

Evidence and Practice Tips

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Burhmester v. Steve Spiess Construction, Inc., When Must the Kotecki Defense be Presented?

Under the well-known rule created in *Kotecki v. Cyclops Welding Corp.*, 146 Ill. 2d 155 (1991), the liability of an employer sued for contribution in a civil suit brought by an employee is generally capped at the amount paid by the employer for workers' compensation benefits for the injured employee. Like many other issues involving contribution, the *Kotecki* doctrine, although well-established, is the subject of much debate and several appellate decisions.

A new case from the Illinois Appellate Court Third District, *Burhmester v. Steve Spiess Construction, Inc.*, 2016 IL App (3d) 140794, is just the latest example. In *Burhmester*, the court addressed whether the *Kotecki* defense must be pled and proven at trial as an affirmative defense or whether it can merely be presented in a posttrial motion following a verdict.

Background and Decision in Trial Court

Nacin Burhmester was severely injured while working on a construction job site for his employer, Keefe. Keefe was the electrical subcontractor at the site and Spiess was the general contractor. Burhmester filed two actions as a result of the accident: (1) a workers' compensation claim against Keefe; and (2) a negligence action against Spiess. *Burhmester*, 2016 IL App (3d) 140794, ¶ 3. In the negligence action, Spiess filed a third-party claim for contribution against the employer, Keefe. Keefe answered the complaint and filed an affirmative defense, asserting that any contribution would be limited to the amount paid or payable in workers' compensation benefits, pursuant to *Kotecki*. *Id.*

At trial in the case against Spiess, Burhmester was awarded a verdict in the amount of \$534,608.82. After judgment was entered against Spiess, Spiess's claim against Keefe was tried. Spiess moved orally for a directed verdict against Keefe at the close of evidence, arguing that Keefe had not presented evidence at trial to establish its *Kotecki* claim as an affirmative defense. *Id.* ¶ 4. The trial court denied the motion, finding that *Kotecki* automatically applies in contribution claims and does not need to be raised as an affirmative defense or proven at trial. *Id.* The court further found that *Kotecki* applies as a matter of law, finding it to be more of a setoff than an affirmative defense. The jury then found Burhmester 30 percent at fault, Spiess 20 percent, at fault and Keefe 50 percent at fault. *Id.* ¶ 5. The trial court entered a contribution judgment in the amount of \$374,720.58. *Id.*

Following the verdict, the court denied Spiess' motion renewing its motion for directed verdict. *Id.* Keefe filed a posttrial motion, seeking to waive its workers' compensation lien and dismiss Spiess' contribution action. In support, Keefe attached an affidavit establishing that Burhmester had received \$95,487.23 in workers' compensation benefits. Spiess objected, arguing that its motion for a directed verdict should have been granted, which would prevent Keefe from waiving the lien posttrial. *Id.* ¶ 6. Spiess argued that an employer's lien could only be waived posttrial if its *Kotecki* affirmative defense and the amount had been proven at trial, or was not in dispute. *Id.*

The trial court granted Keefe's motion to dismiss and vacated the judgment against Keefe. *Id.* ¶ 7. The court then granted Spiess a setoff of \$95,487.23, the amount of Keefe's workers' compensation lien. *Id.* Spiess appealed the trial court's ruling, leading to this decision.

Appellate Decision

In its decision, the Third District addressed two issues: (1) whether *Kotecki* is an affirmative defense that must be pled or a posttrial claim for setoff; and (2) whether an affidavit setting out the workers' compensation benefits paid is enough to prove the *Kotecki* claim.

The court first addressed whether an employer relying on the *Kotecki* rule must plead and prove it as an affirmative defense at trial, or whether the employer can simply make a posttrial claim for setoff. *Id.* ¶ 11. In ruling on the posttrial motions, the trial court had relied on *Kim v. Alvey, Inc.*, 322 Ill. App. 3d 657 (1st Dist. 2001), which held that an employer was not required to raise the *Kotecki* setoff or workers' compensation lien as an affirmative defense, or even before trial. The *Kim* court had relied upon the Illinois Supreme Court's decision in *LaFever v. Kemlite Co.*, 185 Ill. 2d 380 (1998), explaining that the *LaFever* decision clearly allowed an employer to raise its lien in a posttrial motion. Spiess argued that the *Kim* case was an incorrect application of the *LaFever* case that was in conflict with several other cases. *Burhmester*, 2016 IL App (3d) 140794, ¶ 12. Spiess argued that the right to waive the lien following trial is separate and distinct from the requirement to prove the lien at trial. *Id.* Thus, it argued that *LaFever* at most allowed for an employer who had actually proven the workers' compensation setoff at trial to waive that lien post-judgment. *Id.*

The *LaFever* decision was central to the *Burhmester* court's analysis. In *LaFever*, the employer of an injured worker that was sued in a third party action seeking contribution waited until after a verdict was entered and then sought to impose its setoff right under *Kotecki*. *Id.* ¶ 14. The trial court dismissed the contribution action once the *Kotecki* defense was raised, but the appellate court reversed and held that the employer could not wait until after a verdict to assert *Kotecki*. *Id.* The Illinois Supreme Court then reversed the appellate court, holding that "regardless of when [the employer] waived its lien, its contribution liability was always capped at the same amount." *Id.* (citing *LaFever*, 185 Ill. 2d at 403-04). The court further explained that "[w]hether [employer] waived its lien before or after the verdict, *Kotecki* and its progeny limited the maximum contribution liability for [employer] to the amount paid by [employer] in workers' compensation." *Burhmester*, 2016 IL App (3d) 141794, ¶ 4 (citing *LaFever*, 185 Ill. 2d at 404).

The *Burhmester* court found the discussion in *LaFever* instructive. While it admitted that the specific issue in *LaFever* was not whether a *Kotecki* setoff had to be pled as an affirmative defense in order to block a contribution action, it felt that it was implicit under the *LaFever* decision that *Kotecki* is not an affirmative defense to a contribution action since the court held that *Kotecki* can be raised before or after the verdict. *Burhmester*, 2016 IL App (3d) 140794, ¶ 14.

Spiess raised several appellate decisions in support of its argument that a *Kotecki* setoff must be pled and proven as an affirmative defense. The court rejected most of these as having either been decided before the *LaFever* decision or as not truly supporting the position asserted. *Id.* ¶ 15. The court focused heavily on Spiess' reliance on *Doyle v. Rhodes*, 101 Ill. 2d 1 (1984), finding that a decision cited therein actually supported the trial court's ruling. Spiess had specifically cited the following statement made by the *Doyle* court:

“The Workers’ Compensation Act provides employers with a defense against any action that may be asserted against them in tort, but that defense is an affirmative one whose elements—the employment relationship and the nexus between the employment and the injury—must be established by the employer, and which is waived if not asserted by him in the trial court.”

Buhrmester, 2016 IL App (3d) 140794, ¶ 16 (quoting *Doyle*, 101 Ill. 2d at 10 (citing *Robertson v. Travelers Insurance Co.*, 95 Ill. 2d 441, 451 (1983))).

The *Buhrmester* court explained that while this section of the *Doyle* decision referred to an affirmative defense that is waived if not asserted, it did not address whether the defense must be plead. *Id.* ¶ 17. It explained further that this issue had been addressed in *Robertson*, in which the court stated as follows:

“Robertson argues that inasmuch as the instant case was tried before a jury it was incumbent upon Travelers to plead and prove the statutory bar of the [Workers’] Compensation Act [citation] and its failure to do so could not be cured by raising the issue in the trial court in a posttrial motion as Travelers did. Although we do not dispute the general rule that a defense resting on the exclusivity provision of the Act is affirmative in nature, we do not believe Travelers’ omission was fatal in this case. This court has held the failure to plead and prove such a defense decisive only where there was a factual question as to whether the injury alleged arose out of and in the course of the work, so that a verdict for the defendant despite failure to prove coverage was an impermissible shifting of the burden of proof. [citation] *** The question of whether the Workers’ Compensation Act applied to the plaintiff’s injuries was therefore purely a legal one, and no purpose would have been served by requiring its pleading before the jury as long as it came to the attention of the trial judge and Robertson was given a chance to respond. [citation] The trial court had the discretion to entertain the issue in a posttrial motion ***.”

Buhrmester, 2016 IL App (3d) 140794, ¶ 17 (quoting *Robertson*, 95 Ill. 2d at 451-52).

The *Buhrmester* court found the holding in *Robertson* that a defense under the Act does not need to be plead before the matter is tried before a jury to be controlling. *Id.* ¶ 18. The court explained that just as in *Robertson*, the fact that *Buhrmester* was an injured employee receiving compensation under the Workers’ Compensation Act was not in dispute. *Id.* Because there was no dispute, there was no need for the issue to be placed before the jury as an affirmative defense and instead could be addressed by means of a posttrial motion. *Id.* In support of its decision, the court again cited the *LaFever* holding that *Kotecki* can be raised before or after the verdict. *Id.* Thus, the court rejected Spiess’ argument that the *Kotecki* claim needed to be plead and proven at trial as an affirmative defense.

The second issue considered on appeal was whether Keefe had properly proven the amount of the *Kotecki* setoff. *Id.* ¶ 20. Spiess had argued at the trial court level, and now argued at the appellate court, that the affidavit relied upon by Keefe was insufficient to prove the amount of benefits paid to *Buhrmester*. On that basis, Spiess argued that that it was entitled to a contribution for the full amount of Keefe’s pro rata share of the judgment. *Id.*

At trial, Keefe had presented an affidavit from the adjuster in charge of administering *Buhrmester*’s workers’ compensation claim. *Id.* ¶ 22. The affidavit included evidence including the settlement contract and a “payout screen” exhibit showing specific details of the amounts paid in compensation and medical benefits. *Id.*



On appeal, the court found that the affidavit presented was sufficient to establish the amount of compensation paid by Keefe, and thus allowed for the application of *Kotecki*. *Id.* The affidavit had provided evidence of the amounts paid and had further shown that the affiant had personal knowledge of the contents of the affidavit and could have competently testified to those facts at trial. *Id.*

Conclusion

Any attorney who represents employers sued for contribution in third-party actions stemming from the injury of an employee should read the *Burhmester* case. It offers a discussion and analysis of numerous appellate cases addressing *Kotecki* issues. While the court in *Burhmester* ultimately holds that *Kotecki* did not have to be pled and proven at trial as an affirmative defense, and could instead be presented in a posttrial motion, it must be noted that the holding is seemingly limited to cases in which there is no dispute that the underlying plaintiff was an injured employee receiving workers' compensation benefits. Based on the decisions in *Burhmester* and *Robertson*, if there is any dispute as to whether the injury arose out of and in the scope of the injured employee's work, the attorney for the employee should be prepared to plead and prove the *Kotecki* defense at trial.

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