209 VA 111

Record No. 6710

In the Supreme Court of Appeals of Virginia at Richmond

ROGER O. MOORE

v.

I. J. BREEDEN, ET AL.

FROM THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

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. 6710

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 5th day of June, 1967.

ROGER O. MOORE, Plaintiff in error,

against

I. J. BREEDEN AND HILDA BREEDEN, Defendants in error.

From the Circuit Court of Prince William County
Calvin Van Dyck, Judge

Upon the petition of Roger O. Moore a writ of error is awarded him to a judgment rendered by the Circuit Court of Prince William County on the 13th day of January, 1967, in a certain motion for judgment then therein depending, wherein Roger O. Moore, trading as Roger Moore Construction Company, was plaintiff and I. J. Breeden and another were defendants; upon the petitioner, or some one for him, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of $300, with condition as the law directs.

RECORD

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page 27 }

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SPECIAL PLEA FOR AFFIRMATIVE RELIEF

COME NOW the Defendants, I. J. Breeden and Hilda M. Breeden and file this, a special plea and affirmative defense to the motion for judgment filed against them alleging as follows:

1. That at the time the defendant, I. J. Breeden entered into the contract, they were unaware that the Plaintiff, Roger O. Moore, was not a duly licensed contractor in the State of Virginia as required by Chapter 7, Title 54 of the Code of Virginia;

2. That for failure to register as required by law, the Plaintiff ought not to recover in this action.

Respectfully,
I. J. BREEDEN and
HILDA M. BREEDEN
BY: H. SELWYN SMITH
Counsel

Filed July 20, 1966.

NANCY L. SMITH, Deputy Clerk

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page 28 }

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STIPULATION OF FACTS

The parties to this action, by counsel, stipulate and agree as follows:

1. That Roger O. Moore first made application for a license as a masonry contractor on July 1, 1963, with the State Registration Board for Contractors; that on July 19, 1963, I. J. Breeden was notified of Moore's application as a masonry

contractor and requested to comment upon the applicant's ability, quality of work and reputation for carrying out obligations; that I. J. Breeden replied on July 31, 1963, "Mr. Moore has done a considerable amount of work for us and we have found him to be very satisfactory. We like his work and the manner in which he operates,"; on July 26, 1963, Moore's application was denied; that on August 1, 1963, Moore was notified by the State Board that his application had been denied. No notification was given to I. J. Breeden of the Board's action; that on October 1, 1963, Moore's application was re-submitted, reconsidered and denied by the Board on October 30, 1963 and notification that he was not approved was given to Roger O. Moore on November 6, 1963; that application was again re-submitted on April 1, 1964, and again reconsidered by the Board on August 9, 1964 and Moore was notified on April 16, 1964, that he had again not been approved.

page 29 } On April 3, 1964, Roger O. Moore was advised that the Board was in receipt of a report that he was performing masonry work on the I. J. Breeden Apartment project and that such work exceeded the sum of Twenty Thousand Dollars, a copy of said notice to Moore was mailed to I. J. Breeden; that on April 6, 1964, Roger O. Moore replied to the Board, "The work that I am doing is by the apartment, and the full sum involved does not exceed Twenty Thousand Dollars. It is less than half that sum;" that on May 14, 1964, *John L. Breeden, Incorporated* was advised by the Board of a report that Roger Moore was being employed by John L. Breeden Incorporated on the shopping center at Culpeper which may exceed Twenty Thousand Dollars without being registered. (Counsel for I. J. Breeden agrees that such a letter was received by John L. Breeden, but does not see the relevancy or materiality to the pending suit since there is nothing to show that I. J. Breeden or Hilda M. Breeden, the Defendants in this action, had any knowledge or notice of the communication to John L. Breeden, Incorporated); that on May 27, 1964, Roger Moore was advised by the Board that it had received reports that he was contracting with John L. Breeden, Incorporated in an amount in excess of Twenty Thousand Dollars and further requested him to furnish the Board in writing by June 4, 1964, an explanation as to why he proceeded to submit a proposal and undertake the job referred to which exceeded the Twenty Thousand Dollar limits; that the letter advised of the requirements of the Virginia Code relevant to the matter and it further advised "You are also cautioned to be governed strictly by the

requirements of the law in any of your future jobs"; that on June 1, 1964, Roger O. Moore, through his attorney, Stanley A. Owens, responded to the Board's letter of May 27, 1964, stating that, "Mr. Moore tells me frankly and, I think, abjectly, that he was unaware when he bid the job that he had to be registered with your Board. He states that he will certainly not repeat his mistake"; that on July 7,
page 30 } 1964, application was resubmitted and was approved by the Board on August 1, 1964, for the issuance of a certificate of registration as a masonry contractor under Section 54-129 of the Code of Virginia and a proper certificate issued on August 3, 1964.

It is agreed by counsel that the applications made by Roger O. Moore for licensing were as a general contractor; that he was actually approved and registered as a masonry contractor.

The parties further stipulate and agree that Roger O. Moore has twice since had his license renewed, the last being on January 3, 1966.

There is no record of Roger O. Moore being notified as to being in violation of the registration law prior to his making application on July 1, 1963; however, if the Executive Secretary to the Board appeared to testify, he would testify that there is a possibility that he could have been so advised.

That by the last application for renewal of the license dated December 1, 1965 over Roger O. Moore's signature he termed himself a "Sub-Contractor" with a masonry specialty; that he denied any change in his status of his business or in the *developements* or circumstances in connection therewith, but did advise of a pending suit against I. J. Breeden for work performed which he claimed he did not get paid for, and for a claim against him by Winchester Concrete Products, Incorporated, for materials alleged to have been delivered to the I. J. Breeden job.

In answer to the question, "Has there been any change in the class or category of work you do since your current contractors registration certificate (or renewal certificate) was issued," he answered "no,".

That the initial contract relied upon by Roger O. Moore is dated June 22, 1963, signed by Moore and accepted by Breeden.

That Roger O. Moore terminated work on the
page 31 } Breeden project on June 29, 1965.

Respectfully,
ROGER O. MOORE
BY: PAUL B. ELBERT
Counsel

ROBERT B. HARRIS
Counsel

I. J. BREEDEN
and
HILDA M. BREEDEN
BY: H. SELWYN SMITH
Counsel

Filed July 20, 1966.

NANCY L. SMITH, Deputy Clerk

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page 45 }

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ORDER

This cause came on to be heard *Ore Tenus* the 28th day of June, 1966, the Defendants having filed a Special Plea alleging that the Plaintiff herein was not a licensed general contractor and prohibited from recovering in this cause; and

It appearing to the Court from the stipulations of counsel and evidence taken in this cause that the Plaintiff herein is not prohibited from maintaining this action;

WHEREFORE, it is ORDERED, ADJUDGED and DECREED that the Defendants Special Plea is hereby denied with the right reserved unto the Defendants herein to offer further evidence and law in support of the Special Plea filed herein with the Defendants exception to this ruling being duly noted; and

This cause is continued.
ENTERED the 11th day of October, 1966.

CALVIN VAN DYCK, Judge

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page 63 }

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FINAL ORDER

THIS ACTION came on to be heard on the 23rd and 29th days of November, 1966, upon the Motion for Judgment, service of process upon the defendants, the special plea of the defendants by counsel, pleading the statute on the requirement of a certificate for contractors doing work in excess of $20,000.00, i.e., Title 54, Section 142 of the Code of Virginia, upon the evidence put on in support of the plea, and upon the argument of counsel.

WHEREUPON the Court did deliver an oral opinion finding as a fact that the amount of the contract was over $20,000.00; that the plaintiff Moore did not have a license to do contracting work in excess of $20,000.00; that the evidence did affirmatively show that the plaintiff Moore had notice of the statutory requirement prior to the execution of the contract which was the basis for the action and had, in fact, applied several months before for his license and, in fact, had been turned down prior to the execution of the said contract. The Court did further find that the defendants Breeden knew before the execution of the contract which was the subject of this action, that the plaintiff Moore did not have the required license, and that the parties were in *pari delicto;* that the defendants Breeden would be barred from asserting any claim arising from the subject matter against the plaintiff Moore, but that the said defendants were not

page 64 } estopped, by paragraph Two of Title 54, Section 142, from asserting the said section as a defense.

It is accordingly the ORDER of the Court that the Plaintiff, Roger O. Moore, is barred by the statutory requirements plead, from recovering upon the contract alleged as the basis for this action and the special plea is therefore sustained and the Motion for Judgment is dismissed.

To all of the Court's rulings, the plaintiff, by counsel, noted his exceptions as being contrary to the law and evidence.

THERE being nothing further to be done, this ORDER is FINAL.

ENTERED THIS January 13, 1967.

CALVIN VAN DYCK, Judge

H. SELWYN SMITH, pd

Seen and Excepted to:
PAUL B. EBERT, pq
ROBERT B. HARRIS, pq

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page 65 }

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NOTICE OF APPEAL AND ASSIGNMENT OF ERROR

TO: The Clerk, Circuit Court of Prince William County, Virginia

Notice is given that Roger O. Moore appeals in this case.

ASSIGNMENT OF ERROR

The following errors are assigned:

The Trial Court erred in its final Decree in dismissing the Plaintiffs Motion for Judgment based on the Defendant's Special Plea (1) in that no notice was given the Plaintiff in accordance with the meaning of Title 54-142 of the 1950 Code of Virginia and in light of no proper notice in accordance with the meaning of Statute the Defendant's Special Plea should have been denied, (2) in that the evidence and law clearly show that the parties were not in *Pari Delicto* or equally guilty and the Defendants should have been estopped by the Trial Court to raise the licensing requirement, (3) in that the final Order was contrary to the law and contrary to the evidence introduced and testimony presented to the Trial Court.

ROGER O. MOORE
BY: ROGER O. MOORE
Paul E. Ebert and
Robert B. Harris,
Counsel for Plaintiff

Filed March 13, 1967.

L. E. ATHEY, Deputy Clerk.
9:45 P.M.

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page 22 }

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WHEREUPON:

ROGER O. MOORE, a witness of lawful age, being first duly sworn, testified as follows:

By Mr. Ebert:

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page 23 }

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Q. At that time what was the nature of your discussion with Mr. Breeden?

A. Mr. Breeden stated that he had eighteen apartment units he wanted to build and he wondered if I would be interested in them as a general contractor.

Q. What was your reply to him?

A. I told him that I had never done any general contracting, didn't have any experience at all, didn't have the working capital to carry a job of that size.

Q. And what was his reply to that statement?

A. He said not to worry about it. He said that he would make my pay roll every week and take care of the subcontractors and take out all licenses and permits.

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page 24 }

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Q. At the time of the discussion or at the time you executed this contract, did you have any knowledge as to whether or not you had to have a general contractor's license?

A. No, sir.

Roger O. Moore

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page 26 }

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Q. As a result of receiving this letter, did you have any discussion with anyone, any person, regarding this license?
A. Yes, sir.
Q. Who was that?
A. Mr. Breeden, Mr. I. J. Breeden.
Q. What was the nature of that discussion?
A. I took the notice that they had sent me from Richmond and showed it to Mr. Breeden, and I don't remember exactly what was said.
Anyway, I showed it to him and he knew I didn't have a license.

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page 28 }

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Q. I hand you a card and ask you if you can identify that?
A. Yes, sir. That is the building permit.
Q. What is the date on that?
A. February 28, 1964.

Mr. Ebert: I offer this.
The Judge: Do you have any objection?
Mr. Smith: No objection.

Q. At that time who obtained that building permit?
A. Mr. I. J. Breeden.
Q. Did you have anything to do with obtaining
page 29 } the building permit for these apartments?
A. No, sir.

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Roger O. Moore

page 31 }

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Q. Is there any question in your mind as to when you were first notified by the Board of being in violation of this section?

A. Pardon?

Q. Is there any question in your mind as to when you were first notified by the Board of being in violation of their licensing section?

A. No, sir. It was around the 1st of July, to the best of my knowledge.

Q. Did there come a time you sought the aid of Mr. Stanley Owens in obtaining this license?

A. Yes, sir.

Q. Did you discuss this with anybody?

A. Yes, sir, with Mr. Breeden.

Q. Do you recall when that was?

A. June 1964.

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page 34 }

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Q. You said you told Mr. Breeden when you got word from the State, when you got notice from the State?

A. Yes, sir. I did.

Q. Do you recall exactly what was said? What did you say to him and what did he say to you?

A. I told Mr. Breeden that I had received a notice from Richmond that I may have been in violation of one of their laws, that somebody had wrote and told them that I was working for Mr. Breeden, and I showed the notice to Mr. Breeden, and he said, to the best of my knowledge he said not to worry about it. He said, "They have got your thirty dollars. That is all they wanted, and they will be satisfied."

Q. What was the thirty dollars he was referring to?

page 35 } A. That was the fee for the license.

Q. Was it after that you applied for the general contractor's license?

A. Yes, sir.

Roger O. Moore

Q. You say you applied twice in 1963?

A. Yes, sir, I believe so. I think I applied four times, three or four, before I got it.

Q. Did he know of the times you applied and were turned down?

A. Yes, sir, he did.

Q. Did he make any particular statement to you at that time?

A. No, sir.

Q. Did he say anything to you at all about your situation, about your having been turned down for a license?

A. I told him that—

Q. (interrupting) And specifically as to being turned down these two times. You say you told him you had been turned down?

A. Yes, sir.

Q. Did he say anything to you at that time?

A. I beg your pardon?

page 36 } Q. Did he say anything at all to you about not having your license?

A. No, sir.

Q. I mean specifically, about your being turned down the two times? Did he say anything about that?

A. Yes, sir.

Q. Did he say anything in particular on those occasions?

A. No, sir, I can't remember anything in particular. We discussed it a few times.

Q. What did he say in the discussions?

A. Well, he usually said not to worry about it, to forget about it.

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page 38 }

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By Mr. Smith:

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Roger O. Moore

page 39 }

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Q. Now did you notify Mr. Breeden that you were going to make application for a license?

A. Yes, I did.

Q. You did?

A. Yes, sir.

Q. How did you notify him?

A. I told him that Richmond had wrote and told me that I didn't have one.

Q. Why did you call it to his attention at that time, Mr. Moore?

A. Because when they wrote and asked me about it, they said they thought I was in violation of one of their
page 40 } laws, so I thought I had better talk it over with Mr. Breeden.

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page 44 }

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Q. You told him the whole story?

A. I told him I was working for Mr. I. J. Breeden, building some apartments for him, and I—

Q. (interrupting) And what?

A. And that the Board had wrote me and notified me.

Q. What did you tell him about the requirement for the license?

page 45 } A. I don't recall.

Q. Did you know anything about the requirements for a license at that time?

A. They turned me down because I didn't have sufficient working capital, and when I got it, I don't believe I had any more working capital than when I was turned down.

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page 55 }

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WHEREUPON:

I. J. BREEDEN, a witness of lawful age, being first duly sworn, testified as follows:

By Mr. Smith:

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page 57 } Q. When was the first time you knew that he had made application for a license, Mr. Breeden?

A. I don't think I could tell you the exact dates. It was two or three years ago, but I got a letter from Richmond saying he didn't have it.

The Judge: Do you know when you got that letter?

A. No, I can't remember the exact date.

Q. I show you a letter dated July 19, 1963 with the address I. J. Breeden, Centreville Road, with the subject Moore Construction Company, and ask you if that is the letter you are referring to?

A. That is it.

Mr. Smith: Your Honor, this is the letter referred to in the stipulation and the agreement, that has been introduced.

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page 65 }

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Q. Did you ever hear Mr. Moore say he didn't have a license on two or three occasions on the job?

A. Well, each time I got a letter I always went to him and said something to him about his license.

Q. What did you tell him?

A. Well, I would just tell him he had to get his license.

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I. J. Breeden

page 73 }

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Q. Have you ever been convicted of a felony?
A. I wouldn't know what you are talking about.
Q. Have you ever been convicted of arson in Fairfax County?
page 74 } A. I wouldn't know about that now.
Q. You wouldn't know if you were convicted of a felony in Fairfax County in the 1930's?
A. Well, we had a case over there, but I couldn't tell you just how it was.
Q. You don't know whether or not you were convicted then?

Mr. Smith: Your Honor, the record shows that he was, and he never served a day's time and he was granted a pardon by the Governor of Virginia.
The Judge: Do you want to stipulate on that?
Mr. Smith: If you want to stipulate to that and make it a matter of record, that is very fine.
Mr. Ebert: That is all.

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page 80 }

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Mr. Ebert: I have certain bills here we agreed to stipulate as being the amount delivered and the total amount.
Mr. Smith: That is right, delivered to the job.
Mr. Ebert: It will save some time if we put them in.
Mr. Smith: I have no objection. I am sure he can prove each and everyone of these were delivered to the job.
This is the damage?
Mr. Ebert: That is right.
Mr. Smith: I don't see any sense in going through all that. I am sure he put it all down.

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Roger O. Moore

page 98 }

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WHEREUPON:

ROGER O. MOORE, a witness of lawful age, being first duly sworn, testified as follows:

By Mr. Ebert:

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page 105 }

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Q. Did there come a time when, during the course of this contract, Mr. Breeden started to make out checks jointly?
A. Yes, sir.
Q. When was that?
A. About May 1964.
Q. What were you working on at that time?
A. Parcel H.

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page 119 }

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Q. I think you testified there came a time he started making your checks out jointly?
A. Yes, sir.
Q. Approximately when was that?
A. May 1964.
Q. Do you have a list of checks made out jointly to you and various other people involved who worked there?
page 120 } A. Yes, I do.
Q. What is the total amount of the checks you have which were made out jointly?
A. $276,436.13.

Roger O. Moore

By The Judge:

Q. He made these out jointly?

A. Mr. Breeden, about May of 1964, approximately, started making them out jointly.

Q. Did he give you any reason for this?

A. He stated he thought he would be responsible.

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page 127 }

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Q. Mr. Moore, did you have any conversations when you first started working for Mr. Breeden regarding your financial status?

A. Yes, sir.

Q. What was that?

A. I told Mr. Breeden I did not have capital to carry a job that large and that I had never done any general contracting.

Q. What was his reply to that?

A. He said he would see all the bills were paid up and the material men and laborers when they would come due.

Q. There have been certain suits filed against you for materials delivered to this job, have there not?

A. Yes, sir.

Q. Will you run through and tell me the breakdown of the amounts and judgments rendered?

A. Winchester Concrete Products.

The Judge: Do you have a list of those too?

page 128 } A. No, I don't believe I do.

Mr. Ebert: For the record I have the file here for each suit.

The Judge: Would you be able, during the lunch recess, to have that list made? I think it would be much easier.

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page 139 }

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By Mr. Smith:

Roger O. Moore

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Q. Well, as a general contractor, did you look for a permit?
A. Mr. Breeden was to take care of all the building permits and I assumed he had taken care of them.

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page 183 }

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By The Judge:
Q. Do you know when you talked to Mr. Breeden about it?
A. No, not the exact date.
Q. Was it before the application?
A. I believe it was after, after it had been denied.
Q. Did you talk to him before you applied for the application?
A. I believe I mentioned the fact to him that I had applied for it.
Q. What did he say?
A. I don't recall his exact words.
Q. What is your best recollection of what he said?
A. He didn't think it was very important. He seemed to think all they wanted was the thirty dollars.
page 184 } Q. You say you told him after you got turned down the first time?
A. Yes, sir.
Q. What did he say then?
A. I don't recall what he said, Your Honor.
Q. Did he tell you you would have to stop working on the job?
A. Oh no, sir.
Q. Did you ever get your license as a general contractor?
A. Not as a general contractor. They gave me registration later on.
Q. You said you applied four times and were turned down three times. What happened the other time?
A. They approved it.
Q. What do you mean, they approved it?
A. They sent me a license.
Q. Do you have that with you?
A. I have a copy here, I believe.

Roger O. Moore

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page 185 }

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By Mr. Ebert:

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Q. How many different conversations did you have with Mr. Breeden regarding the fact that you had not obtained a license?

A. Probably five or six times. I don't recall the number.

Q. What was his reply, if you can recall, in any of these conversations?

A. I don't recall exactly what he said.

Q. Did he ever talk to you about the fact that you did not have a license?

page 186 } A. No, sir.

Q. He never did ask you to leave the job, did he?

A. No, sir.

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By Mr. Smith:

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page 187 }

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Q. Yes. On July 26th the application was denied and on August 4th you was notified that your application had been denied. "No notification was given Mr. I. J. Breeden of the Board's action."

A. The Board didn't tell him. I did. I told him.

Q. You told him after August 1st that you had been denied your license?

A. I told him I had been turned down.

Q. You did tell him that? Now what did you tell him?

A. I told him that I had applied for a license and that it had been denied.

Q. When did you tell him that?

page 188 } A. After I had gotten the notice from the Board in Richmond.

Q. Did you tell him you had applied for a license the first time?

A. The first time, right after I sent it in. I don't recall exactly.

Q. You don't recall that but you recall specifically the other?

A. I remember telling him, yes.

Q. At the time you started doing Deer Park Apartments, you didn't have a registration as a general contractor or a masonry contractor, did you?

A. No, sir.

Q. And you knew you were supposed to, now didn't you?

A. Yes, sir, I believe I did.

Mr. Smith: I have no further questions.

Mr. Ebert: I have just one question.

By Mr. Ebert:

Q. Mr. Breeden knew you were supposed to, too, didn't he?

A. Yes, sir.

page 189 } By Mr. Smith:

Q. Why do you say Mr. Breeden knew you were supposed to?

A. Because I showed him the papers that Richmond had sent me.

Q. What papers that Richmond had sent you?

A. Saying that I needed a license.

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page 190 }

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WHEREUPON:

I. J. BREEDEN, a witness of lawful age, being first duly sworn, testified as follows:

I. J. Breedon

page 191 } By Mr. Ebert:

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Q. How did you become acquainted with Mr. Moore?

A. He was doing some brick work on some buildings we were having done there.

Q. Where were these buildings?

A. Some of the Colonial buildings we were having done. However, he wasn't doing work for me. He was working for the contractor.

Q. Who was the contractor?

A. A couple of different contractors were there at first.

Q. Who was that?

page 192 } A. I believe Aubrey did the first group and Sexton Company did others. He was working for them.

Q. You wanted to make a contract with him?

A. What was that?

Q. How did it come about that you contracted with Mr. Moore who was doing masonry work for the other man?

A. He was working there on the job. We got to talking. We thought he could do this work so we let him try it.

Q. Did he mention anything about a license at that time when you were talking about the job?

A. I don't remember whether he needed a license or anything. I don't remember it.

Q. It was not mentioned?

A. No, sir.

Q. When you entered into this contract, it was June 22, 1963 that you signed the contract?

A. Yes, sir.

Q. Was there any mention at that time about the license?

A. No, I don't think anything was said about the license then.

Q. Did there come a time you found Mr. Moore

page 193 } was not registered for a contractor's license?

A. Yes, there was talk there about Mr. Moore would have to have his contractor's license.

Different ones were getting them. That is the time we had that conversation.

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I. J. Breedon

Q. You have been building for sometime, haven't you?
A. Yes, sir.
Q. How long have you been building these projects?
A. I have been building for myself most of the time since 1930.
Q. Did you build a shopping center out here?
A. Yes, sir.
page 194 } Q. Did you have a general contractor on that job?
A. No, but we put it out to different sub heads.

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Q. Do you recall receiving letters from Richmond, from the registration people, relative to subs having a license?
A. It seems to me I got a letter from them one time about this, and I answered it.
Q. On June 22, 1963 then you knew licenses were required of general contractors, is that correct?
A. I knew he was supposed to have one before that. I knew he had to have it.

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page 195 }

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Q. Did you know Mr. Moore made application for a license in June 1963?
A. I knew he was trying to get one.
Q. You wrote a letter to the Registration Board of Contractors saying, "Mr. Moore has been working for me and doing the work in a satisfactory manner," and so forth.
A. Yes, that was my recommendation.
Q. At that time did you tell him to get off the job?
A. No, sir.
Q. Did you know he was turned down?
A. I couldn't say that, but I knew he tried to get a license because I urged him to get it.
Q. You mentioned that he tried four times and was turned down three times?
page 196 } A. I don't think I knew this when he tried. I

I. J. Breedon

think he did try four times but I don't know when he tried.

Q. You know he was turned down the third time?

A. I am sure I knew he was trying to get it, but just how many times he was turned down, I don't know. I just knew he was trying and had been turned down three times, but just when, I couldn't say.

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page 197 }

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Q. Well, let me ask you this. Did you ever tell him he couldn't work for you without a license?

A. No, sir, I don't think so.

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page 256 }

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The Judge:

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To repeat some of the rulings I have made, Mr. Smith filed a motion pleading the statute on the requirement of a certificate, and there has been put on evidence with the Court of his plea, and the matter has been argued.

I will find that the amount of the contract was over $20,000. I will find as a fact that Mr. Moore did not have a license, despite the size of the contract. I will find that Mr. Breeden is not estopped by Paragraph 2 of Code Section

page 257 } 54-142 from asserting this section as a defense.

I think the evidence put on by Mr. Breeden and Mr. Smith does affirmatively show that Mr. Moore had notice of the section prior to the execution of the Deer Park contract and that in fact he had applied several months before for his license and in fact had been turned down prior to the execution of the Deer Park contract.

I will rule that Mr. Breeden knew, before the execution of the Deer Park contract, that Mr. Moore had applied and had been turned down, that he did not have the required license, and I will find that Mr. Moore and Mr. Breeden are in *pari delicto* in the matter.

I will find that, since Mr. Breeden *in is pari delicto,* he would be barred from asserting any claim arising from the subject matter against Mr. Moore, and you have noted your exception to that ruling and you have also noted your exception that I felt that Paragraph 2 has been complied with by Mr. Breeden and that he was not prevented from using that section as a defense.

Mr. Harris: Yes, sir.

The Judge: The remaining question is whether, since the two are both not innocent and in *pari delicto,* whether Mr. Moore can sue Mr. Breeden and recover against

page 258 } him, or whether Mr. Breeden is entitled, as a defense, to assert the matter of the license requirement, or in other words, whether Mr. Breeden is estopped from asserting that defense because he is in *pari delicto.*

The only statute provision which deals with when a person cannot use Section 54-142 as a defense is set forth in Paragraph 2 of that section, which I have held does not estop Mr. Breeden.

There are no other statutory expressions as to the circumstances when a person is prevented from using a license requirement as a defense. Perhaps the expression *expressio unius est exclusio alterius* is applicable here.

We are dealing with a specific Virginia statute and specific Virginia cases, and I feel I must be controlled by them, and the cases make it very clear that, where a contractor knowingly does work over $20,000 without obtaining the required license, that Virginia public policy is strong that he can recover neither on his contract nor on *quantum meruit.*

In my opinion, the situation is that, the parties being in *pari delicto,* that neither can press a claim against the other and that Virginia law leaves both parties where they found them.

page 259 } I have found no case in Virginia which hints that, because the second party is in *pari delicto,* that the wrongdoing contractor, whom the statute was enacted to protect against, would be given an exception and allowed to assert a claim against such other party. In my opinion, the public policy in Virginia has been spelled out very clearly by the cases, and it will be my ruling that the defense of a lack of a license can be raised by Mr. Breeden and does apply here, and I will have to sustain the plea of Mr. Breeden.

I have two brief comments. The *Rohanna* case deals with procedural matters where such a plea was made and then withdrawn and judgments entered, and not with estoppel of such. The case of *Rohanna* is 196 Va. 549, 84 S.E. 2d 440.

The case of *Waller* v. *Heans, Adm'r.,* 157 S.E. 721, has been cited, and that is also cited in the case of *Enlow* v. *Higgerson,* 113 S.E. 2nd, 855, 201 Va. 780.

In *Waller* v. *Heans, Adm'r.,* the Court tried to protect an ignorant colored person whom they felt was a victim of circumstances, and this case is cited in the *Enlow* case, stating that the Court held that equitable relief would not be denied

page 260 } to a party less guilty than the other, nor that public policy would be promoted by granting him relief.

The *Waller* v. *Heans* case also cites, on page 725, as pointed out by Mr. Harris in his brief, that in Virginia it has been held that, even though the parties are in *pari delicto,* equity will enforce an illegal contract or grant relief from it, whenever it appears that to do so would promote public policy.

I don't feel that the *Waller* case applies here. I feel that the factual situation is different, that the position of the colored man, Waller, in that case is a lot different from the contractor, Moore, in our case, and I must further note that the Court speaks that an illegal contract will be enforced whenever it appears that to do so would promote public policy.

The Supreme Court of Virginia has made it abundantly clear that, under its licensing statute, Virginia public policy is to provide an absolute bar to recovery by a contractor who knowingly does work over $20,000 without obtaining a license.

I am sure you will want to get your exceptions in the record.

page 261 } Mr. Harris: Could I make an overall exception to all rulings adverse to my client and his interest.

The Judge: All right.

(Whereupon, the hearing adjourned.)

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

INDEX TO RECORD

	Page
Writ of Error Awarded	1
Record	2
Special Plea for Affirmative Relief	2
Stipulation of Facts	2
Order—October 11, 1966	5
Judgment—January 13, 1967	6
Notice of Appeal and Assignment of Error	7
Witnesses:	
Roger O. Moore	8, 15
I. J. Breeden	13, 19
Proceedings	22