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Langhorne Road Apartments, Inc. v. Bisson adds Virginia's authority to the recent trend of precedent free jurisdictions favoring the Connecticut view.¹⁹ The complexities and problems of modern urban living, characterized by an increasing number of large apartment buildings, demand solutions which are not shackled by minute common law distinctions. The Connecticut rule is a modern solution to a modern problem and the trend establishing it as the majority rule should continue.

James K. Stewart

Workmen's Compensation—WHO IS AN "OTHER PARTY" WITHIN THE MEANING OF VIRGINIA CODE § 65.38?¹ A materialman contracted with a general contractor to "receive, unload, warehouse and haul to the job site all material" he would supply for the work.² The unloading at the job site would be directed by the general contractor. Defendant, Boshier, rented two trucks and drivers to the materialman for the deliveries. One of the drivers, unloading and spreading sand pursuant to the principal contractor's directions, injured plaintiff, Jamerson, an employee of that contractor. Plaintiff recovered workmen's compensation for the injury and then instituted this tort action against Boshier. From an order overruling his plea that the action was barred by the Virginia Workmen's Compensation Law, defendant appealed.³

19. *Grizzel v. Foxx*, *supra* note 11; *Young v. Saroukos*, *supra* note 14; *Fincher v. Fox*, *supra* note 14; *Langley v. Lund*, *supra* note 14; *contra*, *Pomfret v. Fletcher*, *supra* note 14.

I. VIRGINIA CODE § 65.38 (1950), which provides:

The making of a lawful claim against an employer for compensation under this act for the injury or death of his employee shall operate as an assignment to the employer of any right to recover damages which the injured employee or his personal representative or other person may have against any *other party* for such injury or death, and such employer shall be subrogated to any such right and may enforce, in his own name or in the name of the injured employee or his personal representative, the legal liability of such other party. The amount of compensation paid by the employer or the amount of compensation to which the injured employee or his dependents are entitled shall not be admissible evidence in any action brought to recover damages. Any amount collected by the employer under the provisions of this section in excess of the amount paid by the employer or for which he is liable shall be held by the employer for the benefit of the injured employee or other person entitled thereto, less a proportionate share of such amounts as are paid by the employer for reasonable expenses and attorney's fees as provided in § 65-39.1. No compromise settlement shall be made by the employer in the exercise of such right of subrogation without the approval of the Industrial Commission and the injured employee or the personal representative or dependents of the deceased employee being first had and obtained. (Emphasis added.)

2. *Boshier v. Jamerson*, 207 Va. 539, 540, 151 S.E. 2d 375, 376 (1966).

3. *Ibid.*

The Supreme Court of Appeals of Virginia held for the defendant finding that the driver at the time of the accident was performing work that was part of the business, trade or occupation of the plaintiff's employer.⁴ Therefore, the defendant, not being a "stranger to the employment,"⁵ and in performing part of the principal contractor's work,⁶ was rendered a statutory employee of the plaintiff's employer and immune from common law actions by the general contractor's employees for his torts committed while on the job.⁷

The workmen's compensation law in Virginia has developed, to a great degree, through judicial interpretation. In 1926, the Supreme Court of Appeals of Virginia established the basic premise on which the workmen's compensation doctrine has developed. In *Humphrees v. Boxley Bros. Co.*,⁸ it declared that the law's intention was to cast the cost of industrial accidents on the employer. Twenty years later, the Court reaffirmed this principle in *Feitig v. Chalkley*⁹ and went on to hold workers barred from bringing common law actions against co-employees when recovery under the workmen's compensation act was available. In *Feitig*, the Court first introduced the "stranger to the employment" as the "other party" amendable to suit under Va. Code § 65.38 and set up involvement in the "work, trade or occupation" of the employer as the test of who is a stranger.¹⁰

After *Feitig*, the Court, in pursuing the concept of the "stranger to the employment," began to apply the test to subsequent situations. The piecemeal delineation of who is an "other party" under the "stranger to the employment" test began with *Sykes v. Stone & Webster Engineering Co.* in 1947.¹¹ In that case, it was held that the general contractor is the statutory employer of subcontractors' employees through

4. Through the materialman, defendant was obligated to unload the sand according to the general contractor's orders. To save the general contractor from having to do it, the sand was being spread at his instruction, in a specific manner when the accident occurred.

5. *Feitig v. Chalkley*, 185 Va. 96, 38 S.E. 2d 73 (1946); *Sykes v. Stone & Webster Engineering Co.*, 186 Va. 116, 41 S.E. 2d 469 (1947).

6. *Nolde Bros. v. Chalkley*, 184 Va. 553, 35 S.E. 827 (1945); *Phillips v. Brinkley*, 194 Va. 62, 72 S.E.2d 339 (1952); *Floyd v. Mitchell*, 203 Va. 269, 123 S.E. 2d 369 (1962); *Lucas v. Biller*, 204 Va. 309, 130 S.E.2d 582 (1963).

7. *Rea v. Ford*, 198 Va. 712, 96 S.E. 2d 92 (1957).

8. *Humphrees v. Boxley Bros. Co.*, 146 Va. 91, 135 S.E. 890 (1926).

9. *Feitig v. Chalkley*, *supra* note 5.

10. *Ibid.*

11. *Sykes v. Stone & Webster Engineering Co.*, *supra* note 5.

Va. Code § 65.27¹² and could not be an "other party." It was further held that the general contractor's workmen are statutory co-employees of the subcontractor's workmen and the same bar to tort action exists between them as between actual fellow servants.¹³

Having held the principal contractor immune to actions outside of the act by subcontractors' workmen, the Supreme Court of Appeals established the same bar in the converse situation where the general contractor's employee attempted to go against a negligent subcontractor in tort.¹⁴ The decision in *Rea v. Ford*¹⁵ joined Virginia with a small minority, consisting of Florida and Massachusetts, which held the subcontractor not liable at common law in such situations.¹⁶ Although the reasoning of this ruling has been questioned,¹⁷ it has been consistently followed and is the basis for the decision in the instant case.

Since 1957, the deciding question of who is an "other party" has involved resolving the issue in specific situations. The decision in *Williams v. Gresham*¹⁸ is particularly in point with regard to the instant case and, in retrospect, clearly foreshadowed the present holding. There the Supreme Court of Appeals held defendant, who had contracted to drive

12. VIRGINIA CODE § 65.27 (1950), which provides:

When any person (in this and the four succeeding sections referred to as 'contractor') contracts to perform or execute any work for another person, which work is not part of the trade, business or occupation of such other person and contracts with any other person for the execution or performance by or under the subcontractor of the whole or any part of the work undertaken by such contractor, then the contractor shall be liable to pay to any workman employed in the work any compensation under this Act which he would have been liable to pay had that workman been immediately employed to him.

13. Forty-one states have such "statutory" employer and co-employee provisions by either legislative or judicial action. See, 2 LARSON, LAW OF WORKMEN'S COMPENSATION 175.

14. *Rea v. Ford*, *supra* note 7.

15. *Ibid.*

16. *Catalano v. George F. Watts Corp.*, 255 Mass. 605, 152 N.E. 46 (1926); *Younger v. Giller Contracting Co.*, 143 Fla. 335, 196 So. 690 (1940); *Street v. Safway Steel Scaffold Co.*, 148 So. 2d 38 (Fla. 1962). *Contra*, *Dillman v. John Diebold & Sons Stone Co.*, 241 Ky. 631, 44 S.W. 2d 581 (1931); *Farrell v. L. G. De Felice & Son*, 132 Conn. 81, 42 A. 2d 697 (1945); *Baker and Conrad, Inc. v. Chicago Heights Const. Co.*, 364 Ill. 386, 4 N.E.2d 953 (1936); *Benoit v. Hunt Tool Co.*, 219 La. 380, 53 So. 2d 137 (1951); *Thomas v. Hycom, Inc.*, 244 F. Supp. 151 (D.C. D.C. 1965).

17. While the principal contractor is liable for payment of compensation to the injured employees of his subcontractors under VA. CODE § 65.27, there is no corresponding responsibility on the part of the subcontractor. Hence, this decision leaves the subcontractor free from liability with regard to the general contractor's workmen both under the act and at common law. See, 1 WILLIAM AND MARY L. REV. 123 (1957). For comment on the Massachusetts and Florida rules, see 2 LARSON, *supra* note 13 at 177.

18. *Williams v. E.T. Bresham Co.*, 201 Va. 457, 111 S.E. 2d 498 (1959).

piles for the Chesapeake Bay Ferry District, free from common law liability to an employee of the district, pointing out that in performing the work, defendant was doing part of the "essential duties" imposed on the district by the act which created it.¹⁹

The decision of the case at bar is remarkable, not as a departure from what has become Virginia's traditional view of the common law rights retained by injured workmen, but as a reaffirmation of that view and an extension of immunity from common law actions arising from industrial accidents to a new class of business.²⁰ It can be surmised that future decisions will further Virginia toward her recognized goal of limiting all recoveries for industrial accidents to compensation under the act.²¹

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19. In the principal case, defendant's driver was performing work that plaintiff's employer had contracted to do when the accident happened.

20. Finding a contract carrier to be a statutory subcontractor is not altogether novel. *See, McVeigh v. Brewer*, 182 Tenn. 683, 189 S.W. 2d 812 (1945).

21. The Supreme Court of Appeals of Virginia is unequivocal in its intent to retain that position, which, when seen by a Federal court sitting in Texas, elicited the comment:

The purpose of the Virginia statute, as interpreted by its highest court, is to limit the recovery of all persons engaged in the business under consideration to compensation under the act, and to deny an injured party the right of recovery against any other person unless he be a stranger to the business.

Doane v. E. I. DuPont de Nemours & Co., 209 F. 2d 921, 926 (4th Cir. 1954).