

## **Case**

AMEC CIVIL, LLC v. COMMONWEALTH OF VIRGINIA, ET AL.  
(Record Number 091662)

## **From**

The Court of Appeals of Virginia.

## **Counsel**

E. Duncan Getchell, Jr., Erin Sine [MCGUIRE WOODS LLP]; and Gregory S. Martin, Brian P. Heald and Roger C. Brown [MOYE, O'BRIEN, O'ROURKE, PICKERT & MARTIN, LLP] for appellant.

Hon. William C. Mims, Attorney General of Virginia, Maureen R. Matsen, Richard Tyler McGrath and Randall H. Wintory [OFFICE OF THE ATTORNEY GENERAL] for appellees.

## **Assignments of Error**

1. The Court of Appeals failed to apply the proper standard of review to the trial court's findings of fact because the Court of Appeals did not consider whether VDOT had demonstrated that such findings were plainly wrong or without evidentiary support.
2. The Court of Appeals erred when it ignored binding precedent of this Court when it failed to apply the proper standard of review to the trial court's finding of fact that the sustained elevated lake levels constituted a differing site condition, i.e. considering the issue as a question of law, as opposed to a question of fact.
3. The Court of Appeals ignored binding precedent in holding that exculpatory language in the Contract overcame the differing site conditions clause and failing to consider the Contract as whole.
4. The Court of Appeals erred when it construed conflicting Contract provisions in favor of VDOT, as opposed to construing such ambiguities against VDOT, the drafter of the Contract, specifically with regard to the exculpatory language and differing site conditions clause.
5. The Court of Appeals failed to apply the proper standard of review to the trial court's finding of fact that AMEC provided VDOT with timely, written notice of its claims, when VDOT failed to demonstrate that such finding was plainly wrong or without evidentiary support.
6. The Court of Appeals erred in solely considering whether written notice was provided at the "beginning of the work," whereas Sec. 33.1-386 also permits written notice at the "time of the occurrence" - a much broader and more ambiguous requirement.
7. The Court of Appeals failed to construe the Contract as a whole, i.e. the court did not take into account the Partnering Provisions of the Contract, which provide for informal, ongoing negotiations to resolve potential claims as they arise on the project, when the court considered whether AMEC provided timely written notice.
8. The Court of Appeals ignored binding precedent of this Court when it failed to consider that written notice is timely if provided before the completion of the project, the Commonwealth has actual notice, and is not prejudiced by any alleged delay in receiving written notice.
9. The Court of Appeals failed to take into consideration that VDOT had actual notice of all of AMEC's claims and therefore was not prejudiced by any alleged delay in receiving written notice.
10. The Court of Appeals ignored that the underlying policy and purpose of the written notice requirement is satisfied when the government has actual knowledge that its act or omission is causing harm so that it might take some action to ameliorate such harm.

11. The Court of Appeals ignored the evidence and wrongly assumed that VDOT would have taken some affirmative action upon receipt of written notice, when the only evidence presented at trial on this point was to the contrary.
12. The Court of Appeals erred by creating additional notice requirements for the benefit of VDOT, not present in the language of Sec. 33.1-386, i.e. that a contractor must "conspicuously declare" that a "serious legal threshold has been crossed."
13. The Court of Appeals erred in assuming that Sec. 33.1-387 is the Commonwealth's waiver of sovereign immunity and by strictly construing the written notice requirement of Sec. 33.1-386; rather, Sec. 8.01-192 codifies the common law that sovereign immunity is waived for contract actions.
14. The Court of Appeals erred when it ignored the bilateral notice requirement of Sec. 104.03, which required VDOT to give AMEC notice of the differing site condition relative to the drilled shafts.
15. The Court of Appeals erred when it failed to consider that all contracts include implied covenants, among those the covenant of good faith and fair dealing and the duty to disclose superior knowledge.
16. The Court of Appeals erred when it determined that AMEC failed to provide timely written notice when VDOT had superior knowledge of the differing site conditions relative to the drilled shafts and the deficiencies in the concrete mix design criteria for the drilled shafts.
17. The Court of Appeals erred when it considered each damage element of AMEC's claim as requiring separate written notice, when the various damage elements such as lost productivity and acceleration, among others resulted from and were derivative of the sustained elevated lake levels and differing site conditions at the drilled shafts.
18. The Court of Appeals failed to apply the proper standard of review to the trial court's finding of fact that AMEC suffered a loss of home office overhead when VDOT failed to demonstrate that such finding was plainly wrong or without evidentiary support.
19. The Court of Appeals erred when it determined that AMEC must prove it could not otherwise recoup pro rata home office overhead expenses.
20. The Court of Appeals failed to apply the proper standard of review to the trial court's finding of fact that AMEC's claim constituted extra work or work significantly changed in character entitling AMEC to contractual markups set forth in the force account provisions.
21. The Court of Appeals erred when it determined that AMEC's claim relative to the differing site conditions should not be calculated based upon the force account provisions.
22. The Court of Appeals erred when it determined that the Commonwealth was not liable for interest on its contractual debts as any other citizen of the Commonwealth would otherwise be liable.

#### ASSIGNMENTS OF CROSS-ERROR.

1. The Court of Appeals erred by failing to rule that the trial court erred by failing to enforce the terms of the contract.
2. The Court of Appeals erred by failing to reverse the trial courts [sic] award of damages to AMEC for drilled shafts and work order nos. 6 and 7 based on accord and satisfaction.
3. The Court of Appeals erred in failing to rule that the trial court erred in admitting evidence relating to a different construction project based on AMEC's claim that VDOT had "superior knowledge" where VDOT had no duty to disclose such information and where such evidence was collateral, irrelevant, and prejudicial.
4. The Court of Appeals erred in failing to rule that the trial court abused its discretion in refusing to admit testimony relating to Butcher's Creek which refuted AMEC's "superior knowledge" evidence.
5. The Court of Appeals erred by failing to rule that the trial courts [sic] award of damages to AMEC for a defective concrete specification should be reversed.

6. The Court of Appeals erred by failing to rule that the trial court's award of damages for Pier 17 foundation cap should be reversed.
7. The Court of Appeals erred by failing to rule that the trial courts [sic] award to AMEC for extended home office overhead should be reversed where the evidence conclusively proved that AMEC was able to recoup such costs and where AMEC offered no evidence that it was on standby.

**Date Granted**

1-28-2010