2016: A Busy Year for the Supreme Court of Virginia, Including 2 Significant Decisions for the Construction Industry

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If you are a design professional providing services in Virginia, or a general contractor on a public works project for the Commonwealth of Virginia, you need to know of two Virginia Supreme Court decisions in 2016. You ask why? The answer is because your current practices and protocols may expose you to the same risks and liabilities that the design professional and general contractor experienced respectively on the projects the Virginia Supreme Court addressed in its two decisions. Now is the time to learn of these decisions and to review and, if appropriate, modify your practices to avoid the same risks and liabilities.

The first decision is William H. Gordon Associates, Inc. v. Heritage Fellowship Church, 291 Va. 122, 784 SE2d 265 (2016), which involved an array of construction issues, including the duty of care that design professionals owe when preparing construction plans and specifications. The second decision is Hensel Phelps Construction Company v. Thompson Masonry Contractors, Inc., 791 SE2d 734 (Va. 2016), in which the Court limited the effect of the general contractor?s flow-down clause in its subcontracts and rejected the general contractor?s indemnity claim against its subcontractor.

William H. Gordon Associates, Inc. v. Heritage Fellowship Church, and A Design Professional?s Duty of Care

In this case, Heritage, a church located in Reston, Virginia, contracted with the Gordon firm to provide engineering services for the site on which the Church?s new sanctuary would be built. The services included designing a storm water management system for the site. The Gordon engineer assigned to the project selected a rain tank system that was relatively new to the industry. Unfortunately, the engineer had no experience with the system and ?cut and pasted? the plans and specifications for the rain tank system that the rain tank vendor had provided into the design documents for the project. The engineer admitted at trial that he did not fully understand many aspects of the rain tank specifications and plans he ?cut and pasted? into the design documents.

While installing the rain tank system, the building contractor became concerned that the system was ill-

suited for the site and requested additional information. Relying on information that the rain tank vendor provided, the Gordon engineer dismissed the contractor?s concerns. The contractor proceeded to install the rain tank system and then paved over the installation as part of the construction of a new parking lot. Shortly after that installation and paving, the rain tank and parking lot above it collapsed. The Church sued the general contractor and engineer for the damages caused by the collapse, including the cost to install a new storm water management system.

Following an eight-day bench trial with over 20 witnesses, the trial court ruled that the engineer Gordon breached the duty of care because its engineer merely ?cut and pasted? the rain tank?s product specifications into the design without ?understand[ing] the specifications.? Despite evidence showing that the contractor did not strictly or fully comply with Gordon?s plans, the trial court concluded that Gordon?s breach of the standard of care was the proximate cause of
the collapse.

Gordon appealed the ruling on the narrow ground that the evidence was insufficient to establish that any breach of the professional standard of care proximately caused the rain tank to collapse.

The Supreme Court affirmed the trial court?s ruling on the issue, concluding that there was sufficient evidence to establish that the engineer violated the standard of care and the breach was the proximate cause of the rain tank collapse and the resulting damage. The Court noted that Heritage offered expert testimony that Gordon breached the standard of care by (1) incorporating the manufacturer?s unverified literature into the design, (2) failing to fully understand the design, (3) failing to consider the unusually high water table, (4) failing to provide quality oversight during construction to ensure that the elements of the plan were being verified and executed, and (5) failing to reexamine the original plan when the contractor requested information from the engineer. The Court also found the evidence sufficient to support the trial court?s finding that the breach of the standard of care was the proximate cause of the rain tank collapse.

Design professionals and project owners should note that the Supreme Court?s ruling was closely tied to the particular facts of the case, and, because the appeal was from a bench trial, the trial court?s ruling could not be disturbed so long as there was some evidence in the record to support the judgment. Based on these circumstances, the Court had no difficulty concluding that there was an evidentiary basis for the trial court?s ruling, especially given that the engineer admitted that he did not understand the specifications for the rain tank system, yet he nonetheless ?cut and pasted? those specifications into the design documents.

While this case was pending the appeal process, design professionals had expressed concern that the Court might accept the argument of the project owner, Heritage, that Virginia licensed design professionals breach the standard of care if they adopt into their sealed design documents the general plans and specifications for a product prepared by a non-engineer manufacturer. The Virginia Supreme Court neither accepted nor rejected that contention.

Hensel Phelps Construction Company v. Thompson Masonry Contractors, Inc.; No Limitations Protection Against Lawsuits By The Commonwealth

The second decision, issued in November 2016, arose from a project the general contractor, Hensel Phelps, had completed some 16 years earlier at Virginia Tech. Virginia Tech is a public, state owned university, and, as such, the University, like other agencies of the Commonwealth, is not subject to any statutory limitations period on claims by the Commonwealth.

The construction at issue in the case, a student health and fitness center, began in 1997 and was substantially complete in 1998, and all work was complete by June 2000. Years after completion, defects were discovered, and Virginia Tech repaired or replaced the defective work at a cost that Virginia Tech claimed to be in excess of $7.0 million. In April 2012, Virginia Tech claimed recovery of its repair and replacement costs against Hensel Phelps. Virginia Tech and Hensel Phelps eventually settled, with Hensel Phelps paying Virginia Tech some $3.0 million. Hensel Phelps then filed a lawsuit against its subcontractors who had performed the defective work, asserting breach of contract and indemnification.

The subcontractors defended on the basis that Hensel Phelps? lawsuit was long outside Virginia?s five year statute of limitations on contract actions. The trial court agreed with the subcontractors and dismissed Hensel Phelps? lawsuit.

On appeal to the Supreme Court, Hensel Phelps argued that the ?flow-down? clause in its subcontracts flowed-down to the subcontractors the obligations that Hensel Phelps owed to Virginia Tech under the prime contract, including the obligation to respond to a Virginia Tech claim at any time. The particular subcontract clauses that Hensel Phelps relied upon were (1) the subcontractor?s incorporation by reference clause, found in most subcontracts, incorporating the prime contract into the subcontract, and (2) the subcontract language: ?The subcontractor is bound to the contractor by the same terms and conditions by which contractor is bound to Virginia Tech.?

The Supreme Court rejected Hensel Phelps? flow-down argument. The Court reasoned that, under Virginia law (like many other states), a waiver of rights must be shown by proving the party giving up its rights (here the subcontractor) has knowledge of the rights to be waived and intends to give up those rights. Hensel Phelps? incorporation by reference subcontract clause and generally worded flow-down clause were not sufficient; there being no express statement by the subcontractor waiving its right to rely on the statute of limitations.

As a fall back argument, Hensel Phelps argued that it was entitled to indemnification by the subcontractors. The Court found Hensel Phelps? express indemnification clause in its subcontracts, however, to be void under Virginia law. The clause included indemnification of Hensel Phelps for any act, error, omission or negligence of Hensel Phelps resulting in damages or losses to Hensel Phelps; thus calling for indemnification for Hensel Phelps? own negligence, a fatal flaw under Virginia law. When Hensel Phelps turned to other subcontract clauses requiring the subcontractor to indemnify Hensel Phelps, the Court determined those clauses to be ineffective, particularly when it was clear that the parties had expressly otherwise agreed to an indemnification clause, although a clause void under Virginia law.

The take away for general contractors from this second decision is the wisdom of reviewing their

?standard? subcontracts before using those ?forms? on their next project. Are the terms drafted to obligate the subcontractor(s) to the same extent and for the same time that the general contractor obligated itself to the project owner, is the indemnification clause enforceable under the law applicable to the subcontract, and does the indemnification clause survive termination or close-out of the prime contract?

3. Conclusion

General contractors? practices and procedures may have been sufficient in the past; but that should not dissuade them from periodically reviewing those practices and procedures and modifying them, if appropriate, to better protect their interests now and in the future.

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