

DECISION COULD CHANGE HOW CONTRACTORS SUE VDOT



A contractor seeking to recover from the Virginia Department of Transportation and from subcontractors can sue them together in one proceeding, a Portsmouth circuit judge has ruled.

VDOT long has claimed that as an arm of the state it has sovereign immunity, which prevents it from being joined in a lawsuit with other defendants.

The result is often litigation that can be “very expensive and time-consuming,” said Norfolk lawyer W. Ryan Snow, counsel for the contractor and president-elect of The Virginia Bar Association.

But Portsmouth Circuit Judge Joel P. Crowe found in *Ryan Construction Co. Inc. v. VDOT* that nothing in the Virginia Code or the Rules of Court prevents joinder of VDOT with other defendants.

The decision “will impact litigation around the state,” Snow said. It certainly will “impact lawyers’ strategies” when they sue VDOT, he added.

PROTECTING THE BRIDGE

The suit arose out of contracts to replace the fender system that protects the West Norfolk Bridge from vessel traffic passing through the Elizabeth River channel.

Ryan Construction was hired to remove the old wooden fenders and install fiber-reinforced composite materials. The project, worth \$3.7 million, was completed after several delays in June 2020.

Then the litigation started. Ryan Construction finished the work and submitted a claim to VDOT. The 10 claim items sought payment of more than \$1.9 million and removal of \$661,500 in liquidated damages that VDOT assessed because the project was completed more than 500 days after the scheduled completion date. VDOT refused the claim.

Ryan Construction filed suit against VDOT and two subcontractors for indemnity.

In its demurrer, VDOT argued that as an arm of the state, sovereign

immunity prevents it from being joined with any other parties.

The judge reviewed Virginia Code and prior case law and found that the commonwealth is “as liable for its contractual debts as any citizen would be.” The code spells out where and how a civil action can be brought against VDOT. Rule 3:12 of the Rules of Court, Crowe wrote, “specifically permits joinder of additional parties in civil actions.”

He wrote, “Neither Virginia Code §§ 33.2-1101 through 33.2-1104 nor any of the Rules of Court specifically prevent the Commonwealth from being joined” with other parties.

Crowe concluded in a breach of contract case against VDOT, “sovereign immunity does not prevent VDOT from being joined with subcontractors as alternative defendants.”

Snow noted that in the case, Crowe made several significant rulings. The sovereign immunity finding was the most significant. But another joinder issue was worth considering.

VDOT and one of the subcontractors, a company called Composite Advantage, argued that they should not be joined as defendants: The claims against VDOT for breach of contract and claims against Composite Advantage for breach of warranty and contract, they said, were separate and did not arise from the same transaction or occurrence.

Crowe found that it did not matter that the breach of contract claims against the two defendants arose from “different contracts entered into at different points in time.”

What mattered, the judge said, was that both claims “stem from a common overriding purpose – [Ryan Construction’s] efforts to complete the Fender Project pursuant to its contract with VDOT.”

The facts giving rise to both claims “orbit around” Ryan Construction being paid for its work. The claims arise out of the same transaction, he found, and joinder was proper.

Senior Assistant Attorney General Chandra D. Lantz, who led the team representing VDOT, did not respond to a request for comment. ■



Paul Fletcher

is executive director of The Virginia Bar Association. He began that role in September 2021 after 32 years as publisher of *Virginia Lawyers Weekly*. A law school graduate of Washington and Lee University, he formerly was an attorney in Abingdon and Bristol, Virginia. He joined the VBA in 1992 and served on its Committee on Special Issues of National & State Importance from 2011 until taking on his current role.