

1991

## Annual Survey of Virginia Law: Construction Law

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### Recommended Citation

D. S. Barnhill, *Annual Survey of Virginia Law: Construction Law*, 25 U. Rich. L. Rev. 699 (1991).

Available at: <http://scholarship.richmond.edu/lawreview/vol25/iss4/9>

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# CONSTRUCTION LAW

*D. Stan Barnhill\**

## I. INTRODUCTION

This article will review recent legislation and judicial decisions in Virginia affecting owners, contractors, and design professionals in the construction context. The discussion will include legislative amendments to the Code of Virginia ("Code") by the General Assembly promulgated in 1990 and the first half of 1991, as well as important cases on construction law decided by Virginia's state and federal courts for the last half of 1989, 1990, and the first half of 1991.

## II. LEGISLATION

The General Assembly was not exceptionally active in the 1990 and 1991 legislative sessions in areas affecting the construction industry. The laws that did pass generally fell within four categories: regulation of contractors; changes in public procurement law; the establishment of an alternative venue for litigation or arbitration of construction contract disputes; and the broadening of civil actions that may be brought against the Virginia Department of Transportation.

### A. *Regulation of Contractors*

In 1990, the General Assembly changed the scope and nature of regulation governing contractors in Virginia. The new legislation, which became effective on January 1, 1991, amended numerous sections of Article 1 of Title 54.1 of the Code.<sup>1</sup>

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1. VA. CODE ANN. §§ 54.1-1100 to -1115 (Repl. Vol. 1991).

One principal change effectuated by the amendments was to require Class B contractors to obtain and maintain a license to work as contractors in Virginia.<sup>2</sup> Prior to this change, Class B contractors needed only to be "registered" to do business in the state.<sup>3</sup> With the amendments, Class B contractors are now subject to essentially the same regulations that govern Class A contractors.

The General Assembly also amended both the definitions of "Class A" and "Class B" contractors to include not only the actual performance of construction, but also the management of construction as well.<sup>4</sup> The obvious intent of this amendment was to bring construction managers within the scope of licensure.<sup>5</sup>

In addition, the General Assembly amended the law in 1990 to impose additional requirements on any person or entity seeking licensure in Virginia as a Class A or Class B contractor. Any such contractor must now employ a full-time "designated employee" who is over 18 years of age and has taken and passed, on behalf of the contractor, an examination administered by the Virginia Board of Contractors.<sup>6</sup> If the "designated employee" should cease working for the contractor after passing the exam, the contractor has ninety days to notify the Board of a qualified substitute in order to maintain licensure.<sup>7</sup> The General Assembly included a grandfather clause in section 54.1-1108.1 which excludes from full compliance all contractors licensed and in business before January 1, 1991.<sup>8</sup> Grandfathered contractors may instead submit a name of one of their full-time employees to the Board as their "designated employee," without that person having passed the Board's examination. Should that employee, however, later cease to be associated

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2. VA. CODE ANN. § 54.1-1108. A "Class B" contractor is defined in the Code as one involved in construction work having a value for any one project or contract of between \$1,500 and \$40,000; or involving the building of a groundwater well, regardless of contract value. *Id.* § 54.1-1100. In contrast, a "Class A" contractor is defined as one involved in construction work having a value for any one project or contract of \$40,000 or more; or having a total value for all projects in a given year of \$300,000 or more. *Id.*

3. *Id.* § 54.1-1108 (Repl. Vol. 1988) (repealed 1990).

4. *Id.* § 54.1-1100 (Repl. Vol. 1991).

5. Construction managers are hired by the owner to coordinate and manage the non-design aspects of the construction process. These professionals first appeared in the 1970s to provide the owner an alternative to the traditional practice of relying solely on the architect and general contractor to manage the construction. *See Schenk, Construction Wars: Part II. Risk and the Construction Manager: A Continuing Development*, 24 REAL PROP., PROBATE & TRUST J. 593, 594 (1990).

6. VA. CODE ANN. §§ 54.1-1100, -1106, -1108 (Repl. Vol. 1991).

7. *Id.* §§ 54.1-1106, -1108.

8. *Id.* § 54.1-1108.1.

with the grandfathered contractor, that contractor will then have to comply with the new law by designating an employee who has passed the Board's examination.<sup>9</sup>

Two final changes in legislation governing contractors are worthy of mention. In both 1990 and 1991, the General Assembly added to the powers of the Board of Contractors. First, the General Assembly amended section 54.1-1110 of the Code by granting the Board the authority to require remedial education of a contractor found to have violated state law governing contractor practice.<sup>10</sup> Prior to the amendment, the Board possessed only the powers of denial or revocation of license under this section.<sup>11</sup>

Second, in 1991 the General Assembly again augmented the powers of the Board of Contractors by the amendment of section 54.1-1102 of the Code.<sup>12</sup> Pursuant to this amendment, the Board now has the authority to promulgate regulations requiring residential contractors, not engaged in routine maintenance or service contracts, to enter into legible written contracts with consumers. The Board can require that these written contracts specify the work to be performed; the fixed price or an estimate of the cost of the work; the schedule and amount of progress payments; a timetable for when the work will be completed; the amount of any down payment; a listing of any specific materials requested by the consumers; and identification business information about the contractor.<sup>13</sup> The Board can require that a contractor soliciting work door-to-door provide the consumer with a "statement of protections" as well.<sup>14</sup>

### B. *Public Procurement*

In 1990 and 1991, the General Assembly passed several amendments to Virginia's Public Procurement Act.<sup>15</sup> The effect of each amendment is to require that public bodies include in their construction contracts additional clauses designed to protect the interests of contractors or their subcontractors.

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9. *Id.*

10. *Id.* § 54.1-1110.

11. *Id.* § 54.1-1110 (Repl. Vol. 1988) (repealed 1990).

12. *Id.* § 54.1-1102 (Repl. Vol. 1991).

13. *Id.*

14. *Id.*

15. *Id.* §§ 11-35 to -80 (Repl. Vol. 1989 & Cum. Supp. 1991).

In 1990, the General Assembly added a new section to Article 2.1 of the Act.<sup>16</sup> This new section, 11-62.11, obligates any contractor in contractual privity with a public body to pay its subcontractors within seven days of receipt of payment from the public body for work performed by the subcontractor.<sup>17</sup> Furthermore, the public body's contract with the contractor must specify that the subcontractor will receive interest on any money not paid within the seven-day statutory period. The interest rate is one percent per month unless a different rate is prescribed in the contract.<sup>18</sup> Section 11-62.11 of the Code also imposes an obligation on the contractor to include these same payment and interest provisions in its subcontracts, to ensure prompt payment of sub-subcontractors providing labor or materials for the project.<sup>19</sup> An exception to the seven-day payment requirement is permitted where the contractor notifies the public body and the subcontractor of its intent to withhold payment and sets out the reason for this action.<sup>20</sup> Finally, section 11-62.11 bars the contractor from recouping from the public body any interest paid to the subcontractor as a result of the contractor's failure to make payment within the statutory seven-day period.<sup>21</sup>

In 1991 the General Assembly added a new section at 11-56.2 of the Virginia Public Procurement Act which protects the contractor's right to recover damages for delay caused by a public body.<sup>22</sup> The section nullifies any provision in a public construction contract that purports to waive or extinguish the contractor's right to recover damages for unreasonable delay caused by acts or omissions of the public body, its agents or employees. Section 11-56.2 of the Code further includes a provision which discourages contractors from filing meritless or questionable delay claims. Under the section, a contractor prosecuting a delay claim must pay a percentage of the costs incurred by the public body in investigating and defending against the claim; the percentage being equal to that portion of the contractor's original claim not proven at trial.<sup>23</sup>

Finally, the General Assembly amended section 11-4.1 of the

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16. VA. CODE ANN. § 11-62.11 (Cum. Supp. 1991).

17. *Id.* § 11-62.11(1).

18. *Id.* § 11-62.11(2), (3).

19. *Id.* § 11-62.11(3).

20. *Id.* § 11-62.11(1)(b).

21. *Id.* § 11-62.11(3).

22. *Id.* § 11-56.2 (Cum. Supp. 1991).

23. *Id.*

Code to bring public bodies within the section's scope.<sup>24</sup> The amendment renders unenforceable any construction contract provision that requires a contractor to indemnify and hold a public body harmless for its negligence or that of its agents or employees.<sup>25</sup>

### C. *Venue for Construction Contract Disputes*

In 1991, the General Assembly amended section 8.01-581.015 of the Code and added section 8.01-262.1.<sup>26</sup> Pursuant to these amendments, parties to a construction contract, without a mandatory arbitration provision, may bring suit in the jurisdiction where the work was to be performed, even if the contract contains a provision establishing an exclusive forum elsewhere.<sup>27</sup> These amendments, in effect, nullify the forum selection clauses which some contractors include in their contracts to neutralize the owner's perceived "home court" advantage if litigation ensues. These amendments also nullify any contract provision that fixes the location for mandatory arbitration outside of the Commonwealth. Henceforth, arbitration proceedings must likewise occur where the work was to be performed, unless the parties agree to an alternative location in Virginia.<sup>28</sup>

Finally, the venue amendments promulgated in 1991 apply only to construction contracts entered into on or after July 1, 1991, and only in the situation where the contractor or subcontractor involved has its principal place of business in Virginia.<sup>29</sup>

### D. *Civil Actions Against the Virginia Department of Transportation*

In 1991, the General Assembly amended sections 33.1-192.1, 33.1-386, and 33.1-387 of the Code.<sup>30</sup> These amendments permit a contractor to bring a claim on behalf of its subcontractors and materialmen against the Virginia Department of Transportation ("VDOT") for costs and expenses incurred as a result of VDOT's

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24. Compare *id.* § 11-4.1 (Repl. Vol. 1989) with *id.* § 11-4.1 (Cum. Supp. 1991).

25. *Id.* § 11-4.1 (Cum. Supp. 1991).

26. *Id.* §§ 8.01-581.015, -262.1 (Cum. Supp. 1991).

27. *Id.* § 8.01-262.1 (Cum. Supp. 1991).

28. *Id.*

29. *Id.*

30. *Id.* §§ 33.1-192.1, -386, -387 (Repl. Vol. 1990 & Cum. Supp. 1991).

errors and omissions. The absence of privity of contract between the affected subcontractors or materialmen and VDOT will no longer bar these types of claims.<sup>31</sup> These amendments will reverse a recent Virginia Court of Appeals case holding to the contrary.<sup>32</sup>

### III. JUDICIAL DECISIONS

#### A. *Mechanic's Liens*

The Supreme Court of Virginia decided four cases in the last two years dealing with the validity and enforceability of mechanic's liens — those creatures of statute that the courts in Virginia strictly construe, often to the advantage of the landowner and the neglect of the lien claimant.<sup>33</sup> In *Woodington Electric, Inc. v. Lincoln Savings & Loan Association*,<sup>34</sup> and *Addington-Beaman Lumber Co. v. Lincoln Savings and Loan Association*,<sup>35</sup> the court declared invalid what it found to be impermissible "blanket" mechanic's liens. In *Mendenhall v. Cooper*,<sup>36</sup> the court struck down a mechanic's lien because the claimant failed to add a "necessary party." Finally, in *McCoy v. Chrysler Condo Developers Ltd. Partnership*,<sup>37</sup> the supreme court upheld a mechanic's lien against an attack that it was untimely filed as a result of the landowner's bankruptcy. These cases reveal important lessons to attorneys practicing in the construction law area.

*Woodington Electric* actually involved three separate mechanic's lien suits. Common to all three suits was the fact that the claimant had filed its lien against both the property it had improved and other property unaffected by its work.<sup>38</sup> These cases presented the Supreme Court of Virginia with its first opportunity to consider whether a trial court had the power to excise from the lien that property which should not have been included, while permitting the claimant to proceed against the property correctly encum-

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31. VA. CODE ANN. §§ 33.1-192.1, -386, -387 (Repl. Vol. 1990 & Cum. Supp. 1991).

32. See APAC-Virginia, Inc. v. Virginia Dep't of Highways & Transp., 9 Va. App. 450, 388 S.E.2d 841 (1990) (discussed *infra* notes 152-53 and accompanying text).

33. See *Rosser v. Cole*, 237 Va. 572, 576, 379 S.E.2d 323, 325 (1989) (citing *Clement v. Adams Bros.-Payne Co.*, 113 Va. 547, 552, 75 S.E. 294, 296 (1912)) (where there is a question of the existence and perfection of a mechanic's lien, the statutes involved are to be strictly construed).

34. 238 Va. 623, 385 S.E.2d 872 (1989).

35. 241 Va. 436, 403 S.E.2d 688 (1991).

36. 239 Va. 71, 387 S.E.2d 468 (1990).

37. 239 Va. 321, 389 S.E.2d 905 (1990).

38. *Woodington Electric*, 238 Va. at 626-28, 385 S.E.2d at 873-74.

bered.<sup>39</sup> The court held that the trial court had no such power. The supreme court observed that it is the duty of the claimant to properly place the lien only upon the property benefitted by the claimant's work and no more. If the claimant files an "over-inclusive" lien, the entire lien will be unenforceable.<sup>40</sup>

In the *Addington-Beaman* case the supreme court applied the "blanket lien" concept to a situation where a material supplier filed liens on multiple townhouse units contained within two buildings under construction.<sup>41</sup> The claimant had supplied its materials on an open account, but had not attempted to apportion its claim among the separate townhouse units. On appeal the claimant unsuccessfully asserted that, where materials are supplied on an open account for an entire subdivision, the claimant need not allocate its lien by separate lot or unit.<sup>42</sup> The supreme court acknowledged that a blanket lien is permissible where there is a single contract to perform work on an entire project and there is no allocation of the price among individual units.<sup>43</sup> In this case, however, the court found that the claimant had supplied materials which added value to each of the individual townhouse units, as opposed to the whole project. These values were determinable from work orders, invoices, and delivery documents.<sup>44</sup> The court held that under these circumstances apportionment of the lien should have occurred. Thus, the claimant's lien was unenforceable.<sup>45</sup>

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39. *Id.* at 629, 385 S.E.2d at 875.

40. *Id.* at 633-34, 385 S.E.2d at 877-78. The *Woodington Electric* court relied upon, but went beyond, two of its prior decisions invalidating "blanket liens". See *Rosser v. Cole*, 237 Va. 572, 379 S.E.2d 323 (1989); *United Masonry, Inc. v. Jefferson Mews, Inc.*, 218 Va. 360, 237 S.E.2d 171 (1977). Additionally, the court rejected the claimant's argument that § 43-15 of the Code permitted the trial court to disregard the over-inclusive scope of the lien. *Woodington Electric*, 238 Va. at 638, 385 S.E.2d at 877. This section states that errors in property description will not invalidate a mechanic's lien. VA. CODE ANN. § 43-15 (Repl. Vol. 1990). The court ruled that an over-inclusive description is not an erroneous description under that section. 238 Va. at 633, 385 S.E.2d at 877.

41. *Addington-Beaman*, 241 Va. at 437-38, 403 S.E.2d at 688-89.

42. *Id.* at 439, 403 S.E.2d at 689.

43. *Id.* at 440, 403 S.E.2d at 690 (citing *Sergeant v. Denby*, 87 Va. 206, 12 S.E. 402 (1890)); *In re Thomas A. Cary, Inc.*, 412 F. Supp. 667 (E.D. Va. 1976), *aff'd per curiam*, 562 F.2d 48 (4th Cir. 1977).

44. *Addington-Beaman*, 241 Va. at 440, 403 S.E.2d at 690.

45. *Id.* Two Virginia circuit court cases were published after *Woodington Electric* and before *Addington-Beaman* which applied a rationale similar to these cases to dismiss mechanic's lien suits involving liens which were over-inclusive in scope. See *Potomac Sav. Bank v. Virginia Clay Prods., Inc.*, 19 Va. Cir. 109 (County of Fairfax Cir. Ct. 1990); *Winder Plumbing, Heating & Air Conditioning, Inc. v. Kanawha Trace Dev. Partners*, 19 Va. Cir. 333 (City of Richmond Cir. Ct. 1990).



The central issue in *Mendenhall* was whether a lien claimant could amend its bill of complaint to add additional parties and raise new claims not included in the original, after the statutory six-month period had run.<sup>46</sup> The claimant originally filed a mechanic's lien against the condominium owner and the two owners of the individual units that had been sold just prior to the recording of the mechanic's lien memorandum. The claimant then filed a bill of complaint against only the developer. After the developer went into bankruptcy, the claimant sought to amend the bill of complaint to add the individual owners previously mentioned, as well as the original lender and the lender's trustee.<sup>47</sup>

In *Mendenhall*, the supreme court first observed that a trial court has no jurisdiction to proceed with a suit unless all "necessary parties" have been added prior to the running of any applicable statute of limitations.<sup>48</sup> The supreme court then concluded that the original lender, its trustee, and the two condominium unit owners were, in fact, "necessary parties" to the mechanic's lien suit, because the suit's outcome could adversely affect their property interests.<sup>49</sup> Relying on prior case law, the *Mendenhall* court observed that the six-month statute of limitations for filing a suit to enforce a mechanic's lien, as set out in section 43-17 of the Code, continues to run on any new claim not brought in the original pleading.<sup>50</sup> Given that the lien claimant had not sued all "necessary parties" within the required statutory period, the supreme court held that the trial court had no jurisdiction to proceed to enforce the mechanic's lien. Consequently, the suit, as to all parties, should have been dismissed.<sup>51</sup>

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46. *Mendenhall*, 239 Va. at 72-73, 387 S.E.2d at 469-70. For the six-month statutory period for filing the bill of complaint, see VA. CODE ANN. § 43-17 (Repl. Vol. 1990).

47. *Mendenhall*, 239 Va. at 73-74, 387 S.E.2d at 469-70.

48. *Id.* at 74-75, 387 S.E.2d at 470 (citations omitted).

49. *Id.*

50. *Id.* at 75, 387 S.E.2d at 471 (citing *Neff v. Garrard*, 216 Va. 496, 498, 219 S.E.2d 878, 879-90 (1975), and *Commonwealth Mechanical Contractors, Inc. v. Standard Fed. Sav & Loan*, 222 Va. 330, 331, 281 S.E.2d 811, 811 (1981)). Additional claims in the mechanic's lien context do not relate back to the original filing for purposes of satisfying the six-month limitation period in § 43-17 of the Code.

51. 239 Va. at 74-75, 387 S.E.2d at 471. In the wake of the *Mendenhall* decision, the circuit courts in Virginia have dismissed a number of mechanic's lien suits upon a finding that the claimant had not included a "necessary party" in either the memorandum of mechanic's lien or the bill to enforce the lien. *See, e.g., Bush Constr. Co. v. Patel*, 21 Va. Cir. 353 (City of Richmond Cir. Ct. 1990) (dismissal where claimant did not add trustee and beneficiary on deed of trust recorded after the filing of memorandum of mechanic's lien but before the filing of bill of complaint); *Harris v. CMANE Beaumeade, Ltd.*, 20 Va. Cir. 376

The final case dealing with mechanics liens, decided by the supreme court in the last two years, is *McCoy*.<sup>52</sup> This case addressed the impact of the automatic stay under federal bankruptcy law on the state law requirement that a lien claimant file its bill to enforce a mechanic's lien within six months after the filing of the memorandum. In *McCoy*, an owner filed a Chapter 11 bankruptcy petition after a plumbing contractor had filed a memorandum of mechanic's lien against the owner's property.<sup>53</sup> Under the Bankruptcy Code, the petition automatically stayed the claimant's right to file its bill to enforce the mechanic's lien.<sup>54</sup> The claimant filed a motion in the bankruptcy court seeking relief from the stay. In response, the bankruptcy court "modified" the stay to permit the claimant to file a bill of complaint in state court.<sup>55</sup>

The claimant, then filed its bill of complaint in the appropriate state court, over six months after the filing of the memorandum of mechanic's lien, and some thirty-three days after the bankruptcy court's order modifying the automatic stay.<sup>56</sup> The defendants named in the bill filed motions to dismiss on the ground that the suit was not brought within six months of the filing of the memorandum, pursuant to section 43-17 of the Code, as extended by section 108(c) of the Bankruptcy Code. Section 108(c) extends any unexpired limitations period for 30 days after the bankruptcy

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(County of Loudoun Cir. Ct. 1990) (dismissal where subcontractor did not add owner and general contractor to enforcement suit even though the lien was bonded off before the filing of suit); *Imprecon Structures, Inc. v. BK Gen. Contractors, Inc.*, 20 Va. Cir. 240 (County of Fairfax Cir. Ct. 1990) (dismissal where claimant in bill to enforce lien made mistake in identifying owner; however, the dismissal was not required for failure to add the surety on the bond filed to release the mechanic's lien, where the bond was filed after the suit was brought); *James River Bldg. Supply Co. v. Residential Innovation, Inc.*, 20 Va. Cir. 156 (County of Chesterfield Cir. Ct. 1990) (dismissal where claimant did not add parties that acquired property after filing of memorandum of mechanic's lien but before filing of bill to enforce); *Winder Plumbing, Heating & Air Conditioning, Inc. v. Kanawha Trace Dev. Partners*, 19 Va. Cir. 333 (City of Richmond Cir. Ct. 1990) (dismissal where claimant failed to name all owners of all lots affected by lien); *Potomac Sav. Bank v. Virginia Clay Prod., Inc.*, 19 Va. Cir. 109 (County of Fairfax Cir. Ct. 1990) (dismissal where claimant failed to name all owners of all lots affected by lien). *Hunt v. Eastbridge Elec., Inc.*, 20 Va. Cir. 43 (County of Loudoun Cir. Ct. 1989) (dismissal where claimant did not add owner to enforcement suit even though the lien was bonded off after the filing of suit).

52. 239 Va. 321, 389 S.E.2d 905 (1990).

53. *Id.* at 323, 389 S.E.2d at 906.

54. 11 U.S.C. § 362(a)(1)(1988). Section 362(a)(1) bars the commencement of any action against the debtor after a bankruptcy petition is filed. *Id.*

55. *McCoy*, 239 Va. at 323, 389 S.E.2d at 906. The bankruptcy court in *McCoy* also directed that the claimant not serve the bill of complaint nor take any action on the pleading without the prior approval of the bankruptcy court. *Id.*

56. *Id.*

court has given notice of the "termination or expiration" of the automatic stay.<sup>57</sup> The trial court granted the defendants' motion to dismiss.<sup>58</sup>

On appeal, the supreme court reversed the trial court, holding that the bill to enforce the mechanic's lien was timely filed. The supreme court distinguished between "termination or expiration", as used in section 108(c) of the Bankruptcy Code, and "modification" of a stay order, which was what the bankruptcy court had done in response to the claimant's motion.<sup>59</sup>

### B. *Statutes of Repose and Limitations Applicable to Construction Disputes*

Over the last two years the Supreme Court of Virginia and the Court of Appeals for the Fourth Circuit have decided several important cases involving the application and constitutionality of Virginia's statute of repose.<sup>60</sup> Section 8.01-250 of the Code essentially bars an action against design professionals and contractors if not brought within five years of the date services are last provided on a construction project.<sup>61</sup>

The first case of importance addressed whether Virginia's statute of repose applied to claims brought by the Commonwealth. In

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57. 11 U.S.C. § 108(c)(1988); VA. CODE ANN. § 43-17 (Repl. Vol. 1990).

58. *McCoy*, 239 Va. at 323, 389 S.E.2d at 907.

59. *Id.* at 324, 389 S.E.2d at 907. While not addressing precisely the same point, two Virginia circuit courts have recently decided cases similarly dealing with the timely filing of mechanic's lien suits. In *Viracon, Inc. v. Southeastern Glass & Door*, 20 Va. Cir. 374 (County of Chesterfield Cir. Ct. 1990), the court dismissed a mechanic's lien suit where the claimant filed its bill of complaint within the requisite six-month period, but failed to pay the proper filing fees at that time. The claimant supplemented the filing fees after the six-month period had run upon receiving notice from the clerk's office. The court reasoned that the suit was not properly filed until accompanied by adequate filing fees. *Id.* at 375.

In *Calcourt Properties, Inc. v. Barnes Const. Co.*, 20 Va. Cir. 202 (County of Chesterfield Cir. Ct. 1990), the court considered whether a lien claimant had timely filed a memorandum of mechanic's lien within the ninety-day period set out in § 43-4 of the Code. The claimant had not filed the lien within the statutory period if the time began to run from when it last performed original work at the site. However, if the time began to run from when the claimant returned to the site to perform repair work, the claimant had filed a timely lien. The court acknowledged that the supreme court had not addressed what effect repair work has on the timing requirements of § 43-4 of the Code. Nonetheless, the court ruled in favor of the claimant based on a "general rule" recognized in other jurisdictions. Under this "general rule", repair work will toll the statutory filing period if it is done in good faith, within a reasonable time after completion of the previous work, pursuant to contract terms, and is necessary to the finished job. 20 Va. Cir. at 203.

60. VA. CODE ANN. § 8.01-250 (Repl. Vol. 1984).

61. *Id.*

*Commonwealth v. Owens-Corning Fiberglass Corp.*,<sup>62</sup> the supreme court held, over a strong dissent, that section 8.01-250 of the Code did in fact bar the Commonwealth's claims brought against suppliers of asbestos building materials.<sup>63</sup> The majority of the court distinguished between statutes of limitations, which at common law do not run against the Commonwealth,<sup>64</sup> and statutes of repose. Statutes of limitation merely impose a time limitation on a party's right to pursue the remedy associated with an accrued cause of action.<sup>65</sup> Statutes of repose, in contrast, fix a definite time in which a suit must be brought, whether a cause of action has accrued or not, after which the defendant is immune from liability for past acts.<sup>66</sup> In *Owens-Corning*, the majority, following earlier precedent,<sup>67</sup> ruled that the expiration of the time period set out in a statute of repose grants the defendant a substantive right to be free of further liability, even from claims by the Commonwealth, which is protected by the due process clause of the Constitution of Virginia.<sup>68</sup>

The *Owens-Corning* court found that application of the statute of repose did not, under the facts of the case, cut off a cause of action before "a right of action" had accrued.<sup>69</sup> Rather, it expressly reserved for another day the question of the statute's constitutionality where it had such an effect.<sup>70</sup> That day came in the next term of court in the case of *Hess v. Snyder Hunt Corp.*<sup>71</sup>

In *Hess*, the plaintiffs were injured when a balcony collapsed in an apartment complex built by the defendant contractor. The accident occurred slightly over five years after the defendant had completed all construction at the complex and a certificate of occupancy had been issued. In response to the plaintiffs' suit, the

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62. 238 Va. 595, 385 S.E.2d 865 (1989).

63. *Id.* at 602, 385 S.E.2d at 869.

64. *Taylor & als' Case*, 70 Va. (29 Gratt.) 780 (1878). The common law rule exempting the sovereign from the running of statute of limitations is currently codified at § 8.01-231 of the Code. VA. CODE ANN. § 8.01-231 (Cum. Supp. 1991).

65. *Owens-Corning*, 238 Va. at 598, 385 S.E.2d at 867.

66. *Id.* at 599, 385 S.E.2d at 867.

67. The court in *Owens-Corning* relied upon, and extended, its prior rulings in *School Bd. v. U.S. Gypsum*, 234 Va. 32, 360 S.E.2d 325 (1987), and *Roller v. Basic Constr. Co.*, 238 Va. 321, 384 S.E.2d 323 (1989). 238 Va. at 600, 385 S.E.2d at 868.

68. *Owens-Corning*, 238 Va. at 600-01, 385 S.E.2d at 868-69.

69. *Id.* at 602 n.5, 385 S.E.2d at 869 n.5.

70. *Id.*

71. 240 Va. 49, 392 S.E.2d 817 (1990).

defendant raised the statute of repose by special plea.<sup>72</sup> The plaintiffs in turn challenged the constitutionality of the statute, as it applied to their case, on the ground that the statute violated the due process<sup>73</sup> and equal protection<sup>74</sup> clauses of the federal and state constitutions.<sup>75</sup>

The supreme court in *Hess* rejected both prongs of the plaintiffs' constitutional attack on the statute of repose. The court observed that the statute passed the applicable "rational basis" test for determining whether a statute satisfies both due process and equal protection.<sup>76</sup> The court found that the legislature could legitimately enact a statute cutting off liability for design professionals and contractors, so as to preclude litigation long after "evidence has been lost, memories have faded, and witnesses have disappeared."<sup>77</sup>

The *Hess* court also rejected plaintiffs' argument that the statute of repose violated due process in their case because its five-year limitation had run before their causes of action had accrued. The court found that only vested rights may not be disturbed by legislative act.<sup>78</sup> Since the plaintiffs' causes of action had not accrued before the statute of repose had run, they had no vested rights worthy of due process protection.<sup>79</sup>

The final supreme court decision dealing with the statute of repose considered the applicability of the "equipment or machinery"

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72. *Hess*, 240 Va. at 51, 392 S.E.2d at 819.

73. U.S. CONST. amend. XIV, § 1; VA. CONST. art. I, § 11.

74. U.S. CONST. amend. XIV, § 1. The plaintiffs also claimed an equal protection right under Virginia's constitution, but the supreme court disregarded that claim on the ground that there is no expressed equal protection right in that document. 240 Va. at 55 n.4, 392 S.E.2d at 821 n.4.

75. *Hess*, 240 Va. at 54, 392 S.E.2d at 820-21.

76. *Id.* at 53, 392 S.E.2d at 821. The *Hess* court determined at the outset of its analysis that no fundamental right or suspect classification was involved so as to trigger a "strict scrutiny" constitutional test. *Id.* Instead, the court noted that the appropriate test of constitutionality for both due process and equal protection in this case was whether the legislature has a "rational basis" for the statute. *Id.* at 53-55, 392 S.E.2d at 820-21.

77. *Id.* at 53, 392 S.E.2d at 820 (quoting *Rosenberg v. Town of N. Bergen*, 61 N.J. 190, 201, 293 A.2d 662, 667-68 (1972)).

78. *Id.* at 54, 392 S.E.2d at 821 (citing VA. CODE ANN. § 1-16 (Repl. Vol. 1979); *City of Norfolk v. Kohler*, 234 Va. 341, 345, 362 S.E.2d 894, 896 (1987); *Shiflet v. Eller*, 228 Va. 115, 120, 319 S.E.2d 750, 753 (1984)).

79. *Id.* at 54, 392 S.E.2d at 820-21. The *Hess* court distinguished the numerous cases from other jurisdictions offered by plaintiffs in support of their constitutional argument. The court found that these cases occurred in jurisdictions which, unlike Virginia, have constitutional provisions guaranteeing the right to court access. *Id.*

exception to the statute.<sup>80</sup> In *Eagles Court Condominium Unit Owners Association v. Heatilator, Inc.*,<sup>81</sup> a condominium owners' association brought suit against the manufacturer, supplier, and installer of a steel fireplace system which was incorporated into each of the condominium units during construction. Some nine years after construction was complete the system failed, causing fire damage to a number of the units. Thereafter, the plaintiffs filed suit and all three defendants raised the statute of repose as a defense by special plea.<sup>82</sup>

The supreme court partially affirmed and reversed the trial court's decision in *Eagles Court*. It affirmed the ruling that the statute clearly barred the association's claim against the installer of the fireplace system.<sup>83</sup> The court, however, reversed the lower court's ruling dismissing the claims against the manufacturer and supplier. In ruling against the manufacturer and supplier, the lower court had relied upon the general statute of limitations in former section 8.24 of the Code,<sup>84</sup> and the case law interpreting it, to hold that the statute of limitations applicable to the manufacturer and supplier ran five years after the installations were completed.<sup>85</sup>

Contrary to the trial court, the supreme court held that the specific language in the second sentence of the statute of repose superseded the general language in, and judicial interpretation of, for-

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80. The equipment/machinery exception is found in the second paragraph of § 8.01-250 of the Code, which states, in pertinent part, that the statute does not apply "[t]o the manufacturer or supplier of any equipment or machinery or other articles installed in a structure upon real property. . . ; rather each such action shall be brought within the time next after such injury occurs as provided in §§ 8.01-243 and 8.01-246." VA. CODE ANN. § 8.01-250 (Repl. Vol. 1984).

81. 239 Va. 325, 389 S.E.2d 304 (1990).

82. *Id.* at 327, 389 S.E.2d at 305.

83. *Id.* at 329, 389 S.E.2d at 306. The supreme court in *Eagles Court* further held that the trial court correctly dismissed the allegations of negligent design of the fireplace system. The first sentence of the statute of repose, the court noted, expressly confers the statute's protection on those involved in design or construction of improvements to real property. *Id.*

84. VA. CODE ANN. § 8-24 (Repl. Vol. 1957) (repealed 1977). Former § 8-24 of the Code stated, in pertinent part, that "[e]very personal action, for which no limitation is otherwise prescribed, shall be brought within five years after the right to bring the same shall have accrued . . ." *Id.*

85. *Eagles Court*, 239 Va. at 329-30, 389 S.E.2d at 306-07. The trial court in *Eagles Court* had concluded that the association's cause of action accrued under § 8-24 of the Code upon the completion of installation, based on its reading of *Virginia Military Inst. v. King*, 217 Va. 751, 232 S.E.2d 895 (1977), and *Housing Auth. v. Laburnum Corp.*, 195 Va. 827, 80 S.E.2d 574 (1954). 239 Va. at 329, 389 S.E.2d at 306.

mer section 8.24 of the Code.<sup>86</sup> The governing language in section 8.01-250 mandates that an action against a manufacturer and supplier be brought within the applicable limitations periods for personal injury and property damage claims *after* the injury occurs.<sup>87</sup> Thus, the supreme court reasoned that if the fireplace system was "machinery or equipment" under the exception to section 8.01-250 of the Code, the association possessed a timely claim against the manufacturer and supplier of that system.<sup>88</sup>

The supreme court then remanded the case to the trial court for a factual determination of whether the fireplace system was "machinery or equipment" or "ordinary building materials."<sup>89</sup> The court's decision to remand was based on its ruling in a prior case, where it held that suppliers of ordinary building materials are protected by the statute of repose.<sup>90</sup>

The very issue remanded in *Eagles Court* was decided by the Fourth Circuit in *City of Richmond v. Madison Management Group*.<sup>91</sup> In *Madison Management*, the City of Richmond sued numerous parties to recover damages related to the use of defective concrete pipe in construction of the city's water transmission line. Among the parties sued was the pipe's manufacturer, which the city sued both for fraud and breach of contract. In response, the manufacturer claimed that the fraud count was barred by Virginia's statute of repose because the suit was not brought within five years of completion of construction.<sup>92</sup>

The Fourth Circuit in *Madison Management* ruled against the manufacturer on the statute of repose issue. Applying the rules established in *Cape Henry Towers, Inc. v. National Gypsum Co.*,<sup>93</sup> the Fourth Circuit held that the concrete pipe was "equipment"

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86. *Eagles Court*, 239 Va. at 330, 389 S.E.2d at 306-07.

87. See *supra* note 80.

88. 239 Va. at 330, 389 S.E.2d at 306-07.

89. *Id.* at 330, 389 S.E.2d at 307.

90. See *Cape Henry Towers v. National Gypsum Co.*, 229 Va. 596, 331 S.E.2d 476 (1985).

91. 918 F.2d 438 (4th Cir. 1990).

92. *Id.* at 442-45. The Fourth Circuit in *Madison Management* does not explain why the manufacturer did not raise the statute of repose to the contract claim. Possibly that issue was not pressed because an earlier Fourth Circuit decision suggested that Virginia's statute of repose does not apply to contract claims, but rather to tort claims for injury to person or property. See *Fidelity & Deposit Co. v. Bristol Steel & Iron Works, Inc.*, 722 F.2d 1160 (4th Cir. 1983); accord *Delon Hampton & Assocs., Chartered, Environdyne Eng., Inc. v. Washington Metro. Area Transit Auth.*, No. 90-2047 (4th Cir. Aug. 6, 1991) (Lexis 1991 U.S. App. 17765).

93. 229 Va. 596, 331 S.E.2d 476 (1985).

within the exception to the statute of repose, as opposed to ordinary building products. Because the exception to the statute of repose applied, and the city had filed suit soon after injury occurred, the suit was deemed timely filed.<sup>94</sup> Among the factors that the Fourth Circuit emphasized in concluding that the concrete pipe constituted "equipment" were: (1) that the pipe was technically sophisticated and subject to quality control at the factory; (2) that the pipe carried independent manufacturer warranties that could be voided if the pipe was not installed according to the manufacturer's instructions; and (3) that the manufacturer had collaborated with the city's engineers and the contractor in the design and development of shop drawings and schedules.<sup>95</sup>

The final Virginia case applying the statute of limitations to a construction dispute is *W.E. Brown, Inc. v. Pederson Construction & Tile Co.*<sup>96</sup> In *Brown*, a Virginia circuit court considered which statute of limitations should apply to a plumbing subcontractor's claim for payment against its general contractor — the three-year statute of limitations applicable to oral contracts<sup>97</sup> or the four-year statute of limitations applicable to the sale of goods.<sup>98</sup> Finding no controlling authority by the Supreme Court of Virginia, the circuit court in *Brown* ruled that the four-year statute controlled because the value of the equipment furnished under the contract greatly exceeded the labor costs.<sup>99</sup>

### C. Surety Disputes

The general rule in Virginia regarding surety disputes has long been that compensated sureties providing bonds for construction contracts are obligated to pay upon the default of their principals, unless there has been a "material variation" in the bonded obligation.<sup>100</sup> Recently, the supreme court reaffirmed that general rule when it reversed a trial court's decision in favor of a surety. In *Board of Supervisors of Fairfax County v. Southern Cross Coal*

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94. *Madison Management*, 918 F.2d at 444-45.

95. *Id.* at 445.

96. 20 Va. Cir. 280 (City of Charlottesville Cir. Ct. 1990).

97. VA. CODE ANN. § 8.01-246 (Repl. Vol. 1984).

98. *Id.* § 8.2-725 (Added Vol. 1965).

99. *Brown*, 20 Va. Cir. at 282-83 (applying the test set out in *Coakley & Williams, Inc. v. Shatterproof Glass Corp.*, 706 F.2d 456 (4th Cir. 1983), *cert. denied*, 475 U.S. 1121 (1986)).

100. *Southwood Builders, Inc. v. Peerless Ins.*, 235 Va. 164, 168-69, 366 S.E.2d 104, 107 (1988); *C.S. Luck & Sons v. Boatwright*, 157 Va. 490, 494-95, 162 S.E. 53, 54 (1932).



*Corp.*,<sup>101</sup> the court found that the surety in question had failed to prove at trial the requisite "material variation" to vitiate the surety's obligation under the bond.<sup>102</sup>

The surety in *Southern Cross* provided a bond to a contractor who was to build subdivision roads for the county. After the contractor's default, the county hired another contractor who completed the work in a manner inconsistent with the original plans.<sup>103</sup> The surety relied upon this inconsistency as proof of a material variation sufficient to void its obligation. The supreme court, however, found that the evidence demonstrated that the county had selected the most cost-effective method of curing the contractor's default. The court observed that the burden of proof was on the surety to show material variation, and that the surety had failed to meet this burden.<sup>104</sup>

The surety in *Charles H. Tompkins Co. v. Lumbermens Mutual Casualty Co.*<sup>105</sup> was more successful in showing a material variation of the bonded obligation. In *Tompkins*, the surety provided a bid bond to a subcontractor who was subsequently awarded the subcontract and had begun performance. Over a year later, the subcontractor defaulted and the general contractor sued on the bid bond.<sup>106</sup> In ruling in favor of the surety, the trial court easily found a material variation of the bid bond obligation. The court noted that the general contractor had not required the subcontractor to procure a performance bond prior to beginning work, even though it was an express obligation of the bid bond. Thus, the court found that the general contractor's acquiescence in the subcontractor's unsecured performance was a material alteration of the surety's bid bond obligation.<sup>107</sup>

The *Tompkins* court also rejected the general contractor's argument that the surety's issuance of the bid bond obligated it to issue a performance and payment bond if the subcontractor received the subcontract. The court noted that the bid bond clearly obli-

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101. 238 Va. 91, 380 S.E.2d 636 (1989).

102. *Southern Cross*, 238 Va. at 95, 380 S.E.2d at 639.

103. *Id.* at 94-95, 380 S.E.2d at 638.

104. *Id.* at 95-96, 380 S.E.2d at 638-39. The surety in *Southern Cross* did not present any evidence of its own. Instead, the surety relied on the county's evidence and on the evidence of its defaulted principal, which was also a party to the suit. *Id.* at 94-95, 380 S.E.2d at 638-39.

105. 732 F. Supp. 1368 (E.D. Va. 1990).

106. *Id.* at 1371-72.

107. *Id.* at 1377.

gated the surety only until such time as the subcontractor entered its subcontract with the contractor and gave a performance bond.<sup>108</sup> Moreover, the court observed that the subcontractor had executed a standard indemnity agreement with the surety; which expressly stated that the surety was under no obligation to issue any bond prospectively as a result of having previously issued any bonds.<sup>109</sup>

Finally, the *Tompkins* court rejected the general contractor's argument that, based on trade custom and usage, an implied contract existed between the subcontractor and the bid bond surety, whereby the surety was obligated to issue performance and payment bonds.<sup>110</sup> The court reasoned that, under Virginia law, trade and usage evidence is only permissible to clarify a contract term, not to create a contract right — such as the one sought by the general contractor in *Tompkins*.<sup>111</sup> Furthermore, the *Tompkins* court added that public policy considerations mitigated against finding that a bid bond surety was subject to an implied contract obligation to enter into a separate performance and payment bond after the award of the contract.<sup>112</sup> The Court reasoned that the principal risk associated with the bid bond is the payment of the difference between the subcontractor's bid and the next highest bid, should there be a default. On the contrary, the risk associated with the performance and payment bond would be much higher. Thus, a surety should be able to consider such risk at the time the contract is awarded.<sup>113</sup>

The supreme court in *Board of Supervisors v. Sentry Insurance Co.*<sup>114</sup> addressed the issue of whether a performance bond contained an enforceable contractual limitations period, which could be used to bar a claim on the bond by the owner/obligee after the principal/contractor defaulted. In *Sentry*, the owner brought suit

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108. *Id.* at 1372.

109. *Id.* The *Tompkins* court cited cases from numerous jurisdictions construing similar language as found in the indemnity agreement at issue in *Tompkins*, which absolved the surety of any obligation to provide a performance bond subsequent to a bid bond. *Id.*

110. *Id.* at 1375-76.

111. *Id.* at 1375 (citing *Charles Syer & Co. v. Lester*, 116 Va. 541, 82 S.E. 122 (1914)).

112. *Id.* at 1375-76.

113. *Id.* Among the factors the *Tompkins* court listed that could affect the surety's decision to provide a performance and payment bond is the difference between the principal's bid and the next highest bid, which might suggest the principal is seriously underbidding the project or has made a serious bid miscalculation. *Id.* at 1376.

114. 239 Va. 622, 391 S.E.2d 273 (1990).

against the surety ten months after the principal's default.<sup>115</sup> As a defense, the surety relied on the language in the bond specifying that the owner may bring suit within six months after default, subject to a tolling provision, should the surety elect to perform the principal's obligations. The paragraph in question also specified that, in the event the owner brought suit, its damages would be limited to costs incurred before the latter of 18 months after suit was filed, or 24 months after default.<sup>116</sup>

The supreme court held that the bond did not contain the "clear language" necessary to establish a mandatory contractual limitations period.<sup>117</sup> The *Sentry* court contrasted language in the bond with language at issue in other cases where it had enforced clear mandatory limitation terms.<sup>118</sup> Thus, in future adherence to *Sentry*, any ambiguity as to contractually established time limits for filing suit will be interpreted as discretionary in nature.

Subsequent to *Sentry*, the supreme court again addressed the contractual limitations issue in the case of *Commercial Construction Specialties, Inc. v. ACM Construction Management Corp.*<sup>119</sup> In *ACM* a subcontractor on a public construction project brought suit on the contractor's payment bond for materials supplied on the project for which it had not been paid.<sup>120</sup> The payment bond contained a provision barring any claim brought more than ninety days after the subcontractor last performed work or provided materials.<sup>121</sup> The subcontractor did not bring suit within this ninety-day period, and the surety and the general contractor filed demurrers to the claim based on the bond's limitation period.<sup>122</sup>

The supreme court in *ACM* reversed the trial court's ruling sustaining the demurrers.<sup>123</sup> The court held that since the subcontractor

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115. *Id.* at 624, 391 S.E.2d at 274.

116. *Sentry*, 239 Va. at 625, 391 S.E.2d at 274.

117. *Id.* at 626, 391 S.E.2d at 275-76. In rejecting the surety's argument in *Sentry*, the supreme court also relied on several other paragraphs in the bond which revealed an intended flexibility of enforcement should default occur. The court found such contractual evidence of flexibility inconsistent with the surety's argument that the six-month reference to bringing suit was mandatory in nature. *Id.* at 627, 391 S.E.2d at 276.

118. *Id.* at 626, 391 S.E.2d at 275 (citing *Southwood Builders, Inc. v. Peerless Ins. Co.*, 235 Va. 164, 366 S.E.2d 104 (1988); *Board of Supervisors v. Sampson*, 235 Va. 516, 369 S.E.2d 178 (1988)).

119. 242 Va. 102, 405 S.E.2d 852 (1991).

120. *Id.* at 103-104, 405 S.E.2d at 852-53.

121. *Id.* at 104, 405 S.E.2d at 853.

122. *Id.* at 104, 405 S.E.2d at 853.

123. *Id.* at 105-106, 405 S.E.2d at 853-54.

tor was not a party to the payment bonds it was not bound by its limitations, particularly when those limitations varied from the 180-day limitation period provided by statute.<sup>124</sup> The court also rejected the defendants' contention that the subcontractor had constructive knowledge of the shorter period, and thus had consented to it, by virtue of the fact that the bond had been filed with the public owner pursuant to statute.<sup>125</sup> The supreme court reasoned that general contractors and their sureties should not be permitted to negate statutes specifically designed to protect subcontractors and materialmen who cannot file mechanic's liens against public property to protect their interests.<sup>126</sup>

The Circuit Court of the City of Richmond has also recently decided a surety case dealing with several interesting payment bond issues. *Starr Electric Co. v. Federal Insurance Co.*<sup>127</sup> concerned a building that was destroyed by fire just prior to the completion of construction. A subcontractor on the project, who had insurance covering its work, filed a claim with its insurance company. The subcontractor sought to recover the value of its work, for which it had not yet received payment from the general contractor. The insurance company paid the subcontractor and then sued the general contractor's payment and performance bond surety to collect the money owed to the subcontractor at the time of the fire.<sup>128</sup>

In response, the surety raised four defenses to the payment claim. First, the surety contended that the destruction of the building prior to completion of the work rendered the subcontractor's contract impossible to perform, excusing the general contractor from its obligation to make payment under the contract.<sup>129</sup> The circuit court rejected this argument. The court distinguished the obligation of the general contractor to provide a finished building, despite fire loss, from the subcontractor's obligation to perform work, which is excused upon destruction of the project. The court

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124. *Id.* at 106, 405 S.E.2d at 854. Section 11-60 of the Code, upon which the ACM Court relied, provides that a subcontractor who is not in privity of contract with the contractor providing a payment bond for a public project may bring an action on the bond, if the subcontractor has given notice of the claim to the contractor within 180 days after last performing services or providing materials. VA. CODE ANN. § 11-60 (Repl. Vol. 1989).

125. *ACM*, 242 Va. at 106, 405 S.E.2d at 854. Section 11-58(D) of the Code requires surety bonds on public projects to be filed with the public body which awarded the contract. VA. CODE ANN. § 11-58(D) (Repl. Vol. 1989).

126. *ACM*, 242 Va. at 106.

127. 20 Va. Cir. 405 (City of Richmond Cir. Ct. 1990).

128. *Id.* at 405-06.

129. *Id.* at 406.

concluded that Virginia law gave the subcontractor a right to receive payment for the value of the destroyed work.<sup>130</sup>

Second, the surety in *Starr* contended that a provision in the subcontract provided that the subcontractor would indemnify the general contractor against claims by third parties, barring the subrogation claim by the subcontractor's insurer.<sup>131</sup> The circuit court rejected this argument as well, finding that the insurer's claim was not a third-party claim that would trigger the indemnity right, but rather was the subcontractor's own claim for payment under the contract.<sup>132</sup> The indemnity clause, therefore, did not apply.

Third, the surety contended that the definition of "work" in the contractor's general conditions, which the subcontractor's contract incorporated by reference, precluded the subcontractor from suing for payment before the "completed construction" of the project.<sup>133</sup> The circuit court found that the definition of work was ambiguous, and thus must be resolved in favor of the subcontractor and its subrogee. Moreover, the court cited language elsewhere in the general conditions that suggested that "work" was to be interpreted as work done to a particular point in time and not to the final completion of the project.<sup>134</sup>

Finally, the surety contended that the subcontractor had waived any right to recover from the general contractor as a result of the waiver provision in the general conditions. This provision required the subcontractor to waive any claim for damages caused by fire to the extent of insurance coverage.<sup>135</sup> The court rejected this argument on the ground that the claim at issue was not for fire loss, but rather it was for payment due under the contract. To the same extent, the court rejected the surety's contention that, as co-insureds, both the contractor and subcontractor were immune from subrogation actions. The court again observed that the claim sued upon was one of payment under the contract and not for recovery

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130. *Starr*, 20 Va. Cir. at 406-07 (citing *Atlantic and Danville Ry. Co. v. Delaware Constr. Co.*, 98 Va. 503, 37 S.E. 13 (1900); *Ricks v. Sumler*, 179 Va. 571, 19 S.E.2d 889 (1942); and *Fowler v. Insurance Co. of Am.*, 155 Ga. App. 439, 270 S.E.2d 845 (1980)).

131. *Starr*, 20 Va. Cir. at 407-08.

132. *Id.* at 408.

133. *Id.* at 408. While the circuit court in *Starr* does not specify the source of the general conditions at issue, the quotations referred to by the court suggest that the general conditions were those published by the American Institute of Architects, Form A-201 (1987).

134. *Id.* at 409.

135. *Id.*

of insurance proceeds paid to a co-insured.<sup>136</sup> Having rejected all of the surety's arguments, the court ruled in favor of the subcontractor's insurer.<sup>137</sup>

#### D. *Contract Disputes Between Owners and Contractors or Contractors and Subcontractors*

The Virginia courts have recently decided a number of cases where owners, contractors, or subcontractors were at odds on issues involving the interpretation of contractual rights. In *Clevert v. Jeff W. Soden, Inc.*,<sup>138</sup> for example, the question before the court was whether defective performance under a construction contract, as opposed to nonperformance, gave rise to a contractual right to recover attorney's fees, where the contract permitted such recovery only in the event of "default."<sup>139</sup> The contractor successfully argued to the trial court that a breach of contract was not a "default" under the contract. The supreme court disagreed, however, holding that the ordinary and applicable meaning of "default" encompassed defective performance. Therefore, it ruled that attorney's fees were recoverable.<sup>140</sup>

The issue in *John Grier Construction Co. v. Jones Welding & Repair, Inc.*<sup>141</sup> was whether a subcontractor who unknowingly cashed a payment check from its contractor having the words "payment in full" on the back was barred by the doctrine of accord and satisfaction from recovering additional money claimed.<sup>142</sup> The supreme court held that, given the subcontractor's lack of knowledge as to the "payment in full" language, there had not been the necessary meeting of the minds to support an accord and satisfaction.<sup>143</sup>

The *John Grier* decision is particularly interesting because the supreme court rejected the defendant's credible argument that sec-

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136. *Id.*

137. *Starr*, 20 Va. Cir. at 410. The *Starr* court did agree with one defense asserted by the surety — that the subcontractor's subrogee had no right to sue on the performance bond. The court, however, found that the subrogee did have standing to recover on the payment bond for the full amount of its claim. *Id.*

138. 241 Va. 108, 400 S.E.2d 181 (1991).

139. *Id.* at 109, 400 S.E.2d at 182.

140. *Id.* at 110-12, 400 S.E.2d at 184.

141. 238 Va. 270, 383 S.E.2d 719 (1989).

142. *Id.* at 272, 383 S.E.2d at 720.

143. *Id.* (relying on *Virginia-Carolina Elec. Works v. Cooper*, 192 Va. 78, 81, 63 S.E.2d 717, 719 (1951)).

tion 8.1-207 of Virginia's Commercial Code<sup>144</sup> supplanted the common law doctrine of accord and satisfaction. The defendant argued that section 8.1-207 now provided the sole statutory method by which "payment in full" checks could be negotiated without forfeiting the right to sue for any deficit. Under that section, the payee may negotiate the check and still preserve its rights to sue for a deficiency, if the payee uses such words as "under protest" when endorsing the check.<sup>145</sup> The supreme court acknowledged that a minority of courts in other jurisdictions have held that passage of a section identical to section 8.1-207 of the Code reversed the common law rules on accord and satisfaction, and therefore provided the only method by which a party to a contract preserved a deficiency claim. The Court, however, elected to follow the majority rule that preserves the common law doctrine.<sup>146</sup>

The supreme court's ruling in *John Grier* left unanswered the question of whether a payee of a "full payment" check can ever endorse the check as a partial payment of the payee's claim. The common law doctrine of accord and satisfaction would suggest that if the payee knows of the "full payment" language, he negotiates the check at his own risk. Section 8.1-207, however, would have at least provided the payee a method to cash the check and sue for the deficiency. Yet, under the common law rules, the more prudent response for a payee who notices the "full payment" language may be to return the check and sue for the full amount.

Another recent case decided by the supreme court dealing with the rights of contracting parties to pursue their claims is *Piland Corp. v. League Construction Co.*<sup>147</sup> In *Piland*, a subcontractor who provided labor and materials for two separate projects brought suit against the general contractor for unpaid retainage on one of the projects. The general contractor admitted holding the retainage and further admitted that the work was satisfactory. Yet, the general contractor affirmatively claimed a right to set off certain back charges and delay claims against the subcontractor's claim. The general contractor also filed a counterclaim for faulty work done at the second project and moved for a stay pending arbitration, as called for in the contract.<sup>148</sup>

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144. VA. CODE ANN. § 8.1-207 (Added Vol. 1965).

145. *John Grier*, 238 Va. at 273, 383 S.E.2d at 721.

146. *Id.* at 273-74, 383 S.E.2d at 721-22.

147. 238 Va. 187, 380 S.E.2d 652 (1989).

148. *Id.* at 189, 380 S.E.2d at 652-53.

The trial court in *Piland* granted summary judgment to the subcontractor on its liquidated claim, denied the stay for arbitration, and denied the general contractor's right of set off of its unliquidated claim against the subcontractor's liquidated claim.<sup>149</sup> The supreme court reversed, finding that summary judgment was improper on the subcontractor's claim, given the dispute as to back charges and delay claims.<sup>150</sup> Moreover, the court found that the general contractor should be permitted to arbitrate those claims, as well as its unliquidated counterclaim for faulty workmanship on the second project, as valid set-offs against the subcontractor's liquidated claim.<sup>151</sup>

In *APAC-Virginia, Inc. v. Virginia Department of Highways & Transportation*,<sup>152</sup> the Court of Appeals of Virginia resolved the question of whether a general contractor could pursue a delay claim against a state agency on behalf of its subcontractor. The court ruled that the general contractor could not pursue the subcontractor's claim, given that the subcontractor's claim was one of economic loss and the subcontractor was not in privity with the agency.<sup>153</sup>

Two recent circuit court cases dealing with contract matters of some importance are *Davis v. Hayden*<sup>154</sup> and *Colonial Mechanical*

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149. *Piland*, 238 Va. at 189, 380 S.E.2d at 653.

150. *Id.* at 190, 380 S.E.2d at 653.

151. *Id.* at 190-91, 380 S.E.2d at 653-54. The *Piland* court relied upon Rule 3:8 of the Rules of Supreme Court of Virginia as authority that an unliquidated debt may be set off against a liquidated debt. That rule provides the basis for a defendant to file a counterclaim at law against the plaintiff "whether or not it is for liquidated damages. . . ." VA. SUP. CT. R. 3:8.

152. 9 Va. App. 450, 388 S.E.2d 841 (1990).

153. *Id.* at 452, 388 S.E.2d at 842 (relying on the economic loss ruling in *Copenhaver v. Rogers*, 238 Va. 361, 366, 384 S.E.2d 593, 595 (1989)). The *APAC* court rejected the general contractor's additional argument that § 33.1-192.1 of the Code authorized a general contractor to pursue a pass-through claim for persons "claiming under" the contractor. The court interpreted that section to be a statute of limitations requiring a contractor to pursue an administrative remedy before filing suit. Further, the court construed the phrase "claiming under" to mean successors in interest and not lower tier subcontractors. 9 Va. App. at 453, 388 S.E.2d at 843.

In contrast to the *APAC* holding, a circuit court in Virginia previously had held that a general contractor may prosecute a pass-through claim against the owner on behalf of its subcontractor. See *George Hyman Const. Co. v. McLean Hotel Assocs. Ltd. Partnership*, 21 Va. Cir. 544, 546 (County of Fairfax Cir. Ct. 1988).

In 1991, the General Assembly reversed the holding in *APAC* as to claims brought against VDOT. See *supra* notes 30-32 and accompanying text. The "economic loss" rule established in *APAC*, however, is broadly stated and will undoubtedly provide a basis for blocking "pass through" claims against owners other than VDOT in future cases.

154. 20 Va. Cir. 250 (County of Smyth Cir. Ct. 1990).



*Corp. v. Jesson & Frantz Constructors and Developers*.<sup>155</sup> In *Davis* the court ruled that a home buyer cannot recover money paid to an unlicensed contractor where there is no allegation of faulty workmanship.<sup>156</sup> In a case of first impression in Virginia, the court in *Colonial Mechanical* ruled that the typical "paid when paid" clause found in many subcontracts did not excuse the general contractor from making final payment to the subcontractor when the owner went bankrupt without first paying the general contractor.<sup>157</sup>

The *Colonial Mechanical* decision will surprise Virginia contractors who have undoubtedly read their "paid when paid" clauses literally. Contractors who wish to ensure that their payment obligation to their subcontractors is contingent on prior receipt of payment from the owner will now need to use much clearer language to avoid the precedent established by *Colonial Mechanical*.<sup>158</sup>

#### E. Recent Tort Cases Involving Contractors or Builders

In *MacCoy v. Colony House Builders*,<sup>159</sup> the Supreme Court of Virginia considered whether a home builder, who had contracted orally with an electrician to wire a residence under construction, was liable for fire damage to the residence caused by the electrician's failure to comply with the building code.<sup>160</sup> The court ruled that the home builder was not liable in tort for the negligent acts

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155. Case No. LS-2979-2 (City of Richmond Cir. Ct., Dec. 14, 1990), reprinted in 3 J. Civ. LITIGATION 66 (1991) [hereinafter Civ. LITIGATION].

156. *Davis*, 20 Va. Cir. at 253-54.

157. See Civ. LITIGATION, *supra* note 155, at 70-72. The "paid when paid" clause in *Colonial Mechanical* read as follows: "The [c]ontractor shall make final payment to the [s]ubcontractor within ten days of receipt of final payment from the owner." *Id.* at 66. The circuit court refused to read this clause literally; rather, the court interpreted the clause as merely imposing a duty on the general contractor to make payment within a "reasonable time" after the subcontractor completes the work associated with the payment. *Id.* at 67 (following *Thomas J. Dyer Co. v. Bishop Int'l Eng'g Co.*, 303 F.2d 655 (6th Cir. 1962)).

158. Attorneys representing contractors who want to ensure that payment from the owner is a condition precedent to the contractor's payment obligation to the subcontractor may want to consider the case of *Crown Plastering Corp. v. Elite Assocs. Inc.*, 560 N.Y.S.2d 694 (N.Y. App. Div. 1990). In that case the court enforced a "paid when paid" clause which read as follows "[r]eceipt of payment from the owner for the subcontractor's work is a condition precedent to payment by the contractor to the subcontractor. The [s]ubcontractor hereby acknowledges that it relies on the credit of the [o]wner, not the [c]ontractor, for payment of its work." *Id.* at 695. Such a clause makes very clear that the subcontractor has agreed that payment from the owner is a condition precedent to any payment from the contractor to the subcontractor.

159. 239 Va. 64, 387 S.E.2d 760 (1990).

160. *Id.* at 65-66, 387 S.E.2d. at 760-61.

of the electrician.<sup>161</sup>

The *MacCoy* court first found that the trial record established that the electrician was an independent contractor and not an employee of the builder, for whom the builder would have been liable on the theory of *respondeat superior*. The court noted that none of the usual indicators of an employment relationship were present — such as the existence of W-2 forms, the withholding of payroll taxes, or the payment of insurance and other benefits.<sup>162</sup> Further, the builder did not control the “methods and means” by which the electrician performed his services.<sup>163</sup>

The *MacCoy* court also rejected the plaintiffs’ argument that the builder owed the plaintiffs a non-delegable duty to ensure that its independent contractor’s work complied with the building code.<sup>164</sup> The court ruled that, while violation of the building code was negligence *per se*, the builder breached no duty to the plaintiffs in relying on its independent contractor to perform the work in a lawful manner.<sup>165</sup>

In *R.B. Hazard, Inc. v. Panco*,<sup>166</sup> the principal issue was whether a contractor, who was sued for negligence on a federal construction project, could avoid tort liability by invoking the “federal contractor” defense. That defense protects a contractor, who performs work consistent with the owner’s design, from liability for the work performed.<sup>167</sup> In *Hazard*, the contractor asserted the defense relative to its installation of a large entrance gate at a military installation in Virginia. The gate had fallen on two occasions on the same day some months after construction was completed, injuring the plaintiff on the second fall.<sup>168</sup>

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161. *Id.* at 68-70, 387 S.E.2d at 763.

162. *MacCoy*, 239 Va. at 66, 387 S.E.2d at 761-62.

163. *Id.* at 67-69, 387 S.E.2d at 761-62. The court in *MacCoy* concluded that the builder’s presence at the site, instructions to the electrician as to the location of wiring fixtures, purchase of electrical materials, and scheduling of the work did not amount to control of the means and methods of the work so as to render the electrician the builder’s employee. *Id.*

164. *Id.* at 69-70, 387 S.E.2d at 762-63.

165. *Id.* The court in *MacCoy* refused to apply the “wrongful *per se*” exception to the general rule that a party is not liable for the negligent acts of an independent contractor. According to the court, this exception only applies when the work to be performed is unlawful, and not when the work to be performed is lawful, but the manner of performance is unlawful. *Id.* at 70, 387 S.E.2d at 763 (following *Emmerson v. Fay*, 94 Va. 60, 26 S.E. 386 (1896)).

166. 240 Va. 438, 397 S.E.2d 866 (1990).

167. *Id.* at 441, 397 S.E.2d at 867-68.

168. *Id.* at 440-41, 397 S.E.2d at 867.

The jury in *Hazard* ruled against the defendant, rejecting the federal contractor's defense on the facts presented. The supreme court affirmed the jury verdict, finding that the contractor had not proven sufficient facts at trial to establish the federal contractor defense as a matter of law. The court noted that evidence was presented to show that the installation of the gate did not comply with the plans, and that the gate's failure was the result of the contractor's poor workmanship.<sup>169</sup>

The contractor in *Hazard* also challenged the jury verdict of liability on proximate cause grounds. The contractor argued that the intervening cause of the accident was the replacement of the gate in an upright position after it fell earlier in the day; this intervening event being the proximate cause of the accident.<sup>170</sup> The supreme court rejected this argument as well. It found that not only was the gate's original failure reasonably foreseeable, given the defects in construction; but also that it was reasonably foreseeable that someone would replace the gate after its initial failure, creating a situation where it would fall again. Thus, the contractor's original negligence was the proximate cause of the accident.<sup>171</sup>

In *City of Richmond v. Madison Management Group*,<sup>172</sup> a case discussed earlier in the statute of repose section of this article,<sup>173</sup> the Fourth Circuit resolved an issue of first impression under Virginia law. The issue was whether a plaintiff can recover economic loss damages in a tort action, when the tort alleged is fraud.<sup>174</sup> The city's fraud count was based on the allegation that the defendant pipe manufacturer knew, when it promised to supply pipe for the city's water line, that the pipe was defective and would fail.<sup>175</sup>

169. *Hazard*, 240 Va. at 442-43, 397 S.E.2d at 868-69.

170. *Id.* at 443-44, 397 S.E.2d at 869.

171. *Id.* at 444, 397 S.E.2d at 869.

172. 918 F.2d 438 (4th Cir. 1990).

173. See *supra* notes 91-95 and accompanying text.

174. *Madison Management*, 918 F.2d at 445-47. The Supreme Court of Virginia has defined economic loss damages as:

[D]amages for inadequate value, costs of repair and replacement of defective product, or consequent loss of profits — without any claim of personal injury or damage to other property . . . as well as the diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold.

*Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*, 236 Va. 419, 423 n.3, 374 S.E.2d 55, 57 n.3 (1988) (quoting *Moorman Mfg. Co. v. National Tank Co.*, 91 Ill. 2d 69, 82, 435 N.E.2d 443, 449 (1982)).

175. *Madison Management*, 918 F.2d at 447.

The manufacturer in *Madison Management* argued that recent case law in Virginia established that damages for economic loss are not recoverable in tort actions; such damages are only recoverable where the defendant breaches contractual duties owed to the plaintiff.<sup>176</sup> The Fourth Circuit disagreed, however, holding that economic loss damages are recoverable in a fraud action. The court reasoned that Virginia law recognizes a tort-based duty not to engage in fraud, which exists independent of contract. Breach of this independent duty provided the basis for recovery of economic losses apart from any contractual remedies that might or might not otherwise exist.<sup>177</sup>

#### F. Workers' Compensation Cases Arising Out of Construction

By its very nature, a construction project brings numerous parties together on a potentially dangerous site, including representatives of the owner and the public, as well as employees of the architect, the contractor, and numerous subcontractors and materialmen. When an injury occurs, the capacity of the injured person to sue the negligent parties at common law is governed by the Virginia Workers' Compensation Act.<sup>178</sup> This Act gives the injured employee a right to recover statutory benefits from his employer, but bars an action against the employer at common law.<sup>179</sup> Virginia courts have repeatedly been required to determine the scope of the workers' compensation bar to common law suits. The supreme court has recently decided two such cases involving architects where the scope of the Act was at issue.

In *Evans v. Hook*,<sup>180</sup> the supreme court considered whether an injured employee of a general contractor on a construction project could bring a tort action against the project's architect, a solo prac-

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176. *Id.* at 445-46 (relying upon the recent case of *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*, 236 Va. 419, 374 S.E.2d 55 (1988)). In *Sensenbrenner*, the Supreme Court of Virginia held that a home owner could not sue in negligence an architect for a defective swimming pool, where the owner was not in privity of contract with the architect. 236 Va. 419, 425, 374 S.E.2d 55, 58 (1988). The *Sensenbrenner* court ruled that economic loss damages are contractual in nature and that recovery of them should be reserved to situations where privity of contract exists between the parties. *Id.*; see also *Rotonda Condominium Owners Assoc. v. Rotonda Assocs.*, 238 Va. 85, 90, 380 S.E.2d 876, 879 (1989)("[E]conomic losses are not recoverable in tort; they are purely the result of disappointed economic expectations. The law of contracts provides the sole redress for such claims.").

177. *Madison Management*, 918 F.2d at 446-47.

178. VA. CODE ANN. §§ 65.1-1 to -163 (Repl. Vol. 1987 & Cum. Supp. 1991).

179. *Id.* § 65.1-40 (Repl. Vol. 1987).

180. 239 Va. 127, 387 S.E.2d 777 (1990).

itioner without any employees, working for the project's developer.<sup>181</sup> The supreme court held that the employee was barred by the Virginia Workers' Compensation Act from maintaining his suit against the architect.<sup>182</sup>

The court observed that section 65.1-29 of the Code and related provisions of the Act had been previously interpreted to confer the status of "statutory employer" on independent contractors who were performing work that was part of the trade, business or occupation of the project's owner.<sup>183</sup> In *Evans* the court concluded that the developer's trade, business or occupation was the construction of the project, and the various independent contractors and their employees were fellow statutory employers and employees.<sup>184</sup> As such, the architect was not a "stranger to the employment" which would permit the injured party to file a common law suit.<sup>185</sup>

In the next term, the supreme court again addressed under a different set of facts the question whether a project architect was immune from suit because of the Workers' Compensation Act. This time, however, the court reached a different conclusion. In *Nichols v. VVKR, Inc.*,<sup>186</sup> the supreme court ruled that the architect did not enjoy immunity from a common law suit for negligence.<sup>187</sup>

As in *Evans*, the injured party in *Nichols* worked for the general contractor, and both the general contractor and the architect worked for the project's owner. The owner in *Nichols*, however, was a "public service company," the Greater Roanoke Transit Company ("GRTC").<sup>188</sup> GRTC had been organized for the purpose

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181. *Evans*, 239 Va. at 128-29, 387 S.E.2d at 777-78.

182. *Id.* at 133, 387 S.E.2d at 780.

183. *Id.* at 129-30, 387 S.E.2d at 778 (citing *Cinnamon v. IBM Corp.*, 238 Va. 471, 384 S.E.2d 618 (1989); and *Smith v. Horn*, 232 Va. 302, 351 S.E.2d 14 (1986)).

184. *Id.* at 130-32, 387 S.E.2d at 778-80.

185. *Id.* at 131-33, 387 S.E.2d at 779-80. The *Evans* court rejected the plaintiff's argument that the architect could not be a statutory employer under the Act because he was a solo practitioner without employees of his own. The court cited prior authority which held that the absence of employees did not bar an independent contractor from being a statutory employer under the Act. *Id.* at 132, 387 S.E.2d at 779 (citing *Lucas v. Biller*, 204 Va. 309, 130 S.E.2d 582 (1963)). Moreover, the court observed that the architect also could qualify as a fellow "statutory employee," given that both he and the injured employee were, for the project in question, under the common canopy of the owner's trade, business or occupation. *Id.* at 131, 387 S.E.2d at 779 (citing *Smith v. Horn*, 232 Va. 302, 307, 351 S.E.2d 14, 17 (1986)).

186. 241 Va. 516, 403 S.E.2d 698 (1991).

187. *Id.* at 523, 403 S.E.2d at 702.

188. *Id.* at 522, 403 S.E.2d at 701-02.

of providing mass transit services, with facility construction being merely an incidental activity.<sup>189</sup>

The architect in *Nichols* advanced two arguments in support of its immunity claim. Both arguments were designed to take advantage of supreme court precedent which held that the trade, business or occupation of a governmental entity or public utility includes construction.<sup>190</sup> First, the architect emphasized that the construction in question had been undertaken as a joint venture by GRTC and the City of Roanoke.<sup>191</sup> The supreme court, however, emphasized that the city participated only in the financing of the project and that all contracts relative to the construction referred to GRTC as owner. Thus, the supreme court concluded that the owner, for purposes of resolving the workers' compensation issue, was GRTC.<sup>192</sup>

Second, the architect argued that, as a "public service company," GRTC should enjoy the same status governmental entities or public utilities enjoy under Virginia's Workers' Compensation Act.<sup>193</sup> The *Nichols* court rejected this argument as well. The court noted that, unlike the situation with governmental entities and public utilities, a public service company can voluntarily define the scope of its business in its charter and bylaws.<sup>194</sup> In that regard a public service company is like any other private business; and, therefore, the same rules governing workers' compensation immunity should apply.<sup>195</sup>

In *McBride v. Metric Constructors*,<sup>196</sup> the issue was whether, under recent amendments to the Longshoremen's and Harbor Workers' Compensation Act ("the federal act"), an injured employee, compensated by his employer under the federal act, could sue a party in negligence who was immune from suit under Virginia's Workers' Compensation Act ("the state act").<sup>197</sup> The plaintiff was an employee loaned to a subcontractor who was painting a tunnel owned by Newport News Shipbuilding & Drydock Co. ("the owner"). After receiving compensation under the federal act from

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189. *Nichols*, 241 Va. at 522-23, 403 S.E.2d at 701-02.

190. See *Henderson v. Central Telephone Co.*, 233 Va. 377, 355 S.E.2d 596 (1987).

191. *Nichols*, 241 Va. at 519-20, 403 S.E.2d at 700-01.

192. *Id.* at 520, 403 S.E.2d at 701.

193. *Id.* at 521, 403 S.E.2d at 701.

194. *Id.*

195. *Id.*

196. 239 Va. 138, 387 S.E.2d 780 (1990).

197. *Id.* at 139, 387 S.E.2d at 781.

his employer, the injured employee sued the owner and the general contractor in negligence. Both defendants asserted immunity under the state act as a defense.<sup>198</sup>

All parties conceded in the trial court that if the state act controlled, the immunity sections of that act<sup>199</sup> barred the plaintiff's state law negligence claim.<sup>200</sup> The plaintiff advanced two arguments supporting his position that the state act was not controlling. First, plaintiff argued that he had made no claim for compensation under the state act.<sup>201</sup> The supreme court rejected this argument. It noted that state tort law governs negligence actions that arise out of accidents falling within the concurrent jurisdiction of the federal and state acts.<sup>202</sup> Under Virginia tort law, the plaintiff was bound by the provisions of the state act whether he filed a claim under that act or not.<sup>203</sup>

Second, the plaintiff in *McBride* argued that recent amendments to the federal act created a federal cause of action that nullified state law immunity.<sup>204</sup> The court rejected this argument as well, noting that Congress enacted the amendments in reaction to a United States Supreme Court case.<sup>205</sup> The *McBride* court further observed that the purpose of Congress' amendments was to narrow the judicial construction of "employer" under the federal act, not to extend exclusive admiralty jurisdiction over state tort law.<sup>206</sup>

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198. *McBride*, 239 Va. at 139, 387 S.E.2d at 781.

199. VA. CODE ANN. §§ 65.1-29, -31, -40 (Repl. Vol. 1987).

200. *McBride*, 239 Va. at 140, 387 S.E.2d at 781.

201. *Id.*

202. *Id.* at 140-41, 387 S.E.2d at 781 (citing *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 211-12 (1971)).

203. *Id.* at 141, 389 S.E.2d at 781-82. The *McBride* court referred to § 65.1-23 of the Code as establishing the tort principle that the plaintiff was governed by the state act even though he had not sought compensation under it. *Id.*

204. *Id.* at 141, 387 S.E.2d at 782. The relevant amendments to the federal act are at 33 U.S.C. § 904(a)(1982), amended by 33 U.S.C. § 904(a) (Supp. V. 1988); and 33 U.S.C. § 905(a)(1982), amended by 33 U.S.C. § 905(a) (Supp. V. 1988). The purpose of these amendments, as the *McBride* court observed, was to clarify that a general contractor, who provides compensation coverage to its subcontractor's employees, will acquire the immunity from suit, as conferred by the federal act, only if the subcontractor has defaulted on its primary obligation to obtain such coverage. *McBride*, 239 Va. at 141-43, 387 S.E.2d at 782-83.

205. *McBride*, 239 Va. at 141, 387 S.E.2d at 782-83. The United States Supreme Court case that resulted in the amendment of the federal act was *Washington Metro. Transit Auth. v. Johnson*, 467 U.S. 925 (1984). In *Johnson*, the court had construed the federal act to confer "employer" immunity on a general contractor, relative to the injuries of a subcontractor's employee, without considering whether the subcontractor had defaulted on its obligation to acquire compensation coverage under the federal act. *Id.* at 936.

206. *McBride*, 239 Va. at 143, 387 S.E.2d at 783.

Thus, the amendments did not affect the bar to suit conferred by the state act on the owner and general contractor in *McBride*.

A final case pertaining to workers' compensation coverage in the construction context is *Spruill v. C.W. Wright Construction Co.*<sup>207</sup> In *Spruill*, the court of appeals considered whether an employee's alleged "willful misconduct" barred the employee from recovering workers' compensation benefits.<sup>208</sup> The claimant had been employed as a lineman and was installing an electrical grounding wire when he was severely burned. The employer had a safety rule that no employee was to work on an "energized line" without safety gloves. The claimant was not wearing safety gloves at the time of his accident.<sup>209</sup> The claimant, however, presented evidence to suggest that, at most, he had negligently concluded that the line in question was de-energized.<sup>210</sup> The court of appeals found that this evidence rebutted any finding of willful misconduct on the part of the employee. Therefore, the employee's workers' compensation claim was not barred.<sup>211</sup>

#### IV. CONCLUSION

While in the past two years the General Assembly has not made widespread statutory changes bearing on construction law matters, in a number of cases the judiciary has dramatically changed the rules governing this area of the law. The Virginia courts have decided important cases involving the enforcement of mechanic's liens; the applicability of Virginia's statute of repose; the obligations of performance, payment and bid bond sureties; the meaning and enforcement of various contract terms and principles; the exposure of contractors to tort claims of various kinds; and the applicability of workers' compensation laws to injuries occurring on the construction site. This article should provide the attorney who

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207. 8 Va. App. 330, 381 S.E.2d 359 (1989).

208. *Id.* at 331, 381 S.E.2d at 359. The "willful conduct" exception bars an employee's recovery on a workers' compensation claim if the evidence shows that the employee's injury arose out of a purposeful decision to ignore the employer's safety rules. *Id.* at 333-34, 381 S.E.2d at 360-61. See *Mills v. Virginia Elec. & Power Co.*, 197 Va. 547, 552, 90 S.E.2d 124, 127 (1955); *Riverside & Dan River Cotton Mills, Inc. v. Thaxton*, 161 Va. 863, 871, 172 S.E. 261, 264 (1934).

209. *Spruill*, 8 Va. App. at 332, 381 S.E.2d at 359-60.

210. *Id.* at 333, 381 S.E.2d at 360-61.

211. *Id.* at 334, 381 S.E.2d at 361.



deals with construction law matters a useable survey of the varied and important changes effectuated by the Virginia legislature and courts over the past two years.