Montana Law Review

Volume 46
Issue 1 *Winter 1985*

Article 10

January 1985

Massey v. Selensky: Workers' Compensation and Coemployee Immunity in Montana

Tracy Axelberg
University of Montana School of Law

CASE NOTE

MASSEY V. SELENSKY: WORKERS' COMPENSATION AND COEMPLOYEE IMMUNITY IN MONTANA

Tracy Axelberg

I. INTRODUCTION

A feature tantamount to all workers' compensation schemes is the exclusive character of the remedy; "once a workers' compensation act has become applicable through compulsion or election, it affords the exclusive remedy for the injury by the injured employee or his dependents against the employer and insurance carrier."[1] This is part of the *quid pro quo* or mutual exchange of rights in which the sacrifices and gains of the employer and employee are put in balance. While the employer gives up his defenses and assumes liability without fault, he is relieved of the prospect of large common law judgments.[2]

Montana joins a majority of states[3] and the Longshoremen's

---

1. *See* A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 65.10 (1983) [hereinafter cited LARSON].

2. *Id.*

3. The following jurisdictions are those which extend immunity to the coemployee: *Alabama*: ALA. CODE § 25-5-11 (Supp. 1984); *Alaska*: ALASKA STAT. §23.30.015 (Supp. 1984); *California*: CAL. LABOR CODE § 3601(a) (Supp. 1984); *Colorado*: COLO. REV. STAT. § 8-52-108(1) (Supp. 1983); *Connecticut*: CONN. GEN. STAT. ANN. § 31-293a (Supp. 1983); *Delaware*: DEL. CODE ANN. tit. 19, § 2363 (Supp. 1982); *District of Columbia*: D.C. CODE ANN. § 36-304 (1981); *Florida*: FLA. STAT. ANN. § 440.11 (Supp. 1984); *Georgia*: GA. CODE ANN. § 34-9-11 (Supp. 1984); *Hawaii*: HAWAII REV. STAT. § 386-8 (Supp. 1983); *Idaho*: IDAHO CODE § 72-223 (Supp. 1984); *Illinois*: ILL. ANN. STAT. ch. 48, § 138.5 (Supp. 1984); *Indiana*: IND. CODE ANN. § 22-3-2-13 (Supp. 1984); *Iowa*: IOWA CODE ANN. § 85.20 (West 1984); *Kansas*: KAN. STAT. ANN. §44-504 (Supp. 1983); *Kentucky*: KY. REV. STAT. 342.690 (Supp. 1984); *Louisiana*: LA. REV. STAT. ANN. § 23:1032 (West 1984); *Massachusetts*: MASS. GEN. LAWS ANN. ch. 152, § 15 (West 1983); *Michigan*: MICH. COMP. LAWS ANN. § 17.237(827) (West 1984); *Mississippi*: MISS. CODE ANN. § 71-3-9 (Supp. 1984); *Montana*: MONT. CODE ANN. § 39-71-412 (1983); *Nevada*: NEV. REV. STAT. § 616.560 (1980); *New Hampshire*: N.H. REV. STAT. ANN. § 281:12 (Supp. 1983); *New Jersey*: N.J. STAT. ANN. § 34:15-8 (West 1984); *New Mexico*: N.M. STAT. ANN. § 52-1-8 (Supp. 1984); *New York*: N.Y. WORK. COMP. LAW § 29.6 (Consol. 1984); *North Carolina*: N.C. GEN. STAT. § 97-9 (Supp. 1984); *North Dakota*: N.D. CENT. CODE § 65-01-08 (Supp. 1984); *Ohio*: OHIO REV. CODE ANN. § 4123.741 (Page 1983); *Oklahoma*: OKLA. STAT. ANN. tit. 85, § 44 (West 1984); *Oregon*: OR. EV. STAT. § 656.018(3) (Supp. 1983); *Pennsylvania*: PA. STAT. ANN. tit. 77, § 72 (Purdon 1984); *South Carolina*: S.C. CODE ANN. § 42-1-540

Act[4] in extending to interemployee relationships this immunity from common law liability.[5] In effect, an employee who negligently injures a coemployee dons his employer's cloak of immunity and is shielded from tort liability.

In a recent case of first impression, *Massey v. Selensky*,[6] the Montana Supreme Court addressed an issue undefined in the Montana Workers' Compensation Act[7]: When is a coworker a coemployee for purposes of triggering coemployee statutory protection? This note will examine the development and present status of the coemployee protective provision of the Montana Act, the policy arguments advanced by other jurisdictions considering this question, and the impact of the *Massey* decision on workers' compensation law in Montana.

II. BACKGROUND

The workers' compensation acts have largely preempted the common law liability of employers to their employees.[8] The theory underlying such legislation is one of social insurance.[9] The injured employee is freed of the financial burden of his injuries by the employer, who in turn transfers the burden to the consumer as a direct cost of production.[10]

Prior to the enactment of such legislation, the employee injured on the job generally faced an insurmountable task in attempting to recover from the employer compensation for his inju-

---

(Law. Co-op. 1983); *Tennessee*: TENN. CODE ANN. § 50-6-112 (Supp. 1983); *Texas*: TEX. REV. CIV. STAT. ANN. art. 8306, § 3(a) (Vernon 1984); *Utah*: UTAH CODE ANN. § 35-1-62 (Supp. 1983); *Virginia*: VA. CODE § 65.1-41 (Supp. 1984); *West Virginia*: W. VA. CODE § 23-2-6a (Supp. 1984); *Wisconsin*: WIS. STAT. ANN. § 102.03 (West 1984); *Wyoming*: WYO. STAT. § 27-12-103 (Supp. 1983).

4. Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, 933(a) and (i) (1927). The Longshoremen's Act extends absolute immunity to a coemployee. *See* Smalls v. Blackmon, 269 S.C. 614, 239 S.E.2d 640 (1977).

5. MONT. CODE ANN. § 39-71-412 (1983).

6. ___ Mont. ___, 685 P.2d 938 (1984).

7. Montana Workers' Compensation Act §§ 39-71-101 to -2909 (1983).

8. W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 80 at 568 (5th ed. 1984) [hereinafter cited as PROSSER AND KEETON].

9. Mahlum v. Broeder, 147 Mont. 386, 393-94, 412 P.2d 572, 576 (1966), holding that:

> The objective of workman's [sic] compensation legislation is to compensate injured workmen for disabilities caused from industrial accidents. It was not enacted to provide for payment of damages in tort-connected liability cases. The principle on which it is based is *social insurance*—to insure the injured workman against disability from a work-connected injury, and to place the costs of that injury on the industry employing him.

(Emphasis added).

10. PROSSER AND KEETON, *supra* note 8, at 573.

ries.[11] The "unholy trinity" of common law defenses—contributory negligence, assumption of the risk, and the fellow servant rule[12]—together with the cost of litigation often precluded employee recovery. Most of those who received any compensation were forced to settle out of court for sums greatly out of proportion to the magnitude of their injuries.[13] Those successful in the courtroom faced the likelihood of retaliatory discharge.[14]

As work-related injuries increased in the wake of the industrial revolution, it became apparent that a mechanism was needed to assure the industrial worker that compensation would follow on-the-job injury. Montana was one of the first states to recognize this need, and in 1909 the Montana Legislature enacted the State Accident Insurance, and Total Permanent Disability Fund[15] for coal miners. Short-lived, the act was struck down on constitutional grounds in 1911.[16] A second and more comprehensive act, introduced in 1915,[17] withstood constitutional attack[18] and since has become the framework for Montana's present Act.[19]

III. CURRENT MONTANA LAW

Catalyzed by a mixture of legislative amendments and judicial interpretation, the Montana Act is in constant flux. To establish a foundation for the consideration of the issue raised in *Massey v. Selensky*, a brief examination of current Montana law regarding coemployee immunity and liability is in order.

The provision of the Act which detailed the exclusive remedy principle and appurtenant employer immunity was extended to coemployees by virtue of a 1973 amendment.[20] The Act now provides:

---

11. The court in Lumbermen's Reciprocal Ass'n v. Behnken, 226 S.W. 154, 156 (Tex. Civ. App. 1920), estimated that 80% of employee personal injuries were noncompensable prior to workers' compensation.

12. For a comprehensive discussion of all three common law defenses, see the opinion of Mr. Justice Rutledge in Owens v. Union Pacific R. Co., 319 U.S. 715 (1943).

13. An extensive examination of the plight of the worker prior to the enactment of workers' compensation laws can be found in S. HOROVITZ, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS (1944).

14. *See* Note, *The North Dakota Workman's Compensation Statutes and the Co-Employee Suit*, 42 N.D.L. REV. 430, 435 (1966).

15. Act of Mar. 4, 1909, ch. 67, 1909 MONT. LAWS 81.

16. Cunningham v. Northwestern Improvement Co., 44 Mont. 180, 119 P. 554 (1911).

17. Act of Mar. 8, 1915, ch. 96, 1915 MONT. LAWS 168.

18. Shea v. North-Butte Min. Co., 55 Mont. 522, 179 P. 499 (1919).

19. The Montana Workers' Compensation Act is considered in detail in N. GROSFIELD, MONTANA WORKERS' COMPENSATION MANUAL (1979) [hereinafter cited as GROSFIELD].

20. Act of Mar. 29, 1973, ch. 493, 1973 MONT. LAWS 1226.

> [A]n employer is not subject to any liability whatever for the death or personal injury to an employee covered by [the] Act . . . . [T]he Act binds the employed himself, and in the case of death binds his personal representative and all persons having any right or claim to compensation for his injuries or death, as well as the employer *and the servants and employees of such employer* and those conducting his business . . . .[21]

While the amendment prohibits suits against employers and fellow employees, it specifically preserves the right of an injured employee to bring an additional cause of action against a negligent third party, in addition to the receipt of compensation benefits.[22]

Statutory protection of the coemployee is not, however, absolute. The Act limits immunity, as follows:

> If an employee receives an injury while performing the duties of his employment and the injury . . . [is] caused by the intentional and malicious act or omission of a servant or employee of his employer, then the employee . . . shall, in addition to the right to receive compensation under the Workers' Compensation Act, have a right to prosecute any cause of action he may have for damages against [such persons] . . . .[23]

In sum, the statutory perspective mandates that the exclusive remedy by an injured worker against his employer is found under the provisions of the Act.[24] This exclusive remedy also extends to the coemployees of the injured worker, unless the injuries are caused by the intentional and malicious acts or omissions of the coemployee.[25] If the injury is caused by a negligent third party *other than the employer or a coemployee*, however, an injured worker has an additional claim against the third party causing the injury.[26]

IV. MASSEY V. SELENSKY

A. *Facts and Procedure*

Massey v. Selensky began as a negligence action arising out of a motor vehicle accident on the premises of the Anaconda Com-

---

21. MONT. CODE ANN. § 39-71-411 (1983) (emphasis added).
22. MONT. CODE ANN. § 39-71-412 (1983).
23. MONT. CODE ANN. § 39-71-413 (1983). *See also* Millers Mutual Ins. Co. v. Strainer, ___ Mont. ___, 663 P.2d 338 (1983).
24. MONT. CODE ANN. § 39-71-411 (1983).
25. MONT. CODE ANN. § 39-71-413 (1983).
26. MONT. CODE ANN. § 39-71-412 (1983) (emphasis added).

pany smelter in Anaconda, Montana.[27] The plaintiff Massey and the defendant Selensky were fellow employees at the smelter. The parties were also neighbors and long before the accident had established a practice of riding to work together in Selensky's pickup. The two would typically arrive at the smelter at approximately 6:50 a.m. to leisurely prepare for the commencement of their shift at 7:30 a.m. It was their custom to temporarily park Selensky's pickup on a hill near the building housing the company time clock, "punch in," and proceed to their respective work areas. The two would then change clothes and visit with fellow employees until their shift commenced.

On January 8, 1980, the parties' day began as described; the men drove to work, parked the pickup, and entered the time-clock building. Massey punched in, exited the building, and proceeded toward his work area. While en route, the pickup either slid or rolled down the hill and struck Massey, causing injury. The pickup was unoccupied at the time and what caused it to move from its temporary parking place is unknown.[28]

Massey filed a claim with the Workers' Compensation Division shortly after the accident. The Division recognized and allowed the claim; Massey received compensation and all related medical bills and expenses were covered.

In December of 1980, Massey brought an action in district court against Selensky, seeking damages for injuries sustained as a result of Selensky's allegedly negligent conduct. Claiming immunity due to the compensable nature of Massey's injuries, Selensky moved for and was granted summary judgment. Massey appealed to the Montana Supreme Court.

B. *The Majority Opinion*

In a 5-2 decision, the supreme court reversed and remanded the ruling of the district court, holding that the question of when a coworker is an "employee"[29] for purposes of applying the coemployee immunity rule was one of first impression, and one which precluded the granting of a motion for summary judgment. The court further held that the proper test for determining coemployee status is "whether the co-worker was acting in the course and scope of his employment at the time the negligent acts occurred,"[30] the same "arising out of" test used to determine whether a claim-

27. *Massey*, ___ Mont. at ___, 685 P.2d at 939.
28. *Id.*
29. *Id.* at ___, 685 P.2d at 940.
30. *Id.*

ant's injuries are work-related. Finally, the court noted that the "liberal construction"[31] provision of the Montana Act is directed only to claimants, not one seeking immunity such as Selensky.

C. *The Dissent*

Chief Justice Haswell, joined by Justice Weber, filed a strong dissent to the majority's "hair-splitting"[32] decision. In an argument founded primarily on past policy considerations, the dissent criticized the majority for ignoring "[t]he fundamental purpose and structure of . . . [the] Act"[33] and concluded that the majority decision would shift the cost of injury "from the employer, where the Act places it, to a fellow employee, where the Act does not place it."[34]

D. *Analysis*

The *Massey* decision, through the mechanism of the "arising out of" test of the coverage formula,[35] attempts to clarify those instances which trigger the statutory protection of section 39-71-411 of the Montana Act. However, two major short-comings are evident.

First, the court's decision to bar application of the liberal construction provision of the Montana Act to coemployees seeking statutory immunity impliedly overrules earlier case law. In 1970, a unanimous court embraced the doctrine of enterprise liability in *Madison v. Pierce*,[36] a decision rendered prior to the enactment of coemployee statutory protection. In *Madison*, the plaintiff brought a common law action against several officers and a supervisor of her corporate employer.[37] At the time of the suit's initiation, the Montana Act provided that compensation benefits were the exclusive remedy "as between employer and employee,"[38] but permitted

---

31. MONT. CODE ANN. § 39-71-104 (1983) provides: "Whenever this chapter or any part or section thereof is interpreted by a court, it shall be liberally construed by such court." *See also* Tweedie v. Industrial Accident Bd., 101 Mont. 256, 263, 53 P.2d 1145, 1148 (1936).

32. *Massey*, ___ Mont. at ___, 685 P.2d at 942 (Haswell, C.J., dissenting).

33. *Id.* at ___, 685 P.2d at 941.

34. *Id.*

35. In order for an injury to be compensable under the Act, it must meet three conditions: There must be (1) an injury (as defined in MONT. CODE ANN. § 39-71-119), which (2) arises out of, and (3) in the course of employment (MONT. CODE ANN. § 39-71-407). GROSFIELD, *supra* note 19, at § 4.11, notes: "The [arising out of] test points to the origin or cause of the accident, presupposing a causal connection between employment and injury." *See* Wiggins v. Industrial Accident Bd., 54 Mont. 335, 170 P. 9 (1918).

36. 156 Mont. 209, 478 P.2d 860 (1970).

37. *Id.* at 210, 478 P.2d at 861.

38. *Id.* at 212, 478 P.2d at 862.

third-party tort actions against "persons or corporations other than the employer."[39] The Act further provided that the state immunity provision did not expressly include coemployees. In examining whether coemployees were amenable to suit the court stated:

> The purposes and provisions of the Act can be fully effectuated by permitting negligence actions, in addition to compensation, *only against strangers to the business enterprise.* There is no reason why negligent strangers to the business should not pay the cost of injury to employees of the enterprise . . . . The Act does not cover strangers, *only employees.* There is no substitution of rights under the Act for common law remedies as between strangers on the one hand and employers and employees of the business on the other.[40]

The *Madison* court accepted the rule that statutes eliminating common law rights should be strictly construed. However, the court perceived a conflict between these rights and the purpose of the Act. Noting that "the legislature eliminated such common law rights by implication, if not by express language,"[41] the court determined that the Act and the common law right to sue a fellow employee could not coexist, "so the latter must give way."[42] The court concluded that the coemployee is not "some person other than the employer"[43] but rather is merged with the employer and shares his immunity.[44]

These strong assertions by the *Madison* court, buttressed three years later by the legislature's decision to specifically provide statutory protection for the negligent coemployee, indicated an intent to expand, not diminish, coemployee protection. The *Massey* decision ignores this intent and is not only a judicial contradiction but approaches superlegislation.

The second short-coming of *Massey* surfaces when one examines the application of the *Massey* test to future cases. Superficially, the "arising out of" standard of the coverage formula appears to provide lower courts with a familiar mechanism for deciding "close" questions involving coemployee immunity. This standard was adopted with the original Act,[45] and subsequent judicial interpretation as to the scope of this standard has generated a

---

39. *Id.*
40. *Id.* at 215-16, 478 P.2d at 864 (emphasis added).
41. *Id.* at 217-18, 478 P.2d at 865 (emphasis added).
42. *Id.*
43. *Id.* at 218, 478 P.2d at 865.
44. *Id.*
45. Act of Mar. 8, 1915, ch. 96, 1915 MONT. LAWS 168.

wealth of case law.[46] This precedent, however, was decided in light of the liberal construction provision of the Act and, due to the *Massey* court's decision to unilaterally apply this provision only to injured claimants,[47] it effectively renders this wealth of precedent useless. Indeed, *Massey* supports a bifurcation of the liberal construction provision: liberal construction of the "arising out of" test in favor of claimants, but narrow construction in opposition to negligent coemployees.

V. Policy Arguments

A. *Limiting Immunity*

Massey is silent on the reasoning behind the majority's unexpected turn from the policy set forth in *Madison v. Pierce*.[48] Several sound arguments, however, have been advanced in support of limiting coemployee immunity.[49]

One argument holds that the *quid pro quo* existing between the injured employee and his employer does not exist between the injured employee and the negligent coemployee.[50] As a result, the negligent coemployee is given a "free ride to immunity,"[51] without incurring any additional responsibilities, financial or otherwise.[52] As the West Virginia Supreme Court stated in *Tawney v. Kirkhart*,[53] "[t]here is no contract as between co-employees and they are subject to the provisions of the compensation act in their relationship with each other in no way."[54] The court noted that since employees do not contribute to the workers' compensation fund, there was no justification for granting them immunity under

---

46. *See, e.g.*, Wise v. Perkins, ___ Mont. ___, 656 P.2d 816 (1983); Gordon v. H.C. Smith Constr. Co., ___ Mont. ___, 612 P.2d 668 (1980); Steffes v. 93 Leasing Co., Inc., 177 Mont. 83, 580 P.2d 450 (1978); Guarascio v. Industrial Accident Bd., 140 Mont. 497, 374 P.2d 84 (1962); Richardson v. J. Neils Lumber Co., 136 Mont. 601, 341 P.2d 900 (1959); Geary v. Anaconda Copper Min. Co., 120 Mont. 485, 188 P.2d 185 (1947); Moffett v. Bozeman Canning Co., 95 Mont. 347, 26 P.2d 973 (1933); Heberson v. Great Falls Wood and Coal Co., 83 Mont. 527, 273 P. 294 (1929).

47. *Massey*, ___ Mont. at ___, 685 P.2d at 940.

48. 156 Mont. 209, 478 P.2d 860.

49. *See generally* 2A Larson § 71.20 (1983).

50. Note, *supra* note 14, at 436.

51. *See* Comment, *Workmen's Compensation: Third Party Actions in South Dakota*, 18 S.D.L. Rev. 423 (1973).

52. *See* Pound and Clark, *Comments on Recent Important Workmen's Compensation Cases*, 16 NACCA L. Rev. 67 (1955).

53. 130 W. Va. 550, 44 S.E.2d 634 (1947).

54. *Id.* at 563, 44 S.E.2d at 641.

the Act.[55] The court concluded that to hold otherwise would allow the negligent coemployee "gratuitous protection for his own misconduct."[56]

Other proponents of limited coemployee immunity maintain that, while it may not actually encourage negligence, coemployee immunity provides little incentive for coworkers to promote and support industrial safety.[57] As one court noted, granting immunity to the negligent coemployee "would unjustly confer upon every employee freedom to neglect his duty toward a fellow employee and thus escape with impunity from all liability for damages proximately caused by his own negligence."[58]

Finally, it is argued that limiting the injured employee's remedy to workers' compensation benefits while the negligent coemployee entirely avoids liability is unconscionable.[59] Generally, the benefits paid under workers' compensation are inadequate to sustain an injured worker at the income level he enjoyed prior to his injury.[60] These benefits are, in actuality, little more than a subsistence income.[61] Therefore, although placing the entire financial burden on the negligent coemployee offends the risk-distribution concept of social insurance, neither is the risk distributed when the burden of the injury must fall to a large degree on the injured employee.[62]

B. *Expanding Immunity*

Although there is some merit to the arguments limiting or even denying coemployee immunity, those supporting broad application of the statutory protection are more convincing. First, although limiting coemployee immunity may effectively raise industrial safety consciousness, narrow application may correspondingly have an adverse impact on overall harmony in the workplace.[63]

---

55. *Id.*

56. *Id.*

57. *See* Comment, *supra* note 51.

58. Rehn v. Bingaman, 151 Neb. 196, 202, 36 N.W.2d 856, 860 (1949). *See also* Botthof v. Fenske, 280 Ill. App. 362 (1935); Tawney v. Kirkhart, 130 W. Va. 550, 44 S.E.2d 634 (1947).

59. *See* Miller, *Suits Against Fellow Employees Under the Missouri Workmen's Compensation Act*, 45 U. Mo. K.C.L. Rev. 321, 337 (1977).

60. *See* Mont. Code Ann. §§ 39-71-701, -703 (1983) for compensation payment levels for the most common types of injury; discussed generally in Grosfield § 6.20 (1979).

61. *See generally* The Report of the Nat'l Comm'n on State Workmen's Compensation Laws 53-74 (1972).

62. Note, *supra* note 14, at 439.

63. *See* O'Brien v. Rautenbush, 10 Ill. 2d 167, 174, 139 N.E.2d 222, 226 (1956), in which the court noted:

The initiation of an interemployee common law action, particularly for negligent acts occurring on the premises of the employer,[64] immediately puts the balance of the work force on notice that liability may result from even the simplest interaction with fellow employees. Employees, particularly those engaged in hazardous occupations,[65] would be justifiably apprehensive of the possibility of a suit against them.

A second argument holds that although injured employees may be denied a long-standing common law right by limiting suits against coemployees, they would in return receive similar immunity from suit.[66] As noted by Larson:

> It is possible, within the bounds of compensation theory, to make out a case justifying this legislative extension of immunity to the coemployee. The reason for the employer's immunity is the *quid pro quo* by which the employer gives up his normal defenses and assumes automatic liability, while the employee gives up his role to common-law verdicts. This reasoning can be extended to the tortfeasor coemployee; he, too, is involved in the compromise of rights. Perhaps, so the argument runs, one of the things he is entitled to expect in return for what he has given up is freedom from common-law suits based on industrial accidents in which he is at fault.[67]

A third theory under which it is argued that the right to sue a coemployee should be limited is that workers' compensation is premised on the principle of enterprise liability.[68] The principle of enterprise liability dictates that employee injuries arising out of and in the course of employment be placed upon the employing enterprise in a manner entailing the least social damage.[69] Holding neg-

---

> In view of the fact that a considerable portion of industrial injuries can be traced to the negligence of a coworker, such litigation could reach staggering proportions, and would not only tend to encourage corrupt and fraudulent practices but would also disrupt the *harmonious relations* which exist between coworkers. The avoidance of such results is most certainly beneficial to the employee.

(Emphasis added).

64. *Massey*, ___ Mont. at ___, 685 P.2d at 940. The allegedly negligent act giving rise to the tort action in *Massey* arose well within the boundaries of the parties' workplace.

65. Miller, *supra* note 59, at 337 which sets forth the example of firemen.

66. *See, e.g.*, Lowman v. Stafford, 226 Cal. App. 2d 31, 37 Cal. Rptr. 681 (1964).

67. 2 LARSON § 72.22 at 14-86 (1983).

68. *See, e.g.*, House v. Anaconda Copper Min. Co., 113 Mont. 406, 126 P.2d 814 (1942); Wight v. Hughes Livestock Co., Inc., ___ Mont. ___, 664 P.2d 303 (1983).

69. As noted by the *Madison* court, *supra* note 36, at 213-14, 478 P.2d at 863:

> The broad purpose of the . . . Workmen's Compensation Act is to substitute a system for the payment of medical costs and wage losses to injured employees without regard to fault, for the common law system of legal action by the injured employee against the one whose negligence proximately caused his injury. The

ligent coemployees amenable in tort through strict statutory construction, however, places the financial burden of these injuries upon an individual rather than the employing enterprise. A coemployee personally exposed to liability likely would be financially devastated by a common law judgment.[70] To the extent that he can be forced to pay, if at all, the risk is not distributed as intended. Coemployee amenability, in such instances, effectuates the purposes of neither tort nor compensation law.[71]

The concept of enterprise liability as a fundamental feature of workers' compensation theory was expounded upon by the North Carolina Supreme Court in *Warner v. Leder*.[72] In *Warner*, the plaintiff-passenger was injured in an automobile collision while with a coemployee on a business trip. The plaintiff applied for and received disability compensation under North Carolina's Workers' Compensation Act. Later, he filed a civil action against the negligent coemployee under a state statute which gave an injured employee "a right to recover damages for such injury . . . from any person other than the employer."[73] The court construed the statute to mean "any person or party who is *a stranger to the employment* but whose negligence contributed to the injury."[74] In dismissing the plaintiff's suit, the court defined the purpose of workers' compensation legislation as an attempt to transfer the economic loss due to employment-related accidents from the employee to the industry or business in which he is employed, and ultimately to the consuming public.[75] The court reasoned that allowing inter-employee civil actions would defeat this purpose and that the legislature "never intended that officers, agents, and employees conducting the business of the employer should so underwrite this

---

> principle behind this legislation was that the business enterprise or industry should directly bear the costs of injury to its employees in the same manner as the enterprise has always borne the costs of maintaining and repairing its plant, machinery and equipment. The business enterprise should pass along the costs of maintenance and repair of its human resources, its employees, in the same manner as is done in the case of other production costs, namely in the price at which its product is sold to the public. This underlying purpose finds summary expression in the familiar phrase "the cost of the product should bear the blood of the workman."

See generally 2 HARPER & JAMES, THE LAW OF TORTS 740, 741 (1956).

70. *See* Comment, *Third Party Actions Under the Alabama Workmen's Compensation Act*, 26 ALA. L. REV. 701 (1974).

71. *See* McCoid, *The Third Person in the Compensation Picture: A Study of the Liabilities and Rights of Non-Employers*, 37 TEX. L. REV. 389 (1959).

72. 234 N.C. 727, 69 S.E.2d 6 (1952).

73. *Id.* at 732, 69 S.E.2d at 9.

74. *Id.* (emphasis added).

75. *Id.* at 733, 69 S.E.2d at 10.

economic loss."[76]

VI. Conclusion

The *Massey* decision leaves the boundaries of coemployee immunity largely without definition. The court's apparent abandonment of the policy considerations embraced in *Madison v. Pierce*,[77] coupled with its decision to deny negligent coemployees the benefit of the Act's liberal construction provision, however, indicates that the court's future posture likely will favor injured plaintiffs.

This note has set forth several arguments in opposition to limiting coemployee protection. The principle of enterprise liability, fundamental to workers' compensation, commands distribution of employment-related injuries over the consuming public as a cost of production. Victimizing the negligent coemployee with this financial burden, particularly in the presence of express statutory protection, is repugnant to this principle and undermines legislative intent.

Further justification for expansion of coemployee immunity rests on the reciprocal exchange of rights between the negligent employee and the injured employee. A *quid pro quo*, much like that of the employer-employee relationship, exists here; *each* foregoes the right to pursue a common law action. Finally, harmony in the workplace is jeopardized if the threat of legal action looms over on-the-job employee interaction.

For these reasons, broad construction of coemployee statutory protection best comports with the policies of the Montana Workers' Compensation Act.

76. *Id.*
77. 156 Mont. 209, 478 P.2d 860.