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Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 6329

In The
Supreme Court of Appeals of Virginia
at Richmond

HENDRICK CONSTRUCTION COMPANY

v.

G. E. THURSTON AND SONS, INC.

FROM THE HUSTINGS COURT OF THE CITY OF RICHMOND, PART II

RULE 5:12 BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 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. 6329

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 14th day of January, 1966.

HENDRICK CONSTRUCTION COMPANY,
Plaintiff in error,

against

C. E. THURSTON AND SONS, INC., Defendant in error.

From the Hustings Court of the City of Richmond, Part II
M. Ray Doubles, Judge

Upon the petition of Hendrick Construction Company a writ of error and *supersedeas* is awarded it to a judgment rendered by the Hustings Court of the City of Richmond, Part II, on the 26th day of July, 1965, in a certain motion for judgment then therein depending wherein C. E. Thurston and Sons, Inc., was plaintiff and the petitioner and another were defendants.

And it appearing from the certificate of the clerk of the said court that a suspending and *supersedeas* bond in the penalty of seventy-five hundred dollars, conditioned according to law, has heretofore been given in accordance with the porvisions of sections 8-465 and 8-477 of the Code, no additional bond is required.

RECORD

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page 1]

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Filed in the Clerk's Office the 31st day of July, 1964.

Teste
CHAS. R. PURDY, Clerk
By I. R. PURDY, D. C.

MOTION FOR JUDGMENT

Plaintiff, C. E. Thurston and Sons, Inc., for its motion for judgment comes now and states the following:

1. On or about January 12, 1962, Defendant, Hendrick Construction Company, Inc. (herein called "Hendrick"), a general contractor, entered into a contract with the Commonwealth of Virginia, Richmond Professional Institute of the Colleges of William and Mary, for the construction of a building described as the Science Building, Richmond Professional Institute, City of Richmond, Virginia.

2. On or about January 12, 1962, Hendrick, as principal, and Defendant, Travelers Indemnity Company (herein called "Travelers"), as surety, executed a statutory performance and payment bond in the amount of $462,000.00 in accordance with the provisions of Section 11-20 of the Code of Virginia. The form of such performance and payment bond is attached as Exhibit A.

page 2] 3. Such statutory performance and payment bond has remained in full force and effect between its obligors and obligees since its execution.

4. On or after January 12, 1962, Hendrick, as general contractor, and Dixie Plumbing and Heating Company, Inc. (herein called "Dixie"), as subcontractor, entered into a contract for the heating and plumbing work in the said Science Building.

5. Hendrick did not require and Dixie did not furnish, as

a part of such contract between them, a statutory payment bond, as required by Section 11-20 of the Code of Virginia, obligating the principal and surety on such bond to pay all persons, including Plaintiff, who had and fulfilled contracts directly with Dixie for furnishing materials in the prosecution of the work provided for in said contract between Hendrick and Dixie.

6. The contract between Hendrick and the Commonwealth referred to in paragraph 1 of this motion for judgment and the General Conditions expressly made a part of said contract imposed a duty upon Hendrick to require a bond of Dixie for the benefit of Thurston and other materialmen furnishing materials to subcontractors.

7. Hendrick was negligent in failing to require the bond as aforesaid, and as a direct result of the violation by Hendrick of the duties to Thurston and others similarly situated imposed upon him by virtue of Section 11-20 of the Code of Virginia and by virtue of the contract between Hendrick and the Commonwealth, Thurston has been deprived of the benefit of a surety of Dixie.

8. Within the scope of Section 55-22 of the Code of Virginia, certain material provisions of the contract between Hendrick and the Commonwealth were intended, in whole or in part, for the benefit of Thurston and others similarly situated.

page 3] Hendrick violated said conditions, and, as a result thereof, Thurston has been denied the specific protection contemplated by Hendrick and the Commonwealth for the protection of Hendrick and others similarly situated.

9. As a result of the failure of Hendrick to require and Dixie to furnish such statutory payment bond, Hendrick and Travelers became obligated, under the statutory performance and payment bond executed by them, to pay all persons, including Plaintiff, who had and fulfilled contracts directly with Dixie for furnishing materials in the prosecution of the work provided for in such contract between Hendrick and Dixie.

10. At various times subsequent to January 12, 1962 and through July, 1963, Plaintiff provided labor and furnished, sold, and delivered to Dixie on open account various materials which were used in the construction of such Science Build-

ing, and on July 31, 1963, the amount of $5,170.24 was justly due by Dixie to Plaintiff on such open account.

11. Such amount of $5,170.24 has remained unpaid to date and is now past due and payable.

WHEREFORE, Plaintiff demands judgment against Defendants, Hendrick Construction Company, Inc., and Travelers Indemnity Company, jointly and severally, in the amount of $5,170.24 together with interest on such amount from July 31, 1963, at the rate of 6% per year, and the costs of this action.

C. E. THURSTON AND SONS, INC.
By JOHN P. ACKERLY, III
Of Counsel for Plaintiff

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Filed: August 10, 1964

Teste: CHAS. R. PURDY, Clerk
By IVA R. PURDY, D.C.

GROUNDS OF DEFENSE OF
HENDRICK CONSTRUCTION COMPANY, INC.

Hendrick Construction Company, Inc., by counsel, comes and files the following as its grounds of defense in the above styled cause:

1. This defendant admits the allegations contained in paragraphs 1, 2, 3 and 4 of the motion for judgment.

2. This defendant avers that it entered into a contract with Dixie Plumbing and Heating Company, Inc., on January 15, 1962 and instructed said company to furnish bond in accordance with the applicable laws of the State of Virginia, and therefore denies all other allegations in the motion for judgment contained in paragraphs 6, 7, 8 and 9 of the motion for judgment.

3. This defendant further alleges that it did not receive proper notice from the plaintiff of its claim prior to payment due Dixie Plumbing and Heating Company,
page 8] Inc., in excess of the value of the services performed by the said Dixie Plumbing and Heating Company, Inc., and is therefore not liable to the plaintiff in any amount.

4. This defendant reserves the right to file such additional grounds of defense as it might be advised are necessary.

HENDRICK CONSTRUCTION COMPANY, INC.
By JOE L. MIZELL, JR.
Of counsel

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In the Hustings Court of the City of Richmond, Part II, the 26th day of July, 1965.

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The Court heretofore having heard this action upon the pleadings, the exhibits, and the Stipulation of counsel, a jury having been waived, and having considered the argument of counsel,

It is adjudged and ordered for reasons set forth in a written opinion of the Court hereby filed as a part of the Record, that the plaintiff, C. E. Thurston and Sons, Inc., do recover of the defendant, Hendrick Construction Company, Inc., the sum of $5,170.24 with interest at the rate of six percent (6%) per annum from the date of this order until paid, to which action of the Court the said defendant, Hendrick Construction Company, Inc., objects and excepts.

And the Court not being advised as to whether an appeal will be prosecuted herein, doth suspend execution upon the aforesaid judgment for a period of four months in order to permit the defendant, Hendrick Construction Company, Inc., to present its petition to the Supreme Court of Appeals of

Virginia and thereafter until such petition is acted on by the Supreme Court of Appeals of Virginia, provided said defendant, Hendrick Construction Company, Inc., shall within 15 days give or file a bond in the Clerk's Office in the penalty of $7,500.00 with surety to be approved by the Clerk of this Court conditioned in accordance with the provisions of Section 8-465 and 8-477 of the Code of Virginia.

page 12] The Court doth further adjudge and order that the plaintiff, C. E. Thurston and Sons, Inc., take nothing by reason of its claim asserted herein against the defendant, Travelers Indemnity Company, but that the said Travelers Indemnity Company do recover of the said plaintiff, C. E. Thurston and Sons, Inc., its costs expended incident to this proceeding.

Enter this Order,
MRD, Judge

* * * * *

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* * * * *

Filed 1965, July 26

Teste: CHAS. R. PURDY, Clerk
By RICHARD H. McDONALD, D.C.

OPINION

I. FACTS

Doubles, J. The plaintiff, a material-man, furnished materials to Dixie Plumbing and Heating Company (a sub-*contrctor*) for use by the latter in performance of its contract with the defendant, Hendrick Construction Company, Inc. (general contractor) in the construction of a building known as the "science building" erected at Richmond Professional Institute pursuant to a contract between the general contractor and the Commonwealth of Virginia.

By contract, dated January 12th, 1962, Hendrick contracted with the Commonwealth for the erection of the building. (A

copy of the form of contract is Exhibit No. 1). Simultaneously, Hendrick, as principal, with Travelers Indemnity Company as surety, executed a statutory performance bond in accordance with Section 11-20 of the Code of Virginia. (Exhibit #2).

Thereafter Hendrick (the general contractor) contracted with Dixie (a sub-contractor) for the heating and plumbing work. Hendrick's Grounds of Defense state, and it is stipulated at bar, that Hendrick "instructed" Dixie to post a bond in accordance with other provisions of Section 11-20 of the Code — but Dixie did not post such a bond.

Dixie contracted with the plaintiff, Thurston, to furnish certain materials for the price of $7,119.00. (Ex-
page 14] hibit #3). Thurston furnished these to Dixie on open account, and as of December 5th, 1962, the unpaid amount owed by Dixie to Thurston was $5,624.01.

Dixie became a bankrupt as of December 5th, 1962.

On December 7th, 1962, Thurston agreed with Hendrick to complete the remainder of the Thurston-Dixie contract for $1,494.99 (the balance of the contract price. See Exhibit Nos. 4 and 5). This agreement was fully performed by both parties.

Thurston received a dividend of $453.77 from the bankrupt estate of Dixie, leaving an unpaid balance of $5,170.24.

II. PLAINTIFF'S CONTENTION

The present action is by Thurston against Hendrick and Travelers Indemnity Company to recover this $5,170.24. The plaintiff's theory is multifold:

1. That Hendrick is liable for negligently failing to require Dixie to post a sub-contractors bond as required by Section 11-20 of the Code.

2. That Hendrick is liable for breach of Paragraph 17(b) of its contract with the Commonwealth of Virginia that it, Hendrick, would require Dixie to post such a bond; and that the plaintiff is a third-party beneficiary of such contract.

3. That Hendrick and Travelers Indemnity Company are liable pursuant to the provisions of their bond; and that the plaintiff is a third-party beneficiary under such bond.

III. THE STATUTE

(a). The First Paragraph

Section 11-20 of the Code has been through many revisions; in fact, the draft thereof governing this case is page 15] not in the current edition of the Code, and resort must be had to Chapter 86, page 66 of the 1958 Acts of the General Assembly.

The first paragraph of the section requires the general contractor to post a bond running to the Commonwealth (1) to guarantee "faithful performance *of the work*" by the general contractor and (2) payment by the general contractor to all persons "who have, and fulfil, contracts *which are directly* with the contractor." (Emphasis added).

The plaintiff does not come under either category of the above first paragraph. There is no dispute about the nature of the *work;* in fact the Commonwealth is the party protected under this clause. The plaintiffs' contract was directly with Dixie, and not with Hendrick; therefore, the plaintiff does not come under the second clause of the first paragraph.

The bond given in this case (Exhibit #2) is in language, which taken literally, is broader than that of the statute, viz., the bond is conditioned that "the Principal shall faithfully perform *the Contract,*" and the contract contains provisions relating to matters other than *the work* to be performed. One of these extra-work provisions is paragraph 17(b) relied on by the plaintiff. The Court is of opinion, however, that the bond itself should be construed as a statutory bond under Section 11-20 of the Code, rather than taken literally, and, therefore, is of opinion that the plaintiff cannot recover from either the defendant Hendrick or the Travelers Indemnity Company on the bond.

(b). The Second Paragraph

The second paragraph of Section 11-20 of the Code reads as follows:

page 16] "No contractor, as the lowest responsible bidder, shall subcontract any work required by the contract except under the following conditions: each subcontractor shall furnish, and the contractor shall require as

a part of the agreement between the subcontractor and the contractor, a payment bond in the amount of 50% of the work sublet to the subcontractor which shall be conditioned upon the payment to all persons who have, and fulfill, contracts which are directly with the subcontractor for performing labor and furnishing materials in the prosecution of the work provided for in the subcontract. Every such bond shall be construed, regardless of its language, as incorporating, within its provisions, the obligation to pay those persons who furnish labor or materials as aforesaid; provided, however, that subcontracts between the contractor and a manufacturer or a fabricator shall be exempt from the provision requiring a payment bond and provided further that subcontracts for less than $2,500.00 each are also exempt hereunder. Provision for said payment bonds shall be made a part of each agreement between the owner and contractor."

The intent of this paragraph is clear. In the construction of public buildings, laborers, and material-men cannot perfect mechanic liens against the sovereign. They must look elsewhere for security for their expenditures. Payment bonds, with corporate surety, are the customary vehicle used as security. The Commonwealth has recognized this in Section 11-20 of the Code, and after providing in the first paragraph for protection to itself and to sub-contractors directly in contract with the general contractor, it undertakes in the second paragraph to protect those who deal with those sub-contractors selected by the general contractor; and the burden is placed upon the general contractor to require of his sub-contractors a bond that will quarantee payment to those who furnish materials or labor to such sub-contractor.

Not only does the statute require this, but the contract entered into between the general contractor (Hendrick) and the Commonwealth required Hendrick to require such a bond of the sub-contractor (Dixie).

page 17] For whose benefit are these provisions in the statute and in the contract? The answer is perfectly obvious that they are for the benefit of those who furnish labor or materials to the sub-contractor. The bond is a payment bond and is not even for the protection of the general contractor. It is wholly for the benefit of laborers and material-men.

The burden is placed squarely upon the general contractor by the Commonwealth to see to it that these laborers and material men are thus protected against default in payment by those sub-contractors selected by the general contractor.

It is conceded at bar that size of the bond that Hendrick should have required of Dixie pursuant to the statute would have been upwards of $25,000.00.

The 1958 version of the statute contains no express provision giving laborers and material-men the right to sue general contractors who fail in their duty to require bonds of sub-contractors. This is not novel in Anglo-American jurisprudence. Where a person is under duty, be it created by the common law or by statute, he may be sued by anyone who is within the class of persons intended to be protected and who has suffered damage by reason of a violation of such duty. True enough, the statute here involved was later amended expressly giving such laborers and material-men the right to sue the contractor and the surety *on the contractor's bond* — but this is not indicative of any lack of legislative intent that a right to sue the contractor *individually* for violation of his statutory and/or contractual duty already existed. It simply added a right to sue the contractor *and his surety* on the contractor's bond, and as seen earlier herein, such legislation would be necessary in order to hold the *surety*.

page 18] IV. CONCLUSION

The plaintiff (Thurston) in contracting with and furnishing materials to Dixie (sub-contractor) had a right to assume that Hendrick (general contractor) had performed the positive duties placed upon it by statute and by the contract Hendrick had with the Commonwealth, viz., that Hendrick had required Dixie to post a payment bond.

It is no answer that Hendrick had "instructed" Dixie to post such a bond. The statute and the contract entered into by Hendrick are explicit; they "require" Hendrick, as a condition precedent to sub-contracting any work, to have the bond posted by the sub-contractor. Hendrick knew this because it says Dixie was "instructed" to post such a bond. "To instruct" one to do a thing is no substitute for "requiring" that the thing be done.

Hendrick was negligent as a matter of law for violating

the terms of a statute requiring performance of a positive duty. As a direct consequence of this negligence, the plaintiff was deprived of the security which the General Assembly has wisely specified it was entitled to. As a direct result of this loss of security, the plaintiff has suffered a loss of $5,170.24 flowing from the insolvency of Dixie, the very condition of affairs for which a bond is required. It is not contended, nor can it be seriously suggested, that this failure on the part of Hendrick was not the proximate cause of the plaintiff's loss.

And even if not negligent, Hendrick breached the provision of his contract with the Commonwealth that it would require Dixie to post such a bond. As stated earlier herein, this provision for a payment bond was inserted in the contract by the Commonwealth for the benefit in part, if indeed not wholly, for laborers and material-men who furnished labor and materials to sub-contractors. The plaintiff, as a third-party beneficiary, pursuant to Section 55-22 of the Code of Virginia, is entitled to sue thereon in its own name as fully as though it was a party thereto and furnished the consideration therefor.

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Thurston proved its claim in Dixie's bankruptcy and received the full dividend allowable for the gross unpaid balance, and this amount has been credited against the loss. Hendrick could have done no more; therefore, it is not prejudiced in this report if it be required to pay the net loss of $5,170.24.

It is the opinion of the Court, therefore, that the plaintiff is entitled to judgment against Hendrick Construction Company for $5,170.24, but the Travelers Indemnity Company is not liable to the plaintiff.

V. AN ENIGMA

The principal contention made by the defendant is that in a similar case involving a claim by Noland Company, Inc., against these same defendants for losses sustained through Dixie's bankruptcy, the Law and Equity Court of the City of Richmond denied the plaintiff a recovery, and that a peti-

tion to the Supreme Court of Appeals for a writ of error was denied on October 12th, 1964.

It is not contended by the defendants that this is *res adjudicata* (the parties being different) — but it is submitted by them that the law of that case, as evidenced by the denial of a writ of error, governs this one.

page 20] The fact that this Court comes to a different conclusion than that reached by the Law and Equity Court is merely a difference of opinion as to the law. The Court has had the benefit of the written opinion of that Court, and it is apparent from three pages thereof that the decision was reached upon the theory that the plaintiff could not sue on the bond executed by Hendrick and Travelers Indemnity Company. With that portion of the opinion this Court is in full accord. But that Court shrugged off the contentions of the plaintiff there as to the negligence of Hendricks and the third-party beneficiary doctrine in one seven-line paragraph with no reference to the rights of the plaintiff under Section 55-22 of the Code. Possibly this was due, as suggested by counsel here, to the fact that the theories of negligence and third party beneficiary were not seriously advanced.

The engima is created, however, by the refusal of the Supreme Court of Appeals to grant a writ of error. The brief of the petitioner, Noland Company, Inc., did present the same theories to the Supreme Court of Appeals as those presented here, and a serious question is presented to this Court as to the effect of the denial of a writ of error, and the traditional language of the Court's Order which states that "the said judgment (of the Law and Equity Court) is plainly right."

The denial of a writ of error, unaccompanied by an opinion other than the formal clause used in the order, could be for any one or more of a number of reasons. In a negative sort of way it does indicate to some extent the opinion of the Court as to the law involved — but admittedly

page 21] it does not have the weight of an opinion of the entire Court after a full argument at the bar of said Court.

Being firmly convinced as to the opinion expressed earlier herein that Hendrick Construction Company is liable to the plaintiff; and being in doubt as to why Noland Company, Inc., was denied recovery and a writ of error, the Court,

with respectful reluctance, will enter an order awarding judgment in favor of the plaintiff.

1965, July 26th

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Filed Aug 12 1965

Teste: IVA R. PURDY, Clerk
By R. H. McDONALD, D.C.

EXCEPTIONS

The defendant Hendrick Construction Company, Inc., excepts to the Court's order of July 26, 1965 upon the following grounds:

(1) That the holding of the Court that the defendant was negligent as a matter of law which proximately damaged the plaintiff in failing to see that a bond was posted is erroneous as there is no showing of a breach of a duty owed the plaintiff by the defendant which proximately caused the damage.

(2) That the holding of the Court that the plaintiff was a third party beneficiary of the contract between the defendant and the Commonwealth is erroneous as the evidence and record fails to show a breach of a contract made for the benefit of the plaintiff.

(3) That the failure of the Court to hold that the case of *Noland Company, Inc.* v. *Hendrick* established the law of the case was erroneous.

(4) That the Court's holding is contrary to the law and evidence.

By G. KENNETH MILLER
Of Counsel

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Filed Aug 19 1965
Teste: IVA R. PURDY, Clerk
By R. H. McDONALD, D.C.

NOTICE OF APPEAL AND ASSIGNMENT OF ERRORS

NOTICE OF APPEAL

Notice is hereby given that the defendant, Hendrick Construction Company, Inc. above named, hereby appeals to the Supreme Court of Appeals of Virginia from the order granting final judgment in favor of the plaintiff, also above named, entered in this action on July 26, 1965, which said order gave judgment in favor of the said plaintiff and against the defendant in the sum of Five Thousand One Hundred Seventy and 24/100 ($5,170.24) Dollars.

Dated this 18th day of August, 1965.

ASSIGNMENT OF ERRORS

The defendant, Hendrick Construction Company, Inc. hereby assigns the following errors:

(1) The Court erred in holding that the defendant was negligent as a matter of law which proximately damaged the plaintiff in failing to see that a bond was posted as there was no showing of a breach of a duty owed the plaintiff by the defendant which proximately caused the damage.

(2) That the Court erred in holding that the plaintiff was a third party beneficiary of the contract between the defendant and the Commonwealth as the evidence

page 25] and Record fails to show a breach of a contract made for the benefit of the plaintiff.

(3) That the Court erred in failing to hold that the case of *Noland Company, Inc.* v. *Hendrick Construction Company* established the law of the case.

(4) That the Court's holding was contrary to the law and the evidence.

HENDRICK CONSTRUCTION CO., INC.

By G. KENNETH MILLER
Of Counsel

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A Copy—Teste:

H. G. TURNER, Clerk.

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