

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F214059

CARLOS HONEYSUCKLE, EMPLOYEE	CLAIMANT
CURTIS H. STOUT, INC, EMPLOYER	RESPONDENT NO. 1
VALLEY FORGE INSURANCE CO., CARRIER	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3
MICHAEL S. MCCARTHY	RESPONDENT NO. 4

OPINION FILED JULY 15, 2008

Upon review before the FULL COMMISSION, Little Rock, Pulaski County, Arkansas.

Claimant represented by HONORABLE JAMES BRUCE McMATH, Attorney at Law, Little Rock, Arkansas.

Respondent No. 4 represented by HONORABLE PHIL HICKY and HONORABLE ANDREA WITCHER BROCK, Attorneys at Law, Forrest City, Arkansas.

Respondents No. 1, 2, and 3 did not participate.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

Respondent no. 4, Michael S. McCarthy, appeals a decision by the Administrative Law Judge finding that Mr. McCarthy was not the claimant's employer and therefore exclusive remedy did not apply to a third party action against Mr. McCarthy. Based upon our de novo review of the record, we find that Mr. McCarthy was an employer and was

therefore entitled to be immune from a third party action by the claimant.

Carlos Honeysuckle was employed by Curtis H. Stout, Inc., as a salesman in the utility division. Michael McCarthy, respondent no. 4, was president of Curtis H. Stout, Inc., as well as sales manager. On December 5, 2002, Mr. Honeysuckle and Mr. McCarthy went to Addison, Texas, for a meeting. They flew in Mr. McCarthy's private plane and on the return trip the plane crashed in Hot Springs, Arkansas. Mr. Honeysuckle was killed as a result of that plane crash. Mr. McCarthy suffered injuries, but survived. The workers' compensation carrier paid benefits to Mr. Honeysuckle's survivors. His survivors have also filed a wrongful death suit against Mr. McCarthy and others in Pulaski County Circuit Court. Pursuant to a Writ of Prohibition from the Arkansas Supreme Court, the Circuit Court case was transferred to the Commission for a determination of subject matter jurisdiction. Specifically the Writ of Prohibition issued by the Supreme Court stated:

Upon remand, the matter should be taken to the Commission for a determination of

whether McCarthy is an employer under the Act at the time of the accident.

As a result, the present claim was heard before Administrative Law Judge Calaway on February 20, 2007. In an opinion filed May 18, 2007, Judge Calaway found that exclusive remedy did not preclude a third party action against Mr. McCarthy. Mr. McCarthy has appealed the finding to the Full Commission. Based upon our de novo review of the record, we hereby reverse the decision of the Administrative Law Judge. Specifically, we find that respondent McCarthy is an employer according to statutory interpretation and therefore is entitled to exclusive remedy and immunity from tort liability.

Ark. Code Ann. §11-9-105(a) provides:

The rights and remedies granted to an employee subject to the provisions of this chapter, on account of injury or death, shall be exclusive of all other rights and remedies of the employee, his legal representative, dependents, next of kin, or anyone otherwise entitled to recover damages from the employer, or any principal, officer, director, stockholder, or partner acting in his or her capacity as an employer, or prime contractor of the employer, on account

of the injury or death, and the negligent acts of a co-employee shall not be imputed to the employer. No role, capacity, or persona of any employer, principal, officer, director, or stockholder other than that existing in the role of employer of the employee shall be relevant for consideration for purposes of this chapter, and the remedies and rights provided by this chapter shall in fact be exclusive regardless of the multiple roles, capacities, or personas the employer may be deemed to have.

In addition to the immunity to employers granted statutorily, the Arkansas Supreme Court has extended immunity to employees in certain situations, i.e., if carrying out the employer's responsibility to provide a safe place to work. See Simmons, Supra; See also Allen v. Kizer, 294 Ark. 1, 740 S.W.2d 137 (1987).

It was undisputed by the parties that Mr. Honeysuckle and Mr. McCarthy were both in the scope and course of their employment with Curtis H. Stout, Inc., at the time of the accident. The other stipulated facts were as follows: (1) that McCarthy was, at all times relevant herein, President, a member of the Board of Directors and a

major stockholder in Curtis H. Stout, Inc.; (2) that employees of Curtis H. Stout, Inc., traveled on company business and were reimbursed for their travel expenses; (3) that McCarthy had carried employees of Curtis H. Stout, Inc. on such business trips in his aircraft on prior occasions as well. When we consider these stipulated facts, it is our opinion that the exclusive remedy provisions of §11-9-105(a) provides immunity to officers, directors and stockholders, and that respondent McCarthy is an officer, director and stockholder and is therefore entitled to immunity.

The interpretation of this statute is the major issue that must be addressed. The Administrative Law Judge, misinterpreted the statute. The phrase "acting in his or her capacity as an employer" modifies the term "partner" and does not apply to principals, officers, directors and stockholders. The commas located just before and after the phrase "or partner acting in his or her capacity as an employer" mean that the phrase is set apart from the remainder of the sentence and the "acting in his or her

capacity as an employer" modifies only "partner". Not only is this interpretation supported by rules of grammar and sentence construction, but also by the rules of constructions set forth by the Arkansas Supreme Court in McCoy v. Walker, 317 Ark. 86, 876 S.W.2d 252 (1994). In McCoy, the Court stated that referential and qualifying phrases relate only to the last antecedent and further stated that evidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding antecedent is demonstrated by separating the phrase from the other antecedents by use of a comma. That is exactly the case in §11-9-105(a). Further, the phrase uses the singular pronouns "his" and "her" which indicates it modifies a singular noun and the last antecedent singular noun in that statute is "partner".

The additional language contained in §11-9-105(a), clearly states:

No role, capacity, or persona of any employer, principal, officer, director, or stockholder other than that existing in the role of employer of the employee shall be relevant for consideration for purposes of this chapter, and the

remedies and rights provided by this chapter shall in fact be exclusive **regardless of the multiple roles, capacities, or personas the employer may be deemed to have.** (Emphasis added.)

The Administrative Law Judge appeared to ignore this language altogether in his opinion. He simply opined that the phrase "acting in his or her capacity as an employer" applied to McCarthy as an officer, director and stockholder and the Administrative Law Judge did not address the additional language contained in the statute. In our opinion, "acting in his or her capacity as an employer" only applies to partners is supported by the last sentence of §11-9-105(a) cited above since the sentence does not include the term "partner". Therefore, it is clear from the plain language of the statute that the Arkansas Legislature provided immunity from suit to principals, officers, directors and shareholders of employers. As such, Mr. McCarthy as an officer, director and a shareholder of Curtis H. Stout, Inc., is immune from suit.

We find that the example of the Wal-Mart stockholder to be completely off base. The Administrative

Law Judge used the example 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. In our opinion, there is a huge difference between this analogy and the facts of this case. In the present case, both Mr. Honeysuckle and Mr. McCarthy were in the course and scope of their employment with Curtis H. Stout, Inc., when the accident took place. This is clearly not the case in this illustration. In fact, in the present case, Mr. McCarthy was undisputedly the President of the employer, Curtis H. Stout, Inc., he was a major stockholder of Curtis H. Stout, Inc., and he was a supervisor at Curtis H. Stout, Inc. Mr. Honeysuckle was traveling with his supervisor on business; his supervisor was the President and a major stockholder of the company; and his supervisor undertook to provide the transportation for the business trip. These facts do not compare to a Wal-Mart employee being injured on the parking lot by someone who owns stock in Wal-Mart who is not employed by Wal-Mart and who is not

in the scope of his or her employment. The Arkansas Workers' Compensation Act provides that no role, capacity, or persona of any employer, principal, officer, director, or stockholder other than that existing in the role of employer of the employee shall be relevant for consideration for purposes of this chapter. In the illustration given by the Administrative Law Judge, the driver of the vehicle on the parking lot had no role as employer of the injured employee. In the present case, Mr. McCarthy did have the role of employer of Mr. Honeysuckle and, therefore, pursuant to the plain language of the statute, no other role, capacity or persona is relevant for consideration as to whether the exclusive remedy provisions applies. Mr. McCarthy was in the scope of his employment and as President, major stockholder and a director of Curtis H. Stout, Inc., he was Mr. Honeysuckle's employer. Therefore, even if the phrase "acting in his capacity as employer" applies, Mr. McCarthy could only be acting in his capacity as employer as no other capacity is relevant for consideration under the Act.

There was no evidence that Mr. McCarthy acted in any role at Curtis H. Stout, Inc. other than President and director of the company. The only way the claimant could argue that §11-9-105(a) does not apply to McCarthy would be to submit evidence that McCarthy was not acting in his scope of employment at the time of the accident. The claimant admitted that Mr. McCarthy was the President of the company, was a member of the Board of Directors of the company, was a major stockholder of the company, and was acting in the scope and course of his employment with the company at the time of the accident. There was never any argument or any evidence that Mr. McCarthy took off his "employer" hat while at work and took on some other persona and, such evidence would not even be relevant under the exclusive remedy provision.

The Commission recently considered the meaning of §11-9-105(a) and the immunity it grants to shareholders of employers in Douglas L. Stocks v. Convenient Store Supply, Inc., Full Commission opinion filed May 3, 2007. (Claim No. E614855). In that case, the claimant was employed by

Convenient Store Supply Incorporated (CSSI) when he sustained a compensable injury. The claimant filed suit in Pulaski County Circuit Court against Affiliated Foods Incorporated (Affiliated) alleging negligence in connection with the compensable injury for which he had been compensated by his employer's workers' compensation carrier. Affiliated Foods was granted summary judgment based on §11-9-105(a) since Affiliated Foods was the sole stockholder of Shur-Value, which was the sole stockholder of CSSI and the Pulaski County Circuit Court found the exclusive remedy provision applied to bar a tort action against Affiliated. On appeal to the Arkansas Supreme Court, the case was reversed and remanded to the Workers' Compensation Commission to make a determination of the claimant's employment status. The Administrative Law Judge found that the claimant was not an employee of Affiliated Foods since Affiliated Foods was not the shareholder of CSSI. However, the Full Commission reversed the Administrative Law Judge and extended immunity to Affiliated Foods due to its close relationship with CSSI. The Commission stated that

"Affiliated is the sole shareholder and not some minority shareholder asking for protection." In the present case, McCarthy was not a minority shareholder asking for protection but a major stockholder as well as the President of the company who was actively involved in the management of the company. Therefore, §11-9-105(a) should certainly apply.

Another case on point is Zenith Insurance Company v. VNE, Inc., 61 Ark. App. 165, 965 S.W.2d 805 (1998). VNE obtained a policy of workers' compensation insurance from Zenith that secured to its employees the benefits of workers' compensation. Jerry D. Gardner, who, with his wife, owned both VNE, Inc, and Sierra Hotel Corporation, was piloting an airplane owned by Sierra Hotel Corporation with Michael Coates, an employee of VNE, on board as a passenger, when the aircraft crashed. As a result of the crash, Coates sustained injuries. Zenith paid Coates workers' compensation benefits. Zenith later filed a complaint against VNE and Sierra seeking to recover the amount of workers' compensation benefits it had paid to Coates. Zenith alleged

that Gardner had been negligent in operating the airplane in which Coates was injured and that Gardner's negligence was a proximate cause of Coates's injuries. Zenith contended that Gardner and Sierra were third parties within the meaning of Ark. Code Ann. §11-9-410 and claimed that Coates' injuries resulted from Gardner's negligence in the operation of Sierra's airplane. The Court held that Gardner was not a third party within the meaning of Ark. Code Ann. §11-9-410(b). In doing so, the Court stated:

The Arkansas Supreme Court has defined a third party under section 11-9-410 as "some person or entity other than the first and second parties involved, and the first and second parties can only mean the injured employee and the employer or one liable under the compensation act."

Under the provisions of Ark. Code Ann. §11-9-410, an employer cannot be a third party. The Court went on to note that the injured employee Coates was the first party and the second party was the employer, VNE. The Court also said:

In this case, the first party is the injured employee, Coates; and the second party is the employer, VNE, or its workers' compensation insurance carrier,

which is the appellant. Since appellant's claim against third parties exists only by virtue of Ark. Code Ann. § 11-9-410(b), as a subrogee of Coats, appellant stands in the same position as Coats, who is prohibited by Ark. Code Ann. § 11-9-105(a) from suing VNE. Also, Gardner cannot be a third party in this case because he is the sole owner and an officer (and therefore a "persona") of VNE, Coats's employer, that is protected by the exclusive remedy provisions of Ark. Code Ann. § 11-9-105(a). Since no third party exists in the case at bar, section 11-9-410(b) is simply not applicable.

Therefore, based upon the statutory construction of Ark. Code Ann. §11-9-105(a), and the relevant case law, we find that Mr. McCarthy was Mr. Honeysuckle's employer at the time of the accident and is therefore entitled to immunity from a third party action.

Even if Mr. McCarthy were not the claimant's employer, a finding that we do not make, we find that he would still be immune from a third party action because he was carrying out the duty to provide a safe workplace. In the present case, the Administrative Law Judge specifically ruled that there was insufficient evidence of an undertaking

on the part of Curtis H. Stout, Inc. to provide transportation for Mr. Honeysuckle and Mr. McCarthy. The opinion cites Stapleton v. M.D. Limbaugh Construction Co., 333 Ark. 381, 969 S.W.2d 658 (1998), in connection with claimant's argument that extending employer immunity further than necessary is unwarranted and unconstitutional. However, the Arkansas Supreme Court held in Stapleton that the amended provision of §11-9-105(a) which extended tort immunity to prime contractors violated the State Constitution barring limits on recovery outside the employment context. In the present case, there can be no argument that Mr. McCarthy is outside the employment context as it was admitted by the claimant that Mr. McCarthy was a supervisor and was an officer, director and stockholder of Curtis H. Stout, Inc., and was acting in the course and scope of his employment with Curtis H. Stout, Inc., at the time of the aircraft accident. Therefore, Stapleton does not apply to the facts in this case and the claimant cannot argue that granting immunity to Mr. McCarthy would limit recovery outside the employment context so as to be

unconstitutional. We would note that this case is a pre-Act 796 case.

Another case cited by the Administrative Law judge is Brown v. Finney, 326 Ark. 691, 931 S.W.2d 769 (1996) but we find this case to be solidly on point with the facts of this case. In Brown, the Arkansas Supreme Court extended tort immunity beyond that provided in §11-9-105(a) and found that co-employees were immune when fulfilling the employer's duty to provide a safe place to work. Since the employer in Brown had elected to provide part-time employees with transportation in a company vehicle both to and from farm work sites, immunity extended to the employee who drove employees between job sites. In the case presently before us, Mr. McCarthy had no supervisor. He was the principal supervisor, the President of the company, a member of the Board of Directors and a major stockholder of the company. Since Mr. McCarthy undertook to provide the transportation in this case and since both Mr. McCarthy and Mr. Honeysuckle were in the course and scope of their employment, immunity extends to Mr. McCarthy. Curtis H. Stout, Inc., is a

corporation, a legal entity which can only act through individuals. As President of the company and as a supervisor, Mr. McCarthy's action to provide the transportation for he and Mr. Honeysuckle to the business meeting was an undertaking on the part of Curtis H. Stout, Inc., to provide transportation. Therefore, Mr. McCarthy is entitled to immunity as he was carrying out the duty to provide a safe place to work. See Rea v. Fletcher, Supra, (extends the workplace to transportation even when the vehicle belongs to the employee).

Further, the opinion of the Administrative Law Judge in this case cannot be reconciled with §11-9-105(a). The Administrative Law Judge relied heavily on the cases which extend immunity to supervisory employees and co-employees when they are carrying out the employer's duty to provide a safe workplace. Then, the Administrative Law Judge interpreted §11-9-105(a) to require officers, directors and shareholders to be acting in their capacities as an employer in order to be immune from suit. However, the opinion fails to interpret or give meaning to the phrase "acting in his or

her capacity as an employer". The opinion stated that Mr. McCarthy was a supervisor and he was an officer, director and major shareholder of Curtis H. Stout, Inc. Therefore, it is unclear how Mr. McCarthy could be in the scope of his employment at Curtis H. Stout, Inc., yet not be acting in his capacity as employer. There is absolutely no evidence that Mr. McCarthy ever acted in any capacity other than employer, as evidenced by my prior finding that Mr. McCarthy was acting as an employer at the time of the accident. The Arkansas Legislature did not limit the exclusive remedy provision in §11-9-105(a) to apply to officers, directors, and shareholders who were carrying out a duty to provide a safe place to work. Rather, the Supreme Court broadened the immunity granted in §11-9-105(a) by extending it to employees who were not officers, directors or shareholders but who carried out duties of the employer to provide a safe place to work. The opinion of the Administrative Law Judge limits Mr. McCarthy's entitlement to immunity to the same type of immunity granted to co-employees under case law and does not apply §11-9-105(a) to

the facts of the case. More specifically, in this case, it is stipulated by the parties that Mr. McCarthy, an officer, director and shareholder of Curtis H. Stout, Inc., was acting in the course and scope of his employment with Curtis H. Stout, Inc., as was Mr. Honeysuckle, at the time of the accident and, therefore, under those circumstances, Mr. McCarthy was acting as an employer and entitled to immunity under Ark. Code Ann. §11-9-105(a). Since the transportation was provided by the claimant's supervisor/employer, Mr. McCarthy and since the accident occurred during the course of the employment of both Mr. McCarthy and Mr. Honeysuckle, it is reasonable to conclude that the "workplace" was in the aircraft at the time of the accident and that Mr. McCarthy was carrying out Curtis H. Stout, Inc.'s duty to provide a safe place to work. Workplace is defined in Brown v. Finney, as not being static in the sense of being limited to the employer's physical premises or actual place of business. In Neal v. Oliver, 246 Ark. 377, 438 S.W.2d 313 (1969), it was held that an employer can not delegate its duty to provide a safe

work place to an employee. See also Allen v. Kizer, 294 Ark. 1, 740 S.W.2d 137 (1987). The Supreme Court later adopted the majority view that a supervisory employee was immune from suit for failure to provide a safe workplace. Simmons First Nat'l Bank v. Thompson, 285 Ark. 275, 686 S.W.2d 415 (1985). This immunity was later extended to non-supervisory employees who failed to provide a safe place to work when the injury occurred. Allen v. Kizer, supra. In Brown v. Finney, the Court held that co-employees who are performing the employer's duty to provide a safe workplace are immune from suit under Ark. Code Ann. § 11-9-105. Currently we recognize that in addition to the employer, Ark. Code Ann. § 11-9-105 extends immunity to the employer's workers' compensation carrier and to co-employees if at the time of the injury they were performing the employer's duty to provide a safe workplace. Therefore, Mr. McCarthy should be immune from suit.

It is also clear that Mr. McCarthy is not a third party. The Arkansas Supreme Court has defined a third party under §11-9-410 as "some person or entity other than the

first and second parties involved, and the first and second parties can only mean the injured employee and the employer one liable under the compensation act." Wilson v. Rebsamen Ins., 330 Ark. 687, 957, S.W.2d 678 (1997). Therefore, under Ark. Code Ann. §11-9-410, neither a workers' compensation carrier nor an employer can be a third party.

Therefore, for all the reasons set forth herein, we hereby reverse the decision of the Administrative Law Judge and find that respondent McCarthy was the claimant's employer and therefore is entitled to immunity from third party action pursuant to Ark. Code Ann. §11-9-410.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

This case hinges on the testimony of Mr. Michael McCarthy. Mr. McCarthy has testified that on the trip that killed Mr. Carlos Honeysuckle, Mr. McCarthy was a private pilot flying his own private plane. In light of Mr. McCarthy's testimony, clearly disregarded by the majority, there is no evidence of record to support the majority's determination that Mr. McCarthy was an "employer" under the Workers' Compensation Act at the time of the accident. There is no evidence of record to support the majority's determination that Mr. McCarthy was "acting in his capacity as an employer." There is no evidence of record to support the majority's assertion that Mr. McCarthy's private plane was a Curtis H. Stout "workplace." There is no evidence of record to support the majority's conclusion that Curtis H. Stout, Inc. had charged Mr. McCarthy with the duty of making his private plane a safe place to work for employee's of Curtis H. Stout, Inc.. As such, this is not a workers' compensation claim. This is a tort claim. Pursuant

to Article 5, Section 32, of the Arkansas Constitution, the Worker's Compensation Commission has jurisdiction only when there is an employment relationship between the litigants. Stapleton v. M.D. Limbaugh Constr. Co., 333 Ark. 381, 969 S.W.2d 648 (1998). As I find that Mr. McCarthy was a private individual flying his own private aircraft at the time of the accident, not acting in any way on the behalf of Curtis H. Stout, Inc., I must respectfully dissent from the majority's determination that the Workers' Compensation Commission have jurisdiction over this tort claim. Accordingly, I must also dissent from the majority's finding that Mr. McCarthy is protected by the "exclusive remedy" of the Workers' Compensation Act.

Mr. McCarthy testified that transportation at Curtis H. Stout, Inc. was something that each individual employee arranged for himself or herself; it was not provided by Curtis H. Stout, Inc. Curtis H. Stout, Inc. did not even provide a credit card for that purpose. If an employee bought an airline ticket, he paid for it himself and turned in a voucher. If a personal car was used, Curtis

H. Stout, Inc. would reimburse for mileage. Where more than one employee was traveling, they would work out the details between themselves on an ad hoc basis. If by car, then one or the other employee would volunteer to drive, and that one would turn in the voucher.

In this particular instance, Mr. McCarthy testified that Mr. Honeysuckle was free to have driven himself, or could have bought an airline ticket. Mr. Honeysuckle was not directed to ride in this plane with Mr. McCarthy and, in fact, no employee was ever required to fly in the airplane. The airplane was Mr. McCarthy's personal airplane. Curtis H. Stout, Inc., had no interest in the airplane, nor did the company carry insurance for the airplane or carry liability coverage for the airplane's operation. When Mr. McCarthy used it for business, he turned in a voucher just like other employees would do for their cars.

It is important to note that Mr. McCarthy was not a commercial pilot, but a private pilot. Accordingly, as he acknowledges, it would be unlawful for him to undertake to

fly this or any aircraft as part of his job duties. While federal law will allow him to fly the aircraft incidental to his business or profession and be reimbursed for the cost of operating the aircraft, he cannot be compensated for flying as such, and thus, it would be unlawful for him to provide pilot service for Curtis H. Stout, Inc. Accordingly, Mr. McCarthy concedes that his duties as President did not include piloting the subject aircraft or any other aircraft or otherwise transporting co-employees. It is, therefore, clear that Curtis H. Stout, Inc. did not undertake to provide transportation to Mr. Honeysuckle in this instance, via McCarthy's airplane or otherwise, and that Mr. McCarthy could not legally be assigned such duties under federal law. Rather, McCarthy volunteered to fly his co-employee to Dallas in his private airplane, much like the unnamed ConAgra employee who was voluntarily driving co-employees between job sites in Brown v. Finney, 326 Ark. 691, 932 S.W.2d 769 (1996)

If Curtis H. Stout and Mr. McCarthy had considered Mr. McCarthy's operation of the plane to be a Curtis H.

Stout, Inc. undertaking, and part of his employment duties, one would have assumed that they would have taken out insurance and Mr. McCarthy would have been properly licensed to assume those duties as part of his job. One would also expect that such duties (flying company employees on business trips) would have been listed on the documentation submitted for workers' compensation coverage since pilots are likely rated differently than company officers for premium determination purposes. It seems clear enough that where an employer has not undertaken to provide transportation as a company function, there is no way that the employee can claim to be discharging a delegated employer duty to provide a safe work place in connection with that function.

Curiously, as the record is devoid of any actual evidence that Curtis H. Stout undertook to provide transportation to Dallas for either Mr. McCarthy or Mr. Honeysuckle, let alone assigned that responsibility to Mr. McCarthy, which would have been illegal for him to accept), the majority argues that since Mr. McCarthy was the

president and had no supervisor, we should assume that his decision to fly Mr. Honeysuckle to Dallas is the same as Curtis H. Stout having done so. Certainly, setting aside the illegality of Mr. McCarthy flying others for hire, which is necessarily implicit in an assertion that he was doing it as part of his job duties, rather than merely as incidental to those duties, one must concede that could have been done. The problem is, by Mr. McCarthy's own very clear testimony this was, in fact, not the case and, in fact, could not lawfully have been done. By federal law, Mr. McCarthy's operation of his private aircraft could only be incidental to his employment, it could not be part of his job duties and the undisputed record is clear and affirms that Curtis H. Stout, Inc. had no role in the operation or maintenance of Mr. McCarthy's private aircraft, either on the day of the incident or otherwise.

Similarly, there is no merit to the majority's argument that as president, anything and everything Mr. McCarthy does while at work is acting in his capacity of employer. A president, like anyone else, can act personally

while at work, thereby assuming personal responsibilities unconnected with the employer's duty to provide a safe work place. Being at work is no more determinative than being president. The question is whether the duty allegedly breached was one owed by the employer related to providing a safe work place and that then was assigned to the employee seeking immunity. If the employer has not assumed it, it can't delegate it. The fact that Curtis H. Stout, Inc. required Mr. McCarthy and Mr. Honeysuckle to take a business trip is not the same as Curtis H. Stout, Inc. assuming the responsibility of providing Mr. McCarthy's and Mr. Honeysuckle's transportation and assigning the task (illegally) to Mr. McCarthy.

Curtis H. Stout, Inc., by Mr. McCarthy's own testimony, did not, in this instance, or any other instance, provide company transportation to traveling employees. Mr. McCarthy's plane was not a company plane. Mr. McCarthy was not hired, in part, or otherwise, to provide pilot services and could not lawfully have done so on the date of this incident. Mr. McCarthy's conduct in the maintenance and

operation of his private aircraft was a personal responsibility, not a Curtis H. Stout, Inc. responsibility.

Curtis H. Stout, Inc. simply and uncontrovertibly did not undertake to fly Mr. McCarthy and Mr. Honeysuckle to Dallas and could not lawfully have done so using the private pilot privileges of Mr. McCarthy. It, therefore, necessarily follows that Mr. McCarthy, in flying to Dallas, using his personal aircraft and exercising his licenses as a private pilot, was acting in his personal capacity, and not on behalf of Curtis H. Stout, Inc. His duties as president of the company had nothing to do with the operation and maintenance of his private aircraft and are in no way the subject of the complaint in question.

The negligence alleged here in the operation and maintenance of Mr. McCarthy's own aircraft is not, and indeed could not, lawfully be related to Mr. McCarthy's duties as president of Curtis H. Stout, Inc., and was not delegated to him by Curtis H. Stout, Inc.. Mr. McCarthy's duties arise solely because he elected to fly himself to Dallas and offered Mr. Honeysuckle a ride. Such incidental use of his private

aircraft is just that; Mr. McCarthy was not hired to fly himself, let alone co-employees, anywhere, and, in fact, could not lawfully do so as a private pilot. Mr. McCarthy offered Mr. Honeysuckle a lift, which Mr. Honeysuckle was free to reject or accept as he saw fit - he was not flying at Mr. McCarthy's direction in this aircraft. In accepting the ride, Mr. Honeysuckle would not have viewed this as company-provided transportation, or Mr. McCarthy as performing any duties as president of the company relative to that operation, any more than if Mr. McCarthy had offered to drive claimant to the airport to fly commercially to Dallas. In acting as a pilot in this instance, Mr. McCarthy was acting in a personal capacity, and, therefore, as a third party, who is not entitled to immunity in the first instance. Having not been acting in the capacity of employer relative to the operation of the aircraft in the first place, there is no dual persona to draw upon the limitations of A.C.A. §11-9-105(b).

The issue of co-employee immunity is not resolved by whether either or both employees are engaged in their

work at the time of the incident (which is only relevant as to the employer's liability which is not fault in nature and arises solely based upon whether the claimed injury occurred during the course and scope of the employment). Rather, co-employee immunity turns solely upon whether the duty breached is one that represents a delegated responsibility owed by the employer to the injured worker for which the employer is immune. A broader grant of immunity to a co-worker would be unconstitutional and an unwarranted extension of the immunity concept which is necessarily limited to immunity for the employer and the employer's agents when acting in the employer's behalf. Co-employee immunity is only properly and constitutionally achieved when the duty being executed by the employee is actually that of the employer.

Contrasting the instant circumstance to a setting where there would be immunity is easy. Curtis H. Stout, Inc. could have rented, leased, or bought an airplane, and then hired a commercial pilot to fly it and thereby assumed a duty with regard to the operation of the aircraft for

employee safety. Any pilot employee hired to operate such an aircraft would necessarily be discharging an employer-assumed responsibility to provide a safe work place for employees while in transit and would, therefore, acquire the employer's immunity. This result would be the same result if the pilot was also the president, again assuming that he/she was actually tasked to provide co-employee transportation by the employer, something a commercially-rated pilot could lawfully do. The immunity conferred in such a circumstance, though, would not be the result of the office, but of the role as pilot hired to fly the company airplane to transport co-employees.

In conclusion, I find that Mr. McCarthy was not an "employer" under the Arkansas Workers' Compensation Act at the time of the accident. The majority has clearly disregarded Mr. McCarthy's testimony. There is no substantial evidence to support the majority's decision. There was no employment relationship between the parties at the time of the accident. This is a tort claim. The Arkansas Workers' Compensation Commission does not have jurisdiction.

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Mr. McCarthy is not protected by the exclusive remedy of the Arkansas Workers' Compensation Act.

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner