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Workmen's Compensation -- Employees of Subcontractors -- Rights Against Owners and Principal Contractors

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Jenkins case, the act was clothed in the dignity and authority of the state and would seem to fall within the principle of *respondeat superior*. If the State of North Carolina were liable "in accordance with the same rules of law as applied to actions against individuals,"[33] the plaintiff in the *Jenkins* case would have been compensated for an obvious wrong.[34] It is submitted that the North Carolina act should be amended to provide not only for the negligence of state employees, but also for intentional wrongs committed by employees while acting within the scope of the employment. There seems to be no logic nor valid reasons for restricting sovereign liability to acts of simple negligence.

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Workmen's Compensation—Employees of Subcontractors—Rights Against Owners and Principal Contractors

In *Adams v. Davison-Paxon Co.*[1] the South Carolina Supreme Court held that an employee of an independent contractor, who operated the millinery department of defendant department store, could not maintain an action at law for negligence against the department store, but that her remedy under the Workmen's Compensation Act was exclusive. The Court held that the department store was an owner within the South Carolina act,[2] and the independent contractor operating the millinery department was performing part of the "trade business or occupation" of the department store so as to make the department store liable to the employees of the millinery department for workmen's compensation.

The contract between the millinery company and the department store gave the latter direct supervision over the operation of the department, and stated that the name of the millinery company was not to be used, but that it was to operate and advertise in the name of the department store. The money from all sales was paid to the cashier of the

[33] From the N. Y. Act; N. Y. CT. CL. ACT § 8 (1939).

[34] In view of the facts as found in the *Jenkins* case, the following excerpt from a letter to the writer from the plaintiff's attorney is significant: ". . . the patrolman who shot and killed D. C. Jenkins was tried . . . upon a charge of manslaughter .... [A]t the conclusion of the State's evidence, the court sustained the defendant's motion for judgment as of nonsuit and directed a verdict of not guilty."

[1] — S. C. —, 96 S. E. 2d 566 (1957).

[2] S. C. CODE § 72-11 (1952). When any person, in this section . . . referred to as owner, undertakes to perform or execute any work which is a part of his trade, business, or occupation, and contracts with any other person (. . . referred to as subcontractor) for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this title which he would have been liable to pay if the workman had been immediately employed by him.

store, who would pay the salary of the employees of the millinery department, and remit the excess to the manager of the millinery department.[3]

This decision is in line with previous South Carolina cases,[4] though there is a split of authority throughout the United States on just what is within the trade, business or occupation of an employer. The courts seem to agree that an orchestra or band playing in a restaurant or café under contract is carrying on an integral part of the business of the restaurant or café,[5] but an independent contractor operating a luncheonette and soda fountain in a department store was held not to be engaged in the trade, business, or occupation of the department store.[6] Larson states the general test to be: ". . . whether this indispensable activity is, in that business, normally carried on through employees rather than independent contractors."[7]

The section of the North Carolina Workmen's Compensation Act dealing with statutory employers[8] differs from that of South Carolina in that it applies only to any principal contractor, intermediate contractor, or subcontractor; it thus excludes owners and principal employers.[9] Although many of the workmen's compensation acts did not originally include them, provisions are rapidly being added in the different jurisdictions, making "principals," "principal employers," "general contractors," etc., liable for compensation to employees of independent contractors and subcontractors.[10] Of the forty-one states which have statutory employer provisions in their workmen's compensation acts,[11] only eleven exclude owners and principal employers.[12] One avowed purpose of the North Carolina statutory employer provision is to fore-

[3] The manager was employed directly by the contractor, and was not led to believe that he was working for the department store as was the injured employee.

[4] Boseman v. Pacific Mills, 193 S. C. 479, 8 S. E. 2d 878 (1940), which held that a contractor engaged in painting the water tank of a textile mill was performing an integral part of the business of the mill even though the water tank was only used for fire prevention purposes. Marchbanks v. Duke Power Co., 190 S. C. 336, 2 S. E. 2d 825 (1939), which held that an employee of a contractor, who had contracted to paint the transmission line poles of the power co., was engaged in work which was within the trade, business, or occupation of the power co. See Blue Ridge Rural Electric Corp. v. Byrd, 238 F. 2d 346, (4th Cir. 1956).

[5] Malony v. Industrial Commission, 242 Wis. 173, 9 N. W. 2d 623 (1943). Cf. Steele Pier Amusement Co. v. Unemployment Compensation Commission, 127 N. J. L. 154, 21 A. 2d 767 (1941); Palumbo v. Unemployment Compensation Board of Review, 148 Pa. Super. 289, 25 A. 2d 80 (1942).

[6] Stratis v. McLellen Stores Co., 311 Mass. 525, 42 N. E. 2d 282 (1942).

[7] I Larson, WORKMEN'S COMPENSATION LAW § 49.12 (1952).

[8] N. C. Gen. Stat. § 97-19 (1950).

[9] Green v. Spivey, 236 N. C. 435, 73 S. E. 2d 488 (1952).

[10] *Annot.*, 58 A. L. R. 872 (1929).

[11] California, Delaware, Iowa, New Hampshire, North Dakota, Rhode Island, and West Virginia have no statutory employer provisions in their workmen's compensation acts.

[12] Arkansas, Florida, Georgia, Kentucky, Mississippi, Nevada, New Jersey, New York, North Carolina, South Dakota, and Tennessee.

stall evasion of the Workmen's Compensation Act by those who might be tempted to subdivide their regular operations with the workers, thus regulating them for compensation purposes to small subcontractors, who fail to carry, or if small enough may not even be required to carry, compensation insurance."[13] It would seem that to achieve this purpose the statutory policy should be extended to owners and principal employers as well as contractors. Under the North Carolina act it would be possible for an employer to let out all his work to small contractors, and escape the payment of workmen's compensation, being liable to the employees of these contractors only as a "third party" in an action at law based on negligence. There is little incentive for the employer to require the contractor to comply with the act, and employees of insolvent contractors would probably have no redress for their injuries. On this point Mr. Larson states, "Some statutes, instead of covering all employers who let out work on contract, are limited to 'principal' or 'general' contractors. This leads to some rather desperate attempts to convert an ordinary entrepreneur into a 'contractor' with someone."[14] The main argument against including employers is that many small businessmen might fail to require contractors to comply with the act and also fail to take out insurance, thus subjecting themselves to a liability leading to financial ruin.

In a case involving the North Carolina Unemployment Compensation Act, employees of an independent contractor who ran a shoe department in defendant department store were held to be part of the "employing unit" of the department store so as to make the department store liable for unemployment compensation taxes.[15] Yet under the North Carolina Workmen's Compensation Act, an employee of the shoe department would not be considered an employee of the department store. Georgia, which has a statutory employer provision[16] similar to that of North Carolina, held that employees of an independent shoe department in a department store were not employees of the department store for workmen's compensation purposes.[17] The only basis on which North Carolina could hold a department store liable to an employee of an independent contractor for workmen's compensation, as did the South Carolina court in the principal case, would be the possibility of estoppel. Estoppel was not discussed in the principal case, nor have any cases been found applying it to a situation such as this. In the principal case the employee of the millinery department appeared to the public

[13] Green v. Spivey, 236 N. C. 435, 443, 73 S. E. 2d 488, 494 (1952).
[14] I Larson, WORKMEN'S COMPENSATION LAW § 49.12, n. 11 (1952).
[15] Unemployment Compensation Comm'n v. L. Harvey and Son Co., 227 N. C. 291, 42 S. E. 2d 86 (1947).
[16] GA. CODE ANN. § 114-112 (1935).
[17] J. M. High Co. v. Hague, 53 Ga. App. 165, 185 S. E. 141 (1936).

to be an employee of the department store, which would probably estop the department store from denying that she was its agent as far as third parties who relied on this appearance to their detriment are involved.[18] Here, however, the employee also actually believed that she was an employee of the dpartment store, a belief resulting from the conduct of the department store, and its acquiescence in the conduct of the independent contractor in concealing the actual relationship. If it had also caused her to believe that she was covered by the workmen's compensation policy of the department store, the cases found on this point would seem to indicate that the store would be estopped to deny that the employee was covered by it under the act unless the independent contractor was also under the act.[19]

In the principal case the Court held that because the owner was liable for compensation to the employee of the contractor, the owner would be relieved of any common law liability to the employee. This was determined under statutory language imposing absolute liability for compensation on the principal employer, though only a secondary liability since he could recover over from the independent contractor. Most states have this type of act, and also relieve the employer from any common law liability to the employees of contractors.[20]

It seems that North Carolina has not abolished the common law liability of these statutory employers. The North Carolina statute[21] makes a contractor liable for compensation to an employee of a subcontractor only if he fails to require that the subcontractor produce a certificate issued by the Industrial Commission stating that such subcontractor has complied with the Act. Two North Carolina cases[22] have held that an employee of a subcontractor was not precluded by the Workmen's Compensation Act from maintaining a negligence action at law against the principal contractor. In neither of the cases, however, was it brought out whether the subcontractor had complied with the act or whether the principal contractor was also liable for compensation.[23]

[18] 2 Mechem, AGENCY § 1722 (1914). See Manning v. Leavitt Co., 90 N. H. 167, 5 A. 2d 667 (1939). Field's Inc. v. Evans, 36 Ohio App. 153, 172 N. E. 702 (1929), noted in 29 MICH. L. REV. 640. Cf. Jewison v. Dieudonne, 127 Minn. 163, 149 N. W. 20 (1914), holding out as partner, two justices dissenting on the ground that no reliance was shown.

[19] Smith Coal Co. v. Feltner, 260 S. W. 2d 398, Ky. (1953). Vogt v. Borough of Belmar, 14 N. J. 195, 101 A. 2d 849 (1954). Beck v. City of Reading, 120 Pa. Super. 468, 182 A. 2d 732 (1936). Ham v. Mullins Lumber Co., 193 S. C. 66, 7 S. E. 2d 712 (1940).

[20] *Annot.*, 151 A. L. R. 1359 (1944), supplemented by 166 A. L. R. 813 (1947).

[21] N. C. GEN. STAT. § 97-19 (1950).

[22] Cathey v. Southeastern Construction Co., 218 N. C. 525, 11 S. E. 2d 787 (1940). Sales v. Loftis, 217 N. C. 674, 9 S. E. 2d 393 (1940).

[23] In neither of these cases, nor in Mack v. Marshall Field, 218 N. C. 697, 12 S. E. 2d 235 (1940) does the court seem to have considered arguments based on

The cases from other states, which have acts similar to the North Carolina Act, are not in accord on this problem. New York[24] and Wisconsin[25] have held the contractor liable at common law regardless of whether or not the subcontractor was insured, while Oklahoma,[26] Missouri,[27] and Florida[28] have held the principal contractor relieved of all common law liability to employees of his subcontractors.

Ohio[29] and Arkansas[30] have made distinctions between the cases in which the subcontractor has complied with the act by securing insurance, and those in which he has not, holding the employee of the subcontractor to be the employee of the principal contractor when the subcontractor has not complied with the act. Thus, if the subcontractor has complied with the act there is no employer-employee relationship, and the employee can bring an action at law against the principal contractor as a third party. If, however, the subcontractor has not complied with the act, an employer-employee relationship exists, and the employee is precluded from bringing an action at law against the principal contractor. It is questionable whether this distinction would be made in North Carolina. The North Carolina Act[31] does not say that the contractor becomes the employer of the employees of the subcontractor, but only says that if he fails to require a certificate of the subcontractor's compliance he will be liable to the same extent as if he were their employer, and if he does require it he will not be liable for compensation insurance actions and benefits. Since neither of the two North Carolina cases holding the contractor liable at common law have mentioned any distinction such as that made in Ohio and Arkansas, it might seem that

the possible policy of § 97-19 as substituting compensation for common law relief as against a superior contractor. The language of § 97-19 relieving a superior contractor who has obtained the required certificate of liability to subcontractor's employees "for compensation or other benefits under this Article" may be thought to negative any intent to relieve from common law liability. However, the amendment in 1945 which places compensation liability on superior contractors when the subcontractor has less than five employees goes far toward treating the combined employments as one single enterprise with responsibility at the top. Such policy seems further fortified by the holding that the superior contractor also need not have five employees to be made liable for compensation, and the reasons assigned for so holding. Withers v. Black, 230 N. C. 428, 434, 53 S. E. 2d 668, 673 (1949).

[24] Sweezey v. Arc Electrical Construction Co., 295 N. Y. 306, 67 N. E. 2d 369 (1946).

[25] Cermak v. Milwaukee Air Power Pump Co., 192 Wis. 44, 211 N. W. 354 (1926).

[26] Deep Rock Oil Corp. v. Howell, 200 Okla. 675, 204 P. 2d 282 (1949).

[27] New Amsterdam Casualty Co. v. Boaz-Kiel Construction Co., 115 F. 2d 950, 8th Cir. (1940).

[28] Brickley v. Gulf Coast Construction Co., 153 Fla. 216, 14 So. 2d 265 (1943).

[29] Trumbull Cliffs Furnace Co. v. Shachovsky, 111 Ohio St. 791, 146 N. E. 306 (1924).

[30] Lanza v. Carroll, 216 F. 2d 808, 8th Cir. (1954).

[31] N. C. GEN. STAT. § 97-19 (1950). See, however, Note 23 *supra*.

none would be made in North Carolina.[32] The argument against the distinction is that by restoring the contractor's common law liabilty it penalizes the contractor for requiring the subcontractor to comply with the act. Since one of the purposes of the act is to encourage contractors to require compliance with the act by subcontractors, this distinction would seem to defeat the purpose of the act.

The holdings subjecting the contractor to workmen's compensation and common law liability have not been without criticism.[33] Larson's *Workmen's Compensation Law* states, "A sounder result would seem to be a holding that the over-all responsibility of the general contractor for getting the subcontractors insured, and his latent liability for compensation if he does not, should be sufficient to remove him from the category of 'third party'. . . . The general contractor, like the immediate employer is subjected to non-fault liability for compensation, whether you call him a statutory employer or insurer or anything else; and he ought in return to get immunity from damage suits."[34] It would seem that the North Carolina act might well be amended to make clear that this common law immunity is granted the principal contractor.

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[32] However, G. S. § 97-19 was amended in 1941, following these two decisions, to make contractors liable *irrespective of whether such sub-contractor has regularly in service less than five employees in the same business within this state* to the same extent as such sub-contractor *would be liable if he had accepted the provisions of this article.* It could be argued that such additional burden on the contractor should relieve him of common law liability to these same employees. This view would seem more in line with other authorities, but there have been no cases on this point since the amendment. It would seem to create an undue burden on a contractor to make him liable for workmen's compensation and also liable for common law negligence to employees of a sub-contractor who does not have five employees and it is not covered by the act.

[33] Note, 39 VA. L. REV. 951, 959 (1953).

[34] 2 Larson, WORKMEN'S COMPENSATION LAW § 72.31 (1952).