v. Kizer, 294 Ark. 1 (1987). Similarly, the concept of the location of the safe workplace was extended to vehicles in Rea v. Fletcher, 39 Ark. App. 9 (1992).

McCarthy contends that he is, by law, immune from suit under the exclusive remedy provisions of Ark. Code Ann. §11-9-105(a). He contends that, merely because of his status as an officer, director, and stockholder of the corporate employer, since the accident arose out of and in the course of the employment of both Honeysuckle and himself, McCarthy is entitled to immunity. He further contends that, although he is immune from suit whether or not he was acting in the capacity of an employer, he was, in fact, so acting at the time of the occurrence and is immune from suit because operating his airplane in order to transport Honeysuckle was part of the delegated duty of the employer to provide a safe place to work.

McCarthy also asserts that he is not a third party within the meaning of Ark. Code Ann. §11-9-410, that the claim is barred by the election of remedies doctrine, and the plaintiff should be estopped from asserting a claim in Circuit Court against him because the receipt of workers' compensation benefits assumes, under the law, that Honeysuckle's death was accidental and arose out of and in the course of his employment.

While the Administratrix concedes that it is necessary in many instances to grant some measure of immunity to employees acting on behalf of the employer, she contends that extending employer immunity further than is necessary to effectuate the employer's own grant of immunity is unwarranted and unconstitutional, and cites as such an example of an unconstitutional overextension of immunity, Stapleton v. M. D. Limbaugh Construction Company, 333 Ark. 381 (1998). The Administratrix argues that immunity is properly conferred only with regard to conduct related to a delegation of the employer's duty to provide a safe place to work for the injured employee. Counsel points to the provision of Ark. Code Ann. §11-9-105(a) indicating that immunity is extended to the employer, or any principal, officer, director, stockholder, or partner, or only when "acting in his or

her capacity as an employer....” To the contrary, McCarthy’s counsel argues that the requirement of acting as an employer only relates to a partner because of the legislative history and because the phrase is not separated from “partner” by a comma and was added at the same time the provision was clarified by amendment specifically to include a partner within the grant of employer immunity.

McCarthy also argues that the use of singular pronouns, “his or her” instead of the plural, “their”, shows that the requirement of acting as an employer relates only to the singular “partner”. However, as above noted, the Legislature did, in fact, use the plural pronoun “their” in an attempt to impose the requirement of acting as an employer on the entire additional group if the immunity, originally limited to the employer, was to be applied. The attempt by the Code Revision Commission to improve the language has resulted in confusion that the Legislature tried to avoid by the use of the plural pronoun. Moreover, the provision also has a comma after “employer,” indicating that the immunity extends to the employer, per se, “or any” of the others when they are acting in the employer’s capacity. The Code Revision Commission saw that the added clause beginning with “or any” was a reference to singular nouns, not all together, but in the alternative, since “or” was used before the final noun, “partner”. Thus, grammar might suggest the use of a singular pronoun in the place of the plural “their”.

Volume II, Book 1, General Acts of Arkansas 1979 (Regular Session 1979) at page 523 shows that Section 1 of Act 253 of 1979 used the plural pronoun “their” when it added the phrase “or any principal, officer, director, stockholder, or partner acting in their capacity as an employer,....”

Volume II, Book 2, General Acts of Arkansas 1993 (Regular Session 1993) at page 2199 shows that Section 4 of Act 796 of 1993 continued the use of the plural pronoun “their”. The Arkansas Statutes and the Arkansas Code also used the Legislature’s pronoun, “their”, until the 1993 supplement

changed the pronoun to the possibly more grammatical “his”. See, Ark. Code Ann. §11-9-105(a)(Supp. 1993). Of course, this was later expanded to “his or her”. Case law may inspire the Arkansas Code Revision Commission to include the pronoun “it”, since a corporation may also be a stockholder. Indeed, the phrase added by the 1979 legislation included singular nouns in the alternative using the singular pronoun “any” at the beginning of the phrase, so that the use of a singular pronoun might be called for. However, the Legislature’s choice of the plural “their” indicates that the entire group was intended and not merely “partner.”

Construction of this provision, based upon the Legislature’s use of the plural pronoun, qualifies and limits the spread of the employer’s immunity in a way that is more consistent with the Arkansas Constitution, the rights of the injured employee or his survivors, and common sense. McCarthy’s position may logically suggest that, by law, the mere status of principal, officer, director, or stockholder confers immunity where the employee is injured in the course and scope of the employment, a startling result, as illustrated by the example in the Administratrix’ brief. That example indicated that merely owning a share of Wal Mart stock would grant immunity to someone who happened to run over an employee on the Wal Mart parking lot because the employee’s injuries arose out of and in the course of the employment. Similarly, one’s status as a member of the board does not mean that such a director should be immune from suit by the Wal Mart employee, if the director’s negligence, while shopping there, should cause the injury. In short, the theory of the Administratrix is more consistent with the limitations that should apply to the exclusive remedy immunity of the Workers’ Compensation Act, if it is to be given a construction that is consistent with the Arkansas Constitution.

It follows that McCarthy should be immune from suit if he was discharging the duty of the employer to provide a safe place to work. The record does not show that Curtis H. Stout, Inc., had undertaken to transport Honeysuckle or McCarthy on the business trip of December 5, 2002. Thus, it does not appear that McCarthy was engaged in discharging the duty of the employer to provide a safe place to work and, consequently, he is not entitled to claim immunity under the Workers' Compensation Act.

Brown v. Finney, Jr., 326 Ark. 691 (1996), cited by the parties, found that the exclusive remedy immunity of the Act protected a co-employee, not having supervisory duties, where his supervisors had assigned him the task of driving employees to and between job sites, when an accident occurred, injuring the plaintiff. There, the employee had been assigned the task of fulfilling the employer's duty to provide a safe place to work, since the employer had elected to provide part-time employees with transportation in a company vehicle both to and from farm work sites. In the present case, however, the employer had not taken on the duty of transporting its employees back and forth from Texas and the duty to provide a safe place to work did not apply to the trip.

Similarly, the doctrine of election of remedies does not apply to McCarthy since the remedy previously elected was against Curtis H. Stout, Inc., legally a separate entity from McCarthy. Thus, McCarthy appears to be a third party within the meaning of Ark. Code Ann. §11-9-410 against whom the Administratrix may bring a cause of action sounding in tort. Finally, there has been no indication that the doctrine of estoppel has any application here or that the moving party has taken some action to his detriment in reliance upon the prosecution of workers' compensation claim by Honeysuckle's survivors, an essential element if estoppel is to be asserted.

Thus, Michael S. McCarthy is not immune from suit under the Workers' Compensation Act and this matter should be, and it is hereby, respectfully, dismissed.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge