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Annual Survey of Virginia Law: Construction Law

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CONSTRUCTION LAW

*James R. Harvey, III**

I. INTRODUCTION

Developments in Virginia construction law during the year 1999-2000 were more modest than those of 1998-1999. Still, several decisions by the Supreme Court of Virginia, the Virginia Court of Appeals, and the United States Court of Appeals for the Fourth Circuit justify the attention of those involved in the construction industry and its related legal practice. These cases address topics involving mechanic's lien waivers, the bar of sovereign immunity, recovery of direct and consequential damages, surety obligations, tortious interference with the bid process, and sanctions by the Virginia Board of Contractors. The majority of these cases demonstrate that the appellate courts are more likely to rule based upon the totality of the facts that define the contractual relationship rather than relying upon some particular and discrete phrase in the contract as the determinative factor.

II. CASES FROM THE SUPREME COURT OF VIRGINIA

A. *Direct or Consequential Damages*

In what will likely be the most significant construction case of last year, *Blue Stone Land Co. v. Neff*¹ provides much needed guidance as to whether certain elements of a claim qualify as direct or consequential damages.² Blue Stone Land Company ("Blue Stone"), looking to develop its land, contracted with Neff to con-

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1. 259 Va. 273, 526 S.E.2d 420 (2000).
2. See *id.* at 278-79, 526 S.E.2d at 519.

struct a road between their adjacent properties.³ Neff sued Blue Stone when Blue Stone refused to pay Neff the contract balance.⁴ Blue Stone refused payment on the basis that Neff's failure to complete the road in a reasonable amount of time constituted a material breach of the contract and caused Blue Stone to incur damages, including the cost of providing access to Blue Stone's lots through the construction of another road.⁵ The trial court granted Neff's motion in limine and refused to allow Blue Stone to present evidence of damages for the cost of constructing the alternate road reasoning that such damages were special damages that should have been pled specifically.⁶ As a result, the court struck Blue Stone's claim, and a jury granted judgment for Neff in his action.⁷

The Supreme Court of Virginia reversed, concluding that the damages Blue Stone sought for the alternate road were direct damages and did not require special pleading.⁸ Citing a previous holding, the court distinguished direct and consequential damages on the following basis:

Direct damages are those which arise "naturally" or "ordinarily" from a breach of contract; they are damages which, in the ordinary course of human experience, can be expected to result from a breach. Consequential damages are those which arise from the intervention of "special circumstances" not ordinarily predictable.⁹

Finding that Blue Stone's claim involved "a garden-variety type of breach of contract," the court determined that there were no special circumstances present that would convert the resulting damages from general to special.¹⁰

According to the supreme court, each party understood the risks of a breach in performance because they were both develop-

3. *Id.* at 275, 526 S.E.2d at 517.

4. *Id.*

5. *Id.* at 276, 526 S.E.2d at 517.

6. *Id.* at 277, 526 S.E.2d at 518. The trial judge stated: "I consider damages for construction of an alternate route to [Blue Stone's] property to be special damages which should have been pled specially . . . and it's too late to change it now on the eve of trial." *Id.*

7. *Id.*

8. *Id.* at 278, 526 S.E.2d at 519.

9. *Id.* at 277-78, 526 S.E.2d at 519 (quoting *Roanoke Hosp. Ass'n v. Doyle & Russell, Inc.*, 215 Va. 769, 801, 214 S.E.2d 155, 160 (1975)).

10. *Id.* at 278, 526 S.E.2d at 519.

ers that understood the objectives of the other in undertaking the project.¹¹ Neff should have expected that Blue Stone would be forced to provide alternate access to the lots in the event it delayed or breached the contract.¹²

Although the parties in this case may well have never contemplated or discussed the construction of an alternate route in the event of delayed performance, the supreme court was willing to infer this expectation upon the parties.¹³ As a result, this decision could have the effect of broadening recoverable direct damages into the realm of previously classified consequential damages. What qualifies as "expected" damages in the ordinary course of human experience now comes closer to the tort-like "reasonably foreseeable damages," even if they were not actually contemplated at the time of contract.¹⁴

It also appears that the term "consequential damages" has little meaning under Virginia law. To be recoverable, the damages must be reasonably expected (direct) or within the contemplation of both parties (consequential).¹⁵ If the damages were within the contemplation of the parties, however, then they were certainly "expected" damages and thus "direct." This may now provide some ambiguity to the standard form AIA 201 contract that limits liability for "consequential" damages.¹⁶ In Virginia, that provision may prove to be indistinguishable from the common law and serve no purpose while also failing to bar damages now classified as direct.

11. *Id.*

12. *Id.*

13. *See id.* at 277-81, 526 S.E.2d at 518-20.

14. The classic case of *Hadley v. Baxendale*, 156 Eng. Rep. 145 (Ex. Ch. 1854), set a universally followed standard that limited a party in breach of a contract to only those damages which were reasonably contemplated by the parties at the time of contract formation. *Id.* at 151. This standard has always been viewed as a more stringent and limited standard for damages than the "reasonably foreseeable" standard in tort. *See, e.g.*, E. ALLAN FARNSWORTH & WILLIAM E. YOUNG, CASES AND MATERIALS ON CONTRACTS 518 (4th ed. 1988). The two standards arguably merge in *Blue Stone*.

15. *Blue Stone Land*, 259 Va. at 277-78, 526 S.E.2d at 518-19.

16. AMERICAN INSTITUTE OF ARCHITECTS, AIA DOCUMENT A201-1997, GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION art. 4.3.10 (1997), reprinted in CHARLES M. SINK & MARK D. PETERSEN, THE A201 DESKBOOK: UNDERSTANDING THE REVISED GENERAL CONDITIONS 21 (1998).

B. Waiver of Mechanic's Liens

*First American Bank of Virginia v. J.S.C. Concrete Construction, Inc.*¹⁷ once again reminds contractors and practitioners of the limited value of Virginia's mechanic's lien statute.¹⁸ In this case, a building contractor sought payment from the owner for work performed on a project.¹⁹ The "Contractor Base Agreement" between the parties contained explicit language that the contractor waived all mechanic's lien rights it may have possessed against the property.²⁰ Additional work was assigned to the contractor through preprinted forms labeled "Extra Work Order."²¹ Under these forms, however, the contractor waived its rights to file mechanics liens only after receiving payment.²²

The contractor claimed that the unpaid work fell outside the scope of the "Contractor Base Agreement" and thus was not subject to the waiver.²³ While the commissioner and the trial court agreed with this argument, the Supreme Court of Virginia disagreed and reversed the lower court.²⁴ The supreme court found that the base agreement incorporated all work on the project, including that done under the Extra Work Orders.²⁵ The document defined "work" broadly including extra work orders, and the extra work order documents generally incorporated the terms of the base agreement.²⁶ By looking at the contract documents as a whole, the court disposed of a more limited argument that did not address the full intentions of the parties.²⁷ The court's rationale for this decision is aptly summarized as follows: "Manifestly, the language of the documents contemplates that both must be read together to set forth the full understanding of the parties, and that neither one standing alone constituted a complete contract."²⁸

17. 259 Va. 60, 523 S.E.2d 496 (2000).

18. VA. CODE ANN. §§ 43-1 to -23.2 (Repl. Vol. 1999 & Cum. Supp. 2000).

19. *First Am. Bank*, 259 Va. at 63-65, 523 S.E.2d at 497-99.

20. *Id.* at 63-64, 523 S.E.2d at 498.

21. *Id.* at 64, 523 S.E.2d at 498-99.

22. *Id.* at 65, 523 S.E.2d at 499.

23. *Id.* at 66, 523 S.E.2d at 500.

24. *Id.* at 69-70, 523 S.E.2d at 501-02.

25. *Id.* at 67, 523 S.E.2d at 500.

26. *Id.*

27. *Id.*

28. *Id.*

C. *Sovereign Immunity*

In *City of Virginia Beach v. Carmichael Development Co.*,²⁹ the Supreme Court of Virginia reaffirmed Virginia's commitment to the doctrine of sovereign immunity.³⁰ Carmichael Development Company ("Carmichael") alleged that the City of Virginia Beach tortiously interfered with its contract to purchase a "troubled" property when it refused to grant Carmichael's permit applications and then purchased the property when the developer was unable to consummate the deal.³¹ Carmichael desired to purchase a controversial lot in Virginia Beach in order to construct a shopping center, but the plan required an additional curb cut onto a major thoroughfare.³² Following a review of Carmichael's "preliminary site plan," the City planning office indicated that it would not support approval of the plan.³³ Carmichael never formally submitted the plan and, as a result, failed to consummate the transaction.³⁴ In the interim, the City made an offer on the troubled property that was eventually accepted by the owner.³⁵

Carmichael sued the city for tortious interference with a contract due to its refusal to approve the curb cut and its subsequent offer to buy the property.³⁶ The trial court permitted the tortious interference claim to proceed "on the theory that the City's offer to purchase the property tortiously interfered with Carmichael's contract"³⁷ A jury awarded judgment against the city.³⁸ The supreme court reversed, finding that the purchase of the property fell within the protected umbrella of a "governmental function" as opposed to a private function that was not entitled to protection.³⁹

29. 259 Va. 493, 527 S.E.2d 778 (2000).

30. *See id.* at 499, 527 S.E.2d at 781-82.

31. *Id.* at 497, 527 S.E.2d at 780-81.

32. *Id.* at 496, 527 S.E.2d at 780.

33. *Id.* (citing potential traffic problems and threats to public safety).

34. *Id.* at 496-97, 527 S.E.2d at 780. Approval of a site plan by the Virginia Beach City Council was a condition of the contract between Carmichael and the seller. *Id.* at 496, 527 S.E.2d at 780.

35. *Id.* at 497, 527 S.E.2d at 780.

36. *Id.*

37. *Id.* at 498, 527 S.E.2d at 781. The trial court dismissed the claim of failure to approve the plan on sovereign immunity grounds, but held that the purchase of private lands was not protected by sovereign immunity. *Id.*

38. *Id.*

39. *Id.* at 501, 527 S.E.2d at 783.

The court proclaimed that “the City’s policy of acquiring by contract and then reselling or leasing ‘troublesome parcels’” has both a proprietary and a governmental function.⁴⁰ The court characterized the property as “troublesome” because the owner (the local SPCA) was unable to find a purchaser for a period of over eleven years.⁴¹ This period of time served as the “overriding” factor for the City to act in purchasing the land as a “governmental function to benefit the welfare and safety of the public.”⁴² *Carmichael* illustrates the broad latitude the supreme court grants governmental entities in assigning the basis for a “governmental function” in order to advance the bar of sovereign immunity.

D. *Tortious Interference in Bidding*

In a deeply contentious case regarding a bid pursuant to the Virginia Public Procurement Act,⁴³ the Supreme Court of Virginia ruled that a protesting bidder is not protected from liability for claims of business torts.⁴⁴ *Lockheed Information Management Systems Co. v. Maximus, Inc.* demonstrates that a party protesting an award may face liability for its statements made as part of a bid protest.⁴⁵

In *Lockheed*, each party bid on a Virginia Department of Social Services project.⁴⁶ A Notice of Intent to Award was made to Maximus.⁴⁷ Following a protest by Lockheed, which alleged that two members of the evaluation panel had undisclosed conflicts of interest, the Notice of Intent to Award was cancelled.⁴⁸ Maximus subsequently filed an action against Lockheed claiming, inter alia, tortious interference of a contract expectancy.⁴⁹ After an ap-

40. *Id.*

41. *See id.* at 496, 527 S.E.2d at 780.

42. *Id.* at 502, 527 S.E.2d at 783.

43. VA. CODE ANN. §§ 11-35 to -80 (Repl. Vol. 1999 & Cum. Supp. 2000).

44. *Lockheed Info. Mgmt. Sys. Co. v. Maximus, Inc.*, 259 Va. 92, 116, 524 S.E.2d 420, 433 (2000).

45. *See id.*

46. *Id.* at 97, 524 S.E.2d at 422.

47. *Id.*

48. *Id.*

49. *Id.* Maximus also claimed conspiracy, but this count was dismissed by the Supreme Court of Virginia upon the second appeal as improperly preserved. *Id.* at 106-08, 524 S.E.2d at 427-49.

peal in 1997, the supreme court concluded that such an action did not require a showing of "malice" or "egregious conduct."⁵⁰ A second trial resulted in a judgment against Lockheed.⁵¹ Lockheed appealed claiming statements made in the course of the bid protest are entitled to absolute privilege as part of a quasi-judicial proceeding.⁵²

The Supreme Court of Virginia disagreed with Lockheed and refused to extend such a privilege to bid protests.⁵³ Justice Lacy, writing for a unanimous court, reviewed the privilege and determined that "[t]he bid protest proceeding in which the statements complained of in this case were made, however, did not have the safeguards inherent in a judicial proceeding."⁵⁴ Judicial proceedings afford the protection of subpoena power, liability for perjury, and the rules of evidence; by contrast, bid protests are often determined without notice to either party or without a hearing.⁵⁵

The court also found no merit in Lockheed's claim that the statements, contained in its affidavits, were intended to influence executive policy, or were made on the basis of legitimate business competition and the protection of public interest.⁵⁶ The court found that affidavits do not provide the judicial protections described; that the specific statements against Maximus were not policy related, but related to a private, commercial matter;⁵⁷ and that the jury was properly instructed as to any defense of business competition.⁵⁸ The outcome of this case should serve as a warning to litigious contractors that an inaccurately worded bid protest or affidavit may produce more harm than benefit.

E. *Virginia Contractor Transaction Recovery Act*⁵⁹

In *Surprenant v. Board for Contractors*,⁶⁰ a rare case concern-

50. *Id.* at 97-98, 524 S.E.2d at 423 (citing *Maximus, Inc. v. Lockheed Info. Mgmt. Sys. Co.*, 254 Va. 408, 493 S.E.2d 375 (1997)).

51. *Id.* at 98, 524 S.E.2d at 423.

52. *Id.* at 100-01, 524 S.E.2d at 424.

53. *Id.* at 101, 524 S.E.2d at 424-25.

54. *Id.*

55. *See id.*

56. *Id.* at 101-06, 524 S.E.2d at 425-27.

57. *Id.*

58. *Id.* at 106, 524 S.E.2d at 427.

59. VA. CODE ANN. §§ 54.1-1118 to -1127 (Repl. Vol. 1998 & Cum. Supp. 2000).

ing the Virginia Contractor Transaction Recovery Act ("VCRA"), the Virginia Court of Appeals protected homeowners by affirming a circuit court finding of dishonest contractor conduct.⁶¹ Torre, the homeowner, sued his general contractor, Surprenant's company, Unique Builders, Inc., in circuit court and obtained a judgment for breach of contract, including a ruling that Surprenant had made material misrepresentations during the course of dealing.⁶² Torre then sought recovery pursuant to the VCRA.⁶³ The Board's Recovery Fund Committee eventually made an award in Torre's favor and Surprenant appealed.⁶⁴

The VCRA requires a finding of "improper or dishonest conduct" by the contractor as a prerequisite to an award.⁶⁵ While Surprenant challenged that finding by the Board, the court of appeals found that the fact of "improper or dishonest conduct" was established by the trial court before the matter was even brought before the board and was therefore dispositive.⁶⁶ Using the limited review standard required by the Virginia Administrative Process Act,⁶⁷ the court of appeals proceeded to uphold the Board's decision against the contractor.⁶⁸ This case demonstrates the deference granted to a circuit court in the establishment of underlying facts and the broad impact such findings may hold for a contractor in a later administrative or judicial proceeding.

III. VIRGINIA CASES BY THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

A. *Pay When Paid Provisions and Surety Obligations*

The long held principal in Virginia that a surety stands in the place of its principal and may assert those defenses available to its principal⁶⁹ may now be in jeopardy following the Fourth Cir-

60. 30 Va. App. 165, 516 S.E.2d 220 (Ct. App. 1999).

61. *Id.* at 167, 516 S.E.2d at 221.

62. *Id.* at 168, 516 S.E.2d at 221-22.

63. *Id.* at 169, 516 S.E.2d at 222.

64. *Id.* at 170, 516 S.E.2d at 222.

65. VA. CODE ANN. § 54.1-1120(A) (Cum. Supp. 1999).

66. *Surprenant*, 30 Va. App. at 171-75, 516 S.E.2d at 223-25.

67. VA. CODE ANN. § 9-6.14:17 (Cum. Supp. 1999).

68. *Surprenant*, 30 Va. App. at 175, 516 S.E.2d at 225.

69. *E.g.*, *Bd. of Supervisors v. S. Cross Coal Corp.*, 238 Va. 91, 96, 380 S.E.2d 636, 639

cuit's decision in *Moore Bros. Co. v. Brown & Root, Inc.*⁷⁰ Applying what the Fourth Circuit decided was Virginia law, the court found that a surety cannot maintain the defense of a "pay when paid" clause in a subcontract when the provision is not incorporated into the payment bond.⁷¹

Brown & Root, Inc. ("Brown & Root") was a general contractor for a road construction project along the Dulles Toll Road Extension, and possessed an ownership interest in the road.⁷² It and the other owners concealed from their financing company that additional paving was necessary, and the fact that such paving would result in added construction costs.⁷³ At the same time, Brown & Root included a "pay when paid" clause in its subcontract with Moore Brothers Company ("Moore Brothers"), the subcontractor it hired to perform the paving work.⁷⁴ Moore Brothers performed the extra work; however, since the financing was not available to pay Brown & Root, Moore Brothers was not compensated for its additional costs.⁷⁵ As a result, Moore Brothers brought suit against Brown & Root and its surety, Highlands.⁷⁶

The payment bond obligated Highlands to pay Moore Brothers "all sums justly due."⁷⁷ Highlands argued unsuccessfully that this meant that it was obligated to pay only those amounts due under the subcontract.⁷⁸ Highlands believed it had no obligation under the subcontract, because the condition precedent of the "pay when paid" clause was not satisfied.⁷⁹ Both the District Court for the Eastern District of Virginia and the Fourth Circuit disagreed with Highlands because the surety did not expressly incorporate

(1989).

70. 207 F.3d 717 (4th Cir. 2000).

71. *Id.* at 723.

72. *Id.* at 720.

73. *Id.* at 721.

74. *Id.* at 720. The subcontract stated:

Notwithstanding any other provision hereof, payment by Owner to General Contractor is a condition precedent to any obligation of General Contractor to make payment hereunder; General Contractor shall have no obligation to make payment to Subcontractor for any portion of the Sublet Work for which General Contractor has not received payment from the Owner.

Id.

75. *Id.* at 721.

76. *Id.* at 722.

77. *Id.* at 720.

78. *Id.* at 722.

79. *Id.* at 722.

the "pay when paid" clause into the payment bond.⁸⁰ Although Judge Wilkins, in his dissent, agreed with Highlands that the term "sums justly due" can only mean those due under the subcontract,⁸¹ the majority held that "there is no indication that the parties intended the phrase 'sums justly due' to incorporate the contingency of payment by the Owners."⁸² The court found that such a provision must be stated expressly in the payment bond.⁸³ The court interpreted broadly the surety's obligation to pay for work performed in the event of an owner's nonpayment, stating:

[T]he very purpose of securing a surety bond contract is to insure that claimants who perform work are paid for their work *in the event that the principal does not pay*. To suggest that non-payment by the Owners absolves the surety of its obligation is nonsensical, for it defeats the very purpose of a payment bond.⁸⁴

Judge Wilkins, in contrast, decried the decision as rewriting an agreement between sophisticated parties which is "completely at odds with the freedom of contract principles embraced" by the Supreme Court of Virginia.⁸⁵

This case presents an interesting dilemma for sureties on construction projects. It appears that they now must expressly incorporate into their bond each risk-shifting provision in a subcontract, creating a cumbersome and potentially ambiguous document in order to avail themselves of their principal's defenses. Otherwise, the surety's obligation will be more expansive than that of the principal. This is truly an odd result, considering that the principal usually must indemnify the surety for losses, thus creating an obtuse method of recovery from a contractor otherwise precluded by the subcontract. This will complicate the negotiation process between contractors as the surety must become more intimately involved in defining its obligations apart from those of its principal. While the facts of this case called for an award in favor of the subcontractor, the Fourth Circuit's holding sets a dangerous precedent and it is less than clear whether the Supreme Court of Virginia would adopt such a holding.

80. *Id.* at 723-24.

81. *Id.* at 728 (Wilkins, J., concurring in part and dissenting in part).

82. *Id.* at 723.

83. *Id.*

84. *Id.* at 723 (emphasis added). The court also found against Brown & Root under the prevention doctrine because Brown & Root's own actions assisted in the prevention of the condition precedent's occurrence. *See id.* at 724-26.

85. *Id.* at 729 (Wilkins, J., concurring in part and dissenting in part).

B. *Termination and Recovery from Performance Bonds*

In keeping with the Fourth Circuit's propensity to issue lengthy, unpublished, per curiam decisions that address significant legal issues, *Siegfried Construction, Inc. v. Gulf Insurance Co.*⁸⁶ gives at least some insight into the court's thinking regarding the requirements of termination before recovery from performance bonds under Virginia law. Though not a controlling precedent,⁸⁷ the case involved a contractor who attempted to recover on its subcontractor's performance bond.⁸⁸ Applying Virginia law, the court found that under the language of the bond, formal notice of termination was not required.⁸⁹

The bond, like most issued today, obligated the surety upon two conditions: (1) the subcontractor's default and (2) the general contractor's declaration of the subcontractor's default.⁹⁰ In this case, the subcontractor failed to provide adequate labor to complete its work, and the general contractor sent two notices of termination before it began supplementing the subcontractor's manpower with additional workers.⁹¹ After the supplementation, the subcontractor was still not adequately progressing, and the general contractor sent a notice to the surety that it intended to file a claim.⁹² The surety investigated but never provided any assistance.⁹³ The general contractor claimed the subcontractor then abandoned the project; however, the general contractor never formally terminated the subcontract.⁹⁴

Although there was little dispute that the subcontractor was in default of its subcontract agreement, the surety claimed that it had no obligation because formal termination never occurred.⁹⁵ The District Court for the Eastern District of Virginia concurred with this argument, but the Court of Appeals for the Fourth Cir-

86. No. CA-98-555-A, 2000 WL 123944 (4th Cir. Feb. 2, 2000) (unpublished table decision), *cert. denied*, 120 S. Ct. 2743 (2000).

87. See 4TH CIR. R. 36(b)-(c).

88. *Siegfried Constr.*, 2000 WL 123944, at **2.

89. *Id.* at **4.

90. See *id.* at **3.

91. *Id.* at **1-2.

92. *Id.* at **2.

93. *Id.*

94. *Id.*

95. *Id.* at **4.

cuit reversed.⁹⁶ It defined the term “default” as a breach of the performance contract.⁹⁷ It then found that the general contractor’s repeated threats of termination “could reasonably be interpreted as pronouncements that [the subcontractor] was not fulfilling its fundamental contractual obligations and that a claim for payment under the bond would be forthcoming.”⁹⁸ As a result, the court found that the general contractor complied with the bond’s declaration of default requirement.⁹⁹ The Fourth Circuit also found that “Virginia law does not counsel” the requirement of an actual termination to declare default because notice of breach of contract was sufficient.¹⁰⁰ The court stated that “equating termination with default could effect a major change in the construction industry in Virginia.”¹⁰¹ Finally, it found that the general contractor provided adequate notice to the surety before supplying its own labor, noting that “Virginia courts have not been overly strict in interpreting the notice requirements of construction bonds.”¹⁰²

Interestingly, just as in *Moore Bros.*,¹⁰³ the Fourth Circuit broadly interpreted Virginia law with regard to contract interpretation and surety law. The court took a more practical approach than might be expected from the Supreme Court of Virginia in approaching the requirement for a separate notice of default and whether formal termination was necessary. Owners and contractors alike may now have greater flexibility to declare a default and preserve their surety rights, while not terminating a contractor for actions that can be remedied before project completion. Both should insist on similar language in future Virginia performance bonds. Hopefully, the Fourth Circuit’s functional approach to surety law will be applied by both federal and state courts despite this case’s unpublished status.

96. *Id.* at **5.

97. *Id.* at **3.

98. *Id.* at **4.

99. *Id.* at **6.

100. *Id.* at **4.

101. *Id.*

102. *Id.* at **6.

103. 207 F.3d 717 (4th Cir. 2000).

IV. CONCLUSION

A review of the construction cases decided in 1999 and 2000 suggests a subtle broadening of contract interpretation and a willingness by appellate courts to impose liability according to its sense of equity. *Blue Stone Land Co. v. Neff*¹⁰⁴ arguably broadens the scope of recoverable "direct" damages,¹⁰⁵ while *Moore Bros. Co. v. Brown & Root, Inc.*¹⁰⁶ and *Siegfried Construction, Inc. v. Gulf Insurance Co.*¹⁰⁷ broadens recovery against sureties.¹⁰⁸ In the area of tort, *Lockheed v. Maximus*¹⁰⁹ broadens a successful bidder's rights against inaccurate bid protesters. The courts limited actions in only two cases. First, in *City of Virginia Beach v. Carmichael Development*,¹¹⁰ the Supreme Court of Virginia strengthened the scope of protected governmental functions, and second, in *First American Bank v. JSC Concrete*¹¹¹ where the court interpreted change orders to incorporate the terms of the underlying contract. Whether these decisions signal a trend in the appellate courts can only be determined after the review of time.

104. 259 Va. 273, 526 S.E.2d 517 (2000).

105. See *supra* Part II.A.

106. 207 F.3d 717 (4th Cir. 2000).

107. No. CA-98-555-A, 2000 WL 123944 (4th Cir. Feb. 2, 2000) (unpublished table decision), *cert. denied*, 120 S. Ct. 2743 (2000).

108. See *supra* Part III.A-B.

109. 259 Va. 92, 524 S.E.2d 420 (2000).

110. 259 Va. 493, 527 S.E.2d 778 (2000).

111. 259 Va. 60, 523 S.E.2d 496 (2000).
