Countrymen, Lend Me Your Employees: The Borrowed-Employee Doctrine

by Jaclyn Kurth

In Illinois, we are fortunate not to be plagued with some of the limitations other injured victims face in other states. The nearest example is our neighbor to the north in Wisconsin, where legislative caps on compensatory damages limit (and essentially extinguish) a plaintiff's ability to receive full and fair compensation when they are killed or injured by another's negligence or a medical mistake. The Illinois civil justice system holds few impediments which constrain the ability of an injured party to seek redress. One such area of potential injustice was highlighted recently in my personal practice on a tragic case which involved the death of a mother in her mid-20s who left behind two young children. The decedent worked as a "temporary employee" and was decapitated while at work when she was cleaning a large spiral freezer. The woman was working sanitation at a facility that made frozen pizzas. A Scanico ambient spiral freezer energized spontaneously while she was near the machine's large fan, she was killed instantly. We alleged the spiral freezer was controlled by a third-party company, the pizza company, who had contracted with the woman's actual employer, a temporary staffing agency, for sanitation services. In cases like this, where the injured party is employed by a temporary staffing agency but injured at third-party's facility, a plaintiff's attorney must brace themselves for the sure-to-come motion to dismiss asserting the "Borrowed Employee Doctrine." This legal precept involves a dreaded zone of overlap between personal injury cases and workers' compensation cases which can bar a direct negligence claim. This article works to provide a broad overview of what this doctrine is and strategies on how to navigate a substantive motion on this issue.

I. What is the Borrowed-Employee Doctrine?

The borrowed-employee doctrine arises out of the Workers' Compensation Act.[1] Workers' compensation cases function differently than personal injury cases in the sense that fault, or negligent conduct, is not considered in the determination of whether an injured plaintiff will receive compensation.[2] The Workers' Compensation Act ("the Act") establishes a quasi-strict liability system in workers' compensation cases.[3] The Act sets forth a "system of liability without fault, designed to distribute the cost of industrial industries without regard to common law doctrine of negligence, contributory negligence, assumption of risk, and the like."[4] As a part of the "balancing act" of cost versus liability, the Act establishes that an employee's exclusive remedy when injured on the job is through the Workers' Compensation Act; the same act, of course, which prescribes numerous limitations on the compensation injured workers can receive.[5] This is known as the "exclusive remedy doctrine." In short, an employer is liable for a worker's injuries regardless of the level of negligence or the level of contributory negligence but in return, workers cannot file high-value personal injury cases against their employers, they may only file cases in the statutorily prescribed manner set forth in the Workers' Compensation Act. As the second district in *Holten v. Syncreon N. Am., Inc.* aptly summarized, "[t]he exclusive remedy provision is a part of the *quid pro quo* pursuant to which the employer assumes liability without fault but is relieved of the prospect of large verdicts for damages."[6]

The borrowed-employee doctrine is borne out of the exclusive remedy doctrine. This zone of overlap comes when an employee is working on the premises of a third-party, employed by a different company but injured while working at the third-party company. The Act carves out an expansion of the exclusive remedy doctrine in these cases. The Act, in essence, sets forth that under certain circumstances the third party company, although not the employer of the injured worker, may also be entitled to protection of the exclusive remedy doctrine because the worker was functioning as the third-party company's "borrowed employee."[7] The language comes from sections 1(a)(4) and 5(a) of the Act as follows:

> Sec. 1(a)(4). **Where an employer** operating under and subject to the provisions of this Act **loans an employee to another such employer and such loaned employee sustains a compensable accidental injury in the employment of such borrowing employer and where such borrowing employer does not provide or pay the benefits or payments due such injured employee**, such loaning employer is liable to provide or pay all benefits or payments due such employee under this Act and as to such employee the liability of such loaning and borrowing

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employers is joint and several, provided that such loaning employer is in the absence of agreement to the contrary entitled to receive from such borrowing employer full reimbursement for all sums paid or incurred pursuant to this paragraph together with reasonable attorneys' fees and expenses in any hearings before the Illinois Workers' Compensation Commission or in any action to secure such reimbursement.

Sec. 5(a). Except as provided in Section 1.2, **no common law or statutory right to recover damages from the employer**, his insurer, his broker, any service organization that is wholly owned by the employer, his insurer or his broker and that provides safety service, advice or recommendations for the employer or the agents or employees of any of them for injury or death sustained by any employee while engaged in the line of his duty as such employee, **other than the compensation herein provided, is available to any employee** who is covered by the provisions of this Act, to any one wholly or partially dependent upon him, the legal representatives of his estate, or any one otherwise entitled to recover damages for such injury.

In applying these provisions, the Illinois Supreme Court in *A.J. Johnson Paving Co. v. Industrial Comm'n*, held that "[a]n employee in the general employment of one person may be loaned to another for the performance of special work and become the employee of the person to whom he is loaned, while performing the special service."[8] Therefore, the borrowed-employee doctrine allows a non-employing, independent third party company to engage in negligence, while not paying workers' compensation benefits or a salary to an injured worker, and still reap the protection of the Workers' Compensation Act's exclusive remedy doctrine. The injustice cited at this article's introduction comes from the have-your-cake-and-eat-it-too result here, that a company's negligence can injure someone and yet, face no liability although they do not employ the individual.

This situation is best illustrated by the following scenarios: Employee John Smith is injured on the job of his employer, Company A. Pursuant to the exclusive remedy doctrine, John Smith's only remedy is through the Workers' Compensation Act because he was injured on the job. In the borrowed-employee scenario, Company B contracts for services to be performed by Company A's employees. John Smith is not employed by Company B. Company B negligently fails to repair a dangerous machine or condition while John Smith is working at their company. John Smith is injured by Company B's negligence. In this scenario, John Smith is still injured on the job, his exclusive remedy with his employer, Company A, is through the Workers' Compensation Act. John Smith sues Company B, who

does not employ him, in a personal injury case arising out of Company B's negligence. It is in this scenario that Company B will argue that although not their actual employee, that John Smith should be found to be their "borrowed employee" such that he cannot sue them in a personal injury action and can only sue Company B through the Workers' Compensation Act (although they do not provide him with these benefits). Had John Smith been a mere patron at Company B when he was injured by their negligence, this legal question never arises. It is this unique intersection between just an injury and an injury while on the job that gives rise to the borrowed-employee doctrine.

II. When Will You See It and What to Do

As alluded to at the article's start, the most common instance in which a plaintiff will face this is when a third-party company uses temporary staffing agencies to fill positions. In the case that led me to this article, the woman was employed by a temporary staffing agency but working at a food packaging company performing night shift sanitation on their machines. If you see a staffing agency circumstance, despite the clear non-employment by the prospective defendant, defense is likely to file a motion to dispose of any case against it citing the borrowed-employee doctrine.

A dispositive motion to this effect will come in the form of a Motion to Dismiss pursuant to Section 2-619(9) or a Motion for Summary Judgment. Under either circumstance, Illinois Supreme Court Rule 191 provides an avenue for further discovery on this issue. Under section (a) of this rule, when a motion is presented specifically under section 2-1005 for summary judgment or under section 2-619 for dismissal, affidavits should be submitted in support of such motions or in opposition.[9] The affidavits "shall not consist of conclusions but of facts admissible in evidence."[10] Section (b) recognizes that certain facts may not be obtainable by affidavit. This section states in pertinent part:

If the affidavit of either party contains a statement that any of the material facts which ought to appear in the affidavit **are known only to persons whose affidavits affiant is unable to procure by reason of hostility or otherwise**, naming the persons and showing why their affidavits cannot be procured and what affiant believes they would testify to if sworn, with his reasons for his belief, **the court may make any order that may be just**, **either granting or refusing the motion, or granting a continuance to permit affidavits to be obtained, or for submitting interrogatories to or taking the depositions of any of the persons so named, or for producing documents in the possession of those persons or furnishing sworn copies thereof.** The interrogatories and sworn answers thereto, depositions so taken, and sworn copies of documents so furnished, shall be

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considered with the affidavits in passing upon the motion.

In the present scenario of the borrowed-employee doctrine, when a motion is filed on this issue it is advantageous to file a Motion to Continue pursuant to Ill. S. Ct. 191(b) under the premise that our clients may not have personal knowledge of the business decisions that led to a temporary staffing agency being used to fill open jobs or the breakdown of who was to control what. In the case of a death, there is no employee to speak to which employer, borrowing or loaning, controlled what aspects of work. Section (b) can then be used as a vehicle to ask the court to allow "submitting interrogatories to or taking the depositions of any of the persons so named, or for producing documents in the possession of those persons."[11] It is ultimately up to the judge to determine how much or how little discovery to allow on the motion filed.[12] When filing such a motion, however, additional research will be necessary in order to comply with the six factors set forth in the cases that interpret the scope of Ill. S. Ct. R. 191(b).[13]

III. Responding to a Motion

If discovery is allowed or based on the record available, the next endeavor is collecting as many advantageous facts as possible. Responding to a Motion to Dismiss or Motion for Summary Judgment on the issue of a borrowed-employee is a highly fact-intensive exercise. These motions are not unlike an apparent agency response, where presentation of a variety of persuasive facts is important.[14] This approach of presenting a factual mosaic gives the deciding judge a menu of options they can find to support your argument. In order to know which facts to highlight, a dive into the cases on this topic is essential.

As a threshold matter, courts apply two elements to determine whether a borrowed-employee relationship existed.[15] The two elements are: "(1) whether the alleged borrowing employer had the right to direct and control the manner in which the employee performed the work and (2) whether there was an express or implied contract of hire between the employee and the alleged borrowing employer."[16] As to the first element, the *A.J. Johnson Paving* court explicitly set forth a list of factors to apply: (1) the employee worked the same hours as the borrowing employer's employees; (2) the employee received instruction from the borrowing employer's foreperson and was assisted by the borrowing employer's employees; (3) the loaning employer's supervisors were not present; (4) the borrowing employer was permitted to tell the employee when to start and stop working; and (5) the loaning employer relinquished control of its equipment to the borrowing employer.[17]

Additionally, on the first element of direction and control, below is a non-exhaustive list of some additional or more specific items considered by various courts in deciding borrowed-employee cases:

- Whether defendants may be

found to be joint employers or joint venturers;[18]

• Whether the borrowing employer set the plaintiff's work schedule;[19]

• Whether the borrowing employer provided the plaintiff with the tools or equipment necessary to complete the assigned tasks;[20]

• Whether the borrowing employer had the right to discharge the employee from the borrowed employment;[21]

• Whether the borrowing employer provides direction on what tasks need to be done versus how tasks need to be done;[22]

• Whether the borrowing employer directed plaintiff to report to a certain site;[23]

• Whether the plaintiff accepted the borrowing employer's handbook and received individualized training;[24]

• Whether the borrowing employer took part in hiring the plaintiff and if so, how.[25]

As to the second element of whether there was an express or implied contract of hire between the borrowing employer and the employee, "[a]n employee's consent to the requisite contract of hire with the borrowing employer may be implied in the context of a business like a temporary employment agency."[26] It can be sufficient if "[p]laintiff accepted the assignment" at a borrowing employer's company.[27] Implied acquiescence to an employment relationship exists "where the employee knows that the borrowing employer generally controls or is in charge of the employee's performance."[28] It is not enough to look at a contract between a temporary staffing agency and a borrowing employer.[29] Illinois courts have found that when a temporary employee applied directly to the borrowing employer and only visited the temporary staffing agency once, there was a question of fact regarding whether the employee consented to a borrowed-employee relationship.[30] In this case, the court highlighted that the temporary staffing agency neither hired nor procured the employee for the borrowing employer and, therefore, there was room to argue no consent occurred.[31]

In summary and as stated, there is no one-size-fits-all answer to combatting these motions. Engaging in discovery and collecting the facts that fit into various cases is critical to showing the court that defendant may not have enough evidence of direction, control, or acquiescence to a relationship in order to dispose of the case in its entirety.

IV. Avoiding Pitfalls

Knowing the facts that do not support your argument is equally as important as knowing the facts that do. In briefing this motion, I was presented with the question of how can someone be directed or controlled if they do not

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understand the direction they are being given? In many temporary staffing agency cases, the advantage of hiring temporary workers is that they are cheaper and a company does not need to provide benefits to these individuals. Common in this dynamic is that the employees sourced by the temporary staffing agency are immigrants, willing to work jobs that others may not and accept a lower wage. It is common to see a temporary employee who may not speak English, or understand the language at all. An argument that this erodes at a company's ability to direct or control is not favored by the law, however.

The *Falge v. Lindoo Installations, Inc.*, 2017 IL App (2d) 160242 opinion is illustrative on this issue. *Falge* presents analogous facts to the scenario discussed in this article. A temporary staffing employee worked at a third party company and injured his finger on the job. Plaintiff argued that the defendant's borrowed-employee motion for summary judgment should be denied since there was "big communication gap because [the forklift operator] didn't speak English."[32] The defendant argued that the operator used "a lot of" head nods and pointing, such that the two individuals could understand each other.[33] The court in *Falge* found that even with the language barrier, a borrowed-employee relationship existed between the plaintiff and the third party company.[34] The court honed in on plaintiff's testimony that he was taking directions from Lindoo's employees when he was setting up the shelves at the warehouse and, specifically, when he was injured.[35] Although plaintiff argues that it was difficult to understand directions because many of Lindoo's employees spoke Spanish, plaintiff testified that he understood what he was supposed to do through the use of hand gestures and other nonverbal communication.[36] Also, Lindoo set plaintiff's work schedule, controlled when he took his breaks, and provided him with the tools to perform the tasks assigned by Lindoo on the date of the accident.[37]

Falge is a two-fold reminder of: 1) the breadth of how unfavorable the law is on this topic and 2) why knowing this law and what facts will not work in a motion response is important. Even a common-sense argument that someone must understand the direction given in order to be directed is not as simple as it may seem in this area of the law. It is pitfalls like this and others scattered throughout the case law that one must be mindful of.

V. Is there a Parent Company?

The old adage of "hope for the best but plan for the worst" applies here. While you can prepare, research, engage in discovery, and draft a comprehensive response, you may still have a judge that disagrees with your position and grants a motion. A ruling that grants defendants' motion on this issue (notwithstanding a Motion to Reconsider or an appeal) kicks that

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case out of the personal injury realm and into the realm of the Illinois Workers' Compensation Commission. In the event a third-party company is not likely to stay in the case, you may still be able to find a path to liability through a parent company. Navigating this course could be the subject of a separate article in its entirety and is not without its challenges given the general law that a parent company is not liable for the acts of its subsidiary.

Under Illinois law there are avenues with which a plaintiff may pierce the corporate veil under a direct participant liability theory where there is "evidence sufficient to prove that a parent company mandated an overall business and budgetary strategy and carried that strategy out by its own specific direction or authorization, surpassing the control exercised as a normal incident of ownership in disregard for the interests of the subsidiary[.]"[38] The Illinois Supreme Court in *Forsythe* held that if one can clear this hurdle, as set forth in that case's decision, then the exclusive remedy may not apply nor absolve the parent company's liability.[39] Therefore, it is reasonable to determine before filing a lawsuit if parent company liability is an option.

VI. Conclusion

If there is any take-away from this article, it should be that these cases are difficult and take skilled lawyering and a special set of facts to succeed **but**, you can succeed if you know what facts you need to find, know the avenue to find them, and apply them in a well-supported response brief. This article started with my opinion that the borrowed-employee doctrine is an area in Illinois law that presents an opportunity for injustice to injured plaintiffs. This is all the more reason to take on these cases, despite the hurdles ahead so that we can keep fighting, and hopefully along the way prompt our courts to re-visit the law in this area given the gravity of the conduct in cases such as the one we see displayed in this article. I encourage others to take on the challenge, and I hope this article provides options on how to do that.

Endnotes

1 Workers' Compensation Act, 820 ILCS 305/1 *et. seq.*

2 820 ILCS 305/5(a).

3 *Gannon v. Chicago, Milwaukee, St. Paul & Pacific Ry. Co.*, 13 Ill. 2d 460 (1958).

4 *Sharp v. Gallager*, 95 Ill. 2d 322, 326 (1983), citing *Gannon*, 13 Ill. 2d at 463.

5 *McCormick v. Caterpillar Tractor Co.*, 85 Ill. 2d 352, 356 (1981).

6 *Holten v. Syncreon N. Am., Inc.*, 2019 IL App (2d) 180537, ¶26.

7 820 ILCS 305/1(a)(4).

8 *A.J. Johnson Paving Co. v. Industrial Comm'n*, 82 Ill. 2d 341, 346 (1980).

9 Ill. S. Ct. R. 191(a). "Motions for summary judgment under section 2-1005 of the Code of Civil Procedure and motions for involuntary dismissal under section 2-619 of the Code of Civil Procedure must be filed before the last date, if any, set by the trial court for the filing of dispositive motions. Affidavits in support of and in opposition to a motion… shall be made on the personal knowledge of the affiants[.]"

10 *Id.*

11 *Id.*

12 *Kensington's Wine Auctioneers & Brokers, Inc. v. John Hart Fine Wine, Ltd.*, 392 Ill. App. 3d 1, 11 (1st Dist. 2009).

13 "Pursuant to Rule 191(b), an affidavit should contain the following information: (1) a statement that material facts are unavailable due to hostility or otherwise; (2) the names of those persons the affiant wants to depose; (3) a showing as to why affidavits could not be procured from those named persons; (4) a statement as to what those persons will testify; (5) the basis for the affiant's belief that those persons will so testify; and (6) the affiant must be a party to the action." *Koukoulomatis by Koukoulomatis v. Disco Wheels, Inc.*, 127 Ill. App. 3d 95, 99 (1st

Dist. 1984).

[14] A word of caution, unlike the recent trend of appellate opinions in the area of apparent agency, the law in the area of the borrowed-employee doctrine is not as favorable to injured plaintiffs.

[15] *Holten*, 2019 IL App (2d) 180537, at ¶52.

[16] *A.J. Johnson Paving Co.*, 82 Ill. 2d at 348; *Falge v. Lindoo Installations, Inc.,* 2017 IL App (2d) 160242, ¶16.

[17] *Id.; Prodanic v. Grossinger City Autocorp, Inc.*, 2021 IL App (1st) 110993, ¶16. Interestingly, courts in other states have highlighted the following factors: (1) which employer controls the employee›s activities, (2) which employer›s business is benefiting, (3) which employer is paying, and (4) which employer has the power to hire or discharge the employee. *See O'Loughlin v. Servicemaster Co. Ltd. Partnership*, 216 Ill. App. 3d 27, 35 (1st Dist. 1991), citing *Workmen's Compensation - The Rights of the Lent Servant Against the General or Special Employer*, 9 Ga. St. B.J. 556, 558 n.15 (1973); *The Borrowed Employee Doctrine in Workmen's Compensation*, 21 Drake L. Rev. 176, 183 (1971).

[18] *Schmidt v. Milburn Bros.*, 269 Ill. App. 3d 261, 265 (1st Dist. 1998).

[19] *Falge v. Lindoo Installations, Inc.,* 2017 IL App (2d) 160242, ¶23.

[20] *Id.; Torrijos v. Int'l Paper Co.*, 2021 IL App (2d) 191150, ¶64.

[21] *Id.* at ¶18; *Chaney v. Yetter Manufacturing Co.*, 315 Ill. App. 3d 823 (4th Dist. 2000).

[22] *Trenholm v. Edwin Cooper, Inc.*, 152 Ill. App. 3d 6, 9 (5th Dist. 1986).

[23] *Morales v. Herrera*, 2016 IL App (1st) 153540, ¶32.

[24] *Chavez v. Transload Services, LLC*, 379 Ill. App. 3d 858 (1st Dist. 2008).

[25] *O'Loughlin v. Servicemaster Co. Ltd. Partnership*, 216 Ill. App. 3d 27, 34 (1st Dist. 1991).

[26] *Falge v. Lindoo Installations, Inc.,* 2017 IL App (2d) 160242, ¶25.

[27] *Holten*, 2019 IL App (2d) 180537, at ¶69.

[28] *Prodanic*, 2021 IL App (1st) 110993 at ¶17.

[29] *Morales*, 2016 IL App(1st) 153540, at ¶33.

[30] *Barraza v. Tootsie Roll Indus.*, 294 Ill. App. 3d 539, 546 (1st Dist. 1997).

[31] *Id.* at 547.

[32] *Falge,* 2017 IL App (2d) 160242, at ¶9.

[33] *Id.*

[34] *Id.* at ¶22.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 290 (2007).

[39] *Id.* at 297.

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