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Litigation Review

Action v. Omission: When an Employee May be Liable in a Premises Liability Suit and Why It Matters

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In Virginia, there are certain advantages to defending a case in federal court. First, in Virginia state court, motions for summary judgment may not be based on deposition testimony. For attorneys seeking a case-dispositive ruling prior to trial, the state court evisceration of the summary judgment process thwarts such efforts. Second, the disclosure and qualification process for expert witnesses are far more stringent in federal court. Through robust expert disclosure requirements and the application of Daubert to experts who are properly disclosed, Virginia federal courts place a premium on well thought out and executed expert strategies.

Knowing most defendants would prefer to remove a claim to federal court, plaintiffs frequently attempt to include a non-diverse employee in a premises liability suit to prevent removal. A defendant will often seek removal even with the non-diverse employee, claiming fraudulent joinder of the employee. In those circumstances, what the employee did or did not do, and whether it was an act by omission or an affirmative act of negligence, will determine whether removal to federal court will succeed.

In *Beaudoin v. Sites*, 886 F. Supp. 1300 (E.D. Va. 1995), the court, in considering a motion to remand, stated: “Under Virginia law, an employee of the owner or operator of the premises in an action based on standard premises liability theories may be held liable only for affirmative acts of negligence, not merely because, in the status of employee of the owner or operator, he or she is guilty of an omission.” If the employee affirmatively acted to create the hazard that allegedly led to the plaintiff’s injury, the employee was potentially individually liable, making the non-diverse employee a proper party and warranting remand. Virginia law permits joint liability for an employer and employee when an employee commits a wrongful act. *VanBuren v. Grubb*, 284 Va. 584 (2012). If, however, the plaintiff claims an employee is individually liable for failing to act a certain way, nonfeasance as opposed to misfeasance, such omission cannot form the basis for an individual claim against the employee. Therefore, the non-diverse employee is not a proper party, and removal is proper.

While there are nuances to the court's analysis of the potential liability of an employee, the first question before attempting removal should be: did the employee affirmatively create the hazard or did the employee merely fail to act with regard to the hazard? If the former, removal is likely improper and does little but increase litigation costs. If the latter, timely seek removal, as Virginia federal court can be a far kinder venue for defendants in Virginia.

Litigation Review is written by the attorneys of the Litigation Practice Group of McCandlish Holton. From offices in Richmond, Virginia and Metropolitan D.C., our team offers trial attorneys with decades of experience practicing before the state and federal courts in Virginia, Maryland and the District of Columbia. For more information on our services, please visit us at www.lawmh.com.

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