

262 VAB41

In The
Supreme Court of Virginia

RECORD NO. 002735

**ROBERT BOSLEY
and
W.B. MEREDITH, II, INC.,**

Appellants,

v.

MICHAEL A. SHEPHERD,

Appellee.

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VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF VIRGINIA BEACH

MICHAEL A. SHEPHERD, ✓

Plaintiff,

AT LAW NO.: 0698-2952

v.

W.B. MEREDITH II, INC.

Serve: Benjamin Hubbard
Registered Agent
112 Coastal Way
Chesapeake, VA 23320

and

ATLANTIC WELDING & FABRICATING, INC.

Serve: Scott Doverspike
1168 Jensen Drive
Virginia Beach, VA 23451

and

ROBERT BOSLEY
2540 Edgehill Ave.
Virginia Beach, VA

and

PETER GODFREY → NON-SUITED

Serve: DMV

Defendants.

MOTION FOR JUDGMENT

Plaintiff, Michael A. Shepherd, by counsel, hereby
moves the Honorable Circuit Court for the City of Virginia
Beach, Virginia, for judgment of and against the defendants,
W.B. Meredith II, Inc. and Atlantic Welding & Fabricating,
Inc., Robert Bosley and Peter Godfrey, jointly and

severally, in the sum of TWO MILLION DOLLARS (\$2,000,000.00) together with interest from 11/14/96 and his taxable costs for this, to wit:

COUNT ONE

1. At all times pertinent hereto, defendant W.B. Meredith II, Inc. (hereinafter "Meredith"), its agents, employees, and assigns, was the General or Prime Contractor for the construction of the SOF Amphibious Support Building, FCTC Dam Neck, in Virginia Beach, Virginia (hereinafter "job site").

2. That Meredith, through its agents, employees and assigns had direct supervisory control and responsibility for the actions of all contract personnel on the project site known as SOF Amphibious Support Building, FCTC Dam Neck in Virginia Beach, Virginia, on November 14, 1996; had direct control and responsibility for the proper installation and erection of the structural steel involved in the construction of said building at all times pertinent hereto; had the duty and obligation to comply with, and cause any other contractors or subcontractors under their direct supervision and control to comply with, all government safety requirements as set forth in government safety manuals regarding erection and placement of structural steel during the construction of said building; and to insure that accepted steel erection procedures and safety requirements be followed in the construction of said

building, including but not limited to the writing, review and implementation of a certain Activity Hazard Analysis for the structural steel erection involved in the construction of said building. .

3. That on or about 14 November 1996, Meredith did negligently supervise the erection by defendant Atlantic Welding and Fabricating, Inc. of structural steel tubes or girts, in the approximate dimensions of 8" by 8" by 30 feet long, on the structure of the SOF Amphibious Support building between the second floor and the roof deck of the structure, some 20 feet from the ground on the southeast side of the building, as those girts were neither left in their supporting slings and attached to their hoisting lines nor tack-welded nor bolted into place prior to releasing the slings and hoisting line from the steel girts being placed.

4. That on or about 14 November 1996 Meredith, its employees, agents and assigns negligently supervised the hoisting and installation, into a horizontal position approximately 20 feet off the ground of an open structure of the SOF Amphibious Support building, of the structural steel girts by failing to insure that said girts remained in their slings and attached hoisting lines, or were secured by tack welds or bolts to secure said steel girts in a safe and proper position, after having been hoisted into bracketing connecting the girts to vertical columns at each end of the girt.

5. That the failure to secure the steel girts by having them remain in slings or attached to hoisting lines or tack welded or bolted into safe position was in violation of accepted steel erection procedures and safety requirements set forth by the government of the United States, and Meredith's negligent failure to insure that those girts were secured by slings and hoisting lines, or by tack welds or bolts as they were hoisted and placed, prior to releasing the slings and hoisting lines which elevated and positioned the girts, created a safety hazard and exposed all individuals at the job site to serious risk of bodily harm.

6. That having negligently supervised the hoisting and erection of the steel girts as set forth above, Meredith further had the duty to take appropriate measures to make safe the areas beneath and around the unsecured girts by clearing that area and preventing all personnel on the job site from entering the immediate area beneath and around the unsecured steel girts, and to otherwise warn all personnel at or around that portion of the job site of the presence of the unsecured steel girts.

7. That Meredith, its agents and assigns, knew or should have known in the exercise of its supervisory capacity on the job site and its duty to exercise due care that the defendant Atlantic Welding and Fabricating, Inc., hoisted and erected the structural steel girts without

properly securing them by tack welds or bolts, prior to releasing the slings and hoisting lines which elevated and positioned the girts, nor had those girts remained in slings and attached to hoisting lines until so bolted and welded, thereby creating a safety hazard to all personnel on the job site.

8. That on or about November 14, 1996 at or about 1500 Meredith, its employees, agents and assigns did negligently supervise, direct, allow and fail to prevent or forbid the delivery and offloading of gypsum sheathing drywall by directing and/or allowing the offloading of that drywall in the immediate area beneath and around the unsecured steel girts, by failing to warn those working in the area beneath and around the unsecured steel girts that the area was hazardous to the health and safety of those in it, as Meredith knew or in the exercise of due care should have known that that area was dangerous to all who entered there.

9. That on or about November 14, 1996 at or about 1500, plaintiff Michael A. Shepherd was lawfully on the project site known as SOF Amphibious Support Building, FCTC Dam Neck , Virginia Beach, Virginia, delivering gypsum sheathing drywall to a subcontractor located on the job site.

10. That on or about the time and place aforesaid, and as a direct and proximate result of the negligence of

Meredith as aforesaid, while plaintiff Michael A. Shepherd was attempting to deliver and place drywall on the second story of the southeast side of the premises through use of a hydraulic truck mounted crane, a structural steel girt became dislodged from its bracket, causing the improperly and negligently secured steel girt to fall upon plaintiff Michael A. Shepherd.

11. That as a direct and proximate result of the negligence of the defendant Meredith as aforesaid, plaintiff was caused to sustain serious, severe, painful and permanent injuries; has incurred medical and hospital expenses in an effort to be healed and cured and will continue to incur said expenses in the future; has suffered and will continue to suffer great physical pain and mental anguish; has been unable to carry on his usual occupation; has lost time from work and will continue to lose time from work in the future; has lost and will continue in the future to sustain a loss of earning capacity; has been otherwise injured and damaged and will continue to be so injured and damaged.

WHEREFORE, plaintiff Michael A. Shepherd moves the Court for judgment as aforesaid against defendant W.B. Meredith II, Inc.

COUNT TWO

12. Plaintiff realleges and incorporates within this Count Two of the Motion for Judgment all allegations

previously set forth in Paragraphs 1-11 above.

13. At all times pertinent hereto, defendant Atlantic Welding and Fabricating, Inc. (hereinafter Atlantic), its agents, employees and assigns was the subcontractor in charge of the erection of structural steel in the construction of the SOF Amphibious Support Building, FCTC Dam Neck, in Virginia Beach, Virginia.

14. That on or about November 14, 1996, defendant Atlantic did negligently hoist into position and place tubular steel girts, in the approximate dimensions of 8" by 8" by 30 feet, on the southeast side of the structure of the SOF Amphibious Support Building between the second floor and the roof deck of the open structure some twenty feet from the ground, by removing the slings and hoisting lines which elevated and placed those girts into position without first having properly secured those girts by tack welding them into position or by bolting those girts into a proper and secure position or by having those girts remain in slings and attached to hoisting lines until bolted or tack welded into position.

15. That at the aforesaid time and place, and at all times pertinent hereto it was the duty of Atlantic, its agents, employees and assigns to properly install and erect the structural steel involved in the construction of said building; further, Atlantic, its employees, agents and assigns had the duty and obligation to comply with, and

cause any other contractors or subcontractors under their direct supervision and control to comply with, all government safety requirements as set forth in government safety manuals regarding erection and placement of structural steel during the construction of said building; and to insure that accepted steel erection procedures and safety requirements be followed in the construction of said building.

16. That on or about 14 November 1996 Atlantic, its employees, agents and assigns negligently hoisted and installed, into a horizontal position approximately 20 feet off the ground of an open structure of the SOF Amphibious Support building, the aforementioned structural steel girts by failing to insure that said girts were secured by tack welds or bolts to secure said steel girts in a safe and proper position after having been hoisted into bracketing connecting the girts to vertical columns at each end of the girt, and by failing to insure that the unbolted and unwelded girts remained attached to their slings and hoisting lines.

17. That the failure to secure the steel girts by tack welds or bolts was in violation of accepted steel erection procedures and safety requirements set forth by the government of the United States, and Atlantic and its employees', agents' and assigns' negligent failure to insure that those girts were secured, prior to the release

of the slings and hoisting lines which positioned those girts, by tack welds or bolts as they were hoisted and placed, or to insure that the girts remained attached to their slings and hoisting lines until so secured, created a safety hazard and exposed all individuals at the job site to serious risk of bodily harm.

18. That having negligently hoisted, installed and erected the steel girts as set forth above, Atlantic, its employees, agents, and assigns further had the duty to take appropriate measures to make safe the areas beneath and around the unsecured girts by clearing that area and preventing all personnel on the job site from entering the immediate area beneath and around the unsecured steel girts, and to otherwise warn all personnel at or around that portion of the job site of the presence of the unsecured steel girts.

19. That on or about November 14, 1996 at or about 1500 Atlantic, its employees, agents and assigns did negligently supervise, direct, allow and fail to prevent or forbid the delivery and offloading of gypsum sheathing drywall by directing and/or allowing the offloading of that drywall in the immediate area beneath and around the unsecured steel girts, by failing to warn those working in the area beneath and around the unsecured steel girts that the area was hazardous to the health and safety of those in it, as Atlantic knew or in the exercise of due care should

have known that that area was dangerous to all who entered there due to the presence of the unsecured steel girts. .

20. That on or about November 14, 1996 at or about 1500, plaintiff Michael A. Shepherd was lawfully on the project site known as SOF Amphibious Support Building, FCTC Dam Neck, Virginia Beach, Virginia, delivering dry wall to a subcontractor located on the job site.

21. That on or about the time and place aforesaid, and as a direct and proximate result of the negligence of Atlantic as aforesaid, while plaintiff was attempting to deliver and place drywall on the second story of the southeast side of the premises through use of a hydraulic truck mounted crane, a structural steel girt became dislodged from its bracket, causing the improperly and negligently secured steel girt to fall upon plaintiff Michael A. Shepherd.

22. That as a direct and proximate result of the negligence of the defendant Atlantic as aforesaid, plaintiff was caused to sustain serious, severe, painful and permanent injuries; has incurred medical and hospital expenses in an effort to be healed and cured and will continue to incur said expenses in the future; has suffered and will continue to suffer great physical pain and mental anguish; has been unable to carry on his usual occupation; has lost time from work and will continue to lose time from work in the future; has lost and will continue in the future

to sustain a loss of earning capacity; has been otherwise injured and damaged and will continue to be so injured and damaged.

WHEREFORE, plaintiff Michael A. Shepherd moves for judgment as aforesaid against the defendants, W.B. Meredith II, Inc. and Atlantic Welding & Fabricating, Inc., jointly and severally.

COUNT THREE

23. Plaintiff, Michael A. Shepherd, hereby realleges and incorporates into Count Three of this Motion for Judgment all allegations set forth in Paragraphs 1-22 above.

24. At all times pertinent hereto, defendant Robert Bosley was the superintendent for W.B. Meredith II, Inc. (hereinafter "Meredith"), the General or Prime Contractor for the construction of the SOF Amphibious Support Building, FCTC Dam Neck, in Virginia Beach, Virginia (hereinafter "job site"), was an employee of the defendant Meredith and was acting within the scope of his employment.

25. That as the employee of Meredith and while acting in the scope of his employment as superintendent on the job site set forth above, defendant Robert Bosley had direct supervisory control and responsibility for the actions of all contract personnel on the project site known as SOF Amphibious Support Building, FCTC Dam Neck in Virginia Beach, Virginia, on November 14, 1996; had direct control and responsibility for the proper installation and erection

of the structural steel involved in the construction of said building at all times pertinent hereto; had the duty and obligation to comply with, and cause any other contractors or subcontractors under their direct supervision and control to comply with, all government safety requirements as set forth in government safety manuals regarding erection and placement of structural steel during the construction of said building; and to insure that accepted steel erection procedures and safety requirements be followed in the construction of said building, including but not limited to the writing, review and implementation of a certain Activity Hazard Analysis for the structural steel erection involved in the construction of said building.

26. That on or about 14 November 1996, defendant Robert Bosley, while acting within the scope of his employment as superintendent for defendant Meredith at the job site set forth above, did negligently supervise the erection by defendant Atlantic Welding and Fabricating, Inc. of structural steel tubes or girts, in the approximate dimensions of 8" by 8" by 30 foot long, on the structure of the SOF Amphibious Support building between the second floor and the roof deck of the structure, some 20 feet from the ground on the southeast side of the building, as those girts were neither tack-welded nor bolted into place prior to releasing the sling and hoisting line from the steel girts being placed, or by having those girts remain in slings and

attached to hoisting lines until bolted or tack welded into position.

27. That on or about 14 November 1996 defendant Robert Bosley, while acting within the scope of his employment as superintendent for defendant Meredith at the job site set forth above, negligently supervised the hoisting and installation, into a horizontal position approximately 20 feet off the ground of an open structure of the SOF Amphibious Support building, of the structural steel girts by failing to insure that said girts were secured by tack welds or bolts to secure said steel girts in a safe and proper position after having been hoisted into bracketing connecting the girts to vertical columns at each end of the girt or by failing to insure that those girts remain in slings and attached to hoisting lines until bolted or tack welded into position.

28. That the failure to secure the steel girts by tack welds or bolts or to insure those girts remain in slings and attached to hoisting lines until so welded or bolted was in violation of accepted steel erection procedures and safety requirements set forth by the government of the United States, and defendant Robert Bosley's negligent failure to insure that those girts were secured by tack welds or bolts as they were hoisted and placed, prior to releasing the sling and hoisting lines which elevated and positioned the girts, or to insure those girts remain in slings and

attached to hoisting lines until so welded or bolted into a safe position created a safety hazard and exposed all individuals at the job site to serious risk of bodily harm.

29. That having negligently supervised the hoisting and erection of the steel girts as set forth above, defendant Robert Bosley, while acting within the scope of his employment as superintendent for defendant Meredith at the job site set forth above, further had the duty to take appropriate measures to make safe the areas beneath and around the unsecured girts by clearing that area and preventing all personnel on the job site from entering the immediate area beneath and around the unsecured steel girts, and to otherwise warn all personnel at or around that portion of the job site of the presence of the unsecured steel girts.

30. That defendant Robert Bosley, while acting within the scope of his employment as superintendent for defendant Meredith at the job site set forth above, knew or should have known in the exercise of his supervisory capacity on the job site and his duty to exercise due care that the defendant Atlantic Welding and Fabricating, Inc., hoisted and erected the structural steel girts without properly securing them by tack welds or bolts, prior to releasing the sling and hoisting lines which elevated and positioned the girts, or that defendant Atlantic did not keep those girts attached to slings and hoisting lines, thereby creating a

safety hazard to all personnel on the job site.

31. That on or about November 14, 1996 at or about 1500 defendant Robert Bosley, while acting within the scope of his employment as superintendent for defendant Meredith at the job site set forth above did negligently supervise, direct, allow and fail to prevent or forbid the delivery and offloading of gypsum sheathing drywall by directing and/or allowing the offloading of that drywall in the immediate area beneath and around the unsecured steel girts, by failing to warn those working in the area beneath and around the unsecured steel girts that the area was hazardous to the health and safety of those in it, as defendant Robert Bosley knew or in the exercise of due care should have known that that area was dangerous to all who entered there.

32. That on or about November 14, 1996 at or about 1500, plaintiff Michael A. Shepherd was lawfully on the project site known as SOF Amphibious Support Building, FCTC Dam Neck, Virginia Beach, Virginia, delivering gypsum sheathing drywall to a subcontractor located on the job site.

33. That on or about the time and place aforesaid, and as a direct and proximate result of the negligence of defendant Robert Bosley as aforesaid, while plaintiff Michael A. Shepherd was attempting to deliver and place drywall on the second story of the southeast side of the premises through use of a hydraulic truck mounted crane, a

structural steel girt became dislodged from its bracket, causing the improperly and negligently secured steel girt to fall upon plaintiff Michael A. Shepherd.

34. That as a direct and proximate the negligence of the defendant Robert Bosley as aforesaid, plaintiff was caused to sustain serious, severe, painful and permanent injuries; has incurred medical and hospital expenses in an effort to be healed and cured and will continue to incur said expenses in the future; has suffered and will continue to suffer great physical pain and mental anguish; has been unable to carry on his usual occupation; has lost time from work and will continue to lose time from work in the future; has lost and will continue in the future to sustain a loss of earning capacity; has been otherwise injured and damaged and will continue to be so injured and damaged.

WHEREFORE, plaintiff Michael A. Shepherd moves the Court for judgment as aforesaid against defendants Robert Bosley., W.B.Meredith II, Inc. and Atlantic Welding and Fabricating, Inc., jointly and severally.

COUNT FOUR

35. Plaintiff realleges and incorporates within this Count Four of the Motion for Judgment all allegations previously set forth in Paragraphs 1-34 above.

36. At all times pertinent hereto, defendant Peter

Godfrey was the foreman on the job site for Atlantic Welding and Fabricating, Inc. (hereinafter Atlantic), and at all times pertinent hereto, was employed by defendant Atlantic and was acting within the scope of his employment as the foreman for Atlantic, the subcontractor in charge of the erection of structural steel in the construction of the SOF Amphibious Support Building, FCTC Dam Neck, in Virginia Beach, Virginia.

37. That on or about November 14, 1996, defendant Peter Godfrey, while acting within the scope of his employment as foreman for defendant Atlantic did negligently supervise the hoisting into position and placement of tubular steel girts, in the approximate dimensions of 8" by 8" by 30 feet, on the southeast side of the structure of the SOF Amphibious Support Building between the second floor and the roof deck of the open structure some twenty feet from the ground, by removing the slings and hoisting lines which elevated and placed those girts into position without first having properly secured, or caused to be secured, those girts by tack welding them into position or by bolting those girts into a proper and secure position or by failing to insure that those girts remain in slings and attached to hoisting lines until bolted or tack welded into position.

38. At the aforesaid time and place, and at all times pertinent hereto it was the duty of defendant Peter Godfrey as foreman for Atlantic on the job site, to insure

KALFUS & NACHIMAN, P.C., ATTORNEYS AT LAW, NORFOLK, VIRGINIA

the safe and proper installation of and to erect the structural steel involved in the construction of said building; further, Peter Godfrey as foreman at the job site for Atlantic, along with its employees, agents and assigns under his direction, had the duty and obligation to comply with, and cause any other contractors or subcontractors under their direct supervision and control to comply with, all government safety requirements as set forth in government safety manuals regarding erection and placement of structural steel during the construction of said building; and to insure that accepted steel erection procedures and safety requirements be followed in the construction of said building.

39. That on or about 14 November 1996 defendant Peter Godfrey as foreman at the job site for Atlantic, along with its employees, agents and assigns under his direction, negligently hoisted and installed, into a horizontal position approximately 20 feet off the ground of an open structure of the SOF Amphibious Support building, the aforementioned structural steel girts by failing to insure that said girts were secured by tack welds or bolts to secure said steel girts in a safe and proper position after having been hoisted into bracketing connecting the girts to vertical columns at each end of the girt, or by failing to insure that those girts remain in slings and attached to hoisting lines until bolted or tack welded into position.

40. That the failure to secure the steel girts by tack welds or bolts was in violation of accepted steel erection procedures and safety requirements set forth by the government of the United States, and the negligent failure of defendant Peter Godfrey, while acting in the scope of his employment as a foreman for defendant Atlantic on the job site, to insure that those girts were secured, prior to the release of the slings and hoisting lines which positioned those girts, by tack welds or bolts as they were hoisted and placed or by failing to insure that those girts remain in slings and attached to hoisting lines until bolted or tack welded into position, created a safety hazard and exposed all individuals at the job site to serious risk of bodily harm.

41. That having negligently supervised the hoisting, installation, and erection of the steel girts as set forth above, defendant Peter Godfrey, while acting in the scope of his employment as a foreman for defendant Atlantic on the job site, further had the duty to take appropriate measures to make safe the areas beneath and around the unsecured girts by clearing that area and preventing all personnel on the job site from entering the immediate area beneath and around the unsecured steel girts, and to otherwise warn all personnel at or around that portion of the job site of the presence of the unsecured steel girts.

42. That on or about November 14, 1996 at or about

1500 Peter Godfrey, while acting in the scope of his employment as a foreman for defendant Atlantic on the job site did negligently supervise, direct, allow and fail to prevent or forbid the delivery and offloading of gypsum sheathing drywall by directing and/or allowing the offloading of that drywall in the immediate area beneath and around the unsecured steel girts, by failing to warn those working in the area beneath and around the unsecured steel girts that the area was hazardous to the health and safety of those in it, as defendant Peter Godfrey knew or in the exercise of due care should have known that that area was dangerous to all who entered there due to the presence of the unsecured steel girts.

43. That on or about November 14, 1996 at or about 1500, plaintiff Michael A. Shepherd was lawfully on the project site known as SOF Amphibious Support Building, FCTC Dam Neck, Virginia Beach, Virginia, delivering dry wall to a subcontractor located on the job site.

44. That on or about the time and place aforesaid, and as a direct and proximate result of the negligence of defendant Peter Godfrey as aforesaid, while plaintiff was attempting to deliver and place drywall on the second story of the southeast side of the premises through use of a hydraulic truck mounted crane, a structural steel girt became dislodged from its bracket, causing the improperly and negligently secured steel girt to fall upon plaintiff

Michael A. Shepherd.

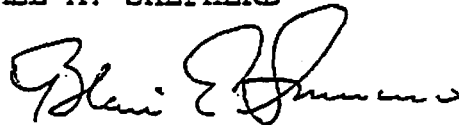
45. That as a direct and proximate the negligence of the defendant Meredith as aforesaid, plaintiff was caused to sustain serious, severe, painful and permanent injuries; has incurred medical and hospital expenses in an effort to be healed and cured and will continue to incur said expenses in the future; has suffered and will continue to suffer great physical pain and mental anguish; has been unable to carry on his usual occupation; has lost time from work and will continue to lose time from work in the future; has lost and will continue in the future to sustain a loss of earning capacity; has been otherwise injured and damaged and will continue to be so injured and damaged.

WHEREFORE, plaintiff Michael A. Shepherd moves for judgment as aforesaid against the defendants, W.B. Meredith II, Inc. and Atlantic Welding & Fabricating, Inc., Robert Bosley and Peter Godfrey, jointly and severally.

Plaintiff demands a jury trial.

MICHAEL A. SHEPHERD

By



Of Counsel

Blair E. Smircina, p.q.
Kalfus & Nachman, P.C.
870 N. Military Highway, Suite 300
Norfolk, VA 23541-0889
(757) 461-4900

FILED
VA. BEACH CIRCUIT COURT

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J. CURTIS FRUIT, CLERK

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH
MICHAEL A. SHEPHERD,

Plaintiff,

v.

At Law No.: CL98-2952

W.B. MEREDITH, II, INC.,
ATLANTIC WELDING & FABRICATING, INC.,
ROBERT BOSLEY, and
PETER GODFREY,

Defendants.

PLEA IN BAR

COME NOW defendants W.B. Meredith, II, Inc., and Robert Bosley, by counsel, and respectfully move this Court to dismiss the plaintiff's Motion for Judgment for lack of jurisdiction, pursuant to Virginia Code § 65.2-307, as discussed more fully below.

1. Virginia Code § 65.2-307 provides that the Virginia Workers' Compensation Act is the exclusive remedy for persons suffering injury arising out of and in the course of their employment. The Virginia Supreme Court has interpreted this Statute to bar a common law personal injury suit by an employee against a statutory employer or statutory fellow employee for accidental injuries arising out of employment. Evans v. Hook, 239 Va. 127, 387 S.E.2d 777 (1990).

2. The accident alleged in plaintiff's Motion for Judgment occurred on the construction project known as SOF Amphibious Support Building, FCTC Dam Neck in Virginia Beach.

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VIRGINIA BEACH CIRCUIT COURT

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J. CURTIS FRUIT, CLERK

3. Plaintiff was employed by Tidewater Interior Products, a subcontractor providing drywall to the construction site. Defendant Bosley was employed by defendant W.B. Meredith, II, Inc., working on the same job site. Contractors, subcontractors, their employees, and all workers who are engaged in the trade, occupation, or business of the owner or general contractor of a project are deemed to be statutory fellow employees. Thus, plaintiff, an employee of one subcontractor (Tidewater Interior Products) is the statutory fellow employee of Bosley and W.B. Meredith, II, Inc. The Workers' Compensation Act is the sole remedy for any injury suffered by an employee as a result of the alleged negligence of a statutory fellow employee. Nichols v. VVKR, Inc., 241 Va. 516, 403 S.E.2d 698 (1991).

For the reasons stated herein and pursuant to the authorities discussed above, defendants respectfully move for entry of an Order dismissing the Motion for Judgment against them and awarding their costs expended.

W.B. MEREDITH, II, INC., and
ROBERT BOSLEY

By Fay F. Spence
Of Counsel

Fay F. Spence, Esquire
SPENCE & WHITLOW
999 Waterside Drive
Dominion Tower, Suite 1630
Norfolk, VA 23510
(757) 624-9649

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Plea in Bar was mailed to all counsel of record and to all parties without counsel of record this 7th day of December, 1998.

Fay F. Spence

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF VIRGINIA BEACH

MICHAEL A. SHEPHERD,

PLAINTIFF,

v.

AT LAW NO.: CL98-2952

W.B. MEREDITH, II, INC.,
ATLANTIC WELDING & FABRICATING, INC.,
ROBERT BOSLEY,
and PETER GODFREY,

DEFENDANTS.

STIPULATIONS

COME NOW the parties, plaintiff and defendants, for purposes of the pending Plea in Bar hearing in this cause, and jointly stipulate the following:

1. The accident which is the subject of this proceeding occurred at the ~~SOF~~ Bldg. construction site on the Navy Base at Dam Neck, hereafter called the "Dam Neck Project."

2. W. B. Meredith, II, Inc. was the general contractor on the Dam Neck Project. The Dam Neck Project was undertaken in accordance with Contract N62470-93-C-3176 between the Department of the Navy ("Owner") and W.B. Meredith, II, Inc. ("General Contractor").

3. Robert Bosley was employed by W. B. Meredith, II, Inc., as Project Superintendent on the Dam Neck Project, and he was acting in the scope of his employment at all times relevant hereto.

4. Virginia-Carolina Steel was a subcontractor of W. B. Meredith, II, Inc., on the Dam Neck Project, and Atlantic

Welding was a subcontractor of Virginia-Carolina Steel on the Dam Neck Project.

5. Peter Godfrey was employed by Atlantic Welding and was performing work on the Dam Neck Project, in the scope of his employment, at all times relevant hereto.

6. Wenger Tile was a subcontractor of W. B. Meredith, II, Inc., on the Dam Neck Project.

7. Gypsum Management & Supply, t/a Tidewater Interior Products, contracted with Wenger Tile to provide, deliver and offload drywall and gypsum sheetrock on the Dam Neck Project.

8. The plaintiff was employed by Gypsum Management & Supply, t/a Tidewater Interior Products and was offloading drywall at the Dam Neck Project, in the scope of his employment, at the time of the accident which is the subject of this suit.

9. Plaintiff was operating a boom truck belonging to his employer on the Dam Neck Project at the time of the accident which is the subject of this suit. Plaintiff drove the boom truck to the job site, then unstrapped the material, unstrapped the boom from the truck, and set up stabilizers for the boom. Plaintiff then climbed a ladder to get into the operator's seat to control the boom to move the backs of drywall into and around the building under construction. The boom is operated with two foot pedals and several hand controls. Plaintiff has been trained and certified in the operation of the boom truck and was the only employee of Gypsum Management & Supply, t/a Tidewater Interior Products, authorized to operate the boom truck on the Dam Neck Project at the date and time of his injury.

10. Wenger Tile directed plaintiff and plaintiff's co-worker to offload at several different locations in the building under construction on the Dam Neck Project. While moving from one location to another, plaintiff was required to relocate the boom and reset the stabilizers.

According to the plaintiff's testimony,
11. Wenger Tile paid Gypsum Management & Supply, t/a Tidewater Interior Products, substantially more money to have the plaintiff offload drywall at several locations in the building under construction rather than paying for mere delivering of drywall to the site.

12. Delivery of drywall to the site, without offloading it into a building under construction, would not require use of a boom truck.

13. According to plaintiff's testimony, some suppliers of drywall, such as HQ, simply deliver the drywall to the site and do not offload into the building under construction. Such suppliers generally do not own or operate a boom truck.

14. If drywall is not offloaded to a particular area by a boom truck, drywall is moved manually on a job site in bundles, i.e. two sheets of drywall at a time. Sometimes this will be done by employees of a supplier and sometimes by the workers installing the drywall.

15. Drywall to be delivered to be used in construction.

W.B. MEREDITH, II, INC. and
ROBERT BOSLEY

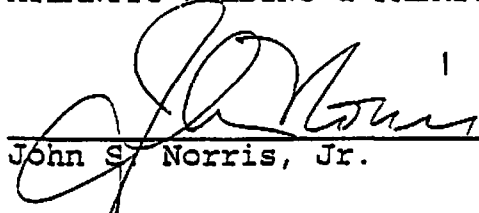
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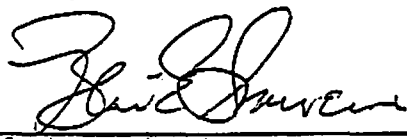
J. CURTIS FRUIT, CLERK

ATLANTIC WELDING & FABRICATING, INC.



John S. Norris, Jr.

MICHAEL A. SHEPHERD



Blair Smircina

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

MICHAEL A. SHEPHERD,

Plaintiff,

v.

AT LAW NO.: CL98-2952

W.B. MEREDITH, II, INC., et. als.,

Defendants.

MEMORANDUM OF LAW IN OPPOSITION TO PLEA IN BAR

COMES NOW Michael Shepherd, plaintiff in the above-styled case, by counsel, and submits the following Memorandum of Law in opposition to the Plea in Bar filed by the defendants, W.B. Meredith, II, Inc. and Robert Bosley in this matter. This brief is filed pursuant to a schedule set forth by The Honorable Judge Hanson of this Court, with opposition briefs and rebuttal briefs to be set forth to this Court subsequently.

STATEMENT OF FACTS

The plaintiff respectfully refers to the Stipulation of Facts previously submitted by the parties in this matter, and to the appended portions of the deposition of John G. Rymiszewski, the supervisor of the plaintiff and Vice-President and General Manager of Tidewater Interior Products, the employer of the plaintiff.

DISCUSSION AND ARGUMENT

Plaintiff, at the time of the mishap resulting in his injuries which is the subject of this lawsuit, was a boom truck operator and a drywall hauler for Tidewater Interior Products. He was

injured while delivering and off-loading drywall to and at the construction site known as the Special Operations Forces Amphibious Support Building aboard the Dam Neck Naval Installation. The provisions of the Workmen's Compensation Act do not bar a tort action if the person or entity who causes the injury is an "other party" within the meaning of the Act; therefore, defendants Meredith, Bosley, and Atlantic Welding were an "other party" if at the time of the accident plaintiff Michael Shepherd was not performing work that was part of the defendants' trade, business, or occupation. The seminal issue to be determined by this Court in ruling upon the Plea in Bar is whether Michael Shepherd was injured while supplying and delivering drywall to the construction site at Dam Neck. If his activities that day were nothing other than supplying and/or delivering materials to the construction site, then the law as set forth repeatedly by the Supreme Court of Virginia is abundantly clear: the plaintiff-deliveryman was not, at the time he sustained his injuries, participating in the construction of the Special Operations Forces building, was not engaged in the trade, business or occupation of the general contractor, and therefore the plaintiff-deliveryman can properly bring a tort action against the general contractor and its subcontractors for the injuries inflicted by the general contractor's statutory employees. Burroughs v. Walmont, Inc., 210 Va. 98, 168 S.E.2d 107 (1969); Yancey v. JTE Constructors, Inc., 252 Va. 42, 471 S.E.2d 473 (1996); Hipp v. Sadler Materials Corporation, 211 Va. 710, 180 S.E.2d 501 (1971). As that is in fact the case, the Plea in Bar should therefore be, and is properly to be, denied.

Defendant W.B. Meredith, II, Inc. was the general contractor of the aforementioned project and Robert Bosley was its construction superintendent. Defendant Atlantic Welding and Fabricating was a subcontractor of Meredith, in charge of the structural steel erection, among other things, at this site. Plaintiff's employer, Tidewater Interior Products, had an agreement with Wenger Tile, the

drywall subcontractor on the Special Operations Forces project, to supply and deliver to Wenger Tile at the project site, gypsum sheathing and insulation on the day of plaintiff's injuries, and for an additional consideration, to place and stack quantities of the sheathing at locations specified by Wenger Tile on the jobsite. While using a boom crane truck to offload and place gypsum sheathing on the second deck of this construction site, plaintiff alleges he was injured when an unsecured steel beam fell off its brackets and slid down the arm of the crane and struck him. At the time plaintiff sustained his injuries, plaintiff's employer had no contractual relationship concerning this project with any of the named defendants, attended no construction meetings concerning the project, and had only an agreement with Wenger Tile to deliver drywall to the jobsite. (See Rymiszewski deposition, pp.67-70, attached as "Exhibit 1" to this pleading).

The present case is identical to the Burroughs case cited above in all pertinent aspects. Plaintiff, in that case, was an employee of a trucking company delivering sheetrock to a residential construction site. Under a contract with the general contractor, Cherrydale Cement Block Company agreed to supply sheetrock for use in walls in the homes being constructed, and for an additional consideration, agreed to deliver specified quantities of sheetrock to the rooms in the homes, and to stack in each room in the homes under construction an appropriate amount of sheetrock. The plaintiff was an employee of the trucking company hired by the sheetrock supplier to deliver the sheetrock, and while carrying sheetrock into the homes under construction, fell down an open stairwell in one of the homes, sustaining injuries. Reviewing the situation, and acknowledging that, as in the instant case, the gathering of material is essential to the construction of a building, the Court nevertheless held that the act of stacking of sheetrock in the several rooms of the construction site constituted the final act of delivery, and not an act of construction. Therefore, persons who

function solely as suppliers and deliverers of goods are an "other party" for purposes of the Workmen's Compensation Act, the activity of the plaintiff/ deliveryman in stacking sheetrock at specified places on the construction site did not transcend delivery, and therefore the plaintiff/deliveryman was not involved in the trade, business or occupation of the general contractor in constructing the building. Burroughs, 210 Va. at 100; See also Perkinson v. Thomas, 158 Va. 699, 164 S.E.2d 561 (1932); Garrett v. Tubular Prods., Inc., 176 F.Supp.101 (E.D.Va. 1959). As the plaintiff/deliveryman was an "other party" for purposes of the Workmen's Compensation Act to the defendant/general contractor, his tort action for personal injuries against the general contractor was not barred by the provisions of the Workmen's Compensation Act.

This holding has been reaffirmed and indeed expanded by the Court in more recent cases. In the Hipp case, it was held that an action was properly brought in tort against a concrete subcontractor to the general contractor by the employee of another subcontractor at the jobsite, who was struck by the concrete subcontractor's vehicle. The concrete subcontractor was to deliver concrete to the jobsite where it would be spread or finished by non-employees of the concrete subcontractor. It was held that the employee of subcontractor who was struck by the concrete subcontractor's truck was not barred by the Workmen's Compensation Act from bringing a tort action against the concrete subcontractor, as the concrete subcontractor was required only to deliver concrete where directed, not to spread or finish the concrete, and in performing its obligation, the concrete subcontractor's employee was performing the final act of delivery, not an act of construction constituting the trade, business or occupation of the general contractor. Hipp v. Sadler, 211 Va. 710, 180 S.E.2d 501 (1971).

The Court stated the proposition differently, but with equal clarity and to the same effect, in the case of Yancey v. JTE Constructors, Inc., 252 Va. 42, 471 S.E.2d 473 (1996). There, an employee of a subcontractor who was injured while inspecting a sound barrier at a highway construction site filed a motion for judgment in tort against the general contractor, alleging negligence. There, it was found and held that the general contractor on a highway project was not the statutory employer of the employee of a subcontractor which supplied and delivered the sound barrier wall panels to the jobsite, who was injured while inspecting the panel after it was unloaded from the delivery truck. The employee was not engaged in the trade, business or occupation of the general contractor at the time he sustained his injury, as the inspection of the sound barrier panel was deemed to be the final act of delivery required by the contract, and the subcontractor's employee (Yancey) did not engage in the general contractor's work of incorporating the panels into the sound barrier wall. Indeed, the panels manufactured and delivered by the subcontractor were not the sound wall itself, but "were component parts of the wall, much like nails, board and sheetrock are component parts of the house ... and (plaintiff's) inspection and patching activities were the final acts of delivery required by the contract." Id., 252 Va. at 45, 471 S.E.2d at 475. It was further found that Yancey's activities in inspecting the panels delivered did not change the substance of what he was doing -- completing the act of delivering sound barrier wall panels as required by the contract.

None of the authorities cited by counsel for the defendants concern delivery of materials to a construction site by a materialman or supplier. Those cases cited deal with delivery of medical services to a city jail, repair of military equipment, or parking lot accidents aboard a naval installation. Further, the issue of whether Michael Shepherd, at the time he sustained his injuries,

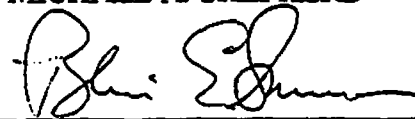
was involved in the work of the general contractor and his subcontractors on this project is one solely determined by what he was doing at that time, which was delivering and placing gypsum sheathing at specified places on the construction site, and that is an issue to be determined by application of the Commonwealth of Virginia's statutory and case law as to what constitutes the trade, business or occupation of the general contractor of this construction project.


In sum, Michael Shepherd, in delivering and placing gypsum sheathing at specified places at the Dam Neck construction site, undertook no activity to incorporate the delivered materials into the construction project; he engaged in no construction activities at the site; his employer had no contractual relationship of any sort with any of the defendants pertaining to this construction project; in short, he was an "other party" and a "stranger" to the employment and work of the general contractor of this construction project, and is thus not within the scope of the exclusionary provisions of the Virginia Worker's Compensation Act. In other words, Michael Shepherd is not limited to the exclusive remedy provided under the Workmen's Compensation Act and can, and has, properly brought a direct action in tort, alleging negligence on the part of the general contractor and its statutory employees.

CONCLUSION

WHEREFORE, the plaintiff, Michael Shepherd, respectfully requests that this Honorable Court deny the Plea in Bar set forth in this case by the defendants W.B. Meredith II, Inc. and Robert Bosley.

MICHAEL A. SHEPHERD

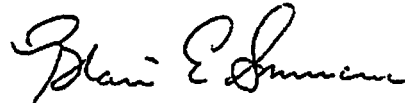
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Of Counsel

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BY 

Blair E. Smircina
VSB# 23499
KALFUS & NACHMAN, P. C.
870 N. Military Highway, Suite 300
P. O. Box 12889
Norfolk, VA 23541-0889
(757) 461-4900

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing pleading was mailed to all counsel of record this 14th day of January, 2000.



Blair E. Smircina

1 EXAMINATION BY MR. NORRIS:

2 Q Mr. Rymiszewski, there was going to be a
3 court hearing awhile back that you were scheduled to
4 appear. What were you going to testify to? What
5 were you prepared to tell the court?

6 A I have no idea.

7 Q Did you not discuss with the lawyers in
8 this room the questions that you were going to be
9 asked at that hearing?

10 MR. AUFENGER: I'm going to object to
11 that. Number one, the question's vague and
12 ambiguous. Number two, it calls for attorney
13 work product. Ask specific questions.

14 MR. NORRIS: I'm not asking you. I'm
15 asking this guy. If you shared it with him,
16 it's not your work product.

17 MR. SMIRCINA: I'm about to ask him the
18 same questions anyway. I'm about to ask him
19 the same questions anyway.

20 MR. NORRIS: All right. All right. Go
21 ahead.

22
23 EXAMINATION BY MR. SMIRCINA:

24 Q I have in my hand a copy of a three-page
25 document that you gave me earlier today. I'd like



1 you to look at the copy. Tell me if you recognize
2 it, and what is it?

3 A Yeah.

4 Q What is it?

5 A The first page is the copy of our
6 preliminary, which is this one right here.

7 Q Preliminary order request?

8 A Yeah. That's typically written up by a
9 person in the office or a sales representative.

10 Q It's indicates that Wenger Tile was the
11 customer?

12 A The second sheet that doesn't show any
13 pricing is typically the delivery sheet. That's
14 asked to be signed once we deliver the material. The
15 last sheet with pricing is actually stapled to the
16 delivery ticket and mailed to the contractor's
17 office.

18 Q All right. So this indicates that you
19 had an agreement with Wenger Tile to deliver
20 sheathing and it looks like some insulation to the
21 SOF Building at Dam Neck in Virginia Beach?

22 A Yes.

23 Q With a delivery date of 11-14-96?

24 A Yes, sir.

25 Q Do you have any contractual relationship

1 with Atlantic Welding and Fabricating or Meredith
2 Construction concerning this project?

3 A No, sir.

4 Q So the only contractual relationship you
5 had -- if you had one at all -- if this constitutes a
6 contract -- would be to deliver drywall to the site?

7 A Yes, sir.

8 Q And that's all the -- that's all you had
9 an agreement with Wenger Tile to do?

10 A Correct.

11 Q You never attended any construction
12 meetings for this project site?

13 A No, sir.

14 Q It's not your business at all, is it?

15 A No.

16 MR. SMIRCINA: I've got nothing
17 further. Thanks. Appreciate your time, John.

18 THE WITNESS: No problem.

19 MR. SMIRCINA: Do you have anything
20 else?

21 MS. SPENCE: I have one briefly.

22 MR. SMIRCINA: Oh, I'd like to make that
23 an exhibit. Number 2.

24 (Marked by the court reporter as
25 Rymiszewski Exhibit Number 2.)

1 EXAMINATION BY MS. SPENCE:

2 Q On the third page of what has been
3 marked as Exhibit 2, it indicates date shipped of
4 November -- looks like a 15 or 16. Tell me which it
5 is.

6 A Okay. If I'm not mistaken, it was
7 delivered on the 14th and billed out on the 15th.
8 I'm not necessarily sure. Sometimes we will file
9 tickets that might not go for a week, but it still
10 has the original date that it was entered.

11 Q Okay. So although it says date shipped,
12 that wouldn't be accurate. That would be date
13 billed?

14 A Correct.

15 MS. SPENCE: Fair enough. That's all I
16 have.

17 MR. SMIRCINA: John, you have the
18 right -- I'm not your lawyer, but you have the
19 right to read and review a copy of your
20 testimony here today prior to it being
21 distributed to the counsel. We're going to
22 order a copy and provide one to you. I say
23 that this lady is likely to transcribe what you
24 said accurately, so I would say you could waive
25 it with safety.

1 THE WITNESS: Okay.

2 MR. SMIRCINA: All right. He waives.

3 (The deposition was concluded at
4 11:31 a.m.)

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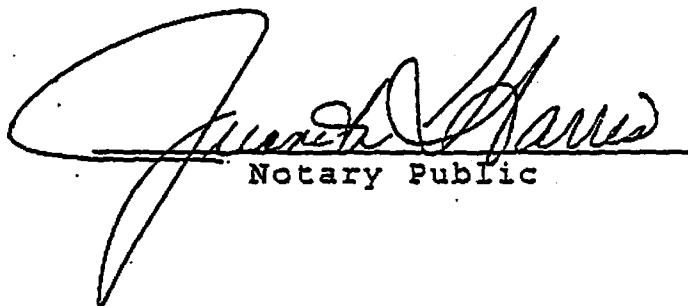
C E R T I F I C A T E

STATE OF VIRGINIA,
CITY OF NORFOLK, to-wit:

I, Juanita Harris, a Notary Public for the
State of Virginia at Large, certify that the
foregoing deposition of John Gerald Rymiszewski was
duly sworn to before me and taken by me at the time
and place and for the purpose in the caption
mentioned.

I further certify that I am not a relative or
employee or attorney or counsel of any of the parties
or a relative or employee of such attorney or counsel
or financially interested in the action.

Given under my hand this 5th day of January,
2000. My commission expires February 28, 2002.


Notary Public

DELIVERY DATE	11-14-96	ORDER NO.		ORDERED BY	
ORDER DATE	11-13-96		1005247	PHONE NO.	
CUSTOMER	WENBER TTEE			JOB PHONE	
C.O. NO.		JOB NO.		BEOPER	
ADDRESS	SOF			G.C.	
	DAM NETH				
	VA METEX, VA				
BUILDING NO.		LOT NO.		FLOOR	

EXHIBIT
Rymiszewski
Deon 2:
JKH 1-4-C

PULL INFORMATION

**INTERIOR
PRODUCTS**

902-C Cooke Ave.
Norfolk, VA 23504

Office (757) 622-2089
Fax (757) 622-2150

Full Service Interior Finish Supply Company

CUSTOMER

Acknowledgment

NUMBER

1005

local

006247-00

SOFT			11/14/96	twg	Rec'd To: Tidewater Interior Products, Inc. P.O. Box 7067 Norfolk, VA 23509-0067
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Wenger Tile & Plastering Co.
619 W. 26th Street
Norfolk, VA 23517

SHIP
TO

SOF Dam Neck

Va Beach, VA

TRUCK NO.

CREW

TIME OUT

TIME IN

TIME COMPLETED

-43-

270
3

PCS
BAG

6/8 GYP SHEATHING 4X8
R-19 6 1/4" UNFACED 24" 120 SQFT/BAG

MSF
MSF

0640
384

Total Wallboard = 0640 Square Ft.

Last Page

RECEIVED BY

TIME

CHECKED BY

SUBTOTAL

TAX

A.M.

802-O Cooke Ave
Norfolk, VA 23504

PRODUCTS

Office (767) 622-2089

Fax (767) 622-2150

Service Interior Finish Supply Company

OFFICE FILE

Invoice

↓ NUMBER ↓

1005

11/15/96

Local

005247.00

SOFT			Jfr	11/14/96	Local	11/16/96	Remit To: Tidewater Interior Products, Inc. P.O. Box 7667 Norfolk, VA 23509-0667
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Wanger Tile & Plastering Co.

25th Street

Norfolk, VA 23517

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SOFT Dam Neck

Va Beach, VA

TRUCK NO.

CREW

TIME OUT

TIME IN

TIME COMPLETED

270	PCS	5/8 GYP SHEATHING 4XB	4'x8'	8640	260.00	2246.40
3	BAG	R-19 6 1/4" UNFACED 24"128 SQF 1/BAG	4'x8'	384	265.00	101.76
		Total Wallboard		8640		

est Page

6/96 If Paid By 12/10/96
12/25/96

RECEIVED BY

TIME

CHECKED BY

SUBTOTAL 2348.16

TAX 105.67

AMOUNT DUE 2453.83

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF VIRGINIA BEACH

MICHAEL A. SHEPHERD,

PLAINTIFF,

v.

AT LAW NO.: CL98-2952

W.B. MEREDITH, II, INC.,
ATLANTIC WELDING & FABRICATING, INC.,
ROBERT BOSLEY,
and PETER GODFREY,

DEFENDANTS.

BRIEF IN SUPPORT OF PLEA IN BAR

COME NOW Defendants, Robert Bosley and W. B. Meredith, II, Inc., by counsel, and submit the following Brief in Support of their Plea in Bar to the action filed against them herein.

STATEMENT OF FACTS

The relevant facts are set forth in the Joint Stipulation of Facts previously submitted to the Court and in referenced portions of deposition transcripts, submitted by agreement of the parties, in particular, the depositions of Phillip Shepard and John Rymiszewski.

ARGUMENT

Under Virginia Code §65.2-307, an injured employee's exclusive remedy for work-related injuries caused by his employer or a fellow employee (including a statutory employer or statutory fellow employee) is under the Virginia Workers' Compensation Act. If the parties and injury fall under the canopy of the Workers' Compensation Act, a Circuit Court has no

jurisdiction over a common law action between the parties.

Bristow v. Cross, 210 Va. 718 173 S.E.2d 815 (1970).

Virginia Code §65.2-302, and cases decided thereunder, define when one becomes a statutory employer or statutory fellow employee. Project owners, general contractors, sub-contractors, and even sub-sub-contractors can all be statutory employers if they contract with another party to perform work which is a part of their own "trade, business or occupation."

The case at bar presents two separate and distinct issues under the Workers' Compensation Act: First, if the United States Navy, as owner of the project on which plaintiff was injured, is the statutory employer of the plaintiff and the statutory employer of defendants W. B. Meredith, II, Inc. and Bosley, then the plaintiff is a statutory fellow employee of the defendants, and the exclusive remedy provisions of the Workers' Compensation Act bar the plaintiff's suit against these defendants. Alternatively, defendants argue that W. B. Meredith, II, Inc., is the direct statutory employer of plaintiff, the employee of a sub-sub-contractor performing work that was part of Meredith's trade, business or occupation. Under either one of the above theories, plaintiff is barred from suing defendants Meredith and Bosley.

1. W. B. Meredith, II, Inc., and Bosley are statutory fellow employees of the plaintiff.

The United States Navy, as owner of the construction

project on which plaintiff's injury occurred, is the statutory employer of the plaintiff and the statutory employer of W. B. Meredith, II, Inc. and Bosley. A project owner is the statutory employer of any contractor, sub-contractor, or worker who undertakes to perform or execute any work which is a part of the "trade, business or occupation" of the owner. Virginia Code §65.2-302(A). When the project owner is a governmental entity, the owner's "trade, business or occupation must be judged according to the public duties they are 'authorized and empowered by legislative mandate to perform.'" Roberts v. City of Alexandria, 246 Va. 17, 19 (1993) (citations omitted; emphasis added). To determine the trade, business or occupation of the United States Navy, one must determine what the United States Navy is "authorized and empowered by legislative mandate" to do. The United States Code grants the Secretary of the Navy responsibility for and "the authority necessary to conduct all affairs of the Department of the Navy, including the following functions: . . . (12) the construction, maintenance, and repair of buildings, structures . . ." 10 U.S.C. § 5013(b).

The Dam Neck construction project where plaintiff's injury occurred was clearly within the duties that the United States Navy is authorized by law to perform. The project was the construction of the SOF Building, a special top security facility.

Not only is the Navy authorized to build and repair

buildings, direct employees of the United States Navy perform construction activities on some projects. Even when the Navy has contracted out some construction activities, on "government furnished equipment contracts," Navy employees actually deliver materials to the job site, the same as material men or suppliers would do on a private construction site. (P. Shepard transcript, pp. 3, 6.) United States Navy employees have also both delivered and installed drywall on government construction projects. (P. Shepard transcript, p. 8.) Thus, not only is the Navy authorized by law to carry out the construction activity involved in this case, but that activity is, in fact, often carried on through employees of the Navy rather than through independent contractors. See Nichols v. VVKR, Inc., 241 Va. 516, 521 (1991). Accordingly, the plaintiff herein - even if merely delivering material - was performing work that was part of the Navy's trade, business or occupation, making the Navy plaintiff's statutory employer.

The case at bar is comparable to Anderson v. Thorington Construction Co., 201 Va. 266 (1959). In Anderson, the General Assembly created the Richmond-Petersburg Turnpike Authority and gave it the powers necessary to construct, operate and maintain the turnpike project. The Turnpike Authority sub-contracted an engineering firm to prepare the plans and specs for the turnpike and to supervise the construction. The Authority also sub-contracted Thorington Construction Company to perform the

necessary construction work. Because the Turnpike Authority had legislative authority both to design and to build the turnpike, the Virginia Supreme Court held that the Turnpike Authority was the statutory employer of both the engineering firm and of the construction company. Because the Authority was the statutory employer of both sub-contractors, an employee of the engineering firm was considered a statutory fellow employee of employees of the construction company. Because these employees were fellow statutory employees, an injured engineering firm employee was barred from suing the construction company for injuries he received on the turnpike project.

Likewise, in the case at bar, the United States Navy is the statutory employer of W. B. Meredith, II, Inc., the company contracted to build the Dam Neck building project. Under Virginia Code §65.2-302(C) the United States Navy was also the statutory employer of the plaintiff, who was employed by Tidewater Interior Products, a sub-contractor of Wenger Tile, which was a sub-contractor of W. B. Meredith, II, Inc.

The significance of the Navy's statutory employer status is not simply to bar the plaintiff's lawsuit herein; rather, the purpose of Virginia Code §65.2-302 is to expand the availability of workers' compensation coverage for accidental injuries occurring from employment related hazards. If plaintiff's direct employer, Wenger Tile, did not provide workers' compensation coverage for some reason, plaintiff would be

entitled to pursue compensation from the general contractor (W. B. Meredith, II, Inc.) or from the project owner (the United States Navy), since all were involved in the same trade, business or occupation. Sites Constr. Co. v. Harbeson, 16 Va. App. 835, 434 S.E.2d 1 (1993). The Virginia Supreme Court has long stated that the Workers' Compensation Act is highly remedial and must be liberally construed to allow injured persons to recover workers' compensation. Henderson v. Central Telephone Co., 233 Va. 377, 382 (1987). Even though the plaintiff herein is not seeking workers' compensation coverage from the United States in this particular case, the Workers' Compensation law must still be construed liberally, just as if he were seeking such workers' compensation. Id.

Plaintiff erroneously attempts to rebut this statutory fellow employee argument by relying on Burroughs v. Walmont, 210 Va. 98 (1969). Burroughs did not involve an owner's status as a statutory employer, particularly not an owner that was a governmental entity. The Court in Burroughs addressed the limited issue of whether mere delivery of supplies by a trucking company was part of the trade, business or occupation of a private general construction contractor. Whether an "owner" is a statutory employer of two separate entities, such that those entities' employees are "fellow statutory employees" is an entirely different issue from the one addressed in Burroughs. See Roberts v. City of Alexandria, 246 Va. 17, 21 (1993). Even

if Burroughs applies to prevent W. B. Meredith, II, Inc., from being a direct statutory employer of the plaintiff, it has absolutely no bearing on the question of whether W. B. Meredith, II, Inc. is plaintiff's fellow statutory employee. For the reasons above, plaintiff and defendants are fellow statutory employees and plaintiff is barred from maintaining this suit against them.

2. W. B. Meredith, II, Inc. is plaintiff's statutory employer.

Under Virginia Code §65.2-302(C):

when the sub-contractor in turn contracts with still another person (also referred to as 'sub-contractor') for the performance or execution by or under such last sub-contractor of the whole or any part of the work undertaken by the first sub-contractor, then the liability of the owner or contractor shall be the same as the liability imposed by sub-sections (A) and (B) of this section.

Id. In simpler terms, a project owner and a general contractor can both be statutory employers of a sub-contractors' sub-sub-contractor, if all are working in the same trade, business or occupation. W. B. Meredith, II, Inc., is undisputedly the general contractor of the owner's project. Wenger Tile is undisputedly a sub-contractor of W. B. Meredith. Gypsum Management and Supply, trading as Tidewater Interior Products, contracted with Wenger Tile to provide and offload drywall on the Dam Neck project. (Joint Stipulations, paragraph 7.) Thus, Tidewater Interior Products can be classified as a sub-contractor on the building project, as a sub-contractor includes

contractors, laborers, mechanics and persons furnishing materials who contract with someone other than the owner of the project. See Virginia Code §43-1. In construction cases, the Virginia Supreme Court has considered all contractors engaged in work on the same construction project to be involved in the same trade, business or occupation. See Kramer v. Kramer, 199 Va. 409, 100 S.E.2d 37 (1957):

In determining whether a sub-contractor (or sub-sub-contractor) is the statutory employee of a privately owned general contractor in construction project cases, the Virginia Supreme Court has drawn a distinction between sub-contractors engaged in construction and those engaged in "mere delivery." Plaintiff relies on Burroughs v. Walmont, supra, in support of his position that he was a "mere delivery man" on the Dam Neck building project, and accordingly, not a statutory employee of defendant W. B. Meredith, II, Inc., the general contractor. Unlike Burroughs, however, the plaintiff's work herein went beyond mere delivery. After arriving on site with the sheet rock, the plaintiff had to assemble and stabilize a boom crane. He then used the crane to move sheet rock to various locations within the building under construction. In order to accomplish this, he had to move his crane from one location to another and re-stabilize it before operating the hydraulic boom. The injured plaintiff in Burroughs did not use construction equipment such as a crane. He fell and was injured while manually carrying

material onto the job site.

Other cases have recognized that utilizing a crane to off-load materials is actually part of the construction process. See Yancey v. JTE Constructors, Inc., 252 Va. 42 (1996) (RECO employee inspecting a panel after delivery was a mere delivery man when contractor JTE used a crane to unload the panel from RECO's delivery truck); See also Garrett v. Tubular Products, Inc., 176 F. Supp. (E.D. Va. 1959) (when the contractor/purchaser of material was responsible for using a crane to unload material from the supplier's truck, the supplier was a mere delivery man). Unlike Yancey, supra, and Garrett, supra, neither the general contractor herein nor any separate sub-contractor was hired to offload material with the crane. The plaintiff himself operated the crane and added the materials to the upper stories of the building project. By operating the boom crane to offload the materials, the plaintiff engaged in an act of construction, such that his activities "transcended mere delivery." Burroughs, supra, at 100. Because he was engaged in construction activities on the project, plaintiff was a statutory employee of W. B. Meredith, II, Inc., and plaintiff is barred from suing these defendants.

CONCLUSION

Because the Dam Neck building project was owned by the United States Navy, a governmental entity fully authorized by the legislature to perform the construction project itself, Bosley and W. B. Meredith, II, Inc., are statutory fellow employees of the plaintiff and therefore immune from this suit under the provisions of the Workers' Compensation Act. Even using the stricter test that applies to sub-contractors of privately owned general contractors, W. B. Meredith, II, Inc. is a statutory employer of the plaintiff because plaintiff's activities on the construction project, namely operation of a boom crane, were construction activities that transcended mere delivery. Under either theory, defendants W. B. Meredith, II, Inc. and Robert Bosley are immune from suit under the exclusive remedy provisions of the Workers' Compensation Act. Wherefore, pursuant to the authorities discussed herein, the defendants respectfully ask this Honorable Court to sustain their Plea in Bar and dismiss this action against them.

W.B. MEREDITH, II, INC.
And ROBERT BOSLEY

By Fay F. Spence
Of Counsel

Fay F. Spence, Esquire
(Va. State Bar No. 27906)
Spence & Whitlow
999 Waterside Drive, Suite 1630
Norfolk, VA 23510
(757) 625-0269

CERTIFICATE

I hereby certify that a copy of the foregoing was mailed to
all counsel of record on the ____ day of _____,
2000.

Fay F. Spence
Fay F. Spence

FILED
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1 VIRGINIA: CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

2
3 MICHAEL A. SHEPHERD,)
4 Plaintiff,)

5 v)

CL98-2952

6 W. B. MEREDITH II, INC.,)
7 et al.,)
8 Defendants.)

9 Deposition of Phillip Shepard, taken before
10 Juanita Harris, Court Reporter, a Notary Public for
11 the State of Virginia at Large, pursuant to notice,
12 at the offices of Kalfus and Nachman, Suite 300,
13 870 North Military Highway, Norfolk, Virginia, at
14 11:32 a.m., January 4, 2000, to be used in the trial
15 of the above-entitled cause.

16
17
18 APPEARANCES: Kalfus and Nachman (Mr. Richard
19 Aufenger and Mr. Blair E.
20 Smircina), attorneys for the
21 plaintiff.

22 Norris and St. Clair (Mr. John S.
23 Norris, Jr.), attorneys for
24 defendants Atlantic Welding and
25 Godfrey.

Spence and Whitlow (Ms. Fay F.
Spence), attorneys for defendants
Meredith and Bosley.

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I N D E X

EXAMINATION BY:

PAGE

Ms. Spence

2

Mr. Norris

6

Mr. Smircina

8

-----oOo-----

1 PHILLIP SHEPARD, called as a witness, having
2 been first duly sworn, was examined and testified as
3 follows:
4

5 EXAMINATION BY MS. SPENCE:

6 Q Good morning, sir. Would you state your
7 name for the record.

8 A Phillip Shepard.

9 Q Where do you work, sir?

10 A W. B. Meredith.

11 Q What is your job there?

12 A Vice president of operations.

13 Q Tell me briefly what the job duties are
14 for vice president of operations.

15 A I oversee all project management,
16 estimation, purchasing and production in the field.

17 Q In the course of your employment with
18 Meredith, are you familiar with the term government-
19 furnished equipment?

20 A Yes, I am.

21 Q What does that mean?

22 A Equipment that's furnished by the
23 government.

24 Q Fair enough; and when does the
25 government furnish equipment?

1 A Depends on -- job specific. For
2 instance -- I beg your pardon?

3 Q Go ahead. Continue.

4 A It's project specific I guess you would
5 say. I mean an example would be -- I have a BEQ that
6 the government furnished bike lockers and we
7 installed them. Happened to be one of the last items
8 of the project that went in. I've had projects where
9 throughout the life of the project -- we have a
10 project right now -- we're just completing one where
11 we've installed government-furnished equipment
12 throughout the entire life of the project as the
13 equipment arrived so --

14 Q Who delivers the equipment when it's
15 government-furnished?

16 A It really all depends. In some cases,
17 it's the government. I would say most cases it's the
18 government. We did have one project we actually had
19 to go pick it up at a centralized warehouse so --

20 Q I'm going to ask if you've had such
21 government-furnished-equipment projects with the Navy
22 specifically?

23 A Yes, I have.

24 Q Can you recall any of those projects in
25 particular?

1 A Do you want the contract numbers or --

2 Q Just the name of the project will do.

3 A BEQ Portsmouth at the Portsmouth Naval
4 Hospital; and the SIMA project, the Shore
5 Intermediate Maintenance Activity addition and
6 upgrade.

7 MS. SPENCE: That's all the questions I
8 have for you.

9
10 BY MS. SPENCE:

11 Q Can you give me some more examples of
12 types of equipment that the government has supplied
13 you?

14 A On the SIMA project, it varied.
15 Anywhere from a computer table all the way up to a
16 fifteen-ton metal lathe or industrial-sized drill
17 presses, ceramic ovens that probably weighed fifty
18 tons; and then, like I said, just furniture. There's
19 been instances where we've -- in other BEQs where we
20 installed the government-furnished refrigerators,
21 microwave ovens.

22 Typically, the way it's notated on the
23 plans and specs would be government-furnished,
24 contractor-installed; so essentially what they buy is
25 the labor. That's quite common.

1 Q So by contractor-installed -- there is
2 work is be done to add the material into the building
3 project?

4 A Labor. I mean that's basically what
5 we -- what they're buying. They'll usually supply --
6 in one instance was the bike lockers, and we actually
7 erected them and installed them; and then an example
8 for the SIMA project would be if there was a piece of
9 equipment -- whether it was a drill or a lathe -- we
10 secured them, fastened them to the existing concrete,
11 and then provided electrical service or mechanical
12 service if it happened to be a piece of equipment
13 that required another one. We have paint -- a
14 spray-paint booth which would require -- they would
15 deliver it, we would set it in place. We would
16 provide the -- we would connect it electrically and
17 mechanically and duct work, plumbing, whatever is
18 required at that point.

19 Q What material were the bike lockers that
20 you all erected?

21 A I couldn't tell you. They're either
22 fiberglass or metal. I don't remember.

23 MS. SPENCE: Okay. That's all the
24 questions I have. Either of these gentlemen
25 may have some for you.

1 EXAMINATION BY MR. NORRIS:

2 Q Mr. Shepherd, my name is John Norris,
3 and I'm representing Atlantic Welding and
4 Fabricating. On a Navy job in which the Navy is
5 providing materials, you say on occasion the Navy
6 will actually deliver the materials to the job site?

7 A Oh, yes.

8 Q So in that case, the Navy is performing
9 the same job as a materialman on any other typical
10 job; is that correct?

11 A A supplier that would supply materials?

12 Q Right.

13 A Correct.

14 Q And so the types of materials -- and,
15 again, I'm focusing now on government-furnished
16 equipment.

17 A Uh-huh.

18 Q When the Navy itself delivers the
19 materials, do they bring it on site in some kind of a
20 truck and off-load it on the site?

21 A Sure. Sometimes it's the same suppliers
22 we use and -- I mean -- and there are other instances
23 when it's government-furnished, government-installed;
24 and at some point in the contract, the construction
25 period, they may coordinate with us and say, Hey, we

1 want to bring in XYZ piece of material or equipment
2 and install it. Is it okay with you? It could be
3 cable, it could be whatever they deem -- whatever
4 they want to rob from another project or however they
5 want to cut the budget. It mean it's a lot of
6 flexibility.

7 Q So the Department of the Navy has the
8 capability, the knowhow and the wherewithal to
9 deliver to a construction site for a Navy project
10 materials to be incorporated into the construction of
11 that site?

12 A Absolutely. It happens all the time.

13 Q Do you know of any instances where the
14 materials delivered by the Navy have included
15 drywall?

16 A Other than the government providing
17 their own build-out, I would say no.

18 Q How about an example where the
19 government provides the build-out?

20 A I've had a project where within my
21 project the government -- the government entity that
22 was occupying that particular facility took it upon
23 themselves to do a, quote, self-help project. I mean
24 that's -- especially in renovation projects where
25 you're renovating a portion of the project or maybe

1 the whole project. The command or the entity that
2 occupies that -- they do a lot of their own work.
3 I've seen that happen.

4 Q So does that include drywall work?

5 A Oh, yes. Yes.

6 Q And would that include delivery and
7 installation?

8 A Sure. Well, delivery of the material
9 and -- yeah. They install. They do all the work
10 themselves. Yeah.

11 Q But at least as to delivery --

12 A Oh, yeah.

13 Q You've known examples where the
14 government has delivered drywall for a project?

15 A Sure.

16 MR. NORRIS: Okay. That's all I have.

17

18 EXAMINATION BY MR. SMIRCINA:

19 Q You work for W. B. Meredith? That's
20 correct?

21 A Yes.

22 Q How long have you been working there?

23 A Three and a half years.

24 Q What is your educational background?

25 A Civil engineer.

1 Q Okay. You've mentioned that the Navy
2 oftentimes provides materials to be used on projects,
3 so generally finished goods, aren't they? As opposed
4 to building supply materials?

5 A Equipment. Yeah.

6 Q Equipment?

7 A Uh-huh.

8 Q You mentioned microwave ovens, you
9 mentioned bike lockers.

10 A Right.

11 Q You mentioned all these sort of things.

12 A Right.

13 Q Is that typical?

14 A That's typical. Yes.

15 Q Are you familiar with the SOF building
16 construction site that's a part of this litigation
17 that's going on? Were you on board at that point in
18 time?

19 A I was on board. I was a project manager.
20 at that time, but it wasn't one of my projects.

21 Q Were you aware whether the Navy was
22 supplying any materials to that project or not?

23 A I was not familiar with that.

24 Q Is the sheet rock considered something
25 that the Navy would supply as part of a project of

1 that sort?

2 A It would be a bit unusual I suppose,
3 yes.

4 Q And you mentioned that the Navy
5 oftentimes supplies these goods because they have the
6 goods on hand and they don't want to repurchase them
7 twice. Is that pretty much the reason why?

8 A No. Typically what happens in the
9 procurement of these buildings -- the design phase is
10 four or five years ago; five, six years ago; and a
11 new captain has come on board, technology has
12 changed. Whoever the entity that's taking over this
13 building -- whether it's a shore maintenance
14 activity, which was a new construction -- there was
15 various groups in there and they all had their --

16 Q Preferences?

17 A -- preferences I guess you could say;
18 and somebody needed a kitchen here, so they took it
19 upon themselves to go ahead and build-out within our
20 project I suppose. I mean, it's just a lag time and
21 sometimes it's easier for them to take it upon
22 themselves. Apparently, they have that procurement
23 arm where they can do work in-house, and that's not
24 all the projects. There's just several projects.

25 Q You don't know whether that was the

1 situation regarding this project that's the
2 subject --

3 A SOF? I couldn't tell you. I wasn't
4 involved with the estimate. I don't know what they
5 did.

6 MR. SMIRCINA: That's fine. Thank you
7 for your time.

8 MS. SPENCE: You have a right to read
9 that transcript and sign it when she types it
10 up or you can waive that right. I recommend
11 you go ahead and waive it.

12 THE WITNESS: Okay.

13 (The deposition was concluded at
14 11:44 a.m.)

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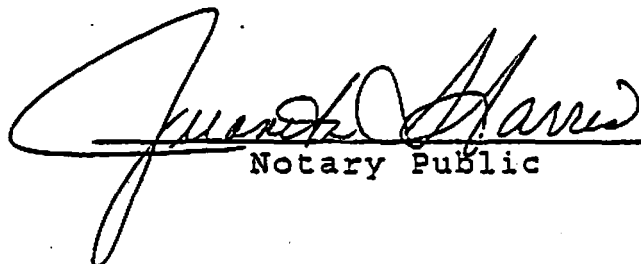
C E R T I F I C A T E

STATE OF VIRGINIA,
CITY OF NORFOLK, to-wit:

I, Juanita Harris, a Notary Public for the
State of Virginia at Large, certify that the
foregoing deposition of Phillip Shepard was duly
sworn to before me and taken by me at the time and
place and for the purpose in the caption mentioned.

I further certify that I am not a relative or
employee or attorney or counsel of any of the parties
or a relative or employee of such attorney or counsel
or financially interested in the action.

Given under my hand this 5th day of January,
2000. My commission expires February 28, 2002.


Notary Public

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VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

MICHAEL A. SHEPHERD,

Plaintiff,

v.

AT LAW NO.: CL98-2952

W.B. MEREDITH, II, INC., et. als.,

Defendants.

SURREBUTTAL BRIEF IN OPPOSITION TO PLEA IN BAR

This brief is filed in response to the rebuttal briefs filed by the defendants in this case. The plaintiff incorporates herein, and cites as authority those cases previously set forth in his initial brief. The tort action he has filed against the defendants is not barred by Virginia Code Section 65.2-307, as he was not the statutory employee of the United States Government, the named defendants or any other subcontractor of the construction project where he was injured through the negligence of the named defendants.

Plaintiff does not dispute that the United States Government is authorized by statute to construct buildings in furtherance of its purposes, nor that this construction project was authorized under the authority granted to the Department of the Navy. However, whether the government as "owner" of this project, and/or the named defendants W. B. Meredith, II, Inc. and Atlantic Welding and Fabricating are the statutory employers of Michael Shepherd, rests upon an analysis of what the plaintiff was doing at that construction site the day of his injury. If the plaintiff was not engaged in the "construction" of the building itself (which is the trade, business or occupation of the "owner"

and/or the general contractor of the project), as that concept has been developed through case law decided by the Supreme Court of Virginia, then he is not the statutory employee of either the government or the general contractor, and this tort action alleging negligence of the named defendants is not barred under the "exclusive remedy" provisions of the Workmen's Compensation Act.

The stipulations and evidence proffered to this Court demonstrate the following:

1. Plaintiff was an employee of Tidewater Interior Products, a corporation which was not affiliated with this project in any manner, other than as a supplier of gypsum sheathing to Wenger Tile, a subcontractor on this project;
2. Plaintiff was injured while delivering gypsum sheathing to the construction site, when an unsecured steel beam fell down the arm of a truck-mounted crane which he was using to place drywall on the second deck of the building being constructed by the named defendants for the use and benefit of the owner of the project, the United States government;
3. That plaintiff was the employee of an independent contractor to the project;
4. That the acts of the plaintiff do not amount to "construction" activities on this project, as that term has been interpreted by the Supreme Court of Virginia in analogous cases.

Plaintiff was not engaged in the construction of the building merely by delivering and placing gypsum sheathing at various places on the second deck of this construction site. The plaintiff was employed by an independent contractor whose only connection with the project was the supplying of gypsum sheathing and its delivery to the construction site. The plaintiff was not the statutory employee of either the government or the named defendants. Defendants Meredith and Bosley cite Anderson v. Thorington Construction, 201 Va. 266 (1959) as authority for the

proposition that a statutory employee is barred from asserting a tort action against a statutory employer for injuries received while engaged in the trade, business or occupation of the employer. This proposition is not disputed by the plaintiff. However, the facts and circumstances of that case are clearly distinguishable from this case. In the Anderson case, the plaintiff was an employee of a firm of engineers engaged by a state authority to supervise construction work on the government project, and was injured by the negligence of another contractor on the project, rendering him a statutory employee of the state authority, as was the purportedly negligent contractor. Therefore, as both plaintiff and defendant were the statutory fellow servants of the state authority, neither was a stranger to the occupation and the work of the authority, and plaintiff could not maintain an action at law against the defendant for damages due to personal injury suffered, as they both were under the canopy of the Workmen's Compensation Act. In the case before the Court, the plaintiff was a mere deliveryman of materials.

Defendants further argue that as the Navy sometimes supplies construction materials to construction sites under their purview, that anyone who delivers building materials to a Navy construction site therefore is a statutory employee of the Navy for purposes of application of the Workmen's Compensation Act. No authority exists, statutory or otherwise, for such a sweeping and mistaken argument. The U. S. government generally, and more specifically under the facts of this case before the Court, was not in the trade, business or occupation of furnishing and delivering gypsum sheathing. There is no evidence in the deposition of Philip Shepard (attached as an exhibit to the brief filed by defendants Meredith and Bosley) that on this construction site, the Navy furnished and delivered construction materials, nor that this was a "government furnished equipment contract" site. Nor by any stretch can it be said that Tidewater Interior Products (plaintiff's

employer) was a subcontractor to this project. Their agreement with Wenger Tile was to furnish gypsum sheathing and deliver it to the construction site pursuant to a purchase invoice between Tidewater and Wenger. Furnishing and delivering building materials by the plaintiff does not, under the cases previously cited by the plaintiff, constitute construction activity on this jobsite by the plaintiff. Therefore, the plaintiff is a stranger to the owner of the project's trade, occupation or business, not the statutory employee of the owner, not the statutory fellow servant of the named defendants, and his law action alleging negligence against the named defendants can properly proceed to trial.

CONCLUSION

WHEREFORE, the plaintiff, Michael Shepherd, by counsel, respectfully requests that this Honorable Court deny the Plea in Bar of the defendants.

MICHAEL A. SHEPHERD

By: 

Of Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing pleading was mailed to all counsel of record this 27th day of January, 2000.

VA. BEACH CIRCUIT COURT

CO JAN 27 PM 4: 02

J. CURTIS FRUIT, CLERK

BY  DC


 Blair E. Smircina

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

MICHAEL A. SHEPHERD,

Plaintiff,

v.

AT LAW NO. CL98-2952

W.B. MEREDITH, II, INC.

and

ATLANTIC WELDING & FABRICATING, INC.,

Defendants.

ORDER


On the 23rd day of February, 2000, came the parties, by counsel, and the defendant's Plea in Bar was argued by counsel.

UPON CONSIDERATION WHEREOF, it appearing to the Court that the defendant's Plea in Bar is not a valid defense to the whole of the plaintiff's cause of action as set forth in his Motion for Judgment herein, it is accordingly

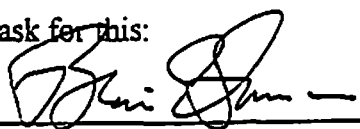
ORDERED that the defendant's Plea in Bar be, and it is hereby, overruled, to which action of the Court defendants' by counsel excepted. However, leave is granted to the defendants, Robert Bosley and W. B. Meredith, II, Inc., to file Grounds of Defense and other such responsive pleadings to the plaintiff's Motion for Judgment on or before the 21st day of March, 2000.

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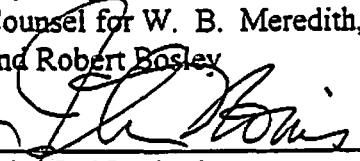


I ask for this:


Blair E. Smircina
Counsel for the Plaintiff

Seen and Objected to: *for reasons stated on the record & in Brief*

Fay F. Spence
Fay F. Spence
Counsel for W. B. Meredith, II, Inc.
and Robert Bosley


John S. Norris, Jr.
Counsel for Atlantic Welding & Fabricating, Inc.

KALFUS & NACIMAN, P.C., ATTORNEYS AT LAW, NORFOLK, VIRGINIA

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF VIRGINIA BEACH

MICHAEL A. SHEPHERD,

Plaintiff,

v.

At Law No. CL98-2952

W. B. MEREDITH, II, INC.,
ATLANTIC WELDING &
FABRICATING, INC.,
and
ROBERT BOSLEY,

Defendants.

MOTION IN LIMINE

Defendant, Atlantic Welding & Fabricating, Inc. (hereinafter referred to as "Atlantic"), by counsel, now moves the Court for entry of an Order *in Limine* to preclude all or a portion of any testimony at trial from Frank L. Burg and as grounds in support thereof states as follows:

1. Plaintiff has listed Mr. Burg as an expert witness whose opinions are summarized in Answers to Interrogatories, a copy of which is attached hereto and labeled Exhibit "A."

2. At his discovery deposition on May 19, 2000, Mr. Burg admitted that he was relying solely upon two OSHA regulations, dealing with the obligations of employers in general to provide their employees with safe workplaces. Copies of the regulations are attached hereto and labeled Exhibits "B" and "C," respectively.

3. Violation of an OSHA regulation, assuming *arguendo* the foregoing regulations were violated in the case at bar, is not evidence of negligence.

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00 MAY 22 AM 9:35

J. CURTIS FRUIT, CLERK

4. Absent reliance on the foregoing OSHA regulations, Mr. Burg will be unable to offer any opinion at a trial of this matter that Atlantic breached any statute, ordinance, code, regulation or industry standard in the performance of its work at the time of the incident in question.

5. Mr. Burg is not otherwise qualified to testify to the standard of care owed to third parties by a steel erection contractor in the Commonwealth of Virginia, much less Virginia Beach, Virginia.

WHEREFORE, Atlantic prays that Mr. Burg be precluded from testifying at a trial of this matter or otherwise offering the opinions set forth in Exhibit "A" hereto, or, in the alternative, that he be precluded from testifying to the alleged violation of any OSHA regulations or from testifying to the standard of care or industry standard applicable to a steel erection contractor for the job and place where the Plaintiff's injury occurred and for such further relief as may be warranted.

ATLANTIC WELDING & FABRICATING, INC.

By 

Of Counsel

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NOTICE

PLEASE TAKE NOTICE that argument in support of the Motion *in Limine* filed herein on behalf of Defendant, Atlantic Welding & Fabricating, Inc., will be made in the
CIRCUIT COURT

Circuit Court of the City of Virginia Beach on Friday, May 26, 2000 at 9:30 a.m. or as soon thereafter as counsel may be heard.

ATLANTIC WELDING & FABRICATING, INC.

By 

Of Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion to Compel Production of Documents was mailed this 19th day of May, 2000, to:

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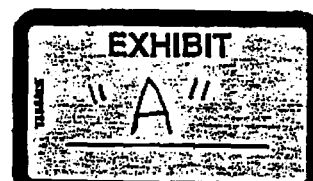
Frank Burg, PE, CSP
360 Ridge Avenue
Crystal Lake, IL 60014

A copy of the *curriculum vitae* of Mr. Burg is attached. Plaintiff reserves the right to supplement this answer at a later date. It is expected that Mr. Burg will testify in accordance with the opinions as set forth in the letter of LCDR Andrew Ashe, CEC, USN, of November 18, 1996 addressed to W. B. Meredith, II, Inc., and the Memorandum of Mr. Manny Seoane, of the Office of ROICC, Oceana, dated November 15, 1996. He is expected to state that the unsecured steel beam which caused plaintiff's injuries was erected and placed in violation of OSHA standards and those standards set forth in the government safety manual and adopted by the United States Navy pursuant to OSHA; that the steel beam, being placed as it was on its brackets, with no tack welds, bolts, or slings securing it in place created a serious hazard to all personnel in the immediate vicinity, again in violation of applicable OSHA standards and those set forth in the government safety manuals pertinent to structural steel erection; that the superintendent of the general contractor and the structural steel foreman violated the applicable standard of care in the planning for and the erection of the steel beam which caused plaintiff's injuries; that the subcontractor's foreman violated accepted steel erection procedures and the applicable standards set forth by OSHA and the government safety manuals by leaving the steel girts unsecured and/or by failing to take steps to secure the area in which those steel girts had been left unsecured; that the on-site superintendent was negligent by being inattentive to the actions of contract personnel at the project site and was responsible for the results of all contract personnel actions; that the on-site superintendent was negligent by allowing structural steel to be left unsecured, or by not noticing that the structural steel was left unsecured, and by not taking appropriate steps to either secure the steel girts and specifically the girt which caused the injury to the plaintiff, or to take the appropriate steps to protect the personnel on site.

LCDR Andrew Ashe, CEC, USN
ROICC Oceana; is expected to testify in accordance with his letter of November 18, 1996 to W. B. Meredith, II, Inc., a copy of which is attached.

Mr. Manny Seoane
ROICC Oceana, is expected to testify in accordance with his Memorandum dated November 15, 1996, a copy of which is attached.

2. State your full name, any former names or aliases, your present address, your date of birth, your social security number, your highest attained level of education and your marital status.



manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding \$10,000 must comply with, among other provisions, a requirement that "no part of such contract will be performed nor will any of the materials, supplies, articles or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract." The rules of the Secretary concerning these standards are published in 41 CFR part 50-204, and express the Secretary of Labor's interpretation and application of section 1(e) of the Walsh-Healey Public Contracts Act to certain particular working conditions. None of the described working conditions are intended to deal with construction activities, although such activities may conceivably be a part of a contract which is subject to the Walsh-Healey Public Contracts Act. Nevertheless, such activities remain subject to the general statutory duty prescribed by section 1(e). Section 103(b) of the Contract Work Hours and Safety Standards Act provides, among other things, that the Act shall not apply to any work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act.

§ 1926.16 Rules of construction.

(a) The prime contractor and any subcontractors may make their own arrangements with respect to obligations which might be more appropriately treated on a jobsite basis rather than individually. Thus, for example, the prime contractor and his subcontractors may wish to make an express agreement that the prime contractor or one of the subcontractors will provide all required first-aid or toilet facilities, thus relieving the subcontractors from the actual, but not any legal, responsibility (or, as the case may be, relieving the other subcontractors from this responsibility). In no case shall the prime contractor be relieved of overall responsibility for compliance with the requirements of

this part for all work to be performed under the contract.

(b) By contracting for full performance of a contract subject to section 107 of the Act, the prime contractor assumes all obligations prescribed as employer obligations under the standards contained in this part, whether or not he subcontracts any part of the work.

(c) To the extent that a subcontractor of any tier agrees to perform any part of the contract, he also assumes responsibility for complying with the standards in this part with respect to that part. Thus, the prime contractor assumes the entire responsibility under the contract and the subcontractor assumes responsibility with respect to his portion of the work. With respect to subcontracted work, the prime contractor and any subcontractor or subcontractors shall be deemed to have joint responsibility.

(d) Where joint responsibility exists, both the prime contractor and his subcontractor or subcontractors, regardless of tier, shall be considered subject to the enforcement provisions of the Act.

Subpart C—General Safety and Health Provisions

AUTHORITY: Sec. 107, Contract Work Hours and Safety Standards Act (Construction Safety Act) (40 U.S.C. 333); secs. 4, 6, 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12-71 (36 FR 8754), 8-76 (41 FR 25059), or 9-83 (48 FR 35736), as applicable.

§ 1926.20 General safety and health provisions.

(a) *Contractor requirements.* (1) Section 107 of the Act requires that it shall be a condition of each contract which is entered into under legislation subject to Reorganization Plan Number 14 of 1950 (64 Stat. 1267), as defined in § 1926.12, and is for construction, alteration, and/or repair, including painting and decorating, that no contractor or subcontractor for any part of the contract work shall require any laborer or mechanic employed in the performance of the contract to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous to his health or safety.



(b) *Accident prevention responsibilities.*

(1) It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.

(2) Such programs shall provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers.

(3) The use of any machinery, tool, material, or equipment which is not in compliance with any applicable requirement of this part is prohibited. Such machine, tool, material, or equipment shall either be identified as unsafe by tagging or locking the controls to render them inoperable or shall be physically removed from its place of operation.

(4) The employer shall permit only those employees qualified by training or experience to operate equipment and machinery.

(c) The standards contained in this part shall apply with respect to employments performed in a workplace in a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, Trust Territory of the Pacific Islands, Wake Island, Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act, Johnston Island, and the Canal Zone.

(d) (1) If a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process.

(2) On the other hand, any standard shall apply according to its terms to any employment and place of employment in any industry, even though particular standards are also prescribed for the industry to the extent that none of such particular standards applies.

(e) In the event a standard protects on its face a class of persons larger than employees, the standard shall be applicable under this part only to employees and their employment and places of employment.

(44 FR 8577, Feb. 9, 1979; 44 FR 20940, Apr. 6, 1979, as amended at 58 FR 35078, June 30, 1993)

§ 1926.21 Safety training and education.

(a) *General requirements.* The Secretary shall, pursuant to section 107(f) of the Act, establish and supervise programs for the education and training of employers and employees in the recognition, avoidance and prevention of unsafe conditions in employments covered by the act.

(b) *Employer responsibility.* (1) The employer should avail himself of the safety and health training programs the Secretary provides.

(2) The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

(3) Employees required to handle or use poisons, caustics, and other harmful substances shall be instructed regarding the safe handling and use, and be made aware of the potential hazards, personal hygiene, and personal protective measures required.

(4) In job site areas where harmful plants or animals are present, employees who may be exposed shall be instructed regarding the potential hazards, and how to avoid injury, and the first aid procedures to be used in the event of injury.

(5) Employees required to handle or use flammable liquids, gases, or toxic materials shall be instructed in the safe handling and use of these materials and made aware of the specific requirements contained in subparts D, F, and other applicable subparts of this part.

(6)(i) All employees required to enter into confined or enclosed spaces shall be instructed as to the nature of the hazards involved, the necessary precautions to be taken, and in the use of protective and emergency equipment required. The employer shall comply with any specific regulations that apply to work in dangerous or potentially dangerous areas.

(ii) For purposes of paragraph (b)(6) of this section, *confined or enclosed space* means any space having a limited means of egress, which is subject to accumulation of toxic or flammable

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Public Law 91 - 596
91st Congress, S. 2193
December 29, 1970

As amended by Public Law 101-552,
§3101, November 5, 1990



An Act



Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the *Occupational Safety and Health Act of 1970*.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the *Occupational Safety and Health Act of 1970*.

Congressional Findings and Purpose

SEC. (2) The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources -

- (1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions;
- (2) by providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;
- (3) *[REDACTED]*
- (4) *[REDACTED]*
- (5) by providing for research in the field of occupational safety and health, including the psychological factors involved, and by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems;
- (6) by exploring ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions, and conducting other research relating to health problems, in recognition of the fact that occupational health standards present problems often different from those involved in occupational safety;
- (7) by providing medical criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience;
- (8) by providing *[REDACTED]*
- (9) by providing *[REDACTED]*

Sec. (4) (a)

(b)(1) Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 274 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2021), exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

(2) The safety and health standards promulgated under the Act of June 30, 1936, commonly known as the Walsh-Healey Act (41 U.S.C. 33 et seq.), the Service Contract Act of 1965 (41 U.S.C. 351 et seq.), Public Law 91-54, Act of August 9, 1969 (40 U.S.C. 333), Public Law 85-742, Act of August 23, 1958 (33 U.S.C. 941), and the National Foundation on Arts and Humanities Act (20 U.S.C. 951 et seq.) are superseded on the effective date of corresponding standards, promulgated under this Act, which are determined by the Secretary to be more effective. Standards issued under the laws listed in this paragraph and in effect on or after the effective date of this Act shall be deemed to be occupational safety and health standards issued under this Act, as well as under such other Acts.

(3) The Secretary shall, within three years after the effective date of this Act, report to the Congress his recommendations for legislation to avoid unnecessary duplication and to achieve coordination between this Act and other Federal laws.

(4) Nothing in this Act shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

Section 5. Public**Occupational Safety and Health Standards**

Sec 6.(a) Without regard to chapter 5 of title 5, United States Code, or to the other subsections of this section, the Secretary shall, as soon as practicable during the period beginning with the effective date of this Act and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees. In the event of conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees.

(b) The Secretary shall

(1) Whenever the Secretary, upon the basis of information submitted to him in writing by an interested person, a representative of any organization of employers or employees, a nationally recognized standards-producing organization, the Secretary of Health, Education, and Welfare, the National Institute for Occupational Safety and Health, or a State or political subdivision, or on the basis of information developed by the Secretary or other wise available to him, determines that

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF VIRGINIA BEACH

MICHAEL A. SHEPHERD,

Plaintiff,

v.

At Law No. CL98-2952

W. B. MEREDITH, II, INC.,
ATLANTIC WELDING &
FABRICATING, INC.,
and
ROBERT BOSLEY,

Defendants.

BRIEF IN SUPPORT OF
MOTION IN LIMINE

COMES NOW the Defendant, Atlantic Welding & Fabricating, Inc. ("Atlantic"), by counsel, and in support of its Motion *in Limine* to preclude all or part of the testimony of Frank L. Burg at the trial of this matter, states as follows:

STATEMENT OF FACTS

Plaintiff was injured while offloading drywall at a construction project, in the course of his employment for Tidewater Interior Products. Basically, the boom of Plaintiff's delivery truck dislodged a steel "girt," a hollow metal tube, which had been positioned, but not yet permanently welded, by Atlantic, a subcontractor on the subject project. The steel girt descended the boom of Plaintiff's delivery truck and struck Plaintiff, causing injury.

Plaintiff has identified Frank L. Burg as a potential expert witness herein. Mr. Burg's purported opinions were summarized in Plaintiff's Answers to Interrogatories, a copy of which was attached to the subject Motion *in Limine* as Exhibit "A." During his discovery

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deposition on May 19, 2000, however, Mr. Burg admitted that his opinion regarding Atlantic's negligence in erecting and placing the girt was based solely upon Atlantic's purported violation of the General Safety and Health Provisions of the Occupational Safety and Health Act ("OSHA"). Burg Deposition Tr. (page 53, line 8). Specifically, Mr. Burg contends that Atlantic violated Public Law 91-596 (actually codified at 29 U.S.C. § 654), which sets forth, in pertinent part, that "[e]ach employer (1) shall furnish to each of his employees employment, and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees . . . [and] [e]ach employer shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct." Burg Deposition Tr. (page 55, line 6).

Mr. Burg admits that OSHA is silent as to the imposition of any specific duty on steel erection contractors, such as Atlantic, in the positioning and securing of steel girts of the type that injured Plaintiff. Burg Deposition Tr. (page 65, line 24). He further admits that he knows of no government safety manual that contains specific requirements with respect to the erection and placement of steel girts of the type that injured Plaintiff. Burg Deposition Tr. (page 89, line 6).

ARGUMENT

I. MR. BURG'S OPINION THAT ATLANTIC VIOLATED OSHA'S "GENERAL SAFETY AND HEALTH PROVISION" IS TANTAMOUNT TO IMPOSING STRICT LIABILITY AGAINST ATLANTIC.

Mr. Burg basically takes the position that since Plaintiff was injured by an object that Atlantic was installing on the subject project, that Atlantic violated OSHA's general mandate

to provide a safe workplace. Setting aside for a moment that Plaintiff was not employed by Atlantic, and, therefore, not even within the class of persons to which Atlantic owed any duty under OSHA, Mr. Burg has not identified any specific code, regulation or standard of any type that addresses the erection and placement of steel girts of the type that injured Plaintiff.

Just as "negligence cannot be presumed from the mere happening of an accident," Sneed v. Sneed, 219 Va. 15, 17 (1978), it should not be presumed from the mere happening of the subject occurrence that Atlantic failed to provide a safe workplace. To do so would be tantamount to imposing a strict liability standard on Atlantic, and Atlantic owed Plaintiff no such duty. See Pike v. Dept. of Labor & Industry, 222 Va. 317, 322 (1981)("The [OSHA] safety regulations at issue here were not designed to make the employer an insurer of an employee's safety. A safe workplace is not necessarily risk-free."(citations omitted)). Mr. Burg even admitted that Atlantic did not have to ensure Plaintiff's absolute safety. Burg Deposition Tr. (page 90, line 12). Yet Mr. Burg has no valid basis to substantiate his opinion that Atlantic was negligent in the erection and placement of the subject girt, and his testimony on this point should be excluded.

II. AN OSHA VIOLATION CANNOT SUPPORT A CLAIM OF NEGLIGENCE *PER SE* BY A NON-EMPLOYEE.

Plaintiff was an employee of Tidewater Interior Products, and this Court has already ruled that Plaintiff was not a "statutory employee" or "statutory fellow employee" of Atlantic. See Order, March 13, 2000. Virginia law is clear that violation of an OSHA regulation cannot benefit a non-employee on a negligence *per se* theory. See Pearson v. Canada, 232 Va. 177, 186 (1986).

The requirements for establishing an action based on negligence *per se* are well settled. First, a plaintiff must prove that the defendant violated a statute that was enacted for public safety. (citations omitted) Second, the plaintiff must establish that she belongs to the class of persons for whose benefit the statute was enacted. (citations omitted) Third, the plaintiff must prove that the statutory violation was a proximate cause of her injury. (citations omitted)

Robinson v. Matt Mary Moran, Inc. 259 Va. 412 (2000)(emphasis supplied). Because Plaintiff was not employed by Atlantic, he does not belong to the class for whose benefit OSHA was enacted.

This point is driven home in Canape v. Petersen, 897 P.2d 762 (1995), a case decided by the Supreme Court of Colorado on facts virtually identical to those before this Court. In Canape, the plaintiff, who was employed by an independent contractor, was delivering and off-loading shingles at a construction site when he sustained injuries due to the alleged negligence of the general contractor. The trial court refused to instruct the jury on negligence *per se* based on the general contractor's purported violation of an OSHA regulation, finding that the plaintiff was not within the class of persons intended to be protected by OSHA. Id. at 764.

The Court of Appeals affirmed, but did so on the broader rationale that 29 U.S.C. § 653(b)(4) of OSHA precludes a finding of negligence *per se* based on an OSHA violation. That section provides:

Nothing in this Act shall be construed to supercede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

The Court of Appeals believed that "application of a negligence *per se* instruction affects the common law rights, duties and liabilities of employers and employees." *Id.* at 764. After a comprehensive analysis of the issues and relevant authority, the Colorado Supreme Court affirmed, holding that a "negligence *per se* instruction transforms the character of the factfinder's inquiry" and thereby enlarges the employer's common law tort liability, in derogation of § 653(b)(4). *Id.* at 767.

In the case at bar, Plaintiff should be precluded from asserting negligence *per se* by presenting Dr. Burg's testimony regarding any alleged OSHA violation by Atlantic.

III. TESTIMONY REGARDING AN ALLEGED OSHA VIOLATION IS ALSO NOT ADMISSIBLE AS EVIDENCE OF NEGLIGENCE OR AS EVIDENCE OF THE APPLICABLE STANDARD OF CARE.

Atlantic can locate no Virginia case that addresses the issue whether evidence of an alleged OSHA violation is admissible as evidence of negligence or as evidence of the applicable standard of care, when the plaintiff is a non-employee. The issue has been addressed within the Fourth Circuit, however, in Trowell v. Brunswick Pulp and Paper Co., 522 F. Supp. 782 (D.C. S.C. 1981).

In Trowell, the defendant filed a Motion *in Limine* to prohibit a non-employee plaintiff from introducing any evidence regarding defendant's purported OSHA violations. The motion sought to exclude mention of such violations as evidence of negligence, the applicable standard of care and/or negligence *per se*. The trial judge acknowledged that no cases within the Fourth Circuit, nor from South Carolina, could be found on the subject issue. After due consideration, however, the judge not only excluded the admission of such evidence to establish negligence *per se* (based on both the rationales in Pearson and Canape, supra), he

went on to exclude such evidence for the purpose of establishing negligence or the applicable standard of care, stating:

The defendant Brunswick cannot be held to a higher standard of care than is required by the common law of negligence. As explained, OSHA does not create a duty of compliance to the OSHA standards on the part of Brunswick in regard to a non-employee such as the plaintiff. It is the opinion of this court that the admission of any evidence of the OSHA violations would be highly prejudicial to this defendant.

Id. at 784.

The same situation exists in the case at bar. To allow Plaintiff's expert to claim that Atlantic violated general safety and health provisions from OSHA, an Act under which Atlantic owed Plaintiff no duty, would generate extreme prejudice against Atlantic. The admission of such testimony in a case involving a non-employee is simply not warranted under existing law.

CONCLUSION

Absent reliance on the foregoing OSHA provisions, Mr. Burg will be unable to offer any opinion at trial that Atlantic breached any statute, ordinance, code, regulation or industry standard in the performance of its work at the time of the incident in question. Mr. Burg is not otherwise qualified to testify to the standard of care owed to third parties by a steel erection contractor in the Commonwealth of Virginia, much less in Virginia Beach, Virginia. Accordingly, Mr. Burg should be precluded from testifying with respect to any issue involving the alleged negligence of Atlantic, the applicable standard of care, and/or any industry standard applicable to a steel erection contractor with respect to the work that was performed by Atlantic herein.

ATLANTIC WELDING & FABRICATING, INC.

By 

Of Counsel

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Tel: (757) 498-7700
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion to Compel Production of Documents was mailed this 20 day of May, 2000, to:

Blair E. Smircina, Esquire
KALFUS & NACHMAN, P.C.
P.O. Box 12889
870 N. Military Highway, Suite 300
Norfolk, Virginia 23541-0889

and

Fay F. Spence, Esquire
ROBEY, SPENCE & DRASH
Dominion Tower
999 Waterside Drive, Suite 1630
Norfolk, Virginia 23510


John S. Norris, Jr.

Frank Burg, PE, CSP
360 Ridge Avenue
Crystal Lake, IL 60014

A copy of the *curriculum vitae* of Mr. Burg is attached. Plaintiff reserves the right to supplement this answer at a later date. It is expected that Mr. Burg will testify in accordance with the opinions as set forth in the letter of LCDR Andrew Ashe, CEC, USN, of November 18, 1996 addressed to W. B. Meredith, II, Inc., and the Memorandum of Mr. Manny Seoane, of the Office of ROICC, Oceana, dated November 15, 1996. He is expected to state that the unsecured steel beam which caused plaintiff's injuries was erected and placed in violation of OSHA standards and those standards set forth in the government safety manual and adopted by the United States Navy pursuant to OSHA; that the steel beam, being placed as it was on its brackets, with no tack welds, bolts, or slings securing it in place created a serious hazard to all personnel in the immediate vicinity, again in violation of applicable OSHA standards and those set forth in the government safety manuals pertinent to structural steel erection; that the superintendent of the general contractor and the structural steel foreman violated the applicable standard of care in the planning for and the erection of the steel beam which caused plaintiff's injuries; that the subcontractor's foreman violated accepted steel erection procedures and the applicable standards set forth by OSHA and the government safety manuals by leaving the steel girts unsecured and/or by failing to take steps to secure the area in which those steel girts had been left unsecured; that the on-site superintendent was negligent by being inattentive to the actions of contract personnel at the project site and was responsible for the results of all contract personnel actions; that the on-site superintendent was negligent by allowing structural steel to be left unsecured, or by not noticing that the structural steel was left unsecured, and by not taking appropriate steps to either secure the steel girts and specifically the girt which caused the injury to the plaintiff, or to take the appropriate steps to protect the personnel on site.

LCDR Andrew Ashe, CEC, USN
ROICC Oceana; is expected to testify in accordance with his letter of November 18, 1996 to W. B. Meredith, II, Inc., a copy of which is attached.

Mr. Manny Seoane
ROICC Oceana, is expected to testify in accordance with his Memorandum dated November 15, 1996, a copy of which is attached.

2. State your full name, any former names or aliases, your present address, your date of birth, your social security number, your highest attained level of education and your marital status.



1 A. Yes.

2 Q. Can you site me to the specific OSHA
3 standards that you think pertain to my client's
4 activity?

5 A. Yes.

6 Q. Thank you. What regulation do you have
7 in mind?

8 A. I would have used Section 5A-1 of the
9 OSHA act, the general duty clause.

10 Q. Can you turn to that provision?

11 A. It's not here, but we do have it.

12 MR. SMIRCINA: I can make some copies.

13 MR. NORRIS: Do you want to take a
14 five-minute break? I'd like to go through this
15 stuff. If you would just get me the dates of
16 those letters.

17 MR. SMIRCINA: Yes, that would be great.

18 (The deposition recessed at 11:14 a.m.

19 At 11:25 a.m. the deposition continued as
20 follows:)

21

22 BY MR. NORRIS:

23 Q. Okay. Mr. Burg, we took a brief break;
24 and I'm going through your interrogatory answer about
25 the things you've relied upon to form your opinion.

1 We're now at the OSHA standards, and I've been handed
2 a photo copy of a portion of the some federal
3 legislation. Can you tell me what it is that I've
4 been handed that you are relying upon?

5 A. Yes. On Page 2, Duties, Section 5A-1,
6 which is, you know, the most important thing that
7 OSHA does. Basically, it guarantees to each employee
8 that they will have a place of work that will not
9 cause death or serious physical harm, and this
10 particular part of the act takes precedent over all
11 the standards, number one.

12 Number two is commonly used for OSHA
13 citations when a specific standard is not found to
14 cover a hazardous situation to which employees are
15 exposed, and I think we went this way because you
16 asked me had I been a compliance officer what I would
17 have done? I was a compliance officer for many, many
18 years; and if I had investigated this accident, this
19 is the section I would have cited your client as well
20 as the general contractor for violating.

21 Q. Okay.

22 A. And perhaps others in regard to the
23 general contractor, but this one specifically for
24 your client.

25 Q. Okay. Well, I'm going to just try and

1 deal with my client and let someone else worry about
2 the general contractor.

3 A. I can understand that.

4 Q. Section 5A -- Now, what is this act that
5 this is a section of?

6 A. This is the OSHA act that was passed in
7 1970. It's a public law. It is the law. In fact,
8 it's the part of OSHA that's enforceable legally.

9 Q. Okay. The section that you are relying
10 upon is entitled, Duties, correct?

11 A. Yes.

12 Q. And it begins by saying, Section 5A,
13 Each employer -- and then I think you are relying on
14 A-1; is that correct?

15 A. Yes.

16 Q. Okay. And if I'm reading it correctly
17 it says, Each employer shall furnish to each of his
18 employees employment and a place of employment which
19 are free from recognized hazards that are -- I can't
20 read the next word.

21 A. Causing or likely to cause.

22 Q. -- causing or likely to cause death or
23 serious physical harm to his employees.

24 Now, I want to stop there. Is it your
25 position that this section places on my client a duty

1 to protect Mr. Shepherd?

2 A. Yes. OSHA has something called the .
3 multi-employer work site policy.

4 Q. Uh-huh.

5 A. And in that policy they define four
6 different types of employers that have obligations
7 under the act; and the four are controlling
8 employers, someone that controls the work site like
9 the general contractor or the owner; exposing
10 employers, someone that exposes either their
11 employees or somebody else's employees to hazards;
12 creating employers, someone that creates a hazard for
13 their employees or for somebody else's employees; and
14 the last one is called a correcting employer. That's
15 someone who's being relied on to fix things and fails
16 to do so.

17 Those are four types of employers that
18 have liability under the OSHA act; and I anticipate
19 your next question, which is, Your client in my view
20 and I think in the view of OSHA would be considered
21 for sure an exposing employer, that they were
22 involved in exposing Mr. Shepherd to the danger of
23 the falling girt by not securing it properly; and,
24 perhaps, the other two also. Perhaps being a
25 creating employer by creating the hazard, by not

1 to rewrite the standard, I would put the purlins in
2 there. I would say anything. For whatever reason it
3 says webbed structural member. For whatever reason.
4 I can't even imagine what the reason might be; but as
5 an OSHA person of eighteen years, I know what happens
6 then. You revert to the general requirements under
7 Subpart C, the ones we just looked at. Those you can
8 use in any area of construction and/or the general
9 duty clause under the act that we talked about.
10 That's what you would have to do, so I think a
11 reasonable person looking at this can understand that
12 if a bolt bucket has to be secured, if a drill bit
13 has to be secured, then certainly a girt and a purlin
14 has to be secured; so you are right. There is sort
15 of a technical problem here the way the standard is
16 written.

17 Q. I consider myself a reasonable person.
18 Don't you think it's more likely for a bucket to be
19 knocked off than a 2,000-pound steel member?

20 A. Well, those buckets are pretty heavy
21 when they are filled with bolts; but they are
22 probably not 2,000 pounds. I'll give you that. I
23 think that's right.

24 Q. And you also agree with me, I think I
25 heard you say, that in the specific OSHA subpart that

1 relates to steel erection work, there is no specific
2 requirement that this purlin or girt have been
3 secured in place?

4 A. Yes.

5 Q. Okay. Now, I think we can go through
6 this quickly. Lieutenant Commander Ash cited this
7 section of the Army Corps of Engineer Safety Manual.
8 27EO1 -- excuse me -- O3. You agree with me, do you
9 not, that that does not apply?

10 A. Well, I've got to be -- I've got to add
11 this as you know and you are not going to be
12 surprised. This gentleman is more knowledgeable and
13 understanding of his standards than I am; however,
14 there is similar language in the OSHA standard that I
15 would say does not apply to the member because it's
16 not a web. You know, the big problem here is it's
17 not a web; and it's not solid either.

18 Q. Right.

19 A. So to me, it's very hard to make this
20 particular standard apply even though there is a
21 significant hazard that exists.

22 Q. I think you are trying very hard not to;
23 but you are agreeing with me, are you not, that the
24 27EO3 of the Army Corps Safety Manual did not apply
25 to this steel member. Isn't that so?

1 the part of my client or omissions not only violated
2 applicable OSHA standards, which you've told me
3 about. Are there any OSHA standards you are going to
4 rely on other than the ones we discussed today?

5 A. No.

6 Q. Okay. Your answer in several places
7 says, After referring to applicable OSHA standards,
8 the following -- and those set forth in the
9 government safety manuals pertinent to structural
10 steel erection.

11 Now, we've addressed the Army Corps
12 Safety Manual?

13 A. Right.

14 Q. The Section 03, which I think you
15 conceded didn't really apply to this particular steel
16 member?

17 A. True.

18 Q. Is there some other safety manual that
19 this answer is referring to that I haven't asked you
20 about?

21 A. No.

22 Q. Should your answer then be amended to
23 delete the reference to government safety manuals?

24 A. Well, I'm sure that the government
25 safety manual has standards that are similar to the

1 ones in Subpart C, general requirements for safety
2 and requirements for conducting inspections of work
3 places by competent persons; and so I would not want
4 to eliminate that reference for those reasons; but it
5 is true what you said that that specific reference is
6 one that I'm not going to be relying on.

7 Q. All right. All right. Should my client
8 have had that girt in place in such a way that it
9 would have been impossible to dislodge it with the
10 boom being operated by Mr. Shepherd?

11 A. No. No one is expected to do that.

12 Q. Okay. So I guess you are agreeing with
13 me that my client doesn't have to ensure the absolute
14 safety of Mr. Shepherd in every situation?

15 A. I agree with that.

16 Q. Okay. So aren't you and I, I guess,
17 arguing about at what point did the boom truck
18 exceed, if it did, reasonable measures to secure that
19 girt? Isn't that really the issue?

20 A. Well, I think we are talking about
21 standard of care as you well know and what could be
22 reasonably anticipated as a hazard on the part of the
23 employer; and I'm only here -- the only reason I'm
24 here is because I believe that this hazard is
25 recognized in the industry, that it could be



Public Law 91 - 596
91st Congress, S. 2193
December 29, 1970
As amended by Public Law 101-552,
§3101, November 5, 1990

An Act



[REDACTED]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the Occupational Safety and Health Act.

Congressional Findings and Purpose

SEC. (2) The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources -

- (1)** by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions;
- (2)** by providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;
- (3)** *[REDACTED]*
- (4)** *[REDACTED]*
- (5)** by providing for research in the field of occupational safety and health, including the psychological factors involved, and by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems;
- (6)** by exploring ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions, and conducting other research relating to health problems, in recognition of the fact that occupational health standards present problems often different from those involved in occupational safety;
- (7)** by providing medical criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience;
- (8)** by providing *[REDACTED]*
- (9)** by providing *[REDACTED]*

Applicability of This Act

Sec. (4) (a)

(b)(1) Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 274 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2021), exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

(2) The safety and health standards promulgated under the Act of June 30, 1936, commonly known as the Walsh-Healey Act (41 U.S.C. 35 et seq.), the Service Contract Act of 1965 (41 U.S.C. 351 et seq.), Public Law 91-54, Act of August 9, 1969 (40 U.S.C. 333), Public Law 85-742, Act of August 23, 1958 (33 U.S.C. 941), and the National Foundation on Arts and Humanities Act (20 U.S.C. 951 et seq.) are superseded on the effective date of corresponding standards, promulgated under this Act, which are determined by the Secretary to be more effective. Standards issued under the laws listed in this paragraph and in effect on or after the effective date of this Act shall be deemed to be occupational safety and health standards issued under this Act, as well as under such other Acts.

(3) The Secretary shall, within three years after the effective date of this Act, report to the Congress his recommendations for legislation to avoid unnecessary duplication and to achieve coordination between this Act and other Federal laws.

(4) Nothing in this Act shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

Sec. 5

Enforcement

Occupational Safety and Health Standards

Sec 6.(a) Without regard to chapter 5 of title 5, United States Code, or to the other subsections of this section, the Secretary shall, as soon as practicable during the period beginning with the effective date of this Act and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees. In the event of conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees.

(b) The Secretary

(1) Whenever the Secretary, upon the basis of information submitted to him in writing by an interested person, a representative of any organization of employers or employees, a nationally recognized standards-producing organization, the Secretary of Health, Education, and Welfare, the National Institute for Occupational Safety and Health, or a State or political subdivision, or on the basis of information developed by the Secretary or otherwise available to him, determines that

219 Va. 15, *; 244 S.E.2d 754, **;
1978 Va. LEXIS 153, ***

Jennifer Sneed, an infant, etc., et al. v. John E. Sneed, Administrator, etc.

Record No. 770281

Supreme Court of Virginia

219 Va. 15; 244 S.E.2d 754; 1978 Va. LEXIS 153

June 9, 1978

PRIOR HISTORY: [***1]

Error to a judgment of the Circuit Court of Wise County. Hon. M. M. Long, Jr., judge presiding.

DISPOSITION: *Affirmed.*

CORE TERMS: shoulder, wheels, driver, roadway, dropped, prima facie case, embankment, feet, mechanical, decedent, happened, driving, swerved, highway, scene, circumstantial evidence, guilty of negligence, produce evidence, steering column, proximate cause, trier of fact, preponderating, disengagement, administrator, probability, conjecture, attributed, happening, extremis, presumed

HEADNOTES:

- (1) Negligence — Burden of Proof on Plaintiff — Requisites for Proof.
- (2) Evidence — Circumstantial — Insufficient to Establish *Prima Facie* Negligence.
- (3) Evidence — Negligence — Not Attributable to Driver when Vehicle Out of Control.

A mother, driving her two children, allowed the right wheels of the automobile to run off the pavement. In trying to return the car to the pavement, she overcompensated, then swerved back to the right, and ran over an embankment. She was killed and her two children were injured. The two children, both infants, sued her administrator for damages. Jury verdicts for the children were set aside by the Trial Court. The issue is whether a *prima facie* case of negligence of the decedent was established.

1. Negligence cannot be presumed from the mere happening of an accident. The burden is on the plaintiff to produce evidence of preponderating weight from which the trier of fact can find that the defendant was guilty of negligence which was a proximate cause of the accident. The evidence [***2] must prove more than a probability of negligence. The plaintiff must show why and how the accident happened. If the cause of the accident is left to conjecture, guess or random judgment, the plaintiff cannot recover.

2. The circumstantial evidence is insufficient to establish a *prima facie* case of negligence. The plaintiff must show more than that the accident resulted from one of two causes, for one of which the defendant is responsible and for the other of which she is not.

3. From the evidence it appears likely that after the right wheels dropped onto the shoulder for some unknown reason, Mrs. Sneed attempted to bring the vehicle back on the highway but was prevented from doing so because of disengagement of the steering column or because the right wheels hung to the edge of the roadway. No negligence can be attributed to her during this period because she was acting *in extremis* and the vehicle was apparently out of control. *Hackley v. Robey*, 170 Va. 55, 195 S.E. 689 (1938) *distinguished*.

SYLLABUS:

Evidence insufficient to establish prima facie case of negligence of driver in single vehicle accident.

COUNSEL: Carl E. McAfee (Cline, McAfee, Adkins [***3] & Gillenwater, on brief) for plaintiff in error.

Leslie M. Mullins (Mullins, Winston & Roberson, on brief) for defendant in error.

OPINIONBY: PER CURIAM

OPINION: [*16] [**754] On January 17, 1974, near Big Stone Gap in Wise County, a station wagon being operated on U.S. Route 23 by Carol D. Sneed left the highway, went over an embankment and overturned. The driver was killed and her two infant children, passengers in the vehicle, were injured. In subsequent damage suits, consolidated for trial, brought by Jennifer Sneed and David Sneed against the administrator of their mother's estate, the trial court set aside jury verdicts in favor of the children in the amounts of \$ 45,000 and \$ 20,000 respectively.

This appeal is from a joint judgment order entered by the court below in February of 1977 in favor of the defendant in both cases. The sole issue is whether a *prima facie* case of negligence was established against defendant's decedent.

The accident occurred about 2:30 p.m. on a clear day. The two-lane, hard-surfaced, north-south roadway was dry and the speed limit was 55 miles per hour. At the scene, the road was 19 feet 10 inches wide and "a little bumpy". [****4]

[**755] State Trooper J. B. Buchanan, not an eyewitness, testified that his investigation revealed that as Mrs. Sneed was driving north-bound downhill on a slight curve to her left, the right wheels of the vehicle "dropped off the paved portion" to a rough shoulder on the right, four to five inches below the hard surface. This difference in levels extended for a distance of 30 to 40 yards. The officer stated that when the driver "cut back to the hardtop, she overcorrected, swerved to the left of the centerline and swerved back to the right, over the embankment where she crashed." From the point where it "dropped off" to the shoulder, the vehicle travelled 210 feet to the top of the embankment and then went 96 feet down the steep hill before coming to rest on its side.

The officer further testified that no other vehicle was "involved", that there was no indication the driver had been drinking intoxicants, that he could not determine what caused the vehicle to initially "drop off" onto the shoulder, and that he could not give any reason why the accident happened.

Plaintiff David Sneed, who was seven years of age at the time of [*17] the accident, testified that he was [****5] sitting on the front seat of the vehicle. He remembered only that before the crash his mother was attempting to turn the steering wheel "and it wouldn't turn" and that "all she said" was: "Hang on."

The children's father testified that his wife was thoroughly familiar with the scene of the accident, having travelled over the road on many prior occasions. He stated that she was a "borderline" diabetic.

An expert in mechanical failure analysis testified that upon his examination of the entire vehicle after the accident, he found no mechanical defects which existed before the

accident. He determined that a "disengagement" which he discovered in the steering apparatus could have only occurred upon impact and did not exist "prior to impact."

[1] Relying principally on *Hackley v. Robey*, 170 Va. 55, 195 S.E. 689 (1938), the plaintiffs argue there was "ample evidence" of negligence on the part of the defendant's decedent, inasmuch as the possibility of mechanical failure in the vehicle had been excluded. They contend that because Mrs. Sneed was familiar with the road at the scene, she knew or should have known of the "drop off" to the right shoulder. They say that due [***6] to inattention or failure to keep a proper lookout, she negligently drove the vehicle onto the shoulder, thereafter losing control of it and causing the resulting injuries. We do not agree with the plaintiffs' contentions.

Axiomatic are the following principles. Negligence cannot be presumed from the mere happening of an accident. The burden is on the plaintiff to produce evidence of preponderating weight from which the trier of fact can find that the defendant was guilty of negligence which was a proximate cause of the accident. The evidence must prove more than a probability of negligence. The plaintiff must show why and how the accident happened. And if the cause of the accident is left to conjecture, guess, or random judgment, the plaintiff cannot recover.

[2] In this case, the evidence fails to disclose why the right wheels on the vehicle left the hard surface of the roadway initially, and dropped to the depressed and rough shoulder. There is no evidence that, prior to that moment, the vehicle had been travelling at an unreasonable speed or that Mrs. Sneed was inattentive or that she did not have the vehicle under proper control. To be [*18] reasonably inferred [***7] from this evidence is either that she was negligent in driving the vehicle onto the shoulder or that the vehicle left the roadway for some non-negligent reason, such as the driver's sudden illness. Such circumstantial evidence is insufficient, however, to establish a *prima facie* case of negligence because it must show more than that the accident resulted from one of two causes, for one of which the defendant is responsible and for the other of which she is not.

[3] From the evidence in general and David's testimony in particular, it appears [***756] likely that after the right wheels dropped onto the shoulder for some unknown reason, Mrs. Sneed attempted to bring the vehicle back onto the highway but was momentarily prevented from doing so either because the steering column became disengaged during the impact caused by the "dropoff", or because the right wheels "hung" along the four-to-five-inch thick edge of the hard surfaced roadway. But no negligence can be attributed to her during this period because she was acting *in extremis* and the vehicle was apparently out of control.

Hackley v. Robey, supra, is inapposite. In that case, a vehicle was being driven [***8] at night into a constricted passageway where Broad Street in the City of Richmond narrowed to pass over a bridge. The car ran up over an eight-inch curb, sideswiped a lamp post on the sidewalk, turned completely over, skidded along the street and across the bridge, and came to a stop 189 feet from the first point of collision. Based on the evidence in that case, we held that the question of the driver's gross negligence was for the jury because the physical evidence showed, among other things, that the car was being operated "at a very high rate of speed". 170 Va. at 62, 195 S.E. at 691. No such evidence of excessive speed is present here.

For these reasons, we hold that the trial court was correct in setting aside the verdicts in these cases. Consequently, the final judgment in favor of the defendant will be

Affirmed.

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Date/Time: Thursday, May 25, 2000 - 10:45 AM EDT

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222 Va. 317, *; 281 S.E.2d 804, **;
1981 Va. LEXIS 307, ***

Floyd S. Pike Electrical Contractor, Inc. v. Commissioner, Department of Labor and Industry,
Etc.

Record No. 800050

Supreme Court of Virginia

222 Va. 317; 281 S.E.2d 804; 1981 Va. LEXIS 307

September 11, 1981

PRIOR HISTORY: [***1]

Appeal from a judgment of the Circuit Court of Buchanan County. Hon. Nicholas E. Persin,
judge presiding.

DISPOSITION: *Affirmed.*

CORE TERMS: pole, wire, catch-off, cold, energized, feet, substation, beneath, mountain,
transmission line, et seq, conversation, regulation, truck, safe, top, findings of fact, civil
penalty, idiosyncratic, foreseeable, supervisor, hazards, highway, ran, placement, favorable,
exposed, lifting, foreman, reels

HEADNOTES:

(1) Pleading and Practice -- Findings of Fact by Trial Judge -- Standard of Review
on Appeal.

(2) Pleading and Practice -- Findings of Fact by Trial Judge -- Evidence Adequately
Supports Conclusions that Employer's Chosen Safety Measure Insufficient and that
Other Measures Which would have Prevented Accident Disregarded.

(3) Protection of Employees -- Safety and Health Codes Commission -- Work Safety
Regulations (Code § 40.1-22 et seq.) -- Statutory Construction -- Employer Not
Insurer of Employee Safety But Must Seek to Prevent Foreseeable Hazards.

(4) Protection of Employees -- Safety and Health Codes Commission -- Work Safety
Regulations (Code § 40.1-22 et seq.) -- Violation of -- Trial Court's Findings Merit
Imposition of Civil Penalty Against Employer.

Pike was engaged by an electrical power company to install a transmission line to a
company substation. The job required one of Pike's foremen and his crew to pull lines down
a mountain and across a highway to the substation. One non-energized [***2] line, or
cold wire, was attached to a catch-off pole (a temporary pole used to secure the end of a
transmission line), located near the substation but not directly beneath an energized line.
The cold wire, however, ran approximately 12 feet 3 inches beneath the energized wire to
the top of the mountain. A second energized line ran parallel to the first, approximately 60-
90 feet to its left. While lifting the cold wire above a bridge on the highway so that a truck
could pass, one worker was killed and another injured when the cold wire whiplashed and
struck the first energized wire. The Commissioner issued a citation charging Pike with
violations of safety regulations under Code § 40.1-22 et seq. The General District Court
heard evidence and dismissed the citation, and the Commissioner appealed to the Circuit
Court.

In the Circuit Court trial, there were significant conflicts between the evidence adduced by
the Commissioner and that adduced by Pike, the most critical of which concerned
conversations between Pike's foreman and his area supervisor regarding placement of the
catch-off pole. A second important conflict in the testimony concerned whether moving the

catch-off [****3] pole 20 to 30 feet to the left of the first energized wire, as the area supervisor reportedly urged, would have made the working conditions safe. The foreman testified that while moving the pole to the suggested location would have prevented the approximately 2,000 feet of cold wire between the catch-off pole and the top of the mountain from traveling beneath the energized wire, the move would not have prevented the approximately 100 feet of cold wire between the catch-off pole and the substation from traveling beneath the energized wire. The Safety Representative for the Virginia Department of Labor and Industry testified that he did not think the pole could have been moved to where it would not have been exposed to other energized lines. A third area of dispute was whether Pike should have employed other safety measures in addition to, or in lieu of, moving the catch-off pole. Several devices for insuring that a transmission line does not rise above a desired height could have been used to prevent the accident. Testimony differed as to their usefulness at this particular location, and as to their general attractiveness as alternatives because of the possibility of malfunction. [****4] In his letter opinion, the Trial Judge noted the conflict between the testimony of the foreman and the area supervisor with regard to the conversation about the catch-off pole, but did not resolve which account was accurate. The Judge stated he was not satisfied that moving the catch-off pole would have prevented this accident, and concluded that if Pike had used alternative safety procedures the accident could have been prevented. From the imposition of a civil penalty, Pike appeals.

1. On appeal, findings of fact by the Trial Judge are presumed to be correct and are given the same effect as a jury verdict, settling all conflicts in the evidence in favor of the prevailing party. The evidence is viewed in a light most favorable to the finding and a contention that the evidence does not support the finding will be sustained only when the finding is plainly wrong or is without credible evidence to support it. *Richmond v. Beltway Properties*, 217 Va. 376, 228 S.E.2d 569 (1976), followed.

2. Here, the evidence adequately supports the Trial Court's conclusion that moving the catch-off pole would not have removed the danger of contact between the cold wire and [****5] the energized lines. The testimonies of two witnesses support this finding. Similarly, there is testimony supporting the Trial Court's finding that Pike should have employed other safety measures or devices in addition to, or in lieu of, moving the catch-off pole, and that the use of these would have prevented the accident.

3. The safety regulations promulgated under the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. § 651 et seq., and adopted by the Virginia Safety and Health Codes Commission, Code § 40.1-22 et seq., were not designated to make the employer an insurer of an employee's safety. A safe workplace is not necessarily risk-free. An employer need not take steps to prevent hazards which are not generally foreseeable, including idiosyncratic behavior of an employee, but must do all it can to prevent foreseeable hazards. *Ocean Electric Corp. v. Secretary of Labor*, 594 F.2d 396 (4th Cir. 1979), followed.

4. Here, the Trial Court's judgment does not impose civil liability on the employer for the idiosyncratic, unforeseeable behavior of an employee. Instead, the Trial Court held that Pike chose a measure (moving the catch-off [****6] pole) that would not have removed the danger to its employees and chose to disregard other safety measures that would have prevented the accident. These findings merited the imposition of a civil penalty against Pike.

SYLLABUS:

While work safety regulations in Code § 40.1-22 et seq. were not designed to make employer an insurer of employee safety, employer must seek to prevent foreseeable hazards; findings of fact by Trial Court given same effect on appeal as jury verdict and evidence supports finding of safety violation by employer meriting imposition of civil penalty.

COUNSEL: James P. Jones (Penn, Stuart, Eskridge & Jones, on briefs), for appellant.

Leonard Vance, Assistant Attorney General (Marshall Coleman, Attorney General; Walter H. Ryland, Chief Deputy Attorney General, on brief), for appellee.

JUDGES: Harrison, Poff, Thompson, JJ., and Harman, S.J.

OPINIONBY: PER CURIAM

OPINION: [*319] [**805] The issue on appeal is whether the trial court erred in concluding that an employer violated work safety regulations adopted by the Virginia Safety and Health Codes Commission.

Floyd S. Pike Electrical Contractor, Inc. (Pike), was engaged by an electrical power company [***7] to install a transmission line to the power company's substation near Grundy. The job required Roger Hubbard, one of Pike's foremen, and his crew to pull lines down a mountain and across a highway to the substation. One non-energized line (hereinafter, "the cold wire") was attached to a catch-off pole (a temporary pole used to secure the end of a transmission line), located near the substation but not directly beneath a 69,000-volt energized line ("the 69-KV wire"). The cold wire, however, ran approximately 12 feet 3 inches beneath the 69-KV wire to the top of the mountain. An 88,000-volt energized line ("the 89-KV wire") ran parallel to the 69-KV wire approximately 60-90 feet to the left side of the 69-KV wire. While lifting the [*320] cold wire above a bridge on the highway so that a truck could pass, one worker was killed and another injured when the cold wire whiplashed n1 and struck the 69-KV wire.

-----Footnotes-----

n1 No one knew what caused the wire to whiplash. Hubbard surmised, however, that the wire became entangled in brush and popped loose when pulled.

-----End Footnotes----- [***8]

The Commissioner of the Department of Labor and Industry issued a citation charging Pike with "serious" n2 violations of safety regulations n3 promulgated under the Occupational [**806] Safety and Health Act of 1970 (OSHA), 29 U.S.C. § 651 et seq., and adopted by the Virginia Safety and Health Codes Commission. See Code §§ 40.1-22, -49.4. The general district court heard evidence and dismissed the citation, and the Commissioner appealed to the circuit court.

-----Footnotes-----

n2 Code § 40.1-49.3(5) defines as "serious" a violation entailing "a substantial probability that death or serious physical harm could result" from a condition or practice which exists "unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." Serious violations result in a civil penalty of up to \$ 1,000. Code § 40.1-49.4(H).

n3 Specifically, Pike was cited for violating Regulation § 1926.955(c)(3), which requires that "the conductor being installed or removed . . . be grounded or provisions made to insulate or isolate the employee" and for violating Regulation § 1926.955(c)(5), which requires that "[c]onductors being strung in . . . be kept under positive control by the use of adequate

tension reels, guard structures, tielines or other means to prevent accidental contact with energized circuits." 29 C.F.R. § 1926.955(c)(3) and (c)(5).

-----End Footnotes----- [***9]

In the circuit court trial, there were significant conflicts between the evidence adduced by the Commissioner and that adduced by Pike, the most critical of which concerned conversations between Hubbard and Leo Sams, Pike's area supervisor and Hubbard's superior, regarding placement of the catch-off pole. Hubbard testified that he told Sams the pole was in the best possible position and that Sams said nothing in reply. On the other hand, Sams testified that approximately one month before the accident he and Hubbard discussed moving the pole 20 to 30 feet to the left so that the line between the catch-off pole and the top of the mountain would not be dangerously close to the 69-KV line. According to Sams, he talked with Hubbard by radio on the Friday preceding the Monday accident and asked if the catch-off pole had been moved. Sams said Hubbard told him, "I'll move it this evening or in the morning one." Sams acknowledged he did not order Hubbard to move the pole. Sams' account of the radio conversation was confirmed by Ronald Gilbert, who testified he heard it on a receiver in his truck.

[*321] A second important conflict in the testimony concerned whether moving the [***10] catch-off pole 20 to 30 feet to the left of the 69-KV wire, as Sams reportedly urged, would have made the working conditions safe. According to both Hubbard and A. L. McAlexander, Safety Director for Pike, if the pole had been so moved, the cold wire between the catch-off pole and the top of the mountain, approximately 2,000 feet long, would not have been directly under the 69-KV wire. Hubbard testified, however, that if the catch-off pole had been moved to the suggested location, the cold wire between the catch-off pole and the substation, approximately 100 feet, would have traveled beneath the 69-KV wire. Placing the catch-off pole approximately 30 feet to the left, moreover, would have positioned the cold wire midway between the 69-KV and 88-KV wires. McAlexander testified that if the catch-off pole had been moved, "there is no way . . . this accident could have occurred in the manner it did." Pressed on cross-examination to state whether the proposed location between the 69-KV and 88-KV wire would have been safe, McAlexander stated that when power lines whiplash, "it's usually an up and down motion rather than a side to side." On the other hand, Eugene Roberts, the Safety Representative [***11] for the Virginia Department of Labor and Industry, testified he did not think the catch-off pole "could have been moved to where it would . . . not [have] been exposed to other energized lines."

A third area of dispute was whether Pike should have employed other safety measures in addition to, or in lieu of, moving the catch-off pole. Several devices for insuring that a transmission line does not rise above a desired height (tie-downs, tension reels, and hold-down blocks) could have been used to prevent the accident but were not. McAlexander described use of these devices as less attractive alternatives because of the possibility of malfunction. Apart from these alternatives, Roberts testified the accident could have been avoided if the two workers had used a bucket truck in lifting the cold wire. Sams stated, however, that the workers could not have used a bucket truck at this site.

In his letter opinion, the trial judge noted the conflict between the testimony of Hubbard and Sams concerning the conversations regarding the placement of the catch-off pole, but did not resolve which account was accurate. The judge also stated he was "not satisfied" that moving the catch-off [***12] pole "would have . . . prevented this accident from taking place." We interpret the [***807] trial [*322] judge's statement as a factual finding that moving the catch-off pole would not have removed the danger of contact between the cold wire and energized lines. Finally, the trial judge concluded that if Pike had used alternative safety procedures, "this accident could have been prevented."

[1] On appeal, findings of fact made by the trial judge are presumed to be correct and are "given the same effect as a jury verdict, settling all conflicts in the evidence in favor of the prevailing party." *Richmond v. Beltway Properties*, 217 Va. 376, 379, 228 S.E.2d 569, 572 (1976). In reviewing such a factual finding, we view the evidence in a light most favorable to the finding. See, e.g., *Rudder v. Housing Authority*, 219 Va. 592, 595, 249 S.E.2d 177, 178 (1978), *appeal dismissed*, 441 U.S. 939 (1979). A contention that the evidence does not support the court's factual finding will be sustained only when the finding is plainly wrong or is without credible evidence to support it.

[2] In light of the deference due a trial court's factual findings, we conclude [***13] that the evidence supports the trial court's judgment. The evidence, viewed in a light most favorable to the findings, adequately supports the trial court's conclusion that moving the catch-off pole would not have removed the danger of contact between the cold wire and energized lines. Hubbard testified that the proposed location for the catch-off pole would have caused a portion of the cold wire to be suspended beneath the 69-KV wire. Roberts, moreover, said that he did not think the catch-off pole "could have been moved to where it would . . . not [have] been exposed to other energized lines." Upon this testimony, the trial court reasonably could conclude that moving the catch-off pole would not have removed the danger of contact between the cold wire and energized lines. Similarly, the evidence supports the trial court's factual finding that the use of tellines, tension reels, hold-down blocks, or similar devices would have prevented the accident.

[3-4] The safety regulations at issue here were not designed to make the employer an insurer of an employee's safety. *Ocean Elec. Corp. v. Secretary of Labor*, 594 F.2d 396, 399 (4th Cir. 1979); *Brennan v. Butler* [***14] *Lime and Cement Company*, 520 F.2d 1011, 1017 (7th Cir. 1975). A safe workplace is not necessarily risk-free. *Industrial Union Dept. v. American Petrol. Inst.*, 448 U.S. 607, 647 (1980) (plurality opinion). "An employer . . . need not take steps to prevent hazards which are not generally foreseeable, including idiosyncratic behavior of an employee, but at the [*323] same time an employer must do all it feasibly can to prevent foreseeable hazards. . . ." *General Dynamics v. Occupational Safety & Health*, 599 F.2d 453, 458 (1st Cir. 1979). The trial court's judgment, however, does not impose civil liability for the idiosyncratic, unforeseeable behavior of an employee. Instead, the trial court held that Pike chose a measure (moving the catch-off pole) that would not have removed the danger to its employees and chose to disregard other safety measures that would have prevented the accident.

In light of the evidence presented, we hold that the trial court's findings were adequately supported by the evidence and merited the imposition of a civil penalty against Pike, and the judgment will be affirmed.

Affirmed.

Source: All Sources : / . . . / : VA Supreme Court, Court of Appeals, and Circuit Court Cases

Terms: employer w/20 "safe work!" (Edit Search)

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Date/Time: Friday, June 2, 2000 - 2:00 PM EDT

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232 Va. 177, *; 1986 Va. LEXIS 243, **;
349 S.E.2d 106, ***; 3 VLR 892

Cecil W. Pearson v. Canada Contracting Company, Inc., et al.; Jac Booden Orthopedic
Supply Company, Inc. v. Richard M. Jones

Record Nos. 830982, 840521

Supreme Court of Virginia

232 Va. 177; 1986 Va. LEXIS 243; 349 S.E.2d 106; 3 VLR 892

October 10, 1986

PRIOR HISTORY: [1]**

Appeal from a judgment of the Circuit Court of the City of Richmond. Hon. Willard I. Walker, judge presiding. Appeal from a judgment of the Circuit Court of the City of Norfolk. Hon. Alfred W. Whitehurst, judge presiding.

DISPOSITION: *Record No. 830982 -- Affirmed.*

Record No. 840521 -- Reversed and final judgment.

CORE TERMS: licensee, firemen, invitee, policemen, occupier, duty, policeman, fireman, reason to know, warn, owed, dangerous condition, privileged, demolition, platform, reasonable care, invitation, unsafe, duty owed, regulation, possessor, demurrers, roof, safe, trespasser, statutory duty, general rule, firefighters, firefighting, discover

HEADNOTES:

Torts -- Negligence -- Duty of Care -- Dangerous Condition -- Liability of Owner or Occupier -- Invitee -- Licensee -- Police Officer -- Firefighters

In the first case a fireman was injured when he fell through the floor of a building while fighting a fire. In an action against the property owner and against the contractors engaged in demolishing the building, he sought damages for personal injuries alleging negligence, negligence *per se*, and nuisance, all of which claims were dismissed. Plaintiff then alleged that defendants breached a duty to warn him of the hidden danger and thereby proximately caused his injuries. The trial court applied a rule of limited liability to persons entering land under a privilege, but created an exception restricting the duty in cases involving premises on which construction or demolition work is under way and [**2] dismissed the action under that rule. Plaintiff fireman appeals.

In the second case, a police officer brought an action for injuries sustained while on duty pursuing a suspect on defendants' unsafe premises. The trial court granted an instruction on the duty of care owed to the policeman as a licensee but refused an instruction identical to the general rule used in the case of the fireman. The court also refused an alternative instruction offered by the defendant on the duty owed to the policeman as a bare licensee.

1. Firemen may not recover for another's negligence in setting a fire because firemen assume the risks of the usual hazards involved in firefighting, regardless of the origin of the fire.
2. Firemen are in a class of their own because of the public nature of their rights and duties and may under certain circumstances in the course of the their duties, enter property as licensees or invitees.
3. Liability is limited in the case of police and firefighters because they are covered by workers' compensation and because, unlike invitees and licensees, they enter at

unforeseeable times and go upon unusual parts of the premises and their presence cannot be [**3] reasonably anticipated so the level of care that is owed is not that of invitees or usual licensees.

4. Where an owner or occupier knows or has reason to know of a dangerous condition and knows or has reason to know of the presence on the premises of an officially privileged person who is unaware of the danger, he owes a duty to use reasonable care to make the condition safe or to warn the person of the danger.

5. An owner or occupier may be liable to firemen or policemen injured as a result of a violation of a statutory duty created for the express benefit of such persons.

6. This holding is limited to cases involving injuries occurring as the result of conditions on areas of the premises not open to the public.

7. Where there is no allegation here that the owners knew or should have known of a fireman's presence. They were not negligent in their failure to warn him of a dangerous condition they had created since that duty arises as to firemen and policemen only where the occupier knows or should have known of their presence on the premises.

8. The defendants did not violate 29 C.F.R. § 1926.850 (1978) promulgated under the Occupational Safety and Health [**4] Act because firemen are not employees within the class of persons for whose protection the regulation was enacted. Therefore, violation of the regulation could not constitute negligence *per se* theory.

9. The defendants did not violate the provisions of the Virginia Uniform Statewide Building Code, Article 13, because that article dealt with treatment of the lot after demolition of a building and was not applicable to demolition work in progress.

10. Defendant in the case of the policeman was not alleged to have violated any statutory duty and the evidence showed that defendant had no knowledge or reason to know of the condition and no knowledge or reason to know that the policeman was on the premises or even likely to be and, accordingly, defendant did not violate any duty owing to the policeman.

11. Because the policeman was not on the part of the premises open to the public and did not go on the property during business hours, there is no evidence that he entered the premises on express or implied invitation and he should not be accorded the status of an invitee on a business enterprise open to the public.

SYLLABUS:

*Two cases where a fireman and a policeman sustained [**5] injuries while on duty on unsafe private premises were consolidated on appeal; no liability is found under claims including violation of a statutory duty, negligence and duties to privileged persons.*

COUNSEL: Robert C. Metcalf (Parker, Pollard & Brown, P.C., on brief), for appellant (Record No. 830982).

Frank B. Miller, III (Roger L. Williams; Sands, Anderson, Marks & Miller, on brief), for appellee Canada Contracting Company, Inc. (Record No. 830982).

James H. Flippen, III (Andrew C. Mitchell, Jr.; Breeden, MacMillan & Green; Cullen, Clark, Insley & Hanson, on briefs), for appellant (Record No. 840521).

William D. Breit (Breit, Rutter & Montagna, on brief), for appellee (Record No. 840521).

JUDGES: Cochran, J., delivered the opinion of the Court.

OPINION BY: COCHRAN

OPINION: [*179] [***108] These two appeals present one dispositive question: what duty of care is owed by an owner or occupier of land to a fireman or policeman injured when he comes on the premises in the performance of his official duties?

I.

On June 25, 1979, about 9:30 p.m., Cecil W. Pearson, employed as a fireman by the City of Richmond, responded to a reported fire in a building on Brown's [**6] Island in Richmond. He was injured when he fell to the basement through a hole in the floor. In an amended motion for judgment, Pearson sought to recover damages for his personal injuries from Ethyl Corporation, owner of the property, Canada Contracting Company, Inc. (Canada), the contractor engaged in demolition of the building, and C. S. Lewis, the subcontractor engaged in cutting and removing metal from the building. Pearson alleged in separate counts negligence, negligence *per se*, and nuisance. Over his objection, the trial court [*180] sustained certain defendants' demurrers and dismissed the negligence and negligence *per se* counts. On motion of Pearson, the nuisance count was also dismissed.

With leave of court, Pearson filed a second amended motion for judgment, alleging that Canada and Lewis had removed steel guard rails formerly protecting the hole through which he fell, that they had covered and obscured the hole by material inadequate to support his weight, that this condition was known to all three defendants and was a man-made trap or hidden danger, and that defendants knew or should have known he or other firefighters had been and would probably be [**7] coming on the premises at night to fight fires. Pearson alleged the defendants breached a duty to warn him of the hidden danger and thereby proximately caused his injuries. Defendants filed separate demurrers and grounds of defense. Thereafter, Ethyl Corporation was dismissed as a party defendant upon Pearson's execution of a covenant not to sue.

The trial court fashioned a general rule, patterned after the duty owed to licensees, of limited liability to persons entering land under a privilege, such as policemen and firemen. n1 Cf. Restatement (Second) of Torts §§ 342, 345 (1965). Creating an exception to this rule, however, the court further restricted the duty owed in cases involving premises on which construction or demolition work is under way by requiring the possessor of property to warn of a dangerous condition only if he knows the privileged person is on the premises. n2 Applying [***109] this exception, the court sustained the defendants' demurrers and dismissed the action.

-----Footnotes-----

n1 The general rule enunciated by the trial court stated:

A possessor of premises is subject to liability for bodily harm caused by a natural or artificial condition thereon to others who are privileged to enter upon the premises for a public purpose without the consent of the possessor, if the possessor

(a) knows that they are upon the premises or are likely to enter upon it in the exercise of their privilege, and

(b) knows of the condition and should realize it involves unreasonable risk to them, and

(c) should have expected they would not discover or realize the risk, and

(d) fails to exercise reasonable care

(i) to make the condition reasonably safe or

(ii) to warn them of the condition and risk involved therein. [**8]

n2 The exception stated:

However, if the bodily harm results from conditions on the premises involving construction or demolition activities, and if persons privileged to enter upon the premises for a public purpose know, or in the exercise of reasonable care should know, that such activities are being conducted thereon, then the possessor is not liable, unless the possessor has:

(i) actual notice of the premises condition which caused the bodily injury, and

(ii) actual knowledge of the presence on the premises of persons so privileged, and

(iii) having obtained such notice and knowledge as set forth in (i) and (ii) above, fails to use reasonable care to warn the persons so privileged.

-----End Footnotes-----

[*181] II.

Richard M. Jones, a police officer employed by the City of Norfolk, brought an action against Jac Booden Orthopedic Supply Company, Inc. (Booden), for injuries sustained in the performance of his duties on the Booden property. Jones alleged that Booden was negligent in the operation of its premises. A jury awarded Jones \$ 3,000 in damages and the trial court entered judgment [**9] on the verdict.

There was no material conflict in the evidence. Jones and two other police officers responded to a report of a burglary at a church behind the Booden premises about 5:15 p.m. on August 9, 1982. Finding the church had been broken into, the officers searched the surrounding area. Jones ascended a stairway at the rear of the Booden property, crossed the wooden platform at the top of the stairs, and went on the Booden roof to look for a suspect or evidence of the crime. When he returned to the platform, he informed an officer below that the roof was clear. As Jones stood on the platform, it collapsed and he was injured in falling.

The stairway, set back about eight feet from the sidewalk, did not look like a front entrance and was "obviously a rear entrance to the roof area." The stairs, made of steel, formerly had led to a second floor apartment, but this had not been occupied since 1965. At the time Jones fell, the stairs had no apparent purpose. Previously, they had been roped off to bar intruders, but when Jones used them they contained no rope, barricade, or warning signs.

Police had once apprehended a criminal suspect on the Booden roof, and Jones and [**10] other officers had been on the roof in the past while making routine police investigations. No one at Booden was aware of the prior arrest, however, or knew that police officers from time to time used the stairs to go to the roof.

Prior to Jones's fall, no defects in the wooden platform had been observed by Jones, by other officers accompanying him, or by Booden employees who had been on the platform. There was evidence, however, that wood from the platform which the officer examined after the accident was rotten.

[*182] The trial court, after denying Booden's motion to strike the evidence, granted an instruction on the duty of care owed to Jones as a licensee. n3 It refused Booden's proffered instruction identical to the general rule announced by the trial court in the Pearson case. See *supra* note 1. The court also refused an alternative instruction offered by Booden on the duty owed to Jones as a bare licensee. n4

-----Footnotes-----

n3 Instruction 7 provided:

When the defendant by the use of ordinary care:

1. knows or should know of an unsafe condition on his premises; and
2. should realize that it involves an unreasonable risk of harm to a licensee; and
3. should expect that a licensee will not discover or realize the unsafe condition; and
4. a licensee does not know or have reason to know of the unsafe condition and the risk involved; then the defendant [has] a duty to use ordinary care either to make the condition reasonably safe or a duty to warn a licensee of the unsafe condition.

If the defendant failed to perform any one or more of these duties, then he was negligent. [**11]

n4 Refused instruction 11A provided:

The Court instructs the jury that the plaintiff was a bare licensee on the defendant's premises, and the defendant owed him no duty to have his premises in a safe condition. The burden is on the plaintiff to prove by a preponderance of the evidence that the defendant knew, or in the exercise of ordinary care should have known, that the plaintiff was in danger and that thereafter the defendant failed to exercise ordinary care to protect him from injury

-----End Footnotes-----

III.

[1] We have held that firemen may not recover for another's negligence in setting a [***110] fire, concluding that firemen assume the risks of the usual hazards involved in firefighting, regardless of the origin of the fire. *C & O Railway v. Crouch*, 208 Va. 602, 608-

09, 159 S.E.2d 650, 655 (1968). We have not been previously called upon, however, to determine the extent of an occupier's liability to firemen or policemen for injuries resulting from risks beyond those inherently involved in firefighting or police work.

Cases addressing this issue have reached varied [**12] results, in large part because of the difficulty in placing firemen and policemen in any of the traditional categories of persons entering land of another -- trespassers, licensees, or invitees. A trespasser is one who unlawfully enters the land of another. See *Richmond Bridge Corp. v. Priddy*, 167 Va. 114, 118, 187 S.E. 518, 519 (1936). A licensee is one who enters for his own convenience or benefit with the knowledge and consent, express or implied, of the owner or [**183] occupier. See, e.g., *Bradshaw v. Minter*, 206 Va. 450, 452, 143 S.E.2d 827, 828-29 (1965) (social guest is licensee, not invitee, regardless of existence of express invitation); *Ingle v. Clinchfield R. Co.*, 169 Va. 131, 137, 192 S.E. 782, 784 (1937) (owner's silent acquiescence in repeated use made trespassers licensees); *Ches. & O.R. Co. v. Corbin*, 110 Va. 700, 702-03, 67 S.E. 179, 180 (1910) (known use of railbed by general public with tacit consent of railroad company made users licensees). And an invitee is one who enters pursuant to the express or implied invitation of the owner or occupier other than for a social purpose or for his own convenience. See, e.g., *Colonial [**13] Nat. Gas v. Sayers*, 222 Va. 781, 784, 284 S.E.2d 599, 601 (1981) (tenant using common area was invitee); *City of Richmond v. Grizzard*, 205 Va. 298, 302, 136 S.E.2d 827, 830 (1964) (implied invitation existed where premises thrown open to public and visitor entered for purpose for which premises open); *Williamsburg Shop v. Weeks*, 201 Va. 244, 246, 110 S.E.2d 189, 191 (1959) (customer in department store was invitee).

Policemen and firemen, however, do not fit into any of these categories; they enter premises as of right, under a privilege based on a public purpose. They clearly are not trespassers. Nor can they be classified as licensees or invitees, who enter with consent or invitation of the occupant, as consent and invitation are irrelevant to a policeman's or a fireman's privileged entry.

[2] In *Crouch*, we held the fireman to be "in a class of his own," or *sui generis*, "because of the public nature of his rights and duties." 208 Va. at 608, 159 S.E.2d at 655. We reaffirm this classification and we hold that it includes policemen as well as firemen. Firemen and policemen may, under certain circumstances in the course of their duties, enter property [**14] as licensees or invitees. In the present cases, however, the fireman and the policeman occupied neither status.

IV.

Some jurisdictions have abolished the distinction between licensees and invitees and established reasonable care as the standard owed by occupiers to firemen and policemen. See, e.g., *Bartholomew v. Klingler Co.*, 53 Cal. App. 3d 975, 980-81, 126 Cal. Rptr. 191, 193-94 (1975) (policeman injured in fall through ceiling during investigation of possible burglary); *Mounsey v. Ellard*, 363 Mass. 693, 707-08, 297 N.E.2d 43, 51-52 (1973) (abolishing licensee-invitee [**184] distinction and creating common duty of reasonable care to all lawful visitors in case involving injury to policeman who fell on accumulation of ice at defendant's residence); *Armstrong v. Mailand*, 284 N.W.2d 343, 350 (Minn. 1979) (landowner owed fireman, killed by explosion of gas storage tank, duty of reasonable care, except where, as here, fireman primarily assumed a risk apparent as part of firefighting). Other courts have reached the same result by labeling policemen and firemen as invitees in order to impose on occupiers an affirmative duty of reasonable care in maintaining [**15] the premises. See, e.g., *Dini v. Naiditch*, 20 Ill. 2d 406, 415-16, 170 N.E.2d 881, 885-86 (1960) (classification of firemen as anything but invitees deemed [***111] illogical); *Cameron v. Abatiell*, 127 Vt. 111, 118, 241 A.2d 310, 315 (1968) (policeman, injured on stairway during routine check of rear door, was a business visitor or invitee with right to

assume premises were reasonably safe for the purpose).

Many courts, however, have held firemen and policemen to be either licensees or *sui generis* and entitled to no greater care than the limited duty owed to licensees. See, e.g., *Roberts v. Rosenblatt*, 146 Conn. 110, 113, 148 A.2d 142, 144 (1959) (status of city fireman was akin to that of licensee); *Nared v. School Dist. of Omaha*, 191 Neb. 376, 380, 215 N.W.2d 115, 118 (1974) (following Restatement (Second) of Torts § 345) (policeman, injured in fall caused by condition on part of premises not open to public, was licensee); *Krauth v. Geller*, 31 N.J. 270, 273-74, 157 A.2d 129, 130-33 (1960) (*sui generis* fireman who fell from unprotected balcony of house under construction could not recover for acts of defendant that were not wanton); **[**16]** *Scheurer v. Trustees of Open Bible Church*, 175 Ohio St. 163, 169, 192 N.E.2d 38, 43 (1963) (duty owed to firemen and policemen is that owed to licensees); *Cook v. Demetrakas*, 108 R.I. 397, 401-03, 275 A.2d 919, 922-23 (1971) (policeman, injured when he pursued fugitive through area of construction and fell over embankment caused by excavation at the site, was licensee).

[3] We are persuaded by two fundamental policies to impose a rule of limited liability in cases such as these. First, injuries to firemen and policemen are compensable through workers' compensation. Code §§ 65.1-4, -4.1. The burden of their financial loss, therefore, is properly borne by the public rather than by individual **[*185]** property owners. **n5** Second, and more important, firemen and policemen, unlike invitees or licensees, enter at unforeseeable times and go upon unusual parts of the premises, including areas not open to the public. Except for scheduled inspections, their presence at any particular time cannot be reasonably anticipated. In such situations, it is not reasonable to require the level of care that is owed to invitees or, without some modification, the level of care owed **[**17]** to licensees. **n6**

-----Footnotes-----

n5 In addition to coverage of policemen and firemen under the workers' compensation laws, the Code provides means for payment by municipalities of additional disability and death benefits. See §§ 15.1-136.1 to -136.7 (payments to beneficiaries of deceased law enforcement officers and firemen); §§ 27-39 to -50 (relief for firefighters and their dependents); §§ 51-115 to -127 (disability and death benefits payable as part of policemen's pensions).

n6 An occupier is liable to a licensee for injuries caused by a condition of the premises if he knows or should know of the condition, should realize the condition carries an unreasonable risk of harm to the licensee, should expect the licensee will not discover the danger, and fails to use reasonable care to make the condition safe or warn of the danger, provided the licensee does not know or have reason to know of the condition and risk. *Busch v. Gaglio*, 207 Va. 343, 348-49, 150 S.E.2d 110, 114 (1966) (adopting Restatement (Second) of Torts § 342). An occupier is liable to its invitee injured "as the result of an unsafe condition (one which was not open and obvious to the invitee) if the invitor knew it existed, or by the exercise of reasonable care should have discovered its existence, and failed to remedy the condition or otherwise to protect the invitee against the danger." *Appalachian Power Co. v. Sanders*, 232 Va. 189, 194, 349 S.E.2d 101, 105 (1986) (this day decided).

-----End Footnotes----- **[**18]**

[4-5] We hold that, where an owner or occupier knows or has reason to know of a dangerous condition and knows or has reason to know of the presence on the premises of an officially privileged person whom the owner or the occupier knows or has reason to know is unaware of the danger, he owes a duty to use reasonable care to make the condition safe or to warn that person of the danger. Cf. Restatement (Second) of Torts §§ 342, 345.

Further, an owner or occupier may be liable to firemen or policemen injured as a result of a violation of a statutory duty created for the express benefit of such persons. See *Scheurer*, 175 Ohio St. at 168, 192 N.E.2d at 43.

[6] We expressly limit this holding to cases involving injuries occurring as the result of conditions on areas of the premises not open to the public, reserving decision on the issue whether a greater degree of care is owed to firemen and policemen injured [***112] on public areas, where the occupier may owe a duty to invitees to keep the premises safe. See *Beedenbender v. Midtown Properties*, [*186] 4 A.D.2d 276, 281-82, 164 N.Y.S.2d 276, 281 (1957); Restatement (Second) of Torts § 345(2).

V.

Pearson [**19] challenges the trial court's action in sustaining demurrers to the negligence and negligence *per se* counts of his pleadings.

[7] Pearson in essence alleged that defendants were negligent in their failure to warn him of a dangerous condition they had created. Under the rule applicable to licensees, an occupier is liable if he fails to use reasonable care to make safe a condition of which he knows or should know or to warn of the danger. *Busch v. Gaglio*, 207 Va. 343, 348-49, 150 S.E.2d 110, 114 (1966). Under the rule which we have enunciated with respect to firemen and policemen, the same duty arises, but only where the occupier knows or should know of their presence on the premises. Pearson did not allege that defendants were present or knew of Pearson's presence on the site or that they had an opportunity to warn him of the dangerous condition. The allegation that defendants knew or should have known that Pearson or other firemen had been and would probably be coming on the premises to fight fires at night is insufficient. There is no allegation that the firemen came on a routine schedule or at any time other than in response to fire alarms. Thus, there is no [**20] allegation that defendants knew or had reason to know of Pearson's presence on the premises at a time when the dangerous condition existed.

[8] Pearson alleged that defendants violated a regulation, 29 C.F.R. § 1926.850 (1978), promulgated under the Occupational Safety and Health Act, and that this violation constituted negligence *per se*. Pearson, however, was not an employee within the class of persons for whose protection the regulation was enacted. Violation of the regulation, therefore, could not benefit Pearson on a negligence *per se* theory.

[9] Pearson further alleged that defendants violated provisions of the Virginia Uniform Statewide Building Code and that this violation constituted negligence *per se*. Specifically, Pearson alleged violation of former § 115.3 of the Building Code, applicable at the time of his accident, which provided:

Lot Regulation: Whenever a structure is demolished or removed, the premises shall be maintained free from all unsafe [*187] or hazardous conditions by the proper regulation of the lot, restoration of established grades and the erection of necessary retaining wall and fences in accordance with the provisions [**21] of Article 13.

The provisions of former Article 13, however, dealt with treatment of the lot after demolition of a building is complete. See §§ 1308.1, 1309.1. Reading these provisions together, we find that § 115.3 was not applicable to this demolition work in progress. Thus, the trial court properly sustained defendants' demurrers to Pearson's negligence *per se* count. Accordingly, we hold that the court did not err in sustaining the demurrers and dismissing

Pearson's action.

VI.

Booden challenges the trial court's action in denying its motion to strike the evidence, made at the conclusion of Jones's evidence and renewed after all the evidence had been presented, and in granting and refusing certain jury instructions. In moving to strike the evidence, Booden contended that Jones was required to prove that Booden knew he was on the premises or was likely to enter, that Booden knew of the condition, should have known it involved unreasonable risk to Jones, and should have expected Jones would not discover or realize the risk, and that Booden failed to exercise reasonable care to make the condition safe or warn Jones. These principles were subsequently incorporated [**22] in an instruction proffered by Booden and refused by the trial court.

[10] [***113] Booden was not alleged to have violated any statutory duty. The sole basis of recovery was Booden's failure to discover the hazardous condition of the wooden platform and make the condition safe or warn Jones of the danger. The evidence showed that Booden had no knowledge or reason to know of the condition of the platform and no knowledge that Jones was on the premises or even that he was likely to come on the premises in the performance of his duties. Unlike *Cameron v. Abatiell*, 127 Vt. 111, 241 A.2d 310 (1968), relied upon by Jones, there was no evidence that Booden knew of any regular or routine police check of its property. Accordingly, Booden did not violate any duty owing to Jones.

[11] Jones contended that he should be accorded the status of an invitee because the Booden property was the site of a business enterprise to which the public was invited. Jones was not on that [*188] part of the premises open to the public and did not go on the property during business hours; there is no evidence that he entered on invitation, either express or implied.

Accordingly, we [**23] hold that the trial court erred in denying Booden's motion to strike the evidence and to enter summary judgment in favor of Booden. We will reverse the judgment in favor of Jones and enter judgment here in favor of Booden.

Record No. 830982 -- Affirmed.

Record No. 840521 -- Reversed and final judgment.

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259 Va. 412; 525 S.E.2d 559, *;
2000 Va. LEXIS 28, **

TERESA F. ROBINSON, ADMINISTRATOR, ETC. v. MATT MARY MORAN, INC., ET AL

Record No. 990778

SUPREME COURT OF VIRGINIA

259 Va. 412; 525 S.E.2d 559; 2000 Va. LEXIS 28

March 3, 2000, Decided

PRIOR HISTORY: [**1] FROM THE CIRCUIT COURT OF THE CITY OF RICHMOND.
Theodore J. Markow, Judge.

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff estate administrator appealed order of Circuit Court of City of Richmond (Virginia) which sustained demurrers of defendants, a club and its bartender, dismissing claim of negligence for serving alcoholic beverages to underage, intoxicated driver of vehicle subsequently involved in accident resulting in death of decedent passenger.

OVERVIEW: Plaintiff, as administrator of decedent daughter's estate, brought an action alleging, inter alia, that defendants, a club and its bartender, were negligent in serving alcoholic beverages to an underage intoxicated person, where the person subsequently drove a vehicle which was involved in an accident resulting in decedent passenger's death. The court held that, regardless of the fact that the vehicle driver was not old enough to legally consume alcohol, defendants were not liable for furnishing the intoxicant since the proximate cause of the injury was the consumption of the intoxicant by the vehicle driver. Similarly, defendants' violation of the statute prohibiting the furnishing of alcoholic beverages to underage patrons did not constitute negligence per se since the statutory violation was also not the proximate cause of decedent's death.

OUTCOME: Order was affirmed; the proximate cause of decedent passenger's death was consumption of alcohol by the driver of the vehicle, rather than furnishing alcohol to the driver by defendants, a club and its bartender, or defendants' violation of statute prohibiting the sale of alcohol to the underage, intoxicated driver.

CORE TERMS: beverages, alcoholic, proximate cause, demurrer, common law, intoxicated, vendor, cause of action, third party, proximate causation, intoxication, blood alcohol, able-bodied, sustaining, restaurant, passenger, serving, volume, matter of law, furnishing, consumed, wrongful death, motor vehicles, regulations, consuming, bartender, underage, driving, alcohol, patron

CORE CONCEPTS - Hide Concepts

Civil Procedure : Pleading & Practice : Defenses, Objections & Demurrers : Failure to State Claim or Cause of Action

Civil Procedure : Appeals : Standards of Review

Where the trial court decides the case on demurrer, the appellate court will consider as true all material facts alleged in the motion for judgment, all facts impliedly alleged, and all reasonable inferences that may be drawn from the alleged facts.

Torts : Negligence : Duty : Purveyors of Alcohol

A vendor of alcoholic beverages is not liable for injuries sustained by a third party that result from the intoxication of the vendor's patron. The basis of the rule is that individuals, drunk or sober, are responsible for their own torts and that, apart from statute, drinking the intoxicant, not furnishing it, is the proximate cause of the injury.

Torts : Causation : Proximate Cause

Torts : Negligence : Duty : Purveyors of Alcohol

The common law considers the act of selling alcoholic beverages as too remote to be a proximate cause of an injury to a third party resulting from the negligent conduct of the purchaser of the beverages.

Torts : Causation : Proximate Cause

Torts : Negligence : Actions

In the absence of proof of proximate causation, a defendant will not be held liable for the injury or death of another person caused by his negligent acts.

Torts : Negligence : Proof of Negligence : Breach of Statute

The requirements for establishing an action based on negligence per se are well settled. First, a plaintiff must prove that the defendant violated a statute that was enacted for public safety. Second, the plaintiff must establish that she belongs to the class of persons for whose benefit the statute was enacted. Third, the plaintiff must prove that the statutory violation was a proximate cause of her injury.

COUNSEL: Thomas E. Albro (Peter J. Caramanis; Tremblay & Smith, on briefs), for appellant.

S. Vernon Priddy, III (Carlyle R. Wimbish, III; Sands Anderson Marks & Miller, on brief), for appellees.

Amicus Curiae: Mothers Against Drunk Driving and National Center for Victims of Crime (Peter S. Everett; Robert J. Stoney; Blankingship & Keith, on brief), in support of appellant.

JUDGES: Present: Compton, n1 Lacy, Hassell, Keenan, Koontz, and Kinser, JJ. , and Poff, Senior Justice. **OPINION BY JUSTICE BARBARA MILANO KEENAN.**

n1 Justice Compton participated in the hearing and decision of this case prior to the effective date of his retirement on February 2, 2000.

OPINION BY: BARBARA MILANO KEENAN

OPINION: [*560] OPINION BY JUSTICE BARBARA MILANO KEENAN

In this appeal, we consider whether the trial court erred in sustaining a demurrer to a wrongful death action, which asserted theories of common law negligence and **negligence per se** against a restaurant and its bartender who allegedly served alcoholic beverages to two intoxicated persons under the age of 21. After leaving the restaurant, one of those intoxicated persons drove a motor vehicle that was involved in an accident in which her passenger, the plaintiff's decedent, was killed.

Teresa F. Robinson, administrator of the estate of her daughter, Nicole Leigh Breckenridge, filed a motion for judgment against Matt Mary Moran, Inc. d/b/a Fox River Cafe and Comedy Club (the Club) and Paul J. Schmidt, a bartender at the Club [**2] (collectively, Fox River), and others. Counts V and VIII of the motion for judgment are at issue in this appeal. In Count V, Robinson alleged that Fox River was negligent in serving alcoholic beverages to two underage patrons. In Count VIII, Robinson alleged negligence per se based on Fox River's violation of statutory and regulatory provisions prohibiting the sale of alcoholic beverages to intoxicated persons and any sale of such beverages to persons under 21 years of age. n2

-----Footnotes-----

n2 Robinson asserted additional counts against Fox River alleging "willful, wanton and intentional conduct," premises liability, and nuisance. The trial court sustained Fox River's demurrer to those counts, and Robinson does not challenge those rulings in this appeal.

-----End Footnotes----- [**561]

Since the trial court decided this case on demurrer, we will consider as true all material facts alleged in the motion for judgment, all facts impliedly alleged, and all reasonable inferences that may be drawn from the alleged facts. *Gina Chin & Assoc. v. First Union Bank*, 256 Va. 59, 61, 500 S.E.2d 516, 517 (1998); [**3] *Norris v. Mitchell*, 255 Va. 235, 237, 495 S.E.2d 809, 810 (1998). Robinson alleged in the motion for judgment that in the late evening of November 12, 1997, 21-year-old Nicole Leigh Breckenridge and several friends, including Nicole C. Johnson and Jason B. Johnson (the Johnsons), consumed alcoholic beverages at the Club. During a period of about three hours, Schmidt and other Club employees served Breckenridge and the Johnsons "a significant amount" of alcoholic beverages. At that time, Jason Johnson was 20 years old and Nicole Johnson was 19 years old.

The Johnsons were employed at a restaurant known as The Tobacco Company, which was located next to the Club. The owner and the general manager of The Tobacco Company, in an effort to prevent underage employees from consuming alcoholic beverages at the Club, had provided the Club's management with a list of the names and birth dates of such employees. The Johnsons' names and birth dates were included on this list.

About 2 a.m. on November 13, 1997, Schmidt and other Club employees directed Breckenridge and the Johnsons to leave the Club premises, despite the fact that they were all obviously intoxicated. Breckenridge [**4] entered a vehicle driven by Nicole Johnson, while Jason Johnson began driving another vehicle. The Johnsons, operating separate vehicles, engaged in a race while heading west on Main Street in Richmond. They raced for several blocks, passing through about 13 intersections controlled by traffic lights. Nicole Johnson lost control of her vehicle, which struck a tree.

Breckenridge died from the injuries she sustained in the collision. Blood alcohol testing conducted after the accident revealed that Nicole Johnson's blood alcohol content was 0.24% by weight by volume, Jason Johnson's blood alcohol content was 0.13% by weight by volume, and Breckenridge's blood alcohol content was 0.25% by weight by volume.

In Count V of her motion for judgment, Robinson alleged that Fox River was negligent in serving alcoholic beverages to the Johnsons when it knew or should have known that they were under 21 years of age and were intoxicated. Robinson also alleged that Fox River knew or should have known that the Johnsons intended to operate motor vehicles and to transport passengers after departing the Club. She alleged that Breckenridge's death was a direct and proximate result of Fox River's [**5] acts.

In Count VIII, Robinson alleged that Fox River violated several statutory and regulatory provisions that prohibit the sale of alcoholic beverages to persons under the age of 21 and to persons who are intoxicated. She alleged, among other things, that these provisions were enacted to prevent persons under the age of 21 from driving after consuming alcoholic beverages and to protect all persons riding as passengers in motor vehicles operated by such drivers. Robinson asserted that Fox River's violation of these statutes and regulations was a proximate cause of Breckenridge's death.

Fox River filed a demurrer to Counts V and VIII, contending that the Commonwealth does not recognize a cause of action against a vendor of alcoholic beverages for injuries or death to third parties caused by the intoxication of a person who consumed alcoholic beverages provided by that vendor. The trial court sustained the demurrer to Count V, based on our holding in *Williamson v. The Old Brogue, Inc.*, 232 Va. 350, 350 S.E.2d 621 (1986). There, we held that a common law negligence action did not lie against a vendor who provided alcoholic beverages to a person who later drove [**6] an automobile and injured a third party. *Id.* at 354, 350 S.E.2d at 624.

Relying on *Williamson*, the trial court also sustained the demurrer to Robinson's claim of negligence *per se* in Count VIII. The court held that the facts alleged did not state a cause of action for negligence *per se* because the sale of alcoholic beverages to a person is not a proximate cause of that person's later [**62] acts. The trial court entered an order dismissing Counts V and VIII, and Robinson appealed from this judgment.

On appeal, Robinson argues that *Williamson* does not control the facts alleged in her motion for judgment because *Williamson* involved an intoxicated person over the age of 21 who was served alcoholic beverages and later caused injury to a third party. Robinson contends that Fox River's act of providing alcoholic beverages to the Johnsons violated a common law duty to refrain from serving alcoholic beverages to persons who are not "able-bodied." She contends that the Johnsons were not "able-bodied" because they were less than 21 years of age, and that Fox River's act in providing them alcoholic beverages was a proximate cause of the motor vehicle [**7] accident.

Robinson also argues that she stated a valid claim of negligence *per se* based on her allegation that Fox River violated the statutes and regulations referenced in her motion for judgment. She contends that these provisions were enacted to protect the general public from the dangers created when persons under the age of 21 drive while intoxicated, and that Breckenridge was a member of the class of persons that these provisions were designed to protect. Robinson further asserts that Fox River's violation of the cited provisions was a proximate cause of Breckenridge's death. We disagree with Robinson's arguments.

We first conclude that Robinson failed to state a cause of action for wrongful death based on common law negligence. The common law of this Commonwealth, as expressed in *Williamson v. The Old Brogue, Inc.*, establishes that a vendor of alcoholic beverages is not liable for injuries sustained by a third party that result from the intoxication of the vendor's patron. 232 Va. at 352-53, 350 S.E.2d at 623. We explained that "the basis of the rule is that individuals, drunk or sober, are responsible for their own torts and that, apart from statute, [**8] drinking the intoxicant, not furnishing it, is the proximate cause of the injury." 232 Va. at 353, 350 S.E.2d at 623.

In stating this rule, we did not incorporate any principles relating to "able-bodied" persons, and we have not recognized this concept as part of the common law of this Commonwealth. In *Williamson*, we referred to the responsibility of "individuals" for the commission of their own torts and we did not qualify that word in the course of our analysis and holding. See *Id.*

We decline to recognize an exception to the common law set forth in *Williamson* based on the distinction urged by Robinson. The responsibility of individuals for torts they commit does not change because they are 19 or 20 years of age, rather than 21 years of age. Moreover, the fact that they cannot legally purchase alcoholic beverages does not alter this responsibility, just as it does not alter the responsibility of intoxicated adults who cannot legally purchase such beverages because of their intoxication. See Code § 4.1-304.

The common law considers the act of selling alcoholic beverages as too remote to be a proximate cause of an injury to a third party [**9] resulting from the negligent conduct of the purchaser of the beverages. *Williamson*, 232 Va. at 353, 350 S.E.2d at 623. Thus, Robinson's pleading is insufficient as a matter of law because Fox River's act of furnishing alcohol to the Johnsons was not a proximate cause of Breckinridge's death. In the absence of proof of proximate causation, a defendant will not be held liable for the injury or death of another person caused by his negligent acts. See *Farren v. Gilbert*, 224 Va. 407, 412, 297 S.E.2d 668, 671 (1982); *Roll 'R' Way Rinks, Inc. v. Smith*, 218 Va. 321, 329, 237 S.E.2d 157, 162 (1977); *S & C Co. v. Horne*, 218 Va. 124, 128, 235 S.E.2d 456, 459 (1977). Therefore, we hold that the trial court did not err in sustaining Fox River's demurrer to Count V.

We emphasize, however, as we did in *Williamson*, that we are not insensitive to the societal problem illustrated by these types of cases. See 232 Va. at 353, 350 S.E.2d at 624. Nevertheless, a decision to abrogate this longstanding common law principle is the proper function of the legislature, not of the courts. The legislature provides a public [**10] forum for consideration of the competing social, economic, and policy issues that are raised by the prospect of abrogating this settled rule. *Id.* at 354, 350 S.E.2d at 624. [*563] The sheer number of issues that can be raised in a debate of this nature demonstrates the inadequacy of the judicial process to balance these competing concerns. Thus, we decline to engage in such an exercise here. *Id.*

We next consider Robinson's assertion of a cause of action based on negligence per se. The requirements for establishing an action based on negligence per se are well settled. First, a plaintiff must prove that the defendant violated a statute that was enacted for public safety. *Halterman v. Radisson Hotel Corp.*, 259 Va. 171, 523 S.E.2d 823, 2000 Va. LEXIS 18, *7 (2000); *MacCoy v. Colony House Builders, Inc.*, 239 Va. 64, 69, 387 S.E.2d 760, 763 (1990); *Virginia Elec. and Power Co. v. Savoy Const. Co.*, 224 Va. 36, 45, 294 S.E.2d 811, 817 (1982). Second, the plaintiff must establish that she belongs to the class of persons for whose benefit the statute was enacted. *Halterman*, 259 Va. at , 523 S.E.2d at , 2000 Va. LEXIS 18, *8; *Williamson*, 232 Va. at 355, 350 S.E.2d at 624; [**11] *Pearson v. Canada Contracting Co.*, 232 Va. 177, 186, 349 S.E.2d 106, 112 (1986). Third, the plaintiff must prove that the statutory violation was a proximate cause of her injury. *Halterman*, 259 Va. at , 523 S.E.2d at , 2000 Va. LEXIS 18, *8; *Thomas v. Settle*, 247 Va. 15, 20, 439 S.E.2d 360, 363 (1994); *Hack v. Nester*, 241 Va. 499, 503-04, 404 S.E.2d 42, 43 (1990).

Our holding in *Williamson* concerning proximate causation resolves this inquiry. As stated above, under that holding, Fox River's act of providing alcoholic beverages to the Johnsons was not a proximate cause of Breckinridge's death. See *Williamson*, 232 Va. at 353, 350 S.E.2d at 623. Thus, Robinson failed as a matter of law to allege proximate causation, one of the three essential requirements for proving a claim of wrongful death based on negligence per se. Accordingly, we conclude that the trial court did not err in sustaining Fox River's demurrer to Count VIII.

For these reasons, we will affirm the trial court's judgment.

Affirmed.

Source: All Sources : / . . . / : VA Supreme Court, Court of Appeals, and Circuit Court Cases

Terms: "negligence per se" (Edit Search)

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897 P.2d 762, *; 1995 Colo. LEXIS 247, **;
1995 OSHD (CCH) P30,882; 17 OSHC (BNA) 1289

MARTIN CANAPE, Petitioner, and COLORADO COMPENSATION INSURANCE AUTHORITY,
Petitioner-Intervenor, v. DAVID PETERSEN, d/b/a WESTERN HILLS CONSTRUCTION,
Respondent.

No. 94SC230

SUPREME COURT OF COLORADO

897 P.2d 762; 1995 Colo. LEXIS 247; 1995 OSHD (CCH) P30,882; 17 OSHC (BNA) 1289;
19 BTR 960

June 5, 1995, Decided

SUBSEQUENT HISTORY: [**1] As Corrected July 12, 1995.

PRIOR HISTORY: Certiorari to the Colorado Court of Appeals.

DISPOSITION: JUDGMENT AFFIRMED

CORE TERMS: regulation, duty, common law, enlarge, Health Act, roof, occupational safety, workers' compensation, general contractor, workplace, legislative history, bypass, job site, subcontractor, diminish, injured employee, opening, safe, legislative enactment, shingles, applicable standard of care, legislative intent, jury instruction, right of action, independent contractor, proposed legislation, failing to provide, cause of action, duty of care, occupational

COUNSEL: Winston & Liston, P.C., Joseph R. Winston, Mary Ann Liston, Colorado Springs, Colorado, LeHouillier & Associates, Patric J. LeHouillier, Colorado Springs, Colorado, Attorneys for Petitioner.

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Vaughan, Reeves & DeMuro, Carla McCord Albers, Colorado Springs, Colorado, Attorneys for Respondent.

JUDGES: JUSTICE VOLLACK delivered the Opinion of the Court. JUSTICE MULLARKEY dissents, and JUSTICE KIRSHBAUM joins in the dissent.

OPINIONBY: VOLLACK

OPINION:

[*762] EN BANC

We granted certiorari to consider the following question:

Whether the Colorado Court of Appeals erred in ruling that a violation of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. (1988), cannot be the basis of a negligence per se jury instruction. We conclude that the trial court correctly refused to

Instruct the jury on the issue of negligence per se. We therefore affirm the court of appeals' ruling on this issue in Canape v. [**2] Peterson, 878 P.2d 83 (Colo. App. 1994).

[*763] I.

On April 10, 1991, the petitioner, Martin Canape (Canape), was delivering shingles to the construction site of a garage being built by the respondent, David A. Petersen d/b/a Western Hills Construction (Petersen). Canape fell through a hole in a roof covered by a loose plywood board. n1

-----Footnotes-----

n1 At the time of the accident, neither Petersen, nor his temporary worker, was present.

-----End Footnotes-----

Canape was not employed by Petersen, a general contractor, but was working for an independent contractor. n2 Immediately prior to the accident, Canape and his co-employees were off- loading the shingles and stacking the material on the partially unfinished roof of the garage. While walking across the roof, Canape stepped on a piece of loose plywood covering a hole in the roof. Canape fell seventeen feet onto a concrete floor. As a result of the injuries he received from this fall, Canape underwent a spinal fusion operation.

-----Footnotes-----

n2 Petersen had ordered from Brookhart's Wholesale Lumber, a roofing supply company, material for the roof of the garage. Canape, an employee of Brookhart's Wholesale Lumber, was the delivery person delivering the shingles. It is disputed whether, upon ordering the shingles, Petersen specified that he wanted them stacked on the roof.

-----End Footnotes----- [**3]

Canape, and the intervenor, the Colorado Compensation Insurance Authority, brought this action against Petersen, alleging that Canape's injuries were the direct and proximate result of Petersen's negligence in failing to provide a warning regarding the conditions of the roof. n3 He requested that the El Paso County District Court instruct the jury on negligence per se and on res ipsa loquitur. n4 The court declined to give these instructions, and the jury found in favor of Petersen. Specifically, the jury found that although Canape incurred injuries, damages, and losses, Petersen was nevertheless not negligent.

-----Footnotes-----

n3 Because Canape was not employed by Petersen, workers' compensation was not available from Petersen. Canape, however, did receive workers' compensation from his employer, Brookhart's Wholesale Lumber.

n4 The petitioners allege that, by failing to provide a safe place to work, Petersen breached the Occupational Safety and Health Act (OSHA), which amounted to negligence per se.

-----End Footnotes-----

The court of appeals [**4] affirmed the ruling of the trial court. The court of appeals first held that instructing the jury on a negligence per se theory of liability would violate the Occupational Safety and Health Act, 29 U.S.C. § 653(b)(4) (1988) (OSHA), because it would affect the common law or statutory rights, duties, and liabilities of employers and

employees. The court of appeals also held that Canape was not entitled to an instruction on *res ipsa loquitur* because it concluded that it was not more likely than not that Petersen's negligence was the cause of the accident.

II.

Canape contends that the trial court erred by refusing to instruct the jury on the issue of negligence *per se*. n5 We disagree.

-----Footnotes-----

n5 Canape further asserts that Petersen owed a duty of care to provide safe working conditions for all employees who could reasonably be expected to be on the job site, regardless of that employee's status as an employee of a general contractor, subcontractor, a supplier, or a materialman.

-----End Footnotes-----

Further, Canape refers to a regulation in [**5] OSHA as the basis for his proposed jury instruction on negligence *per se*. The regulation provides that "floor openings shall be guarded by a standard railing and toe boards or cover." 29 C.F.R. § 1265.500(b)(1) (1990). Subparagraph (f) requires that floor covers be "capable of supporting the maximum intended load and [be] so installed as to prevent accidental displacement." The regulation defines a "floor opening" as "an opening measuring 12 inches or more in its least dimension in any floor, roof, or platform through which persons may fall." 29 C.F.R. § 1926.502(b) (1994).

Negligence *per se* may be established where the defendant's actions are in violation of a statute enacted for the public's safety, and where it is established that the violation of the statute proximately caused the plaintiff's injury. *Lyons v. Nasby*, 770 P.2d 1250, 1257 (Colo. 1989). The plaintiff "must also [**764] show that he or she is a member of the class of persons whom the statute was intended to protect and that the injuries suffered were of a kind that the statute was enacted to prevent." *Id.*

The trial court held that Canape was not entitled to an instruction on negligence *per se* because he was not employed [**6] by Petersen and thus was not within the class of persons intended to be protected by the OSHA regulation. Specifically, the trial court stated:

The Plaintiff was not engaged to "work at the site". The Plaintiff . . . was engaged to deliver materials to the site.

So, [based on the relevant caselaw] the Court sees the distinction [between the status of a subcontractor or the employee of any other firm engaged to work at the site and the situation here] and finds that the OSHA regulations do not apply to the Plaintiff in this particular situation. The trial court additionally determined that the OSHA regulations at issue here were not applicable to the facts of this case. In reaching this determination, the trial court relied on 29 C.F.R. § 1926.500(a), which provides that the floor and wall opening regulation applies "to temporary or emergency conditions where there is a danger of employees or material falling through the floor, roof, or wall openings." (Emphasis added.)

The court of appeals also concluded that an instruction on negligence *per se* was not warranted but relied on a broader rationale. The court of appeals examined the language contained in 29 U.S.C. § 653(b)(4) [**7] (1988), and concluded that an instruction on negligence *per se* would enlarge the plaintiff's common law rights and would thus violate

the statute. Specifically, the court of appeals stated that a negligence per se theory of liability "operates to engraft a particular legislative standard onto the general standard of care imposed by traditional tort law principles." Thus, application of a negligence per se instruction affects the common law rights, duties and liabilities of employers and employees.

We thus elect not to follow those cases which conclude that the intent of [Section] 653(b)(4)

was merely to ensure that OSHA was not read to create a private cause of action, and thus, imposing negligence per se for an OSHA violation is not precluded.

Further, we disregard those cases which have held that OSHA regulations may be used to establish negligence per se, but have done so without addressing 29 U.S.C. § 653(b)(4). Canape, 878 P.2d 83 at 86 (citations omitted).

Canape argues that the court of appeals' decision does not square with the legislative history of § 653 and does not advance the public policy of this state--to provide safe working conditions for all employees. He also [**8] contends that imposing a negligence per se theory does not enlarge the rights, duties, or liabilities of an employer.

Under OSHA, an employer is responsible for the safety and health of its employees. Although OSHA covers a wide range of workplace injuries, it is not "designed to require employers to provide absolutely risk-free workplaces." *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 641, 65 L. Ed. 2d 1010, 100 S. Ct. 2844 (1980); *Usery v. Kennecott Copper Corp.*, 577 F.2d 1113, 1118 (10th Cir. 1977) ("[OSHA] does not hold the employer responsible for the prevention of all accidents.").

Section 654 of 29 U.S.C. sets forth the duties of employers and employees and provides as follows:

(a) Each employer

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this chapter.

Section 654(a)(1) creates a general duty for an employer to protect its employees from hazards that are likely to cause death or serious bodily injury at the work site. Canape was [**9] neither an employee of Petersen nor an employee of a subcontractor employed by Petersen to work at the job site. Rather, he was a material supply person making a [*765] one-time delivery to the job site where he was injured. Because it is undisputed that Canape was not an employee of Petersen, § 654(a)(1) does not apply.

Section 654(a)(2) creates a specific duty of care for employers to comply with OSHA regulations. There is a split of authority from courts who have analyzed this section as to whether it creates a duty of care only as to the employer's own employees. n6 Although a non-employee may have a claim under § 654(a)(2) due to this split of authority, we need not reach this result since our analysis is limited to the scope of 29 U.S.C. § 653(b)(4). Section 653(b)(4) provides that

-----Footnotes-----

n6 See *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799 (6th Cir. 1984) (holding that the general duty clause (29 U.S.C. § 654(a)(1)) imposes a duty of reasonable care on every employer to protect its direct employees from recognized hazards regardless of the employer's amount of control, and that the specific duty clause (29 U.S.C. s 654(a)(2)) protects all employees on the job site, including an independent contractor's employees, if the employer retains or exercises the requisite amount of control over the job site and has the opportunity to comply with the OSHA regulations). But see *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706 (5th Cir. 1981) (holding that OSHA's general and specific clauses only regulate an employer's obligation to provide safe work conditions for its immediate employees).

-----End Footnotes----- [**10]

nothing in this chapter shall be construed to supersede or in any manner affect any work [ers'] compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities, of employers and employees under any law with respect to injuries . . . arising out of, or in the course of employment. (Emphasis added.)

Traditional principles of statutory interpretation dictate that we first look at the plain meaning of the statutory language. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139, 112 L. Ed. 2d 474, 111 S. Ct. 478 (1990). In construing a statute, we assume that the legislative purpose is expressed by the ordinary meaning of the words used. *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 120 L. Ed. 2d 73, 83, slip op. at 6 (U.S. June 18, 1992) (No. 90-1676). Further, a statute should not be construed in a manner which would defeat its legislative intent. *Id.*

In enacting § 653(b)(4), Congress intended to prevent injured employees from using OSHA to bypass state workers' compensation through a private action in federal court. A letter from the Solicitor of Labor to the Chairman of the House Subcommittee on Labor illustrates the legislative intent [**11] in enacting § 653(b)(4):

Dear Mr. Chairman: This is in response to your recent request for information upon which to base a reply to Mr. James E. Bailey, Legislative Counsel, American Society of Insurance Management, Inc.

In his letter, Mr. Bailey expresses concern that under proposed legislation dealing with occupational health and safety "an injured employee could claim violation of the requirements of the legislation and thus bypass the applicable state workmen's compensation benefits through an action in the Federal courts."

The provisions of S.2788, the Administration's proposed Occupational Safety and Health Act of 1969 would in no way affect the present status of the law with regard to workmen's compensation legislation or private tort actions. *Pratico v. Portland Terminal Co.*, 783 F.2d 255, 266 (1st Cir. 1985) (quoting Occupational Safety and Health Act of 1969: Hearings on H.R. 843, H.R. 3809, H.R. 4294, and H.R. 13373 before the Select Subcomm. on Education and Labor, 91st Cong., 1st Sess., Part 2 at 1592-93 (letter of L.H. Silberman, Solicitor of Labor)); see also *Frohlick Crane Serv., Inc. v. Occupational Safety and Health Review Comm'n*, 521 F.2d 628, 631 (10th Cir. [**12] 1975) ("It would appear that by this particular provision [§ 653(b)(4)] Congress simply intended to preserve the existing private rights of an injured employee, which rights were to be unaffected by the various sections of the Act itself.").

Both federal and state courts, interpreting the effect of 29 U.S.C. § 653(b)(4), have reached divergent results on the viability of negligence per se based on an OSHA violation. In *Ries v.*

National R.R. Passenger Corp., 960 F.2d 1156 (3d Cir. 1992), the court [*766] held that an OSHA violation did not establish negligence per se under the Federal Employers' Liability Act (FELA). Ries concluded that "it defies reason to construe section 653(b)(4) as only precluding private actions which would bypass workers' compensation." Id. at 1162. Specifically, the court noted that, if a violation of an OSHA regulation could be evidence of negligence per se, it would be almost axiomatic that the effect would be to "enlarge or diminish or affect" the statutory duty or liability of the employer.

Even if we agreed with Ries' argument that imposing negligence per se for an OSHA violation would not "enlarge" employers' liability, since it merely defines an existing [**13] duty, we are hard pressed to say that it would not "affect" liability. Id. Other jurisdictions have reached the same conclusion. See *Merritt v. Bethlehem Steel Corp.*, 875 F.2d 603, 608 (7th Cir. 1989) (finding that OSHA could not be used to expand or otherwise affect the common law duties or liabilities under a negligence per se theory of an employee of an independent contractor hired by the defendant because workers' compensation provided the employee's exclusive remedy); *Albrecht v. Baltimore & Ohio R.R.*, 808 F.2d 329 (4th Cir. 1987) (finding that an OSHA violation did not constitute negligence per se); *Pratico*, 783 F.2d 255 at 256 (reviewing the scant legislative history behind 29 U.S.C. § 653, and holding that the words "enlarge, diminish, or affect" contained within the statute were specifically placed there to ensure that OSHA did not create a private cause of action for injured workers which would allow them to bypass workers' compensation); *Bertholf v. Burlington Northern R.R.*, 402 F. Supp. 171, 173 (E.D. Wash. 1975) (finding that an OSHA violation does not constitute negligence per se under FELA); *Hebel v. Conrail*, 475 N.E.2d 652 (Ind. 1985) (same); *Wendland v. Ridgefield Const. [**14] Servs., Inc.*, 184 Conn. 173, 439 A.2d 954, 956-57 (Conn. 1981) (holding that a negligence per se jury instruction based on a violation of OSHA was erroneous because such an instruction "affects [the] common law rights, duties and liabilities of employers and employees"). But cf. *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799, 802-05 (6th Cir. 1984) (holding that, once an employer is deemed responsible for complying with OSHA regulations, it is obligated to protect every employee who works at its workplace, and allowing a negligence per se instruction based on an OSHA violation but not considering the impact of 29 U.S.C. § 653); *Sanchez v. Galey*, 112 Idaho 609, 733 P.2d 1234 (Idaho 1986) (allowing negligence per se based on an OSHA violation where the injured worker is an employee of the defendant); *Kelley v. Howard S. Wright Const. Co.*, 90 Wash. 2d 323, 582 P.2d 500, 508 (Wash. 1978) (holding that the general contractor, who had by contract assumed responsibilities for safety, had a duty to comply with the OSHA regulations as to an employee of a subcontractor who fell from a building under construction while laying the metal decking on the structural beams); n7 *Koll v. Manatt's Transp. Co.*, 253 N.W.2d 265, 270 (Iowa 1977) [**15] (ruling that a violation of an OSHA regulation by an employer is negligence per se as to his employee without discussing the effect of the state statute equivalent to 29 U.S.C. § 653(b)(4)).

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n7 Canape urges us to rely on Kelley. We do not find Kelley dispositive as to the factual situation presented in this case. In Kelley, a subcontractor's employee brought a negligence action against the general contractor for injuries sustained from falling twenty-nine feet onto a concrete floor. 582 P.2d 501 at 503. The employee alleged that the general contractor was negligent in failing to provide a safety net, which, he claimed, was required by an OSHA safety regulation. The distinguishing factor in Kelley, in contrast to our case, was that the general contractor's contract with the job site owner provided that the general contractor would be responsible for "initiating, maintaining and supervising all safety precautions and programs in connection with the work" and for "erecting and maintaining as required by existing conditions and progress of the work, all reasonable safeguards for safety and protection." Id. at 506.

The court concluded that the general contractor owed a duty to the subcontractor's employees to "provide a reasonably safe workplace and reasonable safety equipment" based upon its contractual agreement. Id. at 507. Further, the court determined that, because the general contractor had supervisory authority over the employee's workplace, he had a duty to comply with OSHA regulations and his violation of the applicable OSHA regulation constituted negligence per se. Id. at 508.

-----End Footnotes----- [**16]

[*767] In our opinion, the court of appeals' interpretation of § 653(b)(4) is reasonable and is consistent with the legislative intent. As noted in Wendland, 439 A.2d at 956, a negligence per se instruction transforms the character of the factfinder's inquiry. Had the jury in this case been given a negligence per se instruction, it would have altered the general contractor's duty at common law--to exercise reasonable care--by increasing his burden under OSHA. The applicable standard of care would therefore be affected by such an instruction, and general contractor's liability depends upon which standard of care is applied. Accordingly, Petersen's common law tort liability would be enlarged by allowing Canape to proceed with a negligence per se theory.

We hold that the trial court correctly refused to instruct the jury on the issue of negligence per se. Accordingly, we affirm the court of appeals' ruling on this issue.

JUSTICE MULLARKEY dissents, and JUSTICE KIRSHBAUM joins in the dissent.

DISSENTBY: MULLARKEY

DISSENT: JUSTICE MULLARKEY dissenting:

The majority holds that violation of regulatory standards issued pursuant to the Occupational Safety and Health Act, 29 U.S.C. § 651 et seq. (1988) (OSHA), does not [**17] constitute negligence per se. Because I believe that application of OSHA standards to negligence analysis does not expand or enlarge the rights of injured parties, I respectfully dissent from the majority opinion.

Much of the majority's analysis focuses on section 653(b)(4) of OSHA, which provides that:

nothing in this chapter shall be construed to supersede or in any manner affect any workman's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment. (emphasis added). The provision has been construed as precluding the creation of a new federal cause of action against either a plaintiff's employer or a third party. *Sanchez v. Galey*, 112 Idaho 609, 733 P.2d 1234, 1243 (Idaho 1986); *Melerine v. Avondale Ship Yards, Inc.* 659 F.2d 706, 709 (5th Cir. 1981). At the same time, however, this provision is not intended to reduce any of the existing private rights of an injured employee. *Frohlick Crane Serv., Inc. v. Occupational S & H.R.C.*, 521 F.2d 628, 631 (10th Cir. 1975).

Using OSHA [**18] standards to establish negligence per se does not enlarge or diminish the common law rights of an employee or employer. The case now before us was originally pled and has been appealed as a negligence case. To prove negligence, the plaintiff must establish: a duty owed by the defendant to the plaintiff, a breach of that duty, injury to the plaintiff, and proximate cause between the breach and the injury. *Casebolt v. Cowan*, 829 P.2d 352 (Colo. 1992). The duty of a defendant may be:

(a) established by a legislative enactment or administrative regulation which so provides, or

(b) adopted by the court from a legislative enactment or an administrative regulation which does not so provide, or

(c) established by judicial decision, or

(d) applied to the facts of the case by the trial judge or jury, if there is no such enactment, regulation, or decision. Restatement (second) of Torts § 285. n8 Accordingly, the violation of a statute or regulation may constitute a breach of a duty. See [*768] Lyons v. Nasby, 770 P.2d 1250, 1257 (Colo. 1989). In Colorado, the violation of a statute or regulation is negligence per se if it is established that the violation proximately caused the injury, [**19] that the plaintiff is a member of the class that the statute or regulation intended to protect, and that the injuries suffered were of a kind that the statute was enacted to prevent. Id.; State v. Moldovan, 842 P.2d 220, 228 (Colo. 1992). n9

-----Footnotes-----

n8 Comment b to this section states:

In any or all of these respects the standard of conduct may be defined and established by a legislative enactment which lays down requirements of conduct, and provides expressly or by implication that a violation shall entail civil liability in tort. In such case the only questions that can arise as to the effect of the statute are as to its constitutionality and construction. . . .

Comment c adds:

Even where legislative enactment contains no express provision that its violation shall result in tort liability, and no implication to that effect, the court may, and in certain types of cases customarily will, adopt the requirements of the enactment as the standard of conduct necessary to avoid liability for negligence.

n9 Although the trial court refused to give a negligence per se instruction on the grounds that the OSHA standard did not apply to the facts of this case, the court of appeals ruled on the more general basis that OSHA itself does not allow violations of its standards to constitute negligence per se in a state action for personal injury. My dissent addresses the court of appeals' rationale and does not consider whether the facts of this case can show a violation of the particular OSHA standard raised in the trial court.

-----End Footnotes----- [**20]

Negligence per se does not shift the rights or liabilities of employers or employees when an action in general negligence exists. The only difference between negligence per se and general negligence is the method of determining the applicable standard of care. To prevail in a negligence case, the plaintiff still must prove that he or she was injured and that the conduct of the defendant was the proximate cause of the injury.

A negligence cause of action is permitted under state common law and is not an independent private right of action under OSHA. Rather, OSHA may be used to establish the minimum standards within the industry to ensure safety, a purpose which OSHA wholly endorses. 29 U.S.C. § 651(b). n10 The other elements, causation and proof that OSHA intends to protect the injured party, must be proven for negligence per se to be effective.

-----Footnotes-----

n10 This view is also supported by the extensive legislative history of OSHA. The vast majority of legislative discussion prior to enactment of OSHA focused on the need for and the efficacy of a national standard setting organization. The general conclusion of the various members of Congress was that OSHA could be used to establish minimum standards within various industries to ensure the safety and health of workers. See Occupational Safety and Health Act of 1969: Hearings on H.R. 843, H.R. 3809, H.R. 4294, and H.R. 13373 before the Select Subcomm. on Education and Labor, 91st Cong., 1st Sess., part 1 & 2.

-----End Footnotes----- [**21]

Thus, before a violation of an OSHA regulation could be considered negligence per se, the plaintiff must have an independent cause of action based on statute or the common law. *Pratico v. Portland Terminal Co.*, 783 F.2d 255, 265 (1st Cir. 1985). Allowing OSHA regulations to determine standards of care should not be viewed as expanding rights or liability. *Id.*; *Dixon v. International Harvester Co.*, 754 F.2d 573, 581 (5th Cir. 1985) (holding that OSHA may be used as a standard of care when the underlying cause of action is based on state common law or a federal statute); *National Marine Service, Inc. v. Gulf Oil Co.*, 433 F. Supp. 913, 919 (E.D. La. 1977), *aff'd* 608 F.2d 522 (5th Cir. 1977) (holding that OSHA regulations impose duties of care on employers to ensure a safe workplace).

Since the plain language of OSHA does not prohibit use of its standards as negligence per se, the majority must turn to the legislative history to support its interpretation of OSHA. The available legislative history, however, does not support the majority opinion. Rather, the legislative history of OSHA shows that Congress considered the interaction of OSHA regulations with other common law and statutory [**22] schemes only in the context of worker's compensation. *Pratico*, 783 F.2d at 266. The chair of the House Select Committee on Labor received the following letter of inquiry during the hearings preceding the enactment of OSHA:

Some of our members are quite concerned that under proposed legislation dealing with the Occupational Health and Safety Law that an injured employee could claim violation of the requirements and thus bypass the applicable state workmen's compensation benefits through an action in the federal courts.

This situation is not possible under the present law, but I do not know whether any of the proposed bills permit such a procedure.

I would appreciate it very much if you would look into this matter with officials of the Department of Labor. [**769] Occupational Safety and Health Act of 1969: Hearings on H.R. 843, H.R. 3809, H.R. 4294 and H.R. 13373 before the Select Subcomm. on Education and Labor, 91st Cong., 1st Sess., Part 2 at 1592 (letter of James E. Bailey, Legislative Counsel, American Society of Insurance Management, Inc.). It was in response to Mr. Bailey's letter that the Solicitor of Labor sent the following letter to the Chairman of the House Subcommittee on Labor, [**23] cited by the majority at maj. op. at 9:

This is in response to your recent request for information upon which to base a reply to Mr. James E. Bailey, Legislative Counsel, American Society of Insurance Management, Inc.

In his letter, Mr. Bailey expresses concern that under proposed legislation dealing with occupational health and safety "an injured employee could claim violation of the requirements of the legislation and thus bypass the applicable state workmen's

compensation benefits through an action in the Federal courts."

The provisions of S. 2788, the Administration's proposed Occupational Safety and Health Act of 1969 would in no way affect the present status of the law with regard to workmen's compensation legislation or private tort actions. *Id.* at 1592-93 (letter of L.H. Silberman, Solicitor of Labor). According to the Solicitor's letter and the context of the inquiry letter, the purpose of the provision which our court now is construing was to prevent injured employees from using OSHA to bypass state workers' compensation laws through asserting a private right of action in federal court. The OSHA provision clearly explains that it does not create a new private right of [**24] action and that OSHA regulations do not affect state workers' compensation claims. *Pratico*, 783 F.2d 255 at 266. The Solicitor's letter, however, does not state that application of negligence based on the violation of OSHA standards is inappropriate when a common law or statutory right of action exists against third parties. In my opinion, the Solicitor's letter presents no support for the majority opinion. Thus, I find no textual or legislative history to support the majority's construction of the OSHA provision before us.

Furthermore, a significant body of case law has found OSHA regulations to establish the applicable duty of care when applying negligence per se in both employee and non-employee contexts. See *Sanchez*, 733 P.2d 1234 (holding that OSHA may be applicable standard of care under negligence per se); *Pratico*, 783 F.2d at 255 (applying OSHA as negligence per se when cause of action exists under another federal statute); *Teal v. E. I. DuPont de Nemours & Co.*, 728 F.2d 799, 802-05 (6th Cir. 1984) (holding company liable to an independent contractor under negligence per se for violation of OSHA standards); *Kelley v. Howard S. Wright Const. Co.*, 90 Wash. 2d 323, 582 P.2d 500, 508 (Wash. 1978) [**25] (holding that because employer has duty to maintain a safe workplace, OSHA standards can establish negligence per se); *Koll v. Manatt's Transportation Co.*, 253 N.W.2d 265, 270 (Iowa 1977) (holding that OSHA standards are appropriate for employees and nonemployees when applying negligence per se). I would follow these cases.

Based upon this analysis, I would reverse the holding of the trial court and allow a negligence per se instruction because application of the OSHA standards neither enlarges nor diminishes the rights of employees or employers. Thus, I respectfully dissent from the majority.

JUSTICE KIRSHBAUM joins in this dissent.

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29 USCS § 653
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*** THIS SECTION IS CURRENT THROUGH 106-186, APPROVED 4/25/00 ***

TITLE 29. LABOR
CHAPTER 15. OCCUPATIONAL SAFETY AND HEALTH
29 USCS § 653 (2000)

§ 653. Geographic applicability; judicial enforcement; applicability to existing standards; report to Congress on duplication and coordination of Federal laws; workmen's compensation law or common law or statutory rights, duties, or liabilities of employers and employees unaffected

(a) This Act shall apply with respect to employment performed in a workplace in a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Trust Territory of the Pacific Islands, Wake Island, Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act, Johnston Island, and the Canal Zone. The Secretary of the Interior shall, by regulation, provide for judicial enforcement of this Act by the courts established for areas in which there are no United States district courts having jurisdiction.

(b) (1) Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 274 of the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2021), exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

(2) The safety and health standards promulgated under the Act of June 30, 1936, commonly known as the Walsh-Healey Act (41 U.S.C. 35 et seq.), the Service Contract Act of 1965 (41 U.S.C. 351 et seq.), Public Law 91-54, Act of August 9, 1969 (40 U.S.C. 333), Public Law 85-742, Act of August 23, 1958 (33 U.S.C. 941), and the National Foundation on Arts and Humanities Act (20 U.S.C. 951 et seq.) are superseded on the effective date of corresponding standards, promulgated under this Act, which are determined by the Secretary to be more effective. Standards issued under the laws listed in this paragraph and in effect on or after the effective date of this Act shall be deemed to be occupational safety and health standards issued under this Act, as well as under such other Acts.

(3) The Secretary shall, within three years after the effective date of this Act, report to the Congress his recommendations for legislation to avoid unnecessary duplication and to achieve coordination between this Act and other Federal laws.

(4) Nothing in this Act shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

HISTORY:

(Dec. 29, 1970, P.L. 91-596, § 4, 84 Stat. 1592.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"The Canal Zone", referred to in this section, is defined in 22 USCS § 3602.

"This Act", referred to in this section, is Act Dec. 29, 1970, P.L. 91-596, 84 Stat. 1590, popularly known as the Occupational Safety and Health Act of 1970, which appears generally as 29 USCS §§ 651 et seq. For full classification of this Act, consult USCS Tables volumes.

"The Outer Continental Shelf Lands Act", referred to in this section, is Act Aug. 7, 1953, ch 345, 67 Stat. 462, which is generally classified to 43 USCS §§ 1331 et seq. For full classification of this Act, consult USCS Tables volumes.

"The Act of June 30, 1936, commonly known as the Walsh-Healey Act", referred to in this section, is Act June 30, 1936, ch 881, 49 Stat. 2036, and appears generally as 41 USCS §§ 35 et seq. For full classification of such Act, consult USCS Tables volumes.

"Public Law 91-54, Act of August 9, 1969", referred to in this section, is Act Aug. 9, 1969, P.L. 91-54, 83 Stat. 96. Section 1 of such Act added 40 USC § 333. For full classification of such Act, consult USCS Tables volumes.

"Public Law 85-742, Act of August 23, 1958", referred to in this section, is Act Aug. 23, 1958, P.L. 85-742, 72 Stat.

835. Section 1 of such Act amended 33 USC § 941. For full classification of such Act, consult USCS Tables volumes.

"The National Foundation on Arts and Humanities Act", referred to in this section, is Act Sept. 29, 1965, P.L. 89-209, 79 Stat. 845, which appears generally as 20 USCS §§ 951 et seq. For full classification of such Act, consult USCS Tables volumes.

"The effective date of this Act", referred to in this section, is 120 days after Dec. 29, 1970; see the Other provisions note to 29 USCS § 651.

Effective date of section:

For the effective date of this section, see the Other provisions note to 29 USCS § 651.

Other provisions:

Termination of Trust Territory of the Pacific Islands. For termination of Trust Territory of the Pacific Islands, see note preceding 48 USCS §§ 1681.

EPA Administrator not exercising "statutory authority" under this section in exercising any authority under Toxic Substances Control Act. Act Nov. 28, 1990, P.L. 101-637, § 15(a), 104 Stat. 4596, provides: "In exercising any authority under the Toxic Substances Control Act [15 USCS §§ 2601 et seq.] in connection with amendment made by subsection (a) this section, the Administrator of the Environmental Protection Agency shall not, for purposes of section 4(b)(1) the Occupational Safety and Health Act of 1970 [subsection (b)(1) of this section], be considered to be exercising statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health."

NOTES:

CODE OF FEDERAL REGULATIONS

Occupational Safety and Health Administration, Department of Labor—Occupational safety and health standards, 29 CFR Part 1910.

Occupational Safety and Health Administration, Department of Labor—Rules of procedure for promulgating, modifying, or revoking occupational safety or health standards, 29 CFR Part 1911.

Occupational Safety and Health Administration, Department of Labor—Advisory committees on standards, 29 CFR Part 1912.

Occupational Safety and Health Administration, Department of Labor—Occupational safety or health standards for shipyard employment, 29 CFR Part 1915.

Occupational Safety and Health Administration, Department of Labor—Marine terminals, 29 CFR Part 1917.

Occupational Safety and Health Administration, Department of Labor—Safety and health regulations for longshoring, 29 CFR Part 1918.

Occupational Safety and Health Administration, Department of Labor—Gear certification, 29 CFR Part 1919.

Occupational Safety and Health Administration, Department of Labor—Safety and health regulations for construction, 29 CFR Part 1926.

Occupational Safety and Health Administration, Department of Labor—Occupational safety and health standards for agriculture, 29 CFR Part 1928.

Occupational Safety and Health Administration, Department of Labor—Coverage of employers under the Williams-Steiger Occupational Safety and Health Act of 1970, 29 CFR Part 1975.

Occupational Safety and Health Administration, Department of Labor—Identification, classification, and regulation of potential occupational carcinogens, 29 CFR Part 1990.

CROSS REFERENCES

This section is referred to in 15 USCS § 2608; 29 USCS § 673; 42 USCS §§ 2297b-11, 7412; 49 USCS § 5107.

RESEARCH GUIDE

Federal Procedure:

17 Fed Proc L Ed, Health, Education, and Welfare §§ 42:1057-1063, 1067, 1072, 1076-1082.

17A Fed Proc L Ed, Health, Education, and Welfare §§ 42:2296-2303, 2310, 2314, 2315, 2319, 2321, 2323, 2441, 2594.

Am Jur.

2 Am Jur 2d, Administrative Law § 133, 529, 650.
61 Am Jur 2d, Plant and Job Safety—OSHA and State Laws §§ 1-3, 6, 9, 12, 13, 21-26.

Forms:

10B Fed Procedural Forms L Ed, Health, Education, and Welfare (1996) § 37:112, 162.

Annotations:

Who is "Employer" for purposes of Occupational Safety and Health Act (29 USCS §§ 651 et seq.). 27 ALR Fed 943.

OSHA violation by employer or third party as providing cause of action for employee. 35 ALR Fed 461.

United States' tort liability for nonenforcement of OSHA. 35 ALR Fed 963.

Construction and application of § 4(b)(1) of Occupational Safety and Health Act (29 USCS § 653(b)(1), providing that Act does not apply to working conditions of employees with respect to which other federal agencies exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health. 40 ALR Fed 147.

Inspectors' authority to conduct physical examination of employees, or to have access to employees' medical and personnel records pursuant to § 8 of the Occupational Safety and Health Act of 1970 (29 USCS § 657(a), (b)). 56 ALR Fed 262.

Prohibition of discrimination against, or discharge of, employee because of exercise of right afforded by Occupational Safety and Health Act, under § 11(c)(1) of the Act (29 USCS § 660(c)(1)). 66 ALR Fed 650.

Sufficiency of employer's notice to Secretary of Labor under sec. 10 of Occupational Safety and Health Act (29 USCS § 659(a)) of intent to contest citation for violation of Act. 89 ALR Fed 66.

Violation of OSHA regulation as affecting tort liability. 79 ALR3d 962.

Law Review Articles:

Pedersen; Dahl. Occupational Safety and Health Regulation and Agriculture. 1981-1982 Agricultural L J 169

522 F. Supp. 782, *; 1981 U.S. Dist. LEXIS 14829, **

Gerald G. TROWELL, Plaintiff, v. BRUNSWICK PULP AND PAPER COMPANY and Kockum Industries, Defendants

Civ. A. No. 80-1161-1

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

522 F. Supp. 782; 1981 U.S. Dist. LEXIS 14829

October 1, 1981

CORE TERMS: regulation, duty, standard of care, evidence of negligence, common law, shipment, shipping, owed, motion in limine, admissible, chip, mill

COUNSEL: [**1]

Lee S. Bowers, Estill, South Carolina, for plaintiff.

Stephen E. Darling, Sinkler, Gibbs & Simons, Charleston, South Carolina, for defendant, Brunswick Pulp and Paper Co.

Elliott T. Halio, Halio & Holmes, Charleston, South Carolina, for defendant, Kockum Industries.

OPINIONBY: HAWKINS

OPINION: [*782]

ORDER

This matter, instituted on June 19, 1980, is before the court on defendant Brunswick Pulp and Paper Company's motion in limine to prohibit any evidence at trial of violations of Sections 651 et seq., of Title 29 of the United States Code, commonly known as the Occupational Safety and Health Act of 1970 (hereinafter OSHA), or any rules and regulations promulgated thereto as evidence of standard of care, negligence, or negligence per se, and to prohibit any instruction by the court to the jury as to violations of OSHA or its rules or regulations as evidence of a standard of care, negligence, or negligence per se.

This lawsuit arises out of an accident which occurred on October 16, 1978, at the defendant Brunswick Pulp and Paper Company's hardwood chip mill in McCormick, South Carolina. The plaintiff has alleged that the accident was caused by a defective debarker designed [**2] and manufactured by defendant Kockum Industries and improperly operated by the defendant Brunswick. The plaintiff was not an employee of Brunswick but rather was touring the Brunswick premises to observe the chip mill in order for his own employer to have some information before bidding on a project requiring the supply of similar machinery.

No reported cases have been found from South Carolina or from the Fourth Circuit which consider whether or not evidence of OSHA violations would be admissible as [*783] evidence of a standard of care, negligence, or negligence per se.

In several South Carolina cases, the court has found that the violation of a particular statute is negligence per se. See, e.g., *Wright v. S. C. Power Co.*, 205 S.C. 327, 31 S.E.2d 904 (1944); *Eickhoff v. Beard-Laney, Inc.*, 199 S.C. 500, 20 S.E.2d 153 (1942).

Given the fact that these OSHA regulations have the effect of law, see, 29 U.S.C. § 654, that would be applicable to establish negligence per se only if certain criteria are met. The first requirement to be met before such use is that the plaintiff must fall within the class of persons protected under the statute or regulation. See, *Williams v. Hill* [**3] *Mfg. Co., Inc.*, 489 F. Supp. 20 (D.S.C.1980); *Smoak v. Martin*, 108 S.C. 472, 94 S.E. 869 (1918). It is the opinion of this court that plaintiff, as an invitee, is not within the class of those protected by OSHA regulations. The court is persuaded by the following language, which provides that the Act does not "enlarge or diminish or affect in any manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment." 29 U.S.C. § 653(b)(4). This court's view is shared by the Fifth Circuit in *Barrera v. E. I. Dupont De Nemours and Co., Inc.*, 653 F.2d 915, 920 (5th Cir. 1981), and is supported by two district court cases which have held that the OSHA regulations do not even apply to employees of subcontractors. See, *Horn v. C. L. Osborn Contracting Co.*, 423 F. Supp. 801, 808 (M.D.Ga.1976); *Cochran v. International Harvester Co.*, 408 F. Supp. 598, 602 (W.D.Ky.1975). Since the plaintiff is not in the class to be protected, evidence of an OSHA violation would not be admissible as evidence of negligence per se. Furthermore, the argument that OSHA [**4] impliedly creates a private cause of action under federal law for violation of OSHA standards has been rejected by every state and federal court in which it has been advanced, including the Fourth Circuit. See, e.g., *Barrera v. E. I. Dupont De Nemours and Co., Inc.*, 653 F.2d 915 (5th Cir. 1981); *Byrd v. Fieldcrest Mills, Inc.*, 496 F.2d 1323 (4th Cir. 1974); *Russell v. Bartley*, 494 F.2d 334 (6th Cir. 1974).

Similarly, there are no cases in the Fourth Circuit or in South Carolina concerning the issue of whether evidence of OSHA violations, such as those alleged to have been committed by the defendant Brunswick, should be admitted as evidence of negligence or as an applicable standard of care. However, in *Williams v. Hill Mfg. Co., Inc.*, 489 F. Supp. 20 (D.S.C.1980), which involved a tort action by a town employee against a manufacturer, Judge Hemphill held that reference to the Department of Transportation's rules and regulations concerning the shipment of flammables should be stricken from the plaintiff's complaint, because the plaintiff was not a member of the class meant to be protected by such rules as he was injured some fourteen months after shipment. In addition, the court [**5] found that the rules had no relevance to the setting of minimal industry standards as to warnings necessary for the protection of those expected to use the chemical. In the *Williams* case, reference is made to *Garrett v. E. I. Dupont De Nemours & Co.*, 257 F.2d 687 (3d Cir. 1958), where the Third Circuit Court of Appeals affirmed the decision of the trial court to exclude any evidence from expert witnesses of alleged violations by the defendant of certain I.C.C. regulations. In *Garrett*, the plaintiff was badly burned by sulfuric acid as he attempted to pour it out of a fifty-five gallon metal drum which had been lying in the plant for twenty days when the accident occurred. Since the goods could not be said to be in transit, the court found that the plaintiff Garrett was not in the class entitled to protection under certain I.C.C. shipping regulations. Thus, the court found that the trial judge had properly excluded all evidence concerning those shipping regulations even though the defendant had admitted in his answers to interrogatories that those regulations comprised known standards of care in the industry. As explained by the court:

[*784] In an action based upon a [**6] neglect of duty, it is not enough to show that the defendant neglected to perform a duty imposed by statute for the benefit of a third person, and that he would not have been injured if the duty had been performed. He must show that the duty was imposed for his benefit,

or was one which the defendant owed to him for his protection.

Id. at 690.

Of course, the Garrett court approved of the introduction of all other evidence relative to the standards of care recognized by the chemistry industry relating to the injury.

The defendant Brunswick cannot be held to a higher standard of care than is required by the common law of negligence. As explained, OSHA does not create a duty of compliance to the OSHA standards on the part of Brunswick in regard to a non-employee such as the plaintiff. It is the opinion of this court that the admission of any evidence of the OSHA violations would be highly prejudicial to this defendant. Even with the proper instructions to the jury, the prejudicial effect of such evidence would outweigh the probative value in this situation where the regulations are not determinative of the standard of care owed this plaintiff. It is, therefore,

ORDERED, [**7] that defendant Brunswick's motion in limine to prohibit any evidence at the trial as to alleged violations by defendant Brunswick of OSHA provisions, rules and regulations, is hereby granted.

AND IT IS SO ORDERED.

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VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

MICHAEL A. SHEPHERD,

Plaintiff,

v.

AT LAW NO. CL982952

W.B. MEREDITH, II, INC.

and

ATLANTIC WELDING & FABRICATING, INC.,

Defendants.

**PLAINTIFF'S BRIEF IN RESPONSE TO DEFENDANT
ATLANTIC WELDING & FABRICATING, INC.'S MOTION IN LIMINE**

COMES NOW the Plaintiff, Michael A. Shepherd, by counsel and in opposition of Defendant Atlantic Welding & Fabricating, Inc.'s Motion in Limine to preclude all or part of the testimony of Frank L. Burg, the plaintiff's expert witness, at the trial of this matter, and states as follows:

DISCUSSION

Defendant Atlantic Welding & Fabricating, Inc. (hereinafter "Atlantic"), has under-represented and misconstrued the facts of this case especially as pertaining to the plaintiff's expert witness, Frank L. Burg. Defendant incorrectly asserts that Mr. Burg admitted that his opinion regarding Defendant's negligence was "based solely upon Defendant's purported violation . . ." by only referencing Mr. Burg's deposition at page fifty-three, line eight. Defendant's Brief in Support of Motion in Limine, 2 (June 2, 2000). The questioning of the defendant at deposition focused only

on Mr. Burg's opinion that there was an OSHA violation of the placement of the girt in question, and not Mr. Burg's opinion regarding negligence. Deposition of Frank Burg, Michael A. Shepherd v. W.B. Meredith, II, et. al. (page 14, line 5-7) L98-2952. Defendant's counsel inquired whether, in Mr. Burg's opinion, Defendant committed an OSHA violation in erecting and placing the unsecured steel beam which caused plaintiff's injuries in violation of OSHA standards. Id. at page 21, line 1-4. Defendant then asks "if you were investigating this accident from an OSHA violation standpoint, and you've got to make a decision whether to cite my client" Id. at 51:3-5. Continuing in that line of questioning, defendant asks "[c]an you cite me to the specific OSHA standards that you think pertain to my client's activity?" Id. at 53:2-4. The response of Mr. Burg to that question is the response that defendant relies on to claim that Mr. Burg's opinion of negligence is "based solely" on the violation, that response being, "I would have used Section 5A-1 of the OSHA act, the general duty clause." Id. at 53:8-9. Never does Mr. Burg state that Defendant was negligent solely because it violated the general duty clause.

The OSHA regulations and standard of care are important to the instant case because Virginia has adopted OSHA standards as the minimum standards for workplace safety for and in Virginia. § 40.1-XXX *Code of Virginia (1950), as amended*. As Defendant acknowledges, Virginia recognizes violation of a statute as negligence *per se*. See Defendant's Brief, 3-4; Robinson v. Matt Marv Moran, Inc., 259 Va. 412 (2000). In this case, the fact that Defendant violated both the Virginia statute which incorporated OSHA as Virginia's minimum safety standards, and OSHA as it pertains to this federal construction project, is an integral part of the plaintiff's case.

The plaintiff's expert witness, Mr. Burg, is eminently qualified to testify regarding violations of OSHA regulations, particularly in this instance as the work site where plaintiff was injured was

a Department of the Navy project, aboard Dam Neck Naval Base, where the safety standards set forth in OSHA clearly apply. § 8.01-401.3 of the Code of Virginia allows expert testimony in a civil proceeding if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." § 8.01-401.3(A), Code of Virginia (1950), as amended. In the instant case, the trier of fact will be assisted by knowing what the standards of safety are on a construction site because these standards are not usually within the common knowledge of the average person outside of the construction field. "A witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto" *Id.* Mr. Burg was employed by the Department of Labor's Occupational Safety and Health Administration for seventeen years. During that time he served as a safety inspector and taught courses on technical safety and health subjects in construction, both to Federal agencies and the private sector. Curriculum Vitae of Frank L. Burg, PE, CSP. In his capacity of OSHA Safety and Occupational Health Specialist, he worked with states to monitor the effectiveness of state programs. *Id.* He has also held positions of Regional Training Officer and Compliance Officer with OSHA. *Id.* Currently, Mr. Burg is president of Accident Prevention Corporation, and in that capacity he conducts training seminars for such entities as insurance companies, businesses, including steel companies, and the Occupational Safety and Health Administration itself; conducts OSHA style audits; and renders expert testimony for both plaintiffs and defendants in construction accident cases. *Id.* Burg Deposition, 41:22-42:5. He also teaches steel erection safety to OSHA inspectors and the associated general contractors at the National Safety Council. Burg Deposition, 32:11-13. Mr. Burg is involved in auditing the steel erection procedures of companies nationwide,

including Virginia. Id. at 32:16 - 33:3, and has assisted Virginia corporations whose primary business is the erection of steel.

Defendant misleadingly claims that Mr. Burg "admits that OSHA is silent as to the imposition of any specific duty of steel erection contractors" regarding the positioning or securing of girts. Defendant's Brief, at 2. The Defendant's question regarding Mr. Burg's opinion on this matter was "there is no specific requirement that this purlin or girt have been secured in place" with which Mr. Burg agreed. Burg Deposition, at 66:1-3. However, Mr. Burg had previously explained in detail that the subpart being discussed at that point in the deposition, "if you look at the whole subpart as one entity . . . it leaves no doubt that they are concerned about things falling from up above" Id. at 64:20-22. He goes on to elaborate that when there is no specific requirement, "as an OSHA person of eighteen years, I know what happens then . . . [y]ou revert to the general requirements." Id. at 65:4-6. Mr. Burg had testified earlier that "OSHA operates under the concept of what we call a performance standard, basically that OSHA can't describe all the possible dangers that could occur in a workplace . . . [w]hat OSHA tells the employer is . . . OSHA expects . . . that employees are guaranteed that they won't be exposed to death or serious physical harm." Id. at 14:22 - 15:5.

Defendant also contends that there is no specific requirement with respect to steel girt placement. Defendant's Brief, 2. As Mr. Burg diligently attempted to explain to counsel at the deposition, "the idea is that there shouldn't be any exposure of employees to the potential falling of overhead objects . . . if there is a potential for employees to be exposed to the girt or any other object falling down from up above, then you must secure those objects. . . [t]hey should

have done a hazard analysis and determined . . . the potential hazards . . . when they did that, they would decide, [w]ell, what do we have to do here?" Burg Deposition, 16:16 - 17:25.

Defendant cursorily concludes that Mr. Burg is not qualified to testify to the standard of care in Virginia Beach, Virginia, for steel contractors. This argument presupposes, however, that the standards in Virginia Beach are different and less stringent than the standards required by OSHA. By Virginia statute, OSHA is the minimum standard of safety in all workplaces. See § 40.1-xxx Code of Virginia, 1950 as amended. "Under both federal *and state* law, 'each employee shall comply with . . . standards and all rules . . . issued pursuant to this [OSHA] Act . . .'" Marslender v. VEPCO, 37 Va. Cir. 199 (1995). As Mr. Burg expounded in his deposition,

"the Commonwealth of Virginia must adhere to the federal standards as they are promulgated . . . [i]t is possible the Commonwealth of Virginia standards might go beyond federal requirements . . . what I recall is that [Virginia] adopted the OSHA requirements verbatim . . . [t]he standards set regarding the custom and practice in Virginia or anywhere else in this country are in that book right here in OSHA, and there are no exceptions allowed."

Burg Deposition, 71:11 - 73:15. Defendant also makes the claim that "absent reliance on the . . . OSHA provisions, Mr. Burg will be unable to offer any opinion at trial that Defendant breached any statute . . ." Defendant's Brief, 6. Obviously, Mr. Burg must rely on the OSHA statute, and by extension, the Virginia statute which incorporates the OSHA provisions into Virginia law, to offer an opinion that the statute was violated. Any person, no matter how erudite or precocious, would be hard pressed to give an opinion that a certain statute was violated without relying on that statute.

Mr. Burg's expert opinion addresses the lack of safety of this workplace and that unlawful risk of injury existed because of this lack of safety. See, generally, Burg Deposition; Id at 61:16-24, 97:23 - 98:20. As Defendant mentions in his Brief, a safe workplace is not necessarily risk free.

Defendant's Brief, 3. However, in quoting the Virginia Court's decision in Pike v. Dept. of Labor & Industry, the defendant fails to include the Pike court's contention that "at the same time an employer must do all it feasibly can to prevent foreseeable hazards." Pike v. Dept. of Labor & Industry, 222 Va. 317, 322-3 (1981), quoting, General Dynamics Corp. v. Occupational Safety and Health Rev. Com'n, 599 F.2d 453, 458 (1st Cir. 1979). In General Dynamics, the court held that "knowledge of the existence of a hazardous situation must be determined in the light of the common experience of the industry, but that the *extent of the precautions to take against a known hazard is that which a conscientious safety expert would take.*" General Dynamics, 599 F.2d at 464 (emphasis added). It is often not within the purview of the trier of fact to know what precautions a "safety expert" would take. Mr. Burg, as a safety expert, testified during depositions that the accident subject to this suit was "a recognized hazard . . . this is something that would be a great concern to the general contractor . . . these requirements are that when you have people bringing in material handling equipment and you have structural members that could be dislodged, then you have to take appropriate action" Burg Deposition, 97:24 - 98:19. Mr. Burg's testimony is proper, and necessary to the instant case, in light of Virginia's expert witness statute, § 8.01-401.3 of the Code of Virginia.

The claim of defendant that plaintiff in the instant case is not an employee is also directly contradicted by Mr. Burg's testimony. An expert in the field of OSHA who had been directly responsible for safety enforcement while employed by OSHA, Mr. Burg is notably qualified to testify as to who and what is an employee or employer under OSHA. As a compliance officer, Mr. Burg's duties included determining who was the proper entity to be cited for violations, which

involved determining who was the "employer(s)" or "employee(s)" at a workplace. See Burg Deposition, 15:13 - 16:6; 51:1 - 58:17; 98:21 - 101:14.

**OPINION OF VIOLATION OF OSHA
DOES NOT IMPOSE STRICT LIABILITY**

The Defendant mistakenly considers the opinion of Mr. Burg, the expert witness, as imposing strict liability. The expert witness's testimony would not in any way apply strict liability to defendant, and strict liability is not even claimed by plaintiff. Rather, plaintiff is claiming that violation of the OSHA statute is negligence *per se*, or at least evidence of negligence. As set forth above, Virginia recognizes that violation of a statute may, if certain criteria are met, constitute negligence *per se*. See, e.g., Robinson v. Matt Mary Moran, Inc. 259 Va. 412 (2000). Negligence *per se* and strict liability are not the same. As Justice Traynor has stated, "all that the statute does is to establish a fixed standard by which the fact of negligence may be determined." Osborne v. McMasters, 40 Minn. 103, 41 N.W. 543 (1889). "[V]iolation of the statute constitutes conclusive evidence of negligence, or in other words, negligence *per se*." Id. As the court is aware, this is distinguished from strict liability, which establishes liability even when the liable party had exercised all reasonable care or met an objective standard of care. Prosser, et al. Cases and Materials on Torts, 664 (John Wade, et al. eds., 9th ed, 1994). As discussed above, foreseeability is also a necessary element for the plaintiff's case, but in a strict liability case that is not necessarily true.

Defendant also erroneously asserts that the expert witness does not have a valid basis to substantiate his opinion, apparently relying on the fact that OSHA does not specifically address erection and placement of steel girts. Defendant's Brief, 3. Whereas it may be true that safety

regulations are not designed to make employer an insurer of the employee, Congress's specific intent in passing OSHA was to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C.A. § 651(b). The general duty clause of OSHA was enacted to cover serious hazards that were not otherwise covered by specific regulations. Teal v. E. I. Dupont, 728 F.2d 799, 804 (6th Cir. 1984). Congress realized that it could "not anticipate all potential hazards" in the workplace. Id. Virginia courts, however, do recognize, as stated above, that an employer must take all possible precautions to prevent foreseeable hazards. Pike, 222 Va. 317 at 323. Mr. Burg's testimony is directly on point regarding foreseeability in the instant case.

OSHA VIOLATION SUPPORTS A CLAIM OF NEGLIGENCE PER SE

Defendant once again misconstrues the law and the facts to support its contention that OSHA does not support a negligence *per se* claim. Defendant expediently references the Order of this Court regarding the plaintiff's status as an employee under the Virginia Worker's Compensation Act. Defendant's Brief, 3. This Court did not rule that the plaintiff was not a "employee," but rather ruled that the plaintiff was not a statutory employee only *under the Virginia Worker's Compensation Act*. See Order, March 13, 2000. It is obvious that this Court did not rule that the plaintiff was not an employee in any sense, but only that for purposes of the Worker's Compensation Act effect on his private right of action against third parties, plaintiff was not a statutory employee.

It is "inappropriate to use varying state common law definitions of "employee" and "employer" in construing federal legislation." Clarkson Construction v. O.S.H. Review Com'n, 531 F.2d 451.

Rather, the purpose and policy of the statute determines the nature of the employment relationships. See id.

Congress stated that the purpose of OSHA is to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C.A. § 651(b). The clause imposing a general duty to maintain a safe workplace applies to every employer, regardless of whether he controls the workplace, whether he is responsible for hazards, or even whether he has the best opportunity to abate the hazard. Teal v. E. I. Dupont, 728 F.2d 799, 804 (6th Cir. 1984). A general statutory duty is ordinarily for the benefit of *all persons* who are likely to be exposed to injury from its nonobservance. Koll v. Mannatt's Transp., 253 N.W.2d 265, 270 (Iowa 1977) (emphasis added). Under OSHA, which has been adopted by Virginia, an employee includes "every laborer or mechanic under the [Occupational Safety and Health] Act *regardless of the contractual relationship . . . between the laborer and mechanic and the contractor or subcontractor who engaged him.*" 29 C.F.R. 1926.32(j) (emphasis added).

In the instant case, plaintiff was certainly a person "likely to be exposed to injury" for the nonobservance of the general duty clause of OSHA. Plaintiff was laboring at the worksite of the general contractor and the subcontractor. Looking to Congress's stated purpose for OSHA, and the OSHA regulations, plaintiff in this case definitively falls within the category of those whom are meant to be protected.

Defendant quotes Pearson v. Canada Contracting Co., Inc., 232 Va. 177 (1986) as evidence that Virginia does not accept a violation of OSHA as negligence *per se* when a non-employee is the plaintiff. However, defendant errs in two ways in its analysis of Pearson. First, defendant errs in its conclusory statement that the plaintiff in the instant case is a "non-employee." See supra.

Second, the defendant errs in believing that the Pearson ruling is in any way controlling in the instant case. Pearson involved a suit brought by a fireman for injuries sustained in the course of fighting a fire on multiple grounds, including violation of OSHA. Pearson 232 Va. at 179-180, 186. The Court declined to consider the fireman an "employee within the class of person for whose protection the regulations was enacted." Id. at 186. By implication, however, the Virginia Supreme Court in Pearson recognizes an OSHA violation as negligence *per se* if the plaintiff is within the protected class. The court's reasoning, additionally, is inapplicable to the present case. In Pearson, the court distinguished policemen and firemen from all other categories of those to whom a duty is owed, considering them "'in a class of [their] own,' or *sui generis*," "because of the public nature of [their] rights and duties." Id. at 183, quoting, C & O Railway v. Crouch, 208 Va. 602, 608, 159 S.E.2d 650, 655. The presence of policemen or firemen "at any particular time cannot be reasonably anticipated . . . [i]n such situations it is not reasonable to require the level of care that is owed to invitees or . . . licensees." Id. at 185. In no way is the plaintiff in this instant case analogous with a policeman or fireman. The work of the plaintiff did not put him in "a class of his own." The plaintiff's presence at the worksite certainly was "anticipated." The exception that applies to policemen or firemen does not apply to those performing work at the worksite at the behest of the contractor or its subcontractors. As noted previously in this Brief, plaintiff does fall within the class to be protected by OSHA, and therefore the requirements for an action based on negligence *per se* are established in this case.

The defendant also relies on the non-binding ruling of the Colorado Supreme Court that a violation of OSHA is not *per se* negligence. However, there is sufficient law to the contrary. See Canape v. Peterson, 897 P.2d 762, 769, (Mullarkey, J., dissenting). The Idaho Court notes that the

common interpretation of 29 U.S.C. § 653(b)(4), which states that “[n]othing in this chapter shall be construed to supersede . . . or to enlarge or diminish . . . the common law or statutory rights, duties, or liabilities of employers and employees,” has merely “construe[d] its language as precluding the creation of a new civil cause of action.” Sanchez v. Galev, 733 P.2d 1234, 1242 (Idaho 1986). In Sanchez, the court was “persuaded that the intent of Congress in enacting OSHA . . . can best be served by allowing instructions of negligence *per se* for violations of OSHA regulations.” Id. at 1244. The Sixth Circuit likewise has found a violation of negligence the proper basis for negligence *per se*. See Teal v. E.I. Dupont De Nemours and Co., 728 F.2d 799 (6th Cir. 1984). “Tennessee case law establishes that the breach of duty imposed by regulation is negligence *per se* . . . the appellants were entitled to a jury instruction on their negligence *per se* claim.” Id. at 805. The Washington Court has declared that it is “entirely appropriate to adopt the rule that violation of [safe workplace] standards of reasonable conduct, as embodied in administrative regulations, was negligence *per se*. The rationale . . . is equally applicable to violations of OSHA regulations.” Kellev v. Howard S. Wright Const. Co., 582 P.2d 500, 508 (Wash. 1978). The Court held that violation of OSHA regulations “would be negligence *per se*.” Id. The United States District Court in Delaware has also held that violation of OSHA safety regulations which had been adopted by reference into Delaware law (as it has in Virginia) would constitute negligence *per se*. See Carroll v. Gettv Oil Co., 498 F. Supp. 409 (DC Del 1980). An action against a landowner was upheld in Idaho, where an employee of a contractor claimed the violation of OSHA by the owner of the land on which the contractor was working constituted negligence *per se*. See Walton v. Potlatch Corp., 116 Idaho 892, 781 P.2d 229 (1989). A surveyor boarding a docked vessel to inspect it for grain also sustained an action against the shipowner under a theory of OSHA violations

being negligence *per se*. Arthur v. Flota Mercante Gran Centro Americana S.A., 487 F.2d 561 (5th Cir. 1973), reh den, 488 F.2d 552.

The Virginia Supreme Court has not specifically ruled whether a violation under OSHA is negligence *per se*. However, the decision of the Court in Pearson implicitly indicates that OSHA violations can constitute negligence *per se*. In Pearson, the Court did not say that violation of OSHA could not be negligence *per se*, but only that firemen are “in a class of their own” and therefore not in the class of persons for whose protection the regulation was enacted. Pearson, 232 Va. 177 (1986). The plaintiff in Pearson has been distinguished from plaintiff in the instant case elsewhere in this Brief. This year, the Court decided Halterman v. Radisson Hotel Corp., 259 Va. 171, 523 S.E.2d 823, based on the fact that the plaintiff did not prove that defendant violated the OSHA regulation, and therefore did not prove a claim of negligence *per se*. See Halterman, 259 Va. at 176-178. The implication of the Halterman decision is that, had the plaintiff proven the violation, there would have been a negligence *per se* claim. In the instant case, the testimony of plaintiff’s expert witness Mr. Burg goes to proving violation of OSHA, which has statutorily been adopted by Virginia and his testimony is admissible under the expert witness statute, § 8.01-401.3 of the Code of Virginia.

The Norfolk Circuit Court has addressed the admissibility of OSHA standards with regards to negligence. See Marslender v. VEPCO, 37 Va. Cir. 199 (1995). The Norfolk Court determined that “a number of courts have concluded that OSHA regulations are relevant in determining the standard of care in negligence actions” Id. at 200. The court did not allow the introductions of violations of OSHA regulations as negligence *per se*, but only because a Virginia statute dealing

specifically with overhead power lines expressly stated that the Virginia statute could not be used for negligence *per se*. Id. at 201.

While some courts have held that OSHA violations could not be negligence *per se*, those cases can be distinguished from the instant case. See generally, ;79 ALR 3rd, *Violation of OSHA Regulation - Tort Liability* § 4, citing, Ries v. National R. Passenger Corp., 960 F.2d 1156 (3rd Cir. 1992) (since OSHA not safety statute under FELA, no negligence *per se*); Cadillac Fairview of Florida, Inc. v. Cespedes 468 So.2d 417 (Fla 1985) (OSHA regulations not dispositive on state law question of negligence, but allowing evidence of violation of OSHA to prove duty, proximate cause, or industry custom.); Templeton v. Chicago & North Western Transp. Co., 211 Ill. App.3d 489, 570 N.E.2d 467 (1991) (Federal Railroad Administration has exclusive jurisdiction over working conditions of railroad bridges and preempts OSHA regulations); Wiersgalla v. Garrett, 486 N.W.2d 290 (Iowa 1992) (OSHA regulations evidence of negligence rather than negligence *per se*, because action was by general partner of firm against crane operator and electric utility).

Some Courts have held that contractors do not have a duty to provide a safe workplace for employees other than their own, but these are usually limited to situations where the contractor's employees would *in no way* be affected by the noncompliance with the standard, such as when no employees of the contractor are at the worksite. See OSHA Employer 153 ALR Fed 303, § 5(b) 335, 351. Such instances of no liability may occur when the contractor has no control over the workplace, see id. at 350, or when there were non-serious violations which a subcontractor did not create or for which he was not responsible pursuant to contractual duties. Id. at 331. None of those factual situations is involved in the instant case. Both the general contractor and defendant subcontractor, Atlantic Welding, had numerous employees who were on the worksite. Both the

defendant general contractor and defendant, Atlantic Welding, had control over the workplace involved in the accident. In regards to defendant, the violation of OSHA was not a "non-serious" violation, and it was a violation which was created by the lack of due care of both the general contractor and the subcontractor.

TESTIMONY REGARDING OSHA VIOLATION
ADMISSIBLE AS EVIDENCE OF NEGLIGENCE OR
AS EVIDENCE OF STANDARD OF CARE

The defendant wrongfully claims that a 4th Circuit ruling in Trowell v. Brunswick Pulp and Paper Co. is applicable to the instant case. Defendant's Brief, 5. The plaintiff in Trowell was merely touring the defendant's plant when he was injured. Trowell v. Brunswick Pulp and Paper Co., 522 F. Supp. 782 (D.C.S.C. 1981). The court ruled that violation of OSHA regulations were inadmissible because the plaintiff was not in the class to be protected by OSHA, i.e., a non-employee. This case is clearly irrelevant to the instant case. In Trowell, the plaintiff is only a tourist, not performing any type of work whatsoever at the defendant's plant. In the instant case, plaintiff was engaged in work on the construction site directly under the control of the general contractor, as a deliveryman offloading gypsum sheathing drywall to a subcontractor on the site. As previously stated, the purpose of OSHA is to extend a safe workplace to every man and woman in the Nation, as opposed to being designed to provide safe touring environments. As discussed earlier in this Brief, "employee" for purposes of OSHA includes *every* laborer and mechanic, regardless of their contractual relationship with the contractor or subcontractor. See supra, 5, 7-9; 29 C.F.R. § 1926.32(j). The defendant in the instant case owed a duty to the plaintiff under OSHA because, for the purposes of OSHA, Plaintiff was an employee and because it was the duty of

defendants to provide a safe workplace for those who are within the class to be protected by the statute.

Courts, including Virginia, nearly universally admit evidence of OSHA violations as evidence of negligence. See, e.g., Cadillac Fairview of Florida, Inc. v. Cespedes 468 So.2d 417 (Fla 1985) (allowing evidence of violation of OSHA to prove duty, proximate cause, or industry custom.); Wiersgalla v. Garrett, 486 N.W.2d 290 (Iowa 1992) (OSHA regulations evidence of negligence rather than negligence *per se*, because action was by general partner of firm against crane operator and electric utility). Knight v. Burns, 331 So.2d 651; Dunn v. Briner 537 S.W.2d 164; Jupiter Inlet v. Brocard, 546 So.2d 1 (Fla); Manslender, 37 Va. Cir. 199 (1995). As stated previously, the OSHA regulations do not impose a new duty upon employers, but merely codify a standard of care. In the Manslender case, the evidence of OSHA violations was allowed as evidence of negligence and not negligence *per se* only because of a specific statute regarding power line safety which did not allow negligence *per se*. 37 Va. Cir. at 201. In the instant case, plaintiff's expert witness Mr. Burg is able to testify to the industry standards and customs, the standard of care required by defendant under OSHA and Virginia law, and the foreseeability of the subject accident by the general contractor and the defendant subcontractor on this worksite.

CONCLUSION

Virginia recognizes a claim of negligence *per se* if OSHA standards are violated. Plaintiff in the instant case is decidedly in the class of persons for whose protection OSHA was passed by the federal government and adopted by the Commonwealth. OSHA does not create a new or different cause of action, but establishes by statute the duty owed by an employer to workers and the standard of care that is required in the construction field.

Plaintiff's expert witness Mr. Burg is eminently qualified to testify regarding the minimum standard of care and safety, both in the Commonwealth of Virginia and nationwide. His credentials establish that he is a safety expert in the construction field. His many years working for OSHA and training OSHA inspectors and private sector employers (including those located and working in Virginia) prove that he is uniquely competent to understand and explain to a trier of fact OSHA and industry safety standards and what would be considered a breach of the standard of care. To determine a reasonable standard of care on a construction site the trier of fact needs specialized knowledge in how dangers are recognized and eliminated or mitigated. Neither industry standards nor OSHA regulations or applications are a matter of common knowledge outside of the construction and construction safety fields. Mr. Burg's testimony should be embraced and welcomed by this court because it will "assist the trier of fact to understand the evidence [and] to determine [the] fact[s] in issue."

MICHAEL A. SHEPHERD

By: 

Of Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing pleading was faxed ^{or} and hand delivered to all counsel of record this 13th day of June, 2000.

FILED
VA. SUP. CT. CLERK

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J. CURTIS FULTON, CLERK


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MASTER'S DEGREE IN ERGONOMICS
25 YEARS HEALTH AND SAFETY EXPERIENCE
17 YEARS WITH DEPARTMENT OF LABOR - OSHA
OSHA NATIONAL TRAINING INSTITUTE INSTRUCTOR
PUBLISHED AUTHOR IN SAFETY AND WORKER'S COMP
CONSULTANT FOR MAJOR INSURANCE COMPANIES
RELIANCE NATIONAL, AIG, LIBERTY MUTUAL

EXPERIENCE:
2/94 to Pres

Accident Prevention Corporation
Crystal Lake, Illinois
President

President and chief consultant of safety, health, environmental, engineering and training consulting firm. Company specializes in over 75 occupational disciplines including; safety engineering, industrial hygiene, environmental impact, and ergonomics for construction and general industry. Conducts training seminars, OSHA style audits and renders expert testimony. Representative clients include: Reliance National Insurance Company, AK Steel, Samsonite, Grain Processing Corp, Inland Steel Industries, Fischbach and Moore Inc., Atlantic Richfield Corporation, Occupational Safety and Health Administration, Red Rocks Community College. Expert in general industry and construction safety and health, as well as, ergonomics.

2/93 to 2/94

Fischbach And Moore Inc.
New York, NY
Director of Safety and Loss Control

Director of Safety and Loss Control for one of the largest electrical construction contractors in the nation. Primary safety manager for over 320 construction sites. Directed, administered and monitored all safety and health activities, reporting directly to the President and Vice President. Developed safety and health programs. Trained over 400 employees. Coordinated with government agencies and unions. Created programs and procedures to minimize losses through injury and illness, evaluation and prosecution of fraudulent cases.

6/90 - 2/93

**U.S. Department of Labor/OSHA
OSHA National Training Institute
Des Plaines, IL.
Training Instructor (Construction)**

Taught courses on technical safety and health subjects in construction and general industry to adult students from OSHA, other Federal agencies and the private sector. Chairperson for Tunneling, Trenching, Scaffolding, and Fall Protection courses, as well as, advanced certification courses for the private sector. Administered all course activities, conducted testing and evaluation of courses and course materials. Acted as procurement officer for hiring contractors.

7/89 - 6/90

**U.S. Department of Labor/OSHA
Chicago, IL.
Regional Tunnel Coordinator**

First and only Regional Tunnel Coordinator in OSHA's history. This position was created as a result of a significant number of fatalities in underground construction and the highly sensitive nature of subsequent criminal litigation. Primarily, the S.A. Healy Case, a criminal case, had attracted enormous political attention and was closely followed by the national media, which necessitated the assignment of a Tunnel Coordinator. Developed and implemented technical compliance directives for the Underground Construction Standard.

Duties included assuring consistency of enforcement activity throughout the region, as well as, participating in dangerous and sensitive tunnel inspections. Coordinated all regional tunnel activities for sixteen area offices and acted as liaison to EPA, Corps of Engineers, the Mine Safety and Health Administration, contractors and labor. Conducted specialized training for compliance officers and the public on tunnel safety.

6/84 - 7/89

**U.S. Department of Labor/OSHA
Voluntary Protection Program Manager**

Administered and managed a program within OSHA designed to recognize the achievements of industrial and construction companies who have developed the finest safety and health programs in the nation. Served as primary liaison and contact person for industry and labor. Conducted safety and health assessments and made recommendations for improvement in management systems. Directed teams of other safety and health professionals conducting comprehensive reviews. Wrote technical reports of all findings and submitted them to the Assistant Secretary of Labor.

Served on special details to Area Offices to conduct complex safety, health and accident investigations.

8/82 - 6/84

**U.S. Department of Labor/OSHA
Safety and Occupational Health Specialist**

Administered grants to state government for consultation programs in Occupational Safety and Health. Monitored state plan assistance to private employers for the prevention of injuries and illnesses. Examined, approved and monitored budgets and effectiveness of state programs in protecting employees in the work place from recognized safety and health hazards and negotiated agreements with state Governor's representatives.

3/77 - 8/82

**U.S. Department of Labor/OSHA
Regional Training Officer**

Managed a technical safety and health training program for OSHA. Reviewed all technical training to insure consistency with current technology and procured specialized training i.e. radiation, construction and machine guarding to meet identified needs. Compared compliance inspection data before and after training. Conducted training seminars on a variety of technical safety and health topics internally and externally i.e. fire protection, industrial hygiene, construction and ergonomics. Directed a comprehensive video program.

7/75 - 3/77

**U.S. Department of Labor/OSHA
Occupational Safety and Health Compliance Officer**

Conducted comprehensive safety and health inspections and accident investigations in industry and construction. Sampled for toxic chemicals, vapors, and airborne contaminants, monitored for noise and vibration, trained State and Federal OSHA inspectors, and provided expert testimony for OSHA.

3/73 - 7/75

**Safety Services Incorporated
Chicago, IL
Safety Consultant**

Conducted consultations with industrial and construction clients for safety and health and loss control management. Specialized in ergonomics to reduce losses caused by repetitive trauma. Evaluated clients status for EPA, OSHA and MSHA regulations. Provided recommendations for compliance and improved safety and health management. Managed a staff of safety and health specialists. Provided expert testimony for clients at the Federal District court.

9/72 - 3/73

State Of Wisconsin
Madison, WI
Safety Consultant

Developed specialized safety and health training and hazard recognition programs for the State of Wisconsin. Developed and administered an employee hazard awareness program stressing ergonomics.

6/71 - 9/72

Safety Systems Analyst

Evaluated the State of Wisconsin's safety and health programs in comparison to OSHA requirements. Conducted training with State officials and the private sector emphasizing Federal requirements. Recommended changes in the State's program for "as effective as" OSHA requirements.

9/70 - 6/71

University Of Wisconsin
Madison, WI
Lecturer

Taught classes in safety psychology and ergonomics at the University of Wisconsin. Emphasized psychological principles in evaluating safety factors in man-machine interactions.

1/70 - 1/72

Research Assistant

Taught undergraduate students about feedback factors as they relate to safety and health. Utilized computers and closed-circuit television to simulate man-machine interactions which were monitored to reduce stress and strain.

Education:

Graduate School

M.S. Industrial Psychology (Ergonomics),
University of Wisconsin, 1970-1972

College

B.A. Psychology
University of Wisconsin, 1965-1970

Honors

Regents Academic Scholarship
September, 1970

United States Secretary of Labor Award for Exceptional
Achievement in Construction, March, 1992

Other Information:

Labor Relations

July 1976 to January 1989

Served in a number of labor relations positions for a local and national union. Acted as chief negotiator and arbitrator.

January 1987 to January 1989

Served as Chairman for the Secretary of Labor's Safety and Health Committee for the U.S. Department of Labor.

Additional

Featured teacher/instructor/speaker at hundreds Associations, Universities, Unions and Professional Meetings, including: National Safety Council, Associated General Contractors, Associated Building Contractors, Carpenters, Laborers, Heat Treating Institute, United States Navy, NASA, Department of Energy and corporations such as, AK Steel, Reliance National Insurance, Inland Steel Industries, Samsonite, Grain Processing Corporation, Atlantic Richfield and many others. Adjunct professor at UCLA, and Red Rocks Community College. Taught courses at Purdue University, Staten Island University, Maplewood Community College, Keene State University and McHenry Community College.

Provided expert testimony in several precedent setting multi-million dollar lawsuits involving construction equipment and techniques.

Developed examination questions for the Board of Certified Safety Professionals certification examination, in the area of Human Behavior and Ergonomics

January, 1995, appointed as Chairman of the ANSI A10.28 committee. Revised and updated the standard for Work Platforms Suspended From Cranes or Derricks.

June, 1996 Elected Chairman of ASTM E34.15 and Standard Guide E916-86 "Reporting Employee Health History Information and Core Physical Examination Results".

Ongoing professional development include conferences and meetings with ASSE, National Safety Council, ANSI, ASTM, as well as, courses in Public Speaking, Video Production, Labor Relations, Radiation, Industrial Hygiene, Project Management, Decision Making, Successful Negotiating, Management Skills for Supervisors, Time Management, Employee Development, Human

Side of Management, Crane Safety, Construction Safety, Tunnel Safety,
Process Safety Management and Ergonomics.

**Professional
Associations:**

Certified Safety Professional (CSP), September, 1978

American Society of Safety Engineers (ASSE), April, 1973

Certified Audiometric Technician, September, 1974

American Society For Testing and Materials (ASTM) Vice-Chairperson,
Committee E-34 Occupational Health and Safety

American National Standards Institute (ANSI) Chairman, A10 Committee
for Safety Requirements for Construction and Demolition.

Registered Professional Engineer - Commonwealth of Massachusetts No.
37635

Publications:

Article for American Society of Safety Engineers Magazine Professional
Safety, "Safety Management, An Approach for the 90's", July, 1991

Chapter for Book, "Managing Workers' Compensation Human
Resources Guide To Controlling Costs", with Dr. Bruce Douglas, DDS,
MA, MPH, Published by John Wiley & Sons, Inc., 1996

1 VIRGINIA: IN CIRCUIT COURT OF CITY OF VIRGINIA BEACH

2

3 MICHAEL A. SHEPHERD,)
4 Plaintiff,)

5 v)

L98-2952

6 W. B. MEREDITH, II, et al.,)
7 Defendants.)

8

9

10 Deposition of Frank Burg, taken before Angela
11 D. Epps, court reporter, a notary public for the
12 Commonwealth of Virginia at Large, pursuant to
13 notice, at the offices of Kalfus and Nachman, Suite
14 300, 870 North Military Highway, Norfolk, Virginia,
15 at 10:00 a.m., May 19, 2000, to be used in the trial
16 of the above-entitled cause.

17

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18

19 APPEARANCES: Kalfus and Nachman (Mr. Blair
20 E. Smircina), attorneys for
the plaintiff.

21 Robey, Spence and Drash
22 (Ms. Fay F. Spence), attorneys
for defendants Bosley and
23 Meredith.

24 Norris and St. Clair (Mr. John
S. Norris, Jr.), attorneys for
25 defendant Atlantic Welding.

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I N D E X

WITNESS	EXAMINATION BY MR. NORRIS	EXAMINATION BY MS. SPENCE
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1 FRANK BURG, called as a witness, having been
2 first duly sworn, was examined and testified as
3 follows:

4
5 EXAMINATION BY MR. NORRIS:

6 Q. Mr. Burg, my name is John Norris. I'm
7 an attorney representing Atlantic Welding and
8 Fabricating, Inc. We're a defendant in a lawsuit
9 that's been brought by Michael Shepherd. You've been
10 identified as an expert witness, and that's the
11 reason for your deposition today.

12 I'm going to ask you some questions. If
13 you need to take a break at any time, tell me; and
14 we'll stop. If you don't understand a question I've
15 asked, if you think it's technically imprecise, tell
16 me; and I'll try and rephrase the question. It's
17 important that you understand me and that I
18 understand your answers. Is that all right?

19 A. Yes, sir.

20 Q. And as you are doing so far, vocalize
21 your answers as opposed to nodding your head or
22 giving me an unh-unh kind of an answer.

23 A. I will.

24 Q. What is your full name, sir?

25 A. Frank Burg, B-u-r-g.

1 Q. Where do you reside?

2 A. In Woodstock, Illinois.

3 Q. What is your business address?

4 A. 11516 Country Club Road, Woodstock,
5 Illinois 60098.

6 Q. And what business is conducted at that
7 address?

8 A. Accident Prevention Corporation.

9 Q. That's the name of the company?

10 A. Yes.

11 Q. What is your position with that company?

12 A. I'm the president.

13 Q. And how long have you been the president
14 of that company?

15 A. Six and a half years.

16 Q. What does that company do?

17 A. We started off primarily as a training,
18 safety and health training, teaching safety to health
19 professionals, corporations, government agencies
20 including OSHA, conducting training for them; and
21 then it evolved into doing more audits, safety and
22 health audits, for the clients and expert testimony.

23 Q. Okay. Now, you received a notice of
24 deposition, I presume, to be here today?

25 A. Yes.

1 Q. And did you note that there was attached
2 to that notice a request that you produce certain
3 documents?

4 A. Yes.

5 Q. And did you bring those documents with
6 you?

7 A. I believe so.

8 Q. Okay. Are these the documents in front
9 of you that you brought?

10 A. Yes.

11 Q. What are they?

12 A. This is all the material I relied on for
13 my opinions; plus I brought the OSHA standards; and
14 you already had a copy of my CV, which I believe was
15 requested. The correspondence between me and the
16 Kalfus and Nachman law firm.

17 Q. Okay. Now, you say you brought with you
18 the documents you relied upon to form an opinion?

19 A. Yes.

20 Q. Have you brought all the documents you
21 were provided to form an opinion?

22 A. I believe so.

23 Q. Okay. So everything here on the table
24 is what you've been given to review for this case?

25 A. Well, I wouldn't qualify that. It could

1 be that something wasn't there that inadvertently got
2 left behind.

3 Q. As far as you know?

4 A. As far as I know.

5 Q. Okay. For example, it would appear to
6 me from looking at that stack of documents that they
7 are all roughly letter-size pieces of paper. Would
8 you agree?

9 A. Yes.

10 Q. Were you ever shown any plans for this
11 job?

12 A. I don't recall specifically seeing
13 plans.

14 Q. Well, do you see that I have with me
15 today a roll of plans? Were you ever given anything
16 like that to review for this case?

17 A. I don't specifically recall receiving
18 plans.

19 Q. Plans? Blueprints?

20 A. No.

21 Q. Drawings?

22 A. No, nor would I have requested them.

23 Q. Okay. Did you see the contract for the
24 job?

25 A. I believe so.

1 Q. Okay. Did you see the specifications
2 for the job?

3 A. I believe so.

4 Q. Do you have that here with you today?

5 A. I'm not sure. I think it may be in
6 there. I don't recall. I reviewed the depositions
7 in preparation for this deposition, for my
8 deposition; and other materials that were provided I
9 had reviewed earlier.

10 Q. Well, specifications for the job are
11 about so thick; and I'm holding my fingers about
12 three or four inches apart. Do you think you
13 received a document like that?

14 A. I don't recall receiving a document like
15 that.

16 Q. Do you think you received the portions
17 of the specifications that dealt with steel erection?

18 A. I don't specifically recall.

19 Q. Okay. Would that have been important to
20 you in forming an opinion in this case?

21 A. No.

22 Q. Okay. Now, you say you got the
23 contract. What contract did you get?

24 A. I can't recall whether I got it in the
25 mail or -- I believe we discussed the contract a

1 little bit this morning in preparation for the
2 deposition.

3 Q. Who's we?

4 A. Me and the attorneys from the law firm.

5 Q. Prior to this morning -- today is the
6 19th of May, 2000 -- had you discussed the terms of
7 the contract with anyone?

8 A. Well, the contracts, as far as safety
9 and health are concerned, always refer themselves to
10 the regulations.

11 Q. That was not my question. I'll ask it
12 again. Prior to today did you discuss with anybody
13 the terms of the contract in order to form an opinion
14 in this case?

15 A. No.

16 Q. Okay. When did you receive materials to
17 form an opinion in this case?

18 A. Various times.

19 Q. Do you know the first time?

20 A. It must have been around May, early in
21 May.

22 Q. Of which year?

23 A. Of '99.

24 MR. NORRIS: Okay. At some point I need
25 to kind of see what's here. Why don't we do

1 this. Why don't we move along a bit, and maybe
2 we'll take a break at an appropriate time.
3 I'll need about ten minutes to just see what's
4 on the table.

5 MR. SMIRCINA: Except for correspondence
6 to and from us, you are free to.

7 MR. NORRIS: Okay. Well, I take the
8 position that everything there is -- if he says
9 he's brought with him what he relied upon to
10 form an opinion, whether it's correspondence
11 from you or not, it's discoverable.

12 MR. SMIRCINA: I take the position that
13 what I say to my expert you don't get to see.

14 MR. NORRIS: Well, we'll have to address
15 that.

16 MS. SPENCE: We'll have to take that up
17 with the judge because I believe it's
18 discoverable if he relied on it.

19 MR. SMIRCINA: You can look at the
20 materials I sent him. You are not going to
21 look at anything I wrote him.

22 MR. NORRIS: We'll need to have it
23 marked by date and that type of thing so we can
24 have it.

25 MR. SMIRCINA: Not that I think that

1 there's anything in there that's particularly
2 interesting; but, you know, just as a general
3 position. Maybe if I look at it, I'll change
4 my mind.

5 MR. NORRIS: All right. We'll get to
6 the documents in a little bit.

7
8 BY MR. NORRIS:

9 Q. Mr. Burg, I've been provided two things
10 telling me something about you. One is a curriculum
11 vitae, and this is a copy of the CV I received. Is
12 that your CV? Does it need to be altered or amended
13 in any way?

14 A. Yes, it needs to be amended.

15 Q. Do you have a current one with you?

16 A. No.

17 Q. Can you briefly tell me how it needs to
18 be amended.

19 A. Well, my address has changed.

20 Q. Okay.

21 A. Also, there is -- I serve on an ANSI
22 committee. I'm a chairman of a committee. It's
23 called A1028, and it's a committee for work platforms
24 when they are suspended from cranes and derricks; and
25 as chairman of the committee, it was my job to --

1 with my committee -- to revise that standard ANSI
2 A1028, and that's quite a lengthy and elaborate
3 process.

4 I am pleased to say that we accomplished
5 that very recently and that my committee revised that
6 standard, and it was up for comment. We reviewed all
7 the negative comments and satisfied the people who
8 had negative comments, then submitted the standard to
9 the entire ANSI and went out for public --

10 Q. I don't mean to cut you off. We're
11 going to be here a while, so I don't really need to
12 know all the machinations of your committee's work.
13 I just need to know how you need to amend your CV
14 right now.

15 A. I was just about done. The last part is
16 that once the public comment is reviewed, then the
17 standard becomes approved and in place; and I'm very
18 proud to say that the standard was recently approved
19 and is in place and is now an ANSI standard.

20 Q. Other than your address and your role on
21 this committee, does your CV need to be amended in
22 any other way?

23 A. I'd have to make sure. I can't see
24 anything that would be pertinent to this case.

25 Q. All right. Thanks. Now, the other

1 document that I got explaining your role in the
2 case -- and I'm only showing you a portion of the
3 total document -- was an answer to an interrogatory,
4 which contained as a part a recitation of your
5 opinions in this case. Have you reviewed that
6 document?

7 A. I believe I saw portions of that this
8 morning.

9 Q. Is this morning the first time you've
10 seen it?

11 A. Well, I'm sure it was discussed with me
12 on the phone; but I didn't write it of course.

13 Q. Right. But prior to today, had you ever
14 read it?

15 A. I don't specifically recall having read
16 it.

17 Q. Okay. You read it today?

18 A. Maybe. I haven't looked at what you
19 have in front of you.

20 Q. Why don't you look at it and tell me if
21 you've read it.

22 A. Yes, I believe that's what I read
23 earlier today.

24 Q. Okay. So today you think was the first
25 time that you read this interrogatory answer which

1 sets forth your opinions?

2 A. I believe that's right.

3 Q. Is this summary of your opinions
4 accurate?

5 A. I would say it's fairly accurate. Some
6 things I would have put a little differently.

7 Q. Okay. I need to know how you would
8 change it.

9 A. Well, there was emphasis in there on
10 securing the girt; and I believe I would look at it a
11 little more wholistically or in a big picture. I would
12 say it's not just the securing of the girt that's a
13 problem. It's also the fact that material handling
14 is being utilized in the area, and there was exposure
15 of employees below the girt. You certainly could
16 leave a girt unsecured if there's no danger around of
17 contacting the girt or someone being hit below from
18 the girt or any other object; so the fact that the
19 girt was not secured or was secured -- I guess
20 there's a lot of discrepancy about that -- is not my
21 only focus in evaluating the safety at this
22 particular construction site.

23 Q. Okay. One of the things I'm trying to
24 do today is understand as fully as I can the opinions
25 you may express at trial, so I don't want to put

1 words in your mouth; but on the other hand, I want to
2 make sure I understand how it is you think this
3 summary of your opinion needs to be changed.

4 Are you telling me that this opinion
5 needs to be changed to the extent it states that the
6 girt should not have been left unsecured?

7 A. No. I believe the girt should be
8 secured. Secured is way safer than not secured, and
9 I certainly think it would be a good practice and
10 compliant with OSHA to have it secured. On the other
11 hand, from a safety prospective, that's just one
12 factor that we would look at. You could have a room
13 full of razor blades, and it's okay if it's locked
14 and no one can enter it. Technically, you'd have a
15 violation by having exposed razor blades; but there
16 wouldn't actually be a violation because there's no
17 people exposed to the danger, so that aspect of the
18 exposure is not as clear as I would have made it if I
19 had written those opinions.

20 Q. Well, I still need to be more specific.
21 Is it your opinion today that there was an OSHA
22 violation with respect to the placement of the -- and
23 you've used the word girt.

24 A. Purlin is just as good.

25 Q. Okay. I'm going to use girt as well.

1 A. Okay.

2 Q. And so we agree that's the steel member
3 that fell and injured the plaintiff?

4 A. Correct.

5 Q. Okay. Is it your opinion today that
6 there was an OSHA violation of the placement of the
7 girt?

8 A. Yes.

9 Q. Okay. And what was the OSHA violation?

10 A. What specific site?

11 Q. We'll get to the site; but in layman's
12 terms, what was the violation? What did the
13 violation consist of?

14 A. You had an employee exposed to an
15 unsecured girt.

16 Q. And how was the girt unsecured? What --
17 How should it have been secured?

18 A. Well, that's -- There are many options
19 available for securing the girt.

20 Q. To comply with OSHA, what should have
21 been done that wasn't done?

22 A. OSHA operates under the concept of what
23 we call a performance standard, basically that OSHA
24 can't describe all the possible dangers that could
25 occur in a workplace. What OSHA tells the employer

1 is, We know you have a lot of expertise in this area.
2 Here are the results that we expect you to achieve,
3 and the results that OSHA expects to be achieved are
4 that employees are guaranteed that they won't be
5 exposed to death or serious physical harm; so those
6 basically are the requirements of OSHA at the job
7 site.

8 Q. My question was, What should have been
9 done differently to comply with OSHA or to have
10 avoided an OSHA violation? Are you saying
11 Mr. Shepherd shouldn't have gotten hurt and that
12 would have complied with OSHA?

13 A. No. There's a variety of things that
14 the employer could have done to avoid this accident.
15 One of them --

16 Q. What employer?

17 A. Well --

18 Q. The employer of whom?

19 A. Primarily Meredith, the general
20 contractor; but, also, other subcontractors that were
21 involved in this accident.

22 Q. Okay.

23 A. Including Atlantic Welding.

24 Q. You understand, don't you, that
25 Mr. Shepherd wasn't employed by either Meredith or

1 Atlantic?

2 A. I'm fully aware of that.

3 Q. And that none of Atlantic's or
4 Meredith's employees were injured.

5 A. Well, you obviously don't understand
6 OSHA's definition of what an employer is.

7 Q. Okay. We won't get into that. I'm
8 trying to find out what should have been done that
9 wasn't done to have avoided -- for you to have the
10 opinion there was no OSHA violation.

11 A. Well, there are a lot of different
12 scenarios that come into play there; and I'd be happy
13 to describe some of them.

14 Q. Describe as many of them as you are
15 going to describe in the courtroom.

16 A. Well, the idea is that there shouldn't
17 be any exposure of employees to the potential falling
18 of overhead objects; and, therefore, one possible
19 solution is securing the overhead objects so that
20 they don't fall. Another possible solution is having
21 work roles, evaluating, doing your job hazard
22 analysis, your analysis of hazards, and determining
23 which areas material handling equipment is allowed.
24 Another consideration would be what areas have to be
25 secured to prevent exposure of employees to potential

1 falling hazards. Those are the big three I can think
2 of.

3 Q. All right. Now, the first area I think
4 you mentioned was that the girt should have been
5 secured in some fashion. Am I correct that that's
6 what you said?

7 A. No.

8 Q. I'm sorry. What was the first one?

9 A. If there is potential for material
10 handling equipment to be in the area that could
11 contact the girt or any other object and there is
12 potential for employees to be exposed to the girt or
13 any other object falling down from up above, then you
14 must secure those objects, in this case being the
15 girt, to prevent them from falling.

16 Q. Did those conditions precedent obtain
17 here in this case?

18 A. Well, when Meredith determined what the
19 staging of the material was going to be and the
20 location where the material was going to be placed,
21 then they should have done a hazard analysis and
22 determined, Well, here are the potential hazards. A
23 girt could fall. An employee could be hit; and when
24 they did that, they would decide, Well, what do we
25 have to do here? Do we have to cordon off the area?

1 place the materials in another location or secure
2 these components, namely the girt or whatever else
3 might be there, to such an extent that they will not
4 and cannot fall and injure people?

5 Q. I'm trying to focus on securing the girt
6 right now, and we'll get to the cordoning off the
7 area in a minute. What would OSHA have required in
8 your opinion in the way of securing the girt?

9 A. Well, there's -- As we talked there's
10 all kinds of possibilities. Under certain
11 circumstances OSHA doesn't require the girt to be
12 secured at all. If you are not going to have anybody
13 exposed to the danger, you don't have to secure the
14 girt. For example, if you are going to be
15 demolishing the structure, OSHA doesn't care -- OSHA
16 doesn't even want it secured. We just don't want
17 exposure to injury of employees.

18 Q. Mr. Burg, I'm talking about this
19 situation, not a hypothetical. I don't want to talk
20 about razor blades or demolishing the buildings. I'm
21 talking about this situation that resulted in an
22 injury to Mr. Shepherd. What securing of the girt in
23 your opinion should have been done to meet OSHA
24 requirements?

25 A. Well, all OSHA requirements state is

1 that it has to be secured. It's up to the employer
2 to -- not OSHA -- to determine what means or methods
3 are going to be used to protect employees from a
4 falling girt. That's not OSHA's responsibility at
5 all.

6 Q. All right. Would securing include tack
7 welding?

8 A. Depends on the potential hazards in this
9 particular operation. There could be circumstances
10 where tack welding would be insufficient securement
11 of the girt.

12 Q. So do you use hindsight to determine if
13 there's an OSHA violation or foresight?

14 A. Well, once again -- and it seems to me
15 that you misunderstand OSHA and its performance
16 criteria. The OSHA burden is on the employer to make
17 the determination of what is needed to do to protect
18 employees. In this case the determination may have
19 been -- the best determination could have been place
20 these dry wall hacks in a different location because
21 this location is not secure.

22 Q. I don't know any other way to ask it,
23 Mr. Burg. I'm trying to find out if you have an
24 opinion on what should have been done for this
25 precise case to have secured the girt in order to

1 satisfy OSHA. What, if anything, do you feel should
2 have been done to secure the girt? Do you have an
3 opinion about that?

4 A. Well, you know, asking me one time what
5 OSHA requires is one thing. Asking me another time
6 about what my opinion is -- I would say my opinion is
7 that if the girt is secured by welding, that it would
8 be secured to withstand most circumstances that would
9 involve using material handling equipment such as was
10 used in this particular case.

11 Q. So if the girt had been secured by
12 welding prior to the impact, that would have
13 satisfied OSHA?

14 A. It's my opinion that OSHA -- it's my
15 opinion that that accident very likely would not have
16 occurred; but OSHA, you know, when you go back to
17 OSHA again, OSHA is not that specific about what --
18 how or what manner that girt has to be secured. OSHA
19 is only concerned about the exposure to the
20 employer. OSHA would allow the girt to be unwelded,
21 unsecured as long as there's no danger of it being
22 contacted by the material handling equipment or the
23 employee.

24 Q. Mr. Burg, I have in front of me an
25 opinion which was represented to me as being your

1 opinion which says in part that the unsecured steel
2 beam which caused plaintiff's injuries was erected
3 and placed in violation of OSHA standards. Is that
4 your opinion?

5 A. Yes. I don't have any problem with that
6 opinion. It's only one aspect of what OSHA
7 requires. It's somewhat unclear as to how it relates
8 to the material handling equipment and the proximity
9 of the employee; but had I been an OSHA inspector --
10 and, of course, I was one for eighteen years -- I
11 would have absolutely cited both the general and the
12 subcontractor for violations of OSHA for their
13 failure to secure this girt to the structure.

14 Q. Okay. So I'm trying to find out --
15 would you agree with me that the subcontractor
16 doesn't have control of where materials are off-
17 loaded on the site?

18 A. The subcontractor --

19 Q. The steel erection subcontractor has no
20 control over where dry wall materials are off-loaded
21 on the site. Wouldn't you agree with that?

22 A. That would depend on the arrangement
23 between the subcontractor and the general contractor.

24 Q. Is it your understanding that Atlantic
25 Welding and Fabricating had the right to control

1 where dry wall materials were off-loaded?

2 A. I don't believe so.

3 Q. Okay. So your opinion states that the
4 steel beam which caused the plaintiff's injury was
5 erected and placed in violation of OSHA standards.
6 All I want to do now is concentrate on that activity,
7 the erection and placement of the beam, not where
8 materials were off-loaded, not whether there was
9 cordoning. The steel erection and placement. Are
10 you telling me that the erection and placement of
11 this steel which violated the OSHA standard was the
12 failure for that beam to have been welded prior to
13 the impact occurring?

14 A. No.

15 Q. What was the -- What was the portion of
16 the erection or placement of the steel which violated
17 the OSHA standard?

18 A. That the girt was not secured, and that
19 there was a possibility and, in fact, an actuality of
20 it being approached by material handling equipment
21 and also that employees and namely Mr. Shepherd were
22 below and exposed to danger.

23 Q. Okay. How should it have been secured?

24 A. There are many ways of securing it. One
25 could have been bolted.

1 Q. Okay. You told me you didn't review the
2 plans. Were you aware that the plans did not call
3 for bolting of this member?

4 A. Yes, from the deposition testimony. The
5 plans can be changed. There's change orders. They
6 probably wouldn't have bolted it. Maybe they would
7 have strapped it. Maybe they would have welded it.
8 Maybe they would have removed it. That would have
9 been a very good idea, removing it before it was
10 approached by the material handling equipment.

11 Q. I want to go through them one by one.
12 My question is, How should it have been secured?
13 Your first comment was, It could have been bolted.
14 Do you have any reason to dispute that the plans did
15 not call for the bolting of this member?

16 A. No.

17 Q. No, you don't?

18 A. I don't have any reason to dispute
19 that. They decided not to bolt it. That's their
20 decision.

21 Q. You are not saying that the
22 subcontractor decided not to bolt it?

23 A. Well, I presume it was the general
24 contractor that decided not to bolt it.

25 Q. Don't you think the architect and

1 engineer come up with the plans for the construction
2 site and neither the general contractor nor the
3 subcontractor?

4 A. Plans are altered continuously on the
5 job site. There's change orders. There's all kinds
6 of different changes that are made on the job site on
7 a daily basis; so making the architect holy -- I
8 don't understand where you are going with that.

9 Q. Well, Mr. Burg, hopefully you are not
10 testifying that if a steel erection contractor
11 complies with plans which do not call for the bolting
12 of girts, he's automatically violating OSHA?

13 A. I didn't say that.

14 Q. And that's not your opinion, is it?

15 A. No, that's not.

16 Q. Is it your opinion that a subcontractor
17 should have plans changed to require the bolting of
18 girts designed to support precast concrete?

19 A. No, but it could be a subcontractor's
20 responsibility, and it should be a subcontractor's --

21 Q. Not could be?

22 A. It could be a subcontractor's
23 responsibility if they notice something that is
24 unsafe that they report it and recommend action to be
25 taken. A construction site is a very complex

1 interaction of many parties, and it's constantly
2 changing; and so, therefore, all parties have to be
3 aware of the conditions that are occurring and
4 reporting situations that could cause accidents.
5 That's what OSHA wants.

6 Q. I don't represent all the parties,
7 Mr. Burg. I represent the steel erector. Are you
8 saying the steel erector had some duty to seek to
9 change the plans to request the bolting of the girts?

10 A. Well, I'm not limiting myself to
11 bolting.

12 Q. But I'm asking you.

13 A. But the steel erector absolutely has the
14 responsibility if they were aware that there's a
15 possibility of material handling approaching an
16 unsecured girt, to report that and to take
17 appropriate action.

18 Q. That's not my question. The original
19 question was, How should the girt have been secured
20 so that --

21 A. I said there were many ways, one of
22 which is bolting.

23 Q. And I'm dealing with bolting.

24 A. I understand.

25 Q. The plans and specifications didn't

1 require bolting.

2 A. I'm aware of that.

3 Q. Are you saying that under OSHA, Atlantic
4 Welding and Fabricating had some duty to attempt to
5 change the plans and specifications to require the
6 bolting of the girts?

7 A. No.

8 Q. Okay. Now, the second method you
9 mentioned of securing was welding, was it not?

10 A. That's one way, yes.

11 Q. Okay. What kind of welding should have
12 been done in your opinion for this girt at this
13 location so that you would not have the opinion that
14 the beam was erected and placed in violation of OSHA
15 standards?

16 A. Whatever is necessary to secure the
17 member.

18 Q. Do you know what would have been
19 necessary?

20 A. No.

21 Q. Okay. And the third option you
22 suggested was hoists if I recall your testimony
23 correctly.

24 A. All right.

25 Q. Are you saying that hoists should have

1 been used on this job at this location?

2 A. It's an option.

3 Q. You think it is an option?

4 A. Sure.

5 Q. Okay. Do you know what function the
6 girts performed on this job?

7 A. Yes.

8 Q. What function?

9 A. They were going to be used to hang the
10 precast concrete.

11 Q. Okay. And do you know what is involved
12 in the placement of girts to hang precast concrete?

13 A. Yes.

14 Q. What has to be done to ensure the
15 alignment of the outer precast walls? You agree with
16 me that the walls have to be aligned plum and square
17 and even on the surface, do you not?

18 A. Well, I'm a safety expert. I would say,
19 yes, that makes sense to me. I don't have expertise
20 on alignment of walls. I can appreciate just like
21 anyone else that the esthetics -- the need for the
22 esthetics of the structure.

23 Q. Okay. But if the plans and
24 specifications require the steel erection contractor
25 to set the girt so that the outer walls of the

1 building will align correctly, do you know what is
2 involved to ensure that?

3 A. My best answer for that is plans and
4 specifications of the building don't take precedent
5 over the maiming or the safety of employees.

6 Q. That's not my question to you.

7 A. I understand.

8 Q. Do you know how many hoists would be
9 necessary to set girts in a manner to ensure the
10 proper alignment of the outer walls?

11 A. No.

12 Q. Would it make any difference to you how
13 many hoists would be necessary?

14 A. No.

15 Q. Do you know how many cranes would be
16 necessary?

17 A. No.

18 Q. Do you know how much more time that work
19 would involve?

20 A. I am a person that's concerned about
21 human life.

22 Q. Is that a no answer?

23 A. Yes.

24 Q. Okay. Do you know how much more cost
25 would be involved?

1 A. No.

2 Q. Now, we talked about bolting, welding,
3 and hoists. Have I left out any other methods of
4 securing the girt such that its erection and
5 placement would no longer have been in violation of
6 an OSHA standard for this particular incident?

7 A. I can't think of any others.

8 Q. Okay. Now, your answer says that the
9 steel beam being placed as it was on its brackets
10 with no tack welds, bolts, or slings securing it in
11 place created a serious hazard to all personnel in
12 the immediate vicinity, again, in violation of
13 applicable OSHA standards. Now, the term tack weld
14 is used there. Is that your term?

15 A. Yes.

16 Q. What's a tack weld?

17 A. It's usually a temporary weld.

18 Q. So is it your testimony that a tack weld
19 would have been an acceptable means of securing the
20 girt?

21 A. No.

22 Q. Well, how have I misread this answer?

23 The steel beam was being placed as it
24 was on its brackets with no tack welds, bolts, or
25 slings.

1 Doesn't that mean that if there had been
2 tack welds, that would have been an acceptable means
3 of securing the girt?

4 A. No.

5 Q. Why doesn't it mean that?

6 A. Because you might have needed tack
7 welds, bolts, and slings. Whatever is needed to
8 secure the member.

9 Q. Do you know what was needed?

10 A. No. All I know is it came down.

11 Q. Have you been advised that the plaintiff
12 was operating a boom truck at the time of the
13 incident?

14 A. Yes.

15 Q. And that there was contact between the
16 boom truck and the beam?

17 A. I believe that's what happened.

18 Q. Okay. Are you able to say that if tack
19 welds, bolts, and slings had been used, all or some
20 combination of them, whether the girt still would
21 have come down if it had been hit by a boom truck?

22 A. Not with any certainty. I think it's
23 much less likely that the accident would have
24 occurred had the beam been secured. It probably
25 would have been better to stage it differently. To

1 off-load the material, remove the beam, put the
2 materials in another location; but, of course, it
3 depends. There's a lot of variables there that I
4 don't know and that no one would know in regard to
5 the potential contact.

6 Q. Now, you mentioned removing the beam a
7 couple times. Is it your testimony that the steel
8 erection contractor should have moved the beam out of
9 position every time a supplier was off-loading
10 material?

11 A. Well, this operation, like any
12 operation, is required to be planned and analyzed;
13 and had they planned and analyzed it, it seems to me
14 that that would have been a very cost effective
15 measure that could have been taken that would have
16 avoided this accident. There's only this one
17 location where the dry wall is being placed.

18 Q. Is that your understanding, sir, that
19 there was only one location?

20 A. I'm talking about under these
21 circumstances with an unsecured beam or member or
22 girt. It's my understanding that all the others were
23 fully secured.

24 Q. How did you acquire that understanding?

25 A. From the deposition testimony.

1 Q. Is there anything else about this
2 interrogatory answer that you think needs to be
3 changed, altered, or amended in any way?

4 A. No.

5 Q. Okay. Looking at your CV for a moment.
6 Do you have any experience in the steel erection
7 industry?

8 A. Yes.

9 Q. Tell me about that.

10 A. My clients are steel erectors, and so I
11 consult with them on safety. I teach steel erection
12 to the OSHA inspectors, to the associated general
13 contractors at the National Safety Consul. You know,
14 hundreds and hundreds maybe thousands of steel
15 erectors follow my recommendations and training for
16 safety and health procedures. I go out and audit
17 companies and their steel erection procedures and
18 make recommendations for changes. I'm fairly deeply
19 involved in steel erection safety is the best way for
20 me to put it.

21 Q. Can you give me the names of some of
22 your steel erection clients that you've made
23 recommendations to about safety?

24 A. LPR Construction in Loveland, Colorado.
25 The Walsh Construction Company in Chicago, Illinois.

1 Q. Walsh?

2 A. Yeah. One local one here called
3 Hourigan Martone.

4 Q. Right.

5 A. I'm trying to think of others.

6 Q. Now, have you given any of these clients
7 advice, instructions, et cetera, about the placement
8 of girts?

9 A. Well, I've seen the placement of girts;
10 and I've analyzed -- one of the most -- I want to say
11 one of the most important things that I do for my
12 clients is I make certain I teach them how to do the
13 job hazard analysis, the safety analysis; and then I
14 go through the analysis with them. I evaluate what
15 their analyses are and determine whether they are
16 deficient or not. It's a very really fairly easy
17 procedure to go through; and it prevents accidents,
18 unfortunate accidents, like what happen to
19 Mr. Shepherd. That's what I do.

20 Q. Okay. You didn't answer my question.
21 I'll try it again. Have you given advice to any of
22 these steel erection clients about the placement of
23 girts?

24 A. Yes.

25 Q. Okay. Any of the clients you've just

1 mentioned to me?

2 A. The Walsh Group --

3 Q. The Walsh Group?

4 A. -- in particular.

5 Q. Okay. And did these instructions about
6 the placement of girts include the use of either tack
7 welds, bolts, or hoists?

8 A. Well, I believe that we -- When we know
9 there are girts in place, my recommendation is to
10 have material handling equipment place the materials
11 at a different location.

12 Q. I'll ask the question again. Has your
13 advice or instruction to this client included the use
14 of bolts, tack welds, or hoists?

15 A. No.

16 Q. Okay. Other than advising steel
17 erection clients and lecturing to steel erection
18 clientele, do you have any experience in the steel
19 erection industry?

20 A. Well, I am not a steel erector worker if
21 that's what you mean.

22 Q. That's what I'm asking, whether you have
23 any practical experience in steel erection work.

24 A. Well, I am not comfortable with the way
25 you are putting things. I wasn't comfortable with

1 the lecture word, and I'm not comfortable with the
2 practical experience. I understand what your mission
3 is here; however, I am a noted safety expert on steel
4 erection. It would be hard to find someone who has
5 better qualifications for safety and steel erection
6 than me.

7 Q. What part of your CV speaks to that?
8 Can you point me to the portion of your CV that
9 speaks to your notoriety in the steel erection
10 industry?

11 A. My CV is specifically written in a
12 general manner. I am sure in the CV it mentions --
13 probably mentions -- that I teach steel erection. If
14 it doesn't, it mentions that I teach many different
15 courses at OSHA. It's just not a problem. It's a
16 matter of record that I teach steel erection
17 everywhere. In fact, if you look on my web site, I
18 know that I have a steel erection training course, a
19 training course that involves steel erection.

20 Q. Well, but specifically is it mentioned
21 in your CV?

22 A. I don't recall. Perhaps not.

23 Q. Okay. Do you have any publications on
24 steel erection work?

25 A. Not specifically.

1 Q. Included in your safety experience, do
2 you have any background about the safe operation of
3 boom trucks?

4 A. Yes.

5 Q. And the safe manner of off-loading
6 materials?

7 A. Yes. I teach that.

8 Q. Okay. Are there standards which
9 proscribe the amount of clearance in which to
10 off-load materials safely?

11 A. No, not that I know of.

12 Q. Okay.

13 A. I think adequate clearance is the word
14 that's used in the standard.

15 Q. Did Mr. Shepherd have an adequate
16 clearance in this case?

17 A. Perhaps.

18 Q. Perhaps?

19 A. Perhaps.

20 Q. Why do you say perhaps?

21 A. Well, he's a skilled operator of a piece
22 of equipment. He knows better than anyone else what
23 the limitations are. Some operators need more
24 clearance than others. From everything I understand
25 about Mr. Shepherd and his experience, he's an

1 excellent operator; and I believe that the three-inch
2 clearance that was available to him was sufficient
3 clearance.

4 Q. But it wasn't, was it? You are wrong.

5 A. It turned out that he hit a member, but
6 it's not that -- it's very likely that he hit the
7 member, but it's not that unusual in construction for
8 that to happen. I've been doing this for thirty-two
9 years, and I would say that this is a daily
10 occurrence. That's why we have the safety
11 regulations that we have because it's anticipated
12 that this kind of contact can occur.

13 Q. Well, Mr. Burg, you took great pains to
14 tell me that OSHA's focus is on making sure accidents
15 don't happen. Now, speaking to OSHA regulations as
16 to the safe off-loading of materials with a boom
17 truck, is it your statement that OSHA finds it
18 acceptable that a boom operator will come into
19 contact with steel members?

20 A. Well, OSHA is basically silent on that.
21 It would be better if they didn't. On the other
22 hand, the whole approach of OSHA and of safety people
23 is we analyze for potential hazards. We know that
24 there's human weakness and frailty. People can make
25 mistakes. Our job as safety persons and as OSHA is

1 to anticipate that these mistakes can happen and
2 still not have accidents and injuries.

3 Q. Well, wouldn't it have been more prudent
4 for the plaintiff to have off-loaded materials where
5 he had more than three inches of clearance?

6 A. I'm glad you mentioned that. I
7 definitely wanted to say something about that. The
8 thing about workers such as Mr. Shepherd and
9 employees is they rely on other people for their
10 safety, and that's one of the scariest things about
11 working in construction. You know, he has to place
12 the material wherever he's told to place it. If he
13 doesn't deliver the material to the right place, he's
14 in trouble or he has to do it over again; and so
15 there are certain presumptions for his safety that he
16 makes that others have analyzed the location for the
17 positioning of these materials and that it's going to
18 be a safe delivery with no --

19 Q. That's not entirely true, is it? If
20 somebody told him to off-load material right on top
21 of where someone was standing, he wouldn't do it?

22 A. Well, I hope not.

23 Q. Right. So if somebody told him to off-
24 load material where there wasn't enough space for him
25 to do it, would you expect him to say, No, there's

1 not enough space. It's not safe enough.

2 A. That's a possibility. Obviously, he
3 thought there was enough space.

4 Q. So do you agree -- Was a three-inch
5 clearance enough clearance to safely off-load about
6 2,000 pounds of dry wall material with a hydraulic
7 boom crane?

8 A. I'd like there to be more clearance; but
9 as I said, I mean, he has to deliver it where they
10 tell him to deliver it. That's the world he's living
11 in. If they tell him to deliver it at this location,
12 he's going to do everything possible to deliver it at
13 this location.

14 Q. What does OSHA say about off-loading
15 materials if people are below you?

16 A. Shouldn't do it.

17 Q. Is it a violation?

18 A. Yes, it's a violation.

19 Q. Did you review the depositions?

20 A. Yes.

21 Q. There were people beneath the plane
22 where he was off-loading material, weren't there?

23 A. He did not consider those people -- I
24 read his deposition more than once. He did not
25 consider that people were below him because he had a

1 floor between the area where he was off-loading the
2 material and where the people were located.

3 Q. Do you agree with that interpretation of
4 OSHA?

5 A. Yes. If there's a floor -- and the
6 employers are required to determine that the floor
7 can withstand the anticipated loads -- then there
8 should be no hazard for the people below. The
9 standard is someone directly below the material and
10 equipment with nothing -- no barrier protecting them.

11 Q. I want to make sure I understand your
12 testimony. Your testimony is that even though there
13 is evidence that there were workers on the ground
14 floor beneath the area where the plaintiff was
15 off-loading materials, it was not an OSHA violation
16 for him to off-load the materials there?

17 A. Well, first of all, I wasn't there.
18 Second of all, if there were people exposed to that
19 load of dry wall below, then that's an OSHA
20 violation. It's my understanding in my review of the
21 testimony that that was not the case. If it were to
22 be proved that there were people working directly
23 under the dry wall, where the dry wall was docked and
24 dropped, then you are quite right. That would be an
25 OSHA violation.

1 Q. What do you mean by directly underneath?

2 A. There's no barrier between them and the
3 material.

4 Q. Well, by definition if he's off-loading
5 it on a floor, there could never be anybody
6 underneath it, could there?

7 A. If he's off-loading on a floor and the
8 floor is protecting the people from exposure to the
9 material, there's no OSHA violation there.

10 Q. You mentioned some of the various things
11 that your company does. What percentage of what your
12 company does is related to consultation and
13 litigation?

14 A. Well, it was as high as fifty percent.
15 I'm happy to say that I'm reducing it. I think I've
16 got it down to about forty percent again.

17 Q. Forty to fifty percent?

18 A. Yes.

19 Q. Of that forty to fifty percent, what
20 percentage is testimony on behalf of plaintiffs,
21 injured people?

22 A. It's half plaintiff, half defense.
23 That's the way I do it. I what they call cherry pick
24 the cases. I only take the best cases on each side.
25 If I've got three more defense cases, then I stop

1 taking defense cases. I look for plaintiff cases.
2 It is the same thing with plaintiff cases. I work
3 very hard not to get more than three on one side or
4 the other because I don't want to be labeled as a
5 defense expert or a plaintiff's expert.

6 Q. What was it about this case that made it
7 a cherry for you?

8 A. Well, I concerned -- my mission, you
9 know, believe it or not, is to try to change the law
10 and change the world so that people don't get hurt.
11 It's so horrible how many people still in this day
12 and age are getting maimed and killed especially in
13 the construction industry. It's a terrible
14 disgrace. I look for cases where I think I can make
15 a difference, and this case to me stood out as a case
16 where I could -- my testimony could make a
17 difference, and it's too late to protect
18 Mr. Shepherd. He's been severely injured, but there
19 are thousands of other people that as a result of
20 this case, will absolutely be protected from this
21 same accident; and that's what I intend to do.

22 Q. All right. All right. Your
23 interrogatory answer says your opinion is based in
24 part -- excuse me -- that you will testify in
25 accordance with the opinion set forth in the letter

1 of Lieutenant Commander Andrew Ash. Are you familiar
2 with that letter?

3 A. Yes.

4 Q. Okay. Is that accurate that you agree
5 with the opinion set forth?

6 A. There are some of the things that he
7 says that I agree with.

8 Q. Well, let's see if we can figure out
9 what you do and don't agree with.

10 A. Okay.

11 Q. I'm going to show you what was marked
12 in -- previously marked in this litigation as Gilbert
13 Exhibit 2. Do you recognize this as the --

14 A. I believe I've seen this before.

15 Q. Is this the letter from Lieutenant
16 Commander Ash?

17 A. Yes, it is.

18 Q. All right. Is there anything in this
19 letter you disagree with?

20 A. Just give me a minute to review it.

21 Q. Okay. Have you had an opportunity,
22 Mr. Burg, to review this Ash letter?

23 A. Yes.

24 Q. Okay. My question was, Is there
25 something in here other than -- you know, I'm talking

1 about substantive material now -- that relates to the
2 alleged negligence or violations on the part of my
3 client that you don't agree with?

4 A. Yes, there is one thing.

5 Q. Can you tell me what that is?

6 A. I don't agree that it's a webbed
7 structural member.

8 Q. You've just saved us a lot of time
9 today.

10 A. Good.

11 Q. All right. If you don't believe it's a
12 structural webbed member, do you agree that the
13 provisions that Lieutenant Commander Ash is citing
14 apply?

15 A. No. I -- Of course, he's more of an
16 expert on the application of his own provisions than
17 I am. If he says they apply, then I would defer to
18 him on how they apply. The only thing I don't agree
19 with is that this -- I don't believe this is a webbed
20 structural member.

21 Q. Okay. All right. Now, your answer to
22 interrogatory next mentions a memo by a Manny Seoane?

23 A. Yes.

24 Q. Do you remember that memo?

25 A. I sure do.

1 Q. Is this it? I'm handing you what's been
2 marked as Gilbert Exhibit 1.

3 A. Yes, I do recall this memo.

4 Q. Okay. Have you read Mr. Seoane's
5 deposition?

6 A. I have.

7 Q. Okay.

8 A. In fact, three times.

9 Q. Is there some portion of this memo in
10 particular that you are relying upon?

11 A. I'd like to review this one also.

12 Q. All right.

13 A. Okay. I read it. What was your
14 request?

15 Q. The interrogatory answer says you've
16 relied on this in forming your opinion basically.

17 A. Uh-huh.

18 Q. What was it about the memo that you are
19 relying upon?

20 A. This is an eyewitness account after the
21 accident about the circumstances of the accident.

22 Q. Okay. But what is it about the account
23 that assists you in forming your opinion that my
24 client committed an OSHA violation if anything?

25 A. Well, he verifies that the girt was not

1 secured.

2 Q. Okay. And not secured from the
3 standpoint of what?

4 A. Well, he talks about tack welding.

5 Q. Tack welding. Okay. So that's the key
6 thing from this statement in your opinion? the
7 absence of a tack weld?

8 A. No. I don't like the way you are
9 putting that. A tack weld is one way of making the
10 member more secure. Perhaps if it had been secured
11 with tack welds, the accident wouldn't have happened.

12 Q. Are you assuming therefore based on this
13 memo that there was not a tack weld for this girt?

14 A. I'll be honest with you. I don't know
15 for sure whether there was a tack weld or not.
16 There's conflicting testimony about that. I will
17 tell you that I have a tendency to believe this guy,
18 this Manny Seoane. The reason I believe him is
19 because he's a safety person. He has no -- that I
20 know of -- reason to make up a story or lie about
21 this case; so I do think that he has more credibility
22 than the other people who have testified, the welders
23 who have testified that for sure it was tack welded.

24 The reason I say that is because they
25 obviously have more greater interest in the case than

1 Mr. Seoane does; so when I weigh it all, I believe
2 Mr. Seoane has more credibility; however, I've got to
3 add whether it was tack welded or not tack welded
4 really doesn't affect my opinions in any way.

5 Q. You've thrown a lot at me there. Have
6 you met Mr. Seoane?

7 A. No.

8 Q. Have you spoken to him?

9 A. No.

10 Q. Have you met any of the welders for
11 Atlantic Welding?

12 A. No.

13 Q. Have you spoken to any of them?

14 A. No.

15 Q. Okay. But you believe Mr. Seoane to be
16 more credible than the welders?

17 A. That's correct.

18 Q. All right. Are safety experts like
19 yourself just more credible than welders are?

20 A. I thought that I made the point. I
21 mean, when I said safety experts -- because his only
22 duty there, his only concern is to try to find out
23 what the accident is. He has no other role. He
24 doesn't report to anyone. He's not behind the
25 eightball or whatever you want to call it, and he

1 seems to me to be a person that I would consider to
2 be -- the key word here is objective, and so he
3 doesn't have any reason to cover up or lie or
4 anything like that, whereas these other guys who are
5 the welders -- and they probably know it's their
6 responsibility to tack weld; and if they failed to do
7 so, they would have every reason to say, Oh, no, it
8 was tack welded. I wouldn't break the rules. If
9 they didn't say that, they would probably get into
10 some kind of trouble or even fired because of the
11 results, because of the poor man being maimed.

12 Q. Well, according to Mr. Seoane,
13 Mr. Godfrey, who's an employee of my client, said it
14 wasn't tack welded, right? Isn't that what this memo
15 says?

16 A. Yes.

17 Q. Did he get fired?

18 A. I don't know.

19 Q. Would it influence your opinion on the
20 credibility to know whether someone who supposedly
21 admitted that there had been no tack welding was not,
22 in fact, fired or disciplined in any way?

23 A. It wouldn't affect me one way or the
24 other.

25 Q. You just said that was the premise for

1 assuming one was more credible than the other.

2 A. I don't know, you know, how long you
3 want to spend on this. I can only tell you I'm a
4 person that reviewed the documents. I read the
5 depositions; and I believe that anyone, any juror
6 reading this case is going to find Mr. Seoane more
7 credible than the welders; and I don't think you can
8 change that. That's just my opinion.

9 Q. Were you aware of any conflict between
10 the office that Mr. Seoane worked for and the
11 contractors on this job?

12 A. Well, I know they were very unhappy with
13 the general contractor, that there had been some
14 previous incidences where they found that safety had
15 been compromised; and so there was some conflict. I
16 like that kind of -- as a safety person, that's the
17 kind of conflict I like to see because I know that
18 safety will take a back seat to production if the
19 safety people aren't diligent and vigilant. They are
20 up against a heavy burden, those safety people,
21 because the money is real, real important.

22 Q. So the existence of conflict doesn't
23 influence you in assessing credibility?

24 A. Well, first of all, this conflict that I
25 am aware of was with the general contractor and not

1 with the subcontractor. Second of all, I always
2 figure that safety people that are in conflict are
3 doing their job. I train them to do their job.

4 Q. Okay. Have you reviewed the deposition
5 transcript of Mr. Brock?

6 A. I believe so.

7 Q. He's the welder who said that he tack
8 welded the girt the morning of the accident.

9 A. I do recall that.

10 Q. Okay. But you've said it really doesn't
11 matter to you in the end whether it was tack welded
12 or not?

13 A. That's right.

14 Q. Okay. I don't want to open up the can
15 of worms again. Why doesn't it matter from an OSHA
16 violation standpoint whether or not it was tack
17 welded? Is it because the beam fell and if the beam
18 fell, it tells you that even if it was tack welded,
19 it wasn't tack welded enough?

20 A. That's one thing. Also, it may not have
21 to be tack welded at all if there's no exposure,
22 there's no material handling equipment there. The
23 way the OSHA regulations are written, you can't just
24 focus on, Oh, it must be tack welded, because there
25 are other considerations.

1 Q. Let me ask you this. And now I'm going
2 to use a hypothetical here. Would it matter to you
3 if you were investigating this accident from an OSHA
4 violation standpoint, and you've got to make a
5 decision whether to cite my client, the steel
6 erection subcontractor, in an OSHA violation, would
7 it make a difference to you whether that
8 subcontractor had been alerted ahead of time to the
9 fact that there was going to be a boom truck
10 off-loading material in this specific area so that it
11 had an opportunity to take these precautions that you
12 are addressing?

13 A. Yes.

14 Q. Okay. If it were determined that there
15 had been no such advance notice to my client and that
16 my client was unaware at the time of the off-loading
17 in this particular area, would there still be an OSHA
18 violation?

19 A. Well, there --

20 Q. For my client?

21 A. I understand, and I do hold the general
22 contractor responsible for a lot of this; however, if
23 it was determined that your client was required under
24 the proper analysis of hazards either to do the
25 analysis or to secure the beam, the member, in some

1 way and they failed to do so, that would be an OSHA
2 violation.

3 Q. Yeah. But assuming the contract didn't
4 require it and assuming preconstruction meetings
5 didn't require it and assuming they were unaware of
6 the off-loading activity at the time -- I know you
7 expert witnesses hate to be painted into corners --
8 but assuming those things to be true, I may be proven
9 wrong on that, but if those were proven to your
10 satisfaction, is there a violation on the part of my
11 client?

12 A. I guess the best way to answer that
13 question is to say that OSHA cannot cite clients
14 about hazards concerning hazards that they are
15 totally unaware of; so if they were totally unaware
16 of the potential of the girt to come in contact with
17 the material handling equipment --

18 Q. At that time in place?

19 A. -- or the employee, then no citation
20 would be issued.

21 Q. All right. Okay. Now, I'm trying to go
22 through the factors that you've relied upon for your
23 opinion. We've talked about the Ash letter, the
24 Seoane memo. Now, the next thing is OSHA standards;
25 and you brought with you the federal regulation?

1 A. Yes.

2 Q. Can you site me to the specific OSHA
3 standards that you think pertain to my client's
4 activity?

5 A. Yes.

6 Q. Thank you. What regulation do you have
7 in mind?

8 A. I would have used Section 5A-1 of the
9 OSHA act, the general duty clause.

10 Q. Can you turn to that provision?

11 A. It's not here, but we do have it.

12 MR. SMIRCINA: I can make some copies.

13 MR. NORRIS: Do you want to take a
14 five-minute break? I'd like to go through this
15 stuff. If you would just get me the dates of
16 those letters.

17 MR. SMIRCINA: Yes, that would be great.

18 (The deposition recessed at 11:14 a.m.

19 At 11:25 a.m. the deposition continued as
20 follows:)

21

22 BY MR. NORRIS:

23 Q. Okay. Mr. Burg, we took a brief break;
24 and I'm going through your interrogatory answer about
25 the things you've relied upon to form your opinion.

1 We're now at the OSHA standards, and I've been handed
2 a photo copy of a portion of the some federal
3 legislation. Can you tell me what it is that I've
4 been handed that you are relying upon?

5 A. Yes. On Page 2, Duties, Section 5A-1,
6 which is, you know, the most important thing that
7 OSHA does. Basically, it guarantees to each employee
8 that they will have a place of work that will not
9 cause death or serious physical harm, and this
10 particular part of the act takes precedent over all
11 the standards, number one.

12 Number two is commonly used for OSHA
13 citations when a specific standard is not found to
14 cover a hazardous situation to which employees are
15 exposed, and I think we went this way because you
16 asked me had I been a compliance officer what I would
17 have done? I was a compliance officer for many, many
18 years; and if I had investigated this accident, this
19 is the section I would have cited your client as well
20 as the general contractor for violating.

21 Q. Okay.

22 A. And perhaps others in regard to the
23 general contractor, but this one specifically for
24 your client.

25 Q. Okay. Well, I'm going to just try and

1 deal with my client and let someone else worry about
2 the general contractor.

3 A. I can understand that.

4 Q. Section 5A -- Now, what is this act that
5 this is a section of?

6 A. This is the OSHA act that was passed in
7 1970. It's a public law. It is the law. In fact,
8 it's the part of OSHA that's enforceable legally.

9 Q. Okay. The section that you are relying
10 upon is entitled, Duties, correct?

11 A. Yes.

12 Q. And it begins by saying, Section 5A,
13 Each employer -- and then I think you are relying on
14 A-1; is that correct?

15 A. Yes.

16 Q. Okay. And if I'm reading it correctly
17 it says, Each employer shall furnish to each of his
18 employees employment and a place of employment which
19 are free from recognized hazards that are -- I can't
20 read the next word.

21 A. Causing or likely to cause.

22 Q. -- causing or likely to cause death or
23 serious physical harm to his employees.

24 Now, I want to stop there. Is it your
25 position that this section places on my client a duty

1 to protect Mr. Shepherd?

2 A. Yes. OSHA has something called the
3 multi-employer work site policy.

4 Q. Uh-huh.

5 A. And in that policy they define four
6 different types of employers that have obligations
7 under the act; and the four are controlling
8 employers, someone that controls the work site like
9 the general contractor or the owner; exposing
10 employers, someone that exposes either their
11 employees or somebody else's employees to hazards;
12 creating employers, someone that creates a hazard for
13 their employees or for somebody else's employees; and
14 the last one is called a correcting employer. That's
15 someone who's being relied on to fix things and fails
16 to do so.

17 Those are four types of employers that
18 have liability under the OSHA act; and I anticipate
19 your next question, which is, Your client in my view
20 and I think in the view of OSHA would be considered
21 for sure an exposing employer, that they were
22 involved in exposing Mr. Shepherd to the danger of
23 the falling girt by not securing it properly; and,
24 perhaps, the other two also. Perhaps being a
25 creating employer by creating the hazard, by not

1 analyzing their specific work task as required under
2 their contract, federal contract and OSHA, to do that
3 task analysis and then determine potential hazards
4 and then take action to prevent them from occurring;
5 and the last one. They could possibly be a
6 correcting one also because if they identify certain
7 hazards that occur or exist or begin to exist as a
8 result of the work that they are performing for the
9 steel erection, then I know it would be their job to
10 correct it in terms of taking some other action.
11 Those are the reasons that I would hold your client
12 to the duty expressed in the OSHA act.

13 Q. Okay. Does Section 2B apply to my
14 client?

15 A. Yes. That section applies to every
16 client.

17 Q. Okay. That section reads, Each employer
18 shall comply with occupational safety and health
19 standards promulgated under this act.

20 A. Right.

21 Q. Which standards promulgated under the
22 act did my client fail to comply with?

23 A. Well, I'm glad you asked those
24 questions. Under Subpart C under 1921B1 and B2, it
25 speaks to what I would call the safety program

1 required by each employer; and it says under B,
2 accident prevention responsibilities. I'll read them
3 because they are just two short sentences.

4 One, it shall be the responsibility of
5 the employer to initiate and maintain such programs
6 as may be necessary to comply with this part; and
7 then, two, which describes one or gives more detail
8 about what one means, Such programs shall provide for
9 frequent and regular inspections of -- and then it
10 lists job sites, materials, and equipment -- to be
11 made by competent persons designated by the
12 employers.

13 I would maintain to you and to OSHA if I
14 was still working there that your client -- had your
15 client conducted those inspections and provided those
16 competent persons, this accident never would have
17 happened.

18 Q. Okay. Is it your understanding that
19 inspections were not made of my client's work?

20 A. No.

21 Q. No, it wasn't made or --

22 A. No. I'm aware that there were some
23 inspections that were conducted at the job site.

24 Q. There were daily inspections, weren't
25 there?

1 A. I believe that there were daily
2 inspections; however, what I'm maintaining is if had
3 an inspection been conducted of this work, they would
4 have determined either it's not properly tack
5 welded -- remember it says, Job sites, equipments,
6 and materials -- or they would have said, We're going
7 to be placing dry wall in the area. Let's put it
8 somewhere else or let's take some other actions to
9 make sure that it's fully secured.

10 Q. Do you have any reason to believe that
11 this girt was placed at a time other than the morning
12 of the accident?

13 A. I don't know. It seems to me there was
14 some conflicting testimony about that. I don't know
15 when it was placed.

16 Q. Do you agree with me that Mr. Brock's
17 deposition -- he stated that that girt was placed the
18 morning of the accident?

19 A. I believe that's correct.

20 Q. Okay. I want you to assume he's telling
21 the truth even though you told me you question his
22 credibility.

23 A. Okay.

24 Q. If that girt was placed the morning of
25 the accident and Mr. Shepherd was there off-loading

1 material in the -- I think two- or three-o'clock time
2 frame --

3 A. 1500 hours.

4 Q. -- are you saying there should have been
5 an inspection of that girt prior to three o'clock
6 that day?

7 A. Oh, yes, absolutely.

8 Q. By whom?

9 A. By a competent person.

10 Q. By a competent person employed by whom?

11 A. Well, that is between the parties
12 that -- Many times the general contractor will rely
13 on the subcontractor to provide competent persons.
14 Nevertheless, if they are not there, the general
15 contractor is held responsible, so the general
16 contractor has to make a decision. Am I going to
17 provide the competent person or am I going to
18 determine that my subcontractor has competent persons
19 and rely upon them? And, of course, there is a
20 specific definition of what a competent person is and
21 who they are and what they do on the next page.

22 Q. Is it your opinion that Mr. Godfrey, the
23 superintendent for my client, was not competent to
24 inspect the installation?

25 A. No. I didn't say that.

1 Q. Is it your opinion that Mr. Godfrey was
2 not inspecting the installation on the day of this
3 incident?

4 A. No.

5 Q. So -- Okay.

6 A. I don't know whether he did or not.

7 Q. What type of inspection -- Do you know
8 how much this girt weighed?

9 A. Yeah. It weighed almost a ton. There's
10 varied descriptions between 1,600 and 2,000 pounds.

11 Q. Now, assume for a minute that someone is
12 inspecting this ton, thirty-foot-long steel beam
13 setting on some brackets. What should they inspect
14 it for?

15 A. Well, I could only inspect it -- you
16 know, to speculate about that -- but I could tell you
17 that anyone, whether they be a competent person or a
18 safety professional, I think even people on a jury --
19 they look at that girt resting on those clips; and
20 you would say, This could be knocked off. We better
21 secure this especially if you know that someone is
22 going to be bringing material and handling equipment
23 in there. I think anyone would see that. That's a,
24 you know, something that you could see readily.

25 Q. But I'm trying to figure out what the

1 inspection is looking for. You are talking about
2 somebody who is portending what's going to happen
3 later in the day. I'm asking what they are going to
4 inspect the beam to look for. Do they inspect the
5 tack weld?

6 A. Well, they are -- First of all, they are
7 inspecting for potential hazards.

8 Q. Well, they can see there's no hoist on
9 it; and they know there's no bolts on it.

10 A. Right.

11 Q. So the only other thing to inspect is
12 the tack weld, isn't it?

13 A. Well, I don't know. There's more than
14 that. There's tack welds, and there's also -- as I
15 stated earlier, this is where the material handling
16 equipment is going to be; therefore, we have this
17 girt resting on these clips. Part of that inspection
18 process might be, Don't bring the dry wall in here.
19 That would be something a competent person would do.

20 Q. Again, I'm trying to limit the
21 questioning to my client. Were you aware that this
22 is the first time that Mr. Shepherd had been to this
23 site?

24 A. Yes.

25 Q. He hadn't delivered material here

1 before?

2 A. That's correct.

3 Q. What was it that my client should have
4 known on the afternoon of November 14, 1996, if it
5 hadn't been told by somebody that Mr. Shepherd was
6 going to show up at three o'clock with a boom truck
7 and they did this inspection that you said they
8 should have done?

9 A. I'm with you on that. I think that
10 aspect of the case is the responsibility of the
11 general contractor. That aspect of the case, the
12 planning, the staging of the operation -- that is in
13 the domain of the general contractor.

14 Q. Then I have to ask the next question,
15 which is, Assuming that we were not alerted that this
16 delivery was going to take place in this fashion at
17 this location at that time, was some inspection still
18 necessary on our part to comply with OSHA?

19 A. Well, the inspection is always necessary
20 to comply with OSHA. There is supposed to be
21 supervision of activities; but you are not wrong when
22 you say if there was no known potential contact with
23 that girl or exposure to employees, your client
24 wouldn't be cited or be responsible under OSHA to do
25 those inspections.

1 MR. NORRIS: Blair, can I get a copy of
2 this entire section, please?

3 MR. SMIRCINA: Sure. You can keep
4 going. Richard is here.

5

6 BY MR. NORRIS:

7 Q. Mr. Burg, are you aware of any OSHA
8 regulation that applies specifically to steel
9 erection work?

10 A. There was a subpart in that book that
11 specifically -- Subpart L. It specifically relates
12 to steel erection. It's about two pages long.

13 Q. All right. Is there nothing in that
14 section that you believe pertains to this incident?

15 A. Well, if you look at the subpart as a
16 whole, there's plenty. It says in that subpart you
17 have to secure everything from falling. They even
18 want the bolt bucket secured. They are worried about
19 bits falling out of drills and hitting people below;
20 so if you look at the whole subpart as one entity,
21 there's no doubt -- it leaves no doubt that they are
22 concerned about things falling from up above;
23 however, they don't specifically talk about this
24 member, and because then I think it's an oversight.
25 You know, I believe that -- if I was on a committee

1 to rewrite the standard, I would put the purlins in
2 there. I would say anything. For whatever reason it
3 says webbed structural member. For whatever reason.
4 I can't even imagine what the reason might be; but as
5 an OSHA person of eighteen years, I know what happens
6 then. You revert to the general requirements under
7 Subpart C, the ones we just looked at. Those you can
8 use in any area of construction and/or the general
9 duty clause under the act that we talked about.
10 That's what you would have to do, so I think a
11 reasonable person looking at this can understand that
12 if a bolt bucket has to be secured, if a drill bit
13 has to be secured, then certainly a girt and a purlin
14 has to be secured; so you are right. There is sort
15 of a technical problem here the way the standard is
16 written.

17 Q. I consider myself a reasonable person.
18 Don't you think it's more likely for a bucket to be
19 knocked off than a 2,000-pound steel member?

20 A. Well, those buckets are pretty heavy
21 when they are filled with bolts; but they are
22 probably not 2,000 pounds. I'll give you that. I
23 think that's right.

24 Q. And you also agree with me, I think I
25 heard you say, that in the specific OSHA subpart that

1 relates to steel erection work, there is no specific
2 requirement that this purlin or girt have been
3 secured in place?

4 A. Yes.

5 Q. Okay. Now, I think we can go through
6 this quickly. Lieutenant Commander Ash cited this
7 section of the Army Corps of Engineer Safety Manual.
8 27EO1 -- excuse me -- O3. You agree with me, do you
9 not, that that does not apply?

10 A. Well, I've got to be -- I've got to add
11 this as you know and you are not going to be
12 surprised. This gentleman is more knowledgeable and
13 understanding of his standards than I am; however,
14 there is similar language in the OSHA standard that I
15 would say does not apply to the member because it's
16 not a web. You know, the big problem here is it's
17 not a web; and it's not solid either.

18 Q. Right.

19 A. So to me, it's very hard to make this
20 particular standard apply even though there is a
21 significant hazard that exists.

22 Q. I think you are trying very hard not to;
23 but you are agreeing with me, are you not, that the
24 27EO3 of the Army Corps Safety Manual did not apply
25 to this steel member. Isn't that so?

1 A. Well, it specifically says solid web
2 member; and I have examined the pictures and the
3 descriptions of this member; and it was neither solid
4 or a web.

5 Q. So that section doesn't apply, correct?

6 A. Well, it should apply; but it doesn't.
7 You are right.

8 Q. Okay. Thank you, sir. And for the
9 record, the witness was referring to Godfrey
10 Deposition Exhibit 2.

11 Now, you mentioned you had done some
12 work for a committee with ANSI. What is ANSI?

13 A. It's the American National Standards
14 Institute.

15 Q. Are you familiar with AISC?

16 A. I've come across those standards.

17 Q. Do you know what that stands for?

18 A. I don't recall. American -- I don't
19 recall.

20 Q. It stands for the American Institute of
21 Steel Constructors.

22 A. Yes.

23 Q. Are you familiar with that group?

24 A. I've come across them.

25 Q. Do you consider that group a reputable

1 group?

2 A. I really don't know that much about
3 them. I am aware that it's a management organization
4 of steel erectors.

5 Q. Are you familiar that they've
6 promulgated a code of standard practice for the
7 erection of steel?

8 A. I believe I have been made aware of
9 that.

10 Q. Have you reviewed it?

11 A. Not recently.

12 Q. Okay. Well, I'm going to give you an
13 opportunity to do that. I'm showing the witness what
14 was previously marked as Gilbert Deposition Exhibit
15 5. I've only given you a portion of the standards.
16 Would you turn -- take the time you want and look at
17 anything you want. I'm going to be asking you about
18 Section 7.9.1. You'll see there's already some
19 underlining in place there. Take a moment and read
20 that if you would.

21 A. Okay.

22 Q. Do you agree with that statement? that
23 standard I guess is what it is.

24 A. I would say it's okay as long as there's
25 another standard that protects workers from

1 unpredictable loads or -- I guess I don't agree with
2 it because I don't like the last sentence. It says,
3 Unpredictable loads such as those due to tornado. I
4 can understand that. Unpredictable loads due to
5 explosion -- I don't agree with that -- or
6 collision -- I don't agree with that.

7 Q. You don't agree with this standard?

8 A. No. I don't think that's right. I
9 don't think those kind of loads are unpredictable.

10 Q. Do you disagree, though, that this is
11 the standard in the steel erection industry?

12 A. This standard has no weight whatsoever
13 comparative to the OSHA standard. The OSHA standards
14 are enforceable by law. This is an advisory standard
15 by an association of steel erectors.

16 Q. Have you -- You mentioned Hourigan
17 Martone as one of your clients?

18 A. Yes.

19 Q. How much work have you done for them?

20 A. I have done I think one week of site
21 evaluations and two weeks of training.

22 Q. Hourigan Martone is a general
23 contractor, correct?

24 A. Yes.

25 Q. In that period of time when you were

1 working with them, how much of that time was devoted
2 to steel erection?

3 A. Well, they did have some steel erection
4 ongoing which I evaluated, I observed.

5 Q. Okay.

6 A. It was just one part of the work that
7 they were doing.

8 Q. Where was that job?

9 A. It's a while back. It was a couple of
10 years ago. I remember I was in Virginia Beach. I
11 looked at a few job sites, three or four job sites;
12 and then I was in -- I'm trying to think of where
13 their headquarters are.

14 Q. Richmond?

15 A. I was in Richmond, and I saw several job
16 sites there. I believe I had visited all their
17 operating job sites.

18 Q. Okay. The two or three job sites you
19 saw in Virginia Beach, whatever number there were in
20 Richmond -- other than those opportunities to observe
21 steel erection work, have you had other opportunities
22 to observe steel erection work specifically in
23 Virginia?

24 A. No, not that I know of. Not that I
25 recall.

1 Q. So those few occasions were two years
2 ago and were your only opportunities to observe
3 Virginia steel erection work?

4 A. Yes.

5 Q. Would you agree with me, Mr. Burg, that
6 you are not familiar with the standards in the
7 industry in the Commonwealth of Virginia for steel
8 erection work of the type that my client was
9 performing prior to this incident?

10 A. Well, I think the best answer to that is
11 the Commonwealth of Virginia must adhere to the
12 federal standards as they are promulgated. It is
13 possible the Commonwealth of Virginia standards might
14 go beyond federal requirements, and it's perfectly
15 legal; and that I wouldn't be aware of. However, I
16 must say that in thirty-two years of experience,
17 where state standards go beyond federal safety
18 standards, generally speaking, I'm pretty aware of it
19 because I have to teach people from all states at the
20 OSHA training institute, and they usually bring it up
21 to my attention. I can tell you areas where in
22 California they go beyond OSHA requirements. There's
23 some areas in New York where they go beyond OSHA
24 requirements.

25 Q. Mr. Burg, you are really not even coming

1 close to answering my question.

2 A. And I don't recall specifically the
3 Commonwealth of Virginia superseding OSHA
4 requirements. In fact, what I recall is that they
5 adopted the OSHA requirements verbatim.

6 Q. Let me try and ask it again. When you
7 observed Hourigan Martone doing steel erection work,
8 did any of the work involve setting horizontal steel
9 members?

10 A. I don't recall. It probably did.

11 Q. Do you recall whether they set
12 horizontal steel members using hoists?

13 A. I don't recall.

14 Q. Can you recall whether they used tack
15 welding to temporarily support horizontal steel
16 members?

17 A. I don't recall.

18 Q. Can you recall whether they set in place
19 horizontal steel members with bolts?

20 A. See, I was watching procedures.

21 Q. What I'm asking you then, Mr. Burg, is
22 are you able to say what the standard in Virginia is
23 for the use of bolts, hoists, or temporary tack welds
24 for the temporary securing of horizontal steel
25 members?

1 A. Well, that to me is -- I don't know --
2 almost humorous the way you placed importance on
3 that. You know, I really don't know what could be
4 the big deal about that because I'm an expert --

5 Q. I'm not asking you to interpret the
6 question. Just answer it. Do you know what people
7 typically do in Virginia if anything?

8 A. I'm going to answer your question.
9 Okay.

10 Q. All right.

11 A. I'm a safety expert. I am a safety
12 expert in steel erection. The standards set
13 regarding the custom and practice in Virginia or
14 anywhere else in this country are in that book right
15 here in OSHA, and there are no exceptions allowed.
16 For you to make out like somehow there's some local
17 yokel way of doing things that isn't allowed under
18 the federal standards is laughable to me as a safety
19 professional, so there.

20 Q. All right. I'm glad I'm entertaining
21 you, Mr. Burg. Show me the provision in that book
22 there that says a horizontal steel member must be
23 temporarily secured in place with a hoist.

24 A. It's not in there.

25 Q. Is it in there that it has to be secured

1 in place with a temporary tack weld?

2 A. It's not in there.

3 Q. Does it say in there that it has to be
4 bolted in place?

5 A. It's not in there. All it says is that
6 that man gets to go to work and deliver his materials
7 and nothing can fall down and maim him. That's what
8 it says.

9 Q. Do you know who Edward Shelton is?

10 A. That name sounds familiar.

11 Q. He's my expert witness.

12 A. Okay.

13 Q. Did you read his opinions?

14 A. I did.

15 Q. He's been in the steel erection business
16 in Virginia -- I guess you've described him as some
17 local yokel -- for forty years. Do you think you
18 know better than he does what the standard of
19 practice is in Virginia for erecting --

20 A. I'll tell you.

21 Q. Let me finish my question. -- for
22 erecting horizontal steel girts like the one that
23 fell on the plaintiff in this case?

24 A. Listen.

25 Q. That's a real simple question.

1 A. I'm going to give you a simple answer.
2 If anything he does or says allows for the
3 possibility of a steel girt to fall to a lower level
4 of employees, he not only doesn't know what he's
5 talking about, he's putting other employees at risk;
6 and he'll find himself in the witness chair.

7 Q. Please answer my question. It's very
8 simple. Do you think you know more about the
9 standard of the steel erection industry in Virginia
10 than Mr. Shelton does?

11 A. I've already answered that question.
12 The standard of the steel erection industry in
13 Virginia or anywhere else in this country is guided
14 by the requirements of the OSHA regulations, which we
15 have described; and in those requirements it says
16 that that workplace will be free, f-r-e-e, from
17 recognized hazards. This is clearly a recognized
18 hazard, and I don't care what kind of expert you've
19 got. If he hasn't made that workplace free from that
20 hazard, then he hasn't complied with the federal
21 standards.

22 Q. I'll try it a different way. If
23 Mr. Shelton were to testify that no steel erection
24 contractor in Virginia would keep steel girts,
25 horizontal steel girts, in safety hoists until final

1 welding, do you have any facts available to you to
2 disagree with that statement?

3 A. Well, you know, I don't know. I don't
4 see the relevance.

5 Q. You either do or you don't.

6 A. That statement has no relevance to this
7 case.

8 Q. I'm not asking for your opinion about
9 relevance. I'm asking you a factual question. Do
10 you have reason to believe that that statement would
11 be factually incorrect?

12 A. Say it again. I'll give it a shot.

13 Q. If Mr. Shelton were to testify that no
14 steel erection contractor in the Commonwealth of
15 Virginia would maintain horizontal girts in safety
16 hoists until they are finally welded in place.

17 A. Well, it's a preposterous statement. I
18 don't know what to say about it. I mean, the
19 contractors of Virginia have to do whatever they have
20 to do to protect workers from falling objects. If
21 you want to take that same statement --

22 MR. NORRIS: Would you get him to answer
23 the question. I'm tired of pontificating. Get
24 him to answer the question.

25

1 BY MR. NORRIS:

2 Q. Name me a contractor that keeps girls in
3 safety hoists until final welding in Virginia. Name
4 them. That's what I'm asking you.

5 A. I don't live in Virginia.

6 Q. Shelton says there aren't any. If you
7 disagree, tell me who they are.

8 A. I don't live in Virginia.

9 Q. So you cannot name one?

10 A. Obviously not.

11 Q. So you can't disagree with him?

12 A. I disagree with him if he is saying
13 basically on technicality --

14 Q. You are answering --

15 A. -- how he wants to defend your client on
16 the basis of they don't have to comply with safety
17 regulations here in Virginia, that they don't have to
18 comply with OSHA standards here in Virginia, then he
19 should be ashamed of himself.

20 Q. Mr. Burg, you just won't hear my
21 question. I'm not asking you what they should or
22 shouldn't do. Do you understand that I'm not asking
23 your opinion on what they are supposed to do?

24 A. I'm doing the best I can to answer your
25 question.

1 Q. I'm not asking you to tell me what you
2 think contractors in Virginia are supposed to do or
3 are required to do. That is not my question. Here
4 is my question. Mr. Shelton is going to say that in
5 the real world they don't keep girts in safety hoists
6 until final welding. Do you disagree that that's
7 what actually happens in Virginia?

8 A. No.

9 Q. No, you don't disagree?

10 A. If Mr. Shelton says that that's what
11 happens in Virginia, that's okay with me.

12 Q. Okay. That's what I've been trying to
13 find out. Now, you've mentioned my client's failure
14 to perform an activity hazard analysis.

15 A. I call it a job hazard analysis.

16 Q. What was it they failed to do that they
17 should have done in that respect?

18 A. Well, it's a very simple process. You
19 take the job tasks, you put them in one column. In
20 the middle column, you put what could possibly happen
21 to cause an accident or a hazard; and then in the
22 third column, you put what you are going to do to
23 prevent that accident from affecting employees.

24 Q. Who comes up with that form?

25 A. Anyone. All employers that have safety

1 programs have that form.

2 Q. No. If I am a subcontractor on a job --
3 there's some piece of paper you are talking about
4 with these columns on it, right?

5 A. Yeah. You have to document it, yes.

6 Q. Who comes up with the form? Does each
7 subcontractor come up with his own form?

8 A. Yes.

9 Q. Does the general do it for each
10 subcontractor or does the owner do it?

11 A. Usually, the subcontractor has their own
12 form; and then it's coordinated by and through the
13 general contractor, but every employer has to do that
14 whether you are a sub or a general.

15 Q. Has to do it under what rule or
16 regulation?

17 A. Well, it's not specifically required to
18 be on any particular form; but all standards say that
19 potential hazards have to be analyzed and protected
20 and prevented. That's the ultimate safety
21 requirement.

22 Q. Is it your understanding that my client
23 did not meet with the general contractor and analyze
24 the safety aspects of its work on this job?

25 A. No. I didn't say that.

1 Q. What didn't they do that they should
2 have done with respect to this form you are speaking
3 about?

4 A. To make sure that their beams don't fall
5 on people.

6 Q. Well, what was it on this form that was
7 going to ensure that?

8 A. Material handling equipment and
9 unsecured beams are dangerous combinations.

10 Q. Are you saying there's some form in
11 existence that speaks to unsecured girts being hit by
12 boom trucks?

13 A. Well, no. It's a recognized hazard.

14 Q. Well, what is the form going to do to
15 prevent it?

16 A. Well, when they analyze it, instead of
17 just going ahead -- it's like you and me saying,
18 Well, we've got to move this table out through the
19 door. It would be kind of important to measure the
20 table and measure the door. The same thing with a
21 job hazard analysis. We are going to be off-loading
22 or having off-loaded materials in this area. Well,
23 what can happen? They might hit one of our
24 structural members; and if it could fall, it could
25 kill someone. Now, what are we going to do? We are

1 going to have to prevent this from happening.

2 Q. And that's all on this form?

3 A. Well, it's a process. It should be
4 documented.

5 Q. How many different ways do you think an
6 accident could happen in the steel erection process?

7 A. Many.

8 Q. Do you think there are a million
9 different ways an accident could happen?

10 A. No.

11 Q. A thousand?

12 A. No.

13 Q. Less than a thousand ways for an
14 accident to happen?

15 A. Yeah, for each job task. We break it
16 down. We don't say, All steel erection a thousand.
17 We say, How many things can happen for this task? I
18 would say -- I've done many of these -- not more than
19 five, six.

20 Q. There's only five or six?

21 A. Possibilities for each task. This task
22 is the off-loading of materials --

23 Q. Well, that wasn't my client's task.

24 A. -- or securing the beam.

25 Q. I'm talking about my client's

1 subcontract to erect all of the steel for the
2 construction of this building. How many different
3 ways could an accident have happened in the
4 performance of that job?

5 A. Well, if you say all the activities,
6 then you'd have maybe five or six for each different
7 activity.

8 Q. How many different activities are
9 involved?

10 A. I don't know. You tell me.

11 Q. You don't know?

12 A. How would I know.

13 Q. Well, how long would the form have to be
14 to cover every potential accident that could happen
15 for every activity for my client?

16 A. Now you are acting dense. I just said
17 every single job task has to be analyzed
18 individually.

19 Q. Okay.

20 A. So you take each task and you do it.

21 Q. And that's the way you've seen it done?

22 A. That's the way it's done everywhere.
23 Every one of my clients does it that way.

24 Q. How about Hourigan Martone? Do they do
25 it that way?

1 A. They do it that way.

2 Q. So they have some form that evaluates
3 every task of every subcontractor to make sure it's
4 going to be done safely?

5 A. Or they have the subcontractor do it.
6 They don't have to do it themselves. In most cases
7 the general contractor would have the subcontractor
8 do it because they understand the work the best.
9 They understand the hazards the best.

10 Q. And if that form isn't filled out, what
11 does that tell you?

12 A. That they don't have an adequate safety
13 program.

14 Q. And what does that mean?

15 A. Accidents will happen. People will be
16 injured.

17 Q. Is that a violation of OSHA?

18 A. Yeah. There's no question about that.

19 Q. What OSHA provision requires that form?

20 A. Well, it doesn't specifically say that
21 that form is required. What it says is that you have
22 to do the analysis of hazards, the frequent and
23 regular inspections; and as we just went through,
24 make the workplace free from those recognized
25 hazards.

1 Q. Well, if OSHA doesn't require the
2 specific form, why have you been telling me that the
3 absence of the form was an OSHA violation?

4 A. Well, in this case it was required by
5 the Corps of Engineers; and that requirement would be
6 adopted as a part of OSHA.

7 Q. How was it required by the Corps of
8 Engineers?

9 A. I always forget the name of this thing.
10 I actually wrote it down. Activity analysis.

11 Q. Right.

12 A. That's required. It's the same thing.

13 Q. It's required where?

14 A. By the contract with the Corps and by
15 the Corps regs.

16 Q. The contract was with the Department of
17 the Navy.

18 A. Or the Navy. I'm sorry.

19 Q. So you are saying the contract between
20 whom? The general contractor and the Navy?

21 A. There was testimony in the deposition
22 that said -- and they were cited specifically in this
23 memo -- that they hadn't done the required activity
24 analysis, which makes perfect sense to me as a safety
25 professional that it be required.

1 Q. Have you seen this document before? I'm
2 showing the witness what's previously marked as
3 Cullen Exhibit 3.

4 A. This sure isn't that. It's not what we
5 are talking about.

6 Q. You believe that the document you are
7 looking at now is not what was considered on this job
8 to be an activity hazard analysis?

9 A. Well, this would not be considered by me
10 as a safety professional an activity analysis or a
11 job hazard analysis.

12 Q. That's not my question. My question is,
13 Can you say whether or not this is what was treated
14 as an activity hazard analysis form for this job
15 under this contract?

16 A. No, I can't; but if it was, it's totally
17 inadequate.

18 Q. The inadequacy of the form -- do you
19 fault my client for the form?

20 A. Well, it's not your form; but it could
21 be that the general contractor was expecting the
22 subcontractor to conduct their own what I call job
23 hazard analysis, but you are quite right. It would
24 be the general contractor's responsibility to see
25 that it is done.

1 Q. If you --

2 A. And this -- the general contractor would
3 be able to see by looking at this that it wasn't
4 done.

5 Q. If you'd hang on to the form for a
6 minute. Do you see where the form indicates that
7 representatives of my client -- and I'll represent
8 to you representatives of the general contractor --
9 went over safety requirements?

10 A. Yes.

11 Q. And material storage?

12 A. Okay.

13 Q. And installation instructions?

14 A. Okay. This isn't an analysis of
15 anything. This is a reporting form or a note. An
16 analysis of hazards is something far different and
17 far beyond this form; so no matter whose
18 responsibility, if this is what they were doing to
19 analyze hazards, it is totally unacceptable.

20 Q. Mr. Burg, I noted when I went through
21 the materials that you were provided that you have
22 some photographs. One of the questions I asked you
23 earlier was whether you had any welding experience.

24 A. You never asked me that question before.

25 Q. Let me ask it now. Do you have any

1 welding experience?

2 A. Yes.

3 Q. What is your welding experience?

4 A. I teach welding safety, and it's part of
5 that experience. On many occasions I've actually
6 done welding.

7 Q. Okay. This is one of the photographs
8 you were given. They are duplicate photographs, two
9 on the page. I am looking at the bottom page. Are
10 you able to tell me whether that's a photograph of a
11 weld on that steel member?

12 A. It doesn't look like a weld.

13 Q. Why doesn't it look like a weld?

14 A. Because a weld is more sturdy than
15 that. It's more -- more of the material is involved
16 in a weld to secure it to another member. You
17 actually have to have molecular interaction between
18 the materials to secure it, and this looks more like
19 a burn than a weld.

20 Q. Are you a metallurgist?

21 A. No.

22 Q. Are you saying that that is not a weld?

23 A. Well, I don't know. Welding equipment
24 certainly could have made this mark. In fact, the
25 mark looks like it is something that would be made by

1 welding equipment; but I would say my experience is
2 that a weld would be more significant than this.

3 Q. Well, a weld is going to look as
4 significant as the welder made it, isn't it?

5 A. Well, that's true.

6 Q. Are you saying that that is not the
7 remnants of a tack weld?

8 A. No. It could be. It would be a very
9 small tack weld.

10 MR. NORRIS: Okay. For the record, the
11 picture he's looking at, Blair --

12 MR. SMIRCINA: I know the picture. It's
13 fine.

14 MR. NORRIS: I just want the record to
15 be clear. It should have a deposition
16 exhibit. I think it was Brock Deposition
17 Exhibit -- Why don't we do this. Let's make
18 this Burg Deposition Exhibit 1.

19 (Marked by the court reporter as Burg
20 Deposition Exhibit No. 1.)

21

22 BY MR. NORRIS:

23 Q. Mr. Burg, I'm happy to tell you that I'm
24 almost finished. Your interrogatory answer states in
25 part on a couple of occasions that certain actions on

1 the part of my client or omissions not only violated
2 applicable OSHA standards, which you've told me
3 about. Are there any OSHA standards you are going to
4 rely on other than the ones we discussed today?

5 A. No.

6 Q. Okay. Your answer in several places
7 says, After referring to applicable OSHA standards,
8 the following -- and those set forth in the
9 government safety manuals pertinent to structural
10 steel erection.

11 Now, we've addressed the Army Corps
12 Safety Manual?

13 A. Right.

14 Q. The Section 03, which I think you
15 conceded didn't really apply to this particular steel
16 member?

17 A. True.

18 Q. Is there some other safety manual that
19 this answer is referring to that I haven't asked you
20 about?

21 A. No.

22 Q. Should your answer then be amended to
23 delete the reference to government safety manuals?

24 A. Well, I'm sure that the government
25 safety manual has standards that are similar to the

1 ones in Subpart C, general requirements for safety
2 and requirements for conducting inspections of work
3 places by competent persons; and so I would not want
4 to eliminate that reference for those reasons; but it
5 is true what you said that that specific reference is
6 one that I'm not going to be relying on.

7 Q. All right. All right. Should my client
8 have had that girt in place in such a way that it
9 would have been impossible to dislodge it with the
10 boom being operated by Mr. Shepherd?

11 A. No. No one is expected to do that.

12 Q. Okay. So I guess you are agreeing with
13 me that my client doesn't have to ensure the absolute
14 safety of Mr. Shepherd in every situation?

15 A. I agree with that.

16 Q. Okay. So aren't you and I, I guess,
17 arguing about at what point did the boom truck
18 exceed, if it did, reasonable measures to secure that
19 girt? Isn't that really the issue?

20 A. Well, I think we are talking about
21 standard of care as you well know and what could be
22 reasonably anticipated as a hazard on the part of the
23 employer; and I'm only here -- the only reason I'm
24 here is because I believe that this hazard is
25 recognized in the industry, that it could be

1 reasonably anticipated by your client, and that had
2 they exercised diligence -- and, of course, this
3 would be the focus. If I was in your client's
4 industry, the most important thing -- there would be
5 two things. People don't fall from the structure.
6 The structure doesn't fall down and hit the people.
7 There would be nothing more important than that.

8 Has this kind of accident happened again
9 and again? Yes. Are they aware of it? Yes. Did
10 they not do everything that they should have done to
11 protect this man from being maimed? No. That's why
12 I'm here. I think that can be proved.

13 Q. I'm going to try and ask my question
14 again. It is the point -- how much of a -- Let me
15 ask it this way. What's now been marked as Burg
16 Exhibit 1 you said, I believe, may in fact be
17 evidence of a tack weld?

18 A. Yes, it's possible.

19 Q. Okay. I'm not asking you to surmise
20 when it got there.

21 A. Okay.

22 Q. Okay. Do you have an opinion if that
23 tack weld was in place on this girt before it was
24 dislodged was sufficient for OSHA standards?

25 A. No, I don't know that. It would have

1 been safer.

2 Q. I'm not sure I understand your answer.

3 A. I don't know whether that tack weld was
4 sufficient to secure that girt to meet OSHA
5 requirements. There's no way for me to know that. I
6 do know that it's better than nothing. It would be
7 safer if it was there than if it wasn't.

8 Q. That's the question. I mean, that's the
9 \$64,000 question. I'm trying to get an answer from
10 you if I can.

11 A. Yeah.

12 Q. Do you have an opinion about how much of
13 a weld would have met OSHA standards in this
14 situation? Dimension? Size? Any quantifiable
15 definition of what would have been a suitable weld?

16 A. Only a structural engineer can answer
17 that question.

18 MR. NORRIS: Okay. That's all I have of
19 Mr. Burg.

20

21 EXAMINATION BY MS. SPENCE:

22 Q. All right. I've got a few. I'm Fay
23 Spence, and I represent Meredith, the general
24 contractor. I want to ask you a few questions. The
25 same ground rules apply. If I don't make sense, tell

1 me. It sure wouldn't be the first time someone told
2 me that.

3 Did I understand one of the reasons that
4 you chose this case was you saw it as an opportunity
5 to make a difference, to change the way things are
6 done?

7 A. Yes.

8 Q. So a lot of your work deals with
9 focusing on what safety rules should be?

10 A. I agree.

11 Q. Not just on what they are?

12 A. All safety rules are minimum
13 requirements, and employers are expected to go beyond
14 them to get safety.

15 Q. Okay. So you focus on the utmost that
16 can be done? That's important to you?

17 A. Yes, to prevent serious injury and
18 death.

19 Q. Okay. I believe you indicated earlier
20 that familiarity with the Army Corps of Engineering
21 manual regulations was not your forte. Is that fair?

22 A. I wouldn't say that at all. I know of,
23 I think, four or five courses that I have
24 specifically developed and delivered to the Army
25 Corps of Engineers; and part of these courses are not

1 only using OSHA regs, but also using their own safety
2 manuals. It's been quite some time since I did the
3 last one, so I don't really recall all of the
4 specifics. I don't have the same kind of general
5 knowledge about everything that's in the manual that
6 I do -- in their manual than I do about the OSHA
7 requirements, which I use all the time.

8 Q. Okay. Are you relying on any provisions
9 of the Army Corps of Engineering manual regulations
10 to state that the general contractor did not comply
11 with safety regulations?

12 A. Well, I've got to be careful how I
13 answer that question because even though I know OSHA
14 takes precedent over a Corps of Engineer manual and
15 even though I know OSHA specifically in 1926.1616
16 holds the general or the prime contractor responsible
17 for the overall safety program on the project, I do
18 recall a section in the Corps's manual that was
19 similar to that requiring, I believe, general
20 contractors or prime contractors to have some safety
21 and health responsibility; but I didn't bring it with
22 me. I don't recall it specifically, so I just have
23 to leave that door open right now.

24 Q. So you are not specifically relying on
25 that code section?

1 A. I don't have to. The OSHA regulations
2 are the law, and they take precedence over the Corps..

3 Q. So you are not relying on the Corps
4 manual?

5 A. That's correct at this time.

6 Q. Okay. What OSHA regulations do you
7 contend that the general contractor violated?

8 A. The OSHA act, of course, that we spoke
9 to earlier. Section 5A-1, and then there's some more
10 under Subsection C. Well, first of all, under
11 Subsection B 1926.16, rules of construction. Of
12 course, I'm sure you are aware of this. In the last
13 line of that paragraph it says, In no case shall the
14 prime contractor be relieved of overall
15 responsibility for compliance with the requirements
16 of this part for all work to be performed under the
17 contract; and that, of course, I think is quite
18 clear; and, also, it forces the general contractor
19 who is in the best position to coordinate all the
20 subcontractor activities and to communicate the
21 safety rules, the safety programs to all parties.

22 There is really no one else in a
23 position to do that besides the general contractor
24 and the prime contractor; and that, of course, is why
25 the law holds them to that. I always like to tell

1 people it's like a symphony. You know, you've got
2 oboes and strings and all kinds of different
3 instruments; but somebody has got to make them play
4 in harmony so that they make beautiful music
5 together, and the same thing is the case on the
6 construction site. You've got steel erectors and
7 precast concrete and laborers and electricians, and
8 somebody has got to be there making sure they all
9 work together and follow a consistent safety program
10 and plan. That is the job of the general
11 contractor. Not just because I say so, but because
12 the law requires it.

13 Q. So the general contractor has overall
14 responsibility for compliance?

15 A. Coordination, communication, planning,
16 staging, enforcing. All that stuff.

17 Q. Are there any other OSHA violations that
18 you are relying on?

19 A. Yeah. I would cite the same one we
20 mentioned earlier. 20 -- this is under general
21 safety and health provisions. These apply to
22 everybody in construction. 20B-1. It shall be the
23 responsibility of the employer to initiate and
24 maintain whatever programs are necessary to comply
25 with this part, and then 20B-2. Such programs shall

1 provide for frequent and regular inspections of the
2 job sites, materials, and equipment to be made by
3 competent persons designated by the employers.

4 Q. Okay. Let me ask you this. Are you
5 saying that the general contractor did not initiate
6 any programs for safety compliance?

7 A. No, I'm not saying that at all. I'm
8 saying that they have to do whatever is necessary to
9 make the workplace free from recognized hazards. The
10 issues in this case are well recognized in the
11 industry; and, obviously, the inspections and the
12 competent persons were not adequate to prevent this
13 accident from occurring.

14 Q. Are you saying that Dennis Cullen, the
15 quality control inspector, was not competent?

16 A. No, I'm not saying that.

17 Q. And you are aware that the general
18 contractor had daily inspections of the job sites?

19 A. Yes.

20 Q. Are you saying basically then that
21 because this accident happened, the inspections
22 weren't adequate?

23 A. No. I've gone beyond that. I'm saying
24 that this is a recognized hazard. This is something
25 that would be a great concern to the general

1 contractor, and I would say in particular the one
2 that I would hold you most accountable to or your
3 client most accountable to is coordination activity,
4 having -- we've got two separate subcontractors.
5 They are interacting with each other. One is
6 bringing the dry wall. The other one is doing the
7 steel erection, and then there's all that testimony
8 about time is money and production. How important it
9 is, and we can't waist time.

10 When you go through the depositions,
11 there's a lot of testimony like that. Really,
12 safety, as you know, should be a paramount importance
13 on the job, and these -- the interest of production
14 really needs to be weighed against the requirements
15 of the safety program; and these requirements are
16 that when you have people bringing in material
17 handling equipment and you have structural members
18 that could be dislodged, then you have to take
19 appropriate action to make sure that that accident
20 cannot happen.

21 Q. Are you aware that the general
22 contractor had directed the dry wall contractor to
23 have the material off-loaded at a different location?

24 A. There is some testimony to that,
25 conflicting testimony, in the record. You know, I

1 guess if you did -- if that is the -- if I
2 hypothetically say that that's the case, then the
3 problem would be supervision. It's still the
4 responsibility not only to determine where the proper
5 location is for the material, but also to make sure
6 that that is where the material actually is delivered
7 because if you don't do that, then you are not having
8 a safety program. You are not enforcing the rules.

9 Q. So is it your testimony that the general
10 should have stood there the whole time the material
11 was being delivered to make sure that he didn't move
12 to another site?

13 A. Well, you know, the only excuse for
14 having materials delivered to the wrong place would
15 be some kind of misconduct on someone's part. I
16 mean, people will not randomly deliver materials.
17 Mr. Shepherd knows that if he delivers the materials
18 to the wrong place, he'll either get in some kind of
19 trouble or he'll have to go and do more work to move
20 them to another location; so his intent is to deliver
21 those materials to the right place; so if there is
22 some confusion about that between the parties, that
23 would be the responsibility of the general contractor
24 to make certain that there is no confusion.

25 Q. Do you agree that the person who

1 instructed Mr. Shepherd where to off-load was the
2 subcontractor's employee Wenger Tile?

3 A. That's not my understanding. My
4 understanding is that Mr. Hewitt claims that he spoke
5 to the general foreman -- I forgot his name
6 offhand -- for your company, for Meredith in
7 determining where the materials were going to be
8 located. Bosley.

9 Q. If you are mistaken in that
10 understanding, would it be the general's fault if the
11 subcontractor gave Mr. Shepherd improper instructions
12 that directly contradicted the general contractor's
13 instructions?

14 A. I don't think it would let the general
15 contractor completely off the hook, but it certainly
16 would be an issue in this case as far as
17 responsibility between the parties.

18 Q. Why wouldn't it let the general
19 completely off the hook?

20 A. Because the general is supposed to be
21 overseeing the entire project and making sure that
22 there are safeguards and checks so that mistakes like
23 this can't happen because peoples' lives are
24 involved.

25 Q. I'm asking what amount of oversight is

1 the general required to supply?

2 A. The standard says as much as necessary.

3 Q. Are you saying then that he should have
4 stood there the whole time to make sure that
5 Mr. Shepherd didn't move and deliver elsewhere?

6 A. Perhaps.

7 Q. Perhaps?

8 A. Perhaps. If there are subcontractors on
9 the job of my clients that I represent that we feel
10 insecure about that they are not going to be
11 following every safety rule, not going to be doing
12 what we expect, then we stand right there until we
13 are sure; and when we find a violation, we throw them
14 off of our site.

15 Q. Have you come across anything in the
16 material that would give you reason to say that the
17 general contractor should have known that Wenger Tile
18 wouldn't follow the general contractor's directions?

19 A. There is testimony on the part of the
20 plaintiff that Mr. Bosley had spoke to him on, I
21 think, two occasions that he was there right at the
22 time that the materials were being placed; so now
23 every bit of evidence that I am aware of indicates
24 that the general contractor was fully aware of what
25 was going on there; plus it's pretty hard to miss

1 this truck crane on the job site. It's got a very
2 prominent presence.

3 Q. Are you aware of where the general
4 contractor's office trailer was in location to the
5 site?

6 A. I don't know what that would have to do
7 with the case.

8 Q. Are you aware of it?

9 A. No. I don't know.

10 Q. How familiar are you with top secret
11 military building areas?

12 A. Well, I don't have a top secret
13 clearance myself; but many OSHA people had to have
14 top secret clearance to do inspections of various
15 military facilities. I did work closely with
16 government agencies that require top secret
17 clearance, so I know something about it I guess is
18 the best answer. The Department of Energy requires a
19 top secret clearance.

20 Q. Have you ever personally inspected a job
21 site that was classified as top secret?

22 A. No, because I don't have proper
23 clearance.

24 Q. Is it possible for Mr. Shepherd's boom
25 crane, which was capable of carrying and off-loading

1 2,000 pounds of material, to knock a girt loose that
2 was welded?

3 A. Yes.

4 Q. Do you consider it a mistake for a boom
5 crane operator to hit a structural steel girt?

6 A. No.

7 Q. You don't consider that a mistake?

8 A. No.

9 Q. Is it proper operation of the crane?

10 A. Well, I'd say -- and I've talked to many
11 boom truck operators over the years -- that it's a
12 fairly common occurrence. They are asked to load
13 materials in these very confined areas; and so,
14 therefore, you know, touching or hitting a structural
15 member is something that occurs. It's something that
16 we would want -- we as safety personnel and
17 professionals would like to never occur. We'd like
18 there always to be plenty of room. We'd like to
19 avoid hitting any structural members, but to call it
20 a mistake when it's something that's anticipated
21 would be wrong.

22 Q. Well, you said that the risk of
23 structural steel falling on a job site is anticipated
24 also. Are you saying that if it can be anticipated,
25 it's not wrong when it happens?

1 A. If it's secured properly, if it's bumped
2 by a piece of equipment, it won't fall and injure a
3 worker. We spent a lot of time in this case talking
4 about what is adequately secured. That would be my
5 preferred definition.

6 Q. So in your opinion if the crane can
7 knock it loose, it's not adequately secured?

8 A. Well, I didn't say that. I said
9 bumped. Obviously, there's some cranes that are
10 designed for knocking things down. If it's bumped
11 inadvertently, it shouldn't come down.

12 Q. Do you have any personal knowledge of
13 the degree of force that was applied by the crane to
14 this girt?

15 A. No.

16 Q. Would the amount of force have some
17 bearing on your opinion as to whether the crane
18 operator operated properly?

19 A. Yes.

20 Q. Okay. How much clearance would you
21 consider proper clearance for delivering a load?

22 A. I'm not an operator of equipment, so
23 it's very hard for me to answer that question. I
24 don't have much guidance on that either, but I
25 personally would like to see a foot of clearance.

1 Q. How many crane operators that you have
2 spoken to or reviewed did you feel had the skill and
3 expertise to deliver with only three inches of
4 clearance?

5 A. I think most crane operators would tell
6 you they could do that quite easily. I'm just
7 talking -- When I say twelve inches, that's my
8 perspective not being a crane operator. Just from a
9 safety prospective because we want a three-to-one
10 safety factor or four-to-one safety factor or six-to-
11 one safety factor; but if you talk to the people
12 actually doing the work, they'll tell you three
13 inches is way large enough.

14 Q. Has that been your experience that it's
15 way large enough when you've investigated accidents?

16 A. Well, I actually don't know of that many
17 accidents that have been caused by these
18 circumstances. Normally, we call it a near miss more
19 than an accident because we want it reported. If the
20 equipment operators hit anything, we want to know
21 about it; and we'll get them reported, but we only
22 let them operate where the structural steel is fully
23 secured so if they hit it, we want to know about it;
24 but nobody gets hurt. This is unusual from that
25 perspective.

1 Q. How often do equipment operators hit
2 something if you want to know about it?

3 A. I have asked them, and they said they do
4 it out of a hundred times -- maybe twenty out of a
5 hundred times they would hit something, so that's
6 twenty percent of the time they'll hit something.

7 Q. Are you aware that the steel girts had
8 brackets not just that they were sitting on, but
9 there were brackets above that they were actually
10 fitted into?

11 A. I don't recall that.

12 Q. Okay. Are you aware of how much effort
13 it would take to line up the girt even to change the
14 alignment by 16th of an inch after it was placed in
15 the brackets?

16 A. It would take considerable force to move
17 the girt.

18 Q. Does the job hazard analysis guarantee
19 that no one is going to get hurt?

20 A. Of course not.

21 Q. Okay. Other than 5A-1 and 1926.16A and
22 1926.20-B1 and 2, are there any other OSHA standards
23 that you contend the general contractor violated?

24 A. None that I know of.

25 MS. SPENCE: I don't have any other

1 questions.

2 MR. SMIRCINA: Mr. Burg, you have the
3 right to read and review the transcript of your
4 testimony here today. I promise you we are
5 going to get a copy and send it to you. The
6 lady is under a duty to report it accurately.
7 I think she will, so you can -- Do you want to
8 read it?

9 THE WITNESS: Yes, I always reserve the
10 right to read.

11 MR. SMIRCINA: Good enough.

12 (The deposition concluded at 12:40 p.m.)
13

14 -----oOo-----
15

16 I have read the foregoing deposition, and the
17 same is true and correct.
18

19 _____
20 Deponent
21

22 -----oOo-----
23
24
25

C E R T I F I C A T E

COMMONWEALTH OF VIRGINIA

CITY OF NORFOLK, to-wit:

I, Angela D. Epps, court reporter, a notary public for the Commonwealth of Virginia at Large, certify that the foregoing deposition of Frank Burg was duly sworn to before me and taken by me at the time and place and for the purpose in the caption mentioned.

I further certify that I am not a relative or employee or attorney or counsel of any of the parties, or a relative or employee of such attorney or counsel, or financially interested in the action. Given under my hand this 30th day of May, 2000.

My commission expires May 31, 2003.


Notary Public

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VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

MICHAEL A. SHEPHERD,

Plaintiff,

v.

AT LAW NO. CL982952

W.B. MEREDITH, II, INC.

and

ATLANTIC WELDING & FABRICATING, INC.,

Defendants.

RESPONSES TO REQUEST FOR ADMISSIONS

1. That the Girt was not a solid web structural member.

RESPONSE: Admitted.

2. That the plans and specifications for the Project did not require the securing of the Girt to the structure of which it was a part by means of bolts.

RESPONSE: Admitted.

3. That at the time the Plaintiff dislodged the Girt it had not been and was not being "finally placed" by Atlantic.

RESPONSE: Admitted that at the time the Girt was dislodged, it had not been "finally placed" by Atlantic.

4. That Section 27.E.03 of the Department of the Army Safety and Health Requirements, Manual No. 385-1-1, dated October 1, 1992 ("Safety Manual") did not apply to the Girt on or about November 14, 1996.

RESPONSE: Admitted.

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V.A. BEACH CIRCUIT COURT

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5. That the Girt was not an open web steel joist.

RESPONSE: Admitted.

6. That the Girt was being placed on clips, brackets or angles which were permanently welded to supporting columns.

RESPONSE: Admitted. The girt was placed upon a piece of angle iron, eight inches wide by three inches deep. This angle iron was a piece of flat, narrow, L-shaped steel, bent at a ninety degree angle, welded to the vertical support columns, with a flat surface of three inches by eight inches of steel extending out from the column upon which the girt was placed.

7. That Section 27.E.04 of the Safety Manual did not apply to the Girt on or about November 14, 1996.

RESPONSE: Admitted.

8. That no provision of the Federal OSHA requirements in effect on November 14, 1996 specifically required the Girt to be temporarily secured in place prior to final welding.

RESPONSE: Denied. The general duty clause of OSHA required, in the opinion of Mr. Frank Burg, plaintiff's expert, that the girt be temporarily secured in place prior to final welding, if, among other things, any employee at the jobsite could or would be endangered by leaving the girt unsecured prior to final welding.

9. That no provision of the State VOSHA requirements in effect on November 14, 1996 specifically required the Girt to be temporarily secured in place prior to final welding.

RESPONSE: Denied. The general duty clause of OSHA, as adopted in Virginia as VOSHA, required that the girt be temporarily secured in place prior to final welding, if, among other things, any employee at the jobsite could or would be endangered by leaving the girt unsecured prior to final welding.

10. That no provision of either the Federal OSHA or the State VOSHA requirements in effect on November 14, 1996 specifically required the Girt to be temporarily secured in place with the use of a hoist or safety harness prior to final welding.

RESPONSE: Denied. See Answers to numbers 8 and 9 in this Request for Admissions.

11. That no provision of either the Federal OSHA or the State VOSHA requirements in effect on November 14, 1996 specifically required the Girt to be temporarily secured in place with a temporary tack or spot weld prior to final welding.

RESPONSE: Denied. See Answers to numbers 8 and 9 in this request for admissions.

12. That no provision of either the Federal OSHA or the State VOSHA requirements in effect on November 14, 1996 specifically required the Girt to be temporarily secured in place with temporary bolts or braces prior to final welding.

RESPONSE: Denied. See answers to numbers 8 and 9 in this request for admissions.

13. That the plans and specifications for the Project did not require the Girt to be temporarily secured in place prior to final welding.

RESPONSE: Admitted.

14. That Atlantic had no contractual requirement to rope off or cordon the area around which it was performing work on the Project.

RESPONSE: Admitted.

15. That Atlantic did not have contractual responsibility for the location, manner or coordination of the delivery of materials to be used on the Project.

RESPONSE: Admitted as to the location, manner or coordination of the delivery of materials to Wenger Tile from Tidewater Interior Products on November 14, 1996.

16. That Atlantic did not have contractual responsibility for the location, manner or coordination of the delivery of the materials which the Plaintiff was delivering to the Project at the time of his accident.

RESPONSE: Admitted. See answer to number 15 above.

17. That the American Institute of Steel Construction, Inc. ("AISC") set standards for the erection of steel for buildings and bridges which were in effect on or about November 14, 1996 ("Standards").

RESPONSE: Denied. Those "standards" are nothing other than industry guidelines without force of law or administrative regulation, for steel erection which have nothing to do with the safety requirements of OSHA which govern the behavior and work of all employers in the United States.

18. That the portion of the Standards attached hereto and labeled Exhibit "A," set forth applicable industry standards for the erection of the Girt on or about November 14, 1996.

RESPONSE: Denied. See answer to number 17 above.

19. That Atlantic met or exceeded applicable AISC standards for the erection of the Girt on or about November 14, 1996.

RESPONSE: Denied. See answer to number 17 above.


20. That Atlantic met or exceeded applicable industry standards in the Commonwealth of Virginia for the erection of the Girt on or about November 14, 1996.

RESPONSE: Denied. See Answer to number 17 above.

21. That Atlantic met or exceeded applicable industry standards in Hampton Roads, Virginia for the erection of the Girt on or about November 14, 1996.

RESPONSE: Denied. See Answer to number 17 above.


MICHAEL A. SHEPHERD

By: 
Of Counsel

Blair E. Smircina, p.q.
VSB#: 23499
KALFUS & NACHMAN, P. C.
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Norfolk, VA 23541-0889
(757)461-4900

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing pleading was sent via facsimile and mailed to all counsel of record this 15th day of June, 2000.


Blair E. Smircina

COPY

1

1 VIRGINIA: CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

2

3 MICHAEL A. SHEPHERD,)
4 Plaintiff,)

5 v)

6 W. B. MEREDITH, II, INC.,)
et al.,)
Defendants.)

AT LAW

CL98-2952

7

8

9 De bene esse deposition of Gregory E. Slater,
10 taken before Nancy B. Butler, court reporter, a
11 Notary Public for the State of Virginia at Large,
12 pursuant to notice, at the offices of Norris and
13 St. Clair, Suite 230, 440 Viking Drive, Virginia Beach,
14 Virginia, at 3:30 p.m., June 16, 2000, to be read in
15 the trial of the above-entitled cause.

16

17

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18

19 APPEARANCES: Kalfus and Nachman (Mr. Blair E.
20 Smircina), attorneys for the
plaintiff.

21 Robey, Spence and Drash (Ms. Faye
22 F. Spence), attorneys for
defendants Meredith and Bosley.

23 Norris and St. Clair (Mr. John S.
24 Norris, Jr.), attorneys for
defendants Atlantic and Godfrey.

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I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
Slater, G. E.	2	13		

EXHIBIT	DESCRIPTION	PAGE
Slater 1	Copies of photographs	9

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1 GREGORY E. SLATER, called as a witness on
2 behalf of the defendants, having been first duly
3 sworn, was examined and testified as follows:

4

5

DIRECT EXAMINATION

6

7 BY MR. NORRIS:

8 Q Do you go by Chief Slater or Mr. Slater?
9 Which is correct?

10 A Chief Slater.

11 Q Chief Slater, my name is John Norris.
12 I'm an attorney representing the defendant Atlantic
13 Welding and Fabricating in a lawsuit which has been
14 brought by Mr. Shepherd concerning an accident that
15 happened at the Dam Neck Base back in November of
16 1996. I'm going to ask you some questions about that
17 event. If you don't understand any of my questions,
18 tell me and I'll try and rephrase them for you. If you
19 need to take a break at any time, tell me and we can
20 take a break. Please remember to vocalize your
21 answers, because your transcript may well be read to a
22 judge or a jury if this matter goes to trial. All
23 right, sir?

24 A Yes, sir.

25 Q Begin by telling me your full name, sir.

1 A My full name is Gregory E. Slater.
2 Q And how are you employed?
3 A I'm employed in the U. S. Navy.
4 Q And what is your rank?
5 A E7, chief petty officer.
6 Q And how long have you been in the Navy?
7 A Seventeen years.
8 Q Where are you currently stationed?
9 A Currently stationed at CINCLANT Fleet
10 Det. Combat Camera.
11 Q And what is your job function with the
12 Navy at the present time?
13 A I'm a diver photographer.
14 Q And what was your function with the Navy
15 in November of 1996?
16 A I was a photographer for Naval Special
17 Warfare Development Group.
18 Q What were your duties as a photographer
19 with the special warfare group back in 1996?
20 A General duties were documentation of
21 tactics, techniques, and things of that nature to do
22 with the Naval Special Warfare community or the SEAL
23 community. A lot of documentation of projects,
24 equipment, tactics, and things like that.
25 Q Where are you physically based at the

1 present time?

2 A At the Naval Station Norfolk.

3 Q Now, Chief Slater, do you have any plans
4 that will take you out of the area on the 18th of July
5 of this year?

6 A Yes. I'm leaving this Sunday for a
7 deployment to the Mediterranean on the USS Grasp.

8 Q And this Sunday will be the -- I guess
9 the 18th of June; is that correct?

10 A Yes. Sorry. Yes.

11 Q When will you plan on returning from that
12 deployment?

13 A The end of September. Approximately the
14 26th from what I understand.

15 Q So in July of 2000 you will be in the
16 Mediterranean --

17 A That's correct.

18 Q -- on duty.

19 A That's correct.

20 Q Now, where was your base of operations
21 in November of '96?

22 A That was located on the Dam Neck Base.

23 Q Okay. Now, do you remember on November
24 the 14th of 1996 being called to a particular incident
25 in your capacity as a photographer?

1 A Yes, sir, I do.

2 Q Do you remember where you were when you
3 received that call?

4 A To the best of my knowledge in my photo
5 lab -- my work space -- at the time.

6 Q And where was that located?

7 A That's in Building 310, which is in the
8 compound -- the Naval Special Warfare Development Group
9 compound.

10 Q And how far was that in terms of either
11 distance or time to the incident that you were called
12 to?

13 A A two-minute walk.

14 Q Okay. Do you remember the approximate
15 time of day you got the call?

16 A To the best of my knowledge after lunch.
17 Early afternoon I believe.

18 Q All right. And when you got the call,
19 did you proceed immediately to the site?

20 A Yes, sir.

21 Q Where was the site?

22 A The site was located approximately in the
23 center of the Naval Special Warfare Development Group
24 compound. A new construction -- a new building
25 actually being erected there about the middle of the

1 compound.

2 Q All right. Now -- so did you arrive a
3 couple of minutes after the call?

4 A Yes, sir.

5 Q And what were you called to do there?

6 A To shoot still images of an accident
7 scene.

8 Q And is that another way of saying to take
9 some pictures?

10 A Right. Yes. Take some still pictures.
11 Right. Yes. Sorry.

12 Q Do you remember what the scene was like
13 when you first arrived?

14 A Yeah. As I recall there were some
15 medical folks attending to a gentleman which had been
16 injured, fire truck, ambulance, a fork truck -- you
17 know -- basically in the area there.

18 Q By fork truck would you mean a boom type
19 truck?

20 A Right. Yeah. The boom truck. Right.

21 Q Okay. Did you have -- was anything told
22 to you or did you have some understanding of how this
23 man was injured?

24 A Yeah. I had a pretty good idea once I
25 got there -- you know -- what had happened and then --

1 I don't exactly recall who may have said. It may have
2 been the guy in charge of security there. Whoever
3 called me over and informed me just said, Yeah -- you
4 know. Here's what happened. The guy got injured by
5 that piece of steel coming down and there he is --
6 obviously he doesn't have to say that, because I can
7 see him -- and we'd like to you to document the scene;
8 and that's normally -- I mean at that point in my
9 career -- you know -- I had probably -- What? --
10 fifteen years of service and I'd done this quite a bit
11 so they -- depending on who it is, they'll usually
12 just turn you loose -- you know -- and I can tell what
13 needs to be shot and just go to work.

14 Q Okay. How soon after you arrived did
15 you begin taking pictures?

16 A I'd say within a few minutes the best I
17 recall.

18 Q All right. When you started taking
19 pictures was the injured man still present?

20 A I believe so.

21 Q Okay.

22 A I believe so.

23 Q Do you know if you took any pictures of
24 the injured man?

25 A No, I didn't. No, I didn't; and I

1 probably got the background -- or I should say I knew
2 that the guy was a civilian -- civilian involvement
3 and, therefore, wouldn't take pictures of him. It
4 was -- it was Navy grounds which was the common
5 interest for getting the documentation; but the guy
6 wasn't in the Navy, so I probably wouldn't have taken
7 pictures of him.

8 Q Okay. How long did you take pictures?

9 A The best of my recollection I'd say
10 forty-five minutes to an hour.

11 Q Okay. Did you ever leave the scene
12 from the time you arrived and started taking pictures
13 to the time you finished taking pictures?

14 A No, sir.

15 Q Did you ever come back for the purpose of
16 taking pictures at that scene after your initial time
17 there?

18 A No, sir. Not that I recall.

19 Q Now, I'm going to show you, Chief Slater,
20 some reproductions and ask you if you can look through
21 them and identify them for me.

22 A Okay.

23 MR. NORRIS: Off the record.

24 (Discussion off the record.)

25

1 BY MR. NORRIS:

2 Q Now, Chief Slater, I've handed you a
3 stack of color reproductions of photographs. Can you
4 identify those photographs?

5 A Those photographs appear to be the
6 images or the still pictures that I took that day of
7 the accident.

8 Q Okay. And do they appear to be all the
9 photographs that you took on that day?

10 A Yes, sir.

11 MR. NORRIS: All right. I want these
12 collectively then marked as Slater Exhibit 1.

13 MR. SMIRCINA: No objection.

14 MR. NORRIS: There appear to be fourteen
15 pages of photographs, each of which contain
16 three different pictures. So that would be a
17 total of forty-two photographs I believe if my
18 math is correct.

19 (Marked by the court reporter as Slater
20 Exhibit Number 1.)

21

22 BY MR. NORRIS:

23 Q Chief Slater, on the very first page of
24 this exhibit do you see of the three photographs the
25 middle photograph?

1 A Yes, sir.

2 Q Do you recognize what that is a
3 photograph of?

4 A Yes. That's a photograph of the beam
5 that fell off the building and struck the truck.

6 Q All right. Do you recognize any kind of
7 a mark on that beam of any kind?

8 A Yeah. I see two blackish sort of dots --
9 marks on the very end of that beam.

10 Q All right. And were those marks -- I
11 mean I guess this is an obvious question. Were those
12 marks present on the beam when you photographed them
13 while you were there?

14 A Yes, sir.

15 Q During the entire time you were at the
16 scene, Chief Slater, did you observe anyone climb up
17 onto the boom truck and use any kind of a welding or a
18 burning device on the beam?

19 A No, sir.

20 Q Based on your recollection of the events
21 that you saw that day, did anybody get up and alter
22 the appearance of that beam while you were there?

23 A No, sir. Not that I observed.

24 Q Now, do you agree with me that some of
25 these photographs show what I would call yellow tape --

1 the kind of tape you see when maybe the police tape off
2 an area of a crime.

3 A Yes, sir. I agree. That looks like
4 crime scene tape.

5 Q Are the tapes apparent in all of the
6 photographs you took?

7 A No, I don't believe they are.

8 Q Can you explain that?

9 A Probably due to the fact that I have
10 free roam and free will of that site to document the
11 accident. So I could have very well -- instead of
12 zooming way in -- walked -- you know -- gotten over the
13 tape and walked up closer to get a shot like the middle
14 shot there of the -- tight shot of the beam. So I
15 could have very well stepped over that tape or ducked
16 under it or whatever the case to get the photographs
17 that I -- you know -- felt were needed.

18 Q Okay. And finally, Chief Slater, it
19 looks like some of the pictures you took were from an
20 elevated area -- let's see if I can find an example of
21 that -- of pictures that are taken looking down on the
22 boom truck and down on the beam. Do you remember how
23 you were able to take those pictures?

24 A Yes, sir. To the best of my knowledge,
25 I think I went inside the building and shot down on it

1 from the second deck or second floor there.

2 Q Did you attempt to take any pictures of
3 the portion of the steel apparatus that the beam had
4 been on before it fell? Do you understand my question?

5 A That being the metal that the beam sat
6 on --

7 Q Yes, sir.

8 A -- when it was in place? There's --
9 yeah. There's a couple of pictures. They are not very
10 tight or close or close-ups, but there's one there
11 that -- I can see that could have been closer, but
12 it -- you know -- doesn't reveal much.

13 Q Okay. Am I correct that the pictures of
14 those metal clips that you took pictures of are taken
15 looking up at the clips?

16 A That's right. Yeah.

17 Q Were you able to take any pictures
18 looking down on what the top of the clip would have
19 looked like?

20 A No, sir. I didn't -- I didn't do that.

21 Q Okay. Is there any reason for that?

22 A Probably because it was too darned high
23 for me to get up there and there was no means for me to
24 climb up or get up so I could get close enough to shoot
25 a picture of the thing.

1 Q Okay.

2 A And I couldn't zoom in, because I'd still
3 be looking at the bottom of it. I'd have to get on the
4 same plane as the bracket there and be able to shoot --
5 you know -- down on it. The means just weren't
6 available.

7 MR. NORRIS: I have no further questions
8 of Chief Slater. Answer any of the questions
9 the other counsel might have of you, please.

10 THE WITNESS: All right, sir.

11

12 CROSS-EXAMINATION

13

14 BY MR. SMIRCINA:

15 Q Chief, my name's Blair Smircina. I
16 represent Michael Shepherd, the party that was injured
17 at this scene.

18 A Yes, sir.

19 Q Some of the photographs -- let me ask you
20 this in addition. Were there any other photographer
21 mates on base at the time?

22 A Not in that compound. Not -- excuse me.
23 Not in that compound shooting pictures.

24 Q All right. Were there any others
25 assigned to Dam Neck at the time?

1 A There may have been, but they wouldn't
2 have been accessed into that compound.

3 Q Okay. You were the only one with
4 sufficient clearance to do that?

5 A That's right, sir.

6 Q So if any pictures of this site were
7 made at the Dam Neck Base, you would have made them? I
8 mean I'm just asking you. Are you absolutely certain
9 of that?

10 A Well, first we need to -- you're speaking
11 too broadly.

12 Q All right.

13 A The whole base is -- you drive into Dam
14 Neck Base, you're talking about the whole base. Okay?
15 I'm talking about a compound within the base that's
16 actually on the base that has a double fence line --
17 very high security area. So I can't answer for the
18 entire base. I can only answer for that.

19 Q As to pictures of this accident scene,
20 you would have been the only photographer's mate that
21 would have been allowed access to it?

22 A Yes, sir.

23 Q All right. Is that correct?

24 A Yes.

25 Q In November of 1996?

1 A Yes.

2 Q All right. The reason I have a curiosity

3 is some of these pictures show a very cloudy sky and

4 some show a very clear sky; and, for example, the

5 bottom one on Page -- on the fourth page --

6 A Right.

7 Q -- shows a very cloudy sky --

8 A Right.

9 Q -- and the middle one on the fourth page

10 shows a very clear sky; and you stated you were only

11 there forty minutes or so -- say an hour.

12 A Right.

13 Q Do you have any independent -- do you

14 have an independent recollection of doing all this?

15 A Of shooting at all?

16 Q Yes.

17 A Yeah. To the best of my knowledge I was

18 the photographer that shot the scene.

19 Q Okay. And all within an hour time frame?

20 A Right.

21 Q Is that correct?

22 A Yes, sir.

23 Q Who told you to come there? Security at

24 Dam Neck?

25 A To the best of my recollection it would

1 have been the security department.

2 Q All right. And it was the day of the
3 accident, because when you got there somebody was still
4 being tended to who had been injured; is that correct?

5 A Yes, sir. Yes, sir.

6 Q Is there any possibility you came back
7 the next morning?

8 A Not that I recall.

9 Q Not that you recall?

10 A No, sir.

11 Q And you have an odd number of pictures
12 taken -- forty-two. Is that an unusual number of
13 pictures or do you have any reason why it's
14 forty-two as opposed to fifty-two or forty-eight or
15 seventy-two -- which would be a normal roll of film I
16 would suppose for a 35 millimeter camera.

17 A Right. And it was a normal roll of film.
18 Two rolls -- probably two rolls of thirty-six; but if
19 I'm finished at -- you know -- Number 24 on the second
20 roll, I'm going to rewind the film and take it in and
21 get it processed. I'm not going to -- you know --
22 shoot everything three times -- you know -- to finish
23 the roll out. Professionals normally when they're
24 finished, they're finished; and if that means rewinding
25 a roll early, they'll rewind that roll early because --

1 you know -- you're just talking about expending more
2 paper, more time, and all that. So if you're completed
3 with the job midway through the second roll, you're
4 going to rewind that second roll and turn it in and --
5 you know -- continue to work from there.

6 Q And you are certain that these were the
7 only pictures taken by you at the construction site?

8 A Yes, sir.

9 Q How can you be certain? I'm not
10 challenging you. I just want to know. What is your
11 thinking on that?

12 A Well, that I was the only photographer
13 there.

14 Q And you would have been the only
15 photographer allowed to be at that particular point.

16 A That's right.

17 Q All right. And this is part of the
18 Navy's security detail when such things happen? Their
19 protocol when such things happen?

20 A Specific to this command -- that's right.
21 That was --

22 Q Specific to this development -- this
23 particular development site.

24 A That's right. That's right. That was
25 standard operating procedure for us to document any

1 accidents or mishaps that occurred there in the
2 compound.

3 MR. SMIRCINA: I have nothing further.

4 MR. NORRIS: Chief Slater and Lieutenant
5 Commander Lansing, the deponent has a right to
6 read the transcript of his testimony when it's
7 typed up, or he may waive the right to do that.
8 Which do you prefer, sir?

9 LT. CDR. LANSING: Well, since the chief
10 is going to be deployed, I was going to ask
11 could we have the transcript sent care of us and
12 then we can get it to him?

13 MR. NORRIS: We can do that if that's
14 what you want us to do.

15 LT. CDR. LANSING: Yes.

16 MR. NORRIS: I guess --

17 MR. SMIRCINA: Commander, we have a
18 little time problem here. We have about thirty
19 days; and while we can get this done rapidly,
20 I'm sure Mr. Norris would like to have this
21 available. Is it possible that --

22 LT. CDR. LANSING: Are you saying -- I'm
23 sorry.

24 MR. NORRIS: Our trial date is July 18th.

25 LT. CDR. LANSING: Let me just say what I

1 was referring was for the chief to receive a
2 copy of it -- you know. As far as -- as far as
3 the waiving of the signing, yeah, I believe we
4 can waive the signing of the deposition.

5 MR. NORRIS: Okay. But you want us to
6 send him a copy for his own purposes.

7 LT. CDR. LANSING: Yes.

8 MR. NORRIS: Okay. We'll try and do
9 that. Yes, sir.

10 That will conclude the deposition. Can
11 you let the record reflect that counsel have
12 agreed for me to retain Deposition Exhibit 1 or
13 Exhibit 1.

14 (The deposition was concluded at
15 4:07 p.m.)

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C E R T I F I C A T E

COMMONWEALTH OF VIRGINIA,
CITY OF VIRGINIA BEACH, to wit:

I, Nancy B. Butler, court reporter, a Notary Public for the Commonwealth of Virginia at Large, certify that the foregoing de bene esse deposition of Gregory E. Slater was duly sworn to before me and taken by me at the time and place and for the purpose in the caption mentioned.

I further certify that I am not a relative or employee or attorney or counsel of any of the parties, or a relative or employee of such attorney or counsel, or financially interested in the action.

Given under my hand this 21st day of June, 2000.
My commission expires April 30, 2002.


Notary Public

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VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF VIRGINIA BEACH

MICHAEL A. SHEPHERD,

PLAINTIFF,

v.

AT LAW NO.: CL98-2952

W.B. MEREDITH, II, INC.,
ATLANTIC WELDING & FABRICATING, INC.,
ROBERT BOSLEY,
and PETER GODFREY,

DEFENDANTS.

MOTION IN LIMINE

COME NOW Defendants, Robert Bosley and W. B. Meredith, II, Inc., by counsel, and move this Honorable Court for entry of an Order precluding all or a portion of any testimony at trial from Frank L. Burg. In support of this Motion, defendants rely upon the arguments and citations provided by defendant Atlantic Welding & Fabricating, Inc.

ROBERT BOSLEY and
W.B. MEREDITH, II, INC.

By Fay F. Spence
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CERTIFICATE

I hereby certify that a copy of the foregoing was mailed to Blair E. Smircina, Esquire, Counsel for Plaintiff, P. O. Box 12889, Norfolk, VA 23541-0889 and John S. Norris, Jr., Esquire, Counsel for Atlantic Welding & Fabricating, Inc., 440 Viking Drive, Suite 230, Virginia Beach, VA 23452, on this 19th day of June, 2000.

Fay F. Spence

Fay F. Spence

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF VIRGINIA BEACH

MICHAEL A. SHEPHERD,

Plaintiff,

v.

At Law No. CL98-2952

W. B. MEREDITH, II, INC.,
ATLANTIC WELDING &
FABRICATING, INC.,
and
ROBERT BOSLEY,

Defendants.

SUPPLEMENTAL BRIEF IN SUPPORT OF
MOTION IN LIMINE

COMES NOW the Defendant, Atlantic Welding & Fabricating, Inc. ("Atlantic"), by counsel, and states the following in supplement to its prior Brief in support of its Motion *in Limine* to preclude all or part of the testimony of Plaintiff's expert witness, Frank L. Burg, at the trial of this matter:

SUPPLEMENTAL ARGUMENT

The issue as to what was required of Atlantic in the placement and fastening of the subject girt is at the crux of Plaintiff's case against Atlantic. Plaintiff's purported expert, however, cannot offer any testimony as to the applicable standard of care in this area. Although Mr. Burg's credentials suggest a familiarity with OSHA regulations, he does not possess any expertise with respect to industry standards in the area of steel erection.

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VA. BEACH CIRCUIT COURT

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Basically, Mr. Burg offers the circular opinion that since the girt fell and injured Shepherd, the workplace must have been unsafe, and this was a violation of OSHA's general safety provision.

[E]xpert testimony is admissible only when specialized skill and knowledge are required to evaluate the merits of a claim. Issues of this type generally arise in cases involving the practice of professions requiring advanced, specialized education, such as engineering, medicine and law, or those involving trades that focus upon scientific matters, such as electricity and blasting, which a jury cannot understand without expert assistance.

Bd. of Supervisors of Fairfax Co. v. Lake Services, Inc., 247 Va. 293, 297, 440 S.E.2d 600, 602 (1994)(emphasis supplied).

The case at bar is one in which expert testimony may properly assist the trier of fact. Yet Mr. Burg can only offer his non-technical and unsupported opinions regarding the general safety of the subject workplace. "[E]xpert testimony is required to establish the appropriate professional standard, to establish a deviation from that standard, and to establish that such a deviation was the proximate cause of the claimed damages." Seaward International, Inc. v. Price Waterhouse, 239 Va. 585, 592, 391 S.E.2d 283, 287 (1990). Mr. Burg is simply not qualified to testify to the industry standards applicable to the placement and fastening of the subject girt, nor a deviation from that standard, because, by his own admission, he has no specific knowledge as to how such girts are typically placed and fastened in the steel erection industry.

Understandably, Plaintiff's Brief in Response to Atlantic's Motion *in Limine* attempts to distinguish the case of Pearson v. Canada, 232 Va. 177 (1986), which is fatal to the notion that an OSHA violation can constitute negligence *per se* when the plaintiff is a non-employee.

The distinction suggested by Plaintiff, however, is completely without merit. The discussion of the "fireman's rule" in the first half of the Pearson case, which is cited extensively by Plaintiff in his Brief, has absolutely nothing to do with the Court's ruling that violation of OSHA cannot constitute negligence *per se* when the plaintiff is a non-employee. See Pearson at 186.

Plaintiff has not, and cannot, cite a single case involving a non-employee plaintiff wherein a violation of OSHA has been deemed negligence *per se*. Even the Court in Marslender v. VEPCO, 37 Va. Cir. 199 (1995), which involved an employee plaintiff, did not allow the evidence of an OSHA violation to be deemed (contributory) negligence *per se*. The Marslender case did hold that the OSHA regulations could be introduced as evidence of the duty of care that the plaintiff was required to exercise for his own safety, see id. at 201, but, unlike in the case at bar, the plaintiff in Marslender was an employee, not an independent contractor delivering materials to a job-site.

Plaintiff's reliance on Halterman v. Radisson Hotel Corp., 259 Va. 171, 523 S.E.2d 823 (2000) is misplaced. In Halterman, the Court determined that a specific OSHA regulation requiring an employer to share information about a dangerous substance with other employers on the same work site did not impose upon such employer a duty to warn specific employees of other employers. In the case at bar, Mr. Burg relies on no specific OSHA regulation which imposes upon Atlantic a duty to warn or protect other employers (much less employees). Even if such an OSHA regulation exists, Halterman would not place upon Atlantic any duty vis-a-vis the Plaintiff, who is a mere employee of another employer.

WHEREFORE, Mr. Burg should be precluded from testifying with respect to any issue involving the alleged negligence of Atlantic, the applicable standard of care, and/or any industry standard applicable to a steel erection contractor with respect to the work that was performed by Atlantic herein.

ATLANTIC WELDING & FABRICATING, INC.

By 

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I hereby certify that a true copy of the foregoing Supplemental Brief in Support of Motion *in Limine* was faxed and mailed this 17th day of June, 2000, to:

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247 Va. 293, *; 1994 Va. LEXIS 38, **;
440 S.E.2d 600, ***; 10 VLR 1012

BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA v. LAKE SERVICES,
INCORPORATED

Record No. 921892

SUPREME COURT OF VIRGINIA

247 Va. 293; 1994 Va. LEXIS 38; 440 S.E.2d 600; 10 VLR 1012

February 25, 1994, Decided

PRIOR HISTORY: [**1] FROM THE CIRCUIT COURT OF FAIRFAX COUNTY Jack B. Stevens, Judge.

CORE TERMS: barge, boat, sewer pipe, dredging, lake, expert testimony, standard of care, underwater, submerged, depth, pipe, common knowledge, specialized, intelligent, elevation, struck, loaded, repair work, water level, obstruction, precautions, scientific, crossing, crossed, forming, hopper, water, cove, pool, feet

Show Headnotes

COUNSEL: James V. McGettrick, Assistant County Attorney (David P. Bobzien, County Attorney, on briefs), for appellant.

Francis J. Prior, Jr. (Siciliano, Ellis, Dyer & Boccarosse, on brief), for appellee.

JUDGES: Present: All the Justices.

OPINIONBY: BARBARA MILANO KEENAN

OPINION: [*294] [***600] OPINION BY JUSTICE BARBARA MILANO KEENAN

The sole issue in this appeal is whether the Board of Supervisors of Fairfax County (the Board) is required to produce expert testimony establishing a standard of care in a negligence action for damages that occurred in the course of a dredging operation.

Because the trial court sustained a motion to strike the Board's evidence, we view the evidence in the light most favorable to the Board. *Brill v. Safeway Stores, Inc.*, 227 Va. 246, 247, 315 S.E.2d 214, 215 (1984). The Board filed an amended motion for judgment against Lake Services, Incorporated, seeking recovery for damage to an underwater sanitary sewer pipe. The damage allegedly resulted from Lake Services' negligence in operating a barge [**2] during a dredging project. Lake Services had contracted with the Reston Home Owners' Association (RHOA) to dredge portions of Lake Thoreau, a private, artificial lake, which was owned by RHOA on the date of the accident.

The evidence shows that this type of dredging work entails the use of a floating construction crane, which removes material from a lake bed and deposits it on a barge. A boat then pushes the loaded barge to a staging area for unloading.

[***601]

Larry Butler, one of RHOA's managers, testified that, in early July 1987, he gave Gary Jackson, Lake Services' foreman on the project, a map showing the location of the County's sewer line in the West Cove area of Lake Thoreau. The map noted that the pipe was "5.5' down."

Butler explained to Jackson that the notation "5.5' down" meant that the sewer pipe was submerged 5.5 feet below "normal pool elevation." Butler further explained that the term "normal pool elevation" [*295] referred to the elevation of the lake surface when it was full of water. Finally, Butler informed Jackson that Lake Thoreau's pool elevation was approximately four inches below normal at that time.

Lake Services conducted dredging operations in Lake Thoreau in July and [**3] August, 1987. It dredged in the West Cove area on two separate occasions, from July 13 to July 15, 1987, and from August 12 to August 20, 1987. Roger Lee White, a boat captain for Lake Services, was working in the West Cove area during these time periods. He was responsible for piloting the boat that propelled the barges between the dredging sites and the staging area.

Although White could not recall the exact date of an incident involving one of Lake Services' barges, he testified that it occurred about three days before Fairfax County employees began repair work on the sewer pipe lying across West Cove. The record shows that this repair work began on August 21, 1987. White testified that, at the time of the incident, he was piloting a boat that was pushing a loaded "hopper" barge out of West Cove.

A barge of this type is constructed of heavy gauge steel and has an open center compartment into which the dredged material is loaded. A loaded hopper barge has a depth below surface water level of as much as five to five and a half feet. This depth measurement is commonly referred to as its "draft."

White stated that he used his boat to push the hopper barge forward rapidly, in order [**4] to gain enough momentum to clear a sand bar located just outside the entrance to West Cove. During this maneuver, the barge struck a submerged object with sufficient force that the barge's movement was momentarily halted. The barge then broke free and White's boat pushed it out of West Cove. White reported the incident to Jackson, who instructed White "to keep [his] mouth shut." White later observed that the sewer pipe repair work was performed at the same location where the barge had struck the submerged object.

Jackson testified that the depth of the water to the bottom of Lake Thoreau, as well as the depth of any underwater objects, could be measured by "probing" the area. This activity involves the use of a rigid plastic pipe, 12 to 13 feet long, marked at one-foot intervals, which is lowered vertically into the water until it strikes either an object or the lake bed.

Jackson stated that he probed the lake bottom in the West Cove area on July 13, 1987, and found an old road that crossed the entire cove approximately four feet below water level. When asked whether he informed the other employees of this fact, Jackson replied, "Well, I don't recall the conversation."

[*296] Jackson also [**5] testified that one of his daily reports contained a notation that the barges crossing West Cove needed "to be lightened." Jackson stated that he sent his daily reports to Lake Services' office on a weekly basis. However, Jackson did not state whether the boat pilots or barge workers received any of the information contained in these reports. Further, the record is silent regarding whether, after July 13, 1987, Jackson or any other Lake Services employee probed the West Cove area to determine either the depth of the lake bed or the location of the County's sewer pipe.

In the days immediately after Lake Services' barge struck the submerged object, a very significant increase in the flow of sewage was registered "downstream" from the area where the sewer pipe crossed West Cove. This increase, discovered on August 21, 1987, was determined to be caused by a break in the pipe crossing West Cove. The break consisted of a jagged hole in the top half of the pipe.

[***602]

The evidence also showed that, in August 1987, the only watercraft operating on Lake Thoreau other than Lake Services' equipment were small recreational boats and canoes. All of these craft were much smaller than Lake Services' barges. [**6]

At the conclusion of the Board's evidence, counsel for Lake Services moved to strike the evidence on the ground that "expert testimony is required to determine the standard of care as to what is reasonable and what is not." The trial court granted Lake Services' motion, stating:

I'm compelled to agree with defense counsel. I don't think that a standard of care has been established. I don't think a jury can determine negligence here without some testimony showing what that standard is. Otherwise, in my view, they would be speculating completely.

The trial court then entered judgment in favor of Lake Services and this appeal followed.

The Board argues that the trial court erred in ruling that it failed to establish a prima facie case of negligence. The Board contends that expert testimony is not required here, because the issue, whether Lake Services took reasonable precautions to avoid a collision between its barge and a known underwater obstruction, is a matter as to which a jury is competent to form an intelligent opinion.

In response, Lake Services argues that dredging procedures are sufficiently technical in nature so as to require expert testimony to establish [*297] a standard [**7] of care. Based on the evidence presented, we disagree with Lake Services.

[1-2] Expert testimony is inadmissible regarding "matters of common knowledge" or subjects "such that [persons] of ordinary intelligence are capable of comprehending them, forming an intelligent opinion about them, and drawing their own conclusions therefrom." *Richmond Newspapers, Inc. v. Lipscomb*, 234 Va. 277, 296, 362 S.E.2d 32, 42 (1987), cert. denied, 486 U.S. 1023, 100 L. Ed. 2d 228, 108 S. Ct. 1997 (1988). Thus, when the question presented can be resolved by determining what precautions a reasonably prudent person would have taken under like circumstances, no expert testimony is required or permitted. See *Commercial Distribs., Inc. v. Blankenship*, 240 Va. 382, 390, 397 S.E.2d 840, 845 (1990).

[3] Further, expert testimony is admissible only when specialized skill and knowledge are required to evaluate the merits of a claim. See *id.* at 391, 397 S.E.2d at 845. Issues of this type generally arise in cases involving the practice of professions requiring advanced, specialized education, [**8] such as engineering, medicine, and law, or those involving trades that focus upon scientific matters, such as electricity and blasting, which a jury cannot understand without expert assistance. *Richmond Newspapers*, 234 Va. at 297, 362 S.E.2d at 43; see *Seaward Int'l, Inc. v. Price Waterhouse*, 239 Va. 585, 591-92, 391 S.E.2d 283, 287 (1990); *Nelson v. Commonwealth*, 235 Va. 228, 236, 368 S.E.2d 239, 243-44 (1988).

[4] Here, the issue framed by the Board's evidence is whether Lake Services used ordinary care in dredging West Cove on or about August 18, 1987, given its knowledge of the fluctuating water level and the presence of known underwater obstructions. This issue does not concern a scientific matter that the jury required expert assistance to understand. Instead, it involves matters of common knowledge and basic calculation, as evidenced by Jackson's testimony at trial:

Obviously, common sense would tell me that if . . . there is a four foot depth crossing the entire cove where this road lies, that we would have to lighten the barges. We could [**9] not have the barges drafting more than that to get across

We hold that a jury is capable of understanding this issue, and forming an intelligent opinion about it, without expert assistance. Therefore, we conclude that the trial court erred in striking the Board's evidence.

[*298] For these reasons, we will reverse the judgment of the trial court and remand the [***603] case for a new trial consistent with the principles expressed in this opinion. *

-----Footnotes-----

* Since Lake Services has not assigned cross-error here, we do not consider its argument that the Board failed to establish a prima facie case that the collision of Lake Services' barge with the sewer pipe was the proximate cause of any damages that the County incurred. Rule 5:18(b).

-----End Footnotes-----

Reversed and remanded.

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239 Va. 585, *; 1990 Va. LEXIS 72, **;
391 S.E.2d 283, ***; 6 VLR 2154

Seaward International, Inc., et al. v. Price Waterhouse

Record No. 891137

Supreme Court of Virginia

239 Va. 585; 1990 Va. LEXIS 72; 391 S.E.2d 283; 6 VLR 2154

April 20, 1990

PRIOR HISTORY: [**1]

Appeal from a judgment of the Circuit Court of Fairfax County. Hon. J. Howe Brown, Jr., judge presiding.

DISPOSITION: *Affirmed.*

CORE TERMS: fiscal year, deferral, comptroller, subsidiary, looked, audit, qualified expert, deviation, auditing, professional malpractice, professional standard, expert testimony, draw inferences, failed to meet, federal tax, accounting, incorrect, auditor, burden of producing, common knowledge, accounting firm, field work, prerequisites, wholly-owned, malpractice, conformity, conjecture, infer, federal law, export

♦ Show Headnotes

COUNSEL: *T. Jay Barrymore (Carolyn J. Harvey; Jones, Day, Reavis & Pogue, on briefs), for appellants.*

John J. Sabourin, Jr. (Charles F.B. McAleer, Jr.; Hazel, Thomas, Fiske, Beckhorn & Hanes, on brief), for appellee.

JUDGES: Carrico, C.J., Compton, Stephenson, Russell, Whiting, and Hassell, JJ., and Cochran, Retired Justice Justice Russell delivered the opinion of the Court.

OPINIONBY: RUSSELL

OPINION: [*586] [***284] This is an action for professional malpractice brought by corporate clients against an accounting firm. At a jury trial, the defendant moved to strike the plaintiffs' evidence [**5] at the close of the plaintiffs' case and renewed the motion at the close of all the evidence. On both occasions, the court took the motion under consideration. [*587] The case was submitted to the jury, which returned a verdict in favor of the plaintiffs. After verdict, the court sustained the motion to strike, set the verdict aside, and entered final judgment for the defendant. On appeal, the sole question is whether the evidence was sufficient to create a jury issue. We conclude from the record that the evidence was insufficient, and affirm.

[1] When a plaintiff's verdict has been set aside by the trial court, it is not entitled to the same weight as one approved by the trial court. On appellate review in these circumstances, however, the plaintiff is entitled to the benefit of all "substantial conflicts in

the evidence and all reasonable inferences that may be drawn from the evidence." Kelly v. Virginia Power, 238 Va. 32, 34-35, 381 S.E.2d 219, 220 (1989) (citations omitted). We will consider the evidence in that light.

Seaward International, Inc. (Seaward), is engaged in the sale of fenders, buoys, and other marine supplies, some [***6] of which are sold to foreign markets. In 1978, in order to encourage exports, federal legislation permitted the deferral of taxes on export sales made by certain qualifying wholly-owned subsidiaries of exporters, known as domestic international sales corporations (DISC). See Commonwealth v. General [***285] Electric Company, 236 Va. 54, 372 S.E.2d 599 (1988). In 1978, Seaward formed Seaward International Sales Corporation (SISC), a wholly-owned subsidiary, to take advantage of the tax-deferral provisions of the federal law. Like most DISCs, SISC was essentially a shell corporation, having no employees.

Price Waterhouse (PW), a partnership having over 1700 partners, is engaged in the practice of professional accountancy. Seaward engaged PW to audit the consolidated financial statements of both Seaward and SISC for Seaward's fiscal year ending July 31, 1983. n1 PW agreed to undertake the audit by a letter dated June 10, 1983, which contained the following terms:

Our examination will be conducted in accordance with generally accepted auditing standards, and accordingly will include such tests of the accounting records and such other [*588] auditing [***7] procedures as we consider necessary in the circumstances. This examination, however, will not include a detailed audit of transactions such as would normally be required to disclose defalcations or other irregularities.

-----Footnotes-----

n1 The fiscal year of SISC ended on August 31, 1983, one month later than that of the parent corporation. Seaward contends that the purpose of this difference was to provide a time during which SISC could be brought into conformity with federal law if the audit should show that it was falling short of the annual prerequisites necessary to qualify for tax deferral.

-----End Footnotes-----

PW points out that it was not engaged to prepare financial statements or tax returns for either Seaward or SISC; those functions were to be performed entirely by Seaward's employees. Further, PW was not engaged to provide tax advice. Seaward originally charged PW with negligence in that regard, but the trial court granted summary judgment in PW's favor on those allegations, and that ruling was not appealed.

The prerequisites for tax [***8] deferral were complex. If a DISC failed to meet those requirements in any fiscal year, it would lose its status as a "qualified DISC" for that year and would confer no tax benefits upon its parent corporation. One of the prerequisites for tax deferral was a requirement that 95% of a DISC's assets at the end of a fiscal year must be "qualified export assets" (the QEA test). Qualified export assets could consist of, among other things, foreign accounts receivable, "producer's loans" from the parent corporation, and "export-import obligations." Seaward contends that a primary purpose of the audit was to verify the work of its own employees, to insure that SISC would meet the QEA test by the end of its fiscal year, and to obtain timely warning if it was falling short of the DISC requirements so that the fault could be rectified. n2

-----Footnotes-----

n2 The witnesses agreed that action could be taken during some indeterminate period of time after the close of the fiscal year in order to bring a DISC into compliance, although they disagreed as to the amount of leeway available.

-----End Footnotes----- [**9]

PW began its work about June 20, 1983. Its employees engaged in field work at Seaward's offices, examined Seaward's physical inventory on July 31, and conducted "year-end" field work in September. On October 6, PW issued its audit report, declaring that the financial statements Seaward had prepared "present fairly the financial position of [Seaward and SISC] at July 31, 1983 . . . in conformity with generally accepted accounting principles consistently applied."

Seaward's comptroller, William B. Bryan, a certified public accountant, had reported to PW that SISC met the QEA test for the fiscal year, and it is undisputed that he furnished backup information to PW which substantiated his representation. PW's [*589] field work revealed no cause to dispute that assertion, and PW's report therefore reinforced the conclusion, reached by Seaward's employees, that SISC met the QEA test for the 1983 fiscal year. Accordingly, Seaward's comptroller prepared a tax return for SISC, which Seaward's president approved, signed, and filed in the spring of 1984, which represented that SISC met the QEA test as of August 31, 1983.

[***286] In April 1985, an agent of the Internal Revenue Service (IRS), [**10] reviewing SISC's tax returns, concluded that SISC had failed to meet the QEA test for the 1983 fiscal year. Judith McCune, who had replaced Mr. Bryan as Seaward's comptroller, went over such records as were available in 1985, and agreed with the IRS agent. Ultimately, Seaward negotiated a settlement with the IRS, evidenced by a "closing agreement" in June 1986, in which Seaward incurred a substantial additional tax liability. Seaward and SISC brought this action against PW, seeking to recover their losses on both tort and contract theories.

At trial, Seaward relied on the testimony of Chris Turner, a certified public accountant, who qualified as an expert witness. With regard to the applicable standard of care, she testified:

if you as a CPA are going to issue an opinion on financial statements, you have to have a basis for that opinion. You have to get evidence to support it. If you don't get that evidence, you can't issue an opinion. If you don't get the evidence and issue an opinion anyway, then you haven't met the standards.

The witness also testified that an accountant must ask for "management representations -- asking the company. But . . . management representations [**11] by themselves are not enough evidence to issue an opinion on financial statements."

Chris Turner was Seaward's only witness with respect to the standard of care and PW's alleged departure from that standard. She expressed the opinion that PW had been negligent in failing to investigate Seaward's records in sufficient depth to discover that Mr. Bryan's QEA calculations were incorrect. The ultimate issue in the case is whether records existed in 1983, which if PW had examined them, would have revealed that Mr. Bryan was in error.

Chris Turner, when asked what documents she had examined as a predicate for her opinion, said, "Well, there were a couple of [*590] copies of documents which were produced and copied and I looked at all of them. That included Price Waterhouse's work papers for various years." She also stated that she had reviewed the applicable professional standards and the tax rules governing DISCs, had read several depositions, and had listened to the testimony of other witnesses. Later, she testified that she had "looked at two cartons worth of documents" consisting of PW's "work papers." But throughout, her testimony fell short of identifying any particular documents [**12] or other evidence which would have revealed Mr. Bryan's error to PW in 1983. The jury was left to speculate whether any such evidence had in fact existed at that time.

The expert testified that PW had requested and received schedules relating to SISC's qualified export receipts, and that they had been verified. She concluded, however, that PW had not asked for "anything related to the assets test." She gave no factual basis for that conclusion, pointed to no work papers which supported it, and identified no evidence available in 1983 that would have been at variance with the information furnished by Seaward's management, which at all times assured PW that the QEA test was met. Indeed, she testified that the books of Seaward and SISC were in balance, and that they were supported by the underlying journal entries. With regard to PW's alleged shortcomings, she said,

"It's hard to tell from looking at the entries which were reported what actually was on that company's books [s]o if you'd made an investigation at the time, you might have been able to straighten some of this out. I can't tell from the record exactly what you could have done, but you certainly should have [**13] at least tried."

On cross-examination the expert was asked:

Q If you had a list of qualified export receivables, and if the comptroller used that to go through and make a computation of the qualified export assets as you approached the end of the year, and if the accounting firm auditing that particular company reviewed that list, would that be a sufficient evidentiary basis to [***287] find that the QEA test had been satisfied?

A Well, when you're doing all these ifs, if they had done this monitoring, if they had done this list, and if they had done [*591] these precalculations, did you come out with 95 percent or not?

Q I came out with 95 percent.

A Then it seems like that should have done it.

The cross-examiner's question was based upon PW's evidence as to the work it had actually done. Seaward made no effort to refute that evidence.

When granting PW's motion to strike, the trial court observed:

The alleged negligence of [PW] is that the auditors failed to look at the backup material, but merely accepted Mr. Bryan's representation that the DISC met the test [W]hat would [PW] have discovered if they had looked as Seaward says they should have looked? In an effort [**14] to answer that question, . . .

Seaward says in its brief that [PW] would have found that the DISC had insufficient qualified export assets to meet the test for its fiscal year ending in 1983 But [Seaward] failed to prove that.

I kept waiting for the evidence . . . and it's very, very direct and very simple . . . It would have taken half an hour to prove. Witness one gets on the stand: "I am familiar with the records of Seaward as of . . . whatever day you want to say is the day or dates on which [PW] should have looked and should have found . . . here they are."

Witness two, an expert, gets on the stand and says "I have reviewed this pile of records . . . and I can say . . . that a competent auditor . . . should have looked at these records and, if they had looked at these records, would have found that the DISC was not going to qualify and should have then told Seaward" Now that evidence was never produced. It just wasn't there.

[2] We think the trial court analyzed the evidence correctly. In an action to recover damages for professional malpractice, as in any other action at law, the plaintiff ordinarily has the burden of producing sufficient evidence of negligence, [**15] or breach of the terms [*592] of the defendant's contract, n3 to frame an issue of fact to be submitted to the jury. Unless a malpractice case turns upon matters within the common knowledge of laymen, see, e.g., Easterling v. Walton, 208 Va. 214, 218, 156 S.E.2d 787, 790-91 (1967) (foreign object left by surgeon in patient's body), or upon rules which have ripened into rules of law, see, e.g., Spainhour v. B. Aubrey Huffman & Assoc., 237 Va. 340, 346, 377 S.E.2d 615, 619 (1989) (surveyor's duty to follow rule that monuments prevail over acreage measurements), expert testimony is required to establish the appropriate professional standard, to establish a deviation from that standard, and to establish that such a deviation was the proximate cause of the claimed damages. Raines v. Lutz, 231 Va. 110, 113, 341 S.E.2d 194, 196 (1986).

-----Footnotes-----

n3 Here, the alleged negligence was the defendant's failure to follow "generally accepted auditing standards." Because those were the precise terms of the contract between the parties, the plaintiffs' burden was the same under both their tort and contract theories.

-----End Footnotes----- [**16]

[3-5] The definition of "generally accepted auditing standards," and the application of that definition to the facts of a particular case, are matters beyond the common knowledge of laymen. Accordingly, the plaintiffs in the present case had the burden, common to most malpractice actions, of producing expert testimony which would not only define the applicable standard, but also would adduce facts from which the jury could find that the defendant had deviated from it. Such a finding may not be left to speculation. A jury may draw inferences from facts in evidence, but it may not draw inferences from conjecture. Southern R. Co. v. Hall, 102 Va. 135, 139, 45 S.E. 867, 868 (1903).

[6] Here, the record is devoid of facts from which the jury could properly infer negligence. The plaintiffs failed to prove what, if any, records were available in 1983 which, if discovered and examined with the greatest professional skill and diligence, [***288] would have revealed to the auditors that the information provided by the plaintiffs' employees was incorrect. For all the jury could determine, no such records existed in 1983. n4 The evidence provided no facts from [**17] which the jury could infer an answer to that [*593] crucial question. Because the verdict was necessarily based upon conjecture, the court did not err in setting it aside.

-----Footnotes-----

n4 Agents of the IRS concluded that SISC had failed to meet the QEA test based upon records examined in 1985, not in 1983. Further, no witnesses were called to testify with respect to the IRS investigation. The report of the IRS was not admitted in evidence for the truth of its content, but merely to show the position the IRS had taken. Indeed, PW takes the position here, as it did below, that there is no probative evidence in this case that SISC in fact failed to meet the QEA test in 1983. Because of the view we take of the evidence, we do not reach that question.

-----End Footnotes-----

Accordingly, the judgment will be

Affirmed.

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232 Va. 177, *; 1986 Va. LEXIS 243, **;
349 S.E.2d 106, ***; 3 VLR 892

Cecil W. Pearson v. Canada Contracting Company, Inc., et al.; Jac Booden Orthopedic
Supply Company, Inc. v. Richard M. Jones

Record Nos. 830982, 840521

Supreme Court of Virginia

232 Va. 177; 1986 Va. LEXIS 243; 349 S.E.2d 106; 3 VLR 892

October 10, 1986

PRIOR HISTORY: [**1]

Appeal from a judgment of the Circuit Court of the City of Richmond. Hon. Willard I. Walker, judge presiding. Appeal from a judgment of the Circuit Court of the City of Norfolk. Hon. Alfred W. Whitehurst, judge presiding.

DISPOSITION: *Record No. 830982 -- Affirmed.*

Record No. 840521 -- Reversed and final judgment.

CORE TERMS: licensee, firemen, invitee, policemen, occupier, duty, policeman, fireman, reason to know, warn, owed, dangerous condition, demolition, privileged, platform, reasonable care, invitation, unsafe, duty owed, regulation, possessor, demurrers, safe, roof, trespasser, statutory duty, general rule, firefighters, firefighting, discover

Show Headnotes

COUNSEL: *Robert C. Metcalf (Parker, Pollard & Brown, P.C., on brief), for appellant (Record No. 830982).*

Frank B. Miller, III (Roger L. Williams; Sands, Anderson, Marks & Miller, on brief), for appellee Canada Contracting Company, Inc. (Record No. 830982).

James H. Flippen, III (Andrew C. Mitchell, Jr.; Breeden, MacMillan & Green; Cullen, Clark, Insley & Hanson, on briefs), for appellant (Record No. 840521).

William D. Breit (Breit, Rutter & Montagna, on brief), for appellee (Record No. 840521).

JUDGES: Cochran, J., delivered the opinion of the Court.

OPINIONBY: COCHRAN

OPINION: [*179] [***108] These two appeals present one dispositive question: what duty of care is owed by an owner or occupier of land to a fireman or policeman injured when he comes on the premises in the performance of his official duties?

I.

On June 25, 1979, about 9:30 p.m., Cecil W. Pearson, employed as a fireman by the City of Richmond, responded to a reported fire in a building on Brown's [***6] Island in Richmond. He was injured when he fell to the basement through a hole in the floor. In an amended

motion for judgment, Pearson sought to recover damages for his personal injuries from Ethyl Corporation, owner of the property, Canada Contracting Company, Inc. (Canada), the contractor engaged in demolition of the building, and C. S. Lewis, the subcontractor engaged in cutting and removing metal from the building. Pearson alleged in separate counts negligence, negligence *per se*, and nuisance. Over his objection, the trial court [*180] sustained certain defendants' demurrers and dismissed the negligence and negligence *per se* counts. On motion of Pearson, the nuisance count was also dismissed.

With leave of court, Pearson filed a second amended motion for judgment, alleging that Canada and Lewis had removed steel guard rails formerly protecting the hole through which he fell, that they had covered and obscured the hole by material inadequate to support his weight, that this condition was known to all three defendants and was a man-made trap or hidden danger, and that defendants knew or should have known he or other firefighters had been and would probably be [***7] coming on the premises at night to fight fires. Pearson alleged the defendants breached a duty to warn him of the hidden danger and thereby proximately caused his injuries. Defendants filed separate demurrers and grounds of defense. Thereafter, Ethyl Corporation was dismissed as a party defendant upon Pearson's execution of a covenant not to sue.

The trial court fashioned a general rule, patterned after the duty owed to licensees, of limited liability to persons entering land under a privilege, such as policemen and firemen. n1 Cf. Restatement (Second) of Torts §§ 342, 345 (1965). Creating an exception to this rule, however, the court further restricted the duty owed in cases involving premises on which construction or demolition work is under way by requiring the possessor of property to warn of a dangerous condition only if he knows the privileged person is on the premises. n2 Applying [***109] this exception, the court sustained the defendants' demurrers and dismissed the action.

-----Footnotes-----

n1 The general rule enunciated by the trial court stated:

A possessor of premises is subject to liability for bodily harm caused by a natural or artificial condition thereon to others who are privileged to enter upon the premises for a public purpose without the consent of the possessor, if the possessor

(a) knows that they are upon the premises or are likely to enter upon it in the exercise of their privilege, and

(b) knows of the condition and should realize it involves unreasonable risk to them, and

(c) should have expected they would not discover or realize the risk, and

(d) fails to exercise reasonable care

(i) to make the condition reasonably safe or

(ii) to warn them of the condition and risk involved therein. [***8]

n2 The exception stated:

However, if the bodily harm results from conditions on the premises involving construction or demolition activities, and if persons privileged to enter upon the premises for a public purpose know, or in the exercise of reasonable care should know, that such activities are being conducted thereon, then the possessor is not liable, unless the possessor has:

- (i) actual notice of the premises condition which caused the bodily injury, and
- (ii) actual knowledge of the presence on the premises of persons so privileged, and
- (iii) having obtained such notice and knowledge as set forth in (i) and (ii) above, fails to use reasonable care to warn the persons so privileged.

-----End Footnotes-----

[*181] II.

Richard M. Jones, a police officer employed by the City of Norfolk, brought an action against Jac Booden Orthopedic Supply Company, Inc. (Booden), for injuries sustained in the performance of his duties on the Booden property. Jones alleged that Booden was negligent in the operation of its premises. A jury awarded Jones \$ 3,000 in damages and the trial court entered judgment [**9] on the verdict.

There was no material conflict in the evidence. Jones and two other police officers responded to a report of a burglary at a church behind the Booden premises about 5:15 p.m. on August 9, 1982. Finding the church had been broken into, the officers searched the surrounding area. Jones ascended a stairway at the rear of the Booden property, crossed the wooden platform at the top of the stairs, and went on the Booden roof to look for a suspect or evidence of the crime. When he returned to the platform, he informed an officer below that the roof was clear. As Jones stood on the platform, it collapsed and he was injured in falling.

The stairway, set back about eight feet from the sidewalk, did not look like a front entrance and was "obviously a rear entrance to the roof area." The stairs, made of steel, formerly had led to a second floor apartment, but this had not been occupied since 1965. At the time Jones fell, the stairs had no apparent purpose. Previously, they had been roped off to bar intruders, but when Jones used them they contained no rope, barricade, or warning signs.

Police had once apprehended a criminal suspect on the Booden roof, and Jones and [**10] other officers had been on the roof in the past while making routine police investigations. No one at Booden was aware of the prior arrest, however, or knew that police officers from time to time used the stairs to go to the roof.

Prior to Jones's fall, no defects in the wooden platform had been observed by Jones, by other officers accompanying him, or by Booden employees who had been on the platform. There was evidence, however, that wood from the platform which the officer examined after the accident was rotten.

[*182] The trial court, after denying Booden's motion to strike the evidence, granted an instruction on the duty of care owed to Jones as a licensee. n3 It refused Booden's proffered instruction identical to the general rule announced by the trial court in the Pearson case.

See *supra* note 1. The court also refused an alternative instruction offered by Booden on the duty owed to Jones as a bare licensee. n4

-----Footnotes-----

n3 Instruction 7 provided:

When the defendant by the use of ordinary care:

1. knows or should know of an unsafe condition on his premises; and
2. should realize that it involves an unreasonable risk of harm to a licensee; and
3. should expect that a licensee will not discover or realize the unsafe condition; and
4. a licensee does not know or have reason to know of the unsafe condition and the risk involved; then the defendant [has] a duty to use ordinary care either to make the condition reasonably safe or a duty to warn a licensee of the unsafe condition.

If the defendant failed to perform any one or more of these duties, then he was negligent. [**11]

n4 Refused instruction 11A provided:

The Court instructs the jury that the plaintiff was a bare licensee on the defendant's premises, and the defendant owed him no duty to have his premises in a safe condition. The burden is on the plaintiff to prove by a preponderance of the evidence that the defendant knew, or in the exercise of ordinary care should have known, that the plaintiff was in danger and that thereafter the defendant failed to exercise ordinary care to protect him from injury

-----End Footnotes-----

III.

[1] We have held that firemen may not recover for another's negligence in setting a [***110] fire, concluding that firemen assume the risks of the usual hazards involved in firefighting, regardless of the origin of the fire. *C & O Railway v. Crouch*, 208 Va. 602, 608-09, 159 S.E.2d 650, 655 (1968). We have not been previously called upon, however, to determine the extent of an occupier's liability to firemen or policemen for injuries resulting from risks beyond those inherently involved in firefighting or police work.

Cases addressing this issue have reached varied [**12] results, in large part because of the difficulty in placing firemen and policemen in any of the traditional categories of persons entering land of another -- trespassers, licensees, or invitees. A trespasser is one who unlawfully enters the land of another. See *Richmond Bridge Corp. v. Priddy*, 167 Va. 114, 118, 187 S.E. 518, 519 (1936). A licensee is one who enters for his own convenience or

benefit with the knowledge and consent, express or implied, of the owner or [*183] occupier. See, e.g., *Bradshaw v. Minter*, 206 Va. 450, 452, 143 S.E.2d 827, 828-29 (1965) (social guest is licensee, not invitee, regardless of existence of express invitation); *Ingle v. Clinchfield R. Co.*, 169 Va. 131, 137, 192 S.E. 782, 784 (1937) (owner's silent acquiescence in repeated use made trespassers licensees); *Ches. & O.R. Co. v. Corbin*, 110 Va. 700, 702-03, 67 S.E. 179, 180 (1910) (known use of railbed by general public with tacit consent of railroad company made users licensees). And an invitee is one who enters pursuant to the express or implied invitation of the owner or occupier other than for a social purpose or for his own convenience. See, e.g., *Colonial [*13] Nat. Gas v. Sayers*, 222 Va. 781, 784, 284 S.E.2d 599, 601 (1981) (tenant using common area was invitee); *City of Richmond v. Grizzard*, 205 Va. 298, 302, 136 S.E.2d 827, 830 (1964) (implied invitation existed where premises thrown open to public and visitor entered for purpose for which premises open); *Williamsburg Shop v. Weeks*, 201 Va. 244, 246, 110 S.E.2d 189, 191 (1959) (customer in department store was invitee).

Policemen and firemen, however, do not fit into any of these categories; they enter premises as of right, under a privilege based on a public purpose. They clearly are not trespassers. Nor can they be classified as licensees or invitees, who enter with consent or invitation of the occupant, as consent and invitation are irrelevant to a policeman's or a fireman's privileged entry.

[2] In *Crouch*, we held the fireman to be "in a class of his own," or *sui generis*, "because of the public nature of his rights and duties." 208 Va. at 608, 159 S.E.2d at 655. We reaffirm this classification and we hold that it includes policemen as well as firemen. Firemen and policemen may, under certain circumstances in the course of their duties, enter property [*14] as licensees or invitees. In the present cases, however, the fireman and the policeman occupied neither status.

IV.

Some jurisdictions have abolished the distinction between licensees and invitees and established reasonable care as the standard owed by occupiers to firemen and policemen. See, e.g., *Bartholomew v. Klingler Co.*, 53 Cal. App. 3d 975, 980-81, 126 Cal. Rptr. 191, 193-94 (1975) (policeman injured in fall through ceiling during investigation of possible burglary); *Mounsey v. Ellard*, 363 Mass. 693, 707-08, 297 N.E.2d 43, 51-52 (1973) (abolishing licensee-invitee [*184] distinction and creating common duty of reasonable care to all lawful visitors in case involving injury to policeman who fell on accumulation of ice at defendant's residence); *Armstrong v. Mailand*, 284 N.W.2d 343, 350 (Minn. 1979) (landowner owed fireman, killed by explosion of gas storage tank, duty of reasonable care, except where, as here, fireman primarily assumed a risk apparent as part of firefighting). Other courts have reached the same result by labeling policemen and firemen as invitees in order to impose on occupiers an affirmative duty of reasonable care in maintaining [*15] the premises. See, e.g., *Dini v. Naiditch*, 20 Ill. 2d 406, 415-16, 170 N.E.2d 881, 885-86 (1960) (classification of firemen as anything but invitees deemed [***111] illogical); *Cameron v. Abatiell*, 127 Vt. 111, 118, 241 A.2d 310, 315 (1968) (policeman, injured on stairway during routine check of rear door, was a business visitor or invitee with right to assume premises were reasonably safe for the purpose).

Many courts, however, have held firemen and policemen to be either licensees or *sui generis* and entitled to no greater care than the limited duty owed to licensees. See, e.g., *Roberts v. Rosenblatt*, 146 Conn. 110, 113, 148 A.2d 142, 144 (1959) (status of city fireman was akin to that of licensee); *Nared v. School Dist. of Omaha*, 191 Neb. 376, 380, 215 N.W.2d 115, 118 (1974) (following Restatement (Second) of Torts § 345) (policeman, injured in fall caused by condition on part of premises not open to public, was licensee); *Krauth v. Geller*, 31 N.J. 270, 273-74, 157 A.2d 129, 130-33 (1960) (*sui generis* fireman

who fell from unprotected balcony of house under construction could not recover for acts of defendant that were not wanton); **[**16] Scheurer v. Trustees of Open Bible Church**, 175 Ohio St. 163, 169, 192 N.E.2d 38, 43 (1963) (duty owed to firemen and policemen is that owed to licensees); **Cook v. Demetrakas**, 108 R.I. 397, 401-03, 275 A.2d 919, 922-23 (1971) (policeman, injured when he pursued fugitive through area of construction and fell over embankment caused by excavation at the site, was licensee).

[3] We are persuaded by two fundamental policies to impose a rule of limited liability in cases such as these. First, injuries to firemen and policemen are compensable through workers' compensation. Code §§ 65.1-4, -4.1. The burden of their financial loss, therefore, is properly borne by the public rather than by individual **[*185]** property owners. ⁿ⁵ Second, and more important, firemen and policemen, unlike invitees or licensees, enter at unforeseeable times and go upon unusual parts of the premises, including areas not open to the public. Except for scheduled inspections, their presence at any particular time cannot be reasonably anticipated. In such situations, it is not reasonable to require the level of care that is owed to invitees or, without some modification, the level of care owed **[**17]** to licensees. ⁿ⁶

-----Footnotes-----

ⁿ⁵ In addition to coverage of policemen and firemen under the workers' compensation laws, the Code provides means for payment by municipalities of additional disability and death benefits. See §§ 15.1-136.1 to -136.7 (payments to beneficiaries of deceased law enforcement officers and firemen); §§ 27-39 to -50 (relief for firefighters and their dependents); §§ 51-115 to -127 (disability and death benefits payable as part of policemen's pensions).

ⁿ⁶ An occupier is liable to a licensee for injuries caused by a condition of the premises if he knows or should know of the condition, should realize the condition carries an unreasonable risk of harm to the licensee, should expect the licensee will not discover the danger, and fails to use reasonable care to make the condition safe or warn of the danger, provided the licensee does not know or have reason to know of the condition and risk. **Busch v. Gaglio**, 207 Va. 343, 348-49, 150 S.E.2d 110, 114 (1966) (adopting Restatement (Second) of Torts § 342). An occupier is liable to its invitee injured "as the result of an unsafe condition (one which was not open and obvious to the invitee) if the invitor knew it existed, or by the exercise of reasonable care should have discovered its existence, and failed to remedy the condition or otherwise to protect the invitee against the danger." **Appalachian Power Co. v. Sanders**, 232 Va. 189, 194, 349 S.E.2d 101, 105 (1986) (this day decided).

-----End Footnotes----- **[**18]**

[4-5] We hold that, where an owner or occupier knows or has reason to know of a dangerous condition and knows or has reason to know of the presence on the premises of an officially privileged person whom the owner or the occupier knows or has reason to know is unaware of the danger, he owes a duty to use reasonable care to make the condition safe or to warn that person of the danger. *Cf.* Restatement (Second) of Torts §§ 342, 345. Further, an owner or occupier may be liable to firemen or policemen injured as a result of a violation of a statutory duty created for the express benefit of such persons. See **Scheurer**, 175 Ohio St. at 168, 192 N.E.2d at 43.

[6] We expressly limit this holding to cases involving injuries occurring as the result of conditions on areas of the premises not open to the public, reserving decision on the issue whether a greater degree of care is owed to firemen and policemen injured **[***112]** on public areas, where the occupier may owe a duty to invitees to keep the premises safe. See **Beedenbender v. Midtown Properties**, **[*186]** 4 A.D.2d 276, 281-82, 164 N.Y.S.2d 276,

281 (1957); Restatement (Second) of Torts § 345(2).

V.

Pearson [**19] challenges the trial court's action in sustaining demurrers to the negligence and negligence *per se* counts of his pleadings.

[7] Pearson in essence alleged that defendants were negligent in their failure to warn him of a dangerous condition they had created. Under the rule applicable to licensees, an occupier is liable if he fails to use reasonable care to make safe a condition of which he knows or should know or to warn of the danger. *Busch v. Gaglio*, 207 Va. 343, 348-49, 150 S.E.2d 110, 114 (1966). Under the rule which we have enunciated with respect to firemen and policemen, the same duty arises, but only where the occupier knows or should know of their presence on the premises. Pearson did not allege that defendants were present or knew of Pearson's presence on the site or that they had an opportunity to warn him of the dangerous condition. The allegation that defendants knew or should have known that Pearson or other firemen had been and would probably be coming on the premises to fight fires at night is insufficient. There is no allegation that the firemen came on a routine schedule or at any time other than in response to fire alarms. Thus, there is no [**20] allegation that defendants knew or had reason to know of Pearson's presence on the premises at a time when the dangerous condition existed.

[8] Pearson alleged that defendants violated a regulation, 29 C.F.R. § 1926.850 (1978), promulgated under the Occupational Safety and Health Act, and that this violation constituted negligence *per se*. Pearson, however, was not an employee within the class of persons for whose protection the regulation was enacted. Violation of the regulation, therefore, could not benefit Pearson on a negligence *per se* theory.

[9] Pearson further alleged that defendants violated provisions of the Virginia Uniform Statewide Building Code and that this violation constituted negligence *per se*. Specifically, Pearson alleged violation of former § 115.3 of the Building Code, applicable at the time of his accident, which provided:

Lot Regulation: Whenever a structure is demolished or removed, the premises shall be maintained free from all unsafe [*187] or hazardous conditions by the proper regulation of the lot, restoration of established grades and the erection of necessary retaining wall and fences in accordance with the provisions [**21] of Article 13.

The provisions of former Article 13, however, dealt with treatment of the lot after demolition of a building is complete. See §§ 1308.1, 1309.1. Reading these provisions together, we find that § 115.3 was not applicable to this demolition work in progress. Thus, the trial court properly sustained defendants' demurrers to Pearson's negligence *per se* count. Accordingly, we hold that the court did not err in sustaining the demurrers and dismissing Pearson's action.

VI.

Booden challenges the trial court's action in denying its motion to strike the evidence, made at the conclusion of Jones's evidence and renewed after all the evidence had been presented, and in granting and refusing certain jury instructions. In moving to strike the evidence, Booden contended that Jones was required to prove that Booden knew he was on the premises or was likely to enter, that Booden knew of the condition, should have known

it involved unreasonable risk to Jones, and should have expected Jones would not discover or realize the risk, and that Booden failed to exercise reasonable care to make the condition safe or warn Jones. These principles were subsequently incorporated [**22] in an instruction proffered by Booden and refused by the trial court.

[10] [***113] Booden was not alleged to have violated any statutory duty. The sole basis of recovery was Booden's failure to discover the hazardous condition of the wooden platform and make the condition safe or warn Jones of the danger. The evidence showed that Booden had no knowledge or reason to know of the condition of the platform and no knowledge that Jones was on the premises or even that he was likely to come on the premises in the performance of his duties. Unlike *Cameron v. Abatiell*, 127 Vt. 111, 241 A.2d 310 (1968), relied upon by Jones, there was no evidence that Booden knew of any regular or routine police check of its property. Accordingly, Booden did not violate any duty owing to Jones.

[11] Jones contended that he should be accorded the status of an invitee because the Booden property was the site of a business enterprise to which the public was invited. Jones was not on that [*188] part of the premises open to the public and did not go on the property during business hours; there is no evidence that he entered on invitation, either express or implied.

Accordingly, we [**23] hold that the trial court erred in denying Booden's motion to strike the evidence and to enter summary judgment in favor of Booden. We will reverse the judgment in favor of Jones and enter judgment here in favor of Booden.

Record No. 830982 -- Affirmed.

Record No. 840521 -- Reversed and final judgment.

Service: LEXSEE®

Citation: 232 Va. 177

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37 Va. Cir. 199, *; 1995 Va. Cir. LEXIS 1068, **

Melvin R. Marslender v. Virginia Elec. and Power Co.

Case No. (Law) L90-2563

CIRCUIT COURT OF THE CITY OF NORFOLK, VIRGINIA

37 Va. Cir. 199; 1995 Va. Cir. LEXIS 1068

July 31, 1995, Decided

CORE TERMS: regulation, duty, wires, introduce, crane, legal duty, foreseeability, inadmissible, monitor, inspection, height, assumption of risk, motion in limine, exclude evidence, electric power, duty of care, underground, admissible, insulating, electrical, insulate, fuse, tap, convincing, insulated, occupational safety, contributory negligence, expert testimony, own safety, power line

Show Headnotes

JUDGES:

JUDGE John C. Morrison, Jr.

OPINIONBY: MORRISON

OPINION: [*199] This matter is pending on a motion by Melvin R. Marslender to exclude regulations issued under the Occupational Safety and Health Act ("OSHA") from evidence and a motion in limine by Virginia Electric and Power Company ("VEPCO") to exclude various testimony and evidence.

The relevant facts are as follows. On April 28, 1989, Plaintiff and several co-workers were using a crane to move steel beams on the property of their employer, Globe Iron Construction Company. Plaintiff was injured when the crane and an electric power line owned by VEPCO came into contact. Electricity from the power line travelled through the crane to a metal beam that Plaintiff was guiding with his hands. The accident resulted [**2] in the amputation of Plaintiff's arms and legs.

Plaintiff seeks to bar Defendant from introducing OSHA regulations as evidence of foreseeability, contributory negligence, assumption of risk, or negligence per se. Defendant is before the court on a motion in limine to exclude evidence: (1) that VEPCO had any legal duty to insulate its lines with wrap material, bury the lines underground, or segregate the lines with a tap fuse; (2) that VEPCO had any legal duty to monitor the activities of Globe Iron after the 1988 accident; and (3) of any incidents involving [*200] VEPCO lines, except the April 21, 1988, and April 28, 1989, accidents involving the crane. n1 Each motion will be considered in turn below.

-----Footnotes-----

n1 Defendant's motion in limine also requests that VEPCO's internal rules, including its Policy and Procedures Manual and any other VEPCO manuals, be excluded from evidence at trial. The Court need not address this issue because Plaintiff now concedes that such

evidence is inadmissible.

-----End Footnotes-----

I. Plaintiff contends that OSHA regulations, adopted in Virginia, governing operations near electric power lines should be excluded from jury consideration. Under 29 C.F.R. § 1910.180(j)(3), electrical [**3] power line owners must be notified before the commencement of operations near such lines. Similarly, 29 C.F.R. § 1910.180(j)(1)(i) prohibits the use of cranes within 10 feet of energized power lines. Plaintiff argues that these regulations are inadmissible as evidence on the issues of foreseeability, contributory negligence, assumption of risk, and negligence per se.

Plaintiff relies primarily on 29 U.S.C. § 653(b)(4), which provides:

Nothing in this Act shall be construed to supersede or in any manner effect any workman's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases or death or employees arising out of, or in the course of, employment. n2

-----Footnotes-----

n2 Plaintiff also relies on similar language contained in Virginia's Overhead High Voltage Safety Act. See Va. Code Ann. § 59.1-414 (Michie 1950). However, that act became effective after Plaintiff's cause of action arose and is, therefore, inapplicable in this case.

-----End Footnotes-----

Plaintiff maintains that the introduction of OSHA regulations for any of the evidentiary purposes described [**4] above would affect the common law rights of Plaintiff in violation of § 653(b)(4).

The extent to which OSHA regulations may be relied upon in negligence actions has not been resolved in Virginia. However, other jurisdictions have considered this issue. Courts unanimously agree that § 653(b)(4), relied on by Plaintiff, stands only for the proposition that OSHA regulations do not create a private right of action. See, e.g., *Pratico v. Portland Terminal Co.*, 783 F.2d 255, 265-67 (1st Cir. 1985); *Rabon v. Automatic Fasteners, Inc.*, 672 F.2d 1231, 1238 (5th Cir. 1982); *Byrd v. Fieldcrest Mills, Inc.*, 496 F.2d 1323 (4th Cir. 1974). Accordingly, a number of courts have concluded that OSHA regulations are relevant in determining the standard of care in negligence actions. See, e.g., *Pratico*, 783 F.2d at 267; [**201] *Rabon v. Automatic Fasteners, Inc.*, 672 F.2d 1231, 1238 (5th Cir. 1982). Although these cases are not binding precedent in this Court, their reasoning is convincing. Therefore, the Court will allow Defendant to introduce OSHA regulations as evidence of the duty of care that Plaintiff was required to exercise for his own safety.

It should be noted that most of the cases cited by Defendant [**5] have involved actions in which employees sought to introduce OSHA regulations as evidence of the duty of care owed by an employer. The fact that in this case OSHA regulations are being introduced against an employee by a person other than his employer is of no consequence. Under both federal and state law, "each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are

applicable to his own actions and conduct." 29 U.S.C. § 654(b); see also Va. Code § 40.1-51.2(a) (Michie 1950).

Courts have been more reluctant to conclude that a violation of OSHA regulations is negligence per se. See generally Annotation, Violation of OSHA Regulation As Affecting Tort Liability, 79 A.L.R.3d § 4 (1977 & Supp. 1994) (personal injury lawyers more successful in getting OSHA violations before the jury as evidence of negligence than as negligence per se); 61 Am. Jur. 2d, Plant and Job Safety, § 28 (1981 & Supp. 1994) (courts split as to whether violations of OSHA regulations are negligence per se). The Virginia General Assembly has enacted provisions that track the OSHA regulations that Defendant seeks to introduce [**6] and has explicitly mandated that such provisions are inadmissible as negligence per se. See Va. Code Ann. §§ 59.1-406 through 59.1-414 (Michie 1950). Since the Virginia enactments became effective several months after Plaintiff's cause of action accrued, they are not conclusive. Nevertheless, given the past uncertainty on the issue, this Court holds that Defendant may not introduce Plaintiff's alleged violations of OSHA regulations as negligence per se.

Lastly, Defendant provides no convincing authority that OSHA regulations are admissible as evidence of foreseeability and assumption of risk. Therefore, the Court finds that the regulations are inadmissible on those issues.

II. Defendant first argues that Plaintiff should not be allowed to introduce at trial expert testimony that Defendant could have eliminated or reduced the danger of the overhead electrical wires by burying them, insulating them, or by using a tap fuse. VEPCO maintains that it had no legal duty to use any of these alternative safety measures.

[*202] The Virginia Supreme Court has stated that "the duty of insulating, in the sense of covering the wires, is not absolute, and if a company maintains its wires at such height [**7] that it is not reasonable to anticipate contact with them, further insulating is not required." Virginia Elec. & Power Co. v. McCleese, 206 Va. 127, 131, 141 S.E.2d 755 (quoting Trimyer v. Norfolk Tallow Co., 192 Va. 776, 783-84, 66 S.E.2d 441). However, "At places where others have a right and reasonably may be expected to go for work, business, or pleasure, there is a duty to keep wires carrying a dangerous voltage properly insulated . . ." Id.; See also, Andrews v. Appalachian Electrical Power Co., 192 Va. 150, 63 S.E.2d 750 (1951) (no duty to insulate wires placed at a proper height to guard against injuries occasioned by their falling).

The above authority makes clear that VEPCO's decision to place electrical wires above the ground was a viable safety option. Defendant was under no duty to place such lines underground. Accordingly, testimony relating to that issue is excluded. Additionally, there is no dispute that VEPCO's wires were not insulated. Therefore, under McCleese, if VEPCO's wires were at a height at which VEPCO could have reasonably anticipated contact with them, then VEPCO breached its duty of care. Conversely, if the wires were high enough so that contact was not reasonably foreseeable, VEPCO did not breach [**8] its duty, notwithstanding the failure to insulate. Accordingly, any cost/safety analysis by Defendant regarding insulation is irrelevant and, therefore, will not be admitted at trial.

With respect to tap fuses, no authority has been offered as to whether a legal duty to use such devices exists or does not exist. Thus, the Court does not at this time exclude testimony or evidence regarding the propriety of using such devices.

III. Next, Defendant asks the Court to exclude expert testimony that it had a duty to monitor Globe Iron's activities to determine if Globe Iron was continuing to use a crane in its yard.

"It is well settled in this jurisdiction and elsewhere that those who engage in the production and distribution of electricity must exercise a high degree of care." Trimyer, 192 Va. at 783. This degree of care "includes the duty of making reasonable and proper inspection of their wires and appliances." Andrews, 192 Va. at 156. "How often inspection should be made depends upon the circumstances of the particular case and is ordinarily a matter for the jury." Id. Under no circumstances, however, are electric companies the insurers against accidents. See id. Nor are they under [**9] a duty to continuously monitor the land underneath their power lines to ensure that equipment will not be used in dangerous proximity. See, [*203] e.g., Dunnaway v. Duquesne Light Co., 423 F.2d 66, 69 (3d Cir. 1970); Guglielmo v. Scotti & Sons, Inc., 58 F.R.D. 413 (W.D. Pa. 1973). Accordingly, any testimony or evidence pertaining to the reasonableness of VEPCO's inspection and maintenance of its power lines at the Globe Iron plant is admissible and will not be excluded at trial. However, Plaintiff will not be allowed to introduce testimony regarding a duty by VEPCO to continually monitor Globe Iron's activities.

IV. Defendant's last contention is that the Court should exclude evidence of incidents involving VEPCO power lines other than those that occurred on April 21, 1988, and April 28, 1989. The Court does not have a sufficient amount of information to exclude evidence of all other incidents that occurred. Thus, the admissibility of such evidence will necessarily be dealt with by the Court at trial.

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259 Va. 171, *; 523 S.E.2d 823, **;
2000 Va. LEXIS 18, ***

JOHN D. HALTERMAN, JR. v. RADISSON HOTEL CORPORATION, ET AL.

Record No. 990311

SUPREME COURT OF VIRGINIA

259 Va. 171; 523 S.E.2d 823; 2000 Va. LEXIS 18

January 14, 2000, Decided

PRIOR HISTORY: [***1] FROM THE CIRCUIT COURT OF THE CITY OF ALEXANDRIA. John E. Kloch, Judge.

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff employee appealed the judgment of the Circuit Court of the City of Alexandria (Virginia), ruling for defendant employer in plaintiff's claim for violation of 29 C.F.R. § 1910.1200(e), and negligence for injuries received while working at defendant's site.

OVERVIEW: Plaintiff employee brought an action against defendant employer for injuries sustained while working at defendant's site, alleging that defendant violated 29 C.F.R. § 1910.1200(e) in failing to inform him of the hazards posed by chemicals contained at defendant's site, and a negligence claim. The trial court granted defendant's motion to strike the 29 C.F.R. § 1910.1200(e) negligence per se claim, and the jury returned a verdict for defendant on the negligence claim. Plaintiff appealed. The court affirmed because the record contained no evidence that defendant failed to provide any information to plaintiff required under 29 C.F.R. § 1910.1200(e) claim, and thus plaintiff's claims for negligence and negligence per se were properly dismissed.

OUTCOME: Dismissal of plaintiff employee's claims affirmed, because the record contained no evidence that defendant employer failed to provide any required information to plaintiff, and thus plaintiff's claims for negligence and negligence per se were properly dismissed.

CORE TERMS: regulation, workplace, chemical, laundry room, hotel, hazard, hazardous, exposed, sheet, claim of negligence, multi-employer, machine, cracks, negligence claim, display, welding, door, acid, hazardous chemical, data sheet, hydrofluosilicic, pneumonitis, foreseeable, emergency, on-site, washing, laundry, repair, inform, lung

CORE CONCEPTS - Hide Concepts

Labor & Employment Law : Occupational Safety & Health
See 29 C.F.R. § 1910.1200(e).

Torts : Negligence

The requirements for proving a claim of negligence per se are well established. First, a plaintiff must establish that the defendant violated a statute that was enacted for public safety. Second, the plaintiff must prove that he belongs to the class of persons for whose benefit the statute was enacted, and that the harm that occurred was of the type against which the statute was designed to protect. Third, the plaintiff must prove that the statutory violation was a proximate cause of his injury.

Labor & Employment Law : Occupational Safety & Health

The provisions of 29 C.F.R. § 1910.1200(e) apply to any chemical which is known to be present in the workplace in such a manner that employees may be exposed under normal conditions of use or in a foreseeable emergency. 29 C.F.R. § 1910.1200(b)(2).

Labor & Employment Law : Occupational Safety & Health : Compliance & Defenses

29 C.F.R. § 1910.1200(e) requires an employer, among other things, to provide the required information at its workplace to its own employees. 29 C.F.R. § 1910.1200(e) (1).

Labor & Employment Law : Occupational Safety & Health : Compliance & Defenses

Under the multi-employer workplaces provision of 29 C.F.R. § 1910.1200(e), an employer also is responsible for providing information about its hazard communications program to the employer(s) of other employees working at the same work site. 29 C.F.R. § 1910.1200(e)(2). The required information includes, among other things, the methods the employer will use to provide the other employer(s) on-site access to material safety data sheets for each hazardous chemical the other employer(s)' employees may be exposed to while working. 29 C.F.R. § 1910.1200(e)(2)(i).

COUNSEL: Edward S. Rosenthal (Rosenthal, Rich & Costle, on briefs), for appellant).

Joseph Dyer (Siciliano, Ellis, Dyer & Boccarosse, on brief) for appellees.

JUDGES: OPINION BY JUSTICE BARBARA MILANO KEENAN.

OPINIONBY: BARBARA MILANO KEENAN

OPINION:

[*173] [***823] Present: All the Justices

OPINION BY JUSTICE BARBARA MILANO KEENAN

In this appeal, we consider whether the trial court erred in striking the plaintiff's evidence on a claim of negligence per se.

John D. Halterman, Jr., filed an amended motion for judgment against Radisson Hotel Corporation, Mark Center Hotel Limited Partnership, and Radisson Mark Plaza Joint Venture (collectively, Radisson), the owners and operators of the Radisson Plaza Hotel at Mark Center (the hotel) in Alexandria. He alleged that he was injured when he was exposed to hazardous chemicals while repairing washing machines in the hotel's laundry room.

In Count I, Halterman alleged that Radisson was guilty of negligence per se because it violated a federal regulation promulgated under the Occupational Safety and Health Act (OSHA), 29 U.S.C. §§ 651 through -678. The regulation, 29 C.F.R. § 1910.1200(e), known as the Hazard Communication Standard (HCS regulation), requires, among other things, that employers [***2] implement a written hazard communication program to provide

specified information to certain employees concerning hazardous chemicals used at the employer's work sites. This regulation provides, in material part:

(e) *Written hazard communication program.* (1) Employers shall develop, implement, and maintain at each workplace, a written hazard communication program which . . . includes the following:

[**824] (i) A list of the hazardous chemicals known to be present using an identity that is referenced on the appropriate material safety data sheet (the list may be compiled for the workplace as a whole or for individual work areas); . . .

(ii) The methods the employer will use to inform employees of the hazards of non-routine tasks . . .

(2) *Multi-employer workplaces.* Employers who produce, use, or store hazardous chemicals at a workplace in such a way that the employees of other employer(s) may be exposed (for example, employees of a construction contractor working on-site) shall additionally ensure that the hazard communications [*174] programs developed and implemented under this paragraph (e) include the following:

(i) The methods the employer will use to provide the other employer(s) [***3] on-site access to material safety data sheets for each hazardous chemical the other employer(s)' employees may be exposed to while working;

(ii) The methods the employer will use to inform the other employer(s) of any precautionary measures that need to be taken to protect employees during the workplace's normal operating conditions and in foreseeable emergencies; and

(iii) The methods the employer will use to inform the other employer(s) of the labeling system used in the workplace.

(3) The employer may rely on an existing hazard communication program to comply with these requirements, provided that it meets the criteria established in this paragraph (e).

Halterman asserted that Radisson violated the HCS regulation "by failing in all respects to provide information to him about any chemicals known to be present in the laundry room in such a manner that he may be exposed to them while doing the repair work or in a foreseeable emergency."

In Count II, Halterman asserted a simple negligence claim. He alleged that Radisson failed to maintain the hotel laundry room in a reasonably safe condition and failed to warn him of the hazards posed by chemicals contained in laundry [***4] products used in the laundry room.

The following evidence was presented in a jury trial. In March 1995, John Hieatt, the hotel's chief engineer, contacted H & H Machine Company (H & H) to arrange for the repair of a washing machine in the hotel's laundry room that had developed cracks around its stainless steel door hinges. H & H sent Halterman, a certified welder, and Robert Lankford, another employee, to the hotel to perform the work. After Halterman arrived at the work site, Hieatt directed him to repair an additional washing machine that had similar cracks.

Halterman employed a welding process using tungsten inert gas to repair the cracks. During this welding process, heat is generated by electricity and conducted through a noncombustible tungsten electrode to melt stainless steel filler rods and form a weld. The repair work took several hours to complete, and Halterman spent about 30 [*175] to 45

minutes of that time welding the cracks in the doors of the machines.

The hotel maintained a display unit on the wall of the laundry room, which contained material safety data sheets for all the laundry products used by the hotel. These sheets contained information about hazardous components [***5] in the products and included warnings and instructions about the proper use of the products, protective measures to follow, and first aid procedures to employ in the event of improper exposure.

One of the products that the hotel used in the laundry room was a laundry sour known as Liquid Lusterfixe. A material safety data sheet in the display unit noted that Liquid Lusterfixe contained a 15% to 40% concentration of hydrofluosilicic acid, and that this acid was a "hazardous component."

The display unit for the material safety data sheets was located ten feet to the left of the door through which Halterman entered the laundry room. To reach the washing machines, Halterman was required to turn to his right after passing through the door. Hieatt did not point out the display unit to Halterman or otherwise advise him about [***825] hazardous chemicals used in the laundry room.

Halterman testified that he was in good health when he arrived at the hotel but, before leaving the premises, he had developed a cough. During the remainder of the day and the following night, Halterman's cough worsened and he developed shortness of breath.

Dr. Mohammad Taleghani, a pulmonary disease specialist who treated [***6] Halterman, testified that Halterman contracted acute chemical pneumonitis as a result of being exposed to Liquid Lusterfixe. Dr. Taleghani explained that Halterman's pneumonitis eventually "resolved itself" into a condition known as interstitial fibrosis, or scarring of the lung tissue. Dr. Taleghani further stated that, as a result of the fibrosis, Halterman lost about one-third of his vital lung capacity.

Dr. Laura Welch, an occupational medicine specialist, testified that in her opinion, Halterman's lungs were injured when the welding process heated the hydrofluosilicic acid contained in the Liquid Lusterfixe residue that had accumulated in the cracks around the washing machines' hinges. She stated that this heat "acted on" the hydrofluosilicic acid "to create" a gas of hydrogen fluoride or another fluorine-based compound, which are toxins known to cause pneumonitis.

[*176] At the conclusion of Halterman's evidence, the trial court granted Radisson's motion to strike Halterman's evidence on Count I, the claim of negligence per se. The court ruled that Halterman was not within the class of persons that the HCS regulation was intended to protect. The court then denied Radisson's motion [***7] to strike Halterman's evidence on Count II, the simple negligence claim.

After Radisson presented testimony and rested its case, the trial court denied Radisson's renewed motion to strike Halterman's evidence on the simple negligence claim. The court also refused Halterman's proposed jury instruction no. 14, which contained the definition of the term "hazardous chemical" used in the HCS regulation, and proposed instruction no. 15, which stated the duties imposed by the HCS regulation on an employer at a "multi-employer workplace." The jury returned a verdict in favor of Radisson on the simple negligence claim and the trial court entered final judgment in accordance with the jury verdict.

On appeal, Halterman contends, among other things, that Radisson violated the HCS regulation by failing "to ensure that the hazards of Liquid Lusterfixe, plainly set out in its material safety data sheet, were communicated to [him]." He asserts that the "multi-

employer workplaces" provision of the HCS regulation, 29 C.F.R. § 1910.1200(e)(2), imposed this duty on Radisson, and that Radisson's violation of that provision entitled him to assert a claim of negligence per se against Radisson for [***8] the injuries he sustained. We disagree with Halterman's arguments.

The requirements for proving a claim of negligence per se are well established. First, a plaintiff must establish that the defendant violated a statute that was enacted for public safety. *n1 MacCoy v. Colony House Builders, Inc.*, 239 Va. 64, 69, 387 S.E.2d 760, 763 (1990); *Virginia Elec. and Power Co. v. Savoy Const. Co.*, 224 Va. 36, 45, 294 S.E.2d 811, 817 (1982). Second, the plaintiff must prove that he belongs to the class of persons for whose benefit the statute was enacted, and that the harm that occurred was of the type against which the statute was designed to protect. *Williamson v. The Old Brogue, Inc.*, 232 Va. 350, 355, 350 S.E.2d 621, 624 (1986); *Pearson v. Canada Contracting Co.*, 232 Va. 177, 186, 349 S.E.2d 106, 112 [*177] (1986); *Virginia Elec. and Power Co.*, 224 Va. at 45, 294 S.E.2d at 817. Third, the plaintiff must prove that the statutory violation was a proximate cause of his injury. *Thomas v. Settle*, 247 Va. 15, 20, 439 S.E.2d 360, 363 (1994); *Hack v. Nester*, 241 Va. 499, 503-04, 404 S.E.2d 42, 43 (1990); [***9] *Pullen v. Nickens*, 226 Va. 342, 349, 310 S.E.2d 452, 455 (1983).

-----Footnotes-----

n1 We note that Radisson does not argue that an OSHA regulation is not the equivalent of a statute enacted for public safety for purposes of establishing a claim of negligence per se. Thus, in resolving the issues raised in this appeal we will assume, without deciding, that the violation of an OSHA regulation is the equivalent of such a statutory violation in asserting this type of claim.

-----End Footnotes-----

We first consider whether Halterman proved that Radisson violated the HCS [**826] regulation. Since the trial court struck Halterman's evidence, we will review the evidence and the inferences reasonably raised by the evidence in the light most favorable to him. *Claycomb v. Didawick*, 256 Va. 332, 335, 505 S.E.2d 202, 204 (1998); *A.H. v. Rockingham Pub. Co.*, 255 Va. 216, 219, 495 S.E.2d 482, 484 (1998).

In deciding this issue, we need not determine whether Halterman, a repairman sent to the workplace by his employer, [***10] was within the class of persons that the "multi-employer workplaces" provision of the regulation was intended to protect. Even if Halterman was within this class of persons, his evidence failed to show that Radisson violated any requirements imposed by that provision.

At trial, Halterman did not present any evidence that the material safety data sheets Radisson maintained at its workplace lacked sufficient warnings about the hazardous chemicals contained in Liquid Lusterfixe or the potential consequences of exposure to those chemicals. Instead, he based his claim of negligence per se solely on Radisson's violation of an alleged requirement in the "multi-employer workplaces" provision to provide this information about the chemicals directly to him, or to show him the location of the material safety data sheets in the laundry room.

The provisions of the HCS regulation apply to "any chemical which is known to be present in the workplace in such a manner that employees may be exposed under normal conditions of use or in a foreseeable emergency." 29 C.F.R. § 1910.1200(b)(2). The HCS regulation required Radisson, among other things, to provide the required information at its workplace [***11] to its own employees. See 29 C.F.R. § 1910.1200(e)(1). Under the "multi-employer workplaces" provision of the HCS regulation, Radisson also was responsible for

providing information about its hazard communications program to the employer(s) of other employees working at the same work site. See 29 C.F.R. § 1910.1200(e)(2). The required information included, among other things, the "methods the employer will use to provide [*178] the other employer(s) on-site access to material safety data sheets for each hazardous chemical the other employer(s)' employees may be exposed to while working." 29 C.F.R. § 1910.1200(e)(2)(i)(emphasis added).

The plain language of this provision did not obligate Radisson to communicate information about the chemicals in use in the laundry room directly to Halterman, the employee of another employer, but only obligated Radisson to communicate or to make available any required information to Halterman's employer, H & H.

The record contains no evidence that Radisson failed to provide to H & H any information required under the HCS regulation. Thus, we hold that Halterman failed to prove that Radisson violated the HCS regulation, and we conclude [***12] that the trial court did not err in striking Count I of the amended motion for judgment. Since the trial court reached the correct result for reasons not stated in its ruling, we will uphold that result. n2 First Sec. Federal Sav. Bank, Inc. v. McQuilken, 253 Va. 110, 115, 480 S.E.2d 485, 488 (1997); see Robbins v. Grimes, 211 Va. 97, 100, 175 S.E.2d 246, 248 (1970).

-----Footnotes-----

n2 Because the trial court properly struck the evidence on Count I, we also conclude that the court did not err in refusing proposed jury instructions nos. 14 and 15, which were based on the HCS regulation.

-----End Footnotes-----

For the reasons stated in this opinion, we will affirm the trial court's judgment.

Affirmed.

Service: LEXSEE®

Citation: 259 Va. 171

View: Full

Date/Time: Monday, June 19, 2000 - 5:00 PM EDT

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VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

MICHAEL A. SHEPHERD,

Plaintiff,

v.

AT LAW NO. CL982952

W.B. MEREDITH, II, INC.

and

ATLANTIC WELDING & FABRICATING, INC.,

Defendants.

ORDER

THIS DAY, came the plaintiff, and the defendants, represented by their respective counsel, on their Motions and pleadings previously filed with the Court, the evidence being presented *ore tenus*, the Court having considered the findings and written arguments filed herein, and was argued by counsel.

WHEREFORE, it is ADJUDGED, ORDERED and DECREED, and for good cause shown as to Motions in Limine Numbered 1 through 7, as follows:

As to Plaintiff's Motion in Limine Number 1, it is agreed by the parties, and ordered by the Court, that counsel for the defendants are limited for the purposes of the impeachment of the witness, Christopher Scott Hewitt, to attempt to establish only the fact and number of any prior felony convictions and/or any prior convictions involving lying, cheating or stealing;

As to Plaintiff's Motion in Limine Number 2, the Court declined to rule on the issues

presented therein, namely, requesting the Court to suppress and exclude any and all evidence of plaintiff's prior or subsequent injuries, deferring said ruling to the trial judge;

As to Plaintiff's Motion in Limine Number 3, it is agreed by the parties, and ordered by the Court, that Plaintiff's Motion in Limine Number 3, is hereby GRANTED, namely that the issue of plaintiff's having filed a Worker's Compensation claim shall be excluded from the trial of this matter;

As to Plaintiff's Motion in Limine Number 4, the Court DENIED same, specifically, denying plaintiff's request for a Court Order stating that counsel for the defendants be precluded from arguing minimizing statements of contributory negligence in that the Court is of the opinion that entry of such an Order is not appropriate; however, the Court further states that this ruling in no way precluded plaintiff's counsel from objecting to improper argument at the trial of this matter, and

As to Plaintiff's Motion in Limine Number 5, it is agreed by the parties, and ordered by the Court, that Plaintiff's Motion in Limine Number 5, is to be heard at a later date, and prior to trial, once the deposition transcript of Mr. Gordon Marc Cooper is obtained by counsel;

As to Plaintiff's Motion in Limine Number 6, it is Ordered by the Court, that Plaintiff's Motion to suppress and exclude any evidence or argument that the plaintiff did not file a tax return, more specifically, for the year 1995, is DENIED;

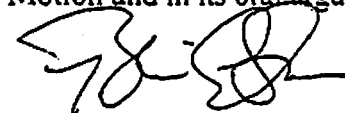
As to Plaintiff's Motion in Limine Number 7, it is agreed by the parties, that Plaintiff's Motion in Limine is to be heard at a later date, and prior to trial, once the deposition transcript of Mr. Edwin Shelton is obtained by counsel, and

That Defendants' Motion in Limine to preclude all or part of the testimony of the plaintiff's expert witness, Frank L. Burg, at the trial of this matter is DENIED.

That Plaintiff's Motion in Limine to exclude any and all testimony of Richard V. Leland, an expert witness specifically retained by Atlantic Welding & Fabricating, Inc. (hereinafter referred to as "Atlantic") is to be heard at a later date, and prior to trial, once the deposition transcript of Richard V. Leland can be obtained by counsel;

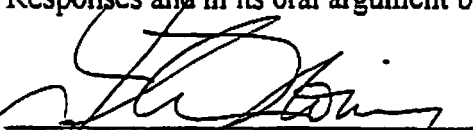
As to Atlantic's Motion to Compel the plaintiff to produce plaintiff's counsel's letter to Frank L. Burg and Defendant Atlantic's Motion to Quash plaintiff's Subpoena Duces Tecum, which included the correspondence between counsel for Atlantic and Richard V. Leland, by agreement of counsel, the aforementioned Motion to Compel and Motion to Quash are removed from the Court's docket with the understanding and agreement between counsel that no letters or correspondence regarding communications between counsel and their respective experts are to be required to be produced.

Seen and Agreed in part and Objected to in part, specifically, Plaintiff objects to the Court's ruling regarding Plaintiff's Motion in Limine Numbers 2, 4 and 6 for the reasons stated in Plaintiff's Motion and in its oral argument before the Court.




Blair E. Smircina,
Counsel for the Plaintiff,
Michael A. Shepherd

Objected to, insofar as the rulings on Defendants' Motion to preclude all or part of the testimony of plaintiff's expert, Frank L. Burg, for the reasons stated in Defendant's Motion and Supplemental Responses and in its oral argument before the Court.



John S. Norris, Counsel for
Atlantic Welding & Fabricating, Inc.



Fay F. Spence
Fay Spence/Counsel for
W. B. Meredith, II, Inc.

Entered :
7/13/00



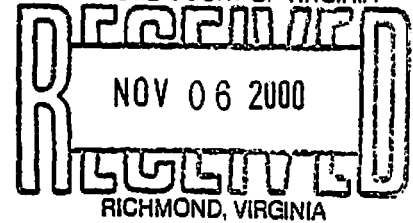
H. B. Shuckley
Judge

VIRGINIA:

CERTIFIED ORIGINAL

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

CLERK
SUPREME COURT OF VIRGINIA



MICHAEL A. SHEPHERD,

Plaintiff,

v.

W. B. MEREDITH, II, et al.,

Defendants.

AT LAW

NO. CL98-2952

TRANSCRIPT OF PROCEEDINGS

Virginia Beach, Virginia

July 18, 2000

Day 1

Before: THE HONORABLE A. BONWILL SHOCKLEY, Judge,
and a jury

TAYLOE ASSOCIATES, INC.

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Norfolk, Virginia

1 Appearances:

2 On behalf of the Plaintiff:

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4 and

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9 (757) 461-4900

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11 and Robert Bosley:

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18 On behalf of the Defendant Atlantic Welding

19 and Fabricating:

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24 (757) 498-7700

25

* * *

1 THE COURT: Why don't we go ahead and
2 recess for lunch a little bit early. Ladies and
3 gentlemen, if you would, meet back in the jury
4 assembly room downstairs in -- how about ten minutes
5 to two; a little more than an hour. You are welcome
6 to have lunch in the building. You are welcome to go
7 out of the building and have lunch, but if you will,
8 be back downstairs and when you're all together, the
9 deputy will bring you up as a group at about ten
10 minutes to two.

11 If you've left anything -- by the way I
12 forgot to tell you, you are welcome to leave personal
13 items back in the jury room back there. The back door
14 opens into where the Judges' offices are, so it's
15 pretty safe back there. If you have anything back
16 there that you need to get, help yourself. If you
17 have everything you need, you can go right on out the
18 back door. Have a nice lunch and we'll see you back
19 downstairs at about ten minutes to two.

20 (The jury leaves for lunch.)

21 THE COURT: Do you want your clients to
22 stay here? I did that so we could go ahead and do the
23 motion and then let them go ahead and have lunch.

24 MR. NORRIS: Your Honor please, I'd like
25 to move to strike the evidence and enter summary

1 judgment in favor of defendant Atlantic Welding and
2 Fabricating based on the opening statement which I
3 know, Your Honor, is a rare occurrence. And I know
4 Courts are loath to keep issues of fact from a jury,
5 but I believe we have a pretty simple question of law
6 in front of you based on the opening statement.

7 If I could borrow -- as I heard the
8 opening statement Atlantic Welding and Fabricating was
9 referred to as a subcontractor. In fact, we were a
10 sub-subcontractor. We had no contract with W. D.
11 Meredith at all, much less with the United States
12 Government, and as I heard the opening statement the
13 argument was Atlantic is going to argue that we
14 complied with the plans and specs, but that doesn't
15 relieve us of the obligations and the contract with
16 the government that are imposed by OSHA.

17 Now, the OSHA requirement that was relied
18 upon in the opening statement is that "each employer
19 shall furnish to each of his employees employment and
20 a place of employment which are free from recognized
21 hazards that are causing or likely to cause death or
22 serious physical harm to his employees."

23 THE COURT: And that's 91 -- I'm trying
24 to read from a distance. 95596?

25 MR. NORRIS: Right. Now, the other

1 requirement relied upon is limited strictly to the
2 general contractor. The other section relied upon --
3 which is this section, the clause in the contract, in
4 order to provide safety controls for the protection of
5 life and health of employees and other persons, et
6 cetera, the contractors shall comply. Okay. So, the
7 only argument that has been made in opening statement
8 that would bind Atlantic Welding -- because in request
9 for admissions the plaintiff has admitted that we --
10 that the work we did complied with plans and
11 specifications for the job -- is if this OSHA Act
12 applies to Atlantic Welding in favor of the
13 plaintiff.

14 Now, the plaintiff is not an employee of
15 Atlantic Welding and Fabricating. In fact, Your
16 Honor, the plaintiff took the position that he was not
17 a fellow statutory coemployee of Atlantic when
18 Atlantic sought to dismiss the case under the
19 Workmen's Compensation Act. He specifically took the
20 position that you and I are not coemployees.

21 Now, I filed a brief and Judge Canada
22 heard this argument a few weeks ago and said, "It's a
23 close call, but I'm going to let it go to the trial
24 judge," and the argument was that the law in Virginia
25 is clear that OSHA can only be relied upon by a

1 plaintiff if he's within the protected class of
2 individuals, the individuals whose -- who are intended
3 to be protected by the OSHA Act. And the Virginia
4 Supreme Court has repeatedly held that that class is
5 limited to the employees of an OSHA violator.

6 Now, there was an argument in an opening
7 statement that the jury would hear evidence that OSHA
8 is meant to protect people like Mr. Shepherd. That's
9 not a jury issue. That is a question of law pure and
10 simple for this Court to decide, and you can decide it
11 and ought to decide it right now at the beginning of
12 this case; whether an alleged violation of the general
13 catchall, all purpose OSHA reg that says, "An employer
14 has to provide a safe workplace to his employees"
15 means that's Atlantic Permanent owes a duty under OSHA
16 to an employee of a material man. No Virginia case
17 holds that it does. The Virginia case law that I
18 cited in my brief holds just the opposite, and the
19 cases we rely upon in that brief are the Pearson case
20 at 232 Virginia 177. Virginia does not accept a
21 violation of OSHA as negligence, per se, when a
22 nonemployee is the plaintiff.

23 THE COURT: When -- not to destroy your
24 train of thought, but when you say "he reserved ruling
25 on the issue" and -- "for the trial Judge to make a

1 ruling," was that --

2 MR. SMIRCINA: He said we could bring it
3 up in court and see what the evidence would be at
4 trial and we could renew a motion to strike at that
5 time. I think Mr. Norris is misstating the opening
6 argument and misstating the evidence we are going to
7 present in this case, and if Your Honor would indulge
8 me, I'd go on.

9 MR. NORRIS: I think the question was
10 directed at me.

11 THE COURT: I think it was directed to
12 Mr. Norris. Let him answer the question. When did --
13 first of all, when did you argue this, so I can look
14 in the Court's file since we've got about seven
15 files?

16 MR. SMIRCINA: Early June. Early June.
17 It was probably entered about June 20th --

18 THE COURT: I think I got --

19 MR. SMIRCINA: -- maybe later than that.

20 THE COURT: Actually, you've put a lot of
21 paper in the file since then. I don't know that I'm
22 going to be able to read it all now, but it was the
23 22nd, Thursday at 2:00. I see the yellow sheet, so,
24 at least, I've got -- and it was a motion to -- is
25 that -- is that the right date, the 22nd of June?

1 MS. SPENCE: Yes, Your Honor. It was
2 June the 22nd.

3 THE COURT: Was an order submitted?

4 MR. SMIRCINA: Yes, an order was
5 submitted and should have been entered by now.

6 THE COURT: Then I will look and find
7 that, too, so that will be easy to look in the Court's
8 file. I won't take the time to do that now. Let me
9 listen to what everybody has to say and I'll look at
10 the file at lunch now that I've found where it is.
11 I'm sorry, Mr. Norris. I think you had last cited 232
12 Virginia 177.

13 MR. NORRIS: Yes, I cited the Pearson
14 case. I also rely on the Robinson versus Matt Mary
15 Moran case.

16 THE COURT: Are these in your brief?

17 MR. NORRIS: Yes, they are, Your Honor.

18 THE COURT: I can check there for the
19 cites, and the argument that you're making now is
20 pretty much the argument that you made then?

21 MR. NORRIS: It is, Your Honor.

22 THE COURT: So, if I look in the
23 paperwork, that will --

24 MR. NORRIS: Yes, Your Honor. The brief
25 is only six pages. We filed a supplemental brief

1 which should be in the Court's file which is only
2 three pages. It's a very short and to the point issue
3 that can focus entirely on Virginia law, and I don't
4 think a plaintiff can have his cake and eat it, too.

5 THE COURT: Were the request for
6 admissions filed at the time that -- the answers to
7 request for admissions filed at the time that the
8 arguments were made?

9 MR. SMIRCINA: More or less
10 contemporaneous. That's what they relied upon.

11 THE COURT: So, everybody agrees that
12 they're before the Court?

13 MR. SMIRCINA: Yes, ma'am.

14 THE COURT: Okay. I don't know if Ms.
15 Spence wants to say anything. It's Mr. Norris' motion
16 as to his client, so I don't know that you --

17 MS. SPENCE: Other than to say that on
18 behalf of Meredith and Bosley I join in the motion to
19 the extent that plaintiff seeks to go forward on the
20 basis of this alleged violation of a general standard
21 provision of OSHA. It is not a specific regulation,
22 and the plaintiff is not a person who is in the class
23 of people to be protected. That does not resolve the
24 other matter against Meredith, and I realize that.

25 THE COURT: And, Mr. Smircina, do you

1 wish to respond on behalf of the plaintiff?

2 MR. SMIRCINA: Yes. Initially, as to
3 Atlantic Welding and Fabricating -- please, do not
4 forget that there is common law that when on a work
5 site you're not to act in a way that could hurt
6 others. We are going to provide evidence concerning
7 the negligence of Atlantic Welding and Fabricating,
8 particularly the fact that this was not done in
9 accordance with the Army safety manual and in
10 accordance with OSHA. The mere fact that this
11 says, "employee" -- that is a term of art that our
12 expert will explain. And employees under OSHA have a
13 specific definition, and this plaintiff falls in that
14 definition and Mr. Burg is going to explain that.

15 Further, this -- why these provisions
16 incorporate the Army safety manual is to be sure the
17 work that is to be done in steel erection is still
18 subject to the provisions of the Army safety manual as
19 well, and it is our argument and it is going to be our
20 proof that this was not complied with by the
21 subcontractor or the sub-subcontractor, nor was it
22 accepted by Meredith Construction. Therefore, we say
23 that the Army safety manual absolutely does apply to
24 this job site. It does apply to everybody working on
25 this job site. Atlantic Welding and Fabricating was

1 working on this the job site; therefore, it applies to
2 them. They have to be -- they have to insure the
3 safety of all of the other workers both under the Army
4 safety manual -- that's what our evidence may say --
5 and under Virginia common law. That's the basis of
6 our argument.

7 We just think the motion should be denied
8 summarily. It's not even close as far as we can see
9 about this. These are terms of art; employee under
10 OSHA. It's going to be explained to the jury. This
11 is the provision of the Army safety manual that
12 applies to both W. D. Meredith and Atlantic Welding
13 and Fabricating and Robert Bosley. We are going to
14 have evidence about that. To strike the evidence at
15 this point seems not logical to say the least. We
16 filed a brief, too, Your Honor, on these matters.

17 THE COURT: It's all going to be in the
18 file about the same place.

19 MR. NORRIS: The meaning of employee in
20 the statute as applied under Virginia law is not a
21 term of art. It's not subject to explanation by an
22 expert witness. It's for the Court to interpret
23 following Supreme Court authority whether the
24 plaintiff under Virginia law is a designated, intended
25 beneficiary of OSHA. It's not for an expert witness

1 to decide that, and the Supreme Court of Virginia has
2 ruled on when a person falls within the umbrella of
3 protection of OSHA, and the Supreme Court has ruled it
4 to be two different things.

5 First of all, you have to be the intended
6 class of beneficiary, which means you have to be an
7 employee of the person alleged to have violated OSHA,
8 and second, not only do you have to be the intended
9 beneficiary, but the statute itself must be geared for
10 the public benefit; health and safety.

11 Now, there was a case called Old Brogue.
12 I'm sorry, I don't have the cite. It's not in my
13 brief, but it dealt with a Dram-Shop law. It was a
14 suit by someone who claimed that a bar owner gave too
15 much alcohol to somebody that went out and caused an
16 accident, and the negligence, per se, argument in that
17 case was failure to follow the statute on -- under the
18 Dram-Shop law. Amazingly, Judge, the Virginia Supreme
19 Court ruled that the Dram-Shop law was not intended
20 for the public health and safety. It had a much more
21 narrow intent, focus and scope by the legislature.

22 Similarly, OSHA is not intended for the
23 general public health and safety. It is intended for
24 employers like Atlantic to make sure its steel workers
25 aren't hurt. That is the purpose of OSHA.

1 MR. SMIRCINA: That's what Mr. Norris
2 says the purpose of OSHA is. The purpose of OSHA --

3 THE COURT: The Court is going to take
4 the whole question under advisement and go have
5 lunch.

6 MR. NORRIS: Here's the cite to Old
7 Brogue. It's Williamson versus The Old Brogue at 232
8 Virginia 350.

9 THE COURT: And I'll give everybody a
10 hint. I don't know that I'm going to get to the
11 bottom of this in an hour, so be prepared to come back
12 and start in after lunch. Okay? We will now take
13 lunch. Wait. We have to pull the rabbit out of the
14 hat. Do you-all want to step up here and pick your
15 alternate?

16 (Counsel approached the Bench and
17 conferred with the Court out of the hearing of the
18 court reporter.)

19 THE COURT: Have a nice lunch and we'll
20 see you back in a little less than an hour.

21 (A lunch recess was taken.)

22 THE COURT: Let me chat with you-all for
23 a couple of minutes before the jury comes back out,
24 and you are welcome to slide that out of the way,
25 too. First of all, I'm not really sure there is such

1 a thing as a motion to strike after opening statement,
2 but be that as it may there were arguments made that
3 had been made before, and I will say that I haven't
4 had a chance to read everything. That's -- one of my
5 concerns is the time frame.

6 It strikes me that some of what Mr.
7 Norris is asking me or asking the Court to rule on are
8 areas where it -- decisions need to be made as a
9 matter of law not as questions of fact, and one hates
10 to get all the way to the point of all of the evidence
11 coming in and then make a ruling of law that makes
12 part of that evidence irrelevant and then you have got
13 it sitting out here staring at -- the 300 pound
14 elephant sitting out here and staring at everybody and
15 it's hard to make it go away. And I'm trying to piece
16 together everybody's arguments. Was there -- are we
17 still proceeding under the original motion for
18 judgment? I couldn't find any amended pleadings.

19 MR. SMIRCINA: The proceedings aren't
20 amended as such, ma'am, but there were allegations of
21 general -- general allegations of things which have
22 been developed over time into what you sort of
23 presented yourself.

24 THE COURT: It strikes me that -- the
25 pleadings look to me as if the original pleadings were

1 that of common law theory of negligence.

2 MR. SMIRCINA: In part, ma'am, and also
3 under -- and they were also pled in part under the
4 Army Corps of Engineers safety manual, but a different
5 provision, and we're arguing it now.

6 THE COURT: Well -- and I guess that's
7 what I'm trying to find out. I can't figure out if
8 this case is a common law negligence case or more of a
9 premises liability case. And I hear the arguments
10 about the OSHA regs. Well, under common law
11 negligence they don't matter. Under something be it
12 an Army regulation or OSHA creating some kind of
13 separate duty, that's not -- that's why I was looking
14 back at the pleadings, to see what was there.

15 MR. SMIRCINA: The pleadings were pled
16 under the Army Corps of Engineers safety manual and in
17 general terms and under specific provisions there
18 under the Corps of Engineers and safety manual. It
19 was Section 27.803 at the time which had to do with
20 the erection of structural steel. It also had general
21 allegations of negligence that violated the Army Corps
22 of Engineers safety manual. As we went on through
23 discovery of the case the case shifted somewhat. To
24 be frank with you I think if you read the original
25 motion for judgment, it is very lengthy.

1 THE COURT: I was trying to get through
2 it at lunchtime.

3 MR. SMIRCINA: It was very lengthy and
4 then when I -- and to be frank with you I wanted to
5 plead both general allegations of negligence and
6 allegations under the Army Corps of Engineers safety
7 manual. I did want to plead that. I mean, I pled it
8 both ways for a reason. I pled it both ways for a
9 reason, because I thought we would come to this day.

10 THE COURT: And the theory under the Army
11 Corps of Engineers regulations, can you better
12 articulate that for me, and I guess --

13 MR. SMIRCINA: Sure. The Army Corps of
14 Engineers safety manual definitely applies. I mean,
15 Mr. Norris is pointing -- in some respects that is
16 well taken, to be frank with you. The Army Corps of
17 Engineers safety manual is the bible for safety on
18 government projects. It is what must be obeyed. The
19 general clause -- the first clause of that
20 says, "every person." I'll just read it. I mean, we
21 already said this, but, "No person shall be required
22 or instructed to work in surroundings under
23 conditions" -- "conditions that are unsafe or
24 dangerous to his or her health." From -- the whole
25 safety manual is paralleled after the OSHA Act. I

1 mean, it is. OSHA is the law on all construction
2 sites throughout the country. It is the law. Now,
3 whether --

4 THE COURT: And it's a legal question as
5 to whether or not that applies to create some kind
6 of -- we have negligence here, you know, of duty and
7 breach of duty, so it becomes a legal decision as to
8 whether or not that creates some kind of different
9 duty than would be the common law duty.

10 MR. SMIRCINA: But if your -- that would
11 support that, yes, ma'am, and that would support
12 whether or not the argument -- whether a violation of
13 OSHA was a -- was a grounds or foundation for an
14 instruction on negligence, per se, perhaps.

15 THE COURT: Okay.

16 MR. SMIRCINA: All right. Now, these are
17 two or three distinct different problems. There's
18 common law negligence. There's a violation of the
19 statutory duty which possibly could lead to an
20 instruction on negligence, per se, on the part of both
21 of these people. The -- when you look at OSHA, these
22 words, though, have specific meanings and they are
23 defined within the statute, part of which have been
24 defined in the briefs. I mean, we discuss them in the
25 brief. Mr. Norris and Ms. Spence discuss them in the

1 briefs as well.

2 THE COURT: But for argument's sake --
3 and I'm just looking at both sides of this. If, in
4 fact, after I read all of this the Court makes a
5 determination that it does create some kind of
6 independent duty that would apply here, then all of
7 the evidence about the violation of the statute would
8 be relevant. If for some reason the Court should
9 determine that it does not as a matter of law apply,
10 then none of that evidence is relevant.

11 MR. SMIRCINA: I still believe, though,
12 that when you have testimony that indicates that they
13 know what the national standards on construction sites
14 are and they do not follow those standards that is
15 evidence which can support a common law negligence
16 instruction as well.

17 THE COURT: Okay.

18 MR. SMIRCINA: That would be the back-up
19 argument.

20 THE COURT: Now, to have somebody come
21 under a common law negligence theory you have to
22 have -- I mean --

23 MR. SMIRCINA: There is case law in
24 Virginia going back to 1906 that I've been able to
25 find where employers and employees, people working on

1 work sites, persons who control the work sites or do
2 the work must do it in a manner that is free from
3 negligence, and I don't have that. That is somewhere
4 back in those four boxes of materials.

5 THE COURT: Okay. Now, under a common
6 law theory of negligence, for argument's sake,
7 Meredith could be negligent because Bosley was
8 negligent.

9 MR. SMIRCINA: Failed to supervise the
10 work site properly is what it comes down to.

11 THE COURT: Through Bosley --

12 MR. SMIRCINA: Yes, ma'am.

13 THE COURT: -- who is a named defendant
14 in this case. Now, under a common law theory of
15 negligence, who is the person that is named in the
16 pleadings that still lives as the individual that you
17 get to Atlantic Welding and Fabricating?

18 MR. SMIRCINA: Atlantic Welding and
19 Fabricating through its agents.

20 THE COURT: Non named agents?

21 MR. SMIRCINA: Non named, nonsuited
22 agents I might add.

23 THE COURT: Can we -- can we have that in
24 a negligence action?

25 MR. SMIRCINA: Why not?

1 THE COURT: Can you hold Coca-Cola liable
2 in a negligence action if you don't sue the driver of
3 the Coca-Cola truck?

4 MR. SMIRCINA: Absolutely. I don't see
5 why not if you prove the agency relationship, if you
6 prove that they did the work, if you prove that they
7 did the wrong whether -- you'd have to prove that
8 there was a relationship among -- that they did it,
9 that the company did it or its agents did it. I don't
10 think -- you don't have to serve the agent. You can
11 serve -- you can serve the principle and not sue the
12 agent.

13 THE COURT: Okay. But we are still back
14 to the legal question --

15 MR. SMIRCINA: And I would say --

16 THE COURT: -- of whether or not the
17 federal statute, whichever ones we are talking about,
18 apply to set up some kind of a duty absent a common
19 law duty. I mean, I thought about it. If you're on a
20 construction site and you dig a hole, you're
21 excavating, and you excavate the hole completely
22 according to the contract and completely according to
23 everything else, and that's basically what everybody
24 says, and then the next thing that happens is nobody
25 marks it off, nobody does anything else and somebody

1 comes tripping through there and falls in. Now it
2 doesn't matter what OSHA says they are supposed to do
3 or anything else. You left a dangerous situation out
4 there and some -- you didn't mark it. You didn't do
5 anything and somebody fell in. It's a common law
6 theory of negligence.

7 MR. SMIRCINA: There is a distinction --
8 may I speak? There is a distinction between following
9 the plans and specifications and putting the steel in
10 place and whether or not that is a safe thing to do.
11 In other words, our theory is, "All right. The
12 brackets were designed and manufactured. The beam was
13 designed and manufactured. It was placed up there."
14 What our argument is is that it wasn't secured.

15 Now, by their argument we don't have to
16 secure it once we put it up on those brackets. Well,
17 why would you ever weld anything together at all
18 then? I mean, if all it says is, "Well, it fits
19 here. It fits here. It fits here," why would you
20 ever need to weld anything? Why would you ever bolt
21 anything? We are saying that violates OSHA. We are
22 saying that violates the Army Corps of Engineers
23 safety manual. That's our argument.

24 THE COURT: Mr. Norris.

25 MR. NORRIS: Yes, ma'am. Thank you.

1 Obviously, you have to start with the pleadings. I am
2 here to defend the case based on what's been pleaded.
3 I will tell you the term "OSHA" appears nowhere in the
4 motion for judgment. Nowhere. This case was pleaded
5 based on a letter that the Navy wrote my client which
6 said, "You violated certain Army Corps of Engineers
7 standards." As it turns out the plaintiff now agrees
8 with us that those standards have no application
9 whatsoever to this particular operation, and my
10 request for admissions asks the plaintiff to admit
11 that those manuals did not apply, and the plaintiff
12 admitted that they do not apply.

13 So, then the plaintiff identified an
14 expert, a man named Frank Burg. Mr. Burg holds
15 himself out as an OSHA expert. Mr. Burg admitted in
16 his deposition that the Army Corps of Engineers manual
17 does not apply, and he further admitted that there is
18 no specific OSHA regulation that governs this
19 particular placement of steel. And that is admitted
20 in our request for admissions, that there's no
21 specific OSHA regulation governing the placement and
22 securing of a girt, but Mr. Burg said, "You, Atlantic,
23 are liable because you have violated catchall
24 provisions in OSHA that every employer owes a duty to
25 his employees to provide a safe workplace."

1 Now, I'm left with two things from the
2 motion for judgment, a common law allegation of
3 negligence that Mr. Burg cannot speak to because Mr.
4 Burg admitted in his deposition he is unfamiliar with
5 the standard of care in Virginia, much less Tidewater,
6 for the placement of steel beams. He is unaware of
7 what is normally done, so he could not testify that
8 some duty has been breached, because he doesn't know
9 the proper method of erecting steel that is employed
10 in the Commonwealth of Virginia, so he could not
11 testify to a breach of any standard of care that would
12 lead to negligence.

13 So, Mr. Burg can do no good to the
14 plaintiff's on a common law negligence theory, and so
15 far as I know they have identified no witness who will
16 be able to sit in this courtroom and testify that he
17 is familiar with the practice in Virginia of erecting
18 steel and that something my client did or failed to do
19 violated that standard. So, all the plaintiff is left
20 with is something not pleaded that we have violated
21 OSHA. That is all the plaintiff can allege against my
22 client, and my client owes no duty to Mr. Shepherd,
23 under OSHA, because as a matter of law in Virginia Mr.
24 Shepherd is not our employee.

25 To say that we are negligent because we

1 violated OSHA is negligence, per se. To say we have
2 common law negligence there has got to be a witness to
3 testify that he is familiar with the proper erection
4 of steel and securing of girts and that those proper
5 procedures were not followed in this case. And that's
6 a breach of care, because otherwise the plaintiff has
7 also admitted in my request for admissions that we
8 followed the plans and specifications to the letter.

9 Now, to use your excavation hypothetical,
10 if I am an excavation contractor and I get a set of
11 plans and specs that I bid on that say, "You will dig
12 a hole and you will go home." It does not say, "You
13 will erect a safety fence around the hole." The
14 negligence there if that's the hypothetical is that
15 the architectural engineer who came up with those
16 plans and specifications to bid upon who does owe a
17 duty of care to the public, but there is no
18 independent duty on any contractor that I'm aware of
19 in Virginia to build a safer project than what the
20 plans and specifications call for.

21 If on the other hand that girt was being
22 hoisted by one of my client's hoists and my client
23 negligently failed to maintain that hoist and it was
24 in a bad condition and the hoist broke and crushed
25 someone, then my client could be negligent at common

1 law, because now you are talking about an action that
2 had nothing to do with the plans or specifications
3 that he bid on, the contract that he's performing.
4 You're talking about a duty that he owes the general
5 world, right?

6 THE COURT: Yes.

7 MR. NORRIS: My client owes a duty to the
8 general world as far as the erection of this girt. He
9 owes only a duty to the parties he contracted with to
10 build it in accordance with the contract documents.
11 If he owes a duty to Mr. Shepherd and the plaintiff
12 realizes this, it's only through OSHA, and we are not
13 the party that owes any duty to the plaintiff through
14 OSHA.

15 Now, this case has been pending for a
16 long time, and the plaintiff could have brought in a
17 steel erection contractor to testify, "Hey, every
18 contractor in Virginia when they erect a girt does
19 this, it does that, and it does the other thing, and
20 these guys didn't do it. And even though it's not
21 written into the plans and specs every contractor in
22 Virginia knows that that's the way you do it." They
23 have no such expert. I have taken discovery out the
24 wazoo to prepare for that and there is -- there will
25 be no such evidence, and it wasn't mentioned in the

1 opening statement.

2 The only evidence is on this placard that
3 we violated general OSHA provisions, and under
4 Virginia law not only is that OSHA
5 provision intended to protect the general public it is
6 not intended to protect a nonemployee.

7 THE COURT: And that's the legal issue
8 that I need to decide before we go any further.

9 MR. NORRIS: Yes, ma'am, I'll agree with
10 that.

11 THE COURT: And I'm going to take the
12 rest of the afternoon to do it, and I'm going to let
13 the jury go home, because it isn't a question -- that
14 part of it is not a question of fact. That part of it
15 is a question of law. I sort of disagree with my
16 colleague, but it needs to be decided and then we know
17 where we are working and where this is going, because
18 again, all the Court has to go by is the pleadings.
19 That's why I asked if they were amended. I mean,
20 it's -- we are here and if this is what we are going
21 to proceed under, this is what you've got.

22 MR. SMIRCINA: Well, I would point out,
23 ma'am, paragraph 16 of the motion for judgment,
24 several times safety requirements are set forth by the
25 Government of the United States. We also plead in

1 common law negligence as far as we are concerned 16 --
2 paragraph 16 -- I don't know which count it is come to
3 think of it. Count one, count two. Count two. Count
4 two on 16 we are saying this is a safety issue, that
5 while they follow the contract and the specifications
6 as to putting the eight-inch by eight-inch by 30-foot
7 steel tube on three-inch steel brackets that that's
8 specified. The fact is they didn't do it safely.
9 There is our argument against Atlantic there. 17, our
10 argument against Atlantic --

11 THE COURT: But who is the "they" that
12 didn't do it?

13 MR. SMIRCINA: Atlantic Welding and
14 Fabricating through its agents. They put the steel up
15 there.

16 THE COURT: Okay. I still need to make
17 this determination.

18 MR. SMIRCINA: I'm just saying in
19 paragraph 17 we reference safety requirements set
20 forth by the Government of the United States and
21 Atlantic and its employees, agents and assigned.

22 THE COURT: I'll tell you right now I'm
23 not going to grant a motion to strike people out of
24 it. I think it is -- while I understand why it was
25 made at this point it's not appropriate to make it at

1 this point, the end of opening statement; however, I
2 can make -- and I'll leave that stand for the record
3 and it's under advisement. I can make -- at this
4 point in time since it was raised before the legal
5 determination of how OSHA applies or doesn't apply so
6 we know where we are going -- because that is
7 something that goes to the jury.

8 MR. SMIRCINA: Okay.

9 THE COURT: So, if you think I have
10 everything I need from what you submitted before, then
11 I'm happy to take the rest of the afternoon, look at
12 it and start off that way in the morning.

13 MR. SMIRCINA: We have -- if you would
14 just realize all parties wrote briefs on this issue
15 before Judge Canada.

16 THE COURT: As I said, I found out at
17 4:00 yesterday afternoon this was going to be mine,
18 so -- and with six files of this I had not had a
19 chance to get through it, but we need to get that part
20 of it answered.

21 MR. NORRIS: May I read the Court's file
22 to see if you need any of --

23 THE COURT: Sure, but before we do that
24 let me explain to the jury that I have some research
25 that I need to do and that I don't think we'll be

1 ready to start with the evidence until the morning and
2 let them out.

3 MS. SPENCE: I was also going to ask if
4 Your Honor would also consider on the evidentiary
5 issue whether OSHA, the general duty clause -- which
6 again, all they have even against the general
7 contractor is the general duty clause of OSHA. I
8 submit that it doesn't apply, because OSHA clearly
9 says that it's not intended to broaden or change any
10 duties under the common law and it substitutes
11 basically a negligence. It gets rid of negligence and
12 says if an accident happens, you're responsible, and
13 that is not the law in Virginia. And I would ask
14 the --

15 THE COURT: As to employee? As to
16 employees?

17 MS. SPENCE: Right.

18 THE COURT: That your position is only as
19 to employees as the strict --

20 MS. SPENCE: As a strict liability.

21 MR. AUFENGER: If I may just point out
22 one thing in our brief on page nine and it
23 says, "under OSHA, which has been adopted by Virginia,
24 an employee includes" and it defines what an employee
25 is under OSHA. Every laborer or mechanic under the

1 Occupational Safety and Hazard Act regardless of the
2 contractual relationship between the laborer and
3 mechanic and the contractor or subcontractor who
4 engage him, which means for the purposes of OSHA every
5 worker on that job site is an employee of every
6 subcontractor or contractor.

7 MS. SPENCE: But according to this
8 Court's earlier ruling on the plea and bar he's not a
9 worker. He's a mere deliveryman.

10 MR. NORRIS: None of us engaged him.

11 THE COURT: I know that, and I know the
12 ruling and I won't -- and I know the ruling, so we --
13 let's get the jury out here and let's have the rest of
14 the afternoon.

15 (The jury returned to the courtroom.)

16 THE COURT: I'm sorry to keep you-all
17 waiting, ladies and gentlemen. There's a legal issue
18 that has come up and I need to do a little research on
19 it before I make a decision, and there's no point in
20 having you-all sit in the back. I know we have
21 opening statements to continue, but what I'm going to
22 do is I'm going to let you go home while I sit with
23 the books for a while this afternoon. And if you
24 would, be back downstairs by about 9:15 tomorrow
25 morning. Get you a parking space and when you have