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South Carolina Supreme Court Recognizes the Dual Persona Doctrine

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For the first time, the South Carolina Supreme Court has recognized the Dual Persona Doctrine as a limited exception to the exclusivity provision of the S.C. Workers' Compensation Act.

In Mendenall v. Anderson Hardwood Floors, and Shaw Industries (Op. No. 27219, Feb 13, 2013), the Supreme Court answered in the affirmative the following question certified to it by U.S. District Court for the District of South Carolina:

> Does the "dual persona" doctrine allow an injured employee to bring an action in tort against his employer as a successor in interest who, through a corporate merger, received all liabilities of a predecessor corporation that never employed the injured person but allegedly performed the negligent acts that later caused the employee's injuries, or is such action barred by the exclusivity provision of the South Carolina Workers' Compensation Act?

The Court did not decide whether the doctrine was applicable to the underlying facts, concluding that decision was more appropriately the purview of the District Court.

Here is a summary of the case.

Walterboro Veneer, Inc. operated a wood manufacturing plant. Walterboro designed and constructed a cement vat for the purpose of soaking hardwood logs in a heated solution prior to milling. Through a series of mergers, Anderson Hardwood Floors later became the surviving entity and assumed all of Walterboro's liabilities.

In January 2008, Everette Mendenall was hired to work at the plant formerly owned by Walterboro. Tragically, he fell into a cement vat containing the heated solution, was severely burned and eventually died as a result.

Mendenall's dependants received workers' compensation benefits. His wife also filed suit in state court alleging wrongful death and survival actions against Walterboro, Anderson and the previously existing corporate entities. The suit alleged Mendenall's fall was the result of faulty design and construction of the vat, the failure to warn of the dangerous conditions of the vat, and the negligent maintenance of the vat after notice of its hazardous conditions.

The defendants removed the case to federal court and moved to dismiss, arguing they were immune under the Workers' Compensation Act. Plaintiff responded that injured employees are not barred from filing civil actions against third-parties, and since Mendenall was never employed by Walterboro, Walterboro's undeveloped liability for defectively designing and constructing the vat did not derive from any employment relationship, but rose independently as a third-party and passed on to Anderson through the mergers. Plaintiff contended Anderson should be liable for the tortious acts of its predecessors under the dual persona doctrine, both as Mendenall's employer and as the successor-in-interest to the third-party liabilities of Walterboro.

The dual persona doctrine should not be confused with another doctrine known as the dual capacity doctrine. Under the dual capacity doctrine, an employer becomes vulnerable to suit if he occupies, in addition to his capacity as employer, a second capacity that confers on him obligations independent to those imposed on him as an employer. Under the dual persona doctrine, an employer may become a third person, vulnerable to tort suit by an employee if – and only if – it possesses a second persona so completely independent from and unrelated to its status as an employer and by established standards the law recognizes that persona as a separate legal person. The dual persona doctrine recognizes different identities, while the dual capacity doctrine recognizes different activities or relationships.

The S.C. Supreme Court considered and rejected the dual capacity doctrine in Johnson v. Rental Uniform Serv. of Greenville, 316 SC 70, 447 S.E.2d 184 (1994). The Court also had discussed the dual persona doctrine in Tatum v. Medical Univ. of S.C., 346 S.C. 194, 552 S.E. 2d 18 (2001). In Tatum, a majority of the Court held the dual personal doctrine did not apply to the facts of that case, so the decision did not reject the doctrine, although it did reverse the Court of Appeals, which had adopted the doctrine in allowing a claimant to sue her employer-hospital and its physicians who allegedly negligently treated an employee for a work-related accident and in so doing, exacerbated the injury.

However, in Mendenall, the Court agreed to recognize the dual persona doctrine as an exception to the Act's exclusivity provision: "The dual persona doctrine is a narrow exception, applicable only when the second set of obligations that forms the basis of the tort suit is entirely independent of the defendants' obligations as an employer." See Larson's Workers' Compensation Law, Section 113.01[4] "Where those sets of obligations are intertwined such as they cannot be logically separated, applications of the dual persona doctrine is inappropriate."

As explained by Professor Larson, if the dual persona doctrine is to apply, it must be possible to say the duty arose solely from the non-employer persona. It is not enough that the second persona impose additional duties. They must be totally separate from and unrelated to those of the employment. The dual persona doctrine will apply only in truly exceptional circumstances. The Court did not hold whether the dual persona applied to the facts in Mendenall suit, concluding that decision would more appropriately be made by the District Court.

The Court cited to the Court of Appeals of Michigan's decision in Herbolsheimer v. SMS Holding Co., 608 N.W.2d 487, 493 (Mich. Ct. App. 2000), for the proposition the dual persona doctrine will only apply in truly exceptional situations: "We are unprepared to . . . assume that a predecessor company in our case is automatically a third party that can be sued through the successor company that happens to also be the employer. . . . Instead, we must look to see if there are separate obligations created by the predecessor that can form the basis of the dual-persona suit. Simply being a successor in liability does not make a company liable — there must be an allegedly viable legal claim against the predecessor in order for the case to survive a motion for summary disposition." Id. at 496.

Part II of this article will discuss examples from other jurisdictions of the application of the dual personal doctrine, including a discussion of the Herbolsheimer opinion and the other cases cited to by the South Carolina Supreme Court in the Mendenall opinion.

About Pete Dworjanyn

Pete Dworjanyn is a shareholder and chair of Collins & Lacy's Insurance Coverage Practice Group and founding author of the South Carolina Insurance Law Blog. Pete also practices in workers' compensation. Following law school, Pete served as a law clerk for the Honorable Julius H. Baggett, Eleventh Judicial Circuit and as Assistant Solicitor in the Eleventh Circuit Solicitor's Office. Prior to joining Collins & Lacy in 1999, Pete was in private practice, focusing on civil litigation. Pete's reputation has earned him a BV rating by Martindale-Hubbell. He also is one of the Best Lawyers in America, the oldest and most respected peer-review publication in the legal profession. Greater Columbia Business Monthly recognized Pete as one of the 2012 Midlands Legal Elite in the area of insurance coverage.