



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

703-246-2221 • Fax: 703-246-5496 • TDD: 703-352-4139

BRUCE D. WHITE, CHIEF JUDGE
RANDY I. BELLOW
ROBERT J. SMITH
BRETT A. KASSABIAN
MICHAEL F. DEVINE
JOHN M. TRAN
GRACE BURKE CARROLL
DANIEL E. ORTIZ
PENNEY S. AZCARATE
STEPHEN C. SHANNON
THOMAS P. MANN
RICHARD E. GARDINER
DAVID BERNHARD
DAVID A. OBLON
DONTAË L. BUGG

JUDGES

COUNTY OF FAIRFAX

CITY OF FAIRFAX

THOMAS A. FORTKORT
J. HOWE BROWN
F. BRUCE BACH
M. LANGHORNE KEITH
ARTHUR B. VIEREGG
KATHLEEN H. MACKAY
ROBERT W. WOOLDRIDGE, JR.
MICHAEL P. McWEENEY
GAYLORD L. FINCH, JR.
STANLEY P. KLEIN
LESLIE M. ALDEN
MARCUS D. WILLIAMS
JONATHAN C. THACHER
CHARLES J. MAXFIELD
DENNIS J. SMITH
LORRAINE NORDLUND
DAVID S. SCHELL
JAN L. BRODIE

RETIRED JUDGES

November 13, 2020

John R. Kelly
Law Office of Andrew S. Kasmer
4020 University Drive, Suite 501
Fairfax, VA 22030

Lacey Ullman Conn
Thomas, Thomas & Hafer, LLP
10555 Main Street, Suite 300
Fairfax, VA 22030

Jeffrey N. Gaull
Geico Staff Counsel
3702 Pender Drive, Suite 140
Fairfax, VA 22030

Re: Anthony Gerben v. Brad Edwards, et al., CL-2020-5618

Dear Counsel:

This matter came before the court on October 16, 2020 on Defendant Brad Edwards' Plea in Bar.

I. FACTUAL BACKGROUND

This case arises out of an automobile accident that occurred on I-66 in Fairfax County, Virginia. Compl. ¶¶ 1-3. Anthony Gerben ("Plaintiff") was a passenger in the vehicle operated by Brad Edwards ("Defendant Edwards"). Id. ¶ 1. Chin Van Nguyen ("Defendant Nguyen") was operating the other vehicle involved in the accident. Id. ¶ 2. Plaintiff and Defendant Edwards were in the course of their employment with Service 1st Vending, Inc. ("Service 1st Vending") at the time of the accident, driving to Tysons Corner Mall to fill a vending machine. Plea in Bar ¶ 2.

Plaintiff and Defendant Edwards are residents of Maryland. Pl.'s Opp'n at 3. Services 1st Vending is a Maryland corporation. *Id.* Plaintiff received workers' compensation under Maryland law due to the injuries he received from this accident. *Id.*

II. PROCEDURAL BACKGROUND

Plaintiff filed a Complaint against Defendant Edwards and Defendant Nguyen in this court on April 14, 2020. Defendant Edwards filed the instant Plea in Bar on June 19, 2020. The court heard oral argument on this Plea in Bar on October 16, 2020. After finding that Virginia law applies to the instant case (*lex loci delicti*), the court took the Plea in Bar under advisement and ordered the parties to submit additional briefing by October 23, 2020 addressing what law applies to the instant case, common law or the Virginia Workers' Compensation Act ("VWCA"), Code § 65.2-100 *et seq.*

III. THE PARTIES' POSITIONS

"A plea in bar asserts a single issue, which, if proved, creates a bar to a plaintiff's recovery." *Hawthorne v. VanMarter*, 279 Va. 566, 576 (2010) (citations omitted). "The party asserting a plea in bar bears the burden of proof on the issue presented." *Id.* (citations omitted).

Defendant Edwards argues that the so-called exclusivity provision of the VWCA, Code § 65.2-307(A), bars Plaintiff from maintaining a civil negligence action against his co-employee because the accident took place in Virginia and because Plaintiff received workers' compensation due to the injuries he received from the accident. Plea in Bar ¶¶ 8-9. In his supplemental brief, Defendant Edwards argues that the VWCA provides the exclusive method for Plaintiff's recovery, Def.'s Suppl. Mem. at 1-6, and that it would contravene the General Assembly's intent not to apply the exclusivity provision in the instant case, *id.* at 7-9.

Plaintiff argues that the VWCA does not apply to the instant case because Plaintiff received workers' compensation under Maryland law, not Virginia law, and because Plaintiff and his employer are Maryland residents who never accepted the provisions of the VWCA. Pl.'s Opp'n at 2-3. In his supplemental brief, Plaintiff emphasizes these facts again, relying on *Solomon v. Call*, 159 Va. 625 (1932) for the proposition that, if a plaintiff is not embraced within the terms of the VWCA, the exclusivity provision does not apply, and the plaintiff is allowed to pursue common law remedies against his employer and co-employee. Pl.'s Suppl. Mem. at 2-4.

IV. ANALYSIS

The exclusivity provision of the VWCA states:

The rights and remedies herein granted to an employee when his employer and he have accepted the provisions of this title respectively to pay and accept compensation on account of injury or death by accident shall exclude all other rights and remedies of such employee . . . at common law or otherwise, on account of

such injury, loss of service, or death.

Code § 65.2-307(A) (emphasis added).

A. State Case Law

The purpose of the [VWCA] . . . is to limit the recovery of all persons engaged in the business under consideration to compensation under the act, and to deny an injured person the right of recovery against any other person unless he be a stranger to the business.

Rea v. Ford, 198 Va. 712, 717 (1957) (quoting *Doane v. E. I. DuPont De Nemours & Co.*, 209 F.2d 921, 926 (4th Cir. 1954)) (internal quotation marks omitted).

The exclusivity provision, however, explicitly limits its application to those employers and employees who have "accepted the provisions of [the VWCA]." Code § 65.2-307(A); see also *Gibbs v. Newport News Shipbuilding and Drydock Co.*, 284 Va. 677, 680 (2012) (recognizing that the VWCA's "exclusivity provision applies only when employer and employee have both 'accepted the provisions of [the VWCA] respectively to pay and accept compensation' ").

The case law is consistent with this limitation. The facts of *Solomon* are directly on point. *Solomon*, a Pennsylvania resident, was employed as a traveling salesman by another Pennsylvania resident. 159 Va. at 628. *Solomon* was injured in a car accident in Virginia while he was acting within the scope of his employment and received workers' compensation under Pennsylvania law as a result. *Id.* *Solomon* then brought a civil negligence action in Virginia state court against the drivers of the other vehicle involved in the accident. *Id.* at 627-28. The Supreme Court of Virginia noted that, because *Solomon's*:

employment was under a Pennsylvania contract, with a Pennsylvania employer and embraced within the terms of the workman's compensation act of that State[, h]is contract of employment was entirely foreign to the State of Virginia and clearly outside of the [VWCA].

Id. at 630.

The Court reasoned that, because of this, *Solomon* "could not have successfully maintained any claim for compensation under the [VWCA] because he was not embraced therein." *Id.* The Court concluded that "not being within the [VWCA] and not having accepted an award thereunder, [Solomon] is not prohibited by the act nor by common law from maintaining his action." *Id.*¹

¹ Defendant Edwards's assertion in his Supplemental Memorandum (at 4) that the exclusivity provision of the VWCA "had not yet been instituted in 1932" when *Solomon* was decided is simply not correct. *Solomon* applied Code § 1887(12), Code of 1930, which is replicated almost word-for-word in Code § 65.2-307(A). 159 Va. at 629 (citing Code § 1887(12), Code of 1930). A case that preceded *Solomon* quotes the entirety of the exclusivity provision as it existed then. *Horsman v. Richmond, F & P.R. Co.*, 155 Va. 934, 937-38 (1931) (quoting Code § 1887(12), Code of 1930).

A more recent case yields a similar conclusion. In *Gibbs, supra*, the Navy entered into a contract with the Newport News Shipbuilding and Drydock Company ("Shipyard") for the purchase of two nuclear submarines to be constructed at the Shipyard and Gibbs, an enlisted seaman on active duty, was assigned to test and inspect the electronic systems on one of the submarines during its construction. 284 Va. at 679. While Gibbs was working at the Shipyard, he was exposed to asbestos and later contracted malignant mesothelioma as a result. *Id.* at 679-80. Gibbs brought a civil negligence action against the Shipyard. *Id.* The Supreme Court of Virginia described the VWCA as "a *quid pro quo* providing no-fault compensation for workers in exchange for immunity for employers from actions at common law" and "a societal exchange, benefitting all employers and all employees who stand together under the canopy of the [VWCA]." *Id.* at 682-83 (quoting *Whalen v. Dean Steel Erection Co.*, 229 Va. 164, 171 (1985)) (internal quotation marks omitted). The Court ultimately concluded that the exclusivity provision of the VWCA did not bar Gibbs's action because neither Gibbs nor the Navy had accepted the provisions of the VWCA.² *Id.* at 683.

B. Federal Case Law

Defendant Edwards relies on several federal cases that are distinguishable from the instant case or which reject the application of *Solomon v. Call, supra*.

In *Home Indemnity Co. of N.Y. v. Poladian*, 270 F.2d 156 (4th Cir. 1959), an out-of-state employee was employed by an out-of-state employer which was hired as a subcontractor by a Virginia partnership. When the employee was injured on a job in Virginia while acting within the scope of his employment, he elected to accept a workers compensation award under his home state's laws. The court held that the employee was barred by the exclusivity provision of the VWCA from maintaining a civil action against the Virginia partnership because it was a "statutory employer" as defined by the VWCA.³

² The Navy did not accept the provisions of the VWCA because it "would not in any circumstances have been liable to pay compensation under the [VWCA]." *Gibbs*, 284 Va. at 681. Gibbs did not accept the provisions of the VWCA because the General Assembly did not intend to include military enlistment within the term "contract for hire" under the VWCA. *Id.* at 681-82 ("Neither we nor the General Assembly has the authority to define our laws in such a way as to affect the relationship between the federal government and members of its armed forces on active duty.").

³ *Home Indemnity Co. of N.Y.* was preceded by a district court decision in *Liberty Mut. Ins. Co. v. Goode Const. Co.*, 97 F. Supp. 316 (E.D. Va. 1951), which held:

To an accident happening within her boundaries Virginia has unhesitatingly given efficacy to the compensation law of the State of the injured's residence, even when materially at variance with her own law. *Solomon v. Call*, 159 Va. 625, 166 S.E. 467.

97 F. Supp. at 317.

In this court's view, this is not an accurate characterization of *Solomon* in that *Solomon* explained that *Solomon's* "contract of employment was entirely foreign

Shortly after *Home Indemnity Co. of N.Y.* was decided, *McCann v. Newport News Shipbuilding and Drydock Co.*, 177 F. Supp. 909 (E.D. Va. 1959), held that an out-of-state employee of an out-of-state employer which was a contractor to a Virginia corporation was a "statutory employee" of the Virginia corporation covered under the VWCA and thus "barred from maintaining any action at common law against his statutory employer." 177 F. Supp. at 913. Notably, *McCann* accepted the result in *Solomon*, recognizing that "there was no employer to whom plaintiff [in *Solomon*] could turn to receive any benefits under the [VWCA]." *Id.* Thus, *Solomon* was "entirely foreign to the issue raised herein." *Id.*

Similarly, *Garcia v. Pittsylvania Cty. Serv. Auth.*, 845 F.2d 465 (4th Cir. 1988), held that the VWCA barred the claims of two employees of a North Carolina subcontractor against a Virginia entity for injuries sustained while working on a project for the Virginia entity in Virginia as they were "statutory employees" of the Virginia entity covered under the VWCA. 845 F.2d at 468.⁴

The most recent federal case is *Demetres v. East West Constr., Inc.*, 776 F.3d 271 (4th Cir. 2015), which involved an out-of-state employee employed by an out-of-state employer which hired a Virginia corporation as a subcontractor to do work in Virginia. The out-of-state employee was injured in Virginia by an employee of the Virginia subcontractor while acting within the scope of his employment and received workers compensation under his home state's laws. When a civil action was brought against the Virginia subcontractor by the out-of-state employee, the court held that the out-of-state employee was barred by the exclusivity provision of the VWCA from maintaining a civil action against the Virginia subcontractor because the out-of-state employee was a "statutory co-employee" of the Virginia subcontractor as defined by the VWCA.

Of significance to the instant case, the *Demetres* court observed that *Demetres* also argued that *Solomon* "expressly allows his claim to be heard in Virginia." 776 F.3d at 275, n.3. The court responded that, although the "Supreme Court of Virginia has never expressly overruled *Solomon*," *Garcia* held

to the State of Virginia and clearly outside of the [VWCA]." 159 Va. at 630. Thus, *Solomon* not only did not "give[] efficacy" to the compensation law of the State of the injured's residence, but rather found that it was "entirely foreign to the State of Virginia . . ." 159 Va. at 630. As a result, because the court noted that, "under the Virginia compensation law the action is not maintainable," 97 F. Supp. at 316, it is this court's view that the district court erroneously decided the case.

⁴ *Garcia* also stated:

McCann states the present law of Virginia on the subject, and even if *Liberty Mutual* was a correct construction of *Solomon* at the time it was decided, it no longer has validity in view of *Carroll* and *Home Indemnity*.

845 F.2d at 467.

As noted in the prior footnote, in this court's view, *Liberty Mutual* was not a "correct construction of *Solomon*." Accordingly, this court agrees that *Liberty Mutual* no longer has validity as it never did.

that *Solomon*, "to the extent that it would allow a suit such as *Demetres's* to proceed, was no longer the 'present law of Virginia on the subject.' 845 F.2d at 467." *Id.* Further, the court stated that "*Garcia* abrogated *Solomon* . . ." *Id.* These statements concerning *Solomon* are misleading.

In the first place, *Solomon* would not have allowed a suit such as *Demetres's* to proceed because, in *Demetres*, the plaintiff's employer had hired a Virginia corporation as a subcontractor to do work in Virginia, whereas, in *Solomon*, there was no Virginia subcontractor. Moreover, a federal court cannot "abrogate" the decision of a state supreme court on a question of state law; only the state supreme court may do so and the federal court in *Demetres* has acknowledged that the Virginia Supreme Court has not expressly overruled *Solomon*. See e.g., *Toghill v. Commonwealth*, 289 Va. 220, 227 (2015) (while federal court decisions are considered persuasive authority in Virginia state courts, "such decisions are not binding precedent.").

In sum, in contrast to the federal cases, in the instant case, neither the employer nor the employee is a Virginia resident, so that the issue in the federal cases -- whether the injured party was a statutory employee under the VWCA -- is not present. Moreover, as noted, *supra*, while federal court decisions are considered persuasive authority in Virginia state courts, "such decisions are not binding precedent." *Toghill*, 289 Va. at 227.

C. Other Authorities

The rest of the cases on which Defendant Edwards relies are also distinguishable from the instant case because all of the employers and employees involved resided in Virginia and were clearly subject to the VWCA.⁵ These cases in no way indicate that the law regarding the VWCA applies to cases involving all out-of-state employers and employees.

Defendant Edwards relies on Code § 65.2-300(A), which provides:

Every employer and employee, except as herein stated, shall be conclusively presumed to have accepted the provisions of this title respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of the employment and shall be bound thereby.

There is, however, no binding case law that applies this statutory presumption to cases involving all out-of-state employers and employees.

Defendant Edwards's argument that it would contravene the General Assembly's intent not to apply the VWCA's exclusivity provision in the instant case is not persuasive. Although the Supreme Court of Virginia decided

⁵ *Giordano v. McBar Indus.*, 284 Va. 259 (2012); *Pfeifer v. Krauss Constr. Co. of Va., Inc.*, 262 Va. 262 (2001); *Plummer v. Landmark Commc'ns, Inc.*, 235 Va. 78 (1988); *Sorrels v. Foreign Mission Bd. of Southern Baptist Convention*, 227 Va. 6 (1984); *Ferrell v. Beddow*, 203 Va. 472 (1962); *Kramer v. Kramer*, 199 Va. 409 (1957); *Feitig v. Chalkley*, 185 Va. 96 (1946); *Griffith v. Raven Red Ash Coal Co.*, 179 Va. 790 (1942); *Perrin v. Brunswick Corp.*, 333 F. Supp. 221 (W.D. Va. 1971).

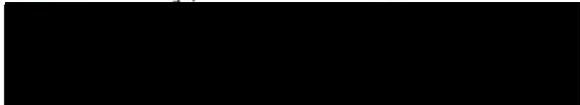
Solomon in 1932, the exclusivity provision at issue here is virtually unchanged from the time of *Solomon*. The General Assembly could have amended the VWCA's exclusivity provision to abrogate the *Solomon* decision, but has not. If anything, this is evidence that the General Assembly intended that the VWCA exclusivity provision not apply to situations like the one in *Solomon* and like the instant case. See e.g., *Cygnus Newport-Phase 1B, LLC v. City of Portsmouth*, 292 Va. 573, 582 (2016) ("inaction by the General Assembly despite awareness of the Court's interpretation of a statute 'is not only acquiescence but approval' of that interpretation.") (internal citation omitted).

Because *Solomon* is directly on point and has never been overruled by the Supreme Court of Virginia, it controls the outcome of this case.⁶ Because Plaintiff is a Maryland resident employed by a Maryland corporation, he could not have received workers' compensation under the VWCA because neither he nor his employer are embraced within its terms. The exclusivity provision of the VWCA thus does not apply to Plaintiff, and his civil negligence action against Defendant Edwards is not barred.

IV. Conclusion

For the reasons set forth, Defendant Edwards's Plea in Bar is OVERRULED. Defendant Edwards shall have fourteen (14) days from entry of this order to file any responsive pleading.

Sincerely,



Richard E. Gardiner
Judge

⁶ Virginia circuit courts "are bound by the decisions of the Supreme Court of Virginia and are without authority to overrule [them]." See, e.g., *Roane v. Roane*, 12 Va. App. 989, 994 (Va. Ct. App. 1991). Moreover, while this court has not found any case that explicitly holds that trial courts are bound by the most recent expression of the law by the Supreme Court, the Court has made that requirement implicit in numerous cases. For instance, in *Edmonds v. Edmonds*, 290 Va. 10 (2015), the Court stated that "the law controlling this case is well-established" and then referred to the "most recent case this Court decided involving this issue" 290 Va. at 18. Similarly, in *Newman v. Erie Ins. Exch.*, 256 Va. 501 (1998), the Court rejected an argument because it was contrary to "our most recent case addressing" that issue. Indeed, the Court held that the holding of the most recent case compelled the Court to overrule a prior decision. 256 Va. at 509. And in *Allaun v. First & Merchs. Nat'l Bank of Richmond*, 190 Va. 104 (1949), the Court held that the "most recent case" is "controlling of the case at bar." 190 Va. at 109-10.

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

ANTHONY GERBEN)	
)	
Plaintiff)	
)	
v.)	CL 2020-5618
)	
BRAD EDWARDS, <i>et al.</i>)	
)	
Defendant)	

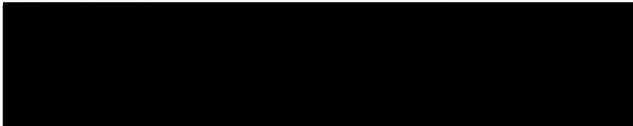
ORDER

THIS MATTER came before the court on October 16, 2020 on Defendant Brad Edwards' Plea in Bar.

IT APPEARING to the court, for the reasons stated in the court's letter of November 13, 2020, that the Plea in Bar should be overruled, it is hereby

ORDERED that the Plea in Bar is OVERRULED and that Defendant Edwards shall have fourteen (14) days from entry of this order to file any responsive pleading.

ENTERED this 13th day of November, 2020.



Richard E. Gardiner
Judge

Copies to:

Lacey Ullman Conn
Counsel for Defendant Brad Edwards

John R. Kelly
Counsel for Plaintiff

Jeffrey N. Gaull
Counsel for Defendant Chin Van Nguyen

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR
THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT
PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA