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## Analyzing The Virginia Workers' Compensation Act's Governance of Employer Non-Compliance

D. Paul Holdsworth

*Glenn Feldmann Darby & Goodlatte, Roanoke, Virginia.*

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# ANALYZING THE VIRGINIA WORKERS' COMPENSATION ACT'S GOVERNANCE OF EMPLOYER NON-COMPLIANCE

*D. Paul Holdsworth* \*

## INTRODUCTION

Workers' compensation schemes across the country, including in Virginia,<sup>1</sup> were established for the important purpose of creating a streamlined system whereby employees who suffered an injury in the course of employment could, irrespective of fault, recover some monetary relief therefor and whereby employers would be simultaneously protected from potentially crippling financial liability.<sup>2</sup>

While the idea of workers' compensation was once an experiment of sorts,<sup>3</sup> workers' compensation statutes have existed in every American jurisdiction for well over a half-century.<sup>4</sup> In 1946, Justice Edward Wren Hudgins of the Supreme Court of Virginia opined, "[t]he Workmen's Compensation Law has passed the experimental stage. It is as essential to industry as it is to labor. It comprises one of the most important branches of law."<sup>5</sup>

Today, the Virginia Workers' Compensation Act (the "Act") maintains its important role to both employees injured in the

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\* Associate, Glenn Feldmann Darby & Goodlatte, Roanoke, Virginia. J.D., 2015, University of Richmond School of Law; B.A., 2012, Brigham Young University.

1. VA. CODE ANN. §§ 65.2-100-106 (Repl. Vol. 2012 & Cum. Supp. 2016).

2. See *infra* text accompanying notes 27-29.

3. See *Feitig v. Chalkley*, 185 Va. 96, 98, 38 S.E.2d 73, 73 (1946); see also LARSON SERIES: WORKERS' COMPENSATION EMERGING ISSUES ANALYSIS 2 (2013) (referencing the "grand experiment" of workers' compensation and how that experiment continues due to flexibility and customization of the multi-jurisdictional model of workers' compensation in the United States).

4. See 1 ARTHUR LARSON ET AL., LARSON'S WORKERS' COMPENSATION LAW § 2.08 (2016).

5. *Feitig*, 185 Va. at 98, 38 S.E.2d at 73 (referring to the Virginia Workers' Compensation Act as it was formerly known, the Virginia Workmen's Compensation Law).

course of their employment and to Virginia's commerce at large.<sup>6</sup> Even so, questions and complexities still arise as to how to interpret and administer the myriad provisions of the Act.

One such ambiguity concerns the interpretation of Virginia Code section 65.2-805(A)—the provision governing the liability of employers who fail to comply with the Act's requirement to carry workers' compensation insurance and provide evidence thereof.<sup>7</sup> The statute, "penal in nature,"<sup>8</sup> clearly aims to punish such employers for non-compliance in several ways, one of which is subjecting them to a common law negligence suit from which they would otherwise be immune under the general provisions of the Act.<sup>9</sup> What remains unclear, however, is whether the employee in such a suit must nevertheless plead a prima facie case of negligence against the non-compliant employer,<sup>10</sup> or whether the employee is entitled to strict liability relief without pleading a prima facie case.

This lack of clarity has already resulted in a difference of opinion within one of Virginia's circuits,<sup>11</sup> and could lead, if it has not

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6. See *VWC's Mission*, VA. WORKERS' COMPENSATION COMMISSION, <http://www.vwc.state.va.us> (last visited Oct. 12, 2016).

7. For the purposes of this essay, an employer may fail to comply with the Act in one of two ways: by not carrying workers' compensation insurance as required by section 65.2-800 or by carrying insurance but failing to provide adequate evidence thereof to the Virginia Workers' Compensation Commission, as required by section 65.2-804. VA. CODE ANN. § 65.2-805(A) (Repl. Vol. 2012 & Cum. Supp. 2016).

8. *Virginia Used Auto Parts, Inc. v. Robertson*, 212 Va. 100, 102, 181 S.E.2d 612, 613 (1971).

9. See *infra* notes 32–33 and accompanying text.

10. The term "non-compliant employer" is used frequently throughout this essay. The "non-compliance" referred to is the failure of an employer to obtain the requisite workers' compensation insurance required under section 65.2-800 and/or the failure of an employer to give adequate notice of the same, as required by section 65.2-804. See *supra* note 7.

11. Two recent cases within the Twenty-Third Judicial Circuit of Virginia concerning the interpretation of section 65.2-805(A) have reached different outcomes. Compare *Bailey v. Hensley*, No. CL16-284, 2016 Va. Cir. LEXIS 74, at \*15–20 (Cir. Ct. May 6, 2016) (Roanoke City) (sustaining the defendant-employer's demurrer because, although section 65.2-805 was to be liberally construed in favor of the employee, the plaintiff-employee was still obligated to establish a prima facie case of negligence and failed to do so), with *Wade v. Scott Recycling LLC*, 89 Va. Cir. 319, 322 (2014) (Roanoke City) (holding that a plaintiff-employee was entitled to Partial Summary Judgment because section 65.2-805 established the non-compliant employer's liability as a matter of law).

There has been one additional published circuit court case on this issue, *Siso v. Aradi, Inc.*, 1995 Va. Cir. LEXIS 1443, at \*2 (Cir. Ct. Apr. 3, 1995) (Loudoun County). In *Siso*, the plaintiff moved to amend the motion for judgment to include a strict liability count, but this was denied. *Id.* at \*1, \*3. The Loudoun County Circuit Court was "not persuaded by the plaintiff's argument that § 65.2-805 provides that the plaintiff need not prove that the employer was negligent, in effect imposing strict liability in cases where the employer has

done so already, to splits within others or among the circuits generally.<sup>12</sup>

This essay attempts to resolve the current disconnect in the state judiciary's application of section 65.2-805(A) by analyzing the language of the statute as well as the various policy implications that undergird its establishment and accompany each interpretation. Part I provides a brief background of workers' compensation law generally, the Virginia Workers' Compensation Act (including section 65.2-805(A)), and the relevant case law involving section 65.2-805(A). Part II proceeds with the essay's argument, i.e., that section 65.2-805(A) should not be interpreted as imposing strict liability on non-compliant employers and thereby eliminating the obligation for a plaintiff-employee to plead a *prima facie* case of negligence. To the extent that this interpretation differs from the original intent of the General Assembly when it enacted section 65.2-805(A), or the current intent of the General Assembly for that matter, Part III invites the legislature to make an appropriate amendment through traditional means.

## I. BACKGROUND

### A. *Workers' Compensation Generally*<sup>13</sup>

The concept of workers' compensation in the United States developed largely from ideas borrowed from Germany, which adopted the world's first modern compensation system around 1884—twenty-five years before the first American jurisdiction.<sup>14</sup> During the latter half of the nineteenth century, the Industrial Revolu-

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not complied with [the Act]." *Id.* at \*2. Instead, the court held: "[t]he language of § 65.2-805 is clear in what advantages plaintiff employees receive in civil suits where an employer has not provided Workers' Compensation coverage. A provision for strict liability is not one of them and the Court finds no legal basis to infer one from the statutory language." *Id.* at \*3.

12. Due to the fact that the vast majority of workers' compensation claims are handled administratively, and that many circuit court decisions go unpublished, there is a substantial possibility that this issue has come up before within other circuits. Notwithstanding, there is no opinion from the Court of Appeals of Virginia or Supreme Court of Virginia *directly* on point—i.e., addressing whether a plaintiff-employee who chooses to sue his or her non-compliant employer under the statute is obligated to establish a *prima facie* case of negligence.

13. "A correctly balanced underlying concept of the nature of workers' compensation is indispensable to an understanding of current cases and to a proper drafting and interpretation of compensation acts." LARSON ET AL., *supra* note 4, at § 1.02.

14. *See id.* at §§ 2.06–07.

tion was in full swing, coinciding with an increasing amount of industrial accidents and workplace injuries.<sup>15</sup> The increase of industrial injuries, coupled with decreasing remedies for employees,<sup>16</sup> facilitated a climate "ripe for radical change" in how such accidents and injuries would be or should be addressed.<sup>17</sup>

Following the lead of the German system, as well as the British compensation system enacted in 1897, many states began the process of adopting their own workers' compensation acts.<sup>18</sup> The first of such legislation was passed in New York in 1910.<sup>19</sup> However, in the years that immediately followed, widespread enactment of workers' compensation statutes was inhibited by constitutionality concerns.<sup>20</sup> The tide turned on these preliminary setbacks in 1917, when the Supreme Court of the United States upheld the constitutionality of three states' compulsory compensation laws: New York, Iowa, and Washington.<sup>21</sup> As a result of these decisions, "the compensation system grew and expanded with a rapidity that probably has no parallel in any comparable field of law."<sup>22</sup>

Prior to the passage of workers' compensation statutes, monetary recovery for workplace injuries could only be obtained through a common law tort claim, which hinged upon a determination of fault and causation.<sup>23</sup> Indeed, all legislation predating workers' compensation acts "accepted the basic common-law idea that the employer was liable to the employee only for the negligence or fault of the employer or, at most, of someone for whom the employer was generally responsible under the respondeat superior doctrine."<sup>24</sup>

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15. See *id.* at § 2.07; see also MARION G. CRAIN ET AL., WORK LAW: CASES AND MATERIALS 863 (2005) (explaining how the common law approach to workplace injuries was insufficient during this era); Debra T. Ballen, *The Sleeper Issue in Health Care Reform: The Threat to Workers' Compensation*, 79 CORNELL L. REV. 1291, 1292 (1994) (explaining that the workers' compensation system arose in the context of increased injuries resulting from the Industrial Revolution and that before workers' compensation statutes, injured workers had to file lawsuits in order to receive compensation for their injuries).

16. Common-law defenses increasingly safeguarded employers from liability during this time. See CRAIN ET AL., *supra* note 15, at 868; Ballen, *supra* note 15, at 1292.

17. LARSON ET AL., *supra* note 4, at § 2.07.

18. See *id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. See CRAIN ET AL., *supra* note 15, at 863.

24. LARSON ET AL., *supra* note 4, at § 2.05.

Nevertheless, the increased litigation of workplace injuries, which naturally followed the increase of workplace accidents due to industrialization, gradually uncovered a two-pronged problem with the traditional system of recovery. On one hand, it became increasingly difficult for injured workers to recover relief for their injuries due to a number of judicially created affirmative defenses, such as contributory negligence, which employers could claim.<sup>25</sup> On the other hand, however, if plaintiff-employees could overcome these defenses, employers became subject to debilitating liability costs significantly beyond their individual insurance coverage—if they had coverage at all.<sup>26</sup>

Workers' compensation legislation seemingly resolved this dilemma for both employees and employers by establishing an administrative mechanism which allowed more workers to recover for their work-related injuries while also ensuring that an employer's liability losses were not ruinously damaging.<sup>27</sup>

In practice, workers' compensation statutes generally obligate an employer to compensate an injured employee for his injury no matter how or why the injury was suffered.<sup>28</sup> And in exchange for obligating an employer to compensate for injuries irrespective of fault, the employee is generally prohibited from suing the employer in tort.<sup>29</sup> The employee may only pursue compensation through his state's statute.

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25. CRAIN ET AL., *supra* note 15, at 868; *see* Ballen, *supra* note 15, at 1292.

26. *See* Ballen, *supra* note 15, at 1292.

27. LARSON ET AL., *supra* note 4, at § 1.03 (distinguishing the amount of recoverable workers' compensation benefits from tort recovery, and indicating that suits in tort have the potential for larger damages than the actual monetary loss suffered); *see also* 21 M.J. WORKERS' COMPENSATION § 2 (2016) ("The underlying purpose of the compensation acts is to provide a system whereby injuries due to industry may be liquidated and balanced in money in the course of consumption."); *infra* text accompanying notes 47–48 (discussing that in Virginia, the responsibility to insure is the onus of the employer). Workers' compensation acts allow more workers to recover because of its inherent no-fault system of recovery, to wit, employees who are negligent can still recover some or a substantial amount of benefits so long as the injury occurred in the course of employment. *See infra* text accompanying notes 42–43.

28. CRAIN ET AL., *supra* note 15, at 875; LARSON ET AL., *supra* note 4, at § 1.01; *see also* 21 M.J. WORKERS' COMPENSATION § 2 (2016) ("The shorthand meaning of 'workmen's compensation laws' is this: a statutorily created insurance system that allows employees to receive fixed benefits, without regard to fault, for work-related injuries.").

29. *See, e.g.*, LARSON ET AL., *supra* note 4, at § 100.01 ("Once a workers' compensation act has become applicable either through compulsion or election, it affords the exclusive remedy for the injury by the employee or the employee's dependents against the employer and insurance carrier."). This bargain is often referred to as the workers' compensation "exclusivity."

One of the more common exceptions to the requirement that an injured worker may only obtain recovery under the state's workers' compensation statute "is the right of suit against an employer who fails to secure its compensation liability. . . ."<sup>30</sup> Virginia recognizes this exception in the statutory section that is the subject of this essay, Virginia Code section 65.2-805(A).<sup>31</sup> Another common exception to workers' compensation exclusivity,<sup>32</sup> also reflected in Virginia Code section 65.2-805(A), is that, under such a suit, an employer will be deprived of certain common law defenses.<sup>33</sup>

## B. *The Virginia Workers' Compensation Act*

### 1. The Creation and Purpose of the Act

As with workers' compensation legislation generally, the Virginia Workers' Compensation Act was the legislative result of a careful balancing of the competing needs of employers and employees.<sup>34</sup> Following the examples of those states which had passed and/or otherwise attempted to pass legislation in the early twentieth century,<sup>35</sup> Virginia passed the Virginia Workmen's (now Workers') Compensation Act in 1918,<sup>36</sup> one year following the Supreme Court's removal of doubts relating to the constitutionality of such legislation.<sup>37</sup> The Act was specifically patterned after Indiana's workers' compensation statute, it "being, practically speaking, a copy of the Indiana act. . . ."<sup>38</sup>

30. LARSON ET AL., *supra* note 4, at § 102.02.

31. See VA. CODE ANN. § 65.2-805(A) (Repl. Vol. 2012 & Cum. Supp. 2016).

32. See *supra* note 29; see also 21 M.J. WORKERS' COMPENSATION § 6 (2016) ("In Virginia, the workers' compensation act is an employee's exclusive remedy against his employer for injuries sustained on the job. That is, an employer is generally immune from an employee's tort suit. . . . [W]hen an employee is eligible for remedy under the Act, he or she may not seek any other remedy against the employer or his fellow employees.").

33. See LARSON ET AL., *supra* note 4, at § 102.02. In other workers' compensation acts, but not in Virginia's, an employer may face a rebuttable presumption that the accident leading to the employee's injury was a result of the employer's negligence. VA. CODE ANN. § 65.2-805(A) (Repl. Vol. 2012 & Cum. Supp. 2016); LARSON ET AL., *supra* note 4, at § 102.02.

34. See, e.g., *Low Splint Coal Co. v. Bolling*, 224 Va. 400, 406, 297 S.E.2d 665, 668 (1982); see also *supra* notes 23–27 and accompanying text (discussing this concept in the context of American jurisdictions at large).

35. See *supra* text accompanying notes 19–21.

36. Act of Mar. 21, 1918, ch. 400 (codified at VA. CODE ANN. § 1887(1) (1924)).

37. See *Big Jack Overall Co. v. Bray*, 161 Va. 446, 454, 171 S.E. 686, 688 (1933); *supra* text accompanying note 21 (discussing the Supreme Court's decisions relating to the constitutionality of several workers' compensation acts).

38. *Big Jack Overall Co.*, 161 Va. at 454, 171 S.E. at 688 (quoting *Hoffer Bros. v.*

The Act—created “for the beneficent purpose of attaining a humanitarian end which had hitherto been frustrated by the inexorable rules of the common law”<sup>39</sup>—has a primary aim of protecting the employee. The Supreme Court of Virginia has also noted that the “broad sweep of the [A]ct’s societal interests [were]: (1) charging the costs of an industrial accident to the industry involved through workers’ compensation coverage, and (2) assuring that others involved in that industry are immune from further common-law liability . . . .”<sup>40</sup> In short, the Act is Virginia’s effort to “insure the workman to a limited extent against loss from accidents in his employment, to give him a speedy and expeditious remedy for his injury, and to place upon industry the burden of losses incident to its conduct.”<sup>41</sup>

## 2. The Act in Practice

Insofar as workers’ compensation recovery is without respect to fault,<sup>42</sup> simple negligence on the part of the employee will not bar his compensation under the Act.<sup>43</sup> However, notwithstanding this and the Act’s underlying goal of protecting the employee, an employee is not guaranteed recovery under the Act in all instances. In section 65.2-306, the General Assembly carefully carved out

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Smith, 148 Va. 220, 227, 138 S.E. 474, 476 (1927)).

39. *A. Wilson & Co. v. Mathews*, 170 Va. 164, 167, 195 S.E. 490, 491 (1938). It does so most obviously by providing compensation for those workers who lose the opportunity to engage in work as a result of suffering an injury or disability “arising out of and in the course of [his or her] employment.” *See* VA. CODE ANN. § 65.2-101 (Cum. Supp. 2016) (defining “Injury” as one which “aris[es] out of and in the course of the employment or occupational disease as defined in Chapter 4 (§ 65.2-400 et seq.)”); *Rust Eng’g Co. v. Ramsey*, 194 Va. 975, 980, 76 S.E.2d 195, 199 (1953); *Ellis v. Commonwealth*, 182 Va. 293, 303–04, 28 S.E.2d 730, 735 (1944); *Burlington Mills Corp. v. Hagood*, 177 Va. 204, 211, 13 S.E.2d 291, 293 (1941); 21 M.J. WORKERS’ COMPENSATION § 2 (2016) (“[The Act was] enacted chiefly for the benefit of the worker, awarding him compensation where previously none could be obtained.”).

40. *Counts v. Stone Container Corp.*, 239 Va. 152, 156, 387 S.E.2d 481, 484 (1990).

41. *Humphrees v. Boxley Bros. Co.*, 146 Va. 91, 106, 135 S.E. 890, 894 (1926); *see also* 21 M.J. WORKERS’ COMPENSATION § 2 (2016) (“The underlying purpose of the compensation acts is to provide a system whereby injuries due to industry may be liquidated and balanced in money in the course of consumption.”).

42. *See, e.g., Griffith v. Raven Red Ash Coal Co.*, 179 Va. 790, 796, 20 S.E.2d 530, 533 (1942); *Shelton v. Ennis Bus. Forms, Inc.*, 1 Va. App. 53, 55, 334 S.E.2d 297, 299 (1985) (“Negligence, either claimant’s or his employer’s, is immaterial in determining the right to recover under the Workers’ Compensation Act.”) (citations omitted).

43. *See, e.g., Fauver v. Bell*, 192 Va. 518, 522, 65 S.E.2d 575, 577 (1951) (“Negligence is of no concern in a compensation case unless the injury is caused by the employee’s wilful[sic] negligence or misconduct.”); *Norfolk & Wash. Steamboat Co. v. Holladay*, 174 Va. 152, 160, 5 S.E.2d 486, 489 (1939).



several types of injuries which would be non-compensable.<sup>44</sup> More specifically, section 65.2-306 dictates that an employee may not recover compensation under the Act if his injury stems from one or more of six different categories of conduct, including inter alia intentional self-injury, intoxication, the failure to use a safety appliance, and use of a non-prescribed controlled substance.<sup>45</sup>

One of the most, if not *the* most, central provisions of the Act is section 65.2-800, which specifically obligates an employer to “insure the payment of compensation to his employees . . . .”<sup>46</sup> In Virginia, this can be accomplished in several ways: “[a]n employer may insure for workers’ compensation through a commercial insurer, self-insurance, a group self-insurance association or through a professional employer organization.”<sup>47</sup> However, regardless of the insurance method chosen, the onus of complying with the requirement to carry compensation insurance falls exclusively on the employer under section 65.2-800. Employers are also charged under section 65.2-804 with providing evidence of their compliance to the Virginia Workers’ Compensation Commission annually, or as often as may be necessary.<sup>48</sup>

The vast majority of workers’ compensation cases in Virginia are handled administratively because the Virginia Workers’ Compensation Commission has “the power to make and enforce rules not inconsistent with the . . . Act, for carrying out the provisions of [the] Act.”<sup>49</sup> However, at times, circuit courts necessarily become involved in interpreting the many provisions of the Act.

### 3. Interpretation of the Act

In interpreting the Act generally, Virginia courts have consistently reiterated that even though the Act is in derogation of the common law, it is “highly remedial and should be liberally construed in favor of the workman.”<sup>50</sup> Its construction should be in

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44. VA. CODE ANN. § 65.2-306 (Repl. Vol. 2012 & Cum. Supp. 2016).

45. *Id.*

46. *Id.* § 65.2-800(A) (Repl. Vol. 2012).

47. See *Insuring*, VA. WORKERS’ COMPENSATION COMMISSION, <http://vwc.state.va.us/content/employers> (last visited Oct. 12, 2016).

48. See VA. CODE ANN. § 65.2-804(A) (Repl. Vol. 2012).

49. *Thomas v. Nordstrom Pentagon City/Nordstrom, Inc.*, 22 Va. App. 626, 630, 472 S.E.2d 288, 289–90 (1996) (citation and quotations omitted).

50. *Barker v. Appalachian Power Co.*, 209 Va. 162, 166, 163 S.E.2d 311, 314 (1968); see, e.g., *Fauver v. Bell*, 192 Va. 518, 521, 65 S.E.2d 575, 577 (1951); *Dixon v. Norfolk Shipbuilding & Dry Dock Corp.*, 182 Va. 185, 187, 28 S.E.2d 617, 618 (1944); *Byrd v.*

“harmony with the humane purpose of the [A]ct.”<sup>51</sup> However, notwithstanding the admonition to construe the Act liberally in favor of the employee, the Supreme Court of Virginia has cautiously opined that “liberality of construction does not authorize the amendment, alteration, or extension of its provisions.”<sup>52</sup> Courts are not entitled to enlarge any of the limitations expressly set out in the body of the statute.<sup>53</sup> And while the courts must always endeavor to construe the Act’s provisions liberally, the Supreme Court has cautioned that “it must not be overlooked that liability cannot rest upon imagination, speculation, or conjecture, but must be based upon facts established by the evidence . . . .”<sup>54</sup>

### C. Virginia Code Section 65.2-805(A)

Virginia Code section 65.2-805(A) establishes penalties for employers who fail to either: (i) obtain, maintain, or carry the required compensation insurance, as required by section 65.2-800, or (ii) fail to provide evidence of their carrying insurance, as required by section 65.2-804.<sup>55</sup> It states in full:

(A) If such employer fails to comply with the provisions of § 65.2-800 or 65.2-804, he shall be assessed a civil penalty of not more than \$250 per day for each day of noncompliance, subject to a maximum penalty of \$50,000. Such employer also shall be liable during continuance of such failure to any employee either for compensation under this title or at law in a suit instituted by the employee against such employer to recover damages for personal injury or death by accident, and in any such suit such employer shall not be permitted to defend upon any of the following grounds:

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Stonega Coke & Coal Co., 182 Va. 212, 221, 28 S.E.2d 725, 729 (1944).

51. *Dixon*, 182 Va. at 187, 28 S.E.2d at 618.

52. *Humphrees v. Newport News Shipbuilding & Dry Dock Co.*, 183 Va. 466, 479, 32 S.E.2d 689, 695 (1945); *see also* *Baggett Transp. Co. v. Dillon*, 219 Va. 633, 637, 248 S.E.2d 819, 822 (1978) (“The duty to liberally construe the Act does not . . . authorize the amendment, alteration or extension of its provisions.”).

53. *See, e.g.*, *Commonwealth v. Granger*, 188 Va. 502, 510, 50 S.E.2d 390, 394 (1948) (“The liberal construction which is to be given the [Workers’] Compensation Act does not include a power of the courts to enlarge the limitations therein expressly set out.”).

54. *Crews v. Moseley Bros.*, 148 Va. 125, 128, 138 S.E. 494, 495 (1927); *see also* 21 M.J. WORKERS’ COMPENSATION § 3 (2016).

55. VA. CODE ANN. § 65.2-805(A) (Repl. Vol. 2012 & Cum. Supp. 2016); *see also supra* note 10 (discussing use of the term of “non-compliant” in the context of the obligations imposed on employers by sections 65.2-800 and 65.2-804).

1. That the employee was negligent;
2. That the injury was caused by the negligence of a fellow employee; or
3. That the employee had assumed the risk of the injury.<sup>56</sup>

Under the statute, employers who fail to carry compensation insurance are punished by fines, computed by days of non-compliance and subject to a maximum penalty of \$50,000.<sup>57</sup> Additionally, the statute declares that such non-compliant employers “also shall be liable” to any employee either in (i) a traditional, administrative workers’ compensation action, or (ii) in a suit of law for the recovery of personal injury damages.<sup>58</sup> Section 65.2-805(A) goes on to say that in a suit of law to recover damages for a workplace injury, the non-compliant employer is prohibited from asserting three defenses: contributory negligence, fellow-servant negligence (i.e., negligence of another employee), and assumption of the risk.<sup>59</sup>

The confusion that has led to inconsistent application of the statute stems from the phrase “also shall be liable [in a suit of law] . . .” coupled with the qualification that “in any such suit such employer shall not be permitted [to assert the three specific affirmative defenses].”<sup>60</sup> Specifically, courts have grappled with the following query: Does the phrase “also shall be liable” render section 65.2-805(A) a strict liability statute wherein the plaintiff-employee need only establish that he was injured and that his employer was non-compliant with section 65.2-800 or section 65.2-804? Or does the iteration of certain precluded defenses imply that a plaintiff-employee is still required to plead and prove a *prima facie* case of his employer’s negligence?

#### D. *Case Law Involving Virginia Code Section 65.2-805(A) in the Supreme Court of Virginia and Court of Appeals of Virginia*

The specific issue of whether section 65.2-805(A) requires the establishment of a *prima facie* case of negligence has never been considered by the Supreme Court of Virginia or the Court of Appeals of Virginia. In fact, Virginia section 65.2-805 has only been mentioned in a handful of cases before those courts. Some of those

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56. VA. CODE ANN. § 65.2-805(A) (Repl. Vol. 2012 & Cum. Supp. 2016).

57. *See id.*

58. *See id.*

59. *See id.*

60. *Id.*

cases referenced the statute only to reiterate the importance that employers carry compensation insurance<sup>61</sup> or as support for upholding a fine issued by the Virginia Workers' Compensation Commission.<sup>62</sup> Other cases involved the issue of election of remedies under the statute.<sup>63</sup>

For example, in *Delp v. Berry*, the Supreme Court of Virginia held that a plaintiff-employee who was unsuccessful in collecting an award through an administrative workers' compensation claim against his non-compliant employer was not barred from filing a civil action to recover damages because section 65.2-805 did not require "an election of remedies."<sup>64</sup> The *Delp* court concurred that a plaintiff-employee is "entitled to only one full recovery" under the statute, but held that where an employee does not receive the full satisfaction of payment for an injury under the administrative remedy, the statute allows the employee to pursue the other statutory avenue of relief.<sup>65</sup>

Arguably the most important case involving Virginia Code section 65.2-805 is the Supreme Court of Virginia's decision in *Virginia Used Auto Parts, Inc. v. Robertson*.<sup>66</sup> The *Virginia Used Auto Parts* case ultimately dealt with a different issue than whether a plaintiff-employee is required under section 65.2-805(A) to plead a prima facie case of negligence. However, the supreme court's analysis has potentially critical implications on determining whether one must plead a prima facie case.

Similar to *Delp*, but decided earlier, the *Virginia Used Auto Parts* case considered the question of whether an unsuccessful re-

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61. See, e.g., *Baldwin v. Wrecking Corp. of Am.*, 464 F. Supp. 185, 188-89 (W.D. Va. 1979) (discussing section 65.1-106, currently codified as section 65.2-805).

62. See *Perkey v. Fridley*, No. 1870-02-3, 2003 Va. App. LEXIS 31, at \*1-2, \*5-7 (Ct. App. Jan. 28, 2003) (unpublished decision) (affirming a fine imposed by section 65.2-805 because evidence existed to support that the complainant was an "employee" under the Act); *Jim's Home Auto Serv., Inc. v. Nielsen*, No. 0215-93-1, 1993 Va. App. LEXIS 234, at \*1-4 (Ct. App. June 29, 1993) (unpublished decision) (same); see also *Biggs v. Norfolk Dredging Co.*, 237 F. Supp. 590 (E.D. Va. 1965), *rev'd on other grounds*, 360 F.2d 360, 361-62 (4th Cir. 1966) (comparing Virginia Code section 65.2-805(A) to section 905 of the federal Longshoremens' Act).

63. See, e.g., *Delp v. Berry*, 213 Va. 786, 786, 195 S.E.2d 877, 878 (1973); see also *Redifer v. Chester*, 283 Va. 121, 127, 720 S.E.2d 66, 69 (2012) (reiterating the central holding of *Delp* but stating that when an employee successfully obtains a final award and is assured of receiving all of the benefits to which he is entitled under that award, he may not pursue another statutory avenue of relief).

64. *Delp*, 213 Va. at 789, 195 S.E.2d at 879.

65. *Id.*

66. 212 Va. 100, 181 S.E.2d 612 (1971).

sort to a suit at law under section 65.2-805(A) barred a plaintiff-employee from pursuing a traditional workers' compensation administrative claim.<sup>67</sup> In *Virginia Used Auto Parts*, the employee was injured in an accident in the course of his employment under the defendant, an uninsured employer.<sup>68</sup> The employee filed an application with the Industrial Commission—predecessor to the Virginia Workers' Compensation Commission—but suspended the action before the Commission in order to institute a civil action against his employer for his injuries.<sup>69</sup> The civil suit was unsuccessful however, as the Circuit Court for the City of Norfolk found, "that there was no proof of negligence on the part of the employer which proximately caused [the employee's] injuries."<sup>70</sup> The employee then requested that the Commission set a hearing for his claim, but, the employer moved to dismiss the claim on the grounds that, given the final judgment of the civil suit in the employer's favor, the employee was barred from doing so.<sup>71</sup>

On appeal, the Supreme Court of Virginia held that the employee was not barred from seeking compensation under the Act even though he was unsuccessful in his suit at law under section 65.2-805(A).<sup>72</sup> In reaching this conclusion, however, the supreme court made several important findings related to section 65.2-805 or section 65-102, as it was codified at the time of the decision. The controlling premise for the *Virginia Used Auto Parts* holding was that because section 65.2-805(A) was part of the Act, it should likewise "be liberally construed in favor of the employee."<sup>73</sup> The supreme court found that the statute, being "penal in nature, provides extraordinary advantages to an injured employee when his employer has failed or refused to comply with the Act."<sup>74</sup> Lastly, the supreme court buttressed its holding by declaring that "[the statute] expressed the overriding legislative intent that an

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67. See *id.* at 103, 181 S.E.2d at 613. The *Delp* case considered the obverse—i.e., whether a plaintiff-employee who was unsuccessful in collecting recovery through a workers' compensation claim was barred from pursuing a common law suit under the statute. 213 Va. at 786, 195 S.E.2d at 878.

68. *Virginia Used Auto Parts*, 212 Va. at 100–01, 181 S.E.2d at 612–13.

69. *Id.* at 100–01, 181 S.E.2d at 612–13.

70. *Id.* at 101, 181 S.E.2d at 613.

71. *Id.*

72. *Id.* at 103, 181 S.E.2d at 614.

73. *Id.* at 102, 181 S.E.2d at 613; *Barker v. APCO*, 209 Va. 162, 166, 163 S.E.2d 311, 314 (1968) (discussing Virginia courts' consistent reiteration that, although the Act is in derogation of the common law, it must be construed liberally in favor of the employee).

74. *Virginia Used Auto Parts*, 212 Va. at 102, 181 S.E.2d at 613.

uninsured employer shall be liable to his employee injured in an accident arising out of and during the course of his employment.”<sup>75</sup> At least one circuit court has relied on this analysis to conclude that section 65.2-805(A) imposes strict liability on a non-compliant employer.<sup>76</sup>

## II. THE MOST REASONABLE INTERPRETATION OF VIRGINIA CODE SECTION 65.2-805(A)

There are persuasive arguments to support both interpretations of whether section 65.2-805(A) was intended to provide strict liability relief for a plaintiff-employee who elects to pursue a suit at law under the statute, or whether it still requires a plaintiff-employee to plead a prima facie case of negligence. This essay cannot ignore the underlying policy aims of the Act generally or the various reiterations from Virginia courts that the Act, and section 65.2-805(A) specifically, should be construed liberally in favor of the employee.<sup>77</sup> Notwithstanding, a close analysis of the statutory language will reveal that the most reasonable interpretation of section 65.2-805(A) is to *not* read it as imposing strict liability. In other words, section 65.2-805(A) should not be viewed as eliminating a plaintiff-employee’s obligation to plead a prima facie case of negligence if he chooses to sue his non-compliant employer under the statute.

### A. Plain Language

The plain language of Virginia Code section 65.2-805(A) does not support a conclusion that the General Assembly irrefutably intended the statute to impose strict liability on non-compliant employers.

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75. *Id.* at 103, 181 S.E.2d at 614.

76. *Wade v. Scott Recycling, LLC*, 89 Va. Cir. 319, 322 (2014) (Roanoke City) (“It seems clear that both the language of Va. Code § 65.2-805, as well as the Supreme Court of Virginia’s interpretation of the statute, necessitate granting [the plaintiff’s] Motion for Partial Summary Judgment . . . [T]he Supreme Court of Virginia has held that [section 65.2-805] is to be penal in nature, should be liberally construed in favor of the employee, and should impose liability against a noncompliant employer. By granting [the plaintiff’s] Motion for Partial Summary Judgment as to liability, this Court is applying the plain language of the statute consistent with the settled case law of the Supreme Court of Virginia.”).

77. *See Virginia Used Auto Parts*, 212 Va. at 102, 181 S.E.2d at 613; *Barker*, 209 Va. at 166, 163 S.E.2d at 314 (discussing Virginia courts’ consistent reiteration that, although the Act is in derogation of the common law, it must be construed liberally in favor of the employee).

In resolving issues of statutory interpretation, the first step is to look to the actual language of the statute. Where the statutory language is “clear and unambiguous, its plain meaning must be accepted without resort to extrinsic evidence or to the rules of construction.”<sup>78</sup> The meaning of statutory language is determined from the express words contained in the statute.<sup>79</sup> If the plain meaning is unambiguously apparent in the statutory language, courts are bound by that meaning and “may not assign a construction that amounts to holding that the General Assembly did not mean what it actually has stated.”<sup>80</sup>

In assessing the plain language of any given statute, courts must presume that the “legislature chose, with care, the words it used when it enacted the . . . statute.”<sup>81</sup> Courts are not permitted to “add language to the statute the General Assembly has not seen fit to include.”<sup>82</sup> Similarly, courts are not “permitted to accomplish the same result by judicial interpretation.”<sup>83</sup> Going further, “[c]ourts are not permitted to rewrite statutes. This is a legislative function.”<sup>84</sup>

As it pertains to Virginia Code section 65.2-805(A), there are certainly cogent arguments that the General Assembly could have intended the statute to be one imposing strict liability on non-compliant employers. To be sure, the language “shall be liable” is strong. Furthermore, a strict liability interpretation is not per se unreasonable in light of the supreme court’s admonition in *Virginia Used Auto Parts*, advising that the statute be construed liberally in favor of the employee.<sup>85</sup>

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78. *Richmond v. Confre Club of Richmond, Inc.*, 239 Va. 77, 80, 387 S.E.2d 471, 473 (1990); see also *Holsapple v. Commonwealth*, 266 Va. 593, 598, 587 S.E.2d 561, 564 (2003) (construing statutory language “according to its plain meaning” after finding language to be unambiguous).

79. See, e.g., *Washington v. Commonwealth*, 272 Va. 449, 458–59, 634 S.E.2d 310, 315–16 (2006); *Alger v. Commonwealth*, 267 Va. 255, 259, 590 S.E.2d 563, 565 (2004); *Tucker v. Commonwealth*, 268 Va. 490, 493, 604 S.E.2d 66, 68 (2004).

80. *Gunn v. Commonwealth*, 272 Va. 580, 587, 637 S.E.2d 324, 327 (2006).

81. *Simon v. Forer*, 265 Va. 483, 490, 578 S.E.2d 792, 796 (2003) (citation omitted).

82. *Holsapple*, 266 Va. at 599, 587 S.E.2d at 564–65.

83. *Burlile v. Commonwealth*, 261 Va. 501, 511, 544 S.E.2d 360, 365 (2001); see *Barr v. Town & Country Props., Inc.*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990); *Watkins v. Hall*, 161 Va. 924, 930, 172 S.E. 445, 447 (1934).

84. *Anderson v. Commonwealth*, 182 Va. 560, 566, 29 S.E.2d 838, 841 (1944).

85. *Virginia Used Auto Parts, Inc. v. Robertson*, 212 Va. 100, 102, 181 S.E.2d 612, 613 (1971).

Notwithstanding, a conclusion that the plain language of the statute clearly and unambiguously imposes strict liability would be ultimately premature. There is no mention of the term “strict” anywhere in section 65.2-805. There is likewise neither mention of the term “strict liability” nor “strictly liable.” If the General Assembly truly intended to make section 65.2-805(A) a strict liability provision, it could have left no doubt whatsoever of this intention by employing a more precise term; however, it did not do so. As such, reading that term into the statute would also amount to the type of “amendment, alteration, or extension” of which the supreme court has previously cautioned against.<sup>86</sup> It would also contradict the principle in Virginia that courts are not to add terms to statutes by virtue of judicial interpretation.<sup>87</sup> Where the General Assembly has not included a term unambiguously manifesting an intent that section 65.2-805(A) imposes strict liability, interpreting the statute in such a way would be imprudent. Accordingly, given these considerations, it is most reasonable to conclude that the plain language of section 65.2-805(A) does not impose strict liability on non-compliant employers, and therefore does not abrogate the need for a plaintiff-employee to establish a prima facie case of negligence against the non-compliant employer in a suit at law under the statute.<sup>88</sup>

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86. *Baggett Transp. Co. v. Dillon*, 219 Va. 633, 637, 248 S.E.2d 819, 822 (1978) (“The duty to liberally construe the Act does not . . . authorize the amendment, alteration or extension of its provisions.”); *Humphrees v. Newport News Shipbuilding & Dry Dock Co.*, 183 Va. 466, 479, 32 S.E.2d 689, 695 (1945).

87. See *Jackson v. Fid. & Deposit Co.*, 269 Va. 303, 313, 608 S.E.2d 901, 906 (2005) (citing *Holsapple*, 266 Va. at 599, 587 S.E.2d at 564–65; *Burlile*, 261 Va. at 511, 544 S.E.2d at 365)); *Baggett Transp. Co.*, 219 Va. at 637, 248 S.E.2d at 822; *Humphrees*, 183 Va. at 479, 32 S.E.2d at 695.

88. Additionally, it is interesting to note that the phrase “shall be liable” is used in one of the most, if not *the* most, heavily litigated statutes throughout the nation, 42 U.S.C. § 1983 (2012). That statute claims, in pertinent part: “Every person who, under color of any statute, . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, *shall be liable* to the party injured in action at law . . .” 42 U.S.C. § 1983 (2012) (emphasis added). However, it is easy for even the most recent law school graduate to observe that this provision, using language which is nearly identical to section 65.2-805(A), does not impose strict liability on every defendant in a § 1983 suit. To the contrary, the Supreme Court of the United States has diligently noted that this language “is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them.” *Imbler v. Pachtman*, 429 U.S. 409, 418 (1976). Section 65.2-805(A) should similarly be read in harmony with the traditional obligation of a plaintiff-employee to establish a prima facie case of negligence against his non-compliant employer.



## B. Expressio Unius Est Exclusio Alterius

A more macroscopic review of section 65.2-805(A) in its entirety provides more strength to the position that the statute was not intended to impose strict liability on non-compliant employers. In addition to lacking more precise terms that would unambiguously evince its strict liability nature, an over-emphasized reliance on the phrase “shall be liable” is unwarranted in the context of the General Assembly’s qualification that precludes three specific defenses for employers.

If statutory language is in dispute and lacking a clear and unambiguous interpretation, courts are obligated to “look to the whole body of [a statute] to determine the true intention of each part.”<sup>89</sup> Where there are specific disputed portions of a statute requiring interpretation, the maxim “*Expressio unius est exclusio alterius*” is especially applicable.<sup>90</sup> Under the principle of *expressio unius est exclusio alterius*, “the mention of a specific item in a statute implies that other omitted items were not intended to be included within the scope of the statute.”<sup>91</sup>

Following this maxim, the Supreme Court of Virginia has held that “[w]hen a legislative enactment limits the manner in which something may be done, the enactment also evinces the intent that it shall not be done another way.”<sup>92</sup> The interpretation of section 65.2-805(A) presents the obverse situation,<sup>93</sup> but the maxim applies nonetheless.

The body of section 65.2-805(A) reveals two important things about the General Assembly’s legislative intent. First, the General Assembly decided that if a plaintiff-employee elected to pursue a suit at law for recovery of personal injuries under the statute, the non-compliant employer should be precluded from

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89. *Oraee v. Breeding*, 270 Va. 488, 498, 621 S.E.2d 48, 52 (2005) (citation omitted).

90. *See Whitehead v. Cape Henry Syndicate*, 105 Va. 463, 471, 54 S.E. 306, 308 (1906).

91. *Smith Mountain Lake Yacht Club, Inc. v. Ramaker*, 261 Va. 240, 246, 542 S.E.2d 392, 395 (2001).

92. *Commonwealth v. Brown*, 259 Va. 697, 705, 529 S.E.2d 96, 100 (2000) (citation omitted).

93. In section 65.2-805(A), the General Assembly delineates the three affirmative defenses which *may not* be asserted by a non-compliant employer in a lawsuit under the statute, evincing the intent that other defenses *may* be asserted. VA. CODE ANN. § 65.2-805(A) (Repl. Vol. 2012 & Cum. Supp. 2016).

asserting specific affirmative defenses.<sup>94</sup> Second, but relatedly, the General Assembly deliberately and intentionally identified *three* specific defenses which employers would be precluded from asserting: contributory negligence, the fellow-servant rule, and assumption of risk.<sup>95</sup>

Just as courts are to presume that the “legislature chose, with care, the words it used when it enacted the . . . statute,”<sup>96</sup> one must also presume that the legislature intended to both abrogate certain affirmative defenses and choose the defenses to be abrogated.

Interpreting section 65.2-805(A), and specifically the phrase “shall be liable,” as imposing strict liability is starkly dissonant with the General Assembly’s qualification of precluded defenses. For if the statute is to be construed as imposing strict liability, the General Assembly’s delineation of the precluded affirmative defenses is “useless, superfluous, and unnecessary.”<sup>97</sup> As Judge Dorsey noted when considering the principle of *expressio unius est exclusio alterius* in *Bailey v. Hensley*, “[i]f an injured employee who chose to pursue recovery via a suit at law under the statute was entitled to a strict liability recovery, presumably *all* affirmative defenses—not just three—would be ‘off the table.’”<sup>98</sup> Rephrased slightly, if a non-compliant employer was strictly liable in a suit brought by his employee under the statute, then that means the employer could raise *no* affirmative defense as a matter of law.

Interpreting section 65.2-805(A) as a strict liability provision would essentially mean that the only actions an injured plaintiff would be required to take to receive compensation under the statute would be to: (i) file an action for damages, (ii) establish that he suffered an injury, and (iii) collect his proverbial check. However, if this were truly the General Assembly’s intent, why would it have gone through the trouble to identify and delineate three specific defenses that employers would be precluded from asserting? It cannot be ignored that the General Assembly *did*, in fact, identify three specific defenses that employers would be pre-

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94. *Id.*

95. *Id.*

96. *Simon v. Forer*, 265 Va. 483, 490, 578 S.E.2d 792, 796 (2003) (citation omitted); see *Rasmussen v. Commonwealth*, 31 Va. App. 233, 238, 522 S.E.2d 401, 403 (1999).

97. *Bailey v. Hensley*, No. CL16-284, 2016 Va. Cir. LEXIS 74, at \*14 (Cir. Ct. May 6, 2016) (Roanoke City).

98. *Id.* (emphasis in original).

cluded from asserting.<sup>99</sup> By doing so, the General Assembly implied that other defenses could be raised. Therefore, recovery is not, as a matter of law, automatic.

In sum, a substantial reliance on the phrase “shall be liable” for the proposition that section 65.2-805(A) imposes strict liability on non-compliant employers is not justified. A careful yet broad review of the statute, in light of the maxim *expressio unius est exclusio alterius*, compels the conclusion that the General Assembly contemplated, and indeed granted, employers the ability to assert other pertinent defenses.<sup>100</sup> And this, in turn, subsequently compels another conclusion: a plaintiff-employee must establish a prima facie case of the employer’s negligence as a pre-requisite to recovery in a suit at law under section 65.2-805(A).<sup>101</sup>

### C. *Not Inconsistent with Established Law or Policy*

Interpreting section 65.2-805(A) to require a plaintiff-employee to establish a prima facie case of negligence in a civil suit under the statute does not conflict with established law or policy. Neither does such an interpretation do violence to the supreme court’s admonition that the statute be “liberally construed in favor of the employee.”<sup>102</sup> In other words, this essay makes no objec-

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99. VA. CODE ANN. § 65.2-805(A) (Repl. Vol. 2012 & Cum. Supp. 2016).

100. Some conceivable defenses which an employer might assert outside of the three precluded defenses include, inter alia, third-party liability and illegal act. Furthermore, section 65.2-306—which carves out six categories of conduct under which an employee’s injury would be non-compensable—implicitly provides additional defenses which employers might also be able to assert. See generally *supra* text accompanying notes 44–45 (discussing the specific categories of non-compensable conduct in section 65.2-306).

101. It should be noted that the negligence referred to is the conduct, if any, attributable to the employer which is related or otherwise causally linked to the injury suffered by the employee. It is *not* the employer’s failure to comply with the statutory requirement of carrying compensation insurance or providing evidence thereof. Although section 65.2-805(A) is penal in nature, it is not a negligence per se statute. It exists to punish the employer for non-compliance, but does not make the employer *liable* for non-compliance. Indeed, the statute indicates that the employer’s liability to the employee is either (a) under a claim for compensation under the Act generally, or (b) under a suit of law by the employee “to recover damages for personal injury.” VA. CODE ANN. § 65.2-805(A) (Repl. Vol. 2012 & Cum. Supp. 2016) (emphasis added). Accordingly, the phrase “shall be liable [to the employee]” cannot be interpreted as “shall be liable to the employee for their non-compliance.” See *Glassco v. Glassco*, 195 Va. 239, 241, 77 S.E.2d 843, 844 (1953) (“A proceeding under the Act is not one to recover damage for a wrong, for the employer’s liability is not based upon tort.”); *infra* note 123 (discussing generally Larson’s description of the infusion of tort concepts in workers’ compensation as a fallacy).

102. *Virginia Used Auto Parts, Inc. v. Robertson*, 212 Va. 100, 103, 181 S.E.2d 612, 613 (1971).

tion to the supreme court's conclusion that the "overriding legislative intent [of Virginia Code section 65.2-805(A) is] that an uninsured employer shall be liable to his employee injured in an accident arising out of . . . his employment."<sup>103</sup> It simply posits that requiring a plaintiff-employee to plead a prima facie case of negligence is not necessarily inconsistent with that intent.

Although somewhat repetitive, in order to elaborate, it is necessary to analyze section 65.2-805(A) holistically. The statute is appropriately titled, "Civil Penalty for violation of §§ 65.2-800, 65.2-803.1, and 65.2-804."<sup>104</sup> As is latently reflected in its title and as was aptly noted by the Supreme Court of Virginia, section 65.2-805 is "penal in nature."<sup>105</sup> Its primary aim is to penalize employers who fail to obtain workers' compensation insurance or provide adequate notice of their coverage. Through its inclusion, the General Assembly sought to create a scheme whereby employers would be incentivized to comply with the insurance and notice requirements.<sup>106</sup>

To accomplish this objective, the General Assembly established in the statute a multi-faceted system of punishments for non-compliant employers. As a threshold matter, section 65.2-805(A) punishes such employers through mandatory fines. Specifically, the statute provides that a non-compliant employer "shall be" fined up to \$250 per day for each day of his non-compliance, subject to a maximum penalty of \$50,000.<sup>107</sup>

In addition to fines, the General Assembly granted aggrieved employees two options to pursue compensation for an injury. An employee who suffers an injury in the course of employment by a non-compliant employer may: (i) pursue a claim for "compensation under [the Act]" (Option One); or (ii) pursue the "recover[y of] damages for personal injury" in a suit at law (Option Two).<sup>108</sup> Section 65.2-805(A) further qualifies that if the employee elects an

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103. *Id.* at 103, 181 S.E.2d at 614.

104. VA. CODE ANN. § 65.2-805 (Repl. Vol. 2012 & Cum. Supp. 2016). The violation of section 65.2-803.1 is dealt with in subsection (B) of § 65.2-805, and is not relevant for the purposes of this essay.

105. *Virginia Used Auto Parts, Inc.*, 212 Va. at 102, 181 S.E.2d at 613.

106. By penalizing non-compliant employers, the incentive for other employers to comply with the insurance and notice requirements (section 65.2-800, 65.2-804) flows naturally therefrom.

107. VA. CODE ANN. § 65.2-805(A) (Repl. Vol. 2012 & Cum. Supp. 2016).

108. *Id.* The use of "Option One" and "Option Two" is aimed at readability and to facilitate clarity of the concepts discussed.

Option Two suit, the employer is precluded from asserting the defenses of contributory negligence, the fellow-servant rule, and assumption of risk.<sup>109</sup>

Option One should not technically be viewed as a punishment because it provides no extraordinary remedy besides that already afforded to employees under the Act.<sup>110</sup> Option Two, on the other hand, inflicts two punishments on non-compliant employers. First, it punishes the non-compliant employer by subjecting him or her to a tort suit from which an employer is normally immune and its accompanying potential for debilitating monetary losses.<sup>111</sup> Second, it further punishes employers by taking away three of their largest swords in defending against such suits.<sup>112</sup>

As Judge Dorsey observed in *Bailey v. Hensley*, Virginia Code section 65.2-805(A) already stacks the odds against non-compliant employers,<sup>113</sup> and justifiably so.<sup>114</sup> However, in a statute which already punishes non-compliant employers in potentially three distinct facets, eliminating the obligation for a plaintiff-employee to establish a prima facie case of negligence creates a

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109. *Id.* A proponent of the strict liability interpretation will be quick to point out that instead of merely granting the employee two options, the statutory language indicates that the non-compliant employer “shall be liable” if the employee elects to pursue Option One or Option Two, with emphasis on the word “shall.” *See id.* However, as was discussed generally in Part III.A, this section infers that extending this word or phrase to mean strict liability is inconsistent with a holistic review of the statute.

110. That is, of course, under an interpretation that section 65.2-805(A) does not impose strict liability on a non-compliant employer. A contrary view would in effect vitiate section 65.2-306, and impose strict liability on a non-compliant employer even if the employee’s injury resulted from, for example, intoxication or the willful breach of a policy adopted by the employer and known to the employee. It is difficult to see that the General Assembly would accept this result. *See infra* notes 123–31 and accompanying text (discussing that a strict liability interpretation would be problematic to the general framework of Option One claims under the Act and could lead to an absurd result); *see also infra* note 121 and accompanying text (discrediting the counterargument that a strict liability interpretation is warranted simply because Option One otherwise does not provide an extra benefit to the employee of a non-compliant employer).

111. *See supra* text accompanying note 30.

112. And again, the removal of these three defenses from the arsenal of employers bolsters the conclusion in and of itself that section 65.2-805(A)’s phrase “shall be liable” cannot be equated with strict liability, and therefore does not dispense of a plaintiff-employee’s obligation to establish a prima facie case of negligence. *See infra* text accompanying notes 117–19; *see also supra* Part II.B (discussing the maxim *expressio unius est alterius exclusio* in the context of the elimination of these three defenses).

113. *Bailey v. Hensley*, No. CL16-284, 2016 Va. Cir. LEXIS 74, at \*15 (Cir. Ct. May 6, 2016) (Roanoke City).

114. It should not be overlooked that the author wholeheartedly believes that widespread compliance with the Act is crucial to its efficacy, and that giving employees certain advantages due to their employer’s non-compliance is justified and even desired.

fourth, and indeed damming, obstacle for employers. The already uphill battle for a non-compliant employer to successfully defend itself in a plaintiff-employee's suit under the statute becomes impossible. This is problematic for the reasons that follow.

First, requiring a plaintiff-employee to plead a prima facie case of negligence is consistent with the Supreme Court of Virginia's acknowledgment that recovery for workplace injury "cannot rest upon imagination, speculation, or conjecture, but must be based upon facts established by the evidence."<sup>115</sup> A strict liability interpretation would facilitate the opposite, allowing a plaintiff-employee to recover compensation benefits or tort damages based on nothing more than the mere allegation of injury.<sup>116</sup>

Second, as previously discussed, the General Assembly's qualification as to the three specific defenses employers are prevented from using clashes with a strict liability interpretation.<sup>117</sup> The fact that the General Assembly specifically chose to preclude three defenses inherently implies that the legislature wanted to make it very difficult for an employer to prevail in lieu of non-compliance,<sup>118</sup> but not necessarily impossible. Both the presence and content of the qualification implies that the General Assembly understood that there might be some limited circumstances wherein an employee should not recover against his non-compliant employer. If the General Assembly had not so contemplated, it would have completely foreclosed that possibility.<sup>119</sup>

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115. *Crews v. Moseley Bros.*, 148 Va. 125, 128, 138 S.E. 494, 495 (1927).

116. *See also infra* note 142 (indicating that there might be constitutional due process concerns with allowing a plaintiff-employee to recover in tort or otherwise without affording the employer the ability to mount a defense).

117. *See supra* Part II.B.

118. The term "prevail" is somewhat misleading because it overlooks the fact that regardless of an employee's exercise of Option One or Option Two under section 65.2-805(A), the employer is already subject to monetary fines. *See* VA. CODE ANN. § 65.2-805(A) (Repl. Vol. 2012 & Cum. Supp. 2016); *see also Bailey*, 2016 Va. Cir. LEXIS 74, at \*16 n.35 ("Plaintiff has repeatedly emphasized, in both written and oral argument, that if Virginia Code § 65.2-805 is interpreted as *not* being a strict liability framework, this would allow a non-complaint employer to 'benefit from' or be rewarded for his or her intentional non-compliance. The logic of this argument is certainly sound; however, its strength is somewhat weakened by virtue of the fact that, under the statute, a non-compliant employer is already subject to potentially ruinous fines.") (emphasis in original). So even if an employer overcomes the significant odds which are stacked against him or her in either an Option One claim or an Option Two suit, the statute still does not permit an employer to get off "scot-free."

119. *See supra* Part II.A (discussing how the plain language does not include the term "strict" and that the General Assembly could have easily included that term if it desired).

Third, a strict liability interpretation makes the General Assembly's inclusion of Option One somewhat puzzling. For if section 65.2-805(A) truly imposed strict liability, it would create two virtually identical avenues for an employee to achieve the same general end: an administrative avenue (Option One) and a litigation avenue (Option Two). Both avenues would allow for an opposition-free recovery but the latter allows for the greater probability of increased damages.<sup>120</sup> Relatively few, if any, employees would choose an Option One claim under such a scenario, rendering it largely superfluous.

Additionally, if section 65.2-805(A) were viewed as imposing strict liability in all instances, one would inevitably query why the General Assembly included Option One in this penal natured statute in the first place.<sup>121</sup> By rejecting a strict liability interpretation it becomes easier to observe that the General Assembly likely foresaw situations where plaintiff-employees could not otherwise establish a prima facie case against their non-compliant employer, and intentionally included Option One as a result. For example, consider the scenario where the injury is entirely the result of the employee's own actions, without the slightest amount of negligence on the part of the employer.<sup>122</sup> In such a situation, Option One would exist to ensure that an injustice is not condoned or perpetuated—i.e., an employee being prevented from compensation where the employer failed to comply with the Act's insurance or notification requirements. It also prevents perhaps a larger injustice—i.e., a non-compliant employer, who lacked any negligence whatsoever relating to the injury, being subject to potentially devastating financial liability for an injury that was truly a result of the employee's own, self-inflicted carelessness.<sup>123</sup>

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120. See *supra* note 27 (referring to the difference in amount between compensation claims and suits in tort); see also *supra* Part II.B (discussing that if strict liability were imposed, all that would be required for a plaintiff-employee to recover would be to establish an injury and collect the proverbial check); *infra* note 127 (addressing and discrediting the counterargument that an employee's victory on liability does not automatically equate to a recovery of damages).

121. See *supra* notes 127–28.

122. See *supra* note 110 and accompanying text, including the paragraph preceding note 126 (discussing such a scenario in more depth).

123. A strict liability proponent would be quick to claim that, in the more garden-variety workplace injury scenario, where the employer was nevertheless non-compliant with sections 65.2-800 or 65.2-804, rejecting a strict liability interpretation would provide no advantages to the employee. For example, consider the employee who develops a back injury from lifting and unloading heavy objects on a daily basis or the employee who de-

Fourth and relatedly, a strict liability interpretation could potentially lead to absurd results. Although the subject of this essay is primarily concerned with reinforcing the obligation to establish a prima facie case of negligence in Option Two suits, a strict liability interpretation would drastically alter the general framework for traditional workers' compensation claims.<sup>124</sup> A strict lia-

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velops carpal tunnel syndrome from repetitive stress on his or her hands. In these scenarios, the injury develops not from a result of negligence by the employer or employee but from the nature of the employment itself. The counterargument posits that refusing a strict liability interpretation would ensure that the employer benefits from the non-compliance while simultaneously preventing any extra benefit to the employee other than what is otherwise available under the Act.

This argument, although not completely without merit, is ultimately misplaced. Option One does provide a benefit to the employee; it reinforces the employee's right to receive compensation. Option One also does not allow the employer to benefit from or be rewarded for the non-compliance. *See supra* note 118 and accompanying text (discussing that employers are fined under section 65.2-805(A) for non-compliance irrespective of liability in an Option One claim or an Option Two suit, thus discrediting the argument that, in the absence of a strict liability interpretation, employers would be able to "benefit from" or "be rewarded for" non-compliance).

Section 65.2-805(A) was *not* designed to put all employees who suffer injury under the employment of a non-compliant employer at equally advantageous footing. Not all injuries are created equal. Some injuries—i.e., those involving a high degree of negligence related to the injury by a non-compliant employer—are more meritorious of the second and third layer of punishments implicit in an Option Two suit under the statute. However, in cases where a prima facie case of negligence cannot be made—i.e., either because the injury was wholly a result of the employee or because the injury developed from the nature of the employment itself—allowing the employee to prevail in a negligence suit is nonsensical. Rather, in such situations, Option One exists to both ensure an appropriate compensation for the employee while also inflicting an appropriate punishment on the employer—a single-layered punishment of fines.

Summarizing, Option One claims have their purpose, as do Option Two suits. It is most reasonable to assume that the General Assembly did not intend for them to be equally available for every type of injury. Instead, Option Two was likely intended to add an extra layer of punishments to non-compliant employers whose negligence played a role in their employee's injury. The Option One remedy, on the other hand, was intended to reinforce protection for the injured employee while not completely ignoring the non-compliance of the employer in situations where the injury resulted from either the employee's negligence or no negligence at all.

124. This might be an appropriate juncture to mention that "Larson's Workers' Compensation Law," the prevailing treatise of workers' compensation law—or "the Bible" as sometimes referred to by practitioners—has taken considerable time to outline that infusing tort or strict liability concepts into the general concept of workers' compensation is a prevailing "fallacy" among common-law trained lawyers and judges. *See LARSON ET AL., supra* note 4, at § 1.03. Indeed, because "the concept of compensation as a kind of strict liability tort has had . . . widespread acceptance among lawyers and . . . effects on compensation decisions," Larson's treatise devotes several sections to "dispel[ling] the strict-liability-tort fallacy" and distinguishing workers' compensation from the common-law. *Id.* §§ 1.02–03. Therefore, proponents of imposing strict liability on non-compliant employers in both traditional workers' compensation claims (Option One) and under negligence suits (Option Two), per section 65.2-805(A), must be well warned that imposing strict liability concepts has been deemed "fallacious" by the prevailing source on workers' compensation law in the United States and contrary to "[a] correctly balanced underlying concept of the



bility interpretation would effectively declare that in any Option One claim, injuries stemming from *any* type of conduct are compensable so long as the employer was non-compliant with sections 65.2-800 or 65.2-804.

Elaborating further, a proponent of interpreting section 65.2-805(A) as imposing strict liability in an Option Two suit could not plausibly argue that the phrase “shall be liable” amounts to strict liability only in Option Two suits.<sup>125</sup> Due to the fact that the aforementioned phrase precedes the statutory establishment of the two options, if such language is to be construed as imposing strict liability, then both Option One claims and Option Two suits necessarily become strict liability actions. And if the statute is to be viewed as imposing strict liability in an Option One claim, the general limitations of non-compensable injuries under section 65.2-306 are essentially “thrown out the window.” In other words, just as an employer would be barred from asserting contributory negligence in an Option Two suit, the employer would likewise be barred from arguing deliberate self-injury, intoxication, or use of a controlled substance in an Option One claim.<sup>126</sup> This seems to offend the broader notions of justice.

Consider the following hypothetical under a strict liability interpretation of section 65.2-805(A). Suppose that an employee is working for his employer in road construction. The employer carries workers' compensation insurance and is regularly making its premium payments, but has failed to provide adequate evidence of this for the past year, in violation of section 65.2-804. On one particular day, while in the course of employment, the employee is using a jackhammer while working with his fellow crew members. The employee and the rest of the crew had been drinking alcohol before their shift and were intoxicated. While using the jackhammer, the employee accidentally drives the jackhammer into his foot, suffering a serious injury. The employee is contemplating both an Option One claim and an Option Two suit under section 65.2-805(A) based on his employer's non-compliance.

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nature of workers' compensation” which is necessary for “a proper . . . interpretation of compensation acts.” *Id.* § 1.03.

125. The phrase “shall be liable” precedes the delineation of the two options of recovery in the statute. *See* VA. CODE ANN. § 65.2-805(A) (Repl. Vol. 2012 & Cum. Supp. 2016). Thus, if the strict liability grows out of that language, it must apply to both. A strict liability interpretation cannot reasonably propose that it only refers to one but not the other.

126. *See generally supra* text accompanying notes 44–45 (discussing the categories of non-compensable injuries outlined in section 65.2-306).

Under these circumstances, the employee would not be able to establish a prima facie case against the employer, primarily due to lacking evidence of causation and breach of duty.<sup>127</sup> If the employee elects an Option Two suit, there is a guaranteed victory as to liability<sup>128</sup> because the employee would not need to establish a prima facie case of negligence and the employer would be prevented from asserting contributory negligence as a defense. If the employee elects an Option One claim, there is also guaranteed recovery because the otherwise non-compensable conduct per section 65.2-306 is a non-issue and cannot be asserted as a defense by the employer.<sup>129</sup> A strict liability interpretation of section 65.2-805(A) in this circumstance, while trying to protect the employee at all costs, would work a grave injustice on the employer who

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127. The employee could also not assert a claim of negligent supervision because such is not a recognized action in Virginia. See *Chesapeake & Potomac Tel. Co. v. Dowdy*, 235 Va. 55, 61, 365 S.E.2d 751, 754 (1988) (“There can be no actionable negligence unless there is a legal duty, a violation of the duty, and a consequent injury. In Virginia, there is no duty of reasonable care imposed upon an employer in the supervision of its employees under these circumstances and we will not create one here.”) (citation omitted); see also *Cook v. John Hancock Life Ins. Co. (U.S.A.)*, No. 7:12-v-00455, 2015 U.S. Dist. LEXIS 4318, at \*37–40 (W.D. Va. Jan. 14, 2015) (acknowledging that the “court [was] uncertain whether Virginia would recognize such a tort in an appropriate case” but refusing to allow a negligent supervision claim based on the substantial case law against doing so); *Madison v. Acuna*, No. 6:12-CV-00028, 2012 U.S. Dist. LEXIS 121704, at \*8–9 (W.D. Va. Aug. 28, 2012) (refusing to recognize a cause of action for negligent supervision after a fatal car accident caused by one of the defendant’s employees); *Hesse v. Long & Foster Real Estate, Inc.*, No. 1:11CV506, 2012 U.S. Dist. LEXIS 57524, at \*8–9, \*11 (E.D. Va. Apr. 23, 2012) (holding that a plaintiff, who had been injured by an independent contractor working under the direction of the defendant, could not recover against the defendant for negligent supervision in failing to ensure that the independent contract obtained an adequate amount of liability insurance under the terms of the contract); *Morgan v. Wal-Mart Stores*, No. 3:10CV669-HEH, 2010 U.S. Dist. LEXIS 116400, at \*12–14 (E.D. Va. Nov. 1, 2010) (holding that a claim for negligent supervision was not allowed when one of the defendant’s employees injured the plaintiff when using a floor buffer in the scope of the employee’s employment).

128. A strict liability proponent might assert that even if the employee wins on liability, it does not necessarily guarantee that he will recover damages. This may be true; however, the argument is of no meaningful consequence. Even if an employee was unable to recoup damages where his employer was deemed indisputably liable, the employee could easily proceed with an Option One claim under *Delp* and *Virginia Used Auto Parts* and obtain no-fault benefits. See *Delp v. Berry*, 213 Va. 786, 789, 195 S.E.2d 877, 879 (1973) (holding that an employee who has been awarded benefits under a compensation claim but has not received satisfaction is not barred from pursuing a civil claim for damages); *Virginia Used Auto Parts, Inc. v. Robertson*, 212 Va. 100, 102, 181 S.E.2d 612, 613–14 (1971) (holding that an employee who unsuccessfully resorts to a civil action is not barred from pursuing a traditional compensation claim under the Act); see also *LARSON ET AL.*, *supra* note 4, at § 1.04 (discussing the principle that claimants of a workers’ compensation claim are still entitled to compensation benefits, but they simply may not be as high as damages in tort would be).

129. See *supra* text accompanying notes 44–45.

lacked even one iota of negligent conduct relating to the injury,<sup>130</sup> notwithstanding their non-compliance.

Although this hypothetical may be extreme, it nevertheless reveals how internal inconsistency, and even absurd results, would result from interpreting section 65.2-805(A) as imposing strict liability on employers in all instances. Such an interpretation would ignore that the General Assembly, in other places of the Act, clearly set out boundaries for employee recovery.<sup>131</sup> In other words, given that the General Assembly has already categorized certain conduct from which resulting injuries would be non-compensable, it would defy logic to conclude that the General Assembly intended to remove these boundaries, making *any and all* injuries compensable, simply because an employer failed to comply with the insurance or notice requirements of sections 65.2-800 or 65.2-804.<sup>132</sup>

As a separate matter, refusing to interpret section 65.2-805(A) as imposing strict liability is not necessarily inconsistent with *Virginia Used Auto Parts*. For one, *Virginia Used Auto Parts* was not concerned about the specific issue of whether section 65.2-805(A) displaced a plaintiff-employee's obligation to plead a prima facie case of negligence. The issue was whether an unsuccessful resort to a civil action under the statute barred the employee from pursuing a traditional workers' compensation claim.<sup>133</sup> Accordingly, the supreme court's analysis of the policies underlying its holding cannot be summarily transplanted into the issue of whether a prima facie case is required under the statute.

One also cannot overlook that the *Virginia Used Auto Parts* court, in analyzing the scheme of section 65.2-805(A), noted that "[t]he statute, penal in nature, provides extraordinary *advantages* to an injured employee when his employer has failed or refused to

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130. See *supra* note 123 and accompanying text (discussing Option One as possibly having been included to ensure that the employer's non-compliance is addressed in some form but that an injustice, graver than non-compliance, is not done); see also *supra* text accompanying note 101 (reiterating that the "negligence" which is of consequence in analyzing all injuries falling under section 65.2-805(A) is that of the conduct relating to the injury, and not the non-compliance of the employer).

131. See VA. CODE ANN. § 65.2-306 (Repl. Vol. 2012); *supra* text accompanying notes 44-45.

132. This is especially true considering that when the General Assembly intended to remove boundaries on the employer's side—eliminating the defenses of contributory negligence, etc.—it did so *explicitly*. And there is, of course, no such explicit removal of the section 65.2-306 defenses anywhere in section 65.2-805(A).

133. *Virginia Used Auto Parts, Inc. v. Robertson*, 212 Va. 100, 101, 181 S.E.2d 612, 613 (1971).

comply with the Act.”<sup>134</sup> The careful employment of the word “advantages” reinforces that the supreme court understood the General Assembly did not intend to completely foreclose the possibility of a non-compliant employer prevailing, but wanted to ensure that such a scenario was truly extraordinary.<sup>135</sup>

Perhaps most important, though, is recognizing that the underlying action in *Virginia Used Auto Parts* stemmed from a previously unsuccessful civil action.<sup>136</sup> Before seeking a remedy for compensation under the Act, the plaintiff-employee in *Virginia Used Auto Parts* had brought a tort action, pursuant to section 65.2-805(A), in the Circuit Court for the City of Norfolk.<sup>137</sup> However, the action was unsuccessful because “*there was no proof of negligence on the part of the employer which proximately caused [the plaintiff’s] injuries.*”<sup>138</sup> The otherwise strong language in *Virginia Used Auto Parts* that would seem to support a strict liability interpretation must be viewed in this context. In essence, the supreme court’s holding in *Virginia Used Auto Parts* was that an “unsuccessful resort to a civil action [*due to the plaintiff’s inability to establish a prima facie case of negligence*] will not bar the employee from pursuing his remedy under the Act.”<sup>139</sup> This, of course, gives further legitimacy to the observation that maintaining the requirement for plaintiff-employees to establish a prima facie case of negligence would not be inconsistent with established law or policy.<sup>140</sup>

In conclusion, requiring plaintiff-employees to plead a prima facie case of negligence in a discretionary tort suit under the statute does not do violence to the policies undergirding section

134. *Id.* at 102, 181 S.E.2d at 613 (emphasis added).

135. See *supra* Part II.A; *supra* text accompanying notes 116–18.

136. *Virginia Used Auto Parts*, 212 Va. at 100–01, 181 S.E.2d at 613.

137. *Id.* at 100–01, 181 S.E.2d at 612–13. The employee did not raise this issue on appeal.

138. *Id.* at 101, 181 S.E.2d at 613 (emphasis added). The employee did not raise this issue on appeal. *Id.*

139. *Id.* at 103, 181 S.E.2d at 614 (emphasis added).

140. A strict liability proponent might plausibly argue that this interpretation—i.e., refusing to interpret section 65.2-805(A) as imposing strict liability—would create disincentives for employers to comply with the Act in the first place. This contention is misplaced, however. Requiring plaintiff-employees to establish a prima facie case of negligence before obtaining recovery against their non-compliant employer in no way eliminates the incentives employers have in avoiding the fines of section 65.2-805(A). See *supra* note 118 (intimating that the central argument of this essay, i.e., that a plaintiff-employee should be required to plead a prima facie case of negligence, does not mean that an employer will get off from his non-compliance “scot-free”).

65.2-805(A) or *Virginia Used Auto Parts*. Rather, refusing to adopt a strict liability interpretation would: (i) be consistent with the supreme court's acknowledgment that recovery under the Act "cannot rest upon . . . speculation or conjecture";<sup>141</sup> (ii) be consistent with both the presence and content of the General Assembly's qualification of precluded affirmative defenses; (iii) avoid an internally inconsistent application of the statutory scheme; and (iv) avoid the possibility of absurd results and prevent, in some scenarios, a miscarriage of justice to the employer.<sup>142</sup>

#### D. *Consistent with Foreign Jurisdictions*

Although this issue has only been the subject of relatively few published cases in Virginia, and none higher than the circuit court level, a number of other jurisdictions have addressed it in the context of their own respective statutes. These other states have overwhelmingly held that plaintiff-employees are still required to establish a prima facie case of negligence in pursuing a suit at law.

Acknowledging that all such cases are merely persuasive to Virginia courts, one jurisdiction's authority in particular, Indiana, demands higher recognition. The Supreme Court of Virginia has noted that the Act is "practically speaking, a copy of the Indiana act, [and that] the judicial construction placed upon the [Indiana] act . . . will be considered to have been adopted along with the act in this State."<sup>143</sup> Accordingly, the supreme court has consistently reiterated that "because the Virginia act is based upon that of Indiana," Indiana decisions construing its workers' com-

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141. *Crews v. Moseley Bros.*, 148 Va. 125, 128, 138 S.E. 494, 495 (1927).

142. The author notes that there is also a plausible argument that a strict liability interpretation of section 65.2-805(A) would deprive employers of due process under 42 U.S.C. § 1983 (2012). In other words, if section 65.2-805(A) were interpreted as imposing strict liability on non-compliant employers, the elimination of the employers' ability to defend themselves, particularly in actions involving no negligence on their part, and subjecting them to financial liability, could amount to a deprivation of rights and property under 42 U.S.C. § 1983 (2012). Acknowledging that there is certainly substance to such an argument, the author ultimately decided to forego further analysis of this issue.

143. *Big Jack Overall Co. v. Bray*, 161 Va. 446, 454, 171 S.E. 686, 688 (1933); *see also* *Bd. of Supervisors v. Boaz*, 176 Va. 126, 131, 10 S.E.2d 498, 500 (1940) ("The Virginia [Workmens'] Compensation Act, adopted in 1918, is practically a copy of the Indiana Act. The judicial construction placed upon that Act in that State will be considered to have been adopted in this State.").

pensation legislation are “peculiarly applicable” to Virginia courts.<sup>144</sup>

In 1941, the Court of Appeals of Indiana considered the case of *Conway v. Park* and held that Indiana’s statute governing non-compliant employers, nearly identical to section 65.2-805(A), cannot be interpreted as dispensing with the requirement of the plaintiff-employee to plead a prima facie case of negligence in a discretionary suit under the same.<sup>145</sup> Although decided more than a half century ago, the *Conway* case has been cited positively several times and remains good law.<sup>146</sup>

In *Conway*, the employee was injured in an automobile accident while operating the automobile in the course of his employment.<sup>147</sup> The employee filed an action against the employer knowing that the employer did not carry the requisite workers’ compensation insurance.<sup>148</sup> The Appellate Court of Indiana—today known as the Court Appeals of Indiana—was charged with determining whether the complaint was sufficient to state a cause of action against the employer.<sup>149</sup> In that determination, it held that “[w]hile the [employee] under the circumstances alleged had an election to seek compensation for his injuries in an action at law, yet in so doing, he [still] assumes the burden of alleging in his complaint sufficient facts to constitute an action at law against his employer.”<sup>150</sup> The *Conway* court further held:

The Workmen’s Compensation Act does not attempt to create a liability against the employer who is wholly without fault even though he is operating without complying with the provisions of the Workmen’s Compensation law. No liability exists under the provisions of the act as to such employers *unless negligence is shown*.<sup>151</sup>

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144. *Cohen v. Cohen’s Dep’t Store, Inc.*, 171 Va. 106, 110, 198 S.E. 476, 477 (1938); *see, e.g., Joyce v. A.C. & S., Inc.*, 785 F.2d 1200, 1207 (4th Cir. 1986); *Haigh v. Matsushita Elec. Corp. of Am.*, 676 F. Supp. 1332, 1353 (E.D. Va. 1987); *Harris v. Diamond Constr. Co.*, 184 Va. 711, 718, 36 S.E.2d 573, 576 (1946); *Stone v. George W. Helme Co.*, 184 Va. 1051, 1062, 37 S.E.2d 70, 75 (1946).

145. 31 N.E.2d 79, 81–82 (Ind. App. 1941).

146. A Shepard’s report of *Conway* on Lexis Advance reveals that the case has been cited to in five other decisions without caution.

147. 31 N.E.2d at 80.

148. *See id.* at 81.

149. *Id.*

150. *Id.* at 82.

151. *Id.* (citing *Vandalia R. Co. v. Stillwell*, 104 N.E. 289, 290 (Ind. 1914)) (emphasis added).

Several other decisions from foreign jurisdictions have held similarly. In 2006, the Court of Civil Appeals of Oklahoma, in *Workman v. Anderson Music Co.*, considered whether the relevant statute governing non-compliant employers, imposed strict liability in a suit at law for compensation.<sup>152</sup> The *Workman* court held that “[w]here [an] employer has failed to provide workmen’s compensation insurance, and an injured employee has filed an action in a court of law under . . . [OKLA. STAT. tit. 85] § 12, the plaintiff must prove [inter alia] . . . (4) negligence of the employer, [and] (5) proximate cause or causal connection between the negligence and the injury.”<sup>153</sup>

A similar interpretation prevails in both Kentucky and Tennessee. In the 1953 Kentucky case of *Skinner v. Smith*, the Court of Appeals of Kentucky reversed a judgment for a miner who had been injured in the course of employment with his employer.<sup>154</sup> There was no dispute that the employer failed to comply with Kentucky’s Workmen’s Compensation Act.<sup>155</sup> However, the court of appeals reversed on the grounds that there was “no proof in the record that establishes any negligence on the part of [the employer], but, rather, the evidence show[ed] either inevitable accident or negligence on the part of [the employee].”<sup>156</sup>

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152. 149 P.3d 1060, 1063 (Okla. Civ. App. 2006). Notably, the Oklahoma statute, as written, was arguably more susceptible to a strict liability interpretation than Virginia section 65.2-805(A) because OKLA. STAT. tit. 85 § 12 states: “If an employer has failed to secure the payment of compensation for his injured employee, . . . an injured employee, . . . , may maintain an action in the courts for damages on account of such injury,” and excludes the same three affirmative defenses excluded in Virginia section § 65.2-805(A). See *id.* at 1062 (quoting OKLA. STAT. tit. 85 § 12) (2006) (emphasis added). By contrast, the Virginia Code specifically uses the language “suit at law,” through which it is more reasonable to presume the legislative intent of a civil action based upon a prima facie establishment of negligence. See *Bailey v. Hensley*, No. CL16-284, 2016 Va. Cir. LEXIS 74, at \*14 n.32 (Cir. Ct. May 6, 2016) (Roanoke City) (“Moreover, the General Assembly’s use of the word ‘suit’ implies a lawsuit, and not simply an automatic action for damages.”). Even still, the Court of Civil Appeals of Oklahoma reiterated that recovery in an action for damages under OKLA. STAT. tit. 85 § 12 still hinges on the plaintiff first establishing a prima facie case of negligence. *Workman*, 149 P.3d at 1063 (emphasis added).

153. *Workman*, 149 P.3d at 1062 (citing *Ice v. Gardner*, 83 P.2d 378, 383 (Okla. 1938)); see also *id.* at 1063 (explaining that if an employee seeks recovery in action at law, he may possibly recover more than in a traditional claim under the Workmen’s Compensation Act, “[b]ut in either event it is incumbent upon him to establish primary negligence, and the injury and causal connection, in addition to the usual proof bringing him within the provisions of the act”) (emphasis in original).

154. 255 S.W.2d 621, 622–23 (Ky. Ct. App. 1953).

155. See *id.* at 622.

156. *Id.*

In *Duncan v. Dickie Rector Lumber Co.*, the Court of Appeals of Tennessee considered the same question under Tennessee's respective statute.<sup>157</sup> The *Duncan* court conceded that because the employer had elected not to comply with the relevant workers' compensation legislation, they were precluded from certain affirmative defenses.<sup>158</sup> Nevertheless, it held that "notwithstanding the elimination of these defenses, [a] plaintiff is entitled to damages only if his injury was proximately caused by some act or omission on the part of the employer or his agents amounting to negligence, or want of reasonable care."<sup>159</sup> The *Duncan* court further opined that "[t]he statutory restrictions relative to matters of defense, where an employer elects not to operate under the Workmen's Compensation Law . . . cannot be so extended as to deprive him of other evidentiary benefits evolving from the same source furnishing basis for such defenses."<sup>160</sup>

In addition to these jurisdictions, the Supreme Court of Appeals of West Virginia held in *Prager v. W. H. Chapman & Sons Co.* that a statute which essentially imposed strict liability on an employer who lacked negligence, but who had not subscribed to the state workmen's compensation fund, was unconstitutional.<sup>161</sup> The *Prager* case centered on the West Virginia legislative amendment to the state workers' compensation act that provided, in a fashion eerily analogous to Virginia Code section 65.2-805(A), that employers who failed to participate in the state workers' compensation fund or defaulted on their compensation payments

shall be liable to their employees . . . for all damages suffered by reason of accidental personal injuries . . . sustained in the course of and resulting from their employment, and in any action by any such employee or personal representative thereof, such defendant shall not avail himself of the following common law defenses: [contributory negligence, the fellow-servant rule, and assumption of the risk].<sup>162</sup>

The *Prager* court reiterated that requiring participation in a workers' compensation fund was within the state's police power, but that the statute at issue did not involve such a scenario.<sup>163</sup>

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157. 212 S.W.2d 908, 909 (Tenn. Ct. App. 1948).

158. *Id.*

159. *Id.* at 911 (quoting *Moore Coal Co. v. Brown*, 64 S.W.2d 3, 4 (Tenn. 1933)).

160. *Id.*

161. 9 S.E.2d 880, 883 (W. Va. 1940).

162. *Id.* at 881 (quoting 1937 W. Va. Acts 422).

163. *Id.* at 882-83.



The court held:

It is one thing to say that the state has power to require employers to contribute to a fund to be administered by the state, for the purpose of compensating employees for injuries sustained in industry; [but] it is quite another thing to require an employer to pay damages, from his own estate, for an injury sustained by one of his employees, in no wise due to any neglect, negligence or wrongdoing on the part of the employer.<sup>164</sup>

Inasmuch as the statutory amendment at issue imposed strict liability on employers for their employees' injuries without respect to any wrongdoing on the part of the employer, the Supreme Court of Appeals of West Virginia held the statute to be unconstitutional.<sup>165</sup>

In sum, even though neither the Supreme Court of Virginia nor the Court of Appeals of Virginia have addressed this issue specifically, there is a considerable amount of support across other jurisdictions for the holding that a plaintiff-employee, in a discretionary suit in tort against a non-compliant employer under the Act, is still required to establish a prima facie case of negligence as a prerequisite to recovery.

### III. AMENDMENT

This essay does not specifically seek to advocate a change in the law. Its purpose is to analyze Virginia Code section 65.2-805(A) in its entirety to clarify for any court that must address this issue in the future. A careful review of the statutory language, its underlying policies, the implications of a strict liability interpretation, and a survey of how other states have resolved the question compel the determination that section 65.2-805(A) does not abrogate a plaintiff-employee's obligation to establish a prima facie case of negligence prior to obtaining recovery against a non-compliant employer in an Option Two suit. The aforementioned also compels the determination that the General Assembly likely did not intend this when it enacted section 65.2-805. To the extent that the current General Assembly feels that a strict liability scheme under section 65.2-805 was or is desired, it should take the opportunity to effectuate this desire by clearly and unambiguously amending the statutory language to that effect.

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164. *Id.* at 883.

165. *Id.*

## CONCLUSION

As workers' compensation cases continue to rise in the courts of the Commonwealth, both in terms of volume and effect, it is imperative to address and resolve any ambiguities which could lead to conflicts among the judiciary. Among the Virginia Workers' Compensation Act's many provisions, Virginia Code section 65.2-805 has created some dissonance among the courts.<sup>166</sup> This friction comes in part because of strong language within the statute which, at first glance, seems to suggest imposing strict liability on employers who fail to carry workers' compensation insurance or give adequate notice thereof. However, a more careful analysis of the statute reveals some troubling implications with that position.

Without overlooking the importance of ensuring that employers comply with the Act, the most reasonable interpretation of Virginia Code section 65.2-805(A) is to require a plaintiff-employee to plead a prima facie case of negligence in a discretionary suit under the statute. Requiring a prima facie case of negligence as a prerequisite to recovery comports with the plain language of the statute, is consistent with the maxim *expressio unius est exclusio alterius*, and does not do violence to established law and policy.

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166. See *supra* text accompanying notes 11-12.

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