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Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 4986

In the Supreme Court of Appeals of Virginia at Richmond

THRAVES LOCKETT ANDERSON

v.

THORINGTON CONSTRUCTION COMPANY, INCORPORATED

FROM THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND

RULE 5:12—BRIEFS.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 4986

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 29th day of January, 1959.

THRAVES LOCKETT ANDERSON, Plaintiff in Error,

against

THORINGTON CONSTRUCTION COMPANY, INCORPORATED, Defendant in Error.

From the Law and Equity Court of the City of Richmond

Upon the petition of Thraves Lockett Anderson a writ of error is awarded him to a judgment rendered by the Law and Equity Court of the City of Richmond on the 16th day of July, 1958, in a certain motion for judgment then therein depending wherein the said petitioner was plaintiff and Thorington Construction Company, Incorporated, was defendant; upon the petitioner, or some one for him, entering into bond with sufficient security before the clerk of the said Law and Equity Court in the penalty of three hundred dollars, with condition as the law directs.

RECORD

* * * * *

Filed in the Clerk's Office the 7 day of Aug., 1957.

Teste:

LUTHER LIBBY, JR., Clerk
IRA M. BARR, D. C.

MOTION FOR JUDGMENT.

Plaintiff moves the Court for judgment against the defendant for the sum of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00) upon the grounds hereinafter stated:

1. The defendant at the time the plaintiff was injured, as hereinafter set forth, was engaged in construction work under a certain contract with the Richmond-Petersburg Turnpike Authority at a point in the City of Richmond, Virginia, near the intersection of the Boulevard with Kelly Road, where the Virginia Barbecue was formerly located;

2. The plaintiff was a project inspector for Parsons, Brinckerhoff, Hall & MacDonald, Consulting Engineers for the Turnpike Authority;

3. On the 12th day of March, 1957, about 9:30 A. M. of that day, the defendant while pursuing its construction work, was engaged in driving piles, with a pile driver rig, at the location aforesaid, and the plaintiff was present, standing or walking a reasonable distance from the operation, in the performance of his duty for his employers, Parsons, Brinckerhoff, Hall & MacDonald, making a record of the number of blows required to drive each individual pile;

4. The said defendant then and there so carelessly, and negligently, maintained and operated said pile driv-
page 2 } ing machinery that a three pound brass hook broke loose therefrom and was hurled through the air with great force and struck the plaintiff on the head with such violence that it fractured his skull and seriously and permanently injured him;

5. That the said piles consisted of thirty foot sections of "steel monotude tubing," which were welded together end to end and driven into the ground by the pile driver until a firm foundation was reached;

6. That when the plaintiff approached the scene of the accident in question, the defendant through its agents, servants and employees, had just finished welding a section of the

steel tubing onto another section of tubing which had previously been driven into the ground by the defendant's pile driver;

7. That in addition to the defendant's negligence in the maintenance and operation of the aforesaid pile driving machinery, the plaintiff charges that the defendant, through its agents, servants and employees, acting within the scope of their employment, was also negligent in—

(a) the manner and way the welding job was performed;
(b) in failing to use a proper type of weld (i. e., a heavy duty weld should have been used);
(c) in employing welders inexperienced in this type of welding; and
(d) in not allowing enough time for the welded area to cool sufficiently before commencing to drive the pile again;

thereby causing the welded pile to become structurally weak and unable to withstand the tremendous force (30,000 foot pounds of driving force) to be applied by the pile driver, thus causing the pile to split below the weld and buckle, thus causing the aforementioned brass hook (which was being used in a dangerous and unsafe manner) to become
page 3 sheared off of the pile driver hammer and follower block and fly through the air and hit the plaintiff;

8. As a direct result of the aforesaid acts of negligence, plaintiff has been prevented from transacting his usual affairs, has suffered and will continue to suffer pain of body and mind, has incurred expenses for medical attention and hospitalization, has suffered a loss of wages, has suffered a permanent loss of earning capacity, and has been otherwise injured and damaged.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00).

GEO. E. ALLEN, JR.
(ALLEN, ALLEN, ALLEN AND ALLEN)
613 Mutual Building
Richmond, Virginia,
Attorney for plaintiff.

DATED: August 6, 1957.

* * * * *

page 5 }

* * * * *

Received and filed Aug. 22, 1957.

Teste:

LUTHER LIBBY, JR., Clerk.

SPECIAL PLEA.

Comes now the defendant, Thorington Construction Company, Incorporated, by counsel, and alleges that the plaintiff, Thraves Lockett Anderson, was injured on the 12th day of March, 1957, while acting within the course and scope of his employment by Parsons, Brinckerhoff, Hall and MacDonald, Consulting Engineers for the Richmond-Petersburg Turnpike Authority; that Parsons, Brinckerhoff, Hall and MacDonald and Thorington Construction Company, Incorporated were both engaged in work that is a part of the trade, business or occupation of the Richmond-Petersburg Turnpike Authority as owner or principal contractor of the work being performed; that Parsons, Brinckerhoff, Hall and MacDonald, Thorington Construction Company, Incorporated and Richmond-Petersburg Turnpike Authority have all complied with the Workmen's Compensation Statutes of Virginia for such cases made and provided; that following the accident set forth above the plaintiff was paid workmen's compensation benefits under workmen's compensation coverage provided by Parsons, Brinckerhoff, Hall and MacDonald; that under the Workmen's Compensation Statutes of Virginia all employees of subcontractors or consultants engaged by the owner or principal contractor for the project undertaken are fellow servants and employees for compensation purposes, and by reason thereof the remedy given to the plaintiff and page 6 } his election to receive benefits under the Workmen's Compensation Act is exclusive; that by reason of the plaintiff coming under the Workmen's Compensation Statutes and receiving payments thereunder he is precluded from bringing his present action against the defendant.

WHEREFORE, the defendant alleges and avers that it is not liable to the plaintiff for the damage of which he complains.

And this the defendant is ready to verify.

THORINGTON CONSTRUCTION
COMPANY, INCORPORATED
By RICHARD L. WILLIAMS
Of Counsel.

* * * * *

page 11 }

* * * * *

OPINION.

The issue before the Court in the instant case is whether the Court has jurisdiction, or The Industrial Commission of Virginia.

In brief, "The Richmond-Petersburg Turnpike Authority" was created by an Act of the General Assembly of 1954 (Chap. 705 Acts of 1954) Va. Code Sections 33-255.24 to 33-255.44 as a political sub-division of the Commonwealth, to exercise "the powers conferred * * * in the construction, operation and maintenance of the turnpike project * * *."

Among other things, it was authorized to obtain title to the right of way by purchase or under its powers of *eminent domain,* to finance the project by the sale of bonds or other methods, both temporary and permanent, and in general to do all things necessary or desirable to construct the turnpike and to operate the same as a toll road. The Richmond-Petersburg Turnpike Authority will be referred to as "Authority" or "Owner."

The Authority contracted with Parsons, Brinckerhoff, Hall and MacDonald as consulting engineers upon the project. They will be referred to as "Engineers." The contract with the Engineers was broad in scope and sweeping in terms providing for the latter furnishing the Authority complete engineering services of "high order of quality, employing competent and experienced personnel all equal to page 12 } the best engineering practice prevalent, commensurate with the magnitude and intricacy of the work * * *." It was further provided that "the services shall be so complete that it will not be necessary for the Authority to supplement any of the operations by its own personnel, but the Authority reserves the right * * * to establish such representatives on the work as may be in its judgment necessary to maintain proper laison. * * *"

Mr. John Pershing, General Manager of the Authority, testified that Parsons, Brinckerhoff, Hall and MacDonald, were employed by the Authority as the consulting engineers of the project by a negotiated written contract, the terms of which are embraced in letters dated September 10, 1954 and September 30, 1954, and accepted by the Authority by resolutions of its Board of Directors adopted in October, 1954.

Counsel, in view of the voluminous character of the various documents, stipulated that the witness Pershing could testify as to the pertinent portions of these documents without the production of the originals, and should either the Court or counsel desire photostatic copies of any portion or portions thereof, the same would be filed by the stipulation.

In view of this stipulation Mr. Pershing testified that the letter of September 10, 1954 from The Engineers to The Authority proposes that Engineers "render engineering services which the proposal breaks down into three stages; Stage 1 is stated to be the preliminary stages; Stage 2 is stated to be the preparation of the contracts, plans, and specifications; and Stage 3 is stated to be the services in connection with the supervision of the construction of the turnpike. He further testified that the issues involved in the instant case comes under Stage 3 of the contract, as the plaintiff was injured during the construction of the turnpike.

Under the provisions of Section 33-255.28 setting out the powers of the Authority, the latter was empowered: to make all preliminary surveys in respect to the location of
page 13 } the turnpike, but subject to the approval of the Virginia State Highway Commission; to determine in its discretion the design standards and materials of construction; the construction, maintenance, and repair of the turnpike, and to operate the same after its construction.

Under its contract with "The Engineers," the latter was to furnish complete engineering services to the Authority, in fact "so complete that it will not be necessary for the Authority to supplement any of the operations by its own personnel * * *." Therefore, all preliminary surveys were made by The Engineers in reference to the location of the turnpike, that is, its right-of-way and the location of all of the offices and other facilities needed by The Authority; it also prepared and promulgated the design standards and materials of construction, and plans and specifications for the construction of the turnpike.

When the Engineers located and fixed the right-of-way for the Authority, the latter proceeded to acquire title to the property upon which the turnpike was to be located, as well

as any necessary easements to enable The Authority to build and to operate the turnpike.

As title to the sections of the right-of-way were acquired by the Authority, plans and specifications for the roadway, bridges, etc., were prepared by the Engineers which were then approved by the Authority, and bids were called for. As the bids were received, they were submitted to the Authority with the recommendation of the Engineers, and The Authority awarded the contracts to the bidders as The Authority saw fit. According to Mr. Pershing "the plans and specifications were prepared progressively. They involved a tremendous amount of work and, as plans and specifications became complete for a particular section, those plans and specifications were advertised and bids received for the construction of the work contemplated by those plans."

Among those contracts for work upon sections of the project, was the section let to the defendant Thorington Construction Company, designated as "A-5-G, Section A," which work consisted in building an overpass near the intersection of Boulevard and Kelly Road. Thorington
page 14 } Construction Company, herein called "Contractor" was engaged in erecting the sub-structure and abutments of the overpass. In the work on the sub-structure, contractor was required to drive certain steel tubing which were in sections, and these sections were required to be welded as they were driven by pile-drivers, into the ground until they reached the required depth, that is, would penetrate a certain minimal distance by a given number of blows of the pile driver hammer.

It was while these welded steel tubes were being driven that the "accident" occurred and the plaintiff was injured. For these injuries the plaintiff seeks to recover damages from the defendant for its alleged negligence while driving the said welded piles.

Whether or not the Court has jurisdiction in this case depends upon the relationship between The Authority, The Engineers, the immediate employer of the plaintiff, and the Contractor.

While there is no doubt about the fact that under the act creating the Authority, the latter is a political sub-division of the Commonwealth of Virginia, it is equally clear that it is authorized to sue, and it may also be sued. Nor does any doubt exist that the title to the right-of-way and the constituent structures of the turnpike is vested in the Authority. The Authority was created for the express purpose of engaging "in the construction, operation and maintenance of the turnpike project * * *." Before the construction could

begin, the Authority was obliged to locate the right-of-way, and having done this it had to acquire title to the lands upon which it would be constructed, either by purchase, or by the exercise of its power of eminent domain, as it was so empowered by the act creating the Authority. In a very real sense, the Authority is the owner of the right-of-way and the constituent structures of the Richmond-Petersburg Turnpike.

The Authority was authorized to acquire the necessary property and to build or construct the Turnpike. It could have employed a staff of its own as an engineering de-
page 15 } partment to do all things relating to locating, planning and building the turnpike, but it elected to employ the Engineers to render engineering services "so complete that it will not be necessary for the Authority to supplement any of the operations by its own personnel," even though the authority reserved "the right from time to time to establish such representatives on the work as may be, in its judgment, necessary to maintain proper liasons." (Tr., pp. 27 and 28). And it appears The Authority did have in its employ a staff engineer to act as liason engineer, to establish relations with Engineer and to have the latter's work interpreted by the Authority's staff for a more general and complete understanding. (Tr., p. 13).

It clearly appears from the record that the Engineer was "employed" by the authority to do all things which was required of the Authority in the nature of engineering services as above noted, including those services set out in Defendant's Exhibit A entitled "Specifications for Engineering Services for the Supervision of Construction—Stage 3." For all practical purposes, the Engineer was, under the contract with the Authority acting for and on behalf of the Authority, and therefore required to locate, the turnpike, prepare and promulgate design standards and materials for the construction of the turnpike, under Stages 1 and 2 of the contract, and as well as to supervise the work of the contractors and sub-contractors in the execution of their work upon the turnpike, under Stage 3 of said contract. In every instance, under this contract the engineers were acting for and on behalf of the Authority, which in a very real sense was the "Owner" of the Turnpike. The Authority was created by the act to acquire the title to the right-of-way; it was created to construct the turnpike and after its construction, The Authortiv was created to operate the turnpike, as well as maintain it and keep it in repair. It appears to the Court that the Authority was not only the "Owner" as contemplated by Section 65-26 of the Virginia Code of 1950, but in employing

Engineers acting on its behalf to construct the Turnpike, it was contracting to have the Engineer undertake to
page 16 } perform "a part of the trade, business or occupation of" the Authority and Owner, and; the Owner, The Engineer as Contractor or Sub-Contractor, engaged with others (Sub-Contractors) for the completion of the work, the "Owner" or contractor, or sub-contractors under this section and the following sections of the code, each respectively became responsible to the employees of the persons employed upon the work according to the provisions of Section 65-26, 65-27, 65-28 and 65-29, with indemnity provided for by Section 65-30.

It would be interesting to apply to the facts of this case, the rules announced in the cases of *Hann* v. *Times Dispatch,* 166 Va. 102, 184 S. E. 183; *Texas Co.* v. *Zeigler*, 177 Va. 557, 14 S. E. (2) 704; *Ross* v. *Schneider*, 181 Va. 931, 27 S. E. (2) 154; *Craig* v. *Doyle*, 179 Va. 526, 19 S. E. (2) 675; *Phillips* v. *Brinkley,* 194 Va. 62, and many other cases on the subject, as one could possibly find such control over the so called sub-contractors and their servants as would make the relationship between the "Owner" or Authority and the employees of the various sub-contractors that of master and servant, but this seems unnecessary to the decision of the case, as the evidence rather shows that the sub-contractors such as the defendant, Thorington Construction Company, were only responsible for the result of its work, that is the completion of their contract in accordance with plans and specifications, and it had the right to select its own employees, and its own methods and means of doing the work, subject only to adhearing strictly to the plans and specifications. The only control which the Authority retained was to have its Engineer check upon the work of Contractor as it progressed, through an Inspector, to make certain Contractor was using the material as specified, and was doing the work in a manner which would insure the finished product being in accordance with the contract, plans and specifications. In this regard, the Court is of the opinion that the defendant Thorington Construction Company was an independent contractor in its contract relations to the Authority. In the opinion
page 17 } of the Court, the strongest position in which the plaintiff could find himself, in order to sustain this action would be to have the Engineers, as well as the defendant Thorington Construction Company held to be independent contractors, and the Court so holds. The authorities cited in the brief of the plaintiff support and sustain the conclusion, not only as to Engineers but the defendant Thorington Construction Company as well. It is also clear

that "Authority," "Engineers" and Contractor are "Employers" as defined by the Workmen's Compensation Act, Va. Code of 1950 Section 65-3.

The cases cited are:

Comr. Inter. Rev. v. *Modjeski,* 75 F (2) 468
Metcalf & Eddy v. *Mitchell,* 269 U. S. 514, 46 S. Ct. 172
Comr. Inter. Rev. v. *Kelker,* 95 F (2) 647
Warner v. *Messick,* 117 Pa. (2) 482
Phillips v. *Brinkley,* 194 Va. 62, 72 S. E. (2) 339.

The status of The Authority, The Engineers, the Contractor, Thorington Construction and the plaintiff, Anderson, are largely determinative of the issues in this case relating to jurisdiction.

As stated above, Anderson was an employee of the Engineers at the time of the accident. He was engaged in inspecting the work of Thorington Construction Co., a Contractor, which had been awarded a contract to construct a section of the turnpike, viz: Building the sub-structure of an overpass over The Boulevard and Kelley Road in the City of Richmond. The defendant, Thorington Construction Co., herein referred to as "Contractor" or "Sub-Contractor," contracted to put in the piles according to specifications, and to do the other work as set out in the contract, *pland* and specifications. A part of the work consisted in driving steel tubes into the ground with a pile driver until a solid foundation should be reached. These steel tubes were in sections or lengths, and in order to reach the required depth so as to support the bridge across Boulevard, the section driven into the ground had some portion protruding above
page 18 } ground, and to this end so protuding another length of tubing was welded, end to end. This process proceeded until the tube reached the required depth, determined by the plans and specifications as interpreted by the inspector employed by the Engineer. The inspector in this case was the plaintiff, Anderson. Not only did the inspector Anderson observe the driving of the tube and approve it as having reached solid foundation, but he constantly observed this and other work of the contractor, among other things, whether or not the ends of the steel tubes were properly welded in accordance with the plans and specifications. On the day of the accident, after a length of steel tubing had been welded, when the hammer of the pile driver came down upon the upper end of the tube, "the splice was broken" and a piece of metal struck the plaintiff in the eye. He testified:

"I was going to stop the pile rig when this splice was broken, because they (the welders) has just gotten off it and they (pile drivers) started hitting the pile when it was hot and that is what caused the pile to misplace." (Tr., p. 49).

All of the plaintiff's work at the time of the accident related to his duties in respect to the determination of the lineal feet of pile (steel tube) driven and that above ground, used in the work of obtaining support, or foundation for the bridge; in seeing that the materials used were as specified, and in seeing that the work proceeded in accordance with the plans and specifications.

The plaintiff was, as an employee of the Engineers, executing a part of the work which the Engineers contracted with the Authority to do, in and about the construction of the Turnpike.

As above noted, The Authority was created for the express purposes set out in the act creating it. (Acts Gen. Assembly of Va. 1954, Ch. 705 Va. Code Sections 33-255.27-33-255.44). Code Section 33-255.27 provides: "*The Richmond-Petersburg Turnpike Authority.* There is hereby created and constituted a political sub-division of the Commonwealth to be known as "The Richmond-Petersburg Turnpike Authority."

page 19 } The exercise by the Authority of "*the powers conferred by this article in the construction, operation and maintenance* of the turnpike project authorized by this article shall be deemed and held to be the performance of an essential governmental function. * * *." (Italics supplied).

The grant of powers is found in Section 33-255.28.

"(a) To determine the location, subject to the approval of the State Highway Commission, of the turnpike project, to determine, in its discretion and without reference to any other provisions of this article or any other law, the design standards and the materials of construction, and to construct, maintain, repair and operate the same;

"(f) To acquire, hold and dispose of real and personal property in the exercise of its powers and the performance of its duties;

"(h) To make and enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under this article:

"(i) To employ, in its discretion, consulting engineers, attorneys, accountants, construction and financial experts, superintendents, managers, and such other employees and

agents as may be necessary in its judgment, and to fix their compensation;

"(o) To sue and be sued, * * *."

"(p) To do all other acts and things necessary or convenience to carry out the powers expressly granted in this article; * * *."

It is to be observed from reading the foregoing, that the Authority was created for the express purpose of: (1) locating the route of the Turnpike: (2) acquiring page 20 } title to the land necessary to construct the Turnpike: (3) Constructing the Turnpike: (4) Operating the Turnpike: (5) Repairing and maintaining the Turnpike after it is in operation. While the ultimate end and object of the Legislature in creating the Authority was to have it operate the Turnpike as a toll road, it is wholly illogical to contend that such purpose was the paramount and sole end and object. It is no less a function of the Authority to acquire title to the right-of-way, to construct the turnpike, to repair and maintain it, than it is to operate the facility, after the acquisition of the right-of-way and the construction of the Turnpike.

In a very real sense, the Authority was engaged at every step of the way, in the course of its usual trade, business or occupation, from the preliminary surveys, through the acquisition of the right-of-way, the construction, and the final operation, maintenance and repair of the Turnpike. The Legislature has so declared by vesting it with the power and charging it with the responsibility of so doing.

This Court holds that the Authority was and is the owner of the right-of-way and all of the real and personal property purchased or acquired by it in discharging its duties imposed, and in exercising its power vested in it in this effort. It holds that in all its activities, exercising its powers pursuant to the statute law creating it, it is engaged in the course of its usual trade, business or occupation.

The Authority contracted with the Engineers, who under the contract were to furnish complete engineering services to the Authority, and in discharging that contract, the Engineers, were an independent contractor. Similarly, Thorington Construction in the discharge of its contract, was an independent contractor.

Applying the provisions of the "Virginia Workmen's Compensation Act" to the facts in this case, as interpreted by The Supreme Court of Appeals of Virginia, it is to be noted that Section 65-26 Va. Code (1950) provides:

page 21 } "When any person (in this section and sections 65-28 and 65-29 referred to as owner) undertakes to perform or execute, any work which is a part of his trade, business or occupation and contracts with any other person (in this section and sections 65-28 to 65-31 referred to as sub-contractor) for the execution or performance by or under such sub-contractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay any workman employed in the work any compensation under this Act which he would have been liable to pay if such workman had been immediately employed by him."

Section 65-37 of Va. Code (1950) provides that: "The rights and remedies herein (Va. Workmen's Compensation Act) to an employee when he and his employer have accepted the provisions of this Act respectively to pay and accept compensation on account of personal injury or death by accident shall exclude all other rights and remedies of such employee * * *."

There is no doubt that the Authority, the Engineer and the defendant contractor all accepted the provisions of the Act and did all things necessary to comply with its provisions to qualify thereunder. Indeed The Authority in each of its contracts with the "Engineers" and all persons, firms and corporations with whom the Authority contracted for the building of the Turnpike or any section of the Turnpike, required such party to come under the compensation laws of the state and fully qualify thereunder, including the procuring of workmen's compensation insurance. It is also true that the plaintiff Anderson as an employee of Engineer, comes under the Workmen's Compensation Act, since he did nothing to take himself out of its provisions as required by Section 65-20 of the Virginia Code.

Section 65-5 (Va. Code 1950) provides that:

"Nothing in this Act contained shall be construed to make, for the purposes of this Act, the employees of
page 22 } an independent contractor the employees of the person or corporation employing or contracting with such independent contractor."

Notwithstanding this section, the provisions of Sections 65-26 through 65-31 inclusive, make the Owner, the General Contractor, Sub-Contractor, etc., liable for the payment of compensation to an injured employee, under certain circumstances, of another independent sub-contractor, regardless of the provisions of Section 65-5.

The Supreme Court of Appeals has in its decisions lighted the pathway sufficiently to enable this Court to conclude that the plaintiff's remedy is before The Industrial Commission of Virginia, and this Court is without jurisdiction.

It seems unnecessary to review and analyze all the cases decided by our Supreme Court of Appeals, since the enactment of Section 20 (a) of the Compensation Act in 1920, and the amendments thereof. (Now embraced in Va. Code Sections 65-26 through 65-31 inclusive.

The first case to be considered is *Feitig* v. *Chalkley*, 185 Va. 96, wherein Chalkley sued his fellow employee Feitig to recover damages for injuries sustained by Chalkley when the truck of Nolde Bros., was wrecked through the alleged negligence of Feitig. It was held that both Feitig and Chalkley were both employees of Nolde Bros. acting in the scope of their employment at the time of the wreck; that the accident arose out of their employment, and that Chalkley was entitled to receive the indemnity provided by the Workmen's Compensation Act. The Court further concluded that the plaintiff Chalkley's rights thereunder were exclusive of all other rights against all persons except those who were strangers to the employment, i. e., a negligent third party.

In this regard, the Court held that fellow-servants were not strangers to the employment, and that Chalkley could not maintain the action against his fellow employee.

The next case with which we should be concerned page 23 } is *Sykes* v. *Stone & Webster*, 186 Va. 116. In that case, Stone & Webster as principal contractor and Richmond Structural Steel Co., as sub-contractor were engaged in erecting a power station in Chesterfield County. Raymond H. Sykes, an employee of the sub-contractor, was injured by the alleged negligence of Stone & Webster, the principal contractor. The administratrix of Sykes instituted an action against the principal contractor to recover for the death of Sykes by reason of the wrongful acts of Stone & Webster. The question involved was whether or not the action at law could be maintained, or whether the only remedy was under the Virginia Workmen's Compensation Act.

The Court held that Stone & Webster was the "Contractor" which contracted with "another person" here called "contractee" to perform or execute work for the "contractee," which work was not a part of the trade, business or occupation of the contractee, and "contractor" then contracted with still "another person," Richmond Structural Steel Co., designated in the section 65-28, as well as Sections 65-29, 65-30 and 65-31 as "sub-contractor," "for the execution of a

part of the work undertaken by such "contractor" and that the contractor is *liabile* to any workman employed in the work by the sub-contractor, for "any compensation under the act which he would have been liable to pay if that workman had been immediately employed by him," the contractor. The Court further held that the dependents of the decedent Sykes were entitled to workmen's compensation as provided by the Act, and therefore, because of the provisions of Section 65-37 the rights, and remedies under the Virginia Workmen's Compensation Act were exclusive of all other rights and remedies of the employee or his personal representative, at common law or otherwise.

The Court also held that the provisions of Section 65-38 (Va. Code 1950) giving to an injured employee, or to the personal representative of a deceased employee, or to the employer who has paid compensation to the injured employee, or the dependents of a deceased employee, the right to recover damages from "any other party for such injury or
page 24 } death" did not give that right of action against any person, except those *other* "Persons who are strangers" to the employment and the work.

The Court held further, that under Section 65-27, Stone & Webster having contracted to build the power plant, which work was part of its trade, business or occupation, and had contracted in turn with Richmond Structural Steel Co. to do a part of the work, Stone & Webster would be liable to the employees of Richmond Structural Steel Co. for compensation as if that employee were immediately employed by Stone & Webster, and therefore neither that employee, nor his employer, nor the insurance carrier of the employer, could maintain an action against Stone & Webster.

Another case to be considered is *Sears, Roebuck & Co.* v. *Wallace,* 172 F (2) 802. In this case, the defendant, Sears, Roebuck & Co. was the lessee of a building in the City of Norfolk, which it used as a storage warehouse. It entered into a contract with a general contractor for alterations to the building. The general contractor, in turn entered into a contract with a sub-contractor for a part of the work, viz: the brick work. The plaintiff Wallace was employed by the sub-contractor as a foreman of the bricklayers and other workmen.

The defendant, engaged in merchandising, and while the warehouse, when completed was to be used in the defendant's business of merchandising, it was not a part of its trade, business or occupation to erect, or to make physical changes in the structure.

In the defendant's building were two elevators which were used by the employees of both the general contractor and the sub-contractor, with the consent of the owner.

On the day of the accident, the plaintiff's hand was caught in the safety door of the elevator, which stayed open instead of closing when the elevator left the floor level due to faulty mechanism. When the plaintiff sought to close the safety door he was injured as aforesaid.

page 25 } The Court held that Wallace could maintain his action against the defendant, because the defendant's "Trade, business, or occupation" was not that of a builder; that it as "owner" had not "undertaken to perform or execute any work which was a part of its trade, business or occupation, and contracted" with another person (in this section referred to as 'sub-contractor' " (Section 65-26 Va. Code 1950) for the execution of all or any part of the work by or under such sub-contractor. The Court as a result also held that since under Section 65-26, the defendant would not have been liable to Wallace for the payment of Workmen's Compensation the defendant was the "other party" contemplated by Section 65-38 of the Va. Code of 1950, against whom the right of action of the injured employee might be asserted.

In the case of *Rea, Adm'r.* v. *Ford,* 198 Va. 712, 96 S. E. (2) 92, the facts were that the City of South Norfolk, desired to erect a high school, and contracted with John W. Daniel & Co., Inc., as principal contractor to execute the work thereon. Daniel & Co. rented from W. W. Ford a crane, with its operator and helper for the purpose of hoisting in place certain trusses. In this work, the crane was operated by Wilson and a helper, Calhoun, employed by Ford, but they were under the direction and control of Jurgensen, Daniel's superintendent, and the deceased Rea, who worked under Jurgensen. It was alleged that the crane crew negligently operated the crane, causing one of the trusses to fall and kill Rea. His dependents received Workmen's Compensation from Daniel's Compensation Insurance Carrier, and the latter, pursuant to the provisions of Section 65-38, filed action against Ford.

Mr. Justice Eggleston, delivered the opinion of the Court, and in the course of the opinion (198 Va.) at p. 717 said:

"In the present case Ford, the defendant, was no stranger to the business of Daniel, the principal contractor. On the contrary, in furnishing the equipment and crew

page 26 } for the purpose of erecting the steel structure Ford was a sub-contractor engaged in an essential part of the work which the principal contractor had to do.

Thus he was not an "other party" within the meaning of Code Section 65-38. Like the principal contractor, Ford was under the canopy of the Workmen's Compensation Act and not subject to an action at law for damages for injury to or death of Rea who was engaged in the same work. Code Section 65-37 *supra.*"

The trial court struck the plaintiff's evidence on the ground that the plaintiff's exclusive remedy was before the Industrial Commission, and the Supreme Court of Appeals affirmed the lower court.

In *Coker* v. *Gunter,* 191 Va. 747, Lock Joint Pipe Company, under a contract with the City of Norfolk, was laying a 40 inch pipe line. The pipe was being laid in 16 foot sections, in a ditch 5 feet wide. The ditch was being excavated with a motor driven ditching machine owned and operated by Lock Joint Pipe Co. Lock Joint rented from Gunter a truck and driver, and this truck was used to haul away the excess material from the ditch after the pipe was laid and covered with the earth taken from the ditch. Minggia was the driver of the truck. Coker, an employee of Lock Joint, was among other duties, directing the truck driver in regard to moving to the ditch digger to be loaded, and then hauling the load away. In some manner the truck was backed over Coker's leg and he was severely injured. Coker filed common law actions against both Minggia and Gunter, the general employer of Minggia. At the conclusion of the plaintiff's evidence the Court struck the same, but the jury returned a verdict for the plaintiff. The court set the verdict aside and entered judgment for the defendants. The Supreme Court of Appeals affirmed the judgment of the lower court, on the grounds that Minggia was under the control of Lock Joint in executing the work assigned to him and his truck. Mr. Justice Buchanan, at p. 755 said: "Minggia's obedience to Lock Joint's directions were not mere cooperation, but complete subordination. * * *

page 27 } Because, Lock Joint, the special employer of Minggia had the right to control both the manner and means by which Minggia accomplished his assigned tasks, he was an employee of Lock Joint, as was Coker, and that Coker's rights were exclusively under the Compensation Act, he could not maintain his action at law against a fellow servant, under *Feitig* v. *Chalkley, supra,* nor against his general employer Gunther, under the theory of *respondeat superior.*

The only other case which need be considered is *Kramer* v. *Kramer,* 199 Va. 409. The facts in this case were as follows: Arlington Church of Christ was desirous of erecting a new

church, and had an architect prepare plans and specifications. The church then called for bids from various artisans for a part of the work. The Chairman of the Building Committee of the church entered into a contract with August F. Kramer to do the carpentry work as set out in the contract and the plans and specifications. In fact all of the work in building the church was to have been done by letting all the work to contractors in their special field. It is not questioned that it was not a part of the "trade, business, or occupation" of the church to build its edifice, but the finished building was to be used by it as a place of worship. There was no general contractor as in the usual case who sub-contracted a part of the work undertaken by him.

During the construction work, it became necessary to put six laminated wooden trusses or arches in place. These trusses were about 40 feet high and weighed from two, to two and one-half tons each. This was not part of the work of the defendant A. F. Kramer's contract, according to the plaintiff's evidence, but the defendant alleged and offered evidence to prove it was a part of his work. This conflict was left to the jury and it was resolved against the defendant.

Old Dominion Hoisting Service contracted with the Church to furnish a crane, an operator thereof, and a helper. As a result of the verdict, the Supreme Court held that both A. F. Kramer, the defendant and Old Dominion Hoisting Service were independent contractors on the church project; that Gustave Kramer, the deceased employee of page 28 } Old Dominion Hoisting Service, no relation of A. F. Kramer, and since the Church in attempting to erect the Church was not engaged in the course of its usual, trade, business or occupation had not contracted with another, to undertake the work, there was no "contractor" who had in turn contracted with another called "sub-contractor" which would make the defendant A. F. Kramer liable to the deceased Gustave Kramer for compensation under any of the provisions of Sections 65-26 to 65-31 inclusive. The Court further held that as between the defendant A. F. Kramer and Old Dominion Hoisting Service, as well as the latter's employee Gustave Kramer each were strangers to the other as engaged in the particular work, and that the personal representative of Gustave Kramer, deceased, could maintain the common law action against A. F. Kramer, the defendant.

A fair summation of the analysis of the foregoing cases and the resulting rule of law therefrom may be thus stated:

(1) A servant cannot maintain an action at law against his fellow servant to recover damages for injuries sustained by

reason of the negligence of the fellow servant, where the injuries resulted from causes which "arose out of and in the course of" the servants employment entitling him to indemnity by way of compensation from the employer of both servants. (*Feitig* v. *Chalkley, supra*).

(2) Where an independent contractor contracts with an "owner" to do work which is not a part of the trade, business, or occupation of the "owner," but such is a part of the trade, business, or occupation of the independent "contractor," and the latter contracts with another, called "sub-contractor," to do a part of the work undertaken by the "contractor" injured by the negligence of the servants of the "contractor," may not maintain an action against the "contractor" if the injuries resulted "from an accident arising out of and in the course of "the injured man's employment entitling him to indemnity by way of the Workmen's Compensation Act, from either his immediate employer the "sub-contractor" or the independent "contractor," because no person, except a stranger to the work and not under "the canopy page 29 } of the Act," can maintain the action, since as between those under said "canopy" the rights thereunder are exclusive. (*Sykes* v. *Stone & Webster, supra*).

(3) Where an "owner," contracts with another (John W. Daniel & Co., Inc.) "contractor" to undertake work, not a part of the "owners" trade, business, or occupation, but a part of the "contractors" trade, business or occupation, and "contractor" contracts with another (Ford) as "Sub-Contractor," to do a part of the work undertaken by "Contractor," and while so engaged a workman employed by "Contractor" is injured by the negligence of an employee of "sub-contractor," under circumstances which entitle the injured employee of contractor to indemnity under the Workmen's Compensation Act, that remedy is exclusive. Since the remedy is exclusive, the injured employee of "Contractor" cannot maintain an action at law for the injuries against the employee of the "Sub-Contractor" nor the Sub-Contractor, since all are under the "canopy" of the Workmen's Compensation Act. (*Rea, Admr.* v. *Ford, supra.*)

(4) Where a "contractor" Lock Joint Pipe Co. contracted to do certain work, a part of its trade, business, or occupation, and contracted with Coker, Sub-Contractor to haul certain excavated soil, with his truck and driver. An employee of "Contractor" was injured by the Driver of the truck. The court held that the injured employee being entitled to indemnity under the Workmen's Compensation Act, could not maintain his action against the truck driver, a "loaned" employee to contractor, and therefore a fellow servant of the

plaintiff, nor against the sub-contractor under the theory of *respondeat superior,* since at the time the sub-contractor was not the "master" of the truck driver. (See *Coker* v. *Gunter, supra.*)

(5) Where an "owner" undertakes to have work done for him by "sub-contractors," which work is not a part of the trade, business or occupation of the "owner," and an employee of one sub-contractor is injured through the negligence of another "sub-contractor," under circumstances that would entitle the injured workman to indemnity under page 30 } the Workmen's Compensation Act from his immediate employer, such injured employee may maintain an action at law against the negligent sub-contractor to recover damages, because as between the two "sub-contractors," there are no relations in respect the work undertaken. They did not contract with an "owner" (under Va. Code Section 65-26) to undertake to do work, which a part of "owners" trade, business or occupation, nor with a "contractor" who had undertaken to execute work, though not a part of "owners" "trade, business or occupation," was a part of such "contractor's" trade, business, or occupation, as provided by Va. Code Section 65-27, but instead they contracted with the "owner" to do certain work, not a part of owner's trade, business or occupation. Each contracted with the "owner" independently of each other, and as to the work being done by each they were strangers to each other. (See *Kramer* v. *Kramer, supra.*)

(6) Where an owner contracted with Contractor to do certain work, not a part of the trade, business, or occupation of "owner," but a part of the trade, business or occupation of "contractor," who in turn contracted with sub-contractor to execute a part of the work undertaken by contractor. An employee of sub-contractor injured by the negligence of "owner," though entitled to indemnity under the Workmen's Compensation Act from either "contractor" or "Sub-Contractor," he could nevertheless maintain an action at law to recover damages from owner. (*Sears, Roebuck & Co.* v. *Wallace, supra.*)

From the rules of law established by these cases, in construing the Workmen's Compensation Act, it seems clear that the plaintiff Anderson, an employee of Engineer, a sub-contractor, who undertook to execute a certain work, which was a part of the trade, business, or occupation of The Authority, "Owner," cannot maintain this action at law to recover damages from another sub-contractor, similarly undertaking to execute certain work for Authority as

"owner," which was likewise a part of the trade, business, or occupation of owner.

These conclusions are reached also after giving due consideration to the cases cited by the plaintiff, as follows:

page 31 } *Bamber* v. *Norfolk,* 138 Va. 26, 121 S. E. 564; *Portsmouth* v. *Daniels,* 156 Va. 614, 162 S. E. 324, and *Board of Supervisors* v. *Boaz,* 176 Va. 126, 10 S. E. (2) 498.

These cases are clearly distinguishable from the case at bar, especially when considered in the light of the more recent cases on the subject, beginning with *Feitig* v. *Chalkley* (*supra*) and above analyzed in this opinion. *Bamber* v. *Norfolk* has been fully explained by the Supreme Court of Appeals in the

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AT RICHMOND
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Record and 4 briefs.
Borrowed by [illegible]
Date borrowed 5-3-69
Date to be returned 5-3-69
Received of Howard G. Turner, Clerk, record and briefs in above styled case, which I agree to return on or before date stated.
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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

Thraves Lockett Anderson, plaintiff in the above styled action, hereby gives notice of his appeal to the Supreme Court of Appeals of Virginia from the final judgment entered in this action on the 16th day of July, 1958, and duly files this, his appeal, together with the following assignment of error:

1. The court erred in sustaining the Special Plea of the defendant and dismissing the action.

Given under my hand this 13th day of August, 1958.

THRAVES LOCKETT ANDERSON
By GEO E. ALLEN
(ALLEN, ALLEN, ALLEN AND ALLEN)
613 Mutual Building
Richmond, Virginia
Attorney for Plaintiff.

Received and filed Aug., 14, 1958.

Teste:

LUTHER LIBBY, JR., Clerk
By EDW. G. KIDD, D. C.

* * * * *

page 2 } (The witnesses and the reporter were sworn.)

Mr. Williams: Your Honor, it has been stipulated and agreed between counsel that Thraves Lockett Anderson, the plaintiff in the pending case, was an employee of Parsons Brinckerhoff, Hall & MacDonald on March 12, 1957, the date he was injured, and that he was acting within the scope of his employment with that concern at the time; that following the accident in which he was injured, he applied for Workmen's Compensation benefits and received such benefits from his employer's Workmen's Compensation carrier; and, by virtue of this stipulation, there need be no formal proof upon that point.

The Court: That stipulation carries with it that Thorington Construction Company had the requisite number of em-

ployees and had complied with the provisions of the Workmen's Compensation Act?

Mr. Williams: No, sir; the employee of Parsons, Brinckerhoff, Hall & MacDonald, and the stipulation carries with it full compliance by Parsons, Brinckerhoff, Hall & MacDonald with the Workmen's Compensation Statutes and the plaintiff's eligibility to receive compensation benefits following his injury.

The Court: Thank you, sir.

Mr. Allen: That is all right, sir.

Now, if it please Your Honor, I suppose that page 3 } by stipulation, we are trying today only the question of the relationship of the parties to determine whether or not the Workmen's Compensation Act bars the plaintiff in his personal injury action.

The Court: That is my understanding. The form of the defensive pleading, which is entitled "Special Plea," seems, in effect, to go to whether or not this Court has jurisdiction to maintain the action.

Mr. Allen: That is right.

Mr. Williams: Your Honor, I do not care to make an opening statement.

Mr. Allen: I think it would clarify the situation if I make a brief opening statement.

It will be our contention, if Your Honor please, that the plaintiff, Anderson, was injured as the result of the negligence of the defendant, Thorington Construction Company. At that time the plaintiff was acting within the course of his employment by the Parsons, Brinckerhoff, Hall & MacDonald, who were the consulting engineers for the Richmond- Petersburg Turnpike Authority. Thorington Construction Company was then engaged in the construction of work under contract with the Authority; Parsons, Brinckerhoff, Hall & MacDonald were acting as consulting engineers under a contract with the Authority.

I might state that to what Mr. Williams has stated page 4 } in his stipulation there should be added here, it is true that Mr. Anderson drew compensation from his employer, Parsons, Brinckerhoff, Hall & MacDonald.

The Court: Now, Mr. Allen and Mr. Williams, the Authority was created by legislative enactment. Do the terms of the enactment spell out whether or not the Authority is simply an owner, or whether under the enactment the Authority had the authority to proceed as the general contractor, shall we say, or whether in its status as owner it was simply employing employees to complete the building of the project which, when completed, would be the property of the

owner, to be used in the prosecution of its business? Is that spelled out in the Act?

Mr. Allen: No, sir.

Mr. Williams: Your Honor, I had intended to put on proof of the enactment. As I understand the enactment, it was to construct, maintain, and operate a turnpike. That was the gist of the enactment. I was going to put on proof of all of the sections, running from 33-255.24 to 32-255.44, in the record and, when we file our briefs, reference could be made back and forth to them.

The Court: Very well. I understand your position.

Mr. Allen: It is our contention, may it please Your Honor, that the Richmond-Petersburg Turnpike Authority
page 5 } does not occupy this status of an owner or a contractor, but the Act expressly says that it is an instrumentality of the government and it acts merely in an administrative capacity, and that these parties, the consulting engineers and the Thorington Construction Company, are independent contractors with the Authority. The Authority did not undertake the work and it cannot be considered, for that reason, as coming in the position of an owner or of a general contractor.

The Court: Very well. I think I understand the position of counsel.

Mr. Williams: Your Honor, might I suggest this to avoid reading these statutes into the record verbatim: Could we ask Mr. Craig to get a copy of all of the statutes relating to the creation of this Authority and file them as an appendix to the record, so that we will have them as a ready reference? Would that be agreeable?

Mr. Allen: I think, if Your Honor please, that would be an unnecessary expense. The Court is required to take judicial notice of the statutes, and I think, if we are going to file briefs, the place to set the statutes out is in the briefs.

Mr. Williams: All right.

The Court: I think your position is well taken, Mr. Allen. Even though the Court does not know the enact-
page 6 } ments and would expect counsel to produce or point to them, the fact that the Court takes judicial notice of the statutes would make it unnecessary to go to the expense of having separate compilations filed with this record.

Mr. Williams: All right. Your Honor, the reason I was asking it is that the sections are not in the physical code.

The Court: I understand, but I assume there must be some printed—

Mr. Allen: They are in the Acts of 1954, Your Honor.

John Pershing.

Mr. Williams: I would like to call Mr. John Pershing as my first witness.

JOHN PERSHING,
called as a witness by the defendant and being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Williams:

Q. Please state your name to the Court.

A. I am John Pershing.

Q. What is your occupation, Mr. Pershing?

A. I am the General Manager of the Richmond-Petersburg Turnpike Authority.

page 7 } Q. How long have you held that position?

A. I have held that position since just after Labor Day a year ago.

Q. Who was your predecessor, Mr. Pershing?

A. My predecessor was Mr. Burton Marye, who was, prior to his becoming General Manager of the Authority, the Chief Engineer and Deputy Commissioner of the State Highway Department.

Q. I believe in 1954 the Legislature of Virginia enacted code provisions for the creation of this Turnpike Authority?

A. That is my understanding.

Q. And those sections are 33-254.24 to 32-255.44?

A. I do not have the code references before me, Mr. Williams, but I am sure you are correct.

Q. Now, following the statutory enactments creating this Turnpike Authority, Mr. Pershing, did the Authority let the contracts to construct a turnpike?

A. It did, sir.

Q. What was the first contract let by the Authority?

A. I do not believe I have the chronology of the contracts let. My understanding by memory is that it was the contract known as B-2-Sub, which was the contract for the construction of the sub-structure of the James River Bridge,

page 8 } and some of those contracts were advertised and awarded quite closely together.

Q. Following the creation of this Authority, was there a contract let by the Authority with Parsons, Brinckerhoff, Hall & MacDonald as consulting engineers?

A. If you mean, Mr. Williams, was it let in the same sense as the construction contracts, it was not. A contract

was awarded to Parsons, Brinckerhoff, Hall & MacDonald by negotiation, not by advertising the letting.

Q. What was the date of that contract, Mr. Pershing?

A. The contract comprises an exchange of letters between Parsons, Brinckerhoff, Hall & MacDonald and the Richmond-Petersburg Turnpike Authority. The letters which constitute the basic contract are letters dated September 10, 1954, and September 30, 1954. The resolution of the Board of Directors of the Authority accepting the proposal set forth in those letters was adopted in October 1954.

Q. Do you have those letters with you, Mr. Pershing?

A. I do.

Mr. Williams: Your Honor, I would like to have those filed in evidence to avoid the reading of them, if that meets with everyone's approval.

The Court: Do you have copies of them?

Mr. Williams: I have some copies of them, Your Honor, and I understand that I can get other copies of
page 9 } them for the purpose of filing with the record.

Q. That is the original you are reading there, is it not, Mr. Pershing?

The Witness: If Your Honor please, these are working documents, the original documents of our Authority, and if they are introduced in evidence I would like to have counterparts substituted, so that we might withdraw our original documents.

The Court: Mr. Pershing, you may be sure that the Court will require the filing of photostats and the return to the Authority of the originals.

The Witness: Thank you, Your Honor.

The Court: In this and all other instances involving contract documents of the Authority or of the independent contractors.

Now, if counsel can get together and stipulate the copies, the Court would be glad to receive them. There is no use of encumbering the record with photostats of huge files such as Mr. Pershing has.

Mr. Williams: That is right. I was only going to ask for the germane portions of it, which I suppose we can
page 10 } handle on a stipulation.

Mr. Allen: May it please the Court, where documents are somewhat voluminous, as I understand they are in

this case—and they certainly are in connection with the Thorington Construction Company, and there is quite a collection of documents between the engineer and the Authority, the law is that a man who is thoroughly familiar with them may be permitted to state a summary of what they show, and I am perfectly willing to let Mr. Pershing do that, if that is satisfactory with Mr. Williams.

Mr. Williams: That is perfectly agreeable.

The Court: If it is stipulated by counsel, I see no reason why it should not be done, with this reservation: After you gentlemen have studied the contract, you may find some part which you feel to be very pertinent to the case and which was omitted in the summary. In that event, I think that the whole portion of that document involved should be presented to the Court.

Mr. Williams: I am willing to stipulate, Your Honor, that after Mr. Pershing's summary, in preparing our
page 11 } arguments, should we desire any additional parts of the contract, Mr. Allen and I can by agreement enter those into the record.

Mr. Allen: That is correct.

The Court: Very well, Gentlemen.

By Mr. Williams:

Q. Coming now to the letters that you have just mentioned, Mr. Pershing, could you summarize the function of the consulting engineer firm of Parsons, Brinckerhoff, Hall & MacDonald with the Authority?

A. Yes, I could, Mr. Williams.

The Witness: If Your Honor please, my summary will, of course, be somewhat in the nature of my conclusion as to this, but I believe you have indicated you understand that.

Mr. Allen: Yes, sir.

The Court: One minute. A conclusion may be a conclusion of law.

Mr. Allen: I take it that it would be a conclusion on the facts, Your Honor, That is what we have in mind.

The Court: The way the question is framed, the witness could hardly avoid giving a conclusion that might be a conclusion of law.

page 12 } Mr. Willaims: Would you read the question back?

(The question was read by the reporter.)

John Pershing.

Mr. Williams: Strike that question.

Q. Can you state, under the letters that you have just referred to, Mr. Pershing, the duties that were to be performed by the engineering firm of Parsons, Brinckerhoff, Hall & MacDonald for the Authority?

A. The letter of September 10, addressed to the Authority by Parsons, Brinckerhoff, Hall & MacDonald, proposes to render engineering services which the proposal breaks down into three stages. Stage 1 is stated to be preliminary stages; Stage 2 is stated to be the preparation of the contract plans and specifications; and Stage 3 is stated to be the services in connection with the supervision of construction of the turnpike.

Q. Now, as I understand it, the matter that we have involved in this case comes under Stage 3; is that correct?

A. In answer to your question, I understand that the plaintiff was injured during the construction of the turnpike.

Q. Which would be Stage 3?

A. Which would be Stage 3, supervision of con-
page 13 } struction.

Q. Stages 1 and 2 are not immediately involved in the present hearing?

A. I would assume not from the little I know of the case.

Q. In the creation of the turnpike, Mr. Pershing, did you set up your own engineering staff?

A. We provided a staff engineer in our administrative set-up. The job specifications for our staff engineer contemplate that he shall act as a liason engineer, establishing relationships with the consulting engineer, insofar as it is necessary for our staff to have the engineering work of our consulting engineer interpreted by our own staff for our more complete understanding.

Q. How many engineers does the Authority have of its own that are salaried employees of the Authority, Mr. Pershing?

A. We have Mr. Frank Blackwell, our staff engineer; Mr. A. H. Bell, our contract engineer; Mr. O. T. Greene, our right-of-way engineer; Mr. Howard VanBenthuysen, who is assistant right-of-way engineer.

Q. What is the operating control of the Authority vested in? Do you have a president, or board of directors, or what are the mechanics by which you operate?

A. The enabling Act to which you refer creates the Au-

thority. It authorizes the Governor to appoint
page 14 } seven members of the board of directors of the
Authority. The Act permits the directors so appointed to elect their own officers. The Governor has appointed seven members of the Authority and re-appointed those members whose terms have expired. The present Chairman of the Authority is Mr. Alfred Suttle, of Petersburg.

Q. Do reports filed by Parsons, Brinckerhoff, Hall & MacDonald, showing progress on the turnpike, come into your office?

A. They do.

Q. And do you pass upon whether the work is being done satisfactorily or not, or who has that responsibility?

A. The primary responsibility is that of the consulting engineers under Stage 3 of their contract. They, of course, have under their engineering set-up a sufficient number of resident engineers and inspectors who, in their judgment, represent the manpower sufficient to supervise and inspect the construction of the turnpike, which is being supervised by our consulting engineers.

Q. But who connected with the turnpike has the ultimate authority to reject or approve reports submitted by your consulting engineers?

A. It would be my function to recommend to our board any matters apparent from the weekly progress reports which, in
my judgment, should be acted upon by the board,
page 15 } if those facts indicated that work being done was
improper or inspection of the work being done was improper.

Q. And that progress report submitted by the consulting engineers is gone over by your staff engineers for interpretation?

A. It is.

Q. And if your staff engineer should decide that the progress report that has been submitted was not satisfactory for the purposes of the turnpike, he would recommend to you that it be rejected; is that correct?

A. He would recommend remedial action be taken in connection with the progress of the particular character of report indicated.

Q. And then it would be your function to see that the remedial action was taken pursuant to the advice of your own staff engineers?

A. It would be my function to communicate directly with

John Pershing.

the project manager, who is the representative of the consulting engineers, and direct him to give consideration to and review the problem which the progress report indicated.

Q. Now, after this contract was negotiated or let with your consulting engineers, did they prepare an overall set of plans for the turnpike that was to be construction?

A. All plans and specifications were prepared by
page 16 } our consulting engineers, either directly or through
engineering consultants who were employed directly by our consulting engineers.

Q. After all the plans and specifications were prepared by your consulting engineers, the Authority itself had to approve those plans and specifications before any contracts could be let for actual construction work?

A. That is correct.

Q. After the plans and specifications were ultimately approved, then did the Authority advertise and let bids to have the construction work begin?

A. That is correct, with this exception: The plans and specifications were prepared progressively. They involved a tremendous amount of work and, as plans and specifications became complete for a particular section, those plans and specifications were advertised and bids received for the construction of the work contemplated by those plans and specifications.

Q. But after the plans and specifications, then, were prepared and approved by the Authority, the Authority itself let a contract for the construction?

A. That is correct.

Q. And your consulting engineers were not a party to those contracts?

A. Not a direct party to the construction con-
page 17 } tract.

Q. In connection with the construction of the turnpike, Mr. Pershing, was there a contract let to Thorington Construction Company, and, I believe, to two co-adventurers for the construction of a portion of the turnpike?

A. There was.

Q. Do you have with you, sir, that contract?

A. I do.

Q. What is the date that contract was let?

A. The contract is known as Contract No. A-5-G, Section A, and it is dated December 12, 1956.

Q. In connection with the contractor, were specifications

prepared by your consulting engineers to govern the manner in which the work under that contract was to be done?

A. They were.

Q. Under your contract with Thorington Construction Company and its co-adventurers, who had the responsibility of supervising the work being done by Thorington Construction Company?

A. Our consulting engineers, Parsons, Brinckerhoff, Hall & MacDonald.

Q. Do you have before you, Mr. Pershing, the appendix and specifications to the contract that was let to Thorington Construction Company?

A. I do.

page 18 } Mr. Allen: On this particular section that was being constructed when the plaintiff was injured?

Mr. Williams: Yes.

I might point out, Your Honor, that there were probably fifteen or sixteen of those contracts let by the Authority, and we are only going into the details of the one in which the plaintiff was injured, A-5-G, I believe is the number. Section A was the specific designation of the work where the plaintiff was injured.

The Witness: That is right.

The Court: Mr. Williams and other counsel, it seems to me that the number of contracts let in the same fashion might have a bearing upon the ultimate question for determination.

Mr. Williams: I am going to put evidence on as to that, Your Honor, but not specific details.

The Court: Very well.

By Mr. Williams:

Q. Would you turn to Section 105 in the specifications of the contract with Thorington Construction Company, Mr. Pershing?

A. I have so turned to Section 105.

Q. Would you read what Section 105 is?

page 19 } A. Section 105 has a main caption, "Control of Work." It is broken down into paragraphs which are designated respectively Sections 105.01, to 105.13, inclusive.

Q. Would you further identify Section 105.01?

A. Section 105.01 has a sub-caption entitled "Authority of the Engineer."

John Pershing.

Mr. Williams: Your Honor, would it be acceptable if I just gave to Mr. Craig a copy of this section and let him put it in the record, or just file it as an exhibit?

Would that be agreeable with you, Mr. Allen?

Mr. Allen: Yes, but I would like to hear it as we go along. It may be there would be some questions I would like to ask on cross examination.

By Mr. Williams:

Q. Would you just read that section into the record verbatim, Mr. Pershing?

A. Section 105.01 reads as follows:

"The work shall be performed under the supervision of the engineer and to his satisfaction."

The specifications contain an article on definitions and the term "engineer" is a defined term as set forth in
page 20 } the definition section of the specifications.

The Court: Thank you very much, Mr. Pershing, and when you run across any word that has a specific meaning under the definition section of the contract, I think it would be well to refer to it and explain it either in the context or at the end of your reading.

The Witness: I will come back to the definitions later.

A. (Continuing) "The work shall be performed under the supervision of the engineer and to his satisfaction. He shall decide all questions which may arise as to the quality and acceptability of materials furnished and work performed and as to the manner of performance and rate of progress of the work; all questions which may arise as to the interpretation of the plans and specifications; all questions as to the acceptable fulfillment of the contract on the part of the contractor; all disputes and mutual rights between contractors; and all questions as to compensation for items covered in the contract."

That is the first of our paragraphs.
page 21 } Do you wish me to read all of them?

By Mr. Williams:

Q. Yes, read all of Section 105.01.

A. "Accordingly, in the event of a difference of opinion between the authorized representatives of the Engineer and

the contractor concerning the meaning or the intent of the plans and specifications, or any other matter pertaining to the work, the contractor may submit details of the difference of opinion to the Engineer in writing for decision.

"Any approval by the engineer of materials, workmanship, plant equipment, drawings, programs, methods, or procedure, or of any other act or thing done or furnished by the contractor, to be done or furnished or in connection with the performance of the work, shall be construed merely to mean that at the time the engineer knows of no good reason for objecting thereto, and any such approval shall release the contractor from his full responsibility for the accurate and complete performance of the work in accordance with the contract drawings and specifications, or from any duty, obligation, or liability imposed upon him by the pro-
page 22 } visions of the contract.

"The engineer will prepare monthly a final certification as provided under Section 109.06. He will give instructions necessary to attain due and full effect of the provisions of the specifications. All materials and work shall be subject to his inspection and approval."

The matter which I have just read is all of Section 105.01 of the contract.

The Witness: Again, Your Honor, so that my statements will not be misinterpreted, the text which I have just read is clear, but possibly Your Honor had better say on the record.

The Court: No, sir.

A. (Continuing) I would like to refer to Section 105.13 of the specifications so that you will have the whole picture. It reads as follows:

"To prevent all disputes and litigations, the general manager of the Richmond-Petersburg *Tunrpike* Authority shall decide all questions when there is a dispute of whatever nature which may arise relative to the interpretation of the plans, construction, prosecution, and fulfillment of
page 23 } the contract, as to the character, quality, amount and value of any work done and material furnished under or by reason of the contract, and his estimates and decisions upon all claims, questions, and disputes shall be final and conclusive upon the parties hereto."

Now, the sections which I have just read refer in their

context to "plans and specifications," to "materials," and possibly one or two other terms which are defined terms in the portions of the specifications setting forth definitions.

Q. Now, in connection with the construction of the turnpike, Mr. Pershing, how many contracts were let by the Authority for the construction work itself?

A. They can be broken down, Mr. Williams, into several categories. The contracts which were advertised on the basis of plans and specifications and awarded to the lowest acceptable bidder numbered about seventeen, I believe. There were a good many additional contracts. We negotiated the contract for the major steel with the American Bridge Division of the United States Steel Company; we negotiated the steel contract with Bethlehem Steel Company; we have negotiated a contract with respect to communication facilities; we have negotiated a contract with respect to the

page 24 } highly technical toll-collecting facilities. We have a few other contracts of a highly specialized nature which are negotiated rather than advertised and awarded to the lowest bidder.

Q. Well, how many contracts did you actually advertise and then award to the lowest bidder?

A. About seventeen, according to my best recollection.

Q. And of those seventeen contracts, did each of those embrace an area of the turnpike itself that was to be constructed or the bridge on the turnpike?

A. It did.

Q. And I believe this contract with Thorington Construction Company that has been designated A-5-G, Section A, was for a specific mileage of the turnpike itself?

A. It was.

Q. Of these seventeen contracts, now, which you have just made reference to, the Authority and the bidding contractor were the parties to each of those contracts?

A. That is correct.

Q. In each of those contracts, was the right of supervision reserved to the consulting engineers for the day-to-day supervision and control of the work being done by those contractors?

A. That is correct.

Q. And these additional contracts would contain

page 25 } a clause similar to Section 105.01 which you have just read?

A. It is my recollection that in each one of those contracts

the specifications which I have read were a part of the contract.

Q. And it would follow that in each of those contracts Section 105.13, designating the general manager of the Turnpike Authority as referee, would also be contained?

A. That is correct.

Q. Now, getting back to your consulting engineers, as I understand your testimony, Mr. Pershing, the Authority negotiated a contract with its consulting engineers initially?

A. It did.

Q. And your own staff engineers are used to interpret either weekly or monthly reports that are submitted to the Authority by the consulting engineers?

A. That is correct.

Q. And you, as General Manager, or your other management, such as your board of directors, act upon the recommendations of your staff engineers or of your General Manager?

A. That is correct.

Mr. Williams: I have no further questions. Thank you.

page 26

CROSS EXAMINATION.

By Mr. Allen:

Q. Mr. Pershing, as I understand your testimony, the Authority itself did not undertake to perform this work of building the turnpike, but rather entered into contracts with others to do so?

A. Yes, Mr. Allen. We have no force account by which we can do our own work. Our construction work is let to contractors.

Q. Now, when it comes to your consulting engineers, you entered into no formal contract with them, but your negotiated contract is evidenced by the letters to which you have referred?

A. Being professional men, it was my understanding that they, as other professional engineers, do not accept work on a competitive basis, and therefore the Turnpike Authority considered that those engineers of national reputation which they wished to consider and, among those, selected Parsons, Brinckerhoff, Hall & MacDonald on the basis of a proposal which that firm rendered to our Authority.

John Pershing.

Q. And you did enter into an agreement with them to do the work as consulting engineers?

A. We did.

page 27 } Q. Now, with reference to the type of work done, that is, consultation, supervision, and so forth, required under your agreement with the consulting engineers, were they subject to the control of the Authority in the manner in which they performed their services, or did they use their own best professional judgment to see that the contractor complied with the specifications?

A. Maybe I had better read that proposal in that connection. I am reading from the specifications for engineering services which our consulting engineers attached to their letter of September 10 in connection with this Stage 3 of the work, Supervision of construction. The letter states:

"It is the intent of these specifications that the consulting engineers will provide complete engineering services of a high order of quality, employing thoroughly qualified, competent and experienced personnel, all equal to the best engineering practice in the profession and commensurate with the magnitude and intricacy of the work contemplated. These services shall be so complete that it will not be necessary for the Authority to supplement any of the operations by its own personnel, but the Authority reserves the

page 28 } right from time to time to establish such representatives on the work as may be, in its judgment, necessary to maintain proper liason."

Our staff engineer is our administrative officer who is appointed as being the individual, in our judgment, necessary to maintain proper liason.

Q. But, after all, the consulting engineers were to exercise their best professional judgment to see that the contract was complied with by Thorington Construction Company?

A. That is the purpose for which they were retained. That is my understanding.

Q. Now, if a dispute arose between the Thorington Construction Company and the consulting engineers as to whether the first contract was being complied with, as I understand it, that dispute might be submitted to the Authority and decided; is that correct or not?

A. Under the specifications which I read, it would be possible for a contractor and the consulting engineers to fall

into a dispute which they might bring to the general manager as an arbiter.

Q. But generally, the consulting engineers themselves, and their decisions, were the last word?

A. That is correct. We have no engineering staff, as such, in the employ of the Authority, other than our

page 29 } consulting engineers.

Q. Were those consulting engineers at liberty at all times to accept other employment as consulting engineers?

A. They were.

Q. Do you happen to know if they did accept other employment?

A. Not of my own knowledge, but, knowing the firm, it is a firm of national reputation and engages every day in engineering work.

Q. Do you know whether the consulting engineers maintained their own office where their own work was done by their own staff?

A. I will have to answer that in two ways. The plans and specifications were prepared in the New York office of our consulting engineers. Our consulting engineers had local offices for the use of their resident engineers at various locations on the turnpike.

Q. Were the employees of the consulting engineers on the payroll of the Authority, or on the payroll of the consulting engineers?

A. They were all on the payroll of the consulting engineers.

Q. Now, as to Thorington Construction Company, do you know whether or not they had full control as to

page 30 } the method of doing the work, save that it must be done in accordance with the specifications?

A. My understanding is that they were at liberty to use their own methods to bring about the completion of the work under the contract, provided they were following the specifications included in their contract.

Q. And it was the engineers who had to see that they followed the specifications?

A. That is correct.

Q. Did you exercise any control over the manner or methods in which the engineers did their work, except, of course, you had the right to accept or reject their advices?

A. It has been a fine, cooperative relationship between the consulting engineers and me. I have in some instances indicated very strongly my judgment as to how I would like

things done, and it always became their judgment and we have had no difficulty.

Q. Are you an engineer yourself, Mr. Pershing?

A. I am not.

Q. I believe you are a lawyer?

A. I am a lawyer.

Mr. Allen: I believe it was stipulated that each of these parties carried Workmen's Compensation for its own employees.

page 31 } Q. I believe it was one of the requirements of the contract that each of the parties had to carry Workmen's Compensation for its own employees?

A. That is correct.

Mr. Allen: I believe that is all I have to ask him, Your Honor.

RE-DIRECT EXAMINATION.

By Mr. Williams:

Q. Does the Authority carry Workmen's Compensation on its employees, Mr. Pershing?

A. We do, yes.

Q. Under your contracts with Thorington Construction Company and the other contractors, I believe they were required to maintain facilities for the consulting engineers to operate from, were they not, as part of their obligations to the turnpike?

A. I think that is correct, Mr. Williams, yes.

Mr. Williams: No further questions, Your Honor.

RE-CROSS EXAMINATION.

By Mr. Allen:

Q. Did Thorington Construction Company select their own employees to use in carrying out their contract?

A. They did.

page 32 } Q. Was that true also of the consulting engineers?

A. It was.

Mr. Allen: That is all.

Nathan Thorington.

By the Court:

Q. Mr. Pershing, who had the obligation and the duty to correlate the work of the several contractors on the project?

A. It was the function of our consulting engineers acting through a resident project manager.

Q. Was this resident project manager on the job at all times?

A. At all times.

The Court: Thank you, sir.

Mr. Williams: No further questions.

Mr. Allen: This may have been asked; if it was, we will forego it.

Q. Were employees of the consulting engineers on your payroll, or on their own individual payroll?

A. On their own individual payroll.

Q. Was that true also of Thorington Construction Company?

A. Thorington's employees were on Thorington's payroll.

Mr. Allen: That is all.

page 33 } The Court: The next witness.
Mr. Williams: Mr. Thorington.

NATHAN THORINGTON,

called as a witness by the defendant and being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Williams:

Q. Please state your name.

A. Nathan Thorington.

Q. What is your occupation, Mr. Thorington?

A. President of the Thorington Construction Company.

Q. Mr. Thorington, did you as president of the Thorington Construction Company, along with some co-adventurers, bid on a contract No. A-5-G that was advertised by the Richmond-Petersburg Turnpike Authority?

A. That is correct.

Q. And who were your co-adventurers?

A. Wiley N. Jackson and Robert T. Main.

Nathan Thorington.

Q. Were the co-adventurers successful in their bid to the Richmond-Petersburg Turnpike Authority?

A. Yes.

Q. And this is the contract that was awarded; is that correct?

A. It appears to be.

page 34 } Q. What feature of the work was Thorington Construction Company doing, Mr. Thorington, under this joint adventure?

A. Our portion of the work consisted of structures, which were the bridges and relative concrete work.

Q. And, as a part of your work, I believe you would drive piles for foundations?

A. That is correct.

Q. And it was in connection with that pile driving that the plaintiff in this case was injured?

A. That is right.

Q. Do you maintain Workmen's Compensation on your own employees?

A. We do.

Q. How did the co-adventurers handle their Workmen's Compensation? Did they have a blanket policy to cover the venture, or did they carry it individually?

A. The co-adventurers had a blanket liability policy, as I recall, covering the employees of the joint venture, which consisted only of the project manager and the secretary.

Q. And then the members of the venture would have their own supervisory staff?

A. That is correct.

Q. And the individual members of the venture

page 35 } also carried Workmen's Compensation?

A. That is right.

Q. Addressing yourself now to the contract that was entered into between your company and the Authority, under that contract, who had the right to supervise the work that was being done by your company and the members of this venture?

A. Well, we were directly under the supervision of Parsons, Brinckerhoff, Hall & MacDonald.

Q. Did you have a project engineer who would come to the job where you were working?

A. We did.

Q. What sort of facilities did he maintain on the job?

A. What do you mean? On each individual site?

Q. Yes, and all the various sites that you worked on?

Nathan Thorington.

A. Well, I don't think they maintained any particular facilities on each individual site. They had a building on Robinhood Road.

Q. Was that a central office—

A. I think that was a central office for several sections of the turnpike.

Q. —to be used by the consulting engineers?

A. Yes.

page 36 } Q. At whose cost and expense was that office maintained for the consulting engineers?

A. I believe, under our contract A-5-G, a part of the proposal was that we were to furnish certain furniture and equipment and maintenance for this particular office.

Q. Under your contract with the Authority, did the engineers have the right to inspect and approve your equipment as it was used?

A. I would say that they had the right. I think it is a matter of the inspector in the field as to how that is interpreted.

Q. Did the engineers directly supervise the work that was being done under your contract?

A. They did.

Q. And did they consult with you and your other staff employees about the progress of the work as it was going along?

A. That is correct.

Q. If any policies of any sort came up, or any problems arose on the job, did you go directly to the consulting engineers?

A. We did.

Q. And if you had any problems to take up with the Authority itself, would they go through the consult-

page 37 } ing engineers, or, under your contract, did you approach them directly?

A. No, we would go through the consulting engineers with all problems.

Q. And that was both engineering problems and administrative problems?

A. That is correct.

Q. Under this contract with the Authority, the engineers designated by the Authority had the right to stop any work that you were doing if they so decided?

A. They did, yes.

Mr. Williams: No further questions.

Nathan Thorington.

CROSS EXAMINATION.

By Mr. Allen:

Q. Mr. Thorington, I understand that you entered into a contract with the Authority for building a certain portion of this project known as the Richmond-Petersburg Turnpike Authority?

A. That is correct.

Q. Namely, among others, the portion on which this plaintiff was injured.

Now, you did that, of course, for a consideration?

A. I think that is very obvious.

page 38 } Q. Were you to do that work with servants of your own selection and under your own direction and control?

A. We hired our own men, yes, sir.

Q. You hired and fired your own men, and you controlled your own men?

A. Well, the Authority has the right, or the engineers have the right to reject any employee that is not satisfactory to them.

Q. The engineers had the right to say whether you were living up to the contract, that is, building the project in accordance with plans and specifications?

A. That is right.

Q. And if you did not meet the plans and specifications, whether it was through an incompetent person or for any other reason, they had a right to stop you?

A. That is right.

Q. But the objective on your part was to furnish the completed job in accordance with the plans and specifications?

A. That is right.

Q. And the objective of the engineers was to see that you did furnish the complete job in accordance with the plans and specifications?

A. That is right.

page 39 } Q. But they did not undertake to tell you whom you should employ to do that work and the method of doing that work? That was left to you, wasn't it?

A. Not altogether. We had to submit plans of our proposed method of operations on a number of jobs, and that, as I say, varies with the field inspectors. We have another contract that is covered by exactly the same specifications in which the engineers required us to submit drawings of our

machinery and methods of work in every detail. In the personnel section it was worked out in the field and we were not required to furnish details of everything.

Q. All of that was worked out to insure the completed job in accordance with the plans and specifications?

A. That is correct.

Q. Was Mr. Anderson on your payroll?

A. He was not.

Q. Your compensation policy, then, did not cover him?

A. No.

Mr. Allen: That is all.

RE-DIRECT EXAMINATION.

By Mr. Williams:

Q. As I understand it, Mr. Thorington, if your own staff engineers and you had one method of accomplishing any particular part of your contract and the method that you selected did not meet with the approval of the engineers, your method could be rejected and you were compelled to follow one approved by them?

page 40

A. They could require you to furnish an alternate method until you had finally gotten one that they approved, yes.

Q. And your own choice would be rejected in favor of their alternate method?

A. In some instances it, of course, wasn't quite as it sounded; it was a suggested method of doing it.

Q. But you had that exposure?

A. That is correct.

Q. Did you have a staff of engineers of your own?

A. We had three engineers on the job, yes.

Q. What was their job? To assist you in doing the work in accordance with the plans and specifications?

A. No: they were actually lay-out engineers, to lay out the construction and shoot the grades and lines, and they were checked by the Authority's engineers and the consulting engineers.

Q. After all, the Parsons, Brinckerhoff, Hall & MacDonald engineers were the ones to see that the completed job was in accordance with the plans and specifications?

A. Not only in accordance with the plans and specifications, but the job as it went along. They would check the alignment, and the steel and the bolts, *et cetera,* before we were allowed to pour.

page 41

James H. Wilson.

Q. But you did your work with your own employees in accordance with your own methods in getting at the result?

A. We actually laid the work out. As I say, we were not permitted to put any physical work in place until it was checked very thoroughly by Parsons, Brinckerhoff, Hall & MacDonald.

Q. To see that the job, whatever piece of work it was, when completed was in accordance with the plans and specifications?

A. To see that it was on line and grade primarily.

Mr. Williams: That is all.

Mr. Williams: The defendant rests, Your Honor.

JAMES H. WILSON,
called as a witness on behalf of the plaintiff and being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Allen:

Q. Mr. Wilson, I believe you have been sworn?

page 42 } A. Yes.

Q. What position do you occupy in connection with the consulting engineers, Parsons, Brinckerhoff, Hall & MacDonald?

A. I am the resident engineer.

Q. Were you present when Mr. Anderson was injured?

A. I was.

Q. So you know where the jury took place?

A. Yes, sir.

Q. Were you on the job as consulting engineer?

A. Yes.

Q. Did the Authority direct or control the consulting engineers in any way in the manner in which they should perform their work as professional engineers?

A. No.

Q. Were you left to exercise your best professional judgment to see that the contract or the work was performed in accordance with plans and specifications?

A. Yes.

Mr. Allen: That is all.

James H. Wilson.

CROSS EXAMINATION.

By Mr. Williams:

Q. Mr. Wilson, I hand you a document entitled "Specifications for Engineering Services for the Supervision page 43 } of Construction Stage 3," and ask you if that is the specifications and the rules that you lived under insofar as this Stage 3 work was concerned, which included the contract held by Thorington Construction Company and its co-adventurers.

A. This is the first time I have seen this.

Q. If I told you that that was given to me by Mr. Pershing, the General Manager of the Authority, as the specifications that went along with the letter of contract filed by Parsons, Brinckerhoff, Hall & MacDonald, would you say that you had never been advised as to the content of those specifications?

A. The contract specifications, I am familiar with. These are the specifications for engineering services of our company with the Authority.

Q. Yes.

A. Now, our partners would be the only ones to draw these specifications up with the Authority. I, as resident engineer, would not know about this. I am directly responsible for the specifications drawn on the contract.

Q. Under this contract?

A. Yes.

Q. And the master specifications that control the engineers' obligations to the Authority, you have no page 44 } say-so about at all?

A. I do not have, of those particular ones.

Mr. Williams: Your Honor, at this point, if Mr. Allen and I can agree that those are the specifications governing the consulting engineers, I will not have to call Mr. Pershing back, but otherwise I will.

Mr. Allen: I think Mr. Pershing said they were.

Mr. Williams: I did not so understand him.

The Court: I believe he did.

Mr. Williams: I would like to file this, Your Honor, as an exhibit on behalf of the defendant.

Mr. Allen: That is all right.

The Court: I will give you an opportunity to verify the belief that Mr. Pershing did so indicate, and if you find that it is admitted, this may be filed by stipulation; if you question

James H. Wilson.

it, Mr. Allen, then the Court will afford opportunity for presentation in the proper fashion.

By Mr. Williams:

Q. Mr. Wilson, look now to page 11, which I be-
page 45 } lieve is the first page, numbered Paragraph 2, and
read that, will you, please?

A. "Check all equipment placed on the project by the contractor and approve same prior to use."

Q. Under the obligations imposed upon the engineers which you have just read, as the resident engineer, was it your duty to inspect the equipment used by each contractor?

A. Yes, I would be the one responsible to check it.

Q. So all the equipment being used by Thorington and its co-adventurers would be checked by you before it was put into use?

A. Well, if we thought it necessary, we would check it.

Q. And if you did not approve that equipment from a safety standpoint or a design standpoint or a functional standpoint, you would so advise Mr. Thorington?

A. Yes, we would.

Q. Under your authority, he would be required to come up with a piece of equipment that met with your approval?

A. That is right.

Mr. Williams: No further questions. Thank you.

page 46 } RE-DIRECT EXAMINATION.

By Mr. Allen:

Q. Mr. Wilson, was it the object of your inspection to determine whether the equipment was adequate to do the work in accordance with the specifications?

A. That is right.

Q. Did you in any manner direct or undertake to direct or control the Thorington Construction Company as to whom they should employ and how they should do this work, other than to see that it must be done in accordance with the plans and specifications?

A. Our only object is to see that they comply with the plans and specifications. We do not tell them how to do it.

Mr. Allen: That is all.

THRAVES LOCKETT ANDERSON,
the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Allen:

Q. State your name, please, for the record.

A. Thraves Lockett Anderson.

Q. I believe you are the plaintiff in this case?

A. Yes, sir.

page 47 } Q. At the time that you were injured, were you on the job as a representative of the consulting engineers?

A. Yes, sir; I was inspector.

Q. What were your duties there?

A. To supervise the construction of driving piles and the manner they did it and record the blows for the lineal feet and figure the bearing on each piling.

Q. What was the object of that in connection with the plans and specifications?

A. Well, you had to have, I believe it is 46 blows to the foot to get the proper bearing for this piling, and that is paid for by the lineal foot, and I had to record how much the cut-off was and how many feet of piling they drove.

Q. Did you in any way control Thorington Construction Company in the matter of the employees they should have, or the manner they should do the work, other than that it must comply with the specifications in the end?

A. No, sir.

Mr. Allen: That is all.

CROSS EXAMINATION.

By Mr. Williams:

Q. You were a salaried employee of the consulting engineer; is that correct?

page 48 } A. Yes, sir.

Q. And your immediate supervisor would be Mr. Wilson, who has preceded you on the witness stand?

A. Yes, sir.

Q. In connection with this title of inspector that you had, did that include inspecting equipment used on the project as called for by this Paragraph 2 which was just read?

A. Well, if I thought that the equipment was faulty, I would turn in a report and tell the contractor.

Thraves Lockett Anderson.

Q. Or if you thought that any given undertaking, such as driving a pile, was being done improperly, as inspector or supervisor you called it to Thorington's attention, didn't you?

A. Yes, sir.

Q. That was your function there?

A. Yes, sir.

Q. To see that the piles were driven correctly and in a proper manner; wasn't that your function there?

A. Yes, sir.

Mr. Williams: No further questions.

RE-DIRECT EXAMINATION.

By Mr. Allen:

page 49 } Q. Mr. Anderson, with reference to your function there, were you concerned with the manner of doing the work, or what was done, other than to be sure that, whatever was used and whatever manner in which it was done, it was adequate to do the job in accordance with the plans and specifications?

A. I was concerned about the manner in which it was done, and I was going to stop the pile rig when this splice was broken, because they had just gotten off of it and they started hitting the pile when it was hot and that was what caused the pile to misplace.

Q. However, did you control them in their employees and whom they should employ?

A. No, sir, I had nothing to do with whom they should employ.

Q. Did you stay with them any considerable length of time in the performance of your duty to see that the plans and specifications were complied with?

A. All the time. I was with them all the time.

Mr. Allen: That is all.

Mr. Williams: No further questions.

The Court: This exhibit that you have asked the Court to mark, Specifications of Engineering Services for the Supervision of Construction, being pages 11 to 15, inclusive, shall we mark this as Defendant's Exhibit A?

page 50 }

Mr. Williams: If you please, Your Honor.

The Court: The exhibit is received and marked Defendant's Exhibit A.

Mr. Williams: It is being tendered in this form to avoid the specifications for Stages 1 and 2, which I think were part of it.

Mr. Allen: I think that is our case, if the Court please.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

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RULE 5:12—BRIEFS

§1. Form and Contents of Appellant's Brief. The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

§2. Form and Contents of Appellee's Brief. The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate references to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this Court, giving his address.

§3. Reply Brief. The reply brief (if any) of the appellant shall contain all the authorities relied on by him not referred to in his opening brief. In other respects it shall conform to the requirements for appellee's brief.

§4. Time of Filing. As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of record or the designated parts. Upon receipt of the printed copies or of the substituted copies allowed in lieu of printed copies under Rule 5:2, the clerk shall forthwith mark the filing date on each copy and transmit three copies of the printed record to each counsel of record, or notify each counsel of record of the filing date of the substituted copies.

(a) If the petition for appeal is adopted as the opening brief, the brief of the appellee shall be filed in the clerk's office within thirty-five days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. If the petition for appeal is not so adopted, the opening brief of the appellant shall be filed in the clerk's office within thirty-five days after the date printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office, and the brief of the appellee shall be filed in the clerk's office within thirty-five days after the opening brief of the appellant is filed in the clerk's office.

(b) Within fourteen days after the brief of the appellee is filed in the clerk's office, the appellant may file a reply brief in the clerk's office. The case will be called at a session of the Court commencing after the expiration of the fourteen days unless counsel agree that it be called at a session of the Court commencing at an earlier time; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

(c) With the consent of the Chief Justice or the Court, counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

§7. Effect of Noncompliance. If neither party has filed a brief in compliance with the requirements of this rule, the Court will not hear oral argument. If one party has but the other has not filed such a brief, the party in default will not be heard orally.

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