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$2.75 million settlement leads to spar over subrogation

IN RECENT CASE, chicken plant sued injured employee to recoup $140,000 from her $2.75 million settlement

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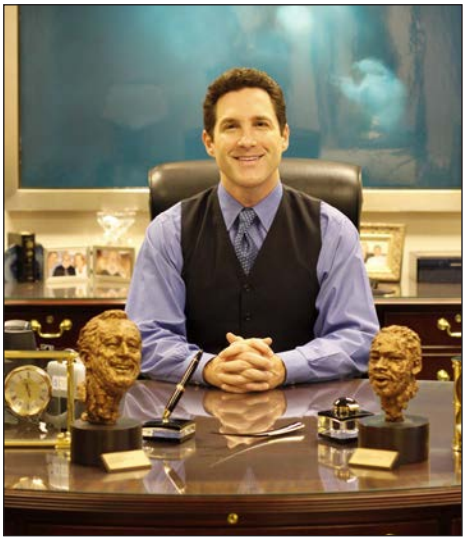
THE LAWYER FOR a young woman who lost an arm in a chicken-processing machine accident said he was able to persuade the chicken plant's owner, Pilgrim's Pride, to drop a suit seeking more than $140,000 in worker's compensation payments from the $2.75 million settlement she reached with the machine's manufacturer.

D. Brandon Hornsby said that while Pilgrim's Pride "did the right thing" by dropping its suit, the case highlights what he called a troubling trend that has accelerated since the General Assembly in 2005 passed a series of laws that generally favored defendants in litigation.

Among the legislative changes was the elimination of joint and several liability, which meant that in cases in which two or more defendants are deemed liable for a plaintiff's injury, that liability must be apportioned. Previously in such cases, losing defendants were deemed to be equally responsible for satisfying the judgment, so if one were unable to pay, the other could be held liable for the entire amount.

Hornsby said that that change, coupled with state and federal laws that allow heath insurers and employers to seek reimbursment for medical and disability benefits they've paid to injured workers who have collected a verdict or settlement from a third party, has led them to pursue subrogation liens against such workers. The liens allow an insurer or employer to place a claim on awards to injured insureds or employers who successfully seek damages from a third party who bears some or all of the blame for the injury.



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Brandon Hornsby says subrogation suits have increased since Georgia's 2005 tort reform laws.

"Before tort reform, it was unheard of for a health insurance company to sue a personal injury victim," said Hornsby. "Health insurance companies recently have started regularly threatening to [sue] or are actually personally suing injury victims and their attorneys unless they fully pay back all the health insurance payments made."

Insurers have argued that subrogation claims prevent plaintiffs from collecting twice for the same injuries and are a vital part of protecting the solvency of the health care system.

Moreover, lawyers on both sides of civil cases said that subrogration claims, while seemingly on the rise, are hard to win and often not worth the cost of litigation.

Apron caught in machine

Hornsby's client, Heather Dalton, was an 18-year-old worker at the Pilgrim's Pride chicken processing plant in Elberton, Ga., on June 16, 2008. She was placing pieces of chicken on an "individual quick frozen" production line when a revolving handle of the machinery caught her apron and smock and dragged her arm and shoulder into a spinning take-up shaft, where her "dominant right arm was crushed and ripped from her body," according to a court filing on her behalf.

In March 2010, Hornsby negotiated a $2.75 million settlement with the machine's manufacturer, Florida-based Stellar Freezing Systems, according to the document.

On June 10, Pilgrims' Pride filed suit against Dalton and Stellar in Madison County Superior Court seeking reimbursement for the $109,667 in medical bills and $30,706 in indemnity benefits it had paid since the accident.

The company cited the subrogation section of Georgia's worker's compensation statute, O.C.G.A. §34-9-11.1. It says that if a third party bears any liability for an employee's injury, "and the employer's liability under this chapter has been fully or partially paid, then the employer or such employer's insurer shall have a subrogation lien, not to exceed the actual amount of compensation paid pursuant to this chapter, against such recovery. The employer or insurer may intervene in any action to protect and enforce such lien."

But the statute also provides that any recovery "shall only be recoverable if the injured employee has been fully and com-

pletely compensated taking into consideration both the benefits received under this chapter and the amount of the recovery in the third-party claim, for all economic and noneconomic losses incurred as a result of the injury."

This section, commonly known as the "made whole rule," means that the employee's economic damages, as well as those assessed for pain and suffering, must first be paid before the insurer or employer can recover their costs, said Hornsby.

In a July 5 response and counterclaim demanding that Pilgrim's Pride dismiss its suit, Hornsby said Dalton's net recovery from the settlement after subtracting attorneys' fees and expenses was $1.75 million.

After subtracting her economic damages—medical expenses, a life care plan and loss of lifetime earnings—of a little more than $1.7 million, Hornsby said his client's recovery for pain and suffering was just $38,748.

Given that Hornsby had demanded $7.5 million at the beginning of the case against the machine maker, he concluded that it was "abundantly clear that's she settled her case for a fraction of what it was worth."

On July 23, the parties signed a joint dismissal with prejudice, with each side bearing its own costs.

"We just decided not to pursue a subrogation claim against her," said Pilgrim's Pride attorney Frank R. McKay of Gainesville's Stewart, Melvin & Frost. He declined to discuss the case further.

Needing 'every penny'

Hornsby credited Pilgrim's Pride and McKay for their decision. But he takes issue with the company's initial efforts to dip into Dalton's settlement, and with the larger practice of insurers and health plans pursuing similar tactics.

"In catastrophic personal injury cases, the victim needs every penny she can get," he said. "Although Heather received an excellent settlement, she was not able to be fully compensated for her case."

Situations like Dalton's are particularly egregious, Hornsby said, because his investigation revealed that Pilgrim's Pride also bore some of the blame for her injuries.

"We determined that both Pilgrim's Pride and Stellar had joint liability; however, [Pilgrim's Pride] had complete immunity under the workers' compensation law; if Georgia, if you are injured on the job and accept workers' compensation, you cannot sue your employer no matter how negligent they are."

That protection of the employer helps third-party defendants in personal injury suits, Hornsby said, in light of the 2005 tort reform legislation's elimination of joint and several liability.

Now a third party, such as the maker of a machine that was involved in a worker's accident, can ask the jury to apportion liability between it and the employer.

That means that a jury could hold an employer responsible even for egregious negligence, said Hornsby, but the employer not only pays nothing but also can "raid the verdict" for compensation it has paid to the employee.

From the perspective of insurance companies, subrogation claims "are critical cost-saving devices for employers and other plan sponsors facing strong health care cost inflation pressures," according to an amicus brief filed in a 2005 case by America's Health Insurance Plans Inc., a trade association.

"Millions and potentially billions of dollars are recouped annually by health plans and insurers by virtue of subrogation and other recovery mechanisms, allowing them to make more affordable the costs of health care coverage. In the absence of such recoveries, some participants and beneficiaries would be unjustly enriched by retaining double recoveries," the association's brief continued.

Macon's Charles M. Cork III, who represented the employee in the 2005 case in which the health plan filed the amicus brief, said that the federal subrogation rules, which apply to companies' self-funded insurance plans, are less restrictive than the "made whole" rules in Georgia and other states. Governing those rules is the federal Employee Retirement Income Security Act, or ERISA.

Cork said he has no empirical evidence of a trend, "but I have seen an increase in the use of standardized self-insuring ERISA plans which, I surmise, are marketed by firms that provide plan administration services."

"This probably reflects a move in the market toward such plans, and thus a trend. Since those plans escape state made-whole rules, they make it easier for the employers to sue their employees," said Cork.

Uncertain chances

Forest Park attorney George C. Creal Jr., who filed Dalton's worker's compensation claim, said he has seen an uptick in subrogation liens in such cases, but he said their degree of success is uncertain.

"Over the last 10 years, all these insurance companies have really been pursuing these subrogation liens," he said. "I can't say for sure, but I think they must be telling [lawyers] at some CLE course to fire up these types of liens."

But the 1992 Georgia law governing such liens is "pretty ambiguous," he said, and proving that a worker has been "made whole" and has the means to repay the workers' compensation insurance carrier can be a difficult and expensive proposition.

"The courts are not particularly friendly to these subrogation claims," Creal said. "Generally speaking, if you fight them, it's difficult for them to pursue. And if it's a general claim, they can't prove which part is for pain and suffering, and which is for lost wages. … The general view among the plaintiffs' bar is that it's very difficult for insurers and employers to win."

Michael J. Goldman, a partner at Hawkins Parnell Thackston & Young who represented Stellar, agreed that subrogation lien claims have increased in recent years.

"The unusual thing here is that she got sued," said Goldman. "We handle a lot of these cases, and it rarely gets to the point where the employer sues the employee. You may receive a letter saying, 'We want a part of the settlement.' Generally, you write them and explain why there was no complete compensation for the employee, and they'll either agree, or you will reach a negligible settlement with them."

"It's a little questionable in my mind as to whether that subrogation statute, which some workmans' comp carriers thought would be such a boon, has really met that goal," he said.

William T. Mitchell of Cruser & Mitchell, who often represents civil defendants, said "I've seen an upswing in interveners, but I've not seen an intervener get a penny in the last 10 years.

"I get calls from out-of-state workers' comp carriers all the time [saying], 'Hey, we lost 10 grand, we want it back.' I just say, 'They've settled, forget it.' I guess they're hoping that, in the 1-in-10 chance the case goes to trial, they're in the game."

But the threat of a subrogation claim does help get plaintiffs to the bargaining table, said Mitchell, citing a case in which an insurer was seeking $700,000 in workers' compensation reimbursements for a woman who had lost a leg.

"I just told [the plaintiff's attorneys], 'Sure, let's try the case, but there's a $700,000 tax on your case if you win.'

"The indirect impact is that it's led to settling cases, especially if you're a defense lawyer looking to settle," he said. "For defense lawyers, if you're a prudent negotiator, the lien statute has helped us." DR