

WORKERS COMPENSATION

Dodds v. Red Lake School District ISD #38 - Compensable Mental Injury?

On March 21, 2005, 16-year-old Jeffrey Weise went on a shooting spree at Red Lake School, killing six people, including some students in the classroom of math teacher Missy Dodds. Weise also aimed a gun at Dodds and pulled the trigger, but the gun was empty and Dodds was spared. Weise later died of a self-inflicted gunshot wound.

Dodds has not worked since that attack and suffers from both physical and psychological ailments. The main issue in the workers' compensation case before Judge Gary Mesna was whether Ms. Dodd's injuries were purely mental. It is a long-standing principle of Minnesota workers' compensation law that cases in which mental stimulus produces a purely mental injury are not compensable. *Lockwood v. Independent School District #877*, 34 W.C.D. 305, 312 N.W.2d 924 (Minn. 1981).

The employee developed a severe case of posttraumatic stress disorder ("PTSD") following the shootings. She also suffers from depression and anxiety. The parties agreed that the PTSD was a substantial result of the March 21, 2005 incident. However, they disputed whether PTSD, depression and anxiety are exclusively mental injuries or whether they are related to a physical injury that occurred to the employee's brain.

The employer and insurer argued that the PTSD and depression are purely mental injuries with no physical injury to the brain. The employee argued that these brain abnormalities constitute a physical injury.

Both the expert for the employee and the expert for the employer and insurer agreed that there was little or no structural damage to the brain and they both agreed that there was

abnormal neuro-electrical and neuro-chemical activity in Ms. Dodd's brain following the shooting incident. The experts disagreed on whether abnormal neuro-electrical and neuro-chemical activity constitutes a physical injury.

Judge Mesna found that the employee suffered extreme mental stress at work on March 21, 2005, and that the extreme stress produced a physical injury to the employee's brain that left her with PTSD, anxiety and depression. He found that chemicals, electrons and neurons are physical in nature, as are chemical and electrical activity in the brain.

The judge also found a physical injury to the employee's neck and shoulder. Of interest, the neck and shoulder pain were said to be a result of the stress and tension from the PTSD and anxiety disorder. They were compensable conditions, said Judge Mesna, because these physical symptoms were independently treatable and were not simply manifestations of the employee's anxiety or personality disorder.

In addition to awarding the employee permanent total disability benefits, Judge Mesna awarded 20% permanent partial disability for the employee's brain dysfunction under Minn. Rule 5223.0360, subp. 7. Judge Mesna was persuaded that there have been alterations to the circuitry of the employee's brain, in the neuro-electrical impulses of her brain, and in her brain chemistry. "The memory of the traumatic event has been burned so deeply into her brain that it keeps coming back uncontrollably and alters the way her brain works."

- HDBOB Attorneys Prevail at the Minnesota Court of Appeals
- Bad Faith Termination of At-Will Employees in *George Daum v. Planit Solutions, Inc.*
- Limiting the Scope of Foreseeability in *Foss v. Kincade*
- Minnesota Law and Politics Recognizes "Super Lawyers"

SAINT PAUL OFFICE
3900 Northwoods Drive
Suite 250
Saint Paul, MN 55112
(651) 482-8900
(800) 994-6056
(651) 482-8909 FAX

WISCONSIN OFFICE
1700 Tainter Street
Menomonie, WI 54751
(715) 233-9900
(715) 233-9981 FAX

*With lawyers licensed to practice
in Minnesota and Wisconsin*

COVERAGE

HDBOB Attorneys Prevail at the Minnesota Court of Appeals

On July 7, 2009, the Court of Appeals issued a decision in *Jarvis & Sons' Inc. et al. v. International Marine Underwriters, et al.*, No. 82-C3-07-002624, 2009 WL 1919851 (Minn. July 7, 2009), a hotly contested insurance coverage dispute, in favor of Jarvis & Sons ("Jarvis"), represented by HDBOB attorneys Mark Catron and Stacey Sorensen.

Jarvis operates a charter boat company on the St. Croix River. In Late October 2006, a woman fell and was injured while on board a Jarvis vessel to decorate for a wedding cruise. International Marine Underwriters ("IMU") insured Jarvis for liability. Jarvis submitted the claim to IMU, but the company denied coverage, claiming the injury occurred during the vessel's "lay up" period, which required that the vessel be "laid up and out of commission" between October 1 and April 30 of each year. The term "laid up and out of commission" was not defined by the policy.

After IMU's coverage denial, Jarvis filed a Declaratory Judgment action asking the court to determine whether IMU was required to defend it against the injured woman's claims. The basis for Jarvis' argument in favor of coverage was a provision in the policy stating that "[i]f the vessel commences, or proceeds on, a voyage during the term of this insurance, this policy shall thereupon terminate as soon as the vessel leaves her moorings to depart from the above named port." At the time the woman was injured, the vessel was moored at the Port of Afton and the cruise was not scheduled to

CONTINUED ON PAGE 3

EMPLOYMENT LAW

Bad Faith Termination of At-Will Employees in *George Daum v. Planit Solutions, Inc.*

Employment at-will allows an employer to terminate any employee at any time and for any or no reason. At-will employment is the central principle of most employment relationships in Minnesota. In the absence of any contrary law, intent is not relevant and employees are free to leave just as employers are free to terminate their employment. However, in *George Daum v. Planit Solutions, Inc.*, 619 F. Supp. 2d 652 (D. Minn. 2009), the Minnesota federal court addressed the issue of bad faith in the context of the termination of at-will employees.

George Daum was head of the global wood division of Planit, a subsidiary of Velocity Holdings Limited, a company based in the United Kingdom. In September 2006, Daum paid £100,000 to purchase a four percent interest in Velocity.

Under Velocity's bylaws, a person who owns Velocity stock and who is employed by the company or one of its subsidiaries (including Planit) may become entitled to favorable stock buy-back provisions if, at the time the employment ends, he has worked for the company at least two years following the purchase of Velocity shares and ends his employment because of death, disability, or "dismissal other than for reasonable cause." The agreement specifically provided that he was an at-will employee whose employment could be ended by either party at any time. It provided that if his employment were terminated without "cause" under the contract, he would be entitled to certain severance benefits. "Cause" was defined in various ways, including conviction of a crime, a declaration of bankruptcy, or failure to adequately perform relevant job duties.

According to Daum, his job performance was excellent and he succeeded in expanding Velocity's woodworking business. On June 2, 2008, he met with Velocity's CFO, who informed him that his Velocity shares had appreciated \$2.1 million. At that point, he was three months away from the two-year time period after which he would become eligible for the favorable buy-back of his stock.

Unfortunately for Daum, he was fired on June 26, 2008 allegedly due to "fail[ure] to carry out [his] duties under the Employment Agreement and engag[ing] in unacceptable work performance." As a result of his termination (allegedly "for cause"), he was advised by Velocity that he was required to transfer his shares back to the company without the benefit of the favorable buy-back agreement. He was also informed by Velocity that he was required to transfer his shares back to the company. Daum refused to execute the transfer and sued the company in federal court, asserting it lied about the reasons for his termination so it could prevent him from benefiting financially from the stock value appreciation.

Daum alleged many claims, but the most interesting was the claim for wrongful interference with prospective economic advantage. He alleged that his "poor job performance" was just a pretext for the company's bad-faith plan to terminate him and evade its obligation to pay him the fair market value of his company stock.

Velocity claimed that Daum was an at-will employee, meaning it could terminate his employment at any time, for any reason. Therefore, his termination could not form the basis of a claim for wrongful behavior by Velocity.

CONTINUED ON BACK PAGE

PREMISES LIABILITY

Limiting the Scope of Foreseeability in *Foss v. Kincade*

On October 15, 2003, three-year-old David Foss was seriously injured when a bookcase fell on him at the home of Stephanie and Jeremy Kincade. While his mother, Peggy Foss, and Stephanie Kincade were in another room visiting, David attempted to climb an empty bookcase that had not been anchored to the wall. The bookcase subsequently fell on David, causing serious head injuries, which later led to several invasive surgical procedures.

The minor child's father brought an action against the Kincades, arguing that they had negligently failed to secure the empty bookcase to the wall to prevent it from tipping over. *Foss v. Kincade*, 766 N.W.2d 317 (Minn. 2009). Deposition testimony of Peggy Foss revealed that she had seen David climb furniture in her own home, but she never specifically told the Kincades of David's propensity to climb furniture.

The Kincades moved for summary judgment, which the district court granted, concluding that the Kincades owed no duty to David because the accident was not foreseeable. The Minnesota Court of Appeals affirmed this decision.

The general test for determining whether a danger is foreseeable is whether the specific danger was objectively reasonable to expect and not whether it was within the realm of any conceivable possibility. Justice Paul Anderson explained that when dealing with a three-year-old child, the realm of possible harm is much larger than the realm of reasonably foreseeable harm. "It is not difficult to make a laundry list of common household items with which a three-year-old could conceivably injure himself, but negligence law does not require a homeowner to take every

precaution to guard against every possible eventuality."

The majority held that it was not foreseeable that David would climb on and become injured by a common household item such as a freestanding bookcase. Homeowners do not usually expect their guests to climb on bookcases. Had the Kincades known or had reason to believe that David had a propensity to climb bookcases, then the Kincades may have had a duty to secure the bookcase to the wall to prevent it from tipping. Thus, even though the bookcase was in such a position as to be easily tipped over, the Kincades had no duty to anchor the bookcase to the wall because there was no reasonable expectation that David would try to climb the bookcase.

Justice Alan Page dissented, asserting that all young children have a propensity to climb and roam and play. Consequently, he believed that it was reasonably foreseeable that David would attempt to climb the bookcase. Therefore, the Kincades had a duty to secure it to the wall to guard against a potential fall.

Although this case does not set forth a bright-line rule determining liability for injuries to guests in one's home, it does provide homeowners with a tool to argue against foreseeability of potential hazards. Furthermore, it supports and clarifies the distinction between possible hazards and foreseeable hazards — a key issue in determining personal injury liability for accidents by guests on one's property.



Nicholas J. Micheletti
nmicheletti@hdbob.com
651.332.8721

MENTAL INJURY CONTINUED FROM PAGE 1

The case has been appealed to the Workers' Compensation Court of Appeals, but the appeal has been stayed pending a confidential settlement agreement between the parties.

It remains to be seen whether this case will encourage other employees to argue that any mental injury has a physical component. While others may test the boundaries of the ruling, it is likely that *Dodds* will be interpreted quite narrowly in the future, being applicable only in those instances where the employee is exposed to extreme traumatic or violent stimuli.



Joan G. Hallock
jhallock@hdbob.com
651.332.8744

VICTORY CONTINUED FROM PAGE 2

begin until an hour after the injury occurred. The District Court found coverage on the basis that the policy clearly indicated when coverage terminated — when the vessel leaves her moorings — and that condition had not yet been met when the injury occurred.

IMU appealed the District Court's decision and on appeal, following consideration of written briefs and oral arguments, the Minnesota Court of Appeals affirmed the District Court's decision.



Stacey H. Sorensen
ssorensen@hdbob.com
651.332.8710



HANSEN DORDELL
BRATT ODLAUG & BRATT

ATTORNEYS AT LAW

3900 Northwoods Drive, Suite 250
Saint Paul, Minnesota 55112

Provided by the law firm of Hansen, Dordell, Bratt, Odlaug & Bratt, P.L.L.P. Quarterly is only a general summary of the topics discussed here and is not a substitute for legal advice. If you have any questions regarding these topics, please call us at (651) 482-8900.

Editor: Jason Schmickle

Assistant Editor: Trisha Vicario

©Hansen, Dordell, Bratt, Odlaug & Bratt, P.L.L.P.

Minnesota Law and Politics Recognizes “Super Lawyers”

Minnesota Law and Politics recently released its annual list of “Super Lawyers”—the top Minnesota lawyers as voted upon by their peers. Among those honored are HDBOB’s Bill Bratt, J. Mark Catron, Dave Odlaug and Randy Sayers.

Bill Bratt’s practice focuses on personal injury, products liability, medical negligence, construction litigation, and third party liability alternative dispute resolution. *Minnesota Law and Politics* honored Bill for his work in personal injury defense.

J. Mark Catron’s current practice focuses on mediation, arbitration and neutral evaluation, which includes insurance coverage, personal injury, commercial and construction issues and claims. Mark was honored for his work in alternative dispute resolution.

Dave Odlaug has been practicing workers’ compensation law for 36 years, all of them at HDBOB, and was recognized by *Minnesota Law and Politics* for his accomplishments in workers’ compensation.

Randy Sayers has been practicing in the areas of wills, trusts, probate and taxation of estates and trusts for 24 years and was honored as a “Super Lawyer” for his work in estate planning and probate.

Congratulations to the HDBOB attorneys selected as “Super Lawyers”!

BAD FAITH TERMINATION CONTINUED FROM PAGE 2

The court concluded that the company could not hide its actions behind the at-will employment doctrine. While this holding appears to be incompatible with many Minnesota cases holding that there exists no implied covenant of good faith and fair dealing in employment contracts under Minnesota law, the court was specific in its holding that an employer may not engage in bad faith conduct intended to deprive an employee of expected economic benefits.

Velocity further argued that Daum could not have had a “reasonable expectation of economic advantage,” because he was an at-will employee who could be fired at any time, including within two years of the purchase of his Velocity shares. Again, the judge rejected this argument and labeled the timing of the termination “suspicious.”

Given how close Daum was to being able to resign with the benefit of a favorable return on his investments, taking with him more than \$2 million in profits from his stock, the court concluded that Daum could have had a reasonable expectation of remaining employed by Velocity for the remaining few months necessary to cross the two-year line, notwithstanding his at-will status. The court ordered that Daum be permitted to proceed with his claim that his termination was in bad faith, and therefore illegal interference with his prospective economic advantage.

This case could generate a number of new cases in Minnesota challenging at-will terminations as being made in bad faith. Recommendations to employers are the same—use good judgment when evaluating employees, and have good recorded reasons for terminating employees. You cannot do anything about the possibility of facing more lawsuits, but you certainly can try to control whether you win them.



Colleen O. Kaufenberg
ckaufenberg@hdbob.com
651.332.8722