Liability of Co-Employees

by Judge James O. Haley
Jefferson Circuit Court, 10th Judicial Circuit

Historical Background

It, no doubt, is safe to start this article with the statement that the history of co-employee suits under the Alabama Workmen's Compensation Law in recent years has been a stormy one. This, of course, is tied in with the development of workmen's compensation laws throughout the world. The initial concept of workmen's compensation in America was not originated by English Common Law, but instead began in Germany in 1884. Workmen's compensation did not gain widespread acceptance in the United States until uncompensated industrial injuries became such a problem that legislators felt the need to remedy the situation.

The Alabama Legislature passed a Workmen's Compensation Act in 1919 and the Act, as originally passed, gave to the injured employee or to his dependents in the case of his death the option to accept workmen's compensation benefits or to pursue his remedy against a third party, but not both. In 1947 the Act was amended so as to afford to the injured employee or his dependents in case of his death the right to accept benefits under the Act and also to proceed against "any party other than the employer" who might be legally liable. We thus see that prior to 1919 there was no law that deprived an injured employee of a right of action against a fellow employee for injuries negligently inflicted. As a practical matter, however, suits of this type were not filed because then the co-employees had no liability coverage and it is a known fact that it takes liability insurance to make cases of this type worthwhile.

Then from 1919 until 1947 co-employees were immune from liability by virtue of the provisions of the workmen's compensation law. Under the present holding of the Supreme Court this provision probably was unconstitutional, but it at least was considered constitutional during that period of time. From 1947 until 1970, when the case of *United States Fire Insurance Co. v. McCormick*, 286 Ala. 531, 243 So.2d 367, was decided, it was generally considered by the legal profession that suits of this nature could not be maintained by reason of the fact that the executive officers and co-employees were immune on the theory that they in law enjoyed the same status as an "employer" for immunity purposes. The Alabama Supreme Court, however, in the *McCormick* case held that a co-employee can be held liable in damages for injuries negligently inflicted upon a fellow employee and said in part as follows:

> "To hold a co-employee is not a person other than an employee would be the equivalent of saying an employee is an employer, and this we cannot do."

Finally the Court held, "We hold that the words in Title 26, Sec 312, as amended, in part, 'other than the employer' permit co-employees to be treated as third parties."

After the *McCormick* decision was handed down a deluge of suits were filed against corporate officers, directors, executives and co-employees by workers who were injured on the job and who had been paid and who had accepted workmen's compensation benefits.

In response to the *McCormick* decision, the Legislature in 1973 amended Sec. 312 (now Sec. 25-5-11, Code 1975) to provide:

> "Neither an officer, director, agent, servant or employee of the same employer nor his personal representative . . . shall be considered a party other than the employer."

The validity of the 1973 amendment was immediately challenged on the belief by many that a legislative

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"slip-up" occurred and that this section which purportedly took away the right to sue fellow employees was, in fact, not passed by the Legislature. This section did, however, appear in the code, but its validity was not finally passed upon by the Supreme Court until the case of *Childers v. Couey*, 348 So.2d 1349 (1977) was handed down. The Court in the *Childers* case upheld the validity of the 1973 amendment. Since it was a known fact that the validity of this amendment was being seriously challenged, the Legislature in 1975 reenacted the same provision to take care of the situation in the event the 1973 amendment was held invalid. Thus from 1973 until 1975 no lawyer or judge knew whether suits of this type could be maintained or not but many were filed. After the 1975 amendment was passed, it was generally conceded that it did insulate co-employees from suits, but some attorneys still contended that the amendment was unconstitutional and continued filing such suits. In 1977, when the Supreme Court in the *Childers* case held that the 1973 Act was constitutionally passed and thus valid, all of the claims that arose subsequent to 1973 were subject to dismissal. The Court did, however, observe in the *Childers* decision that the constitutionality of the Act was not challenged and, therefore, this was not being decided. As the law stood, however, those claims that arose in the interim period certainly were due to be dismissed and many were either on a motion to dismiss or on a motion for summary judgment.

To complicate the issue more, the U. S. District Court for the Middle District of Alabama in the case of *Barr v. Preskitt*, 389 F. Supp. 496 (1975), held that the 1973 amendment was retrospective in application. This obviously was an unsound ruling and was repudiated by our Supreme Court in the case of *Sewell v. Harris*, 351 So.2d 566, (1977) and our Court writing through Justice Maddox said, "We hold that there is no apparent Legislative intent in the 1973 amendment to Sec. 312 that it should be applied retrospectively." We now have a situation where an injured employee who was injured prior to 1973 could sue a fellow employee but one injured after 1973 could not maintain such a suit. This status was short lived, however, for in May, 1978 the Supreme Court in the case of *Grantham v. Denke*, 359 So.2d 785, held the 1975 amendment unconstitutional and concluded the opinion by saying:

> "We, therefore, conclude that Sec. 13, Constitution of Ala., 1901, limits the power of the Legislature to enact the 1975 amendments to Sec. 312, Tit. 26, Code 1940 (Sec. 25-5-11 Code 1975) which would bar negligence actions for damages by an injured employee against her or his co-employees. Those amendments violate Sec. 13 and cannot have their intended effect."

As the law is now interpreted, the right of a co-employee to sue a fellow employee has existed since 1947.

Death Actions

When the *Grantham* case was decided, the Court made no mention of death actions. Immediately the contention was raised that the immunity provision still was good insofar as suits against co-employees for wrongful death was concerned. The reasoning was that the Court in *Grantham* held the act immunizing co-employees from liability unconstitutional because that the employee had the right to sue a fellow employee at common law and it was beyond the power of the Legislature to take this right away from them. There was no right to sue for wrongful death at common law and, therefore, it was contended that that portion of the Act immunizing co-employees from liability for wrongful death was valid. The Supreme Court, however, in the case of *King v. Landrum*, 13 ABR 343, apparently settled the issue by holding that the dependents of a deceased workman would have the right to sue a fellow employee. The Court did not discuss the issue but it did say, "This appeal involves two issues:

1. The effect of federal removal statues on Alabama appellate procedures.
2. The right of the widow of a deceased employee covered by Workmen's Compensation to sue a co-employee of the deceased."

The opinion was concluded by the following statement:

> "The second issue involves the immunity provisions of Title 26, Sec. 312, Code 1940, as they pertain to actions against co-employees. The circuit court's grant of summary judgment in favor of Landrum and Reeves on the basis of these Code sections was erroneous. *Grantham v. Denke*, 359 So.2d 785 (Ala. 1978).

[Editor's Note: On April 6, 1979 the Alabama Supreme Court, in *Slagle v. Parker*, ____ ABR ____ held that co-employees may not be sued when their negligence results in the death of a fellow employee.]

What About Those Suits That Were Dismissed or Resulted in Summary Judgments Based Upon the Childers Decision?

As above stated, many cases that were filed prior to the *Childers* decision and were still pending when it was handed down were dismissed or had summary judgments rendered in favor of the co-employees. Almost invariably, motions have been filed to reinstate. Many trial judges have considered that Rule 60 should be given a liberal interpretation and have been reinstating such cases even though the time for appeal has expired. This seems to be a proper approach.

In Jefferson County we have had a number of cases where a co-employee was not sued during that time interval and now the plaintiff is attempting to add one or more even though the claims are barred by the statute of limitations. It is being contended that the plaintiff was prohibited from filing suit against the co-employee by virtue of the 1973 and 1975 amendments and, therefore, the statute did not commence running until the Act was held unconstitutional. They rely upon Sec. 6-2-12, Code of Ala., 1975 which provides in part as follows:

> "When the commencement of an Act is stayed by injunction or *statutory prohibition* the time of the continuance of the injunction or prohibition is not computed as a part of the limitation time."

This contention probably is not well founded although there is no decision of the Alabama Supreme Court which could be considered as a direct authority. Our Court did in the case of *Vann v. Rogers*, 225 Ala. 186, 142 So. 539 (1932), consider this section of the Code but in an entirely different factual situation. Our Court did say that Sec. 6-2-12 "clearly indicates a reference to Court procedure whereby the commencement of the action is 'stayed' and could not properly be construed as having reference to a mere consequential inability to sue under said Section . . . "

The Illinois Court in the case of *Peterson v. Montegna & Co.*, 136 N.E. 2d 586 (1956), did consider a very similar factual situation and held:

> "An unconstitutional statute is null and void as of the date of its enactment. It is not a law. It confers no rights, imposes no duties and affords no protection. It is in legal contemplation, as inoperative as though it had never been passed."

The Supreme Court of Georgia in the case of *Harris v. Gray*, 49 Ga 585 (1873) considered the same legal question and held:

> ' . . . [T]hat part of the constitution of 1968 which prevented him from suing, was void, as declared by the Supreme Court of the United States. He was not legally prohibited from suing. It is said, however, that practically he was prohibited; that the highest tribunal of the State so held. But a void law is no law; the plaintiff had a plain remedy. If the Judge of the Superior Court dismissed his suit he should have appealed to this Court, and if this Court refused him his rights, he had the right, and it was his duty, to resort to the Supreme Court of the United States. On the question involved, an appeal would lie by writ of error. It is not true, therefore, that he was prohibited from suing. He ought not to have submitted to the dismissal of his suit in 1870. It is no reply to say that the Supreme Court of the State agreed with the circuit judge. In all cases where there is an appellate tribunal the legal question in dispute is not finally decided until the final tribunal has passed upon it. One might just as well say he acted on the opinion of a Justice of the Peace, or a Judge of a County Court, or the Judge of the Superior Court. From each of these there is an appeal finally to this Court, and on certain questions from this Court to the Supreme Court of the United States. We know of no justification for stopping at one point in the series rather than another. It will occur that Justices, Superior Court Judges, and Supreme Court Judges, will err. In such cases the only remedy is to appeal, and until the appellate tribunal has passed on the question no person has a right to consider it settled.
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> Every man must see to his own rights. If a Judge or a Court, even the highest Court of a State, decides one man's case, and he submits to the decision, and another man, whose case is decided on the same principle, appeals and has the decision reversed, the party who failed to appeal gets nothing by the superior pluck or perseverance of the appellant. Nor can he complain. He could have gotten the same result by the same process.
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> We conclude, therefore, that the plaintiff was not prevented. True, the Judge so held, but the Judge was wrong, there was no valid law prohibiting suit. That part of the constitution of the State is either good or bad. If it is good, the plaintiff's suit falls by it. If it is bad and allows hime to sue now, it was always bad, and he could always have sued.

What Does It Take to Prove Liability Against Co-Employees?

We now face the critical issue as to what it takes from an evidentiary standpoint to establish liability against a co-employee or an executive officer. The problem is not difficult insofar as co-workers are concerned. Two men are working side by side and one causes a steel beam to fall and hit the other one. That case involves a simple issue as to whether or not the defendant was negligent in the manner in which he performed his work. It is just a case of common law negligence. But cases of this type usually are not brought because fellow workers are seldom covered by insurance. If he is a defendant in the case, most likely he is there for the purpose of preventing a removal to Federal Court. The problem arises when the plaintiff sues a supervisory employee or executive who is not actually performing work but who is covered by the employer's insurance. I will discuss the insurance coverage question briefly a little later on.

Who Are Executive Officers?

Some of the factors to consider in determining the status of an executive officer are:

- Managerial responsibility for affairs of corporation.
- Relationship with corporation.
- Authority to make or alter contract terms, conditions or procedures.
- Nature of duties and responsibilities.
- Authority to hire and fire.
- Responsibility for formulation of corporate policy.
- Whether paid on hourly basis or salary.
- Totality of employment situation.
- Officer, director or stockholder of company.

Many cases can be found from other states discussing the liability of company executives for injuries received by an employee of a company. Because of the dirth of Alabama authority on this point it is necessary to look to the decisions of other courts. Our Supreme court has, however, in the case of *United States Fidelity & Guaranty Co. v Jones*, 356 So.2d 596 (1977) (which will be discussed later on) been about as liberal in imposing liability against an insurance company for negligent inspection as any court in the land and we, therefore, might reasonably expect that it will adopt the holding of the liberal courts on the question of the liability of executive officers. This speculation is based in part upon a provision of our Code, Sec. 25-1-1 which reads as follows:

> (a) Every employer shall furnish employment which shall be reasonably safe for the employees engaged therein and shall furnish and use safety devices and safeguards and shall adopt and use methods and processes reasonably adequate to render such employment and the places where the employment is performed reasonably safe for his employees and others who are not trespassers, and he shall do everything reasonably necessary to protect the life, health and safety of his employees and others who are not trespassers . . . (c) For the purposes of this section, the following terms shall have the meanings ascribed to them by this subsection: (1) Employer. Such term includes every person, firm, corporation, partnership, joint stock association, agent, manager, representative, foreman or other person having control or custody of an employment, place of employment or of any employee, but the terms of this section shall not be construed to cover the employment of agricultural workers of domestic servants.

It is noted that "employer" is defined as a "person having control or custody of any place." By the very wording of the section it includes a foreman. Can this section be construed to mean that there is an absolute duty on the employer and/or those executive officers to whom the duty has been delegated to furnish the employee an "absolutely" safe place and tools and machinery for the performance of his work? The answer probably is "no." It would seem that the rule should be that the company has the right and duty to designate to certain employees the duty to see that the premises are *reasonably* safe and that said employee is liable to an injured employee if he negligently fails to discharge this duty. This probably would include the duty to warn the employee of any risk of harm and to acquaint him with any dangers in and about the premises or procedures of which he works. *Hill v. Metal Reclamation, Inc.*, 348 So.2d 493 (Ala. 1977). In *Hill* the employee was suing his employer (they were not subject to the provisions of the Workmen's Compensation Law) but what the Court said with reference to the duty of the employer might well be said concerning the duty of the employee to whom the employer had delegated the duty of advising employees with reference to safety. This would be especially true of a small corporation where the defendant is the owner of most or all of the stock of the company and in that situation he might be held to the same duty to the employee as the employer (company). *Neal v. J. P. Oliver*, 438 S.W.2d 313 (Ark. 1969).

The states of Louisiana, Wisconsin and Minnesota probably have developed more case law on this question than any other states. The Louisiana decisions are more liberal in holding executives liable and the Minnesota and Wisconsin states are conservative in that respect. The Louisiana Court in the case of *Galloway v. Employers Mutual of Wausau*, 286 So.2d 676(1974), laid down what appears to be a sound practice by which the liability of executive officers or employees should be gauged. That rule is:

- The employer must owe a duty of care to the employee.
- That duty is delegated by the employer to the individual defendant.
- That duty was breached by the defendant through his own personal fault, whether by malfeasance, misfeasance, or nonfeasance.
- That personal liability cannot be imposed on the individual just because he has some general administrative responsibility. Rather, he must have a personal duty toward the injured plaintiff. He may delegate the duty or responsibility to a subordinate, and hence escape personal liability but only if (a) he is not personally at fault in creating the unsafe condition, or (b) he can show he did not personally know or should not be charged with constructive knowledge of the fact that the delegated duty is not being discharged and (c) with authority to do so, he nevertheless fails to remove the danger or risk.

Defenses

The legal defenses available to co-employees will have to be decided by the Supreme Court. It will be contended by defense attorneys that the common law defenses of assumption of risk and the negligence of fellow-employees are available. They will rely heavily upon the decision of the Supreme Court in the case of *Foreman v. Dorsey Trailers, Inc.*, 256 Ala. 253, 254 So.2d 499 (1951). The Court in that case did say:

> "Except as modified by statute, a servant assumes the risk of injury caused by a fellow servant. This is the common law doctrine. *Boggs v. Alabama Consol Coal & Iron Co.*, 167 Ala. 251, 52 So. 878."

The Court in that case stated that:

> "If the duty to maintain the premises in a reasonably safe condition has been delegated, then the doctrine applies."

The plaintiff on the other hand will contend that the fellow servant and the assumption of risk defenses are

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available to the employer only, since these common law defenses were applicable only in employee v. employer cases. It is doubtful that our Supreme Court will hold that these two common law defenses are available to a co-employee.

When rulings on those defenses have been made, most of the co-employee defenses will boil down to not guilty of negligence and contributory negligence.

It is suggested that on a defense of "not guilty" the defendant, in its answer or at a pre-trial hearing, should be required to specify with particularity his contentions, *i.e.*:

- Whether there was any duty on him to exercise care to the plaintiff.
- Whether there was an acceptance by him of any delegation of responsibility.
- Whether he (the defendant) had delegated the particular responsibility for safety to a responsible subordinate.
- Whether the negligence of the particular defendant was the proximate cause of the plaintiff's injury.

The defense of contributory negligence is available. In almost all cases the issue of contributory negligence is one to be decided by the jury. Cases involving "obvious and known" danger seldom, if ever, warrant a directed verdict on the issue of contributory negligence. Our Court in the case of *USF&G v. Jones*, supra, made the following observation:

> "Appellant next contends that contributory negligence was proved as a matter of law. The burden of this plea is upon the defendant. The question is one of law for the Court only when the facts are such that all reasonable men must draw the same conclusion therefrom. It is a question for the jury when, under the facts and circumstances, reasonable minds may fairly differ upon the issue of negligence. *Baptist Medical Center v. Byars*, 289 Ala. 713, 271 So.2d 847 (1972) *Southern Railway Co. v. Carter*, 276 Ala. 218, 160 So.2d 628 (1963) and *Mackintosh v. Wells*, 218 Ala. 260, 118 So. 276 (1928). This, however, cannot be viewed from the vantage of hindsight. The fact that a jury did not find contributory negligence is no evidence that it was properly submitted to the jury in the first instance.
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> Thought is is apparent that Jones had knowledge of the hole, his appreciation of the danger of that opening, the voluntariness of his encounter with the danger, and his use of due care were issues properly submitted to the jury. *Beasley*, supra. As to these requisites of the defense of contributory negligence, the burden of proof rests upon U.S.F.&G.: and this issue, submitted on appropriate instructions, was resolved by the jury adverse to the defendant. *Beloit*, supra: *Alabama Power Co. v. Mosley*, 294 Ala. 394, 318 So.2d 260 (1975); *Kingsberry Homes Corp. v. Ralston*, 285 Ala. 600, 235 So.2d 371 (1970) and *Mackintosh*, supra."

Coverage Questio -

The question of the construction of insurance policies as to whether or not certain employees are covered or not is too far reaching to discuss in this paper except in a cursory manner. It is safe to say that many of the trial judges will be called upon to decide whether or not named defendants in damage suits are entitled to the coverage of the employer's policy. The insuring agreements of policies are couched in different wording but most of them give the following definition of the term insured:

> "Unqualified word insured includes the named insured and also any executive officer, director or stock holder thereof while acting within the scope of his duties as such."

The big question that is usually raised is whether the particular employee is covered by that provision of the policy. In the *McCormick* case, supra, our Supreme Court held that the president, vice president, (who acted as general superintendent on the job) and the sewer foreman on the job (who was in charge of some 8 to 10 men) all were covered by the policy. This was done without discussing the activities or the duties performed by the three employees. Since the Court held that a foreman who had 8 or 10 men working under him was an executive officer it has been contended that all foreman are covered by the policy. This is not the case, however. Judge Lynn in the case of *United States Fidelity & Guaranty Company v. Warhurst*, 336 F. Supp. 1190, had the following to say with reference to the McCormick opinion:

> "The Court is well aware of the Alabama Supreme Court's decision in *United States Fire Ins. Co. v. McCormick*, 286 Ala. 531, 243 So.2d 367 (1970), wherein it was summarily held that a corporate president, vice-president, and sewer foreman were "executive officers" within the meaning of an insurance policy using language substantially identical to that of the policy under consideration. However, after carefully probing both the published opinion and the unpublished record of the *McCormick* case, the Court believes that the Erie doctrine does not require a mechanical extension of the result reached in *McCormick* to the facts of the case at bar. It is to be observed that there is insufficient factual data presented in the McCormick opinion to determine whether, in classifying the sewer foreman, the Alabama Supreme Court considered the positive criteria of "executive officer" status repeatedly emphasized by the Fifth Circuit. Moreover, it would not seem amiss to infer from the available records that instead of independently determining whether the corporate president, vice-president, and sewer foreman were each to be accorded "executive officer" status, the Alabama court may well have classified the three defendants in an "all or none" fashion. In any event, this Court is not convinced that the Supreme Court of

Alabama intended to establish an ironclad rule to the effect that all plant foremen or supervisors wielding authority comparable to that of the sewer foreman involved in *McCormick* should be treated as "executive officers" of their respective corporations. Absent such a categoric rule, the Court is impelled to follow the rationale of the Fifth Circuit decisions hereinbefore cited, and to find that defendant Warhurst is not an "executive officer" of King Stove & Range Co. within the coverage of the policy at issue.

Our Supreme Court in the case of *Wolsey v. Aetna Casualty Co. & Surety Co.*, 346 So.2d 952 (1977) adopted the Louisiana Rule and held that a foreman under the facts of that case was not an executive officer.

"The sole issue is whether Butler, a foreman, was an executive officer within the meaning of the United States Fidelity & Guaranty policy so as to make him an insured under that policy. We hold that in this case the foreman was not an executive officer under the meaning of the insurance policy and was not due to be defended by United States Fidelity & Guaranty.

The evidence was that Butler was employed by Naughton Equipment Co. as a foreman and welder; he was paid on an hourly basis; he was not an officer, director or stockholder of the company; and he had no authority to make corporate policy or to make contracts on the company's behalf.

We adopt the principle expressed in numerous Louisiana cases that an executive officer exercises managerial responsibility for the affairs of the corporation generally, while an employee does not. Annot., 39 A.L.R. 3d 1434 (1971) (citing, inter alia, *Bruce v. Travelers Ins. Co.*, 266 F.2d 781 (5th Cir. 1959); *Guillory v. Aetna Ins. Co.*, 415 F.2d 650 (5th Cir. 1969); *Employers' Liab. Assurance Corp. v. Upham*, 150 So.2d 595 (La.App. 1963). Applying this principle to the evidence, it is clear that Butler was only an employee, not an executive official. Such a finding is not contradictory of *United States Fire Ins. Co. v. McCormick*, 286 Ala. 531, 243 So.2d 367 (1970)."

Time and space does not permit a more in depth discussion of the question as to "Who is an Executive Officer." It can be stated, however, that the title of a particular employee is not controlling. You must look to his authority to determine whether he does, in fact, exercise managerial responsibilities as opposed to purely ministerial and as usual each case will have to be decided on the basis of the particular facts involved.

Subrogation

The plaintiff in all cases in which co-employees are the defendants has been paid, or is entitled to receive, workmen's compensation benefits and, therefore, the employer or its insurance carrier is entitled to subrogation. How to handle these subrogation claims presents problems. Historically the workmen's compensation carrier has intervened and become a party plaintiff by intervention but the Supreme Court in the case of *Hughes v. Newton*, 295 Ala. 117, 324 So.2d 270 (1975), held that,

"When the same insurance carrier has the liability coverage and the workmen's compensation coverage 'unencumbered' intervention under Rule 24 ARCP should not be allowed in view of the patent conflict of interest and the inherent potential for collusion."

In a big percentage of these cases the workmen's compensation carrier also has the liability coverage on the individual defendants. The Court did hold that in such a situation "encumbered" intervention precluding active participation as a party plaintiff would be proper. This simply means that an encumbered intervenor cannot in any wise participate in the trial but it can have its subrogation rights protected by a proper judgment entry just as though it had participated. An "unencumbered" intervenor has the right to fully participate in the trial and when that is allowed, the workmen's compensation payment becomes an issue in the case and testimony is allowed on it and, also, the jurors would be qualified as to their interest in the compensation insurance carrier. The law is definite that no effort shall be made to let the jury know that compensation benefits have been paid in any case where the intervention is an encumbered one. As to whether or not it is proper to qualify the jury as to their interest in the subrogation insurance carrier when the intervention is encumbered and when that company does not have the liability coverage has not been decided but it probably would be proper to do so.

Up until the decision in the case of *Jones v. Crawford*, 12 ABR 1661, there was uncertainty as to whether or not an injured employee could recover for medical expenses which he did not pay or become obligated to pay but which, in fact, was furnished by and paid by the workmen's compensation carrier. The *Jones* case, however, laid to rest any uncertainty in that regard and held definitely that such expenses are recoverable and further that the defendant should not in any wise suggest to the jury that the plaintiff did not pay them. As early as 1960 in the case of *Liberty Mutual Ins. Co. v. Manasco*, 271 Ala. 124, 123 So.2d 527 (1960), our Court has been committed to the fact that the workmen's compensation carrier had no subrogation rights for medical expenses and it still has none. It, therefore, follows that pursuant to the *Jones* decision the plaintiff is permitted to recover for medical expenses which he neither paid nor became obligated to pay. The Court reasoned that if there were to be a windfall as between the injured part and the tortfeasor, the benefits should fall upon the injured person. Using the exact language of Justice Bloodworth, I quote:

"Certainly, if there must be a windfall it is

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more just that the injured party profit therefrom rather than relieving the wrong doer of his full responsibility of his wrong doing."

The judge in the *Jones* case permitted the plaintiff's attorney to delete the name of the insurance company from the hospital and medical bills. The Supreme Court approved of that procedure and stated,

"We follow the rule that any showing that the plaintiff has received insurance benefits from his injuries is prejudicial to his case and should not be permitted."

As has been demonstrated, the trial judge will enter an appropriate judgment protecting the rights of the insurance carrier when final judgment is rendered. The question then is raised as to the fee to be paid to the plaintiff's lawyer for effecting the recovery. Ala. Code, Sec. 25-5-11c (1975) provides:

"In any settlement made under this section with a negligent third party by the employee . . . , the employer shall be liable for that part of the attorney's fees incurred in the settlement with the third party, either with or without a civil action, in the same proportion that the amount of the reduction in the employer's liability to pay compensation bears to the total recovery had from such third party.

The policy behind this section has been expressed by the Alabama Court of Civil Appeals in *Baggett v. Webb*, 46 Ala. App. 666, 248 So.2d 275, 279 (Ala. Cir. App. 1971):

"It is clear that at least one of the purposes of Sec. 25-5-11(c) was to grant to the employee . . . some relief from the expense of his bringing the third party action and thus saving the employer or his carrier from paying some or all of the due compensation, or if compensation had been paid, recovery of some or all of it."

Usually the insurance carrier is going to vigorously resist the payment of a lawyer's fee to the plaintiff's attorney. They like to have the choice of the attorney who is going to represent them and in most cases they do, in fact, hire a lawyer who attempts to assert the claim by intervention. It is quite natural, therefore, that they would prefer to have their own attorneys collect the fee rather than pay it to an attorney whom they did not select. The *Baggett* case and the excellent article written by Justice Richard L. Jones before he became a member of the Supreme Court appearing in *26 Ala. Lawyer* 296, 299 (1965) plus the Code Section and *Antram v. Stuyvesant Life Insurance Co.*, 291 Ala. 716 (a case recognizing the right of the attorney to be paid a fee) are the only authorities that I can cite on the question. No big problem arises, as a rule, concerning recovery for the payments already made. The controversy usually centers around the cancellation of the benefits not yet accrued. The insurance company should be required to pay a fee for both the recovery of benefits previously paid and for the savings on those benefits which would have been due and payable in the future. A factual finding as to the future benefits saved will have to be made and when that is done it would appear that the carrier should be required to pay on the basis of that saving at the same rate it paid for the recovery of money already paid out. The mathematics of determining the fee to be paid plaintiff's attorney for savings effected for the insurance company should be checked carefully to be sure that he is not being paid twice for the same recovery. For example, suppose the net recovery over and above the benefits previously being paid is $10,000, but the savings to the insurance company on unaccrued benefits is $3,000.00. The plaintiff has not received the $3,000 and never will, but he could have gotten it without any effort on his part. He, therefore, should pay a fee on the basis of a $7,000 recovery and the insurance company on the basis of a $3,000 savings. This would give plaintiff's attorney his full fee for the $10,000 recovery and both the plaintiff and the insurance carrier would be paying its pro rata part. It is understandable that you now are confused about the mathematics involved, but I can assure you that the more thought you give to the problem the more confused you will become—read Justice Jones' article, supra.

Suits Against Insurance Carrier for Negligence in Conducting Inspections

The 1975 amendment attempted to immunize insurance carriers from liability for negligence in inspecting premises. The Supreme Court in the *Grantham* case did not discuss the constitutionality of the Section as it relates to insurance carriers and so far has not directly ruled that insurance carriers are not immune. Some attorneys still are contending that the 1975 Act is valid insofar as insurance carriers are concerned. I cannot see any logic to this argument. It seems clear that if the Legislature has no power to grant immunity to co-employees it has no power to grant immunity to insurance carriers who are negligent in conducting their inspections.

The Supreme Court in the case of *Beasley v. MacDonald Engineering Co.*, 287 Ala. 189, 249 So.2d 844 (1971), after analyzing cases from many jurisdictions and after discussing the various pros and cons our Court said:

The same reasoning applys to performing safety engineering services. The role of the carrier is to respond financially in case of injury to employees of its insured. If safety engineering is negligently performed by one "other than the employer" and the employee is injured, he can proceed against the safety engineer. It is immaterial as to whether the insurance company has a duty to inspect or whether it receives extra compensation for the safety inspections. A gratuitous inspection if negligently made will impose liability.

The most recent, and probably the most far reaching, decision of our Court on the question is the case of *United States Fidelity & Guaranty Co., v. Jones, supra*. Some courts have applied the Second Restatement of Torts, Sec. 324(a) which provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person,or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

It is significant to note that our Court has rejected this Restatement and apparently has held that requirement "c" of the restatement is not necessary in Alabama. If that is the holding of the *Jones* case, and it apparently is, it indeed places Alabama in the "liberal" column insofar as placing liability on insurance carriers for negligence in inspecting.

.hat to Expect in the Future

The right to sue co-employees in both personal injuries and death actions now exists. We can be sure, however, that the issue is not forever settled. Justice Maddox in the case of *Gardner v. Bethea*, 13 ABR 29, in a specially concurring opinion stated:

> "I concur only because *Grantham v. Denke*, 359 So.2d 785 (Ala., 1978) does control. I registered my dissenting views in *Grantham v. Denke*, at length. I failed to persuade a majority of the Court in that case that it had erred: therefore, *Grantham v. Denke* is the law of this state, at this time. Unless and until Grantham is revisited, an event not likely to occur within the foreseeable future, I see no justifiable reason to continue to register my dissenting views. I reserve the right, however, to overrule Grantham, if, and when, I can persuade a sufficient number of justices on this Court that *Grantham* is wrong."

Whether Justice Maddox will be successful in persuading a majority of the justices to overrule *Grantham* is a question that I cannot answer. I do know for sure, however, that an effort will be made to amend the Constitution to empower the Legislature to immunize co -kers and again, whether they are successful or no. . an open question.

I hope that anyone reading this paper will understand that it was not written for the purpose of giving answers to most of the questions that will have to be ruled upon. The purpose of the paper is to call to the attention of the trial bench some of the problems that they will be dealing with and to cite some of the pertinent decisions both from our Court and from courts of other states.

Addendum to Article on Co-Employee Liability

This paper was prepared on the assumption that the cases of *Hughes v. Newton*, 295 Ala. 117, 324 So.2d 270) (a case tried by this writer and one in which the defendant owned all of the stock of the small corp.) and *Queen City Furniture Co. v. Hinds*, 274 Ala. 584, 150 So.2d 756, had decided the issue of the liability of an executive officer to an injured employee. In the *McCormick* decision the Court, with reference to the *Queen City* case, said:

> "We held that the president and principal stockholder of a corporation was covered by workmen's compensation insurance. It would hardly be rational to hold that an officer of a corporation was an employee in that case, but hold him to be an employer when an employee sues him for negligence."

Since preparing this paper, however, the Supreme Court has decided another case which throws doubt on the liability of an executive officer. The style of the case is *Jones v. Watkins*, 13 ABR 182 and I quote a part of the opinion of Justice Embry:

> The Watkinses argue that under *Grantham* and subsequent decisions of this Court:
>
> > "While the majority of the Court holds that the involved section of the code is unconstitutional under Section 13 of the Constitution of Alabama of 1901, it is the contention of the Appellee, that as set forth in the dissenting opinion of Mr. Justice Maddox, that the Workmen's Compensation Act itself, provides the 'remedy' which Section 13 of the Constitution requires. In the instant case, as in many cases, the supervisory personnel, are the president and vice president of a corporation, which is owned by them. Accordingly, the plaintiff in this case gets a double shot, one at the corp., which is owned by the individuals, and in fact, one and the same as the individuals, and then has another cause of action, against them in their individual capacity."

"The "involved" section of the code is that part of Section 25-5-11, Code 1975, reading:

> [P]rovided, however, that neither an officer, director, agent, servant or employee of the same employer nor his personal representative nor any workmen's compensation insurance carrier of the employer nor any officer, director, agent, servant

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or employee of such carrier nor any labor union or any official or representative thereof making a safety inspection for the benefit of the employer or its employees shall be considered a party other than the employer against whom such an action may be brought.

At the outset, we note that there is *no evidence* in the affidavits that the Watkinses are other than co-employees. That being true, we have before us nothing different from the fact situation in *Grantham*. Thus, there is nothing in this record showing a bar to Jones' action. Under the pleadings and affidavits it is possible Jones might recover in his action. *Benson v. Pachetti*, 349 So.2d 17 (Ala. 1977). The case must, therefore, be reversed and remanded.

For guidance of trial courts and litigants we observe that immunity of officers, directors, etc., was not raised in *Grantham*, nor was it addressed. Neither was it properly raised, nor is it addressed here. Even if it be assumed that officers, directors, etc., may be held immune from suit by an injured employee of the corporation without violating Section 13 of the Constitution of Alabama of 1901 there remains the question of whether he, or she, is immune from suit by the injured employee when standing in the shoes of the corporate entity as such. The answer to this question may well turn on the nature of the function or work being performed by the officer or director who may then become a co-employee of the injured employee. *Mount Pleasant Mining Corp. v. Vermeulen*, 117 Ind. App. 33, 65 N.E.2d 642 (1946). The North Carolina Supreme Court in *Jones v. Planters' National Bank & Trust Co.*, 206 N.C. 214, 173 S.E. 595 (1934), held the test to be not the title of the person, but the nature and quality of the act he is performing. Although these cases deal with officers seeking employee status in order to *claim* workmen's compensation, we find this test one which may be applicable in resolving the question implicit in the arguments, pro and con, on the question of whether one holding a position as corporate officer, director, etc. may be legally immunized by the statute from suit by an injured corporate employee.

An officer may exercise a dual function and enjoy a dual capacity in a corporation. Depending on his, or her, function at the time of injury, he, or she, may not be immune from suit by an injured employee."

Which function the officer is fulfilling in a matter of fact. In small closely held corporations the likelihood of officers or directors acting as employees is greater than that in larger corporations. See *In re Raynes*, 66 Ind. App. 321, 118 N.E. 387 (1917).

Nevertheless, no evidence concerning the Watkinses' functional role in the corporation at the time of Jones' injury is present in this case. The judgment of the circuit court must, therefore, be reversed and the cases remanded for further proceedings not inconsistent with this opinion.

It will be noted that a majority of the Court did not concur in the opinion written by Justice Embry and what he said in that opinion, therefore, is not law, but it is reasonable to assume that he does represent the thinking of the majority of the Court.

It, therefore, would appear that a factual determination will have to be made to determine whether or not an executive officer at the time he committed the negligent acts was, in fact, acting as a co-employee or as the employer of the plaintiff.