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Illinois Supreme Court's Ruling in *Munoz V. Bulley & Andrews, LLC:* No Immunity for General Contractor Against Suit Filed by Subsidiary's Employee

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Illinois Supreme Court's Ruling in *Munoz V. Bulley & Andrews, LLC:* No Immunity for General Contractor Against Suit Filed by Subsidiary's Employee

The Illinois Supreme Court recently ruled in *Munoz v. Bulley & Andrews*, 2022 IL 127067, issued on January 21, 2022, that a general contractor was not afforded immunity under the exclusive remedy provisions of the Workers' Compensation Act from a personal injury suit filed by a subsidiary's employee—even though the general contractor paid the workers' compensation policy premiums.[1] In its ruling, the supreme court discussed its previous rulings and offered guidance as to when contractors may be afforded immunity, and when they will not, pursuant to the Workers' Compensation Act.

Below is a brief background of the relevant facts in *Munoz*, summaries of the Illinois Appellate Court's and the Illinois Supreme Court's rulings, as well as key takeaways for legal practitioners in the wake of the *Munoz* decision.

Background

In 2010, Bulley & Andrews, LLC (Bulley & Andrews) bought Takao Nagai Concrete Restoration (Takao Nagai) and continued operating Takao Nagai under said name until Takao Nagai became known as Bulley & Andrews Concrete Restoration, LLC (Bulley Concrete) in 2015.[2] Bulley Concrete is a wholly owned subsidiary of Bulley & Andrews, however the companies operated as separate entities—each had its own federal tax identification number and filed separate federal and state income tax returns.[3] The companies had different presidents and employed different workforces.[4] The companies had different "specialties" with Bulley & Andrews employing approximately 500 carpenters and labors, and Bulley Concrete employing approximately 100 laborers, caulkers and concrete finishers.[5]

In March 2015, Bulley & Andrews entered into a contract with owner, RAR2-222 South Riverside (South Riverside), to serve as general contractor of a construction project located at 222 South Riverside, Chicago.[6] As part of its scope of work, Bulley & Andrews agreed to perform much of the concrete work itself, for which it used Bulley Concrete; however, Bulley & Andrews' contract with South Riverside did not contain

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language to that effect.[7] Although Bulley & Andrews entered into subcontracts with other subcontractors, it did not enter into a subcontract with Bulley Concrete.[8]

Per its contract with South Riverside, Bulley & Andrews obtained workers' compensation insurance policy for its employees, as well as the employees of Bulley Concrete.[9] Article 11, Section 11.1 of said contract required Bulley & Andrews to:

> [P]urchase from and maintain in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located such insurance as will protect the Contractor from claims set forth below which may arise out of or result from the Contractor's operations and completed operations under the Contract and for which the Contractor may be legally liable, whether such operations be by the Contractor or by a Subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for those acts any of them may be liable.
>
> 1. Claims under workers' compensation, disability benefit and other similar employee benefit acts that are applicable to the Work to be performed.
> 2. Claims for damages because of bodily injury, occupational sickness or disease, or death of the Contractor's employees;
> 3. Claims for damages because of bodily injury, sickness or disease, or death of any person other than the Contractor's employees;
> 4. Claims for damages insured by usual personal injury liability coverage.[10]

In 2016, plaintiff Donovan Munoz was employed as a construction worker by Bulley Concrete; Bulley Concrete paid Munoz's wages, and withheld and paid federal and Illinois income taxes, Medicare and Social Security taxes.[11] On December 4, 2016, Bulley Concrete instructed Munoz to go to the site located at 222 South Riverside and pull blankets off fresh concrete to allow another subcontractor to perform additional work on the concrete.[12] The recent precipitation had caused the blankets to become waterlogged and heavier than usual. While pulling off the blankets, Munoz injured his back.[13]

Munoz filed a claim with the Illinois Workers' Compensation Commission against Bulley Concrete.[14] Munoz's medical bills totaled $76,046.34, and he was paid $2,157.71 in temporary disability benefits.[15] At the time of incident, Bulley & Andrews and Bulley Concrete were insureds under a workers' compensation policy issued by Arch Insurance Company, and Bulley & Andrews paid the premiums for the insurance.[16] The policy provided for a $250,000 deductible for every claim.[17]

On April 11, 2019, Munoz filed a personal injury action in Cook County against Bulley & Andrews, South Riverside (the owner) and the management company operating 222 South Riverside, Behringer Harvard South Riverside, LLC.[18] Munoz alleged that the blankets placed on the top of the concrete were worn and riddled with holes, allowing water penetration and ultimately causing the blankets to become unreasonably dangerous to be manually moved.[19] Although Munoz admitted to being an employee of Bulley Concrete, Munoz alleged that Bulley & Andrews, as the general contractor, "retained control over the safety at the construction site, supervision of the work at the construction site, and control of the means and methods of the work on the construction site to ensure that all work was performed safely by all subcontractors, including [plaintiff's] employer."[20] Munoz further alleged that Bulley & Andrews breached its duty of care by failing to use its retained control to stop Bulley Concrete from using unsafe equipment, by permitting an unsafe condition to be created through the use of worn, unfit and defective concrete blankets, and by failing "to regulate and limit the hours worked by laborers, including plaintiff, thus making him more susceptible to injuring himself through repetitive lifting of heavy objects and construction materials."[21]

In circuit court, Bulley & Andrews moved to dismiss the complaint pursuant to Section 2-619(a)(9). Bulley & Andrews argued that Munoz's claims were barred by the exclusive remedy provisions of 820 ILCS 305/5(a).[22] Bulley & Andrews argued that it had a pre-existing legal obligation to pay for Munoz's workers' compensation benefits and that it did so by paying more than $76,000 of Munoz's medical expenses.[23] On December 27, 2019, the circuit court granted its motion to dismiss, finding that Bulley & Andrews was legally obligated under its contract with South Riverside to pay for the workers' compensation insurance and benefits that Munoz received.[24] The circuit court's order found there was no just reason to delay the enforcement or appeal of its order under Rule 304(a), and leave of appeal was allowed.

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Appellate Court

On appeal, Munoz argued that the circuit court improperly granted the motion to dismiss in that the exclusive remedy provisions under the Workers' Compensation Act did not bar him from suing Bulley & Andrews—Bulley & Andrews was not his employer; his employer was Bulley Concrete.[25] Bulley & Andrews argued it was properly dismissed since Bulley & Andrews was legally obligated to provide workers' compensation coverage for all of its own employees and those employees of its wholly owned subsidiaries (including Bulley Concrete), per its contract terms with South Riverside, thus the exclusive remedy provisions of the Act did bar Munoz's cause of action.[26] The appellate court agreed with Bulley & Andrews and affirmed the circuit court's dismissal of Munoz's cause of action against it.

The appellate court's primary goal was interpreting the Workers' Compensation Act to determine the intent of the legislation relative to the exclusive remedy provisions.[27] Citing *Folta v. Ferro Engineering*, the appellate court confirmed that the legislature enacted the Act to establish "a new framework for recovery to replace the common-law rights and liabilities that previously governed employee injuries."[28] The legislation created a no-fault system of liability upon the employer, in exchange for the employee being statutorily limited in his recovery for injuries arising out of his employment. [29] To this end, the Act contains "an exclusive remedy provision as part of the quid pro quo which balances the sacrifices and gains of employees and employers."[30]

The exclusive remedy provisions of the Act are found in Sections 5(a) and 11.[31] First, in relevant part, Section 5(a) of the Act states:

> No common law or statutory right to recover damages from the employer *** 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 ***. [32]

Section 11 of the Act states:

> The compensation herein provided, together with the provisions of this Act, shall be the measure of the responsibility of any employer engaged in any of the enterprises or businesses enumerated in Section 3 of this Act, or of any employer who is not engaged in any such enterprises or businesses, but who has elected to provide and pay compensation for accidental injuries sustained by any employee arising out of and in the course of the employment according to the provisions of this Act ***.[33]

In the above provisions, the Act provides the exclusive remedy for an employee to recover against his employer for injuries arising during the course of employment.[34]

The appellate court acknowledged that Munoz did not dispute that he was an employee under the Act and that he was injured during the course of his employment, i.e. Munoz did not dispute that he was under the purview of the Act.[35] Rather, Munoz argued that Bulley & Andrews was not his direct employer, thus it could not enjoy the immunity afforded by the exclusive remedy provisions in the Act.[36] So the appellate court turned to the definition of "employer" under the Act. According to the Act, an "employer" is defined as follows:

> Every person, firm, public or private corporation[ ] *** who has any person in service or under any contract for hire, express or implied, oral or written, and who is engaged in any of the enterprises or businesses enumerated in Section 3 of this Act, or who at or prior to the time of the accident to the employee for which compensation under this Act may be claimed, has in the manner provided in this Act elected to become subject to the provisions of this Act, and who has not, prior to such accident, effected a withdrawal of such election in the manner provided in this Act.
> *** Any one engaging in any business or enterprise referred to in subsections 1 and 2 of Section 3 of this Act who undertakes to do any work enumerated therein, is liable to pay compensation to his own immediate employees in accordance with the provisions of this Act, and in addition thereto if he 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.[37]

According to the appellate court, subsections 1 and 2 of Section 3 include such enterprises or businesses as "maintaining, removing, remodeling, altering or demolishing of any structure" and "[c]onstruction."[38] In its analysis, the appellate court considered two Illinois Supreme Court rulings, *Laffoon v. Bell & Zoller Coal Co.* and *Ioerger v. Halverson Construction Co.,* and the Illinois Appellate Court's ruling in *Burge v. Exelon Generation Co*.[39]

Laffoon v. Bell & Zoller Coal Co.

In *Laffoon*, three employees of different subcontractors were injured, but the subcontractors did not provide workers' compensation insurance, which resulted in the general contractors being responsible for the workers' compensation claims.[40] Thereafter, the workers sued the general contractors, but all three lawsuits were dismissed in favor of the general contractors. The plaintiffs appealed, and the cases were ultimately consolidated before the supreme court. The defendants in *Laffoon* maintained that Section 5(a) of the Workers' Compensation Act provided them with immunity from an action for damages by an employee of an uninsured subcontractor when they were required to pay compensation benefits to that employee under Section 1(a)(3) of the Act.[41] The plaintiffs responded that Section 5(a) was intended to provide immunity only to the employer of that employee, and alternatively, if the defendants' interpretation of Section 5(a) was correct, that interpretation was violative of their rights to due process and equal protection.[42]

In *Laffoon*, two issues were presented on appeal: first, whether the exclusive-remedy provision of Section 5(a) of the Workers' Compensation Act was intended to bar an action under the Structural Work Act by an injured workman against a general contractor who "is liable to pay compensation" to that workman under Section 1(a)(3) of the Workers' Compensation Act; and second, assuming it was intended to bar such an action, did Section 5(a) violate the employee's right to due process and equal protection of the law.[43]

The supreme court in *Laffoon* acknowledged that it is the duty of this court to construe acts of the legislature so as to uphold their validity and constitutionality if it can reasonably be done, and if their constitutionality is doubtful, to resolve that doubt in favor of their validity.[44] Accordingly, the supreme court held that it had to interpret the exclusive remedy provisions "as conferring immunity upon employers only from common law or statutory actions for damages by their immediate employees" and "[t]o hold otherwise in light of the present factual situations would be violative of the injured employee's right to due process and equal protection of the laws."[45]

The *Laffoon* court found the defendants' argument that construing Section 5(a) adverse to their position would result in a violation of their rights to due process and equal protection, was without merit. The defendants based their argument on the premise that they would be liable to pay compensation benefits without fault under Section 1(a)(3) and still remain subject to a subsequent common law or statutory action for damages. The *Laffoon* court reasoned that under its construction of Section 5(a):

> [D]efendants are placed in no worse position than they are in regard to suits by employees of insured subcontractors. The only difference between the two situations is that in one case the general contractor has paid compensation. He, however, has the right of indemnification against the uninsured subcontractor. If the subcontractor is insolvent, the general contractor who is found liable based upon a common law or statutory cause of action may set off from that award the amount of compensation benefits he has previously paid to the employee. The employee receives no windfall or double recovery. In some cases, where the subcontractor is insolvent and the general contractor prevails in the common law or statutory action, the general contractor must bear the burden of the compensation payments. It must be noted, however, that the general contractor had it within his power to protect himself from this loss by hiring insured subcontractors. Furthermore, it is an underlying rationale of workmen's compensation law that the loss occasioned by injuries to employees should be borne by the common enterprise.[46]

The supreme court in *Laffoon* reversed and remanded all three consolidated

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cases to their respective circuit courts for further proceedings consistent with its ruling.[47]

Ioerger v. Halverson Construction Co.

In addition to *Laffoon*, the appellate court in *Munoz* considered the Illinois Supreme Court's decision in *Ioerger v. Halverson Construction Co*.[48] In *Ioerger,* Midwest Foundation Corporation (Midwest) entered into a joint venture with Halverson Construction Company, Inc. (Halverson), in connection with a project undertaken by the Illinois Department of Transportation (IDOT) to repair the McCluggage Bridge over the Illinois River in Peoria.[49] Midwest and Halverson entered into a written agreement that stated Midwest and Halverson "constitute[d] themselves as joint venturers for the purpose of submitting joint bids * * * for the performance of the construction contracts herein before described, and for the further purpose of performing and completing such construction project."[50] Per the agreement, if the bids were awarded, they were to be "entered into in the names of the parties as joint venturers."[51] Additionally, the agreement provided that profits, losses and liabilities resulting from the project were to be shared 60/40, with the larger share going to Midwest, and Midwest and Halverson were required to each make periodic contributions of working capital to the joint venture in proportion to their respective share of the profits and losses.[52]

Further, pursuant to the agreement, Midwest was responsible for "the performance of all labor for the joint venture, including payroll, payroll taxes, fringes and other employee expenses, including, but not limited to, the establishment of worker[s'] compensation insurance and the payments of all premiums therefore."[53] Correspondingly, Midwest was "entitled to reimbursement from the Joint Venture for the costs incurred in performing the foregoing obligations; such reimbursement to be paid at such time or times as the Joint Venture shall determine."[54]

IDOT ultimately accepted the joint venture's bid, and the joint venture began work on the bridge project with Midwest furnishing workmen for the project. Throughout the course of the project, Midwest would pay the labor costs, including workers' compensation insurance premiums, then submit statements to the joint venture for reimbursement.[55] Among the workers employed by Midwest were ironworkers Daniel Ioerger, Randy McCombs, Robert L. Foulks, Sr., and Ralph Bill.[56] On April 24, 2000, while the four were working from a platform suspended above the river, the platform collapsed, causing them to plummet into the river below.[57] Ioerger, McCombs and Bill were injured. Foulks was killed.

The injured ironworkers and estate of Foulks applied for and received workers' compensation benefits through Midwest's workers' compensation insurer. It was undisputed that these workers' compensation benefits were the ironworkers' exclusive remedy with respect to Midwest and that Sections 5(a) and 11 of the Workers' Compensation Act precluded them from bringing a common law action for negligence against Midwest.[58]

In addition to seeking workers' compensation benefits from Midwest, the ironworkers brought a civil action against Halverson, the joint venture, and various other defendants to recover damages for injuries they sustained as a result of the accident.[59] Halverson and the joint venture filed motions for summary judgment, arguing that as co-venturers with Midwest, they are cloaked with the same immunity enjoyed by Midwest under the Workers' Compensation Act.[60] The trial court entered summary judgment in their favor; the appellate court reversed and remanded. Halverson and the joint venture appealed, and the petitions were consolidated.[61]

The issue for the supreme court in *Ioerger* was whether the immunity afforded to an employer by the exclusive remedy provisions of the Workers' Compensation Act extends to the employer's co-venturer in a joint venture and to the joint venture itself.[62] The supreme court stated that under Illinois law, the joint venture was governed by partnership principles, "for a joint venture is essentially a partnership carried on for a single enterprise."[63] Partners, in turn, are agents of the partnership and of one another for purposes of the business per common law and the Uniform Partnership Act, which Illinois has adopted.[64] Therefore, as a co-venturer with Midwest, Halverson was Midwest's agent, and because Halverson was Midwest's agent, it was, in turn, entitled to invoke the same immunity afforded to Midwest by the exclusive remedy provisions of the Workers' Compensation Act.[65]

Relative to the joint venture itself, the supreme court in *Ioerger* reached the same conclusion for two reasons: First, while a partnership is treated as a separate entity for purposes of owning property, it is not a separate legal entity; since joint ventures are governed by partnership principles, the same is true of them.[66] The joint venture was thus inseparable from Midwest and Halverson. Since Midwest and Halverson were immunized by the exclusive remedy provisions of the Workers' Compensation Act, it necessarily followed that the joint

venture was likewise shielded by the exclusive remedy provisions of the Act.[67]

Second, the supreme court in *Ioerger* found that providing immunity for the joint venture was also mandated by the principles underlying the Act's remedial scheme.[68] Although the supreme court had observed in previous cases that "allowing a party who has paid nothing toward an injured employee's workers' compensation benefits, to nevertheless invoke the Act's immunity to escape tort liability for the employee's injuries, would be tantamount to allowing the party 'to have its cake and eat it too'", by the same token, subjecting a party to tort liability for an employee's injuries, notwithstanding the fact that the party had borne the costs of the injured employee's workers' compensation insurance, would be the same as declaring that the party (who has paid for the cake) may neither keep it nor eat it.[69]

In *Ioerger*, the supreme court explained that "the immunity afforded by the Act's exclusive remedy provisions is predicated on the simple proposition that one who bears the burden of furnishing workers' compensation benefits for an injured employee should not also have to answer to that employee for civil damages in court."[70] The joint venture agreement between Midwest and Halverson specified that Midwest was responsible for "the performance of all labor for the joint venture, including payroll, payroll taxes, fringes and other employee expenses, including, but not limited to, the establishment of worker[s'] compensation insurance and the payments of all premiums therefore," and that Midwest was "entitled to reimbursement from the joint venture for the costs incurred in performing the foregoing obligations."[71] Ultimately, per said language, the responsibility for payment of the workers' compensation insurance premiums fell on the joint venture, thus it was entitled to immunity under the Act's exclusive remedy provisions.[72]

The supreme court in *Ioerger* reversed the appellate court's judgment, affirmed the judgment of the circuit court, and remanded to the circuit court for further proceedings.

Burge v. Exelon Generation Co.

In addition to *Laffoon* and *Ioerger*, the appellate court in *Munoz* considered the Second District's ruling in *Burge v. Exelon Generation Co.*[73] In *Burge*, the plaintiff worked for Exelon Nuclear Security, LLC (ENS)—a wholly owned subsidiary of the defendant, Exelon Generation Company (Exelon).[74] The plaintiff was injured while providing security services for ENS on Exelon's premises. Following the injury, the plaintiff filed a claim for workers' compensation benefits against ENS, which was settled and paid for by Exelon; then, plaintiff sued Exelon.[75] ENS was a Delaware limited liability company organized pursuant to an LLC agreement; said agreement stated that Exelon was the sole member of ENS and provided that ENS would supply security services on Exelon's premises.[76]

Exelon filed a motion to dismiss, arguing that it had engaged ENS as a contractor and it was the one who paid for the plaintiff's workers' compensation benefits; thus, it was immune from litigation under the exclusive remedy provisions of the Workers' Compensation Act.[77] The circuit court granted Exelon's motion, and the appellate court reversed and remanded.

The appellate court in *Burge* found that, although it is true Section 5(a) of the Workers' Compensation Act bars lawsuits against an employer's agents, Exelon was not ENS's agent.[78] The parties' LLC Agreement stated, in pertinent part:

> *Management.* The Management of [ENS] shall be vested in the sole member, Exelon Generation Company, LLC. The Member shall have exclusive authority over the business and affairs of [ENS] and shall have the full power and authority to authorize, approve or undertake any action on behalf of [ENS] and to bind [ENS], without the necessity of a meeting or other consultation. In connection with the foregoing, the Member is authorized and empowered:
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> a. to appoint, by written designation filed with the records of [ENS], one or more persons to act on behalf of [ENS] as officers of [ENS] with such titles as may be appropriate including the titles of President, Vice President, Treasurer, Secretary and Assistant Secretary, and
>
> b. to delegate any and all power and authority with respect to the business and affairs of [ENS] to any individual or entity including any officers and employees of [ENS]. In the absence of appointment of officers, agents and employees of [ENS] shall have such power and authority to act on behalf of [ENS], as shall be conferred by the Member.[79]

The appellate court in *Burge* found nothing in the LLC Agreement that gave ENS any right to control Exelon; instead, quite the opposite appeared to be true—

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because ENS had no right to control Exelon, Exelon was not ENS's agent.[80]

The appellate court's remaining question in *Burge* was whether Exelon's role, if any, in paying plaintiff's workers' compensation settlement conferred immunity, pursuant to Section 5(a), from a common-law action for damages.[81] To answer that question, the appellate court in *Burge* considered the principles set forth in *Ioerger,* and an earlier decision from our supreme court, *Forsythe v. Clark USA, Inc.*[82] In *Forsythe,* the plaintiffs brought wrongful-death actions against the defendant. The decedents, who were employees of a wholly owned subsidiary of the defendant, died in a fire at a refinery.[83] The fire allegedly occurred when other employees of the defendant's subsidiary attempted to replace a valve on a pipe without ensuring that flammable materials within the pipe had been depressurized.[84] The plaintiffs alleged that, as part of its overall budgetary strategy, the defendant required its subsidiary to engage in cost-cutting measures that prevented the subsidiary from properly training its employees and keeping the premises in a safe condition.[85] The defendant in *Forsythe* argued that it was merely a holding company and owed no duty to the employees of its subsidiary. The *Forsythe* court rejected the defendant's argument that Section 5(a) of the Act immunized it from active-participant liability for injuries to workers employed by its subsidiary.[86]

The supreme court in *Forsythe* concluded that the defendant could potentially be held liable under a theory of active-participant liability, holding that "[w]here 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, that parent company could face liability."[87] In *Forsythe,* it was the subsidiary, not defendant, who paid workers' compensation benefits to the decedents' families and who actually employed the decedents.[88] As such it was the subsidiary, not the defendant, that should enjoy the exclusive remedy provision of the Workers' Compensation Act.[89] The *Forsythe* court declined to allow the defendant to pierce its own corporate veil and enjoy immunity under the Act.[90]

In *Forsythe,* our supreme court observed that:

> Section 5(a) serves a balancing function. On the one hand, the Act establishes a new "system of liability without fault, designed to distribute the cost of industrial injuries without regard to common-law doctrines of negligence, contributory negligence, assumption of risk, and the like." On the other hand, the Act imposes "statutory limitations upon the amount of the employee's recovery, depending upon the character and the extent of the injury' and provides 'that the statutory remedies under it shall serve as the employee's exclusive remedy if he sustains a compensable injury.'"[91] If the system is to maintain this balance, an entity cannot be permitted to choose whether to be treated like an employer or like a third party, depending on what appears the most to its advantage in a particular case.[92]

Thus, the appellate court in *Burge* agreed that immunity under Section 5(a) of the Act cannot be predicated on defendant's payment of workers' compensation unless defendant was under some legal obligation to pay (such as the contractual obligation imposed by the joint-venture agreement in *Ioerger*).[93] Accordingly, the *Burge* court found that Exelon had failed to establish a basis for claiming immunity under Section (5)(a) of the Act, and it was error to dismiss the plaintiffs' complaint, therefore the matter was reversed and remanded for further proceedings.[94]

After analyzing the above cases, the appellate court in *Munoz* found it most similar factually to *Burge* except that Bulley & Andrews had sufficiently proven that it had a pre-existing legal obligation to pay for workers' compensation benefits of Bulley Concrete's employees, including Munoz (while the court in *Burge* found the defendant therein had not sufficiently proven the same).[95] The *Munoz* court found that despite the fact that Bulley & Andrews was not the direct defendant of Munoz, it bore the burden of providing workers' compensation benefits to Munoz, thus was entitled to avail itself to the exclusive remedy provisions of the Act.[96]

Although the appellate court in *Munoz* also found that it was factually similar to *Laffoon*, the *Munoz* court distinguished the facts from *Laffoon*, in that there was no evidence in *Laffoon* that the general contractors had pre-existing legal obligations to pay for workers' compensation insurance.[97] Accordingly, in *Munoz*, the appellate court affirmed the circuit court's granting of Bulley & Andrews motion to dismiss.[98] The Illinois Supreme Court allowed the plaintiff's petition for leave to appeal.

The Illinois Supreme Court

The Illinois Supreme Court identified the issue on appeal as whether the exclusive remedy provisions of the Workers' Compensation Act extend to a general contractor, Bulley & Andrews, who paid workers' compensation insurance premiums and benefits for a subcontractor, Bulley Concrete, and its employees, including Plaintiff Munoz.[99] Based on a plain reading of the Act's exclusive remedy provisions and definition of "employer," the Second District Appellate Court's decision in *Burge v. Exelon Generation Co., LLC*, and in the context of the supreme court's decisions in *Forsythe v. Clark USA, Inc.*, *Ioerger v. Halverson Const. Co., Inc.*, and *Laffoon v. Bell & Zoller Coal Co.*, which the *Munoz* court said "addressed this very issue," the supreme court held that immunity only extends to the injured employee's "immediate employer," Bulley Concrete.[100] The court did not end there, however, as it went on to explain why the appellate court's finding that a pre-existing legal obligation to pay for workers' compensation benefits, apparently based on this prior case law, was incorrect.[101]

Statutory Language and Intent Under *Forsythe*, *Laffoon* and *Burge*

The Illinois Supreme Court's summary of the facts emphasizes the legal and practical separation of Bulley & Andrews versus Bulley Concrete and, aside from first detailing the language of the prime contract that required Bulley & Andrews to procure workers' compensation insurance, the court devoted much of its discussion of the facts to the differences between these two entities.[102] The court also emphasized the intent, purpose, and language of the Act's exclusive remedy provisions and definition of "employer" pursuant to *Forsythe*, *Laffoon*, and *Burge*.[103]

Observing that the Act is designed to provide financial protection to workers for accidental injuries arising out of and in the course of employment, that its purpose is to place the costs of industrial accidents on the construction industry, and that it establishes a no-fault system under which the employer exchanges common-law defenses for the prohibition of common-law suits against it, the court examined the exclusive remedy provisions at Sections 5(a) and 11 of the Act and had no trouble finding, as an initial matter, that Munoz was an "employee" and that he was injured in the course of employment.[104] As noted above, the court identified the crux of the dispute as whether Bulley & Andrews, who was not Munoz's "direct employer," enjoys exclusive remedy immunity.[105] To answer this question the court examined the Act's definition of "employer," defined in part as "[e]very person, firm, public or private corporation … who has any person in service or under any contract for hire, express or implied, oral or written … " in the context of *Laffoon*, under which the supreme court had previously found that exclusive remedy protection from common law or statutory actions for damages was only conferred upon an employer's "immediate employees."[106]

Indeed, the *Munoz* court remarked that it had "previously addressed this very issue" in *Laffoon*, where three general contractors who hired uninsured subcontractors and paid benefits to employees of the uninsured subcontractors were denied exclusive remedy protection because they were not the "direct employer[s]" of the injured workers, and specifically set forth its holding in *Laffoon* that:

> [W]e must interpret section 5(a) as conferring immunity upon employers only from common law or statutory actions for damages by their immediate employees. To hold otherwise in light of the present factual situations would be violative of the injured employee's right to due process and equal protection of the laws.[107]

As in *Laffoon*, the *Munoz* court reasoned that immunity does not "hinge on the payment of benefits" but rather is rooted in the language of Section 5(a), which does not carve out immunity for an entity like Bulley & Andrews where it was not Plaintiff's "immediate employer."[108] That is, Section 5(a) "includes no category granting nonemployers of the injured worker the ability to acquire immunity by either paying workers' compensation insurance premiums on behalf of the injured worker's direct employer or compensation benefits directly," as Bulley & Andrews did here.[109]

The supreme court next observed that, in *Forsythe*, a parent company and its subsidiary were operated as separate entities but only the entity that was the "immediate employer" of the injured worker was entitled to immunity under Section 5(a) of the Act.[110] In light of *Forsythe*, the *Munoz* court found Bulley Concrete's status as a subsidiary of Bulley & Andrews, the separate and distinct operations of the two entities, and that they used separate tax identification numbers, executives, project superintendents and workers, was of "no import" since Bulley & Andrews was not Munoz's "immediate employer."[111]

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The *Munoz* court brought this issue to a close later in the opinion when it cited to *Burge* for the proposition that the Act does not make "any provision for an entity that is legally distinct from the immediate employer to insulate itself against liability for its negligence by paying workers' compensation insurance premiums or benefits on behalf of the immediate employer of an injured worker."[112] In other words, pursuant to *Burge*, there is no means by which immunity may be purchased by a general contractor who is not the injured worker's "immediate employer" and such a construction of the Act would be contrary to the intended purpose of the Act.[113]

Appellate Court's Refusal to Follow *Laffoon* and Reliance on *Ioerger* Was Error

The *Munoz* court then detailed the appellate court's reversible error. The first error the *Munoz* court identified was the appellate court's refusal to follow *Laffoon*, even though it acknowledged *Laffoon* involved similar facts.[114] The second error was the "new test" the appellate court set forth pursuant to *Ioerger*, which incorrectly sought to establish that a pre-existing legal obligation to pay for workers' compensation benefits may confer and did confer immunity for a non-immediate employer here.[115]

The then court touched on the factual circumstances at issue in *Ioerger*. In *Ioerger*, pursuant to a joint venture agreement to perform a bridge repair project, Midwest Foundation Corporation was responsible for performing all labor, but the joint venture was obligated to reimburse Midwest for all labor costs, including premiums for workers' compensation insurance.[116] Three employees of Midwest were injured and one was killed in an accident at the project, and the injured workers and the estate of the decedent received compensation benefits from Midwest's workers' compensation insurer.[117] The surviving employees and the estate of the decedent then filed a civil action against the joint venture itself and the other co-venturer, Halverson Construction.[118] Halverson and the joint venture each moved for summary judgment under Sections 5(a) and 11 of the Act. While the trial court granted the summary judgment motions, the appellate court reversed.[119]

The *Munoz* court identified the "specific issue" on appeal to the Illinois Supreme Court in *Ioerger* as "whether the immunity afforded to an employer by the exclusive remedy provisions of the Workers' Compensation Act *** extends to the employer's co-venturer in a joint venture and to the joint venture itself."[120] Observing that the exclusive remedy provisions extend to the "employer and other specified entities, including agents of the employer," the *Ioerger* court's holding that each member of a joint venture and the joint venture itself may be shielded from liability by the exclusive remedy provisions was based on two reasons. [121]

First, in Illinois, joint ventures are governed by partnership principles and, because the joint venture in *Ioerger* was not a separate legal entity under partnership law and was inseparable from its constituent entities, if each member of the joint venture was immunized, it "necessarily followed that the joint venture itself was shielded by the exclusive remedy provisions of the Act."[122] The *Munoz* court explained that a "secondary reason" to its holding in *Ioerger* was the "existence of an agreement between the joint venture and the direct employer of the workers that required the joint venture to reimburse the employer for all labor costs, including workers' compensation insurance premiums" which made immunity for the joint venture appropriate because "the Joint Venture bore the expense of the workers' compensation premiums and was thus responsible for making workers' compensation benefits available to plaintiffs," and "it was entitled to avail itself of the Act's exclusive remedy provisions."[123] The *Munoz* court found that the "new test" created by the appellate court pursuant to *Ioerger* was invalid because the "specific and completely different issue" in *Ioerger*, whether Section 5(a) applied to a joint venture, was narrow, limited to the specific factual situation involving a joint venture and the existence of an agreement with the direct employer that required the joint venture to reimburse the direct employer for workers' compensation premiums, therefore, did not apply to the facts presented in *Munoz*.[124]

The *Munoz* court found that even if the "secondary reason" for the holding in *Ioerger* applied here, *i.e.*, that a legal obligation to provide workers' compensation benefits could warrant immunity, Bulley & Andrews clearly was not an agent of Bulley Concrete and, thus, could not avail itself of exclusive remedy immunity.[125] Moreover, even if Bulley & Andrews was an agent of Bulley Concrete, the pre-existing legal obligation requirement was not met since Bulley Concrete was not a party to the prime contract and could not enforce the alleged obligation of Bulley & Andrews to provide workers' compensation insurance for its employees.[126]

Importantly, the *Munoz* court's holding was made "under the facts of this case" so its application may be limited

based on the facts of future cases.[127] However, the *Munoz* court made clear that payment of benefits is not the key to the analysis. Rather, the key to the analysis is the statutory language at issue and the intent of that language given its plain and ordinary meaning.

In conclusion, the Illinois Supreme Court found that the appellate court and circuit court erroneously declined to follow its holding in *Laffoon*. The supreme court held that the exclusive remedy provisions under Sections 5(a) and 11 of the Act do not extend to a general contractor who is not the employee's immediate employer and, therefore, the court reversed the judgments of the lower courts and remanded to the circuit court for further proceedings.

The Takeaways

The supreme court's decision in *Munoz* has provided clarity under Illinois law and common-sense guidance to those attorneys who find themselves representing general contractors seeking to take advantage of the immunity provided by the exclusive remedy provisions of the Illinois Workers' Compensation Act.

A general contractor cannot benefit from Section 5(a) of the Act if it simply pays for the workers' compensation insurance premiums even if that obligation exists in writing between the general contractor and its subsidiary or other subcontractor.

For two separate and distinct entities to enjoy immunity by the exclusive remedy provisions of the Workers' Compensation Act, those entities must be partners in a joint venture (as under in the written joint venture agreement between Midwest and Halverson in *Ioerger*) such that the entities are agents of each other. Regardless of which partner was initially responsible for securing workers' compensation insurance for the project, the entity paying for the policy per the joint venture agreement must be reimbursed so the cost is ultimately borne by the joint venture. This is true for all costs of labor, including payroll, payroll taxes, fringe benefits and other employee expenses. If both parties, for example, share the costs of the venture, govern under partnership principles, and act as a single enterprise instead of separate and distinct entities, then immunity under the Act is afforded.

When interpreting the supreme court's recent decision in *Munoz*, the specific facts of the case are paramount to understanding how courts will interpret the exclusivity provision of the Workers' Compensation Act. The test created for whether a parent company (general contractor) will receive immunity under Section 5(a) from a third-party personal injury suit is centered on whether it acted as a separate entity from its subsidiary (subcontractor). In *Munoz*, Bully & Andrews was not afforded the immunity provided by the exclusive remedy provision because it failed to establish that an agency relationship existed between itself and Bully Concrete, the direct employer, and the two companies acted and operated as separate entities. It may be difficult for parent companies to successfully invoke the exclusivity provision of the Act where the employee who was injured worked for the subsidiary, unless the parent company can establish that it and the subsidiary acted as a single legal entity, as partners or in a joint venture.

The obvious benefit to paying for one worker compensation policy for "all" employees (and to protect the general from civil claims) for a project may be outweighed by other legal considerations. Creating a joint venture or partnership to bid on a job simply to take advantage of immunity under the Act creates other possible legal obligations such as warranty claims, property damage claims, non-comp insurance issues and tax issues. While a contractor is typically liable for certain claims regardless of whether the issue was the result of an act or omission of one of its subcontractors (such as a warranty claim), the contractor may lose its ability to bring a third party, counter or cross claim for contribution or breach of contract if the entities are partners.

If the sole goal of a contractor is to seek immunity from civil lawsuits by someone else's employee who may be injured on the job, then the contractor should seek a partnership or joint venture with the other entity. Otherwise, the contractor cannot, in any way, be treated as an "immediate employer" and enjoy the immunity it seeks from the Workers' Compensation Act.

(Endnotes)

1 *Munoz v. Bulley & Andrews*, 2022 IL 127067.
2 *Id.* ¶ 5.
3 *Id.*
4 *Id.*
5 *Id.*
6 *Id.* ¶ 4.
7 *Id.* ¶ 6.
8 *Id.*
9 *Id.* ¶ 9.
10 *Id.* ¶ 4.
11 *Id.* ¶ 7.
12 *Id.*
13 *Id.*
14 *Id.* ¶ 9.
15 *Id.*
16 *Id.*
17 *Id.*
18 *Id.* ¶ 10.

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[19] *Munoz v. Bulley & Andrews, LLC*, 2021 IL App (1st) 200254, ¶ 7.
[20] *Munoz*, 2022 IL 127067, ¶ 10.
[21] *Id.*
[22] *Id.* ¶ 11.
[23] *Id.*
[24] *Id.* ¶ 12.
[25] *Munoz*, 2021 IL App (1st) 200254, ¶ 12.
[26] *Id.* ¶ 12.
[27] *Id.*
[28] *Id.* (citing *Folta v. Ferro Engineering*, 2015 IL 118070, ¶ 11).
[29] *Id.* ¶ 14.
[30] *Id.*
[31] 820 ILCS 305/5 and (11) (West 2018).
[32] 820 ILCS 305/5(a) (West 2018).
[33] 820 ILCS 305/11 (West 2018).
[34] *Munoz*, 2021 IL App (1st) 200254, ¶ 14.
[35] *Id.* ¶ 15.
[36] *Id.*
[37] 820 ILCS 305/1(a)(2), (3) (West 2018).
[38] *Id.* ¶ 16.
[39] *Laffoon v. Bell & Zoller Coal Co*, 65 Ill. 2d 437 (1976); *Ioerger v. Halverson Construction Co*, 232 Ill. 2d 196 (2008); *Burge v. Exelon Generation Co,* 2015 IL App (2d) 141090.
[40] *Laffoon v. Bell & Zoller Coal Co*, 65 Ill. 2d 437 (1976).
[41] *Id.* at 443.
[42] *Id.*
[43] *Id.* at 440.
[44] *Id*. at 446.
[45] *Id*. at 447.
[46] *Id.*
[47] *Id*. at 448.
[48] *Ioerger v. Halverson Construction Co*, 232 Ill. 2d 196 (2008).
[49] *Id*. at 198.
[50] *Id*. at 199.
[51] *Id*.
[52] *Id*.
[53] *Id*.
[54] *Id*.
[55] *Id*.
[56] *Id*. at 200.
[57] *Id*.
[58] *Id*.
[59] *Id*.
[60] *Id*. at 201.
[61] *Id*.
[62] *Id*. at 198.
[63] *Id.* at 202 (citing *In re Johnson, 133 Ill. 2d 516, 526 (1989)*; *Burtell v. First Charter Service Corp., 76 Ill. 2d 427, 438 (1979))*.
[64] *Id.* at 202.
[65] *Id.*
[66] *Id.* at 203.
[67] *Id.*
[68] *Id*
[69] *Id.*
[70] *Id.*
[71] *Id.* at 204.
[72] *Id.*
[73] *Burge v. Exelon Generation Co*, 2015 IL App (2d) 141090.
[74] *Id.* ¶ 2.
[75] *Id.*
[76] *Id.*
[77] *Id.* ¶ 1.
[78] *Id.* ¶ 9.
[79] *Id.*
[80] *Id.*
[81] *Id.* ¶ 10.
[82] *Id.*; *see also Forsythe v. Clark USA, Inc, 224 Ill. 2d 274 (2007)*.
[83] *Id.* ¶ 11 (citing *Forsythe*, *224 Ill. 2d at 278)*.
[84] *Id.*
[85] *Id.*
[86] *Id.* ¶ 12.
[87] *Id.* ¶ 11 (citing *Forsythe*, *224 Ill. 2d* at 290).
[88] *Id.* ¶ 12 (citing *Forsythe*, *224 Ill. 2d at* 297-98).
[89] *Id.*
[90] *Id.*
[91] *Id.* ¶ 14 (citing *Forsythe*, *224 Ill. 2d at* 296).
[92] *Id.* ¶ 14.
[93] *Id.* ¶ 15.
[94] *Id.* ¶¶ 18-20.
[95] *Munoz,* 2021 IL App (1st) 200254, ¶ 22.
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Munoz v. Bulley & Andrews, LLC*, 2022 IL 127067, ¶ 1; 820 ILCS 305/5(a), 11.
[100] *Munoz*, 2022 IL 127067, ¶¶ 2, 26, 29, 30-35 (citing *Laffoon v. Bell & Zoller Coal Co.*, 65 Ill. 2d 437, 440 (1976); *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 297-98 (2007); *Ioerger v. Halverson Const. Co., Inc.*, 232 Ill. 2d 196, 198 (2008); *Burge v. Exelon Generation Co., LLC*, 2015 IL App (2d) 141090, ¶ 14).
[101] *Id*. at ¶¶ 30-39 (citing *Laffoon*, 65 Ill. 2d 437; *Ioerger*, 232 Ill. 2d 196; *Burge*, 2015 IL App (2d) 141090).
[102] *Id*. ¶¶ 4-10.
[103] *Id*. ¶¶ 23, 26, 29, 35 (citing *Forsythe*, 224 Ill. 2d at 296-98; *Laffoon*, 65 Ill. 2d at 440-47; *Burge*, 2015 IL App (2d) 141090, ¶ 14).
[104] *Id*. ¶¶ 23-24 (citing 820 ILCS 305/5(a), 11; *Meerbrey v. Marshall Field & Co., Inc.*, 139 Ill. 2d 455, 462 (1990); *Forsythe*, 224 Ill. 2d at 296).
[105] *Id.* ¶ 24.
[106] *Id.* ¶¶ 4-10, 22-25, 27 (citing 820 ILCS 305/1(a)(2), (3), 5(a), 11; *Laffoon*, 65 Ill. 2d at 447).
[107] *Id.* ¶ 27 (citing *Laffoon*, 65 Ill. 2d at 447).
[108] *Id.*
[109] *Id.* ¶ 35.
[110] *Id.* ¶ 29 (citing *Forsythe*, 224 Ill. 2d at 297-98).
[111] *Id.*
[112] *Id.* ¶ 35 (citing *Burge*, 2015 IL App (2d) 141090, ¶ 14).
[113] *Id.*
[114] *Id.* ¶ 30 (citing *Ioerger*, 232 Ill. 2d 196).
[115] *Id.*
[116] *Id.* ¶ 31 (citing *Ioerger*, 232 Ill. 2d at 198-201).
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.* ¶ 31 (citing *Ioerger*, 232 Ill. 2d at 198).
[121] *Id.* ¶ 32 (citing *Ioerger*, 232 Ill. 2d at 198-203).
[122] *Id.*
[123] *Id.* ¶ 33 (citing *Ioerger*, 232 Ill. 2d at 198-204).
[124] *Id.* ¶ 34.
[125] *Id.* ¶ 38.
[126] *Id.* ¶ 39.
[127] *Id.* ¶ 2.