



## Workers' Compensation Issues in Doscher's Case

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A Charleston grocery store recently prevailed in a ruling involving a coverage dispute after a shooting in the store. As you will recall, the facts of the underlying action alleged Doscher's employed Burton Thorne as a grocery store bagger, and Thorne was shot by a fellow employee in the break-room during one of Thorne's work shifts. Anita Thorne, as Guardian ad Litem for Burton Thorne, initially filed a workers' compensation claim but voluntarily dismissed it before a ruling was issued. Anita Thorne later brought suit against Doscher's in the Court of Common Pleas for Charleston County asserting causes of action for negligence based on negligent hiring, training, retention, management, and supervision. The complaint alleged Doscher's failed to take adequate steps to make the workplace safe and to protect Thorne after learning of threats by the shooter.

The underlying facts to *Pennsylvania National Mutual Casualty Insurance Company v. DOSCHER'S SUPER MARKETS*, Dist. Court, D. South Carolina 2012, bring up two common workers' compensation questions.

1) Can an employee sue his or her employer? If both the employee and employer are subject to the Act, workers' compensation is the exclusive remedy of an employee against an employer for injury or death by accident. S.C. Code Ann. §42-1-540.

However, an intentional tort is not an "accident" within the Act and an employee's suit at common law against an employer is not barred by the exclusivity doctrine of §42-1-540. An employee cannot recover twice for the same injury, but may elect to pursue benefits under the Act or damages under common law.

2) Is an assault by a co-employee compensable under the Act? For an assault to be compensable under the Act, it must arise out of and in the course of employment. The parties in this case agreed the shooting occurred in the course of his employment. The issue was whether the shooting arose out of his employment. The court in this case pointed out, the phrase "arising out of" is interpreted differently in workers' compensation policies versus CGL policies. South Carolina courts construe workers' compensation policies in favor of a finding that the accident did "arise out of" the employment, whereas, CGL policy exclusions are construed in favor of finding that an accident did not "arise out of" the employment. "Arise out of" is narrowly defined as "caused by" in CGL policies such as the one in this case. However, the phrase is more broadly construed in the workers' compensation context and an employee only has to prove a causal connection between the assault and his or her employment to be covered under the Act.

Thorne and others testified that the shooting occurred because of the shooter's jealousy over Thorne's friendship with a female co-employee. Generally, assaults arising out of purely personal transactions are not considered compensable. However, Thorne allegedly reported the shooter's threats to his supervisor. The case was voluntarily dismissed before the Commission could make a ruling on whether benefits were owed under these circumstances.

Practice tip: A workers' compensation policy does not protect you against liability from all injuries that occur at work. Look to both your CGL and workers' compensation policies when you have claims, like an assault of an employee, which may be dual in nature.

### **About Kristian Cross**

Kristian Cross is an associate with Collins & Lacy practicing in Workers' Compensation and Retail / Hospitality / Entertainment law. In addition to her position on the South Carolina Bar Workers' Compensation Committee, Kristian serves on the executive board of Sexual Trauma Services of the Midlands. Kristian received her Juris Doctor from the University of South Carolina, where she served as the Secretary of the Student Bar Association, as well as the Academic Assistance Program Property Tutor. During law school, she also served as a law clerk for Collins & Lacy and another local firm. Prior to joining Collins & Lacy in 2010, Kristian worked as an attorney for a Columbia-based firm practicing in the areas of business, commercial and insurance litigation.

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