No. 127067

IN THE SUPREME COURT OF ILLINOIS

DONOVAN MUNOZ Plaintiff-Appellant, v. BULLEY & ANDREWS, LLC Defendant-Appellee.	)	On Appeal from the Illinois Appellate Court, First District, Case No. 1-20-0254 There Heard on Appeal from the Circuit Court of Cook Judicial Circuit, Cook County, Illinois Case No. 19L3878 Honorable Daniel T. Gillespie Judge Presiding

REPLY BRIEF OF PLAINTIFF-APPELLANT

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ARGUMENT

I. THIS COURT'S DECISION IN *IOERGER* DOES NOT SUPPORT BULLEY & ANDREWS' POSITION

The central issue in this case is whether Bulley & Andrews, a separate and distinct entity from Munoz's employer, Concrete Restoration, is also entitled to immunity from common law causes of action under Sections 5 (a) and 11 of the Workers' Compensation Act. 820 ILCS 305/5 and 11. It is Munoz's position that under the plain language of Sections 5(a) and 11, immunity is limited to an injured worker's immediate employer with limited exceptions. Entities that can claim immunity in addition to an employer only include "his insurer, his broker, any service organization retained by the employer, his insurer, or his broker to provide 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 duty as such employee…." 820 ILCS 305/5(a).

It is indisputable that Bulley & Andrews did not employ Munoz. It is equally indisputable that Bulley & Andrews does not fit into any of the other categories listed in Section 5 (a) which permit dual immunity. *Id*. Specifically, Bulley & Andrews does not contend it is an agent of Munoz's employer, Concrete Restoration. In this instance, the only entity entitled to immunity is Munoz's immediate employer, Concrete Restoration against whom. Munoz filed a claim in the Workers' Compensation Commission which is still pending. (A. 106-108). Because Concrete Restoration had immunity under Sections 5 (a) and 11, Munoz did not sue the company in his common law action and it is not a party to this appeal.

The linchpin of Bulley & Andrews' claim of immunity rests on this Court's decision in *Ioerge*r *v. Halverson Construction Co*., 232 Ill. 2d196 (2008). It claims that *Ioerger*

created a new category of entities that can claim immunity at the same time as an employer. Bulley & Andrews construes *Ioerger* to stand for the proposition that if an entity pays for an injured worker's benefits rather than the worker's immediate employer and the payments were made due to a pre-existing legal obligation, it becomes a *de facto* employer entitled to immunity along with the actual employer. The deficiency in Bulley & Andrews argument is that no such category of immunity is provided under Section 5 (a). Bulley & Andrews interpretation of *Ioerger*, as adopted by the trial court and appellate court, is mistaken and must be corrected for the following reasons.

First, as argued by Munoz in his opening brief, the function of the judiciary is to interpret Sections 5 (a) and 11 as written and not legislate. *Folta v. Ferro Engineering*, 2015 IL 118070, ¶ 43. Therefore, the Workers' Compensation Act cannot be amended by judicial fiat to create a new category of immunity not enacted by the legislature. *Roselle Police Pension Board v. Village of Roselle*, 232 Ill. 2d 546, 557 (2009). See also, Appellant's Brief at 14-16. In this instance, the trial court and appellate court misconstrued *Ioerger*, stepped beyond their authority and impermissibly legislated an immunity not provided in the Act. For that reason, the decision of the court below should not be allowed to stand.

The Amicus Brief filed by the Illinois Trial Lawyers Association, which reviews workers' compensation laws from other States, lends further support for the proposition that a State's legislature and not its courts must define the breadth of immunity granted by its workers' compensation statutes. As summarized in its brief, jurisdictions that grant immunity to general contractors that pay for the workers' compensation insurance of its subcontractors and their subcontractors' employees specifically include language in their

workers' compensation statutes to provide such immunity. Amicus Brief at 3-4. In contrast, other states, like Illinois, where the immunities provided under their respective Acts do not specifically include general contractors that purchase insurance for subcontractors, the courts in those States have refused to create such immunity through judicial decision. Amicus Brief at 3-10. This Court should reach the same result here by reversing the rulings of the trial and appellate court.

Second, when *Ioerger* decision is analyzed in its entirety, it is apparent that this Court did not intend to create a new category of immunity under Section 5 (a) as Bulley & Andrews asserts. In *Ioerger*, this Court was asked to interpret the term "agent" as used in Section 5 (a). The specific issue was whether members of a joint venture and the joint venture itself were all "agents" of one another and, as a result, entitled immunity under Section 5 (a). *Ioerger*, 232 Ill. 2d at 201-02. See also, Appellant's Brief at 11-14. Applying partnership law, this Court concluded that the two joint venturers were agents of each other and immune under Section 5(a). *Id*. at 202-03. As to the joint venture itself, the Court concluded that it was "inseparable from its constituent entities" and that it "necessarily follow[ed] that the Joint Venture was likewise shielded by the exclusive remedy provisions of the Act." *Id*. at 203. As further justification for its conclusion that the joint venture was an "agent" of the joint venturer that directly employed the injured workers and entitled to Section 5 (a) immunity, was the fact that the joint venture had reimbursed the employer for all labor costs including premiums for workers' compensation insurance. *Id*. at 204.

The *Ioerger* opinion, however, makes no suggestion that it was creating a new category of immunity under Section 5 (a). It merely held that the term "agent" as used in

that section encompassed a joint venture and all components. The limited holding in *Ioerger* would have relevance only if Bulley & Andrews was claiming that it paid Munoz's workers' compensation benefits because it was engaged in a joint venture with Concrete Restoration at the 222 South Riverside project were the injury occurred. Bulley & Andrews makes no such claim and therefor *Ioerger* is inapplicable.

The second case Bulley & Andrews relies upon, *Burge v. Exelon Generation Co., LLC*, 2015 IL App 141090, is equally inapplicable. In *Burge*, Exelon contended that like the defendants in *Ioerger*, it was an agent of the plaintiff's direct employer and that it had a contractual obligation to pay the plaintiff's workers' compensation benefits. In that instance, the appellate court found that there was no evidence to support these assertions and immunity was denied. *Burge*, 2015 IL App 141090 at ¶¶ 9 and 17.

II. BULLEY & ANDREW'S CONTRACT WITH RAR-222 SOUTH RIVERSIDE, LLC (RAR-222) DID NOT OBLIGATE IT TO BUY WORKERS' COMPENSATION INSURANCE FOR CONCRETE RESTORATION OR ANY OTHER SUB-CONTRACTOR IT HIRED

Even if *Ioerger* is interpreted as allowing an independent company to buy Section 5(a) immunity, Bulley & Andrews had no legally enforceable obligation to supply Concrete Restorations employees with workers' compensation insurance or benefits. Bulley & Andrews attempts to "shoehorn" itself into a fact scenario similar to *Ioerger* by claiming that its contract with the developer, RAR-222, obligated it to provide workers' compensation coverage for Concrete Restoration, all other subcontractors and their employees working at the project. Appellee Brief at 40. Bulley & Andrews position is flawed for a number of reasons.

First, unlike *Ioerger*, the contract Bulley & Andrews relies upon did not run between itself and Concrete Restoration. Therefore, it had no direct legal obligation to provide

workers' compensation benefits to employees of Concrete Restoration. Furthermore, Concrete Restoration was not a party to Bulley & Andrews' contract with RAR-222 and therefore could not enforce Bulley & Andrews' alleged promise to provide workers' compensation coverage. *Martis v. Grinnell Mutual Reinsurance Co*., 388 Ill. App. 3d 1017, 1020 (2009). In the absence of an enforceable promise, Bulley & Andrews cannot claim Section 5 (a) immunity. *Burge*, 2015 IL App 141090 at ¶ 17.

Second, the language of the RAR-222 contract did not require Bulley & Andrews to buy workers' compensation insurance for Concrete Restoration and the other subcontractors it hired for the project. Bulley & Andrews' conduct confirms it had no obligation to do so. The plain language of the agreement only required Bulley & Andrews to insure itself against liabilities "for which [it] may be legally liable" on the project. (R. Sup. C259.) Under the framework of the Act, Bulley & Andrews would only become liable for paying workers compensation benefits to employees of Concrete Restoration or the other subcontractors pursuant to Section 1 (a) (3) if those entities were uninsured and insolvent. 820 ILCS 305/1 (a) (3). See also, *Laffoon v Bell & Zoller Coal Co*., 65 Ill. 2d 437, 447 (1976).

If Bulley & Andrews was not insured or unable to pay liabilities arising from its status as a statutory employee under Section 1 (a) (3), then the liability would go up the chain to RAR-222. 820 ILCS 305/1 (a) (3). Therefore, it made sense for RAR-222 to protect itself from this potential liability by requiring Bulley & Andrews to purchase insurance to cover this contingency. In reality, it was unlikely that the subcontractors Bulley & Andrews hired for the 222 South Riverside project would be uninsured. Concrete Restoration and the other subcontractors were engaged in construction

enterprises, and, therefore, under Section 3 of the Act were mandatorily included in the workers' compensation system. 820 ILCS 305/3(1) and (2). And, as a result of their status of being engaged in the construction industry, the Act further imposed on these entities an independent statutory duty under Section 4(a) of the Act to obtain workers' compensation insurance or guarantee the financial ability to pay benefits. 820 ILCS 305/4(a). Because all of the companies had a pre-existing statutory obligation to secure their own workers' compensation coverage, it is illogical that Bulley & Andrews would volunteer to undertake this financial obligation. The evidence in the record and Bulley and Andrews' conduct confirms that it did not.

During the abbreviated discovery in this matter, Bulley & Andrews produced the applicable workers' compensation policy issued by Arch Insurance Company. The Arch policy Schedule of Named Insureds does not list any subcontractors hired to work on the 222 South Riverside project other than Concrete Restoration. (R. Sup. C137-41). The fact that Bulley & Andrews did not insure the other subcontractors confirms that it was not obligated to do so by its contract with RAR-222.

Moreover, Bulley & Andrews makes contradictory arguments on whether it was obligated by its contract with RAR-222 to provide workers' compensation coverage to Concrete Restoration and the other subcontractors it hired. In Section B (3) of it brief, Bulley and Andrews says it "had a prior obligation to provide coverage and could not selectively pick when it was and when it was not an employer under the Act as best suited [Bulley & Andrews'] needs." Appellee Brief at 26. In the same section of its brief, Bulley & Andrews repeats the assertion that: "Quite the opposite, and unlike *Laffoon*, [Bulley & Andrews] could not freely pick when it was and was not an 'employer' under

the Act. Under [Bulley & Andrews'] contract with RAR2-222 South Riverside, [Bulley & Andrews] agreed on day one of this construction project that it would handle worker's compensation coverage for all workers." Appellee Brief at 27.

In Section B (6) of its brief, Bulley and Andrews sings a different tune. There it argues that its contract with RAR-222 did not impose on it an iron-clad obligation to provide all workers on the project with workers' compensation coverage. Appellee Brief at 40-41. Instead, Bulley & Andrews asserts that under the concept of "pass thru" liability, its obligation to supply coverage was within its discretion, not mandatory. *Id.* That is, Bulley & Andrews contends it had the option of retaining the alleged contractual obligation to secure workers' compensation insurance or pass the obligation to the sub-contractors it hired, including Concrete Restoration. *Id*. Bulley & Andrews claims that in this instance, it opted not to pass-thru its alleged obligation to furnish workers' compensation insurance to Concrete Restoration and secured coverage for the company under the Arch policy. *Id*. The Arch policy, however, does not name any other subcontractors Bulley & Andrews hired to perform work on the South Riverside project indicating it selectively chose not to insure them. (R. Sup. C137-41).

On its face, it appears that Bulley & Andrews was maneuvering to best serve its financial interests. Its machinations exemplify the perversion of the workers' compensation system that the appellate court warned against in *Burge v. Exelon Generation Co., LLC,* 2015 IL App 141090. The court in *Burge* observed that the Act makes no provision that would permit an entity that is legally distinct from the employer of an injured worker to unilaterally insulate itself from liability for negligence by paying the employer's insurance premiums for workers' compensation insurance or

compensation due under the Act. *Id*. at ¶ 14. The *Burge* court stated further that to maintain the balance between an employer's liability without fault and the limitations the Act imposes on the employee's recovery, "an entity cannot be permitted to choose whether to be treated like an employer or like a third party, depending on what appears to be to its advantage in a particular case." *Id*. In this instance, it appears that Bulley & Andrews did just that and its insurance manipulations should not countenanced.

As admitted by Bulley & Andrews in its brief, it "passed thru" to all subcontractors other than Concrete Restoration the obligation to secure their own workers' compensation coverage. Thus, Bulley & Andrews would have no basis to claim immunity, even under *Ioerger*, if an employee of one of those companies was injured at the 222 South Riverside project and filed a common law cause of action against it. If Munoz is barred from suing Bulley & Andrews by Section 5 while an employee of another subcontractor working at the same project would not, Munoz would be denied equal treatment under Section 5, an outcome this Court sought to prevent through its holding in *Laffoon* and should not be permitted here. *Laffoon*, 65 Ill. 2d at 447. See also, Amicus Brief at 10-15.

III. BULLEY & ANDREWS WAS NOT MUNOZ'S EMPLOYER UNDER 820 ILCS 305/1(A) (3)

Bulley & Andrews attempts to bolster its position by contending that it is entitled to immunity because it was Munoz's employer under Section 1(a) (3) of the Act. By making this argument, Bulley & Andrews tacitly admits that immunity under Sections 5 and 11 of the Act is available only to an injured worker's "employer" or its agents. *Laffoon v Bell & Zoller Coal Co*., 65 Ill. 2d 437, 447 (1976) It is indisputable that Bulley & Andrew was not Munoz's direct employer. Instead, Concrete Restoration employed

Munoz. Bulley & Andrews seeks to gain the status of employer and the cloak of immunity through Section 1(a)(3) which it claims mandates that a construction contractor must pay compensation to its own immediate employees and to all employees of subcontractors it hires. It further claims that in this instance, because it hired Concrete Restoration to do work on the 222 South Riverside project, it became Munoz's statutory employer under Section 1 (a) (3) with a concomitant obligation to pay him benefits following his injury and thus entitling it to immunity from his lawsuit. This argument misrepresents what section 1(a) (3) actually provides.

Under Section 1(a) (3), the obligation of a general contractor to pay benefits under the Act to an injured employee of a subcontractor arises only if the subcontractor is uninsured or insolvent. *Duggan v. Builders Associates*, 271 Ill. App. 3d 744, 745 (1995). Specifically Section 1(a) (3) provides that if a contractor "directly or indirectly engages any contractor whether principal or sub-contractor to do any such work, he is liable to pay compensation to the employees of any such contractor or sub-contractor **unless** such contractor or sub-contractor has insured, in any company or association authorized under the laws of this State to insure the liability to pay compensation under this Act, or guaranteed his liability to pay such compensation." (Emphasis added.) 820 ILCS 305/1 (a) (3).

Even if a general contractor or its insurer pays benefits to a statutory employer under Section 1(a) (3), it still is not entitled to immunity under Section 5. *Laffoon v Bell & Zoller Coal Co*., 65 Ill. 2d 437, 447 (1976). Immunity does not arise because the Act does not convert an uninsured subcontractor's employees into employees of the contractor.

Statewide Insurance Co. v. Brendan Construction Co., 218 Ill. App. 3d 1055, 1060 (1991).

In this instance Concrete Restoration, like Bulley & Andrews, is in the construction business which is deemed to be an ultra-hazardous enterprise under Section 3, and, therefore, it had an obligation equal to that of Bulley & Andrews, to obtain insurance for its liabilities under the Act or get approved by the Commission to self-insure. 820 ILCS 305/4(a). If Concrete Restoration negligently failed to obtain insurance or approval to self-insure, its officers and directors could be found guilty of a Class A misdemeanor. 820 ILCS 305/4(d). The evidence in the record, however, establishes that Concrete Restoration complied with Section 4 (a). It was insured for its workers' compensation liabilities under the policy issued by Arch Insurance. (R. Sup. C137-41). Therefore, the condition precedent necessary to make Bulley & Andrews a statutory employer under Section 1(a) (3) did not exist. Because Bulley & Andrews was neither Munoz's statutory employer nor his actual employer, it is not entitled to immunity. *Statewide Insurance Co. v. Brendan Construction Co*., 218 Ill. App. 3d 1055, 1060 (1991).

IV. MUNOZ WILL NOT RECEIVE DOUBLE RECOVERY IF HE IS PERMITTED TO PROCEED WITH HIS LAWSUIT AGAINST BULLEY & ANDREWS

A recurring theme in Bulley & Andrews' brief, is the contention that it will be required to pay duplicative damages to Munoz if he is permitted to proceed with his lawsuit and prevails. It contends further that such an outcome would be unfair and contrary to the purposes of the Workers' Compensation Act. These arguments are without merit.

First, the damages sought by Munoz in his common law causes of action against Bulley & Andrews are qualitatively different than his workers' compensation benefits.

Munoz's rights to compensation under the Act arose from his employment with Concrete Restoration. He is entitled to those benefits without having to prove that his employer was at fault. *Fregeau v. Gillespie*, 96 Ill. 2d 479, 486 (1983). In contrast, any right to receive damages in the instant case will arise from Bulley & Andrews' direct negligence in the manner it exercised its retained control over the construction site where Munoz was injured. *Carney v. Union Pacific Railroad Co*., 2016 IL 118984, ⁋ 36. Certainly, Bulley & Andrews cannot claim unfairness is it is held to account for an injury caused by its own negligent conduct.

Second, the damages to which Munoz will be entitled if he proves that Bulley & Andrews was negligent and a proximate cause of his injury are more expansive and could include compensation for pain, suffering and emotional distress. *Babikian v. Mruz*, 2011 IL App 102579, ⁋⁋ 18-19. The Workers' Compensation Act does not provide recovery for these elements. Under the Act, the amount of compensation is subject to statutory limitations. *Folta v. Ferro Engineering*, 2015 IL 118070, ¶ 12. The limitations on recovery under the Act are part of the *quid pro quo* for a system of no-fault liability on the part of an employer "which balances the sacrifices and gains of employees and employers." *Id*. The rationales underpinning the Act do not apply here. Bulley & Andrews did not employ Munoz. Therefore he is not entitled to a no-fault recovery from it. Munoz will recover damages in this case only if he proves Bulley & Andrews' acted negligently.

Finally, Munoz will not receive a windfall of double damages if he prevails in this litigation. Section 5 (b) of the Act dictates that Munoz, if successful, must repay the amount of compensation he received under the Act. 820 ILCS 305/5(b). Or in the

alternative, Bulley & Andrews will be entitled to a set-off for any compensation benefits it paid. *Laffoon*, 65 Ill. 2d at 447. This mechanism will preclude Munoz from duplicate compensation. *Id*.

CONCLUSION

For the reasons stated, the Court should reverse and vacate the judgment entered by the Appellate Court and the Circuit Court Order and Judgment made pursuant to 735 ILCS 5/2-619 which dismissed Plaintiff-Appellant Munoz's causes of action. Further, Plaintiff-Appellant Munoz requests this Court to remand this cause to the circuit court for a trial on the merits.

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CERTIFICATE OF COMPLIANCE WITH RULE 341(c)

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is twelve pages.

By: /s/ *Milo W. Lundblad*
Milo W. Lundblad

No. 127067

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	)	Case No. 2019 L 003878
	)	
Defendant-Appellee.	)	The Honorable Judge
	)	Daniel T. Gillespie
	)	*Judge Presiding*

NOTICE OF FILING

TO: See Attached Service List

On August 18, 2021, I caused to be filed with the Supreme Court of Illinois, ***Plaintiff-Appellant's Reply Brief,*** a copy of which is attached hereto and served upon you.

By: /s/Milo W. Lundblad
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CERTIFICATE OF SERVICE

I, a non-attorney, hereby certify that on August 18, 2021, I filed the above-mentioned document via Odyssey and served the document listed above to the above-mentioned parties via e-mail as provided by law pursuant to 735 ILCS 5/1-109 of the Code of Civil Procedure., on or before the hour of 5:00 p.m.

/s/ Victoria Nieto
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