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Clerk, Supreme Court of Appeals

Record No. 7367

In the Supreme Court of Appeals of Virginia at Richmond

DAVID R. HIPP

v.

SADLER MATERIALS CORPORATION

FROM THE COURT OF LAW AND CHANCERY OF THE CITY OF NORFOLK

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.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 7367

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 3rd day of December, 1969.

DAVID R. HIPP, Plaintiff in error,

against

SADLER MATERIALS CORPORATION, Defendant in error.

From the Court of Law and Chancery of the City of Norfolk
Walter A. Page, Judge

Upon the petition of David R. Hipp a writ of error and *supersedeas* is awarded him to a judgment rendered by the Court of Law and Chancery of the City of Norfolk on the 12th day of May, 1969, in a certain motion for judgment then therein depending, wherein the said petitioner was plaintiff and Sadler Materials Corporation was defendant; upon the petitioner, or some one for him, entering into bond with sufficient security before the clerk of the said court below in the penalty of $300, with condition as the law directs.

RECORD

page 1 }

* * * * *

MOTION FOR JUDGMENT

* * * * *

The plaintiff, David R. Hipp, moves the Honorable Judge of the Court of Law and Chancery of the City of Norfolk, Virginia, for a judgment and award of execution against the defendant, Sadler Materials Corporation, a corporation, for the sum of thirty-five thousand ($35,000.00) Dollars, which sum of money is due the plaintiff from the defendant, with interest at the rate of six (6) per cent from March 15, 1968, for this, to-wit:

1. On the 15th day of March, 1968, the plaintiff was lawfully and properly on the premises of the Lake Wright Motel in the City of Norfolk, Virginia.

2. On the said date the defendant owned, operated and controlled a motor vehicle which was proceeding on the premises of the Lake Wright Motel in the City of Norfolk, Virginia.

3. As a result of the negligence of the defendant in the operation and control of its motor vehicle, it was caused to come into violent contact with a scaffold on which the plaintiff was working causing the plaintiff to fall and receive serious and permanent injuries.

4. The plaintiff was caused to suffer and in the future will be caused to suffer great physical pain and mental anguish.

5. The plaintiff was caused to expend and he will in the future be caused to expend a large sum of money in an endeavor to be healed and cured of said injuries.

6. The plaintiff was caused to lose and he will in the future be caused to lose large sums of money which he otherwise would have earned.

page 2 } 7. The plaintiff was caused to be unable and he will in the future be unable to perform his necessary and lawful affairs.

David R. Hipp,

By L. David Lindauer
Of Counsel

* * * * *

Filed in the Clerk's Office the 23rd day of Sep., 1968.
Teste:
Katherine V. Respess, Clerk
W. K. McCrory, D. C.

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SPECIAL PLEA TO THE JURISDICTION

The defendant, Sadler Materials Corporation, says that this Court has no jurisdiction over the subject matter of plaintiff's claim against it, but that on the contrary, plaintiff's sole and exclusive remedy for his injuries and damages allegedly sustained by reason of the accident set forth in the motion for judgment is under the Virginia Workmen's Compensation Act, and the Workmen's Compensation Commission of Virginia is the sole court or tribunal to which the plaintiff could or can apply for relief. And, as the grounds of their said plea, the defendant say:

1. That the defendant, Sadler Materials Corporation, was employed by John Wright & Son, a partnership, to furnish materials to be used in the construction of a building to be located adjacent to the Lake Wright Motel in the City of Norfolk, Virginia.

2. That C. G. Conner and J. E. Stephenson, trading as Quality Masonry Company, was also employed by John Wright & Son, a partnership, to construct the aforesaid building.

3. That the plaintiff, David R. Hipp, was an employee of the said C. G. Conner and J. E. Stephenson, trading as Quality Masonry Company, during the construc-
page 5 } tion of said building and was allegedly injured while acting in the scope of his employment in the construction of the aforesaid building.

4. That the plaintiff has made a claim against his employer, the said C. G. Conner and J. E. Stephenson, trading as Quality Masonry Company, for benefits under the Virginia Workmen's Compensation Act, and has been and is being paid those benefits to which he is entitled under the Act.

5. That the defendant, Sadler Materials Corporation, and C. G. Conner and J. E. Stephenson, trading as Quality Masonry Company, were performing work in the course of the trade, business or occupation of John Wright & Son, a part-

nership, in the construction of said building, at the time of the alleged injury to the plaintiff.

6. The plaintiff having been injured in the course of his employment and having his exclusive remedy pursuant to the Workmen's Compensation Act of Virginia and under the authority of the Industrial Commission of Virginia, Department of Workmen's Compensation, this Court has no jurisdiction to entertain any claim of the plaintiff against Sadler Materials Corporation.

The defendant, Sadler Materials Corporation, hereby requests a reply to the allegations contained in paragraphs 1 through 5 of this plea.

Wherefore, this defendant says that this Court does not have any jurisdiction over the subject matter of this action and that the same should stand dismissed as to it.

Sadler Materials Corporation
By Ralph E. Lawrence

* * * * *

Court of Law and Chancery
Filed Oct 14 1968
By: K. R. Hinderliter, D. C.

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ANSWER

For his Answer to the Special Plea to The Jurisdiction filed herein, the plaintiff answers and states as follows:

1. The plaintiff admits that the defendant, Sadler Materials Corporation, was engaged in delivering materials which were to be used in the construction of a building to be located adjacent to the Lake Wright Motel in the City of Norfolk, Virginia, but denies that the defendant, Sadler Materials Corporation, was an employee of John Wright & Son, a partnership.

2. The plaintiff admits that Quality Masonry Company was engaged in the construction of the aforesaid building, but the said Quality Masonry Company was not an employee of John Wright & Son, a partnership.

3. The plaintiff admits that he was an employee of Quality Masonry Company and was acting in the scope of his employment at the time he was injured.

4. The plaintiff admits that he has made a claim under the Virginia Workmen's Compensation Act, and has been and is being paid benefits under this Act.

5. The plaintiff denies that the defendant, Sadler Materials Corporation, was performing work in the course of the trade, business or occupation of John Wright & Son, a partnership, in the construction of said building, at the time of the alleged injury to the plaintiff.

page 8 } The plaintiff further moves that the Court strike the Special Plea To The Jurisdiction filed herein, by the defendant, and require the defendant to file his Answer and Grounds of Defense.

David R. Hipp

By L. David Lindauer
Of Counsel

* * * * *

Court of Law and Chancery
Filed Oct 30 1968
By: K. R. Hinderliter, D. C.

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STIPULATIONS OF FACT

1. John C. Wright and Son, a partnership, was under contract with Lake Wright Playhouse, Inc. to construct and lease to Lake Wright Playhouse, Inc. a building. The building was to be built from plans and specifications furnished John C. Wright and Son by Lake Wright Playhouse, Inc.

2. John C. Wright and Son contracted with Quality Masonry Company to do the masonry work, with Theodore Griffin to do the concrete finishing, and with Sadler Materials Corporation for the concrete to be poured into the forms and footings of the project.

3. John C. Wright and Son's contract with Sadler Materials Corporation called for delivery to the job site of concrete of specified strength to be poured into forms and footings where directed by the concrete finishing subcontractor.

4. Sadler Materials Corporation designed the mix of the concrete to be delivered to meet the strength specifications of John C. Wright and Son. This concrete was delivered to

the job site in "ready-mix" trucks owned by Sadler Materials Corporation and driven by its employees,
page 13 } and was poured from the truck by the driver where directed by the concrete-finishing subcontractor.

5. On March 15, 1968, Sadler Materials Corporation delivered to the job site a ready-mix truck load of concrete meeting said specifications, the truck being driven by Bernard Hayes, its employee.

6. Bernard Hayes delivered and poured the concrete where instructed by the concrete-finishing subcontractor at the job site.

7. After pouring the concrete, Bernard Hayes drove the ready-mix truck away from the building site.

8. During the process of driving the ready-mix truck from the building site, plaintiff, an employee of Quality Masonry Company working on a scaffold, alleges that the ready-mix truck struck the scaffold, thereby causing the injuries complained of.

Sadler Materials Corporation

By Ralph E. Lawrence
Of Counsel

David R. Hipp

By L. David Lindauer
Of Counsel

Court of Law and Chancery
Filed Apr 21 1969
By: W.K .McCrory

page 14 } April 21, 1969

L. David Lindauer, Esq.
Bangel, Bangel & Bangel
Law Building
Portsmouth, Virginia 23704

Ralph E. Lawrence, Esq.
Williams, Worrell, Kelly & Worthington
Virginia National Bank Building
Norfolk, Virginia 23510

Re: Hipp v. Sadler Materials Corp.
At Law #5062

Gentlemen:

This action is before the court on defendant's special plea to the jurisdiction alleging that defendant was not an "other party" or stranger to a certain building contract (Code § 65-38) and that plaintiff's exclusive remedy is before the Industrial Commission of Virginia under the provisions of the Workmen's Compensation Act. (Code § 65-37). The pleadings, the stipulation of the parties and the deposition of John C. Wright present for consideration the following factual situation:

John C. Wright and Son was the prime contractor for the construction of a playhouse theatre in the city of Norfolk. As customary, Wright engaged in the work several subcontractors, including plaintiff's employer Quality Masonry Corporation. The defendant, Sadler Material Corporation, supplied the "ready-mix" concrete to the job site in its motor vehicles that were operated by its employees. Sadler had no subcontract with Wright. Nevertheless, Sadler was required to follow Wright's specifications as to concrete mix ingredients; was required to pour the mix in forms and footings preinstalled at the job site; and its employees in doing so were required to follow the directions of the subcontractor concrete finisher (Theodore Griffin). On March 15, 1968, Sadler made a delivery to the job site, and its employee poured the concrete in the footings where instructed and directed. The driver, while driving from the *building* site, struck a scaffold upon which plaintiff was working and injured him.

page 15 } In order to perform under the contract, the prime contractor and the subcontractor were required to complete the concrete work—hence it was part of their trade, business or occupation. If the services of Sadler (or other "ready-mix" companies) could not have been had, then the prime and subcontractor would have been bound to doing the work themselves. It would have been incumbent upon them to mix the concrete on the site and pour it into the footings.

It is settled law that mere suppliers of material are not ordinarily engaged in "the trade, business or occupation" of the general or other contractors. However, if during or after delivery of the materials the supplier performs any of the contractors' duties or obligations, then he is not an "other party" or stranger to the work.

The court is of the opinion that this action falls clearly within the ambit of the principles stated in *Bosher* v. *Jamerson,* 207 Va. 539, and *Floyd, Administratrix* v. *Mitchell,* 203

Va.269. In *Bosher* the supplier was held not to be a stranger to the work where after dumping a load of sand at the site he spread it as a subbase for a concrete floor as required in the general contract. In *Floyd* the defendant, a mere supplier of transport trucks, was held not to be an "other party" because "at the time of the accident, Mitchell was engaged in a central part of Glamorgan's (Pipe and Foundry Company) business, the loading of pipes on vehicles for transportation to its customers."

As the plaintiff did in *Bosher*, our plaintiff relies upon the finding of the court in *Shook Company* v. *Barksdale,* 206 Va. 45. But in distinguishing the two cases the Court of Appeals said, "The decision in the *Shook Company* case turned on the fact that Bolt and his employee Barksdale (the plaintiff) had no obligation to unload the truck. Buffalo Shook's employee, by unloading the truck, did not become engaged in the trade, business or occupation of Bolt. The defendants, Buffalo Shook and its employee, were therefore 'other parties.'" It can be seen, therefore, that when anyone on a job site is *obligated* to perform any work of a contractor in the ascending scale he is not an 'other party." In this case Sadler was under an obligation to fill the forms and footings as directed and instructed by the contractors.

The court has considered the well-reasoned memorandum opinion filed in *Porter* v. *Cardinal Erection Cor-*
page 16 } *poration* in the Circuit Court of the City of Portsmouth on March 11, 1968. (Henry W. MacKenzie, J.). But as in *Bosher,* the case turned on the court's finding that "There was no obligation on the part of Tidewater to unload the steel at the job site . . ."

An order sustaining defendant's plea to the jurisdiction may be presented for entry, preserving to plaintiff his exception.

Sincerely yours,

Edward L. Ryan, Jr.
Judge

* * * * *

Court of Law and Chancery
Filed Apr 21 1969
By: W. K. McCrory, D. C.

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ORDER

This action came on to be heard upon the plea to the jurisdiction heretofore filed by the defendant, Sadler Materials Corporation, and was argued by counsel.

And the court being of the opinion that the said plea to the jurisdiction ought to be sustained, it is accordingly so ordered and said action is hereby dismissed as to the defendant, Sadler Materials Corporation, to which action of the court, the plaintiff by counsel duly excepted.

Enter this order:
May 12, 1969

WAP
Judge

We ask for this:
Ralph E. Lawrence, p.d.

Seen and exception noted:
L. David Lindauer, p.q.

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ASSIGNMENTS OF ERROR

Pursuant to the abovementioned Rule, the plaintiff, David R. Hipp, assigns the following errors:

1. The Court erred in sustaining the defendant's Plea To The Jurisdiction.

2. The Court erred in finding that the defendant was not an other party or stranger and in ruling that the plaintiff's exclusive remedy was before the Industrial Commission of Virginia, under the provision of the Workmen's Compensation Act.

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David R. Hipp

By L. David Lindauer
Of Counsel

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Court of Law and Chancery
Filed Jun 12 1969
By: W. K. McCrory

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Arlington, Virginia
Friday, November 22, 1968

Deposition of John C. Wright, taken on behalf of the defendant in the above-entitled action, at the office of John Wright & Son, Arlington Trust Building, 1515 North Courthouse Road, Arlington, Virginia, pursuant to notice, beginning at 10:05 o'clock, a.m. before Leone M. Vialpando, a notary public in and for the County of Arlington, Commonwealth of Virginia, when were present on behalf of the respective parties;

For the Plaintiff:

David B. Kinney, Esq.,
Kinney, Smith and Barham
2007 N. 15th St.
Arlington, Va. 22216

For the Defendant:

Ralph E. Lawrence, Esq.,
Williams, Worrell, Kelly & Worthington
1700 Virginia National Bank Bldg.
Norfolk, Virginia 23510

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JOHN C. WRIGHT, was called for examination by counsel for the defendant, and having been first duly sworn by the notary public, was examined and testified as follows:

EXAMINATION BY COUNSEL
FOR THE DEFENDANT

By Mr. Lawrence:

Q. Will you state your name and address, please?

A. John C. Wright. I live at 1701 North Kent in Arlington.

John C. Wright

Q. Mr. Wright, what is your relationship with the partnership known as John C. Wright & Son?
A. I'm a partner.

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Q. Mr. Wright, did you have occasion to engage certain individuals and firms and corporations to assist you in the construction of these premises?
A. Yes.
Q. What firms and individuals and corporations did you employ to do this work for you?
A. Well, there were a number of different sub-contractors.
Q. Were you acting as general contractor?
A. Yes.
Q. What were the names of some of the sub-contractors involved?
A. Oh—let's see—Harry M. Brown did the heat-
page 6 } ing and air conditioning. Harry F. Brown did the plumbing. Quality Masonry did the masonry work.
Q. Was the name of the concrete finisher Theodore Griffin?
A. Theodore Griffin contracted with us to do the labor and finishing of the concrete.
Q. Was Sadler Materials Corporation a sub-contractor on this job?
A. Not as such. They sold us the concrete material.

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EXAMINATION BY COUNSEL
FOR THE PLAINTIFF

By Mr. Kinney:
Q. What were the duties of Sadler Materials Corporation, Mr. Wright?
A. They sold us and delivered concrete to this Playhouse that we built.

John C. Wright

Q. Were they required under any conditions that you imposed to spread or finish the concrete?

A. No.

Q. Would they deliver the concrete to wherever the masonry contractor specified?

A. They delivered it wherever our concrete finisher specified.

Q. Was it the duty of the truck driver at any
page 9 } time who delivered the concrete to spread or finish
the concrete?

A. It was his duty to pour the concrete but not to finish it. They poured it from the truck in the footings.

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Q. Would it be fair to say that when Sadler Materials Corporation dropped off the concrete, wherever you told them, that their job was finished?

A. Yes, provided the concrete met our strength specification.

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

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