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**Hardly a *Clean Sweep*:
An Analysis of the Supreme Court of Virginia's
Treatment of Statutory Employee Litigation**

Scott Pasierb*

I. Introduction

The decision in *Clean Sweep Profl Parking Lot Maint., Inc., v. Talley*¹ reveals the Supreme Court of Virginia's challenging task of applying the Commonwealth's workers' compensation scheme to industrial accident cases. Fraught with fine-line distinctions, which in many instances nullify a plaintiff's common law negligence claim, case law in this area deserves close attention. Verdicts in such statutory employee cases turn on the facts and offer counsel on both sides the opportunity to creatively argue their client's position.

Part II of this note explores the legal background of Virginia's statutory employee scheme, first with an overview of two relevant statutes, followed by a thorough review of case law which interprets the statutes and fleshes out the scheme. Part III provides the facts surrounding the *Clean Sweep* case. Part IV analyzes the court's holding in *Clean Sweep* and assesses the implications of that decision for future statutory employee litigation.

II. Legal Background

A. Virginia's Statutory Scheme

1. Overview of the Workers' Compensation Act

Virginia's Workers' Compensation Act (the "Act") provides for the compensation of workers injured in the course of their job performance.² Liability for the injuries sustained by a subcontracted worker is addressed in the Act's "statutory employer" provision.³ Three subsections in the provision address instances in which an entity engages a general contractor or subcontractor to work on its behalf.⁴ In each instance, the entity incurs the liability to pay to any of its subcontracted workers the same compensation the entity would have been liable to pay if the worker had been a direct employee.⁵

The first subsection of the Act's statutory employer provision envisions any person who hires a general contractor to perform work normally within the scope of that person's own "trade, business, or occupation."⁶ The second subsection applies to relationships farther down the

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¹ 267 Va. 210 (2004).

² Va. Code Ann. §§ 65.2-101 et seq. (Michie 2004).

³ Va. Code Ann. § 65.2-302.

⁴ Va. Code Ann. § 65.2-302(A)-(C).

⁵ *Id.*

⁶ Va. Code Ann. § 65.2-302(A).

contractual chain and targets statutory employer arrangements between general contractors and their subcontractors.⁷ The final subsection addresses a third degree of separation—those instances in which subcontractors become the statutory employers of other, smaller subcontractors.⁸

2. Scope of the Act

The Act is limited in scope. An employer is not always liable for workers' compensation if engaged in property management merely as an agent of the owner. Liability does not attach where the employer neither engaged in nor profited from services performed by other individuals engaged in the same trade, business or occupation as the injured worker.⁹ The Act goes further to define property management as the "oversight, supervision, and care of real property or improvements to real property" on behalf of the owner.¹⁰

3. The Exclusivity Provision

If an injured worker is a statutory employee of the party responsible for the injury, the Act's exclusivity provision limits the worker's remedies to those furnished within the Act.¹¹ Equally important, however, is that the Act effectively nullifies the worker's common law tort claim against that statutory employer.¹² Because of its lethality to plaintiffs' tort claims, this provision serves as the trigger for statutory employer litigation.

The Act also affords injured workers an exception to the exclusivity provision. An injured worker or a personal representative thereof may pursue a common law suit against any "other party" for injuries sustained.¹³ The term "other party" is defined in case law rather than by statute.

B. *Shell Oil Co. v. Leftwich: Genesis of the Modern Statutory Employer Test*

Whether a person is subject to or bound by the exclusivity provision of the Act presents a mixed question of law and fact requiring a determination in light of the circumstances of each case.¹⁴ In *Shell Oil Co. v. Leftwich*,¹⁵ the Court applied the test enunciated in *Burroughs v. Walmont*¹⁶ to assess statutory employer liability.¹⁷ In *Shell Oil*, the injured employee of an independent service station owner pursued a workers' compensation claim against Shell Oil.¹⁸

⁷ Va. Code Ann. § 65.2-302(B).

⁸ Va. Code Ann. § 65.2-302(C).

⁹ Va. Code Ann. § 65.2-302(D)(1).

¹⁰ Va. Code Ann. § 65.2-302(D)(2).

¹¹ Va. Code Ann. §§ 65.2-307.

¹² *Id.*

¹³ Va. Code Ann. § 65.2-309(A).

¹⁴ *Burch v. Hechinger Co.*, 264 Va. 165, 169 (2002) (quoting *Bosely v. Shepherd*, 262 Va. 641, 648 (2001)).

¹⁵ 212 Va. 715 (1972).

¹⁶ 210 Va. 98 (1969).

¹⁷ *Shell Oil*, 212 Va. at 722.

¹⁸ *Id.* at 716.

Shell Oil's normal work included the discovery and refining of petroleum, but it performed no role in the sale of its product to the public—it simply distributed gasoline to service stations.¹⁹

The Court eschewed analysis of whether the contractor's activity was useful, necessary, or even absolutely indispensable to the statutory employer's business. Rather, it asked if the activity was, in the oil refinery business, normally undertaken through the statutory employer's own employees, rather than independent contractors.²⁰ Noting that Shell Oil was not in the trade, business, or occupation of selling gasoline directly to the public, the Court concluded that Shell Oil was not a statutory employer of the independent service station.²¹ It rescinded the injured employee's workers' compensation benefits, leaving the employee with only a common law negligence claim against Shell Oil.²²

The *Shell Oil* analysis, known as the “normal-work test,” highlights the Court's modern statutory employer jurisprudence.²³ A variant of the analysis, known as the “subcontracted-fraction test,” applies in the context of contractor-subcontractor relationships.²⁴ Where the work performed by the subcontracted entity in such cases mirrors the trade, business, or occupation of the contractor, the contractor becomes the statutory employer of the injured worker.²⁵

C. The Delivery Concept: Dividing the Two Groups of Statutory Employee Case Law

Statutory employee case law forms two distinct groups. The first group consists of cases in which an employer is deemed an “other party” to the project. These cases usually feature a company whose obligation ends at mere delivery of its own independently manufactured goods to the jobsite. Because the labor performed by the worker is not part of the defendant's trade, business, or occupation, the Court allows common law suits to proceed in this group of cases. The second group consists of cases in which an employer is engaged in the trade, business, or occupation of another contractor. The Court grants statutory employer status in this latter group of cases and precludes tort claims per the Act's exclusivity provision.

1. Preservation of Common Law Tort Claims

The Court has issued a string of decisions upholding plaintiffs' tort-based causes of action against their employers. Although a precursor to the *Shell Oil* decision, *Burroughs*²⁶ illustrates the Court's reliance on the concept of “the final act of delivery” as a distinguishing characteristic in statutory employee cases. *Burroughs*, an employee of a trucking subcontractor,

¹⁹ See *id.* at 721-22.

²⁰ *Id.* (noting “We must therefore determine whether the retailing of gasoline to the general public, admittedly an indispensable activity to the Shell Oil Company, is an activity normally carried on by Shell through its employees rather than through independent contractors.”).

²¹ *Id.* at 724.

²² *Id.*

²³ See *Cinnamon v. IBM Corp.*, 238 Va. 471, 476 (1989).

²⁴ *Id.*

²⁵ *Id.*; see also *Stone v. Door-Man Mfg. Co.*, 260 Va. 406, 416-17 (2000) (articulating the “subcontracted-fraction” test).

²⁶ 210 Va. 98 (1969).

was injured while carrying sheetrock into a house being constructed by the general contractor.²⁷ The trucking company had agreed to deliver and stack sheetrock in rooms of the various houses under construction.²⁸ The Court held that “the stacking of sheetrock in the several rooms constituted the final act of delivery, not an act of construction.”²⁹ Consequently, the plaintiff was not engaged in the general contractor’s trade, business or occupation.³⁰ The Court ultimately viewed the general contractor as an “other party” to the project and subject to common law suit.³¹

*Hipp v. Sadler Materials*³² also prefaces the *Shell Oil* decision and further distinguishes the difference between an act of delivery and an act of construction. In *Hipp*, a concrete subcontractor’s employee was finishing a concrete footing as required under a contract with the general contractor.³³ Defendant Sadler Materials, also a subcontractor, was contracted to furnish and pour concrete into footings under the general contractor’s direction.³⁴ Notably, Sadler Materials was not required to spread or finish the concrete.³⁵ The Court considered this activity as mere delivery of an independently-created product and preserved the injured employee’s common law claim against Sadler.³⁶

The Court cited the *Hipp* decision favorably in *Bosley v. Shepherd*,³⁷ noting, “[w]e have held repeatedly that a subcontractor’s employee who merely delivers materials to a job site is not engaged in the trade, business, or occupation of the general contractor.”³⁸ In *Bosley*, the plaintiff, an employee of a subcontractor, was using a crane under the general contractor’s direction to deposit sheetrock into a partially-constructed building.³⁹ Allowing the plaintiff’s common law tort action to proceed, the Court concluded that use of a crane to deposit the sheetrock at designated points did not expand the scope of plaintiff employee’s duties beyond mere product delivery.⁴⁰

Finally, in *Yancey v. JTE Constructors, Inc.*,⁴¹ Virginia’s Department of Transportation hired a general contractor to build a sound barrier. That general contractor then subcontracted for design, manufacture, and delivery of concrete wall panels to a job site.⁴² When an employee of the subcontractor injured himself in the delivery process, the Court ruled that the subcontractor merely completed a contractual duty and did not actively engage in the general

²⁷ *Id.* at 99.

²⁸ *Id.* at 98.

²⁹ *Id.* at 100.

³⁰ *Id.*

³¹ *Id.*

³² 211 Va. 710 (1971).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *See id.* at 711.

³⁷ 262 Va. 641, 648-49 (2001).

³⁸ *Id.* at 648.

³⁹ *Id.* at 641.

⁴⁰ *See id.* at 649.

⁴¹ 252 Va. 42 (1996).

⁴² *Id.* at 43.

contractor's trade, business, or occupation.⁴³ As a result, the Court reversed and remanded the case for further proceedings.⁴⁴

2. Negation of Common Law Tort Claims

In contrast, the Court has also issued a series of decisions which effectively nullified some workers common law negligence suits. Each of these cases offers insight on how the Court diagnoses a statutory employer relationship.

In *Bosher v. Jamerson*,⁴⁵ an employee of a subcontracted trucking company delivered sand to a construction site. At the general contractor's direction, the employee participated in the spreading of the sand to create a foundation.⁴⁶ That individual later injured an employee of the general contractor while spreading the sand.⁴⁷ The Court barred the plaintiff's common law tort suit against the trucking company's employee, holding that the individual was performing work on behalf of his employer, the trucking company, which was part of the trade, business or occupation of the general contractor.⁴⁸ The Court concluded that the trucking company, although an independent contractor, was not an "other party" against whom the plaintiff could file a common law tort action.⁴⁹

In *Peck v. Safway Steel Products, Inc.*,⁵⁰ an employee of a general contractor died after falling from scaffolding supplied by the defendant subcontractor. Notably, the subcontractor had spent over 5,000 man-hours of labor erecting, modifying, and dismantling the scaffolding used by that general contractor to repair a tall building.⁵¹ The subcontractor in *Peck* also responded to several change orders, continually repositioned the scaffolding, and uploaded other materials to the building's roof.⁵² The Court considered this cumulative activity so integral to the general contractor's performance that the case exceeded classification as one of mere "delivery."⁵³ Therefore, the Court considered the subcontractor a statutory employee of the general contractor and barred the plaintiff's claim as per the Act's exclusivity provision.⁵⁴

Decided in the same year, *Anderson v. Dillow*⁵⁵ involved a plaintiff employed by Virginia International Terminals ("VIT"), a general contractor responsible for the daily maintenance operations at Norfolk International Airport. The defendant, an employee of a waste management company subcontracted by VIT, crashed his company's vehicle while carrying out his job

⁴³ *Id.* at 45.

⁴⁴ *Id.*

⁴⁵ 207 Va. 539 (1966).

⁴⁶ *Id.*

⁴⁷ *Id.* at 540-41.

⁴⁸ *Id.*

⁴⁹ *Id.* at 543.

⁵⁰ 262 Va. 522 (2001).

⁵¹ *Id.* at 527-28.

⁵² *Id.*

⁵³ *Id.* at 528.

⁵⁴ *See id.*

⁵⁵ 262 Va. 797 (2001).

responsibilities and injured the plaintiff.⁵⁶ The Court stated, “[T]hough the broad question here is whether the defendants were ‘other parties,’ the precise issue is whether, at the time of the accident, the defendants were strangers to the trade, business, or occupation in which the plaintiff was involved.”⁵⁷ Because the defendant was subcontracted to perform a fraction of the work formerly assumed by the general contractor in its contract with the airport, the Court rejected the plaintiff’s common law tort claim against the subcontractor.⁵⁸

III. The Facts of *Clean Sweep*

In August 1997, Virginia Paving Company (“Virginia Paving”) was contracted to repave several sections of Interstate Highway 95 in Spotsylvania County, Virginia.⁵⁹ Virginia Paving procured the contract from the Virginia Department of Transportation.⁶⁰ The contract required Virginia Paving to mill the existing road surface, remove the milled asphalt, sweep away loose debris, and repave the roadway with fresh asphalt.⁶¹

Postured as a general contractor, Virginia Paving hired two subcontractors to assist with the project.⁶² J.E. Coleman Trucking Company (“Coleman Trucking”) transported asphalt from Virginia Paving’s plant to the jobsite, loaded asphalt into the paving machines, and hauled the millings from the jobsite back to the plant.⁶³ Clean Sweep Professional Parking Lot Maintenance, Inc. (“Clean Sweep”) cleared the roadway of asphalt milled by Virginia Paving’s machines.⁶⁴

Frank Talley, Sr., a Coleman Trucking employee, “loaded fresh asphalt at the Virginia Paving plant, delivered it to the jobsite, dumped the asphalt into the paving machine, and reloaded the truck with asphalt millings.”⁶⁵ While at the site, Talley responded to a request to examine a disabled Coleman truck also at the site.⁶⁶ A Clean Sweep sweeper vehicle subsequently struck and injured Talley as he examined the truck.⁶⁷ Talley sustained significant back injuries in the collision.⁶⁸ Talley sued Clean Sweep and the sweeper vehicle’s operator, alleging negligence and recklessness on their behalf.⁶⁹ The jury rejected the defendants’ claims that the Act was Talley’s sole remedy, and issued a verdict in Talley’s favor for \$900,000.⁷⁰

⁵⁶ *Id.* at 799.

⁵⁷ *Id.* at 801.

⁵⁸ *Id.* at 802.

⁵⁹ *See Clean Sweep*, 267 Va. at 212.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 212-13.

On appeal, the Court reviewed the trial court's finding that Coleman Trucking performed "a function which was solely as supplier or deliverer of goods and, of course, to haul off goods."⁷¹ Appellant Talley supported this conclusion and argued that his attempts to repair the disabled Coleman truck were not part of Virginia Paving's trade, business, or occupation.⁷² This relationship, Talley argued, trumped the exclusivity provision of the Act and validated his common law negligence suit.⁷³

The Court disagreed and concluded that Coleman Trucking's participation exceeded the mere delivery of goods to Virginia Paving's project.⁷⁴ Under its contract with the state highway department, Virginia Paving was solely responsible for milling, sweeping, and paving the road surface.⁷⁵ The Court noted that Coleman Trucking did not "merely deliver [its] own independently manufactured parts... [but] was hauling asphalt millings to Virginia Paving's plant and delivering the recycled asphalt from the plant back to the road project to be used in new paving."⁷⁶ The Court considered these tasks an essential part of the obligations Virginia Paving assumed when it undertook the project.⁷⁷

IV. Analysis

A. *Applying the Correct Law*

The ostensible purpose of the workers' compensation legislation is to "protect the employees of subcontractors who are not financially responsible and to prevent employers from relieving themselves of liability [for compensation] by doing through independent contractors what they would otherwise do through direct employees."⁷⁸ However, the Act's exclusivity provision also serves to limit an injured employee's capacity to gain compensation by nullifying certain common law negligence claims in certain cases. The outcome in *Clean Sweep* illustrates this fact.

Before rendering its verdict, the Court in *Clean Sweep* looked comprehensively at the case law surrounding statutory employee litigation.⁷⁹ The Court provided several examples of a subcontractor's mere delivery of finished goods, but distinguished these from cases in which a subcontractor performed tasks representing an obvious fraction of a general contractor's work.⁸⁰ After setting the stage for its analysis, the Court properly applied the "subcontracted fraction of the work" variant of the *Shell Oil* statutory employee test and correctly classified Coleman Trucking's participation in Virginia Paving's project.

⁷¹ *Id.* at 214.

⁷² *Id.* at 213-14.

⁷³ *Id.* at 217.

⁷⁴ *Id.* at 216-17.

⁷⁵ *Id.* at 216.

⁷⁶ *Id.*

⁷⁷ *Id.* at 217 (citing *Peck*, 262 Va. at 528).

⁷⁸ *Bassett Furniture Indus., Inc. v. McReynolds*, 216 Va. 897, 902 (1976) (quoting *Sears, Roebuck & Co. v. Wallace*, 172 F.2d 802, 810 (4th Cir. 1949)).

⁷⁹ *Clean Sweep*, 267 Va. at 214-15.

⁸⁰ *Id.*

Counsel for an injured plaintiff employee is well advised to review the Court's opinion in this and other pro-employer rulings when arguing to preserve a common law cause of action. Facts weigh heavily in the Court's analysis of each case, and counsel should attempt to distinguish the facts of all negative case law. The cumulative view of a statutory employee's activity, taken by the *Peck* court, for example, may present significant problems to the plaintiff employee of a subcontractor with a long historical relationship to a construction project.

B. *The Future of Statutory Employee Litigation*

Application of the "mere delivery of goods" standard is an ingenious tool for evaluating a subcontractor's level of participation in a project. Undoubtedly, statutory employee litigation will continue to hinge upon the nature of the tasks performed by a contracted entity before and after its initial delivery of goods. As the case law illustrates, these facts often make the difference in close cases. The Court said as much in *Clean Sweep*, noting that "not all cases that initially appear to be 'delivery' cases have resulted in a holding that the plaintiff was not engaged in the trade, business or occupation of the general contractor."⁸¹ This is perhaps the most valuable outcome of the *Clean Sweep* decision. The Court's own admission that good lawyering can make or break a case should give pause to litigants who may envision a decisive victory in court.

V. Conclusion

The Court undoubtedly arrived at a logical and well-supported decision in *Clean Sweep*. The Workers' Compensation Act operated as intended, holding Virginia Paving accountable as a statutory employer of plaintiff Talley.⁸² However, the *Clean Sweep* decision also effectively terminated Talley's common law negligence suit against Virginia Paving.⁸³ From a plaintiff's perspective, some flexibility in the workers' compensation system could enhance its effectiveness. Family members pursuing a wrongful death action, for example, may welcome the opportunity to voluntarily forfeit state-mandated workers' compensation in favor of the pursuit of a common law tort claim. The Act's exclusivity provision offers no such choice, however, and plaintiff's counsel must be prepared to attack a statutory employee defense and the supporting case law.

⁸¹ *Id.* at 214.

⁸² *Id.* at 216-17.

⁸³ *Id.*