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GEORGIA'S EXCLUSIVE REMEDY DOCTRINE:

APPLICATION, EXCEPTIONS, AND HOW TO OVERCOME THE DEFENSE

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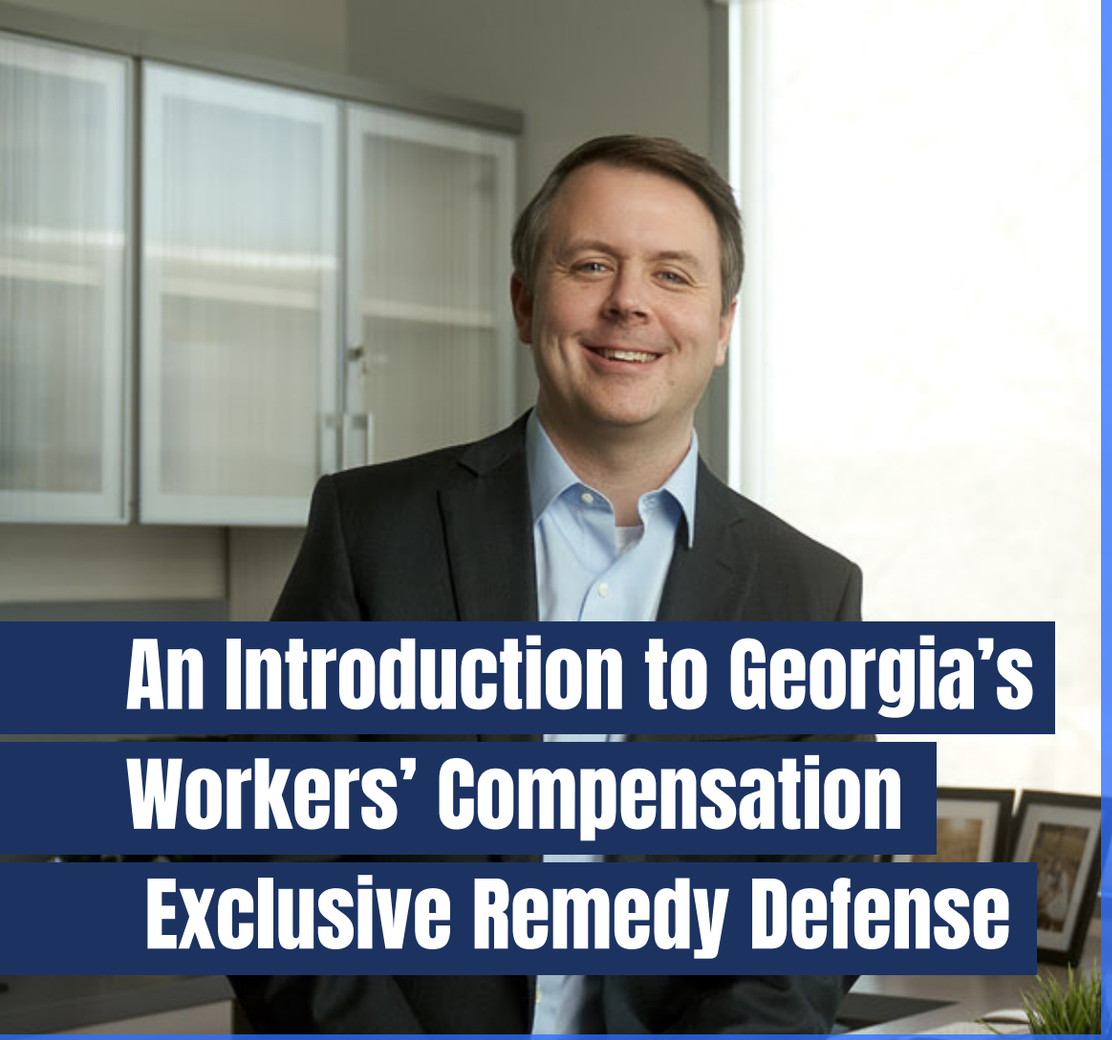

An Introduction to Georgia's Workers' Compensation Exclusive Remedy Defense

Georgia's Workers' Compensation Act has existed for more than 100 years. First enacted in 1920, the law was created to ensure prompt payment for workers injured on the job without any proof of fault on the part of the employer and without having to overcome the standard common law defenses that existed. But this guaranteed benefit came with a catch: employees could not sue their employers for on-the-job injuries. This quid pro quo was the "grand bargain" of the creation of the workers' compensation system and has been referred to as the bedrock of the workers' compensation system.[1] In return for guaranteed payment of work-related injuries, employers received essentially blanket immunity.

[1] *Doss v. Food Lion, Inc.*, 267 Ga. 312, 313 (1996).

The immunity provided to employers is known as the exclusive remedy doctrine because the workers' compensation system is the employee's exclusive remedy against the employer. This defense is powerful and can rear its ugly head in even unexpected cases where an employee is attempting to sue someone other than his direct employer. If the exclusive remedy defense applies, it will bar your personal injury tort action. An in-depth understanding of this defense—when it applies, what the exceptions are, and how to overcome the defense—is critical for anyone representing injured plaintiffs in Georgia.

I have dealt with exclusive remedy issues in my personal injury practice over the years, but what prompted me to take a deeper dive into the defense was a wrongful death lawsuit against MARTA that we settled in 2022 for $17 million. One of the critical issues in the case was whether the exclusive remedy doctrine barred our plaintiff's claim. The lawsuit arose out of the death of Robert Smith, a contractor who died in 2018 while performing work as part of a project to install a cellular wireless system in MARTA's stations and tunnels. MARTA initially refused to acknowledge responsibility for Mr. Smith's death and attempted to blame him and a co-worker for being partially responsible for the incident. After a year and a half of litigation, MARTA accepted that it was 100% negligent in causing Mr. Smith's death.

Nevertheless, MARTA then raised a new defense. After exchanging extensive discovery and taking numerous depositions, MARTA argued for the first time that the Workers' Compensation Act's exclusive remedy provision barred the plaintiff's claims entirely. The case suddenly shifted focus. Issues we litigated for a year and a half suddenly changed to an entirely different area.

In preparing to rebut the defense, I did extensive research and looked at the history of the Workers' Compensation Act going back to 1920 and cases interpreting the Act. After more than 20 depositions of MARTA employees on just this defense, extensive written discovery, and a seven-hour hearing before Judge Emily Richardson of the Superior Court of Fulton County, Judge Richardson announced that she was rejecting the exclusive remedy defense. Faced with the prospect of a trial for Mr. Smith's death, MARTA agreed to settle all claims against MARTA and its employees for $17 million.

I have structured this guide in a way that I think is helpful to having a good, in-depth understanding of the exclusive remedy defense.

First, I'll start big picture and go over a brief history of the exclusive remedy statute. The history of this law is essential when interpreting case law. Second, I'll discuss the requirements for the immunity afforded under the statute to apply. Next, I'll discuss third-party claims for on-the-job injuries. Last, I'll conclude by discussing some procedural considerations when handling cases where the exclusive remedy doctrine may arise.

The Exclusive Remedy Statute

Its History and Current Form

The Workers' Compensation Act, passed in 1920, created a system that would ensure prompt, guaranteed compensation for injured employees in return for employers obtaining immunity from tort suits. The immunity was the quid pro quo for the guaranteed compensation. Workers would be guaranteed prompt benefits for work-related injuries, regardless of negligence or common tort defenses. Employers would have limited liability, protecting them against common law damages awards and liability for claims such as pain and suffering or loss of consortium.

In its current version, the exclusive remedy statute provides:

"The rights and the remedies granted to an employee by this chapter shall exclude and be in place of all other rights and remedies of such employee, his or her personal representative, parents, dependents, or next of kin, and all other civil liabilities whatsoever at common law or otherwise, on account of such injury, loss of service, or death; provided, however, that the employer may be liable to the employee for rights and remedies beyond those provided in this chapter by expressly agreeing in writing to specific additional rights and remedies; provided, further, however, that the use of contractual provisions generally relating to workplace safety, generally relating to compliance with laws or regulations, or generally relating to liability insurance requirements shall not be construed to create rights and remedies beyond those provided in this chapter. ***No employee shall be deprived of any right to bring an action against any third-party tort-feasor, other than an employee of the same employer*** *or any person who, pursuant to a contract or agreement with an employer, provides workers' compensation benefits to an injured employee, notwithstanding the fact that no common-law master-servant relationship or contract of employment exists between the injured employee and the person providing the benefits, and other than a construction design professional who is retained to perform professional services on or in conjunction with a construction project on which the employee was working when injured, or any employee of a construction design professional who is assisting in the performance of professional services on the construction site on which the employee was working when injured, unless the construction design professional specifically assumes by written contract the safety practices for the project. The immunity provided by this subsection to a construction design professional shall not apply to the negligent preparation of design plans and specifications, nor shall it apply to the tortious activities of the construction design professional or the employees of the construction design professional while on the construction site where the employee was injured and where those activities are the proximate cause of the injury to the employee or to any professional surveys specifically set forth in the contract or any intentional misconduct committed by the construction design professional or his or her employees." O.C.G.A. § 34-9-11(a) (emphasis added).*

The Workers' Compensation Act is the exclusive remedy for covered injuries, so there can be no tort claims, except as to third-party tortfeasors who are not employees of the same employer.

Before 1974, "employees of the same employer" did not enjoy any immunity because they were considered third parties. Only "employers" were entitled to immunity under the Act. In *Cunningham v. Heard*, 134 Ga. App. 276, 277 (1975), the court observed that pre-1974, an injured employee could recover workers' compensation from his employer and still proceed against a fellow employee in a common law tort action. As the Court of Appeals stated in *Borochoff v. Fowler* in 1958, the exclusive remedy provision "would not preclude a recovery by the plaintiff against an individual third-party tortfeasor, even though he be a fellow employee or corporate officer." 98 Ga. App. 411, 414-15 (1958).

In 1974, the legislature added "other than an employer of the same employer" to extend the defense to co-employees. The 1974 amendment changed the law so that employees of the same employer are now a class of third parties who are entitled to the benefit of the exclusive remedy provision.

Requirements for Immunity to Apply

For the exclusive remedy provision to apply, the claim must involve an employee who was acting in the course and scope of their employment, and sustained an injury or injuries compensable under the Act.[2]

Was the injured person an "employee"?

The Act has a lengthy definition of employee found at O.C.G.A. § 34-9-1(2). It begins with: "'Employee means every person in the service of another under any contract of hire or apprenticeship, written or implied, except a person whose employment is not in the usual course of the trade, business, occupation, or profession of the employer."

Several sentences later, the statute distinguishes "independent contractor" from "employee": "A person shall be an independent contractor and not an employee if such person has a written contract as an independent contractor and if such person buys a product and resells it, receiving no other compensation, or provides an agricultural service or such person otherwise qualifies as an independent contractor…." O.C.G.A. § 34-9-1(2).

[2] The Workers' Compensation Act does not apply to an employer that has in service less than three employees, unless the employer voluntarily elects to be covered by the Act.

To determine whether an individual is considered an employee (as opposed to an independent contractor), the courts look to the language of the contract.

The primary question is: Does the contract give, or does the employer assume, the right to control the time, manner, and method of executing the work? In *Estes v. G&W Carriers*, LLC, 354 Ga. App. 156 (2020), the court held that the test for determining whether the individual is a contractor or an employee is "not whether the employer did in fact control and direct the employee in the work, but whether the employer had that right under the employment contract." Courts look for contract language such as actual work hours, the right to tell a person how to do the job details, and whether the employer provides procedures, tools, and resources. They also consider how the work is actually performed and who controls it.

The right to control by the employer "may be inferred where the person is employed generally to perform certain services for another, and there is no specific contract to do a certain piece of work according to specifications for a stipulated sum." *Boatright v. Old Dominion Ins.* Co., 304 Ga. App. 119, 121 (2010). In *Boatright*, for example, the court deemed the worker an employee based on facts that included the plaintiff was paid weekly by the employer, the employer provided all necessary tools and materials for the work (other than the plaintiff's own hammer, measuring tape, and tool belt), the employee was required to perform work as instructed by the employer's foreman, and the employer could have discharged the plaintiff.

In *Stalwart Films, LLC v. Bernecker*, 359 Ga. App. 236 (2021), the Georgia Court of Appeals held that a stuntman who died on the set of the Walking Dead TV show was not a contractor, even though he was issued a 1099 and classified as a contractor. The Court of Appeals noted that the employer's classification of the worker as an employee versus a contractor is not dispositive.

Instead, the focus was on whether the employee actually had the right to control the time and manner of work. Quoting prior precedent, the Court of Appeals stated: "The right to control the time means the employer has assumed the right to control the person's work hours. The right to control the manner and method means the employer has assumed the right to tell the person how to perform all job details, including the tools he should use and the procedures he should follow."

Employers Mut. Liability Ins. Co. of Wausau v. Johnson is an example of the court considering the plaintiff a contractor, not an employee. 104 Ga. App. 617 (1961). In Johnson, the decedent was electrocuted while placing a pipe in the ditch for his employer, Lanier. A construction company employed Lanier to build a oil company bulk plant. The issue in the case was whether the decedent was an employee or contractor of the construction company, Rosamond & Sons. The facts showed that Rosamond & Sons paid Lanier a lump sum for the work. It did not provide him with any blueprints or detailed specifications for the job. They just showed him what they wanted done with no particular time to start or finish the job. It was merely agreed it would be done "as quickly as possible." Lanier performed the work under the "direction" of Rosamond & Sons and the company continually checked the work to ensure it complied with the directions.

Rosamond & Sons never changed the work, but they had the authority to do so. Lanier "guessed" they could fire him. While performing the work, he used his own equipment and hired his own employees.

The Court of Appeals concluded that Lanier was an independent contractor. Rosamond & Sons did not have the right to control the time, manner, and method of the work. Instead, it could only control the expected results and had the right to insist that it be done in conformity with the contract. "The fact that an employer continuously checks the work of an independent contractor to see that the work is being done according to the specifications of the job is thoroughly consistent with the relationship of employer and independent contractor and with the mere right of the employer to insist on a certain specific result." *Id.* at 619.

The court further stated: "The right to control the time of doing the job means the right to control the hours of work. The right to control the manner and method means the right to tell the employee how he shall go about doing the job in every detail, including what tools he shall use and what procedures he shall follow. None of these elements were present in this case." *Id.* at 620

Course and Scope of Employment; Arising out of Employment

If an injury to an employee arises out of and in the course of employment, it is compensable under the Act, and therefore, the exclusive remedy defense would apply. O.C.G.A. § 34-9-1(4). In *Murphy v. ARA Servs., Inc.*, 164 Ga. App. 859 (1982), the court noted that "arising out of" and "in the course of" are not synonymous; they are different tests. The injury in question can include the aggravation of a preexisting condition. Willful acts of a third person directed against another employee for personal reasons are not covered. The statute also references other specific exclusions, such as heart disease, heart attack, and stroke.

Courts apply a time, place, and circumstances test to determine whether an injury is "in the course of employment." The accident or injury must have occurred:

- within the period of employment,
- at a place where the employee may reasonably be performing work duties, and
- while the employee is fulfilling those work duties or doing something incidental to them.

Potts v. UAP-Ga. Ag. Chem, 270 Ga. 14 (1998); Smith v. Camarena, 352 Ga. App. 797 (2019).

As the court observed in *Murphy*, an injury that arises out of employment will ordinarily also be in the course of employment. However, the converse is not necessarily true. That is, an injury may be in the course of employment but not arise out of it. An injury "arises out of the employment" when there is a rational, causal connection between required work conditions and the resulting injury. It includes injuries that follow as a natural incident of the work, but excludes injuries that cannot be rationally or fairly traced to the employment as a contributing cause. 164 Ga. App. at 861-62.

Typically, a court will rule that an injury *did not arise out of their employment* if: 1) the tortfeasor was not acting in furtherance of work purposes, 2) the injured party would have been equally exposed to the hazard apart from the employment, 3) the job did not occasion the hazard, or 4) the work conditions did not produce a peculiar risk.

Here are some examples of Georgia appellate decisions on whether an injury arose out of the employment.

- In *Cox v. Brazo*, 165 Ga. App. 888 (1983), the court held that an employee's claim that the employer should have known of the supervisor's reputation for sexual harassment did not "arise out of" her employment.
- In *Mayor and Aldermen of Savannah v. Stevens*, 278 Ga. 166 (2004), the crash of an off-duty police officer running personal errands did not arise out of her employment.
- In *Macy's South v. Clark*, 215 Ga. App. 661 (1994), an employee injured while returning to their car at night did arise out of their employment; the employee was only in the parking garage because of her job, and only having one guard on duty in the public parking garage created a risk.
- In *Dawson v. Wal-Mart Stores, Inc.*, 324 Ga. App. 604 (2013), the court held that an employee's parking lot assault did arise out of her employment because the employee was walking from the employer's parking lot into the store during the early morning attack.

Ingress / Egress Rule

Generally, injuries that occur while employees are traveling to and from work do not arise out of and in the course of employment. But there are some exceptions, such as:

- **The employee is in ingress to and egress from their place of work, while on the employer's premises.**
- **The employee is going to and from parking facilities provided by the employer.**
- **The employee is doing some act permitted or required by the employer, and also beneficial to the employer, while en route to and from work.**
- **The employer furnishes the transportation.**
- **The employee is on call and is being reimbursed for transportation costs.**
- **The employee has already signed out for the day, but the accident occurred before they left the employer's property. In *Connell v. Head*, 253 Ga. App. 443 (2002), the court held that a school cafeteria employee's car accident did "arise out of her employment" after she had signed out of work for the day but was hit by a city school bus while still on city property.**

Considering the ingress/egress rule, the period of employment generally includes a reasonable time for ingress and egress from the place of work while on the employer's premises. *Peoples v. Emory Univ.*, 206 Ga. App. 213 (1992).

Intentional Torts for Purely Personal Reasons

Specifically excluded from the Workers' Compensation Act's definition of injury are those injuries caused by the willful acts of "a third person directed against an employee for reasons personal to such employees." O.C.G.A. § 34-9-1(4). Immunity does not apply if the third party committed the tortious act for personal reasons unrelated to the conduct of the employer's business. *Betts v. Medcross Imaging Ctr.*, 246 Ga. App. 873 (2000).

Another example is *Pavuk v. Western Intern. Hotels*, 160 Ga. App. 82 (1981), where the court held that there **was immunity** for an employee's sexual assault because the conditions of the employment increased the risk of attack. There was **also immunity** in *Hadsock v. J.H. Harvey Co., Inc.*, 212 Ga. App. 782 (1994), where one employee murdered another employee who was making a deposit for their employer at a bank. However, in *Johnson v. Holiday Food Stores*, 238 Ga. App. 822 (1999), the court held that there was **no immunity** when an employee suffered an assault at their workplace by their fiancé because the attack "grew out of a specific private relationship which had no connection with the premises or employment whatsoever."

When a co-worker causes an injury, and it can be shown that the act of the co-worker was a willful effort to cause injury, and that the act was purely personal in nature, the claimant may bring suit against the co-worker. These requirements can be difficult to overcome because—absent a blatant physical attack on the claimant—proving willful intent can be challenging.

Psychological Injuries

Only physical injuries or harms are compensable under the Act. As a result, there is no immunity when the injury is non-physical. *See Oliver v. Wal-Mart Stores, Inc.*, 209 Ga. App. 703 (1993). For example, a claim for libel, slander, or intentional inflection of emotional distress is not barred. *Id.* However, if an employee suffers a physical injury in the course of employment, a related claim for mental damages will be barred by the exclusive remedy provision. *See Bryant v. Wal–Mart Stores*, 203 Ga. App. 770 (1992). Where the non-physical injury stems from a concern about a future injury, the exclusive remedy provision will apply. *Betts v. Medcross Imaging Ctr. Inc.*, 246 Ga. App. 873 (2000).

Categories of Defendants Entitled to Immunity

Defendants who can raise the exclusive remedy defense include employers (including temp services and borrowed servant situations), employees of the same employer, statutory employers under O.C.G.A. § 34-9-8, "alter egos" of the employer, persons who provide workers' compensation benefits to an injured employee, and construction design professionals.

Employers

The exclusive remedy provision of the Workers' Compensation Act provides immunity to an employer. The most common example of an employer is a direct employer. For a discussion of the employee versus contractor distinction, see the earlier discussion on the definition of an "employee." Additionally, if the employer is insured, the insurer falls under the definition of "employer."

Immunity extends to an employer that borrows an employee from another company. This is known as a borrowed servant defense. The borrowing employer, also known as a special employer, is entitled to immunity because a borrowed servant is considered an actual employee of the special employer. *U.S. Fidelity & Guaranty Co. v. Forrester*, 230 Ga. 182 (1973); *Underwood v. Burt*, 185 Ga. App. 381, 382 (1987).

The borrowed servant defense has three elements that the special employer must show:

- **The borrowing employer or special master had complete control and direction of the servant for the occasion, ("complete control" means the right to tell an employee how they shall go about doing the job in every detail, including what tools they shall use and what procedures to follow),**
- **The general master had no such control or direction of the employee, and**
- **The borrowing employer or special master had the exclusive right to discharge the borrowed employee or servant.**

***Six Flags Over Ga., Inc. v. Hill*, 247 Ga. 375, 377 (1981).**

Each prong of this test focuses on the specific task for which the servant is loaned and the occasion when the injury occurred. A skilled worker can be considered a borrowed servant for a specific task.

Concerning "complete control," there is a distinction between the act of merely following directions while assisting another's servant and the status of being within the "complete control" of another's servant. In *Food Giant v. Davison*, 184 Ga. App. 742 (1987), for example, the court concluded that a driver delivering goods and following the directions and instructions of a warehouse employee was not a borrowed servant; the driver was cooperating with the warehouse employee—there was no implicit subordination.

"Where each requirement of the borrowed servant doctrine is not explicitly set forth in the contract, the relationship between the hirer and the bailor's employee is generally a question of fact to be decided by a jury." *Coe v. Carroll & Carroll*, 308 Ga. App. 777 (2011).

An employer using the services of a temporary employment service, or employee leasing company, also receives immunity under the Act. *See* O.C.G.A. § 34-9-11(c).

Employees of the Same Employer

Before 1974, employees of the same employer did not have immunity under the exclusive remedy provision because they were considered third parties. The exclusive remedy defense "would not preclude a recovery by the plaintiff against an individual third-party tortfeasor, even though he be a fellow employee or corporate officer." *Borochoff v. Fowler*, 98 Ga. App. 411, 414-15 (1958). Employees of the same employer could be held liable, even where the plaintiff had obtained workers' compensation benefits from his employer.

In 1974, the phrase "other than an employee of the same employer" was added to the statute to create an exception to the rule that third-party tortfeasors could be held liable for injuries.

The exclusive remedy provision now reads: "No employee shall be deprived of any right to bring an action against any third-party tort-feasor, other than an employee of the same employer or any person who, pursuant to a contract or agreement with an employer, provides workers' compensation benefits to an injured employee...." O.C.G.A. § 34-9-11(a).

Under the current version of the Act, employees of the same employer cannot sue each other.

As stated below in the statutory employer discussion, while an "employee of the same employer" is immune from suit, an employee of the *statutory employer* is not. This difference is significant because a statutory employer often will have insurance covering its employee, or if not, the employer may still indemnify the employee. As a result, even if the business proves its "statutory employer" status, a successful suit—and a recovery—can still often be maintained against the business's employee who acted negligently.

Statutory Employer

Under O.C.G.A. § 34-9-8(a), "a principal, intermediate, or subcontractor shall be liable for compensation to any employee injured while in the employ of any of his subcontractors engaged upon the subject matter of the contract to the same extent as the immediate employer." The statutory employer defense provides that principal contractors under O.C.G.A. § 34-9-8 are entitled to immunity because of their potential liability for workers' compensation benefits. *Wright Assocs., Inc. v. Rieder*, 247 Ga. 496 (1981).

A "principal contractor" is "those who contract to perform certain work, such as the furnishing of goods and services, for another, and then sublet in whole or part such work." *Yoho v. Ringier of Am., Inc.*, 263 Ga. 338 (1993). A principal contractor differs from a simple contractor in that a principal contractor engages subcontractors to assist in the performance or completion of work that the principal contractor has undertaken to perform for another. *Id.*

A principal contractor must owe a contractual obligation to a third party to qualify as a contractor. There must be 1) a contractual obligation on the part of the person held as a contractor, and 2) a subletting of a part of that obligation to the person to be held as a subcontractor.

A principal contractor for a project is entitled to the same worker's compensation immunity from tort liability available to the injured worker's immediate employer. The reason is that a principal contractor is potentially liable for workers' compensation benefits if contractors lower on the contractual relationship ladder do not have the required workers' compensation coverage. *Wright Assocs., Inc. v. Rieder*, 247 Ga. 496 (1981); O.C.G.A. § 34-9-8. Significantly, a principal contractor that qualifies as a statutory employer is entitled to immunity, even if it did not have any actual liability for workers' compensation benefits. It is the "potential" for liability that triggers the immunity. *See Rieder*, 247 Ga. at 499-500.

When a principal contractor raises a statutory employer defense, consider these arguments:

- **the defendant owed no contractual obligation to another**
- **the defendant's contractual obligation does not relate to the specific work that the plaintiff was performing**
- **the contractual obligation is too vague, ambiguous, or undefined to apply to the work that the plaintiff was performing, or**
- **the defendant is acting pursuant to an ownership interest and not in the furtherance of any contractual obligation**

If the employer did not have any actual liability for workers' compensation benefits, you should also raise the argument that *Reider* was wrongly decided and that the principal contractor only has immunity if it actually paid workers' compensation benefits. Before *Rieder*, the law was that the statutory employer only had immunity if it was liable for paying workers' compensation benefits (for example, if the subcontractor employer failed to carry workers' compensation coverage). *See Rieder*, 247 Ga. at 497-98 (discussing *Blair v. Smith*, 201 Ga. 747 (1947) and *BLI Construction Co. v. Knowles*, 123 Ga. App. 588 (1971)). In 1981, 61 years after the Act was passed, the Georgia Supreme Court held in *Rieder* that the immunity extended to **all** principal contractors, regardless of whether they had liability for workers' compensation benefits.

Significantly, *Rieder's* holding was not based on any language in the statute. Instead, it was based on public policy and citation to a treatise. There is absolutely nothing in the Act that extends immunity to principal contractors who do not have liability for workers' compensation benefits. *Rieder* had a dissenting justice who wrote that immunity should only extend to principal contractors that have actual liability for workers' compensation benefits. While lower courts are bound to follow *Rieder* unless and until it is overruled, any case involving a claim against a principal contractor that did not have actual liability for workers' compensation benefits should urge that *Rieder* be overturned so that the issue is preserved for appeal.

Employees of the Statutory Employer ARE NOT Immune

While statutory employers are entitled to immunity from tort liability, the statute does not apply to employees of the statutory employer. In *Long v. Marvin Black*, 250 Ga. 621 (1983), the Georgia Supreme Court addressed the issue of whether an employee of the statutory employer was an employee of the same employer entitled to immunity under the exclusive remedy provision. Based on the terms of the statute, the court held that "the words 'employee of the same employer' do not apply when, as here, the injured employee is an employee of a subcontractor which paid compensation benefits and the alleged tortfeasor is an employee of the principal contractor."

Although you can sue an employee of the statutory employer, you cannot sue an "alter ego" of the statutory employer for nonfeasance. Alter egos are discussed in more detail below. *Pardue v. Ruiz*, 263 Ga. 146 (1993), established that alter egos of the statutory employer are immune from suit.

In *Pardue*, the issue was whether the managerial employee of a statutory employer who committed nonfeasance could claim immunity as the alter ego. The defendant was a vice president who never inspected the building scaffolding that collapsed and injured the plaintiff. The vice president was not present on the day of the plaintiff's injuries. The sole theory of liability was the vice president's failure to inspect the scaffolding.

The Georgia Supreme Court held that the allegations against the vice president were an attempt to hold him liable as the alter ego of the statutory employer. The Court reasoned that the failure to inspect the scaffolding was nonfeasance in his representative capacity. The Court concluded: "Where, as here, the duty breached by the supervisor is a nondelegable duty of general supervision or of providing a safe workplace, the employee shares in his employer's tort immunity."

The Court in *Pardue* expressly stated that it limited its holding to supervisors that were alleged to be liable for nonfeasance, and that its holding would not extend to supervisors who commit "an affirmative act causing or increasing the risk of injury to another employee." It is important to point out that the actual holding was based on the conduct being nonfeasance, as opposed to misfeasance. Although an affirmative act is misfeasance, the failure to act may also be misfeasance in certain situations. "Misfeasance" is the improper doing of an act that the agent might lawfully do. It may also involve, to some extent, the idea of not doing. *Warnock v. Elliott*, 96 Ga. App. 78 (1957).

Independent Contractor Sole Proprietor Exception

A narrow exception to be aware of is the independent contractor-sole proprietor exception discussed in *Kaplan v. Pulte Home Corp.*, 245 Ga. App. 286 (2000). In *Kaplan*, the plaintiff was an independent contractor working as a subcontractor for Kitchen & Bathworld, which was also working as a subcontractor for Pulte Home Corporation. Pulte was the builder and developer of a neighborhood where the plaintiff was working when he was injured. The plaintiff was considered a sole proprietor because he made the proper election to be treated as his own employee, gave proper notice to his insurer of his election, and paid an additional premium for his own workers' compensation coverage. *See* O.C.G.A. § 34-9-2.2. As a result, the plaintiff was not an employee of anybody and was not entitled to any workers' compensation benefits from anyone besides his own insurer. Under these facts, the Court of Appeals held that the plaintiff could maintain an action against Pulte.

Alter Egos

Alter egos of the employer have immunity from liability. Even before 1974, before the language "other than an employee of the same employer" was added to the exclusive remedy statute, there was already a distinction between a fellow employee and an alter ego. A fellow employee was not entitled to immunity, but an alter ego was entitled to immunity for nonfeasance because the alter ego shared the employer's identity. The alter ego rule applies to officers, shareholders, owners, officers, stockholders, and managers of the immediate employer. *See*, e.g., *Pardue v. Ruiz*, 263 Ga. 146 (1993); *Betts v. Medcross Imaging Center, Inc.*, 246 Ga. App. 873 (2000); *Stoker v. Wood*, 161 Ga. App. 110 (1982); *Vaughn v. Jernigan*, 144 Ga. App. 745 (1978); *Chambers v. Gibson*, 145 Ga. App. 27 (1978). An insurer providing workers' compensation benefits is also considered an alter ego of the employer, in addition to being included in the definition of "employer." *Coker v. Great Am. Ins. Co.*, 290 Ga. App. 342 (2008).

Any Person Who Provides Workers' Compensation Benefits to an Injured Employee

The exclusive remedy statute extends immunity to "any person who, pursuant to a contract or agreement with an employer, provides workers' compensation benefits to an injured employee, notwithstanding the fact that no common-law master-servant relationship or contract of employment exists between the injured employee and the person providing the benefits." O.C.G.A. § 34-9-11(a). Additionally, the Act's definition of "employer" includes this exact same language. O.C.G.A. § 34-9-1(3); *see Sykes v. Smolek Grading, Inc.*, 204 Ga. App. 633 (1992).

Construction Design Professionals

Construction design professionals have tort immunity, subject to some exceptions. O.C.G.A. § 34-9-11(a) states that immunity extends to a "construction design professional who is retained to perform professional services on or in conjunction with a construction project on which the employee was working when injured, or any employee of a construction design professional who is assisting in the performance of professional services on the construction site on which the employee was working when injured."

There are several exceptions to this immunity. One is that the construction design professional is not immune from a tort suit when it "specifically assumes by written contract the safety practices for the project." O.C.G.A. § 34-9-11(a). Another exception is that immunity does not extend to the negligent preparation of design plans and specifications. *Id.*

Additionally, immunity does not "apply to the tortious activities of the construction design professional or the employees of the construction design professional while on the construction site where the employee was injured and where those activities are the proximate cause of the injury to the employee." Yet another exception is for "any professional surveys specifically set forth in the contract." And last, there is no immunity for intentional misconduct committed by the construction design professional or his or her employees.

Exceptions in O.C.G.A. § 34-9-2

The Workers' Compensation Act exempts certain employers and employees from the Act in § 34-9-2. The exceptions listed in this statute include common carriers by railroad (which are covered by the Federal Employers' Liability Act); farm laborers and domestic servants; employees whose employment is not in the usual course of trade, business, occupation or profession of the employer; employers with less than three employees (unless the employees and employers elect to be bound by the Act); and licensed real estate salespersons and associate brokers who have written contracts as independent contractors. O.C.G.A. § 34-9-2(a)(2). There are also several provisions in the statute specific to independent contractors. *See* O.C.G.A. § 34-9-2(d), (e), (f).

Third-Party Claims

The Workers' Compensation Act's exclusive remedy provision only applies to the employer, not third-parties. It does not provide any immunity to third parties, except employees of the same employer and the other categories of defendants discussed above. So, who is considered a third party?

Who is a third-party?

A third-party is any person or entity that is not an employer, statutory employer, or special employer of a borrowed servant. An employee of the same employer is technically considered a third-party tortfeasor, but they are expressly provided immunity: "No employee shall be deprived of any right to bring an action against any *third-party tort-feasor*, other than an employee of the same employer...." O.C.G.A. § 34-9-11 (emphasis added).

Can I Sue Third Parties While Also Receiving Workers' Compensation Benefits?

An injured employee can still pursue a claim against a third party while receiving workers' compensation benefits. Georgia does not have an election of remedies requirement.

Subrogation

Subrogation gives the employer/insurer the right to recover money paid to a claimant by a third-party claim arising from the same work-related accident.

O.C.G.A. § 34-9-11.1 gives the employer, or employer's insurer, a subrogation lien on any right of action the employee has against a third party. The statute gives the employer or insurer the right to intervene in a lawsuit that the employee files against a third-party tortfeasor. The employer or its insurer can file its third-party action if the employee does not initiate a lawsuit within one year of the date of injury. If the employer or its insurer does institute the lawsuit, it must notify the employee, who shall have the right to intervene. The employer/insurer's subrogation rights are limited. Recovery is limited to the money paid to or on behalf of the claimant.

The subrogation rights are also subject to the Made Whole Rule. This rule states that the employer and its insurer are not entitled to reimbursement if the injured employee "has been fully and completely compensated, taking into consideration both the benefits received under this chapter and the amount of recovery in the third-party claim, for all economic and non-economic losses incurred as a result of the injury." O.C.G.A. § 34-9-11.1(b).

The employer has the burden of proving that the employee has been fully and completely compensated, and the question of whether that burden has been met is one for the trial court. *See Best Buy Co. v. McKinney*, 334 Ga. App. 42 (2015). The lien is only enforceable against the recovery for economic losses. It cannot be enforced against any portion meant to compensate the employee for non-economic damages. *Id.* As a result, Georgia courts have held that a court cannot enforce the lien when it is unable to determine what portion of the recovery against the third party was meant to compensate the employee for economic damages v. non-economic damages. *Id.*

Procedural Considerations

There are a several procedural considerations to keep in mind when addressing the exclusive remedy defense. Due to some Georgia cases where the court is loose with its language concerning the exclusive remedy defense, some defense lawyers may try to argue that the trial court must resolve the exclusive remedy defense before trial, that the court is the finder of fact, or that the provision is jurisdictional. However, this is not accurate.

How is Defense Raised?

The exclusive remedy defense is an affirmative defense. The defendant bears the burden of establishing that the defense applies in their case. *Mullinax vs. Pilgrim's Pride Corp.*, 354 Ga. App. 186 (2020); *Pilcher v. Wise Elec. Co., Inc.*, 129 Ga. App. 92, 93 (1973); *Troxler v. Owens-Illinois*, 717 F.2d 530 (11th Cir. 1983). The defendant waives the defense when they fail to raise it at trial. *See Johnson v. Hensel Phelps Const. Co.*, 250 Ga. 83 (1982). Courts routinely adjudicate the exclusive remedy defense on summary judgment, but the trial court does not have to resolve the issue before trial.

The Jury Decides

Defense attorneys may also argue that the court is the fact finder on exclusive remedy defenses, but the jury—not the judge—is the fact finder. When the exclusive remedy provision is raised defensively in a tort action, the normal procedure is "for the jury to find facts and then to apply those facts to the law as given by the trial court in its instructions." *Utz v. Powell*, 160 Ga. App. 888, 889 (1982). Any disputed factual issues are submitted to the jury. The applicability of the exclusive remedy provision is a "mixed question of law and fact" that the trial court can only resolve as a matter of law where "the material facts are not in dispute." *Rheem v. Butts*, 292 Ga. App. 523, 525 (2008).

Not a Subject Matter Jurisdiction Defense

Some defendants may argue that the workers' compensation defense is a subject matter jurisdiction defense. Some appellate decisions are loose with their language in using the phrase "subject matter jurisdiction" to refer to this defense, but the defense is clearly not jurisdictional.

We know this because the way courts actually handle the defense is the direct opposite of how subject matter jurisdiction defenses are handled:

- **For 100+ years, courts have routinely adjudicated the exclusive remedy defense on summary judgment, but subject matter jurisdiction cannot be adjudicated on summary judgment;**
- **disputed factual issues are submitted to the jury, but the subject matter jurisdiction cannot be adjudicated by a jury; and**
- **this defense can be waived if not raised at trial, but subject matter jurisdiction cannot be waived.**

For decades, the Georgia Supreme Court has repeatedly noted that the "term 'jurisdiction' has been used far too loosely in many reported opinions." *Hopkins v. Hopkins*, 237 Ga. 845, 846 (1976); *see also Abushmais v. Erby*, 282 Ga. 619, 620 (2007). This has caused "substantial confusion" in how to resolve issues. *Abushmai*, 282 Ga. at 620. (2007). The Georgia Supreme Court has held that the phrase "subject-matter jurisdiction" "refers to subject matter alone, i.e., conferring jurisdiction in specified kinds of cases." *Id.* (internal quotations omitted). "Jurisdiction of the subject matter does not mean simply jurisdiction of the particular case then occupying the attention of the court, but jurisdiction of the class of cases to which that particular case belongs." *Id.* (internal quotations omitted).

There should be no doubt tort cases belong to a "class of cases" that trial courts have jurisdiction to hear and decide. Nothing in the Georgia Constitution says that trial courts—superior or state—lack jurisdiction to hear tort actions when the exclusive remedy defense is raised or is applicable. A lack of subject matter jurisdiction deprives the trial court of the authority to decide the merits of a claim or defense. *See, e.g.*, *First Christ Holiness Church, Inc. v. Owens Temple First Christ Holiness Church, Inc.*, 282 Ga. 883 (2008) (holding that trial court has no authority to enter a judgment on the merits if subject matter jurisdiction is lacking). If trial courts did not have jurisdiction over tort actions when an exclusive remedy defense is raised, then who would have jurisdiction to decide the applicability of the exclusive remedy defense?

Employer Doesn't Have Workers' Compensation Coverage

The law requires employers with at least three or more employees to carry workers' compensation insurance. O.C.G.A. § 34-9-120. They may face fines and penalties for not maintaining their workers' compensation coverage. However, being uninsured when the law requires that the employer have workers' compensation insurance does not cause the employer to lose their tort immunity.

In *Samuel v. Baitcher*, 247 Ga. 71 (1981), the court held that an employee could not sue their employer for tort remedies when the employer has not procured insurance. Similarly, in *Saxon v. Starr Indemnity & Liability Co.*, 339 Ga. App. 495 (2016), the court concluded that relief under the Workers' Compensation Act was the plaintiff's only available remedy despite the defendant's failure to procure workers' compensation coverage. In *Fox v. Stanish*, 150 Ga. App. 537 (1979), the court held that the exclusive remedy provision prevented the employee from pursuing a tort claim against their employer, even where the employer failed to carry the required insurance.

Conclusion

The Workers' Compensation Act can benefit injured employees who may otherwise be left without compensation for work-related injuries. However, the quid pro quo of immunity in exchange for guaranteed compensation may also prevent an employee from recovering full compensation for their injuries, regardless of the egregiousness of the employer's misconduct. The exclusive remedy defense is a powerful one that can bar a plaintiff's tort claim entirely. For those who represent injured plaintiffs in Georgia, understanding the defense's application, exceptions, and how to overcome the defense is crucial for evaluating cases, identifying potential sources of recovery, and pursuing third-party claims.

If you have any questions about a particular case or the law, do not hesitate to reach me on my cell phone at 404-324-6847 or by email at champ@thechampionfirm.com.

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