

PA Superior Court Issues Split Decision; Complicates Application of the Statutory Employer Defense

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by: James Donohue and T. Justin Chapman

On March 27, 2012, the Superior Court of Pennsylvania issued a split decision that potentially adds a “screening question” to the five elements of the longstanding *McDonald* test, which Pennsylvania courts have been using since 1930 to determine whether general contractors are statutorily immune from tort suits of employees of their subcontractors arising from worksite accidents. In *Patton v. Worthington Associates*, 2012 Pa. Super 74 (March 27, 2012), the court held that a factual determination as to whether a subcontractor’s employee is an employee or an independent contractor with respect to a general contractor must be made before applying the *McDonald* test.

THE PURPOSE OF THE STATUTORY EMPLOYER DEFENSE AND THE MCDONALD TEST

The Pennsylvania Workers’ Compensation Act (the Act) imposes a no-fault system for the compensation for employees’ work-related injuries upon employers. Employers, in turn, are immune from tort liability for work-related injuries. The Act imposes employer liability for work-related injuries upon both actual employers and statutory employers. The classic statutory employer situation in the construction industry is where a property owner hires a general contractor or construction manager, who hires a subcontractor to do specialized work on the jobsite, and an employee of the subcontractor is injured in the course and scope of his employment. Under the Act, a general contractor is liable to pay workers’ compensation benefits to its subcontractor’s employees if the subcontractor defaults on its obligation to pay these benefits. Because the general contractor is secondarily liable for workers’ compensation benefits for its subcontractor’s employees’ injuries, the general contractor is also immune from tort suits involving work-related injuries to its subcontractor’s employees.

In *McDonald v. Levinson Steel Co.*, 302 Pa. 287, 153 A. 424 (1930), the Pennsylvania Supreme Court set forth the following five elements which establish the creation of a statutory employer relationship:

1. An employer who is under contract with an owner or one in the position of an owner;
2. Premises occupied by, or under the control of, such employer;
3. A subcontract made by such employer;
4. Part of the employer’s regular business is entrusted to such subcontractor; and
5. An employee of such subcontractor.

Since *McDonald*, courts have consistently held that if a contractor satisfies this five-part test, it is immune from tort suit as a statutory employer.

PATTON V. WORTHINGTON ASSOCIATES AND ITS SIGNIFICANCE

In *Patton*, a carpenter was injured when he fell from a scissor lift while performing carpentry work on a church. The injured carpenter owned the carpentry company with which the general contractor subcontracted to perform the carpentry work on the church. The general contractor raised the statutory employer defense at trial. The trial court instructed the jury that it must determine whether the carpenter was an independent contractor or employee with respect to the general contractor before engaging in a *McDonald* analysis. The jury determined that the carpenter was an independent contractor and the general contractor was not permitted to seek immunity under the *McDonald* test.

The general contractor appealed and argued that the trial court erred in instructing the jury that it must determine whether the carpenter was an independent contractor or employee with respect to the general contractor before applying the *McDonald* test, but the Superior Court affirmed the trial court's decision. Although the general contractor argued that the trial court was adding a "screening question" to the *McDonald* test, the Superior Court reasoned that the first prong of the *McDonald* test requires that the general contractor qualify as an "employer." However, no other court has ever required such an inquiry before applying the *McDonald* test and the *Patton* holding marks a significant potential change in the law.

The plaintiffs' bar will undoubtedly try to use *Patton* to overcome summary judgment in cases where general contractors raise the statutory employer defense. However, *Patton* is distinguishable from most other cases. Typically, the plaintiff in a construction accident case is merely an employee of a subcontractor. By contrast, in *Patton*, the plaintiff owned the carpentry company that subcontracted with the general contractor. Therefore, general contractors can argue that *Patton* is inapplicable unless the plaintiff is the owner of the subcontractor. General contractors should argue that, under the Act, regular employees of subcontractors are employees with respect to general contractors for the purposes of the *McDonald* test as a matter of law because the Act imposes secondary liability on the general contractor for workers' compensation benefits owed to subcontractors' employees.

Although *Patton* can be distinguished from most cases, it poses a real problem for general contractors in construction accident litigation. Accordingly, general contractors should consider including language in subcontracts that provides that subcontractors' employees are to be considered employees of the general contractor for the purposes of tort suits because the general contractor will be secondarily liable to the subcontractor for workers' compensation benefits. Such language was previously unnecessary because this relationship was implied under the Act. However, in light of *Patton*, such a provision could be the difference between summary judgment and a multi-million dollar verdict.

Finally, it must be noted that on April 5, 2012, the general contractor in *Patton* filed an application for reconsideration. If denied, the general contractor will likely seek permission to appeal the case to the Supreme Court of Pennsylvania. Although the Supreme Court rarely grants appeals, *Patton* is a published split decision and this increases the odds that the Supreme Court will take the appeal if one is sought.

CONCLUSION

Patton marks a significant potential shift in the way that Pennsylvania courts apply the statutory employer test to general contractors in construction accident litigation. It may prove to be an outlier decision and may even ultimately be overturned. However, at least for the time being, it represents a real obstacle for general contractors seeking immunity



as statutory employers. Thus, general contractors should consider adding language to subcontracts that helps overcome the “screening question” that *Patton* arguably adds to the statutory employer test. Attorneys in White and Williams’ Construction and Surety Practice Group are monitoring this case and are experienced in drafting contractual provisions aimed at limiting and avoiding liability related to construction accidents.

For more information regarding this alert, please contact Jim Donohue (215.864.7037 / donohuej@whiteandwilliams.com) or Justin Chapman (215.864.6394 / chapmant@whiteandwilliams.com).

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