

SUPREME COURT OF LOUISIANA

No. 95-C-1830

ROGER KIRKLAND

vs.

RIVERWOOD INTERNATIONAL USA, INC.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,
SECOND CIRCUIT, STATE OF LOUISIANA

KIMBALL, J., dissenting.

I believe the legislature intended to overrule the *Berry v. Holston Well Service*¹ three-level inquiry and return to the pre-*Berry* "integral relation" test outlined by this court in *Thibodaux v. Sun Oil Co.*²; therefore, I respectfully dissent. The most central and material part of the 1989 amendment to LSA-R.S. 23:1061 is that the types of work specified "*shall not prevent* the work undertaken by the principal from being considered part of the principal's trade, business, or occupation"³ In my view, the legislature's action eliminates the *Berry* factors' usefulness in a statutory employer determination, either alone or under a totality of the circumstances analysis.

At the time of *Berry*, this court was "shift[ing] its interpretive analysis regarding the statutory employer defense from one which favored a liberal application" to a more restrictive interpretation.⁴ This court initiated this shift "[b]eginning with the case of *Benson* and followed by the cases of *Lewis* and *Rowe*"⁵ Therefore, "[f]rom a reading of *Benson* and its progeny" this court began to formulate a three-level analysis.⁶ To factors taken mainly from the *Benson* line of cases, we added

¹ 488 So.2d 934 (La. 1986).

² 218 La. 453, 49 So.2d 852, 854 (1950).

³ 1989 La. Acts 454, §3 (emphasis added).

⁴ *Berry*, 488 So.2d at 937.

⁵ *Id.*; see *Benson v. Seagraves*, 436 So.2d 525 (La. 1983); *Lewis v. Exxon Corp.*, 441 So.2d 192 (La. 1983); *Rowe v. Northwestern Nat'l Ins. Co.*, 471 So.2d 226 (La. 1985).

⁶ *Berry*, 488 So.2d at 937.

the specialization factor and another concerning the principal's engagement in business.⁷ Whether or not *Berry* actually changed the law, or merely organized years of statutory employer jurisprudence,⁸ the legislature's 1989 amendment zeroed in on the *Berry* "test", tracking its language, in an attempt to return the law to its pre-*Berry* status.⁹

I interpret this enactment to be a return to the *Thibodaux* "integral relation" test.¹⁰ To hold otherwise is to render the 1989 amendment, and the legislature's obvious intent,¹¹ inconsequential; for to resurrect the *Berry* factors in a totality of the circumstances framework is to resurrect *Berry*.¹² That approach interprets the legislature's action not as a substantive repudiation of the factors which *Berry* comprised, but a pro forma correction intended to abrogate *Berry*'s rigid application. Moreover, by legislatively overruling *Berry*, I believe the legislature voiced disagreement with *Berry*'s abandonment of the integral relation test in favor of the three-tiered method of analysis. I agree with the majority that extending tort immunity to a statutory employer who has not paid compensation contradicts a basic principle upon which the statutory scheme is based, which the majority has termed a "*quid pro quo*" between the principal and worker.¹³ However, I conclude the legislature rejected this rationale in the 1976 codification of principal tort immunity originally conferred by this court in *Thibodaux*.¹⁴ In addition, I find the legislative purpose behind the 1989 amendment was to broaden

⁷ See *ante* at 10-11.

⁸ See Wex S. Malone & H. Alston Johnson, III, *Workers' Compensation Law & Practice*, §364 at 181-82, 14 La. Civil Law Treatise (3d ed. 1994).

⁹ The 1989 amendment tracks the first and second tiers of the *Berry* analysis, specifically rejecting those factors. The amendment implicitly nullifies the third tier, relative to whether the principal actually engaged in the contract work at the time of injury, by stating that the principal may still be considered a statutory employer "regardless of whether the principal has the equipment or manpower capable of performing the work." Therefore, the legislature rejected entirely the *Berry* scheme.

¹⁰ Under the "integral relation" test, a principal is deemed to be a statutory employer if the contract work is an integral and/or essential part of the principal's trade, business, or occupation. *Thibodaux*, 49 So.2d at 854.

¹¹ *Ante* at 12.

¹² I respectfully disagree with the majority that the legislature, by amending section 1061, intended merely to suppress "one or more factors enumerated in *Berry*" *Ante* at 13.

¹³ See *ante* at 5 & 9 n.4.

¹⁴ George W. Pugh, Jr., *Judge Albert Tate, Jr. and the Employee Personal Injury Action: An Overview*, 47 La. L. Rev. 993, 1006 (1987) (The 1976 amendment "foreclosed any further judicial reconsideration of the concerns raised by Judge Tate in *Broussard*, and the imbalance in the act remains."); see *Broussard v. Heebe's Bakery, Inc.*, 268 So.2d 656, 661 (La. 1972) (Tate, J., concurring).

the availability of the "statutory employer defense" and depart from the *Berry* framework. Thus, I believe the legislature's departure from the *Berry* test, which itself was crafted largely from cases following the 1976 amendment to section 1032,¹⁵ revived the *Thibodaux* test to determine whether the work was part of the principal's trade, business, or occupation.

Based upon the foregoing, I would reverse the court of appeal's judgment and reinstate the judgment of the trial court, which applied the integral relation test to the facts of this case. Accordingly, I respectfully dissent.

¹⁵ See *ante* at 10; see also *Brock v. Chevron Chemical Co.*, 750 F. Supp. 779, 780-81 n.2 (E.D. La. 1990) (Collins, J.) (finding the *Benson*, *Lewis*, and *Rowe* cases began the departure from a liberal construction of the statutory employer doctrine), *vacated on other grounds*, 946 F.2d 1544 (5th Cir. 1991).