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WORKMEN'S COMPENSATION AND NEGLIGENT THIRD PARTIES

A problem confronting the courts with increasing regularity[1] is that of determining who is a third party against whom a workman, covered by the Workmen's Compensation Act, may pursue a common law remedy. The Virginia Supreme Court of Appeals has consistently held that the purpose of the Virginia statute is to limit the recovery of workmen to compensation and to deny an injured workman a recovery in a common law action, unless the negligent party is clearly a stranger to the workman's employment.[2] In *Anderson v. Thorington Constr. Co.*,[3] the court was called upon to determine whether two independent contractors working for a common employer on the same project bore the relationship of third parties to each other's employees.[4] It was held that since the owner was the statutory employer of each, the independent contractors were not third parties; therefore plaintiff's exclusive remedy was workmen's compensation.[5]

Prior to the adoption of the Workmen's Compensation Acts, an employer was liable for injuries to his employees resulting from his negligence.[6] However, liability was not imposed on the employer in the majority of cases[7] because the injured employee, in addition to having the burden of proving the employer's negligence, was subject to the common law defenses of contributory negligence, voluntary assumption of risk, and the fellow servant doctrine.[8] Under the Workmen's Compensation Acts an employer gives up his common law de-

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[1]Smith v. John B. Kelley, Inc., 275 F.2d 169, 172 (D.C. Cir. 1960) (concurring opinion).

[2]Doane v. E. I. DuPont De Nemours & Co., 209 F.2d 921, 926 (4th Cir. 1954) (applying Virginia law); Sykes v. Stone & Webster Eng'r Corp., 186 Va. 116, 125, 41 S.E.2d 469, 472 (1947); Feitig v. Chalkley, 185 Va. 96, 102, 38 S.E.2d 73, 75 (1946).

[3]201 Va. 266, 110 S.E.2d 396 (1959), appeal dismissed, 363 U.S. 719 (1960).

[4]The scope of this comment will be confined to this issue and will not consider plaintiff's contention, which the court rejected, "that because the act creating the Authority provides that it is 'created and constituted a political subdivision of the Commonwealth,' it is not an 'owner' within the meaning of § 65-26...." Id. at 273, 110 S.E.2d at 401. The court's rejection of this argument was reaffirmed in Williams v. E. T. Gresham Co., 201 Va. 457, 465, 111 S.E.2d 498, 504 (1959).

[5]201 Va. at 272, 110 S.E.2d at 400. This holding was later cited with approval in Williams v. E. T. Gresham Co., 201 Va. 457, 462-63, 111 S.E.2d 498, 502-03 (1959).

[6]1 Larson, Workmen's Compensation Law § 4.10-.30 (1952) (hereinafter cited as Larson); Prosser, Torts § 67 (2d ed. 1955).

[7]One writer estimates that 80% of the cases resulted in favor of employers. Horovitz, Current Trends in Basic Principles of Workmen's Compensation, 12 Law Soc. J. 465, 467 (1947).

[8]1 Larson § 4.30; Prosser, Torts § 68 (2d ed. 1955).

fenses and is made liable without fault, while a workman gives up his common law action for negligence in return for certain, though limited, compensation irrespective of fault.[9]

All states now have Workmen's Compensation Acts[10] which, although differing widely in their terms, are based upon the idea that an industrial accident is a cost of production.[11] In keeping with this enterprise theory of compensation, most states have adopted the statutory employer concept,[12] which makes the owner[13] or principal contractor[14] a statutory employer, and makes all persons engaged in the "trade, business or occupation" of the owner or principal contractor statutory employees subject to the terms of the Act. At the same time, however, all states recognize an employee's right to a common law action against a negligent third party.[15] The majority of statutes provide that an injured worker can maintain an action against "persons other than the employer" or against "third persons."[16] Some acts,[17] such as that of Virginia, provide for a common law action against the "other party"[18] while stipulating that compensation shall be the exclusive

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[9]Thomas v. George Hyman Constr. Co., 173 F. Supp. 381, 382 (D.D.C. 1959); Feitig v. Chalkley, 185 Va. 96, 98, 38 S.E.2d 73, 74 (1946); Prosser, Torts § 69 (2d ed. 1955).

[10]Prosser, Torts § 69 (2d ed. 1955).

[11]Thomas v. George Hyman Constr. Co., 173 F. Supp. 381, 382 (D.D.C. 1959); McCoid, The Third Person in the Compensation Picture: A Study of the Liabilities and Rights of Non-Employers, 37 Texas L. Rev. 389, 396-97 (1959) (hereinafter cited as McCoid).

[12]Forty-one states have statutory employer type statutes. 2 Larson § 72.31.

[13]"When any person (in this section and §§ 65-28 and 65-29 referred to as 'owner') undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and §§ 65-28 to 65-31 referred to as 'sub-contractor') for the execution or performance by or under such sub-contractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Act which he would have been liable to pay if the workman had been immediately employed by him." Va. Code Ann. § 65-26 (1950).

[14]"When any person (in this and the four succeeding sections referred to as 'contractor') contracts to perform or execute any work for another person which work or undertaking is not a part of the trade, business or occupation of such other person and contracts with any other person (in this section and §§ 65-28, 65-29, 65-30 and 65-31 referred to as 'sub-contractor') for the execution or performance by or under the sub-contractor of the whole or any part of the work undertaken by such contractor, then the contractor shall be liable to pay to any workman employed in the work any compensation under this Act which he would have been liable to pay if that workman had been immediately employed by him." Va. Code Ann. § 65-27 (1950).

[15]McCoid, Note 11 supra, at 393.

[16]Id. at 403 & n.49.

[17]Id. at 403-04 & n.50.

[18]"The making of a lawful claim against an employer for compensation ... shall

remedy against the employer and "those conducting his business."[19] A major problem arises when the courts, in an effort to ascertain legislative intent, attempt to define "other party" or "third party." The test usually employed is whether the work being done at the time of the injury was part of the "trade, business or occupation" of the owner or principal contractor; if so, he is not an "other party" amenable to a common law action.[20]

Two basic factual relationships are presented in these third party cases—*vertical* and *horizontal.* In the classic *vertical* line the parties are in privity with one another, whereas in the more unique *horizontal* line the parties are not in privity nor is one working under the other's control.[21] The primary distinguishing factor is that in a *vertical* relationship the general contractor is liable for compensation to the subcontractor's employees; whereas in a *horizontal* relationship the general contractor, who has contracted with two independent contractors to perform separate services, may be liable for compensation to the employees of the independent contractors,[22] but one independent contractor is not liable for compensation to the employees of the other independent contractor.[23]

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operate as an assignment to the employer of any right to recover damages which the injured employee ... may have against any other party...." Va. Code Ann. § 65-38 (1950).

[19]"Every employer subject to the compensation provisions of this Act shall insure the payment of compensation to his employees in the manner hereinafter provided. While such insurance remains in force he or those conducting his business shall only be liable to an employee for personal injury or death by accident to the extent and in the manner herein specified." Va. Code Ann. 65-99 (1950).

[20]Sears, Roebuck & Co. v. Wallace, 172 F.2d 802, 806 (4th Cir. 1949) (applying Virginia law). It is to be noted that the common law control test is no longer a factor in the statutory employer sections; furthermore, it is not determinative in the third party cases. See Schulte v. American Box Board Co., 358 Mich. 21, 99 N.W.2d 367, 372 (1959) (concurring opinion).

[21]Anderson v. Dixie Drilling Co., 173 F. Supp. 21, 22 (W.D. La. 1959). This distinction is not generally recognized, probably because there are relatively few cases that present the horizontal relationship.

[22]An owner is liable for compensation to employees of independent contractors if the independent contractors are engaged in the trade, business or occupation of the owner. See Anderson v. Thorington Constr. Co., 201 Va. 266, 110 S.E.2d 396 (1959). On the other hand, an owner is not liable for compensation if the independent contractors are not engaged in the trade, business or occupation of the owner. See Kramer v. Kramer, 199 Va. 409, 100 S.E.2d 37 (1957). Furthermore, the Virginia statute provides: "Nothing in this Act shall be construed to make, for the purpose of this Act, the employees of an independent contractor the employees of the person or corporation employing or contracting with such independent contractor." Va. Code Ann. § 65-5 (1950).

[23]The Act is not controlling if the employer-employee relationship does not exist in fact, or is not created by statute. Kramer v. Kramer, 199 Va. 409, 418, 100 S.E.2d

The vertical line usually has four parties in interest[24]—an owner, general contractor, subcontractor, and an employee who is injured through the negligence of one of the parties. The problem in such a situation is in determining who is an "other party" on the ascending-descending scale. The Virginia statute provides that an owner or general contractor is liable for compensation if the employee is engaged in work which the owner or general contractor has undertaken to have performed as part of his own trade, business or occupation.[25] Under such circumstances, an owner or general contractor is deemed to be the statutory employer of his subcontractor's employees, and as such is not an "other party" amenable to a common law action by an employee of his subcontractor.[26] However, if the work being performed by an employee is not a part of the owner's or general contractor's business, then he is amenable to a common law action for his negligence.[27] Moreover, just as the Act bars a common law action

37, 44 (1957). There is no employer-employee relationship between the employee of one independent contractor, i.e., Anderson, and the other independent contractor, i.e., Thorington. Thus, no liability for compensation exists.

In Kramer the court said that "if the employee cannot sue another independent contractor at common law, it must be because under the compensation law the plaintiff is the employee of the defendant. . . ." However, this reasoning is extended by Thorington where it is seen that non-liability for compensation is not necessarily co-extensive with common law liability.

[24]Sykes v. Stone & Webster Eng'r Corp., 186 Va. 116, 123, 41 S.E.2d 469, 472 (1947); Bamber v. City of Norfolk, 138 Va. 26, 33, 121 S.E. 564, 566 (1924).

[25]Va. Code Ann. § 65-26 (1950) (owner); Va. Code Ann. § 65-27 (1950) (contractor). See notes 13 and 14 supra. The owner is liable for compensation if the work being performed is part of the trade, business or occupation of the owner. However, if the work is not part of the trade, business or occupation of the owner and the owner contracts with someone else to perform such work, the contractor and not the owner is liable for compensation. Sykes v. Stone & Webster Eng'r Corp., 186 Va. 116, 124-25, 41 S.E.2d 469, 472 (1947).

[26]Owner: Corban v. Skelly Oil Co., 256 F.2d 775 (5th Cir. 1958); Maryland Cas. Co. v. Gulf Ref. Co., 110 So. 2d 784 (La. App. 1959); Stansbury v. Magnolia Petroleum Co., 91 So. 2d 917 (La. App. 1957); Sykes v. Stone & Webster Eng'r Corp., 186 Va. 116, 122, 41 S.E.2d 469, 472 (1947) (dictum).

General contractor: Home Idem. Co. v. Poladian, 270 F.2d 156 (4th Cir. 1959) (applying Virginia law); McCann v. Newport News Shipbuilding & Dry Dock Co., 177 F. Supp. 909 (E.D. Va. 1959); McEvilly v. L. E. Myers Co., 211 Ky. 31, 276 S.W. 1068, 1071 (1925); Bunner v. Patti, 343 Mo. 274, 121 S.W.2d 153 (1938); Sykes v. Stone & Webster Eng'r Corp., 186 Va. 116, 41 S.E.2d 469 (1947).

Contra, Thomas v. George Hyman Constr. Co., 173 F. Supp. 381 (D.D.C. 1959); Schulte v. American Box Board Co., 358 Mich. 21, 99 N.W.2d 367 (1959); Wilson v. Faull, 45 N.J. Super. 555, 133 A.2d 695 (App. Div. 1957); Cutillo v. Emory Housing Corp., 19 Misc. 2d 865, 190 N.Y.S.2d 502 (Sup. Ct. 1959). See generally 108 U. Pa. L. Rev. 155 (1959).

[27]Owner: Sears, Roebuck & Co. v. Wallace, 172 F.2d 802 (4th Cir. 1949) (applying Virginia law); Battistelli v. Connohio Inc., 138 Conn. 646, 88 A.2d 372 (1952); Jones

on the ascending scale, Virginia has also held that the Act bars an action on the descending scale, thereby preventing an employee of the owner or general contractor from maintaining an action against a subcontractor.[28]

The *horizontal* line, on the other hand, is illustrated by the *Anderson* case.[29] The Richmond-Petersburg Turnpike Authority contracted with an engineering firm, plaintiff's employer, to act as consulting engineers and to supervise the construction. The Authority also contracted with the defendant, Thorington, to perform construction work. In the performance of this contract, Anderson was injured by one of Thorington's employees. The trial court sustained defendant's special plea and held that the case was within the exclusive jurisdiction of the Industrial Commission of Virginia. The Virginia Supreme Court of Appeals affirmed, and, recognizing the trial court's holding that Thorington and the engineering firm were independent contractors, held that Thorington and plaintiff's employer were both engaged in the trade, business or occupation of the Authority. Thus, Thorington was not an "other party" within the meaning of the Act and was not amenable to a common law action.[30] The court further reasoned that Anderson and the employees of Thorington were both

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v. Florida Power Corp., 72 So. 2d 285 (Fla. 1954); Ball v. Kaiser Alumnium & Chem. Corp., 112 So. 2d 741 (La. App. 1959).

General contractor: Garrett v. Tubular Prods. Inc., 176 F. Supp. 101 (E.D. Va. 1959).

[28]Doane v. E. I. DuPont De Nemours & Co., 209 F.2d 921 (4th Cir. 1954) (applying Virginia law); Williams v. E. T. Gresham Co., 201 Va. 457, 111 S.E.2d 498 (1959); Rea v. Ford, 198 Va. 712, 96 S.E.2d 92 (1957). In reasoning that a subcontractor is not an "other party" within the meaning of the Act, it has been pointed out that "there is nothing to indicate that while a workman is so engaged, he has a common law right of action against any contractor or workman below him in the descending line." Doane v. E. I. DuPont De Nemours & Co., supra at 925-26; Rea v. Ford, supra at 717, 96 S.E. 2d at 95.

The majority of jurisdictions that have considered this question have held that a sub-contractor is a third party, 2 Larson § 72.32, reasoning that the statute operates downward as far as liability for compensation is concerned and upward as far as the employee's rights of compensation are concerned, thus permitting the workman to maintain a common law action against someone below him on the descending line. Dillman v. John Diebold & Son Stone Co., 241 Ky. 631, 44 S.W.2d 581, 583 (1931).

[29]The issue presented by the principal case had been considered by the Virginia court only two years earlier in Kramer v. Kramer, 199 Va. 409, 100 S.E.2d 37 (1957). However, in that case the owner was not engaged in the business of the contractor and was thus a stranger to the employment, or an "other party." The court held that an employee of one independent contractor could maintain a common law action against another independent contractor where there was no common statutory employer. Accord, Pimental v. John E. Cox Co., 299 Mass. 579, 13 N.E.2d 441 (1938). See Miami Roofing & Sheet Metal Co. v. Kindt, 48 So. 2d 840, 842 (Fla. 1950).

[30]201 Va. at 272, 110 S.E.2d at 400, applying § 65-38 of the Act, supra note 18.

statutory employees of the Authority. This being so, the employees of the two independent contractors were "statutory fellow servants" and as such were not entitled to maintain a negligence action against one another or against their respective employers.[31]

It is apparent that in the principal case Anderson would have had no cause of action against the Authority if he had been injured by an employee of the Authority—since he was engaged in its "business" the Authority was not an "other party."[32] But, in *Anderson,* it was further reasoned that as the Authority was the statutory employer of both contractors, one independent contractor was not an "other party" with relation to an employee of the other. In so concluding the court is applying to the *horizontal* relationship the same statutory concept that is normally applied to the *vertical* relationship.

In holding that a statutory fellow servant is not an "other party" subject to a common law action, the court relied on its previous decision in *Feitig v. Chalkley.*[33] In that case the court held that a co-employee is included in the phrase "those conducting his business" and that a workman injured through the negligence of a fellow worker is bound by his exclusive remedy under the Act. It was reasoned that an injury by a fellow worker is an inherent risk contemplated by the Act, and the burden of such industrial accidents should be shared by the entire enterprise as an industrial cost.[34] Some jurisdictions immunize the fellow servant,[35] either by statute or judicial decision, and this result is well supported by the theory of the Acts.[36] One authority suggests that by accepting the terms of the Act the employee, as well as the employer, should be free from common law liability.[37]

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[31]Id. at 272, 110 S.E.2d at 400-01, applying § 65-26 of the Act, supra note 13.

[32]McCann v. Newport News Shipbuilding & Dry Dock Co., 177 F. Supp. 909, 912 (E.D. Va. 1959); see note 26 supra and accompanying text.

[33]185 Va. 96, 38 S.E.2d 73 (1946).

[34]Id. at 102, 38 S.E.2d at 76.

[35]Rylander v. Chicago Short Line Ry., 17 Ill. 2d 618, 161 N.E.2d 812, 818 (1958); Bresnahan v. Barre, 286 Mass. 593, 190 N.E. 815 (1934); Rauch v. Jones, 4 N.Y.2d 592, 152 N.E.2d 63, 176 N.Y.S.2d 628 (1958); Phillips v. Brinkley, 194 Va. 62, 72 S.E.2d 339 (1952); Feitig v. Chalkley, 185 Va. 96, 38 S.E.2d 73 (1946); 2 Larson § 72.20. Contra, Gee v. Horvath, 169 Ohio St. 14, 157 N.E.2d 354 (1959); Zimmer v. Casey, 296 Pa. 529, 146 Atl. 130 (1929).

[36]Comment, 10 Wash. & Lee L. Rev. 274, 279-80 (1953); Note, 43 Iowa L. Rev. 352, 355-56 (1958); Note, 39 Va. L. Rev. 951, 953 (1953).

"That result follows from the basic purpose of workmen's compensation to place the cost of industrial accidents upon the industry. That purpose would be blunted if the cost of those accidents was shifted from one employee to another within the industry. So far as persons within the industry are concerned, the Workmen's Compensation Act eliminated fault as a basis for liability." Rylander v. Chicago Short Line Ry., 17 Ill. 2d 618, 161 N.E.2d 812, 818 (1959).

[37]2 Larson § 72.20.

This suggestion is well supported by the fact that the employee is merely the *alter ego* of the employer, and as such should be entitled to enjoy the same benefits.

In applying the rule of the *Feitig* case to the factual situation presented in *Anderson,* some might think that the court has stretched the logical limits of this reasoning to an extreme which would produce unjust results to an injured workman who has received inadequate compensation.[38] However, other jurisdictions have reached like results,[39] and these decisions appear to be supported by the theory of workmen's compensation. The result reached by the Virginia court finds further justification in Professor Larson's suggestion that an employee who has accepted the terms of the Act should also be granted immunity from common law actions.[40]

Thus it appears that the Virginia Supreme Court of Appeals, in dealing with the increasing attempts to maintain common law actions against third parties, has adhered to the original theory and purpose of the Act by making workmen's compensation an exclusive remedy, unless the negligent party is clearly a stranger to the employment. In this era of highly specialized work and large construction projects employing many contractors, it becomes readily apparent that to hold otherwise would in many instances cast the burden of industrial accidents on the employees, thereby abandoning the original theory and purpose of the Acts—the concept of enterprise liability.

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[38]As compensation payments are scaled according to injury there are many cases where a worker receives inadequate compensation for his injury and loss of work. See Larson, "Model-T" Compensation Acts in the Atomic Age, 18 NACCA L. J. 39 (1956).

[39]Miami Roofing & Sheet Metal Co. v. Kindt, 48 So. 2d 840 (Fla. 1950); Pimental v. John E. Cox Co., 299 Mass. 579, 13 N.E.2d 441, 444 (1938); Dresser v. New Hampshire Structural Steel Co., 296 Mass. 97, 4 N.E.2d 1012 (1936). Contra, Anderson v. Dixie Drilling Co., 173 F. Supp. 21 (W.D. La. 1959); Rota-Cone Oil Field Operating Co. v. Chamness, 197 Okla. 103, 168 P.2d 1007 (1946). In the Miami Roofing and Dresser cases, the problem was whether an employee of one subcontractor can maintain a common law action against another subcontractor on the same job where both subcontractors are performing work for the same general contractor. It is submitted that this issue is identical with the issue presented by the principal case and these decisions are controlling.

[40]See note 37 and accompanying text.