VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday *the* 29th *day of* December, 2010.

Gary Lee Bailey, Appellant,

against Record No. 092449
Circuit Court No. CL08000061

Keith Irwin Installations, et al., Appellees.

Upon an appeal from a judgment rendered by the Circuit Court of Tazewell County.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that there is reversible error in the judgment of the circuit court.

On March 16, 2006, Gary Lee Bailey, an employee of Aramark Uniform Services ("Aramark"), was injured in a fall from a catwalk at Aramark's facility in Bluefield, Virginia. Bailey later filed a complaint against Keith Irwin Installations ("KEI") alleging that KEI had been negligent in the design, construction, and installation of the catwalk.

KEI filed a motion to dismiss and plea in bar in which it asserted that it was a fellow statutory employee of Aramark and that Bailey's claims therefore were barred by the Virginia Workers' Compensation Act, Code §§ 65.2-100 to -1310 ("the Act"). KEI specifically argued that Aramark's trade, business and occupation included industrial cleaning and processing of uniforms and that the stockroom operations, of which the catwalk was a part, were an indispensable part of that trade, business and occupation. KEI further contended that Aramark employees had assisted with the

catwalk's installation and Aramark's strict supervision afforded KEI no discretion over the design and installation of the catwalk.

Relying on our prior decisions in Bassett Furniture Industries, Inc. v. McReynolds, 216, Va. 896, 224 S.E.2d 323 (1976) and Shell Oil Company v. Leftwich, 212 Va. 715, 187 S.E.2d 162 (1972), the circuit court held that "an independent contractor is considered a statutory employee of the employer . . . if the work performed by the independent contractor was indispensable to the business of the employer and is work that is normally carried out through employees rather than independent contractors." The court then found the evidence established "that Aramark's business included the storage and maintenance of uniforms" and that "modifications to systems that provide for the storage and movement of uniforms in the warehouse appear to be part of Aramark's normal business." The court considered further evidence that Aramark had actively participated in the design and installation of the catwalk, contributed its own employees to complete certain aspects of the project, and allowed KEI "little to no discretion" as to the catwalk's installation or design. Accordingly, the court ruled that KEI was a fellow statutory employee of Aramark and granted KEI's motion to dismiss.

"A plea in bar presents a distinct issue of fact which, if proven, creates a bar to the plaintiff's right of recovery. The moving party has the burden of proof on that issue." Hilton v. Martin, 275 Va. 176, 179-80, 654 S.E.2d 572, 574 (2008). While we uphold the circuit court's factual findings unless plainly wrong or without evidence to support them, we review the court's legal

conclusions de novo. Station # 2, LLC v. Lynch, 280 Va. 166, 175, 695 S.E.2d 537, 542 (2010).

It is apparent from our review of the record of the proceedings below that the circuit court erroneously applied the "normal work test" set forth in the Shell Oil line of cases. The correct test is the "stranger to the work test" set forth in Feitig v. Chalkley, 185 Va. 96, 38 S.E.2d 73 (1946).[1] However, no party has assigned error to the circuit court's use of the "normal work test" so it is now the law of the case.[2] Covel v. Town of Vienna, 280 Va. 151, 163, 694 S.E.2d 609, 616 (2010); Lane v. Stark, 279 Va. 686, 689 n.3, 692 S.E.2d 217, 218 n.3 (2010).

The "normal work test" evaluates whether the activity engaged in by the subcontractor whose employee has been injured is "normally carried on" by the employees of the general contractor or owner being sued, rather than its subcontractors. Shell Oil, 212 Va. at 722, 187 S.E.2d at 167 (emphasis in original). As applied

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[1] In Whalen v. Dean Steel Erection Co., 229 Va. 164, 327 S.E.2d 102 (1985), and Stone v. Door-Man Manufacturing Co., 260 Va. 406, 537 S.E. 305 (2000), we stated clearly that the "normal work test" is applied where a subcontractor's employee is injured by a general contractor or owner. Stone, 260 Va. at 416, 537 S.E.2d at 309 (quoting Whalen, 229 Va. at 170, 327 S.E.2d at 106). Thus, the "normal work test" is used to determine whether the general contractor or owner is the statutory employer of the subcontractor's employee. Where, as here, the employee of a general contractor or owner is injured by the subcontractor of the general contractor or owner, the "stranger to the work test" applies. Id., 537 S.E.2d at 310 (citing Whalen, 229 Va. at 170, 327 S.E.2d at 106.)

[2] Nevertheless, as in Stone, the result we reach today on the specific facts presented in this case would be the same under either test.

to this case, the "normal work test" analysis turns on whether KEI's installation of the catwalk is activity normally carried on in Aramark's trade, business and occupation.

In Bassett Furniture Industries, Inc. v. McReynolds, 216 Va. 897, 224 S.E.2d 323 (1976), we stated that frequency and regularity of the activity "are factors to be considered in determining whether work is 'normally carried on through employees,'" but neither "mere capacity to perform" nor "performance which is a de minimis part of the total business operation" is determinative. Id. at 902-03, 224 S.E.2d at 326-27. However important the catwalk and the efficient movement and storage of uniforms at the Bluefield facility may be to Aramark's trade, business, and occupation, that trade, business, and occupation remains the laundering and processing of uniforms--not the construction of catwalks.

While Aramark may have supervised the catwalk's design and installation and Aramark's employees may have assisted in the installation, there is no evidence that Aramark regularly used its own employees to undertake similar construction projects. Rather, the involvement of Aramark's own employees appears to be indistinguishable from the facts in Bassett Furniture. As in that case, the evidence adduced here demonstrates only that some Aramark employees had, at most, transitory interaction with the catwalk installation and that one employee, who regularly was involved in the design, comprised "[o]nly a negligible fraction" of Aramark's workforce. Id. at 903, 224 S.E.2d at 327.

Consequently, there was insufficient evidence for the circuit court to find that KEI was a statutory employee of Aramark under the "normal work test" and to hold that Bailey's claims were barred

by the Act. The judgment therefore is reversed and the case is remanded for further proceedings consistent with this order.

This order shall be certified to the said circuit court.

A Copy,

Teste:

Clerk