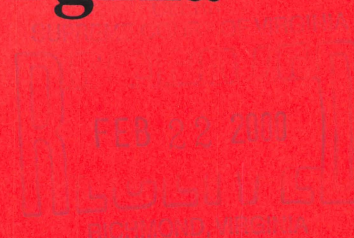


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IN THE
Supreme Court of Virginia

RECORD NO. 992259



**FREDERICKSBURG CONSTRUCTION
COMPANY, INC.,**

Appellant,

v.

J. W. WYNE EXCAVATING, INC.,

Appellee.

JOINT APPENDIX

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SANDS ANDERSON
MARKS & MILLER
Post Office Box 1998
Richmond, Virginia 23219
(804) 783-7238**

Counsel for Appellant

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THE LAW OFFICES OF
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Counsel for Appellant

**Rex L. Edwards, Jr.
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LEWELLYN & EDWARDS, P.C.
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(540) 825-6000**

Counsel for Appellee

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V I R G I N I A:

IN THE CIRCUIT COURT FOR SPOTSYLVANIA COUNTY

FREDERICKSBURG CONSTRUCTION
COMPANY, INC.
P.O. Box 172
Lorton, Virginia 22079

Plaintiff,

v.

J.W. WYNE EXCAVATING, INC.
18 Shannon Drive
Fredericksburg, Virginia
22401

SERVE: James W. Wyne
Registered Agent
10722 Leavells Road
Fredericksburg, VA
22401

Defendant.

AT LAW NO. L-94-8

MOTION FOR JUDGMENT

Plaintiff, Fredericksburg Construction Company, Inc.,
("FCCI"), for its Motion for Judgment against defendant J.W. Wyne
Excavating Co., alleges as follows:

1. This is an action for, among other things, breach of
contract, against the defendant, J.W. Wyne Excavating ("Wyne"),
for its failure and refusal to perform its obligations under
subcontract executed by the FCCI and the defendant in connection
with a construction project located at the Electronics Warfare
Integration Laboratory, in Dahlgren, Virginia.

Parties

2. FCCI is a Virginia corporation, having its principal place of business located at 7000E Newington Road, Lorton, Virginia. FCCI is engaged in the business of general contracting, and, among other things, acts as general contractor for civil and defense related projects for the federal government.

3. Defendant J.W. Wyne Excavating Inc., is a Virginia corporation, and upon information and belief has its principal place of business at 18 Shannon Drive, Fredericksburg, Virginia. Upon information and belief Wyne is a subcontractor engaged primarily in the business of construction site excavation and preparation.

Jurisdiction and Venue

4. Jurisdiction of this Court is founded on Va. Code Ann § 8.01-328.1(A)(1) (Michie 1992).

5. Venue is properly laid in this Court pursuant to Va. Code Ann. § 8.01-262 (Michie 1992).

Factual Background

6. On or about November 2, 1992, FCCI was retained by the federal government as the general contractor to construct the Electronics Warfare Integration Laboratory (the "Laboratory"), a two-story building of approximately 65,000 square feet, contract #N62477-89-C-0126 (the "Prime Contract"), located in Dahlgren, Virginia.

7. On or about November 20, 1992, FCCI entered into a subcontract (the "Subcontract"), with Wyne, for certain demolition and excavation work to be done at the site where the Laboratory was to be constructed, pursuant to specifications contained in the Prime Contract. A copy of the Subcontract has been attached hereto as Exhibit A.

8. The original contract amount for the work to be performed by Wyne under the Subcontract was \$374,500. (THREE HUNDRED SEVENTY-FOUR THOUSAND, FIVE HUNDRED DOLLARS). Subsequently five change orders to the Subcontract were authorized by FCCI, which increased the cost of the work to be performed by Wyne under the Subcontract to a total of \$398,829 (THREE HUNDRED NINETY-EIGHT THOUSAND, EIGHT HUNDRED TWENTY-NINE DOLLARS).

9. Wyne did not complete all of the site and excavation work called for by the Subcontract and the specifications included therein. Inter alia, Wyne failed to complete the following contracted-for work as listed in the Subcontract and specifications of the Prime Contract (the "Uncompleted Work"):

\$105,000 in paving work: failure to do new paving, pavement marking, and bit walk work.

\$1610 in demolition work: failure to remove 60 sf. of sidewalk; failure to remove 50 linear feet ("l.f.") of chain link fence; and failure to sawcut approximately 152 l.f of pavement.

\$37,000 in earthwork: failure to haul approximately 4,000 cy. of topsoil off site; failure to rough grade approximately 24,882 sq. yds.

\$1500 in storm sewer work: failure to supply 3 manhole covers.

\$1000 in water testing work: failure to provide results of water purification testing.

10. FCCI has notified Wyne of the Uncompleted Work and demanded that defendant finish the work pursuant to its obligations under the Subcontract. Wyne has never responded to FCCI's demands and has not returned to the Laboratory to finish the Uncompleted Work. On or about October 12, 1993, pursuant to paragraph 8 of the Subcontract FCCI notified Wyne that the Subcontract was terminated due to defendant's default on its obligation to complete the work specified therein and due to Wyne's failure to pay its subcontractors and materials suppliers in accordance with the Prime Contract and Subcontract.

11. The total value of the Uncompleted Work is approximately \$146,110 (ONE HUNDRED THIRTY-SIX THOUSAND, ONE-HUNDRED AND TEN DOLLARS). Because of Wyne's failure to finish the Uncompleted Work, FCCI made arrangements with other contractors to have this work performed.

12. FCCI executed a change order to the Subcontract to reflect the value of the Uncompleted Work. This last change order reduced the Subcontract amount to \$252,719 (TWO HUNDRED FIFTY-TWO THOUSAND, SEVEN-HUNDRED NINETEEN DOLLARS).

13. FCCI has made payments totalling \$215,226.35 (TWO HUNDRED FIFTEEN THOUSAND, TWO HUNDRED TWENTY-SIX DOLLARS AND THIRTY-FIVE CENTS), to defendant for work performed pursuant to the Subcontract.

14. FCCI has been contacted by several of Wyne's suppliers and subcontractors, who have indicated that defendant has failed

to pay them for materials supplied and work performed on the Laboratory job. These suppliers and sub-subcontractors have filed or given FCCI and its fidelity bond agent notice of a total of \$58,912.37 (FIFTY-EIGHT THOUSAND, NINE-HUNDRED TWELVE DOLLARS AND THIRTY-SEVEN CENTS), in Miller Act claims against FCCI arising out of defendant's failure to pay them for work performed on the Laboratory project.

COUNT I

(Breach of Contract)

15. FCCI realleges and incorporates by reference the allegations contained in paragraphs 1-14 inclusive, of this Motion for Judgment.

16. Wyne has breached material terms of the Subcontract by failing to finish the Uncompleted Work and by failing to pay its subcontractors and suppliers.

17. As a result of defendant's contractual breaches, FCCI has suffered damages. FCCI had to pay third parties to finish the Uncompleted Work which Wyne failed or refused to perform. Likewise FCCI has paid or will be caused to pay Wyne's subcontractors and suppliers who performed work or provided materials for the Laboratory job, and who have not been paid by Wyne for such work or materials.

Prayer for Relief

WHEREFORE, Fredericksburg Construction Company, Inc., respectfully requests that this Court award the following relief:

(1) Declare that defendant J.W. Wyne Excavating Co., breached the Subcontract;

(2) Enter judgment in favor of FCCI against defendant J.W. Wyne, in the amount of \$21,419.72 (TWENTY-ONE THOUSAND FOUR HUNDRED NINETEEN DOLLARS AND SEVENTY-TWO CENTS). This amount reflects the balance due Wyne under the Subcontract minus the amounts FCCI has expended or will expend to pay defendant's subcontractors for work performed or materials supplied to the Laboratory job. FCCI also requests plus pre-judgment interest at the rate of 9% per annum from October 12, 1993, the date the Subcontract terminated due to Wyne's default.


(3) Award such other and further relief as the Court deems proper, including without limitation the Plaintiff's attorney's fees and costs in this action.

Respectfully Submitted,

Fredericksburg Construction Company
Inc.

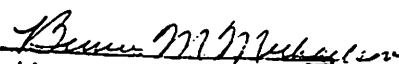
By Counsel

COUNSEL:


R. Steven Holt, VSB No. 23420
Brian D. Sullivan, VSB No. 35268
ARENT FOX KINTNER PLOTKIN & KAHN
8000 Towers Crescent Drive
Suite 700
Vienna, VA 22182-2733

Office of Spotsylvania County 1-14
5.00
35.00
4.00
2.00
5.00
Total Paid \$51.00

Tester


Linda Jo Johnson, Clerk of the Court

V I R G I N I A:

IN THE CIRCUIT COURT OF SPOTSYLVANIA COUNTY

FREDERICKSBURG CONSTRUCTION COMPANY, INC.

Plaintiff,

v. At Law No. L-94-8

J. W. WYNE EXCAVATING, INC.,

Defendant.

DEMURRER

Comes now the defendant, J. W. Wyne Excavating, Inc., by counsel, and files this demurrer, respectfully representing as follows:

1. Based on the allegations of the Motion for Judgment, the plaintiff is currently indebted to the defendant in the amount of \$37,492.65, calculated as follows:

Adjusted contract price	\$398,829.00	¶ 8
Less "Uncompleted Work"	<u>146,110.00</u>	¶s 9 & 11
Subtotal:	\$252,719.00	¶ 12
Less payments made	<u>215,226.35</u>	¶ 13
Total:	\$37,492.65	

The additional sums sought by the plaintiff are merely "claims" for payment. Since the plaintiff has not been required to pay anything on such claims, the plaintiff has no cause of action against the defendant for such sums.

The Motion for Judgment should be dismissed because, under Virginia law, a person owing the money has no right to sue the person owed the money.

2. The plaintiff has not requested a declaratory judgment, and the relief requested in paragraph (1) of the "Wherefore" clause is not appropriate and should be stricken.

3. The plaintiff has not alleged a loss of \$21,419.72, and the relief requested in paragraph (2) of the "Wherefore" Clause, for "amounts FCCI ... will expend" is not appropriate and should be stricken.

4. The plaintiff has filed an action at law, and the relief requested in paragraph (3) of the "Wherefore" is not appropriate and should be stricken.

WHEREFORE, the defendant, by counsel, moves the Court to dismiss the Motion for Judgment filed herein, plus its attorney's fees.

J. W. WYNE EXCAVATING, INC.

BY COUNSEL

GROUND OF DEFENSE

Comes now the defendant, J. W. Wyne Excavating, Inc., by counsel, and files its Grounds of Defense herein, respectfully representing as follows:

1. The defendant admits the allegations contained in paragraph numbered 1 of the Motion for Judgment filed herein.

2. To the best of its current information, the defendant admits the allegations contained in paragraph numbered 2 of the Motion for Judgment filed herein.

3. The defendant admits the allegations contained in paragraph numbered 3 of the Motion for Judgment filed herein.

4.& 5. The defendant need not respond to the legal conclusions set forth in paragraphs numbered 4 and 5 of the Motion for Judgment filed herein.

6. To the best of its current information, the defendant admits the allegations contained in paragraph numbered 6 of the Motion for Judgment filed herein.

7. The parties entered into a "Construction Contract", dated November 20, 1992, covering demolition and excavation work. The contract speaks for itself. The complete contract has not been attached to the Motion for Judgment filed herein. The defendant denies the allegations contained in paragraph numbered 7 of the Motion for Judgment filed herein, to the extent that they are inconsistent with the express admissions contained herein.

8. The original contract price was \$374,500. Five change orders were issued to increase the contract price by \$24,329.00. There were additional minor adjustments in the contract price. The defendant denies the allegations contained in paragraph numbered 8 of the Motion for Judgment filed herein, to the extent that they are inconsistent with the express admissions contained herein.

9. The defendant admits that it did not complete all of the site and excavation work called for by the subcontract and

specifications because the plaintiff failed to pay the amounts due under the contract and improperly terminated the defendant. The remaining work has a value far less than alleged by the plaintiff. The defendant denies the allegations contained in paragraph numbered 9 of the Motion for Judgment filed herein, to the extent that they are inconsistent with the express admissions contained herein.

10. With a letter, dated September 10, 1993, the defendant provided the plaintiff with a summary sheet of account, showing a balance due of \$58,304.45, and stating that "I will need this payment in full in order to continue my work". The defendant failed to pay the amount due and then wrongfully terminated the contract of the plaintiff. The defendant denies the allegations contained in paragraph numbered 10 of the Motion for Judgment filed herein, to the extent that they are inconsistent with the express admissions contained herein.

11. The defendant denies the allegations contained in paragraph numbered 11 of the Motion for Judgment filed herein.

12. The defendant denies for lack of knowledge the allegations contained in paragraph numbered 12 of the Motion for Judgment filed herein.

13. The defendant denies the allegations contained in paragraph numbered 13 of the Motion for Judgment filed herein.

14. The defendant denies for lack of knowledge the allegations contained in paragraph numbered 14 of the Motion for

Judgment filed herein.

15. The defendant denies any allegations contained in the Motion for Judgment which are not expressly admitted herein.

16. The defendant denies that it is indebted to the plaintiff in any amount.

17. The defendant reserves the right to amend its Grounds of Defense.

WHEREFORE, the defendant, J. W. Wyne Excavating, Inc., by counsel, moves the Court to dismiss the Motion for Judgment filed herein, plus its costs and attorney's fees.

J. W. WYNE EXCAVATING, INC.

BY COUNSEL

COUNTERCLAIM

Comes now the defendant, J. W. Wyne Excavating, Inc. (Wyne), by counsel, and files this counterclaim against the plaintiff, Fredericksburg Construction Company, Inc. (FCCI), respectfully representing as follows:

1. Wyne is a Virginia corporation.
2. FCCI is a Virginia corporation.
3. The parties entered into a "Construction Contract Between General Contractor and Subcontractor", with attachments, for the "Electronics Warfare Integration Laboratory, Dahlgren, Virginia", whereby Wyne would performing excavating and demolition work.

4. Pursuant to this contract, Wyne performed work pursuant to the contract entitling it to the sum of \$284,858.34.

5. The parties entered into five change orders, increasing the contract price by \$24,329.00. Wyne performed the work pursuant to these change orders, entitling it to the sum of \$24,329.00.

6. The parties agreed to minor adjustments in the contract, causing the contract price to be reduced by \$3,052.30.

7. Therefore, FCCI owed Wyne the total sum of \$309,186.02 under the contract.

8. FCCI paid Wyne \$213,120.00 pursuant to the contract, and paid one of Wyne's subcontractors the sum of \$2,196.35.

9. FCCI wrongfully terminated Wyne under the contract. Wyne is entitled to receive an additional \$14,168.40 for overhead and profit.

10. FCCI is presently indebted to Wyne in the sum of One Hundred Eight Thousand Thirty Eight and 07/100 Dollars (\$108,038.07).

WHEREFORE, the defendant, J. W. Wyne Excavating, Inc., by counsel, moves for judgment against the plaintiff, Fredericksburg Construction Company, Inc. in the amount of One Hundred Eight Thousand Thirty Eight and 07/100 Dollars (\$108,038.07), plus its costs, plus interest from the date the above-referenced services were rendered, plus its attorney's fees expended herein.

J. W. WYNE EXCAVATING, INC.

BY COUNSEL



R. Scott Pugh
Attorney at Law
The Professional Building
Post Office Box 999
Spotsylvania C.H., VA 22553
(703)-582-5438
Counsel for the defendant
J. W. Wyne Excavating, Inc.

CERTIFICATE

I, R. Scott Pugh, Esquire, do hereby certify that I
mailed a true copy of the foregoing to counsel for the plaintiff,
this 25 day of February, 1994.


R. Scott Pugh

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V I R G I N I A:

IN THE CIRCUIT COURT FOR SPOTSYLVANIA COUNTY

FREDERICKSBURG CONSTRUCTION
COMPANY, INC.

Plaintiff,

v.

J.W. WYNE EXCAVATING, INC.

Defendant.

AT LAW NO. L-94-8

GROUND OF DEFENSE

Plaintiff and Counterclaim Defendant Fredericksburg Construction Company, Inc., ("FCCI"), by counsel, for its Grounds of Defense to Defendant and Counterclaim Plaintiff J.W. Wyne Excavating, Inc.'s ("Wyne"), Counterclaim filed herein, answers the allegations contained in the numbered paragraphs of the Counterclaim as follows:

1. Neither admits nor denies that Wyne is a Virginia corporation, as FCCI does not have sufficient information to affirm or deny this allegation.

2. Admits.

3. Admits.

4. Denies.

5. Admits that the Change Orders were executed in the amounts stated. The contract referred to speaks for itself. FCCI denies each and every remaining allegation contained in ¶ 5 of the Counterclaim.

6. Admits.

7. Admits.

8. Admits.

9. Denies each and every allegation contained in ¶ 9 of the Counterclaim.

10. Denies.

FCCI further denies each and every allegation of the Counterclaim not specifically admitted herein to be true, and denies that Defendant, Counterclaim-Plaintiff is entitled to any of the relief requested.

First Affirmative Defense

Wyne's claims are precluded by the doctrines of waiver and estoppel.

Second Affirmative Defense

Wyne's claims are barred by a failure of consideration.

Third Affirmative Defense

Wyne's claims are barred by payment.

Fourth Affirmative Defense

FCCI's actions were not the legal cause of any injury which may have been suffered by Plaintiff.

Fifth Affirmative Defense

Wyne's Counterclaim fails to state any claims upon which relief can be granted.

WHEREFORE, having responded fully, FCCI requests that the Counterclaim be dismissed in its entirety with prejudice, and that FCCI be awarded its attorneys' fees and costs incurred in defending this action, and such further relief as the Court may deem proper.

Respectfully submitted,

Fredericksburg Construction Co.,
Inc.

By Counsel

Counsel:

ARENT FOX KINTNER PLOTKIN & KAHN

A handwritten signature in black ink, appearing to read "Brian D. Sullivan", is written over a horizontal line.

Brian D. Sullivan, VSB # 35268
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
202/857-6257

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of March, 1994, a true and accurate copy of the foregoing Grounds of Defense to Defendant's Counterclaim was sent by facsimile and first class mail, postage prepaid to:

R. Scott Pugh, Esq.
9108 Courthouse Rd.
P.O. Box 999
Spotsylvania, Virginia 22553-0999



Brian D. Sullivan

V I R G I N I A:

IN THE CIRCUIT COURT OF SPOTSYLVANIA COUNTY

FREDERICKSBURG CONSTRUCTION COMPANY,

Plaintiff,

v.

J. W. WYNE EXCAVATING, INC.,

Defendant.

PRAECIPE

PLEASE TAKE NOTICE that on Term Day, Monday, April 18, 1994, at 10:00 a.m., the defendant, by counsel, will move the Court to set this case for trial, without a jury.

Please conduct yourself accordingly.

J. W. WYNE EXCAVATING, INC.

BY COUNSEL



R. Scott Pugh
Attorney at Law
The Professional Building
9108 Courthouse Road
Spotsylvania, Virginia 22553
(703)-582-5438
Counsel for the defendant

qllac.



Certificate

I, R. Scott Pugh, do hereby certify that I mailed a copy of the foregoing to counsel for the defendant, this 11th day of April, 1994.




R. Scott Pugh

RECORDED IN LAW C
BOOK QQQ PAGE 31

(703)-582-5438
Counsel for the defendant

SEEN AND OBJECTED TO:



Brian D. Sullivan
ARENT, FOX, KITNER, PLOTKIN & KAHN
8000 Towers Crescent Drive
Suite 700
Vienna, VA 22182-2733
Counsel for the plaintiff

V I R G I N I A:

IN THE CIRCUIT COURT FOR SPOTSYLVANIA COUNTY

FREDERICKSBURG CONSTRUCTION COMPANY, INC.)	
)	
Plaintiff,)	AT LAW NO. L-94-8
)	
v.)	
)	
J.W. WYNE EXCAVATING, INC.)	
)	
Defendant.)	

AMENDED GROUNDS OF DEFENSE

Plaintiff and Counterclaim Defendant Fredericksburg Construction Company, Inc., ("FCCI"), by counsel, pursuant to the Order of the Court dated May 19, 1994, for its Amended Grounds of Defense to Defendant and Counterclaim Plaintiff J.W. Wyne Excavating, Inc.'s ("Wyne"), Counterclaim filed herein, answers the allegations contained in the numbered paragraphs of the Counterclaim as follows:

1. Neither admits nor denies that Wyne is a Virginia corporation, as FCCI does not have sufficient information to affirm or deny this allegation.
2. Admits.
3. Admits.
4. Denies.
5. Admits that the Change Orders were executed in the amounts stated. The contract referred to speaks for itself. FCCI denies each and every remaining allegation contained in ¶ 5 of the Counterclaim.
6. Admits.

7. Admits.

8. Admits.

9. Denies each and every allegation contained in ¶ 9 of the Counterclaim.

10. Denies.

FCCI further denies each and every allegation of the Counterclaim not specifically admitted herein to be true, and denies that Defendant, Counterclaim-Plaintiff is entitled to any of the relief requested.

First Affirmative Defense

Wyne's claims are precluded by the doctrines of waiver and estoppel.

Second Affirmative Defense

Wyne's claims are barred by a failure of consideration.

Third Affirmative Defense

Wyne's claims are barred by payment.

Fourth Affirmative Defense

FCCI's actions were not the legal cause of any injury which may have been suffered by Plaintiff.

Fifth Affirmative Defense

Wyne's Counterclaim fails to state any claims upon which relief can be granted.

Sixth Affirmative Defense

Wyne's Counterclaim is barred by setoff and/or recoupment.

WHEREFORE, having responded fully, FCCI requests that the Counterclaim be dismissed in its entirety with prejudice, and

that FCCI be awarded its attorneys' fees and costs incurred in defending this action, and such further relief as the Court may deem proper.

Respectfully submitted,

Fredericksburg Construction Co.,
Inc.

By Counsel

Counsel:

ARENT FOX KINTNER PLOTKIN & KAHN

A handwritten signature in black ink, appearing to read "Brian D. Sullivan", is written over a horizontal line.

Brian D. Sullivan, VSB # 35268
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
202/857-6257

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of May, 1994, a true and accurate copy of the foregoing Amended Grounds of Defense to Defendant's Counterclaim was sent by facsimile and first class mail, postage prepaid to:

R. Scott Pugh, Esq.
9108 Courthouse Rd.
P.O. Box 999
Spotsylvania, Virginia 22553-0999



Brian D. Sullivan

V I R G I N I A:

IN THE CIRCUIT COURT OF SPOTSYLVANIA COUNTY

J. W. WYNE EXCAVATING, INC.,

Plaintiff,

v. AT LAW

FREDERICKSBURG CONSTRUCTION COMPANY, INC.,

Defendant.

AMENDED MOTION FOR JUDGMENT

The plaintiff J. W. Wyne Excavating, Inc. (Wyne), by counsel, files this Amended Motion for Judgment, respectfully representing as follows:

1. The plaintiff is a Virginia corporation with its principal place of business in Spotsylvania County, Virginia.

2. The defendant Fredericksburg Construction Company, Inc. (FCCI) is a Virginia corporation with its principal place of business in Fairfax County, Virginia.

3. On or about November 2, 1992, FCCI, as general contractor, entered into a contract with the United States of American for the construction of the Electronics Warfare Integration Laboratory, Dahlgren, Virginia. The contract was designated Contract No. N62477-89-0126 (hereinafter the project contract). The construction project is in King George County, Virginia.

4. On or about November 20, 1992, FCCI, as general contractor, and Wyne, as subcontractor, entered into a Construction Contract (hereinafter the construction contract) whereby the plaintiff would perform sitework for the project (the

work), as specified in the construction contract.

5. Wyne entered into the performance of its contract and furnished labor and equipment as prescribed therein, and performed additional and extra labor in the prosecution of the work.

6. FCCI terminated its contract with Wyne without just cause in the Fall of 1993.

7. The plaintiff has provided substantial labor and material to the project (directly and through its subcontractors), and, after all lawful deductions and credits, is entitled to recover not more than One Hundred Ten Thousand Dollars (\$110,000.00) from the defendant, on its construction contract, including lost profits, and/or for the reasonable value of the labor and materials provided to the project.

8. Despite demand, FCCI has failed and/or refused to pay the amount due to Wyne.

9. The plaintiff is entitled to recover not more than One Hundred Ten Thousand Dollars (\$110,000.00) from the defendant.

WHEREFORE, the plaintiff, J. W. Wyne Excavating, Inc., by counsel, prays for judgment against the defendant Fredericksburg Construction Company, Inc., in the amount which does not exceed One Hundred Ten Thousand Dollars (\$110,000.00), together with interest from August 9, 1993, and for costs of this action.

J. W. WYNE EXCAVATING, INC.

BY COUNSEL



R. Scott Pugh
Attorney at Law
9108 Courthouse Road
Post Office Box 999
Spotsylvania, VA 22553
(703)-582-5438
Counsel for the plaintiff

Certificate

I, R. Scott Pugh, do hereby certify that I mailed a copy of the foregoing to Brian D. Sullivan, counsel for Fredericksburg Construction Company, Inc., this 9th day of September, 1994.



R. Scott Pugh

BIMMB



V I R G I N I A:

IN THE CIRCUIT COURT FOR SPOTSYLVANIA COUNTY

J.W. WYNE EXCAVATING, INC.

Plaintiff,

vs.

FREDERICKSBURG CONSTRUCTION
CO., INC.

Defendant.

AT LAW NO. L-94-8

ANSWER, GROUNDS OF DEFENSE AND COUNTERCLAIM

Defendant and Counterclaim Plaintiff Fredericksburg Construction Company, Inc., ("FCCI"), for its Answer and Grounds of Defense to Plaintiff, J.W. Wyne Excavating Inc.'s Amended Motion for Judgment states as follows:

FIRST DEFENSE

The Amended Motion for Judgment fails to state a claim upon which relief may be granted, in whole or in part.

SECOND DEFENSE

For its answers to the numbered allegations of the Amended Motion for Judgment, FCCI states as follows:

1. Neither admits nor denies that Wyne is a Virginia corporation, as FCCI does not have sufficient information to affirm or deny this allegation.

2. Admits.

3. The referenced "project contract" speaks for itself. FCCI denies any allegations in ¶ 3 of the Motion for Judgment to the extent that they are inconsistent with the referenced contract.

4. The referenced "construction contract" speaks for itself. FCCI denies any allegations in ¶ 4 of the Motion for Judgment to the extent that they are inconsistent with the referenced contract.

5. Denies.

6. Denies.

7. Denies.

8. Denies.

9. Denies.

FCCI further denies each and every allegation of the Amended Motion for Judgment not specifically admitted herein to be true, and denies that Plaintiff is entitled to any of the relief requested.

THIRD DEFENSE

Wyne's claims are precluded by the doctrines of waiver and estoppel.

FOURTH DEFENSE

Wyne's claims are barred by a failure of consideration.

FIFTH DEFENSE

Wyne's claims are barred by payment.

SIXTH DEFENSE

FCCI's actions were not the legal cause of any injury which may have been suffered by Plaintiff.

SEVENTH DEFENSE

Wyne's Counterclaim is barred by setoff and/or recoupment.

EIGHTH DEFENSE

Wyne committed the first breach of the contract upon which it seeks to recover, and therefore is not entitled to bring an action to enforce its rights under the contract.

NINTH DEFENSE

Wyne was terminated for default under the contract upon which it seeks recovery, and therefore cannot recover.

TENTH DEFENSE

FCCI incorporates by reference herein its allegations of its counterclaim, as an additional basis for defense.

WHEREFORE, having responded fully, FCCI requests that the Amended Motion For Judgment be dismissed in its entirety with prejudice, and that FCCI be awarded its attorneys' fees and costs incurred in defending this action, and such further relief as the Court may deem proper.

COUNTERCLAIM

Defendant and Counterclaim Plaintiff, Fredericksburg Construction Company, Inc., ("FCCI"), for its Counterclaim against plaintiff J.W. Wyne Excavating Co., hereby alleges as follows:

1. This is an action for, among other things, breach of contract, against the counterclaim defendant, J.W. Wyne Excavating ("Wyne"), for its failure and refusal to perform its obligations under subcontract executed by the FCCI and the counterclaim defendant in connection with a construction project

located at the Electronics Warfare Integration Laboratory, in Dahlgren, Virginia (the "Project").

2. FCCI is a Virginia corporation, having its principal place of business located at 7000E Newington Road, Lorton, Virginia. FCCI is engaged in the business of general contracting, and, among other things, acts as general contractor for civil and defense related projects for the federal government.

3. On or about November 2, 1992, FCCI was retained by the federal government as the general contractor to construct the Electronics Warfare Integration Laboratory, a two-story building of approximately 65,000 square feet, contract #N62477-89-C-0126 (the "Prime Contract"), located in Dahlgren, Virginia.

4. On or about November 20, 1992, FCCI entered into a subcontract (the "Subcontract"), with Wyne, for certain demolition and excavation work to be done at the site where the Laboratory was to be constructed, pursuant to specifications contained in the Prime Contract.

5. The original contract amount for the work to be performed by Wyne under the Subcontract was \$374,500. Subsequently five change orders to the Subcontract were authorized by FCCI, which increased the cost of the work to be performed by Wyne under the Subcontract to a total of \$398,829.

6. Wyne did not complete all of the site and excavation work called for by the Subcontract and the specifications included therein.

7. FCCI has notified Wyne of its failure to complete the work specified in the Subcontract and demanded that Wyne finish the work pursuant to its obligations under the Subcontract. Wyne never responded to FCCI's demands and has not returned to the Project to complete its work under the Subcontract. On or about October 12, 1993, pursuant to paragraph 8 of the Subcontract FCCI notified Wyne that the Subcontract was terminated due to Wyne's default on its obligation to complete the work specified therein and due to Wyne's failure to pay its subcontractors and materials suppliers in accordance with the Prime Contract and Subcontract.

8. Since October 12, 1993, FCCI has expended \$173,757 to complete the work that Wyne failed to perform before it was terminated for default under the Subcontract. FCCI has executed a change order to the Subcontract in the amount of \$173,757 which reduced the contract price of the Subcontract from \$398,829 to \$225,072.

9. FCCI has made payments totalling \$199,800 directly to Wyne for work performed pursuant to the Subcontract. In addition, FCCI made payment of \$13,320 to the Internal Revenue Service on behalf of Wyne and pursuant to a Notice of Levy served on FCCI by the IRS, which has been charged against the amount owed Wyne under the Subcontract. FCCI has also made payments totalling \$13,774.59 to Wyne's suppliers and/or subcontractors who notified FCCI that Wyne had failed to make payment to them for materials and/or labor supplied to Wyne in connection with work performed on the Project. Finally, FCCI has received

notices from several of Wyne's subcontractors and/or suppliers that Wyne owes them at least \$43,608.38, for labor and supplies provided to the Project.

COUNT I

(Breach of Contract)

10. FCCI realleges and incorporates by reference the allegations contained in paragraphs 1-9 inclusive, of this Counterclaim.

11. Wyne has breached material terms of the Subcontract by failing to complete its work specified under the Subcontract and by failing to pay its subcontractors and suppliers in accordance with the terms of the Subcontract.

12. As a result of Wyne's contractual breaches, FCCI has suffered damages. FCCI had to complete the work Wyne had not finished as of the date it was terminated for default under the Subcontract. Likewise FCCI has paid or will be caused to pay Wyne's subcontractors and suppliers who performed work or provided materials for the Project, and who have not been paid by Wyne for such work or materials.

Prayer for Relief

WHEREFORE, Fredericksburg Construction Company, Inc., respectfully requests that this Court award the following relief:

- (1) Declare that defendant J.W. Wyne Excavating Co., breached the Subcontract;
- (2) Enter judgment in favor of FCCI against plaintiff and counterclaim defendant J.W. Wyne Excavating, in the amount of

\$45,451.76 (FORTY-FIVE THOUSAND, FOUR HUNDRED FIFTY-ONE DOLLARS AND SEVENTY-SIX CENTS). This amount reflects the amount FCCI overpaid Wyne under the Subcontract (\$1,843.38) plus the amounts FCCI has expended or will expend to pay Wyne's subcontractors for work performed or materials supplied to the Project (\$43,608.38). FCCI also requests plus pre-judgment interest at the rate of 9% per annum from October 12, 1993, the date the Subcontract was terminated due to Wyne's default.

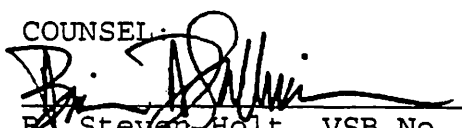
(3) Award such other and further relief as the Court deems proper, including without limitation FCCI's attorney's fees and costs in this action.

Respectfully Submitted,

Fredericksburg Construction Company
Inc.

By Counsel

COUNSEL:



By Steven Holt, VSB No. 23420
Brian D. Sullivan, VSB No. 35268
ARENT FOX KINTNER PLOTKIN & KAHN
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
202/857-6257

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of September, 1994, a true and accurate copy of the foregoing Answer, Grounds of Defense and Counterclaim was sent by facsimile and first class mail, postage prepaid to:

R. Scott Pugh, Esq.
9108 Courthouse Rd.
P.O. Box 999
Spotsylvania, Virginia 22553-0999


Brian P. Sullivan

RECEIVED
FACSIMILE
SEP 27 1994
FAX
FACSIMILE
SEP 27 1994
FAX

V I R G I N I A:

IN THE CIRCUIT COURT FOR SPOTSYLVANIA COUNTY

J.W. WYNE EXCAVATING, INC.

Plaintiff,

vs.

FREDERICKSBURG CONSTRUCTION
COMPANY, INC.

Defendant.

AT LAW NO. L-94-8

FREDERICKSBURG CONSTRUCTION
COMPANY, INC.

Counterclaim
Plaintiff,

vs.

J.W. WYNE EXCAVATING, INC.

Counterclaim
Defendant.

MOTION FOR CONTINUANCE OR STAY

Defendant/Counterclaim Plaintiff Fredericksburg Construction Company, Inc., ("FCCI"), by counsel, moves that this case be continued until a date after the United States District Court for the Eastern District of Virginia has made a ruling on FCCI's motion for leave to intervene in the case styled United States of America for the Use and Benefit of J.W. Wyne Excavating, Inc. v. The American Insurance Company, Civ. Action No. 3:94cv501, or in the alternative that the proceedings in this action be stayed pending the outcome of said motion, and as grounds for this motion states as follows:

1. FCCI was originally the plaintiff in this matter, having filed a motion for judgment alleging breach of contract against J.W. Wyne Excavating Inc., ("Wyne"), in this Court on January 19, 1994. FCCI's cause of action arose out of Wyne's performance as a subcontractor to FCCI on a project known as the Electronics Warfare Integration Laboratory, in Dahlgren, Virginia. FCCI had contracted directly with the United States government to construct several improvements at the Dahlgren site.

2. Wyne demurred to FCCI's motion for judgment and filed a counterclaim on February 25, 1994.

3. FCCI filed its grounds of defense and motion to overrule Wyne's demurrer on March 21, 1994.

4. On April 18, 1994, this Court sustained Wyne's demurrer to FCCI's motion for judgment, and gave FCCI leave to file an amended grounds of defense to Wyne's counterclaim to allege additional defenses of set-off and recoupment. On this date the Court set Wyne's cause to be tried on August 4, 1994.

5. On August 2, 1994, FCCI and Wyne had scheduled depositions to be taken prior to the trial on August 4, 1994. On August 2, 1994, FCCI's counsel arrived at Wyne's counsel's office for the scheduled depositions, and was informed by Wyne's counsel that he desired to continue the August 4, 1994 trial as a result of documents which had been delivered to Wyne's counsel by FCCI on July 26, 1994. Given that the documents that had been delivered to Wyne's counsel had only recently become available,

and presented a potential for a change affecting the issue to be tried, FCCI's counsel consented to Wyne's counsel's request for a continuance made to Judge Farmer.

6. Three days later, on August 5, 1994, Wyne served FCCI's surety for the Dahlgren project, The American Insurance Company, with a complaint filed under the provisions of the Miller Act, in the United States District Court for the Eastern District of Virginia. This complaint, which is attached hereto as Exhibit A, is virtually identical to the allegations contained in Wyne's Amended Motion for Judgment filed against FCCI in this Court.

7. A pre-trial conference is scheduled in the United States District Court for the Eastern District of Virginia on November 3, 1994. See, Scheduling Order in United States of America for the Use and Benefit of J.W. Wyne Excavating, Inc. v. The American Insurance Company, Civ. Action No. 3:94cv501, which is attached hereto as Exhibit B. At this scheduling conference the Court will set a trial date in this matter for a date within four to eight weeks.

8. On Friday, October 7, 1994, FCCI filed a motion for leave to intervene as a defendant and counterclaim plaintiff in the case Wyne filed against FCCI's surety. The reasons supporting FCCI's motion for leave to intervene are more fully set forth in FCCI's motion and memorandum of points and authorities in support thereof, which have been attached hereto as Exhibit C. As noted in the attached motion, FCCI is the real party in interest to Wyne's complaint filed in case styled United

States of America for the Use and Benefit of J.W. Wyne
Excavating, Inc. v. The American Insurance Company, Civ. Action
No. 3:94cv501.

9. For reasons of judicial economy, and so that FCCI will not be forced to expend resources in discovery and trial of the action presently scheduled for trial in this Court on October 27, 1994, as well as the case brought by Wyne against FCCI's surety in federal court, FCCI submits that a continuance of the trial date in this Court should be granted until the federal court rules on FCCI's motion for leave to intervene. If the federal court grants FCCI's motion for leave to intervene all parties with a stake in the outcome of this action will be before one court. FCCI's surety, The American Insurance Company, could not be sued in this Court under the Miller Act, as exclusive jurisdiction for such causes of action is vested in Article III Courts of the United States.

10. This Court, in the exercise of its sound judicial discretion, may grant a continuance of the trial date at any stage of this action. Lacks v. Commonwealth, 182 Va. 318 (1944).

11. No prejudice or delay in justice will result if the Court grants FCCI's motion for continuance. As noted in the scheduling order in the federal court action, Wyne's case against FCCI's surety will be set for trial on a date in November or December 1994. Wyne obviously will not be prejudiced by a single trial against both FCCI and its surety in federal court, as Wyne has chosen itself chosen this forum.

WHEREFORE, defendant/counterclaim plaintiff FCCI respectfully requests that the Court continue the trial date set for this action until such time as the United States District Court for the Eastern District of Virginia has ruled on FCCI's motion for leave to intervene as a defendant and counterclaim plaintiff in the case styled United States of America for the Use and Benefit of J.W. Wyne Excavating, Inc. v. The American Insurance Company, Civ. Action No. 3:94cv501.

Respectfully submitted,

Fredericksburg Construction Co., Inc.

By Counsel

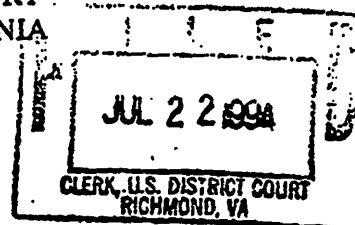
Counsel:

Arent Fox Kintner Plotkin & Kahn



Brian D. Sullivan, VSB #35268
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
202/857-6257

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION



UNITED STATES OF AMERICA

FOR THE USE OF

J. W. WYNE EXCAVATING, INC.,

Plaintiff,

v.

Civil Action No. 3:94cv501**RECEIVED**THE AMERICAN INSURANCE COMPANY,
Defendant.

AUG 5 1994

COMPLAINT

BEVERLEY L. CRUMP
Registered Agent

The plaintiff J. W. Wyne Excavating, Inc. (Wyne), by counsel, respectfully

represents as follows:

1. This action arises, and this Court has jurisdiction, under the Miller Act, United States Code, Title 40, Sections 270a through 270d.
2. The plaintiff is a Virginia corporation with its principal place of business in Spotsylvania County, Virginia.
3. The defendant The American Insurance Company is a Nebraska corporation.
4. On or about November 2, 1992, Fredericksburg Construction Company, Inc., as general contractor, entered into a contract with the United States of American for the construction of the Electronics Warfare Integration Laboratory, Dahlgren, Virginia. The contract was designated Contract No. N62477-89-0126 (hereinafter the project contract). The construction project is in King George County, Virginia.
5. On or about November 4, 1992, Fredericksburg Construction Company, Inc., as principal, and the defendant, The American Home Insurance Company, as surety, executed and delivered to the United states of American, a Miller Act bond for the project contract,

Contract No. N62477-89-0126.

6. On or about November 20, 1992, Fredericksburg Construction Company, Inc. as Contractor, and the plaintiff, as subcontractor, entered into a Construction Contract (hereinafter the construction contract) whereby the plaintiff would perform sitework for the project (the work), as specified in the construction contract.

7. The plaintiff entered into the performance of its contract and furnished labor and equipment as prescribed therein, and performed additional and extra labor in the prosecution of the work.

8. The plaintiff "last" performed or supplied material to the project on August 9, 1993.

9. The plaintiff has provided labor and material to the project and is entitled to receive One Hundred Eight Thousand Thirty Eight and 07/100 Dollars (\$108,038.07), on its construction contract and/or for the reasonable value of the labor and materials provided to the project.

10. Despite demand, Fredericksburg Construction Company, Inc. has failed and/or refused to pay the amount due to the plaintiff for labor and equipment provided by it or on its behalf, to the project, which amount presently totals One Hundred Eight Thousand Thirty Eight and 07/100 Dollars (\$108,038.07).

11. The plaintiff is entitled to recover One Hundred Eight Thousand Thirty Eight and 07/100 Dollars (\$108,038.07) from the defendant surety under the Miller Act.

12. All conditions precedent for the bringing and maintenance of this action have been performed or have occurred.

WHEREFORE, the United States of America on behalf and for the use of the plaintiff, J. W. Wyne Excavating, Inc., by counsel, prays for judgment against the defendant The American Home Insurance Company, in the amount of One Hundred Eight Thousand Thirty Eight and 07/100 Dollars (\$108,038.07), together with interest from August 9, 1993, and for costs of this action.

J. W. WYNE EXCAVATING, INC.

BY COUNSEL



R. Scott Pugh
Attorney at Law
9108 Courthouse Road
Post Office Box 999
Spotsylvania, VA 22553
(703)-582-5438

AO 740 (Rev. 1/90) Summons in a Civil Action

RETURN OF SERVICE

Service of the Summons and Complaint was made by me ¹	DATE
NAME OF SERVER (PRINT)	TITLE

Check one box below to indicate appropriate method of service

- ☐ Served personally upon the defendant. Place where served: _____
- ☐ Left copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein.
Name of person with whom the summons and complaint were left: _____
- ☐ Returned unexecuted: _____
- ☐ Other (specify): _____

STATEMENT OF SERVICE FEES

TRAVEL	SERVICES	TOTAL
--------	----------	-------

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on _____
Date Signature of Server

Address of Server

1) As to who may serve a summons see Rule 4 of the Federal Rules of Civil Procedure.

15 COLUMBUS CIRCLE • NEW YORK, NEW YORK 10023-7773
(212) 373-7500

PRENTICE HALL CORPORATE SERVICES

United States Corporation Company

The Prentice-Hall Corporation System, Inc.

DATE: August 5, 1994

VA-16043-U

TO: Fireman's Fund Insurance Company
777 San Marin Drive
Novato, CA 94998
Att: Robert L. Fleischman, General Counsel

MOTOR CARRIER _____
OR
STATUTORY XX

RE: The American Insurance Company
(Represented Company)

Account # 031355

NOTICE OF SERVICE OF PROCESS

We enclose the following documents which were served upon:

UNITED STATES CORPORATION COMPANY of VIRGINIA

as registered agent for the above-captioned corporation on 8-5-94 via:

Personal Service XX Mail: Regular _____ or Certified _____ Certified # _____

<u>XX</u> Summons in a Civil Action	_____ A self-addressed stamped	_____ Notice of Mechanic's Lien
<u>XX</u> Complaint	_____ envelope enclosed	_____ Notice of Default Judgment
_____ Duplicate copies of the Notice and	_____ Garnishment	_____ Subpoena
_____ Acknowledgement enclosed	_____ Notice of Attorney's Lien	
<u>XX</u> Other: _____		

TITLE OF ACTION: United States of America for the Use of
J.W. Wyne Excavating, Inc.
vs. The American Insurance Company

Case No. 3:94CV501

COURT OR JURISDICTION US District Court Eastern District of VA Richmond Division

RETURN DATE August 25, 1994

Tel Call Placed Direct _____ Collect _____ Spoke to _____ Agent called New York Office _____

COMMENTS: _____

ATTORNEYS FOR CLAIMANT R. Scott Pugh
9108 Courthouse Road
Spotsylvania, VA 22553

Phone: 703-582-5438

PAPERS TRANSMITTED TO CLIENT
Fed-X XX Reg. Mail _____
Other _____ FORM PREPARED BY Anita V. Staples

PLEASE ACKNOWLEDGE RECEIPT OF THIS NOTICE AND THE ENCLOSURES BY SIGNING AND RETURNING THE DUPLICATE COPY. A BUSINESS REPLY ENVELOPE IS ENCLOSED FOR YOUR CONVENIENCE.

Date Received: _____ Signed: _____

15 COLUMBUS CIRCLE NEW YORK, NEW YORK 10023-7773
(212) 373-7500

PRENTICE HALL CORPORATE SERVICES

United States Corporation Company

The Prentice-Hall Corporation System, Inc.

DATE: August 5, 1994

VA-16043-U

TO: Fireman's Fund Insurance Company
777 San Marin Drive
Novato, CA 94998
Att: Robert L. Fleischman, General Counsel

MOTOR CARRIER _____
OR
STATUTORY XX

RE: The American Insurance Company
(Represented Company)

Account # 091355

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UNITED STATES CORPORATION COMPANY OF VIRGINIA

as registered agent for the above-captioned corporation on 8-5-94 via:Personal Service XX Mail Regular _____ or Certified _____ Certified # _____XX Summons in a Civil ActionA self-addressed stamped
envelope enclosed

Notice of Mechanic's Lien

XX Complaint

Notice of Default Judgment

Duplicate copies of the Notice and

Garnishment

Subpoena

Acknowledgement enclosed

Notice of Attorney's Lien

XX Other: _____

TITLE OF ACTION: United States of America for the Use of
J.W. Wyne Excavating, Inc.

Case No. 3:94CV501

vs.

The American Insurance CompanyCOURT OR JURISDICTION US District Court Eastern District of VA Richmond DivisionRETURN DATE August 25, 1994

Tel Call Placed Direct _____ Collect _____ Spoke to _____ Agent called New York Office _____

COMMENTS: _____

ATTORNEYS FOR CLAIMANT

R. Scott Pugh
9108 Courthouse Road
Spotsylvania, VA 22553

Phone: 703-582-5438

PAPERS TRANSMITTED TO CLIENT

Fed-X XX Reg. Mail _____

Other _____

FORM PREPARED BY Andra V. Staples

PLEASE ACKNOWLEDGE RECEIPT OF THIS NOTICE AND THE ENCLOSURES BY SIGNING AND RETURNING THE
DUPLICATE COPY. A BUSINESS REPLY ENVELOPE IS ENCLOSED FOR YOUR CONVENIENCE.

Date Received: _____

Signed: _____

ACKNOWLEDGE TO PHIC 15 COLUMBUS CIRCLE PLAZA NEW YORK NY 10023-7773

United States District Court

For The Eastern

DISTRICT OF Virginia

RICHMOND DIVISION

UNITED STATES OF AMERICA
FOR THE USE OF
J.W. WYNE EXCAVATING, INC.

Plaintiff,

V.

THE AMERICAN INSURANCE COMPANY,
Defendant.

SUMMONS IN A CIVIL ACTION

CASE NUMBER: 3:94CV501

TO: (Name and Address of Defendant)

THE AMERICAN INSURANCE COMPANY
c/o Beverly L. Crump, Registered Agent and Attorney
11 South 12th Street
Richmond, VA 23219

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)

R. Scott Pugh, Attorney at Law
9108 Courthouse Road
Spotsylvania, VA 22553-0999

RECEIVED

AUG 5 1994

BEVERLEY L. CRUMP
Registered Agent

an answer to the complaint which is herewith served upon you, within twenty (20) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

DORIS R. CASEY

CLERK

July 28, 1994

DATE

BY DEPUTY CLERK

Sharon A. Wilson

47

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

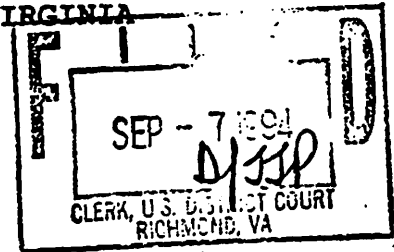
Richmond Division

UNITED STATES OF AMERICA FOR THE USE
OF J.W. WYNE EXCAVATING, INC.

v.

THE AMERICAN INSURANCE COMPANY

CIVIL ACTION NO. 3:94CV501



SCHEDULING ORDER

A pretrial conference will be held in this action on
NOVEMBER 3, 1994, at 9:20 A.M.

All discovery must be concluded two weeks prior to the date of trial. The trial date will be set at the pretrial conference for a day certain, not later than four to eight weeks from the date of the pretrial conference. Once a trial date has been set, the case cannot be transferred to a Magistrate, without leave of Court, unless the Magistrate can maintain the trial date.

Unless a later time has previously been allowed, any defendant who has not filed an answer must do so within ten (10) work days from the date of this order.

Within twenty (20) calendar days from the date of this order, counsel shall meet and confer in an effort to enter into written stipulations of any uncontroverted facts. Between ten (10) and twenty (20) calendar days before trial, counsel shall meet and confer in an effort to enter into further written stipulations of any uncontroverted facts and of the undisputed authenticity of any documents. All stipulations shall be filed with this Court by 12:00 Noon no later than three (3) calendar days before trial. If the third day before trial is a Saturday or Sunday, the stipulations shall be filed with the Court no later than 5:00 p.m. Friday.

Thirty (30) calendar days from the date of filing, all non-discovery motions unnoticed for a hearing are considered submitted on the pleadings. A hearing date should be arranged with the Court's secretary.

Within ten (10) work days from the date of filing, all discovery motions unnoticed for a hearing are deemed withdrawn. Any discovery matter not resolved by the parties pursuant to Local Rule 11.1(J) that is submitted to the Court for resolution will result in sanctions being imposed on either the non-prevailing party, such party's attorney, or both, pursuant to Rule 37, Federal Rules of Civil Procedure.

Responses to tions shall be governed by Local Rule 11(F). Replies, if necessary, shall be filed within three (3) work days after the response.

If a party objects to the production of documents on the grounds of attorney-client privilege, attorney work product, or any other privilege, he must provide the requesting party with an inventory list of the documents to which he is objecting, and a brief description of what each document contains. Unless this list is provided at the time the objection is filed, the objection will be considered waived.

One week prior to trial, counsel must exchange with each other and file with the Clerk a list of witnesses proposed to be called, a list of exhibits, and the exhibits themselves, premarked. No witness or exhibit not so listed and filed will be permitted at trial except for impeachment or rebuttal purposes. Objections to exhibits must be noted (they will be ruled on at trial) within five (5) calendar days after the exhibits are filed; otherwise the exhibits shall stand admitted in evidence.

Counsel should tender to the Clerk two binders of the exhibits to be used at trial. These should be indexed for easy reference and each exhibit should be individually tabbed. One of these binders will be for the Court's use and the other is for use by the witness. Counsel should have their own copy of each exhibit and should furnish opposing counsel with a copy of each exhibit. If counsel desires, each juror may also have a binder of exhibits to view as counsel examines the witnesses.

No expert witness will be permitted to testify who, in response to a request for his identity, has not been identified as such in time to allow the facts relied upon and opinions held by such expert to be obtained by Federal Rules of Civil Procedure 26(a)(4)(A) or deposition prior to the discovery cutoff. This includes treating physicians, other health care providers, and in-house technical witnesses if they are asked to give an opinion on causation or any other relevant issue. Only one expert per discipline is permitted, except by Court order.

Depositions, interrogatories, requests for documents and admissions, and answers and responses thereto, shall not be filed except on order of the Court or for use in this action. Federal Rules of Civil Procedure 5(d).

In non-jury cases, counsel should file with the Clerk by 12:00 Noon three (3) calendar days before trial written proposed findings of fact and conclusions of law. In jury cases, counsel should file with the Clerk by 12:00 Noon three (3) calendar days before trial written proposed jury instructions. Counsel should also supply copies for the Court's use. If the third day before trial is a Saturday or Sunday, the proposed findings of fact and conclusions of law or proposed jury instructions shall be filed with the Clerk no later than 5:00 p.m. Friday.

In all cases where a prevailing plaintiff is entitled to attorney fees, counsel for the plaintiff must deliver to counsel for the defendant, three (3) calendar days before the scheduled

trial date, his accumulated time records and quantified fee demand. If the plaintiff prevails at trial, counsel should then be prepared to proceed with a hearing to determine the plaintiff's fee entitlement. Failure to comply with this procedure will be deemed a fee waiver.

Issuance of subpoenas, assessment of jury costs, qualification of experts, and depositions will be governed by Local Rules 19, 20(c) and 21, respectively.

Counsel are advised that if this order conflicts with the Federal or Local Rules, a hearing within ten (10) work days should be scheduled to resolve such conflicts.


UNITED STATES DISTRICT JUDGE

SEP - 7 1994

United States of America for the Use of
J.W. Wyne Excavating, Inc.

Plaintiff,

v.

The American Insurance Company

Defendant.

Defendant and Counterclaim Plaintiff Fredericksburg Construction Company, Inc., (hereinafter "Fredericksburg Construction"), for its Answer to Plaintiff J.W. Wyne Excavating, Inc.'s Complaint, answers the numbered allegations of the Complaint as follows:

2. Neither admits nor denies that J.W. Wyne is a Virginia corporation, as Fredericksburg Construction does not have sufficient information to affirm or deny this allegation.

4. The referenced "project contract" speaks for itself. Fredericksburg Construction denies any allegations in § 4 of the

Complaint to the extent that they are inconsistent with the referenced contract.

5. Admits delivery of a payment bond to the United States of America in connection with the construction of the Electronics Warfare Integration Laboratory in Dahlgren, Virginia. The referenced payment bond speaks for itself. To the extent that the allegations of § 5 are inconsistent with the bond, the allegations are denied.

6. The referenced "construction contract" speaks for itself. Fredericksburg Construction denies any allegations in § 6 of the Complaint to the extent that they are inconsistent with the referenced contract.

7. Denies.

8. Admits that the last date upon which Plaintiff had employees on site at the Electronics Warfare Integration Laboratory was August 9, 1993. Denies the remaining allegations of § 8.

9. Denies.

10. Denies.

11. Denies.

12. Denies.

Fredericksburg Construction further denies each and every allegation of the Complaint not specifically admitted herein to be true, and denies that Plaintiff is entitled to any of the relief requested.

FIRST AFFIRMATIVE DEFENSE

The Complaint fails to state a claim upon which relief may be granted, in whole or in part.

SECOND AFFIRMATIVE DEFENSE

J.W. Wyne has failed to meet all of the prerequisites for filing a claim under the Miller Act.

THIRD AFFIRMATIVE DEFENSE

J.W. Wyne's claims are precluded by the doctrines of waiver and estoppel.

FOURTH AFFIRMATIVE DEFENSE

J.W. Wyne's claims are barred by a failure of consideration.

FIFTH AFFIRMATIVE DEFENSE

J.W. Wyne's claims are barred by payment.

SIXTH AFFIRMATIVE DEFENSE

Fredericksburg Construction's actions were not the legal cause of any injury which may have been suffered by Plaintiff.

SEVENTH AFFIRMATIVE DEFENSE

J.W. Wyne's Counterclaim is barred by setoff and/or recoupment.

EIGHTH AFFIRMATIVE DEFENSE

J.W. Wyne committed the first breach of the contract upon which it seeks to recover, and therefore is not entitled to bring an action to enforce its rights under the contract.

NINTH AFFIRMATIVE DEFENSE

J.W. Wyne was terminated for default under the contract upon which it seeks recovery, and therefore cannot recover.

TENTH AFFIRMATIVE DEFENSE

Fredericksburg Construction incorporates by reference herein its allegations of its counterclaim, as an additional basis for defense.

WHEREFORE, having responded fully, Fredericksburg Construction requests that the Complaint be dismissed in its entirety with prejudice, and that Fredericksburg Construction be awarded its attorneys' fees and costs incurred in defending this action, and such further relief as the Court may deem proper.

COUNTERCLAIM

Defendant and Counterclaim Plaintiff, Fredericksburg Construction Company, Inc., (hereinafter "Fredericksburg Construction"), for its Counterclaim against plaintiff J.W. Wyne Excavating, Inc., hereby alleges as follows:

1. This is an action for, among other things, breach of contract, against the counterclaim defendant, J.W. Wyne Excavating, Inc. (hereinafter "J.W. Wyne"), for its failure and refusal to perform its obligations under the subcontract executed by Fredericksburg Construction and the counterclaim defendant in connection with a construction project located at the Electronics Warfare Integration Laboratory, in Dahlgren, Virginia (hereinafter "the Project").

2. Fredericksburg Construction is a Virginia corporation, having its principal place of business located at 7000E Newington Road, Lorton, Virginia. Fredericksburg Construction is engaged in the business of general contracting, and, among other things,

acts as general contractor for civil and defense related projects for the federal government.

3. On or about November 2, 1992, Fredericksburg Construction was retained by the federal government as the general contractor to construct the Electronics Warfare Integration Laboratory, a two-story building of approximately 65,000 square feet, contract #N62477-89-C-0126 (hereinafter the "Prime Contract"), located in Dahlgren, Virginia.

4. On or about November 20, 1992, Fredericksburg Construction entered into a subcontract (hereinafter the "Subcontract"), with J.W. Wyne, for certain demolition and excavation work to be done at the site where the Laboratory was to be constructed, pursuant to specifications contained in the Prime Contract.

5. The original contract amount for the work to be performed by J.W. Wyne under the Subcontract was \$374,500. Subsequently five change orders to the Subcontract were authorized by Fredericksburg Construction, which increased the cost of the work to be performed by J.W. Wyne under the Subcontract to a total of \$398,829.

6. J.W. Wyne did not complete all of the site and excavation work called for by the Subcontract and the specifications included therein.

7. Fredericksburg Construction has notified J.W. Wyne of its failure to complete the work specified in the Subcontract and demanded that J.W. Wyne finish the work pursuant to its

obligations under the Subcontract. J.W. Wyne never responded to Fredericksburg Construction's demands and has not returned to the Project to complete its work under the Subcontract. On or about October 12, 1993, pursuant to paragraph 8 of the Subcontract, Fredericksburg Construction notified J.W. Wyne that the Subcontract was terminated due to J.W. Wyne's default on its obligation to complete the work specified therein and due to J.W. Wyne's failure to pay its subcontractors and materials suppliers in accordance with the Prime Contract and Subcontract.

8. Since October 12, 1993, Fredericksburg Construction has expended \$173,757 to complete the work that J.W. Wyne failed to perform before it was terminated for default under the Subcontract. Fredericksburg Construction has executed a change order to the Subcontract in the amount of \$173,757 which reduced the contract price of the Subcontract from \$398,829 to \$225,072.

9. Fredericksburg Construction has made payments totalling \$199,800 directly to J.W. Wyne for work performed pursuant to the Subcontract. In addition, Fredericksburg Construction made payment of \$13,320 to the Internal Revenue Service on behalf of J.W. Wyne and pursuant to a Notice of Levy served on Fredericksburg Construction by the IRS, which has been charged against the amount owed J.W. Wyne under the Subcontract. Fredericksburg Construction has also made payments totalling \$13,774.59 to J.W. Wyne's suppliers and/or subcontractors who notified Fredericksburg Construction that J.W. Wyne had failed to make payment to them for materials and/or labor supplied to J.W.

Wyne in connection with work performed on the Project. Finally, Fredericksburg Construction has received notices from several of J.W. Wyne's subcontractors and/or suppliers that J.W. Wyne owes them at least \$43,608.38, for labor and supplies provided to the Project.

COUNT I

(Breach of Contract)

10. Fredericksburg Construction realleges and incorporates by reference the allegations contained in paragraphs 1-9 inclusive, of this Counterclaim.

11. J.W. Wyne has breached material terms of the Subcontract by failing to complete its work specified under the Subcontract and by failing to pay its subcontractors and suppliers in accordance with the terms of the Subcontract.

12. As a result of J.W. Wyne's contractual breaches, Fredericksburg Construction has suffered damages. Fredericksburg Construction had to complete the work J.W. Wyne had not finished as of the date it was terminated for default under the Subcontract. Likewise, Fredericksburg Construction has paid or will be required to pay J.W. Wyne's subcontractors and suppliers who performed work or provided materials for the Project, and who have not been paid by J.W. Wyne for such work or materials.

Prayer for Relief

WHEREFORE, Fredericksburg Construction Company, Inc., respectfully requests that this Court award the following relief:

(1) Declare that defendant J.W. Wyne Excavating Co.,
breached the Subcontract;

(2) Enter judgment in favor of Fredericksburg Construction
against Plaintiff and Counterclaim Defendant J.W. Wyne
Excavating, in the amount of \$45,451.76 (FORTY-FIVE THOUSAND,
FOUR HUNDRED FIFTY-ONE DOLLARS AND SEVENTY-SIX CENTS). This
amount reflects the amount Fredericksburg Construction overpaid
J.W. Wyne under the Subcontract (\$1,843.38) plus the amounts
Fredericksburg Construction has expended or will expend to pay
J.W. Wyne's subcontractors for work performed or materials
supplied to the Project (\$43,608.38). Fredericksburg
Construction also requests plus pre-judgment interest at the rate
of 9% per annum from October 12, 1993, the date the Subcontract
was terminated due to J.W. Wyne's default.

(3) Award such other and further relief as the Court deems
proper, including without limitation Fredericksburg
Construction's attorney's fees and costs in this action.

Respectfully Submitted,

FREDERICKSBURG CONSTRUCTION COMPANY,
INC.

By Counsel

Counsel:



R. Steven Holt, VSB No. 23420
Brian D. Sullivan, VSB No. 35268
Arent Fox Kintner Plotkin & Kahn
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
202/857-6257

Of Counsel:

Eric B. Bruce
Arent Fox Kintner Plotkin & Kahn
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
202/857-6257

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of October, 1994, a true and accurate copy of the foregoing Answer, Affirmative Defenses and Counterclaim was sent by first class mail, postage prepaid to:

R. Scott Pugh, Esq.
9108 Courthouse Rd.
P.O. Box 999
Spotsylvania, Virginia 22553-0999



Brian D. Sullivan

Brian
CERTIFICATE OF SERVICE
FILED
OCT 10 1994
U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

V I R G I N I A:

IN THE CIRCUIT COURT FOR SPOTSYLVANIA COUNTY

J.W. WYNE EXCAVATING, INC.)	
)	
Plaintiff,)	AT LAW NO. L-94-8
)	
vs.)	
)	
FREDERICKSBURG CONSTRUCTION)	
CO., INC.)	
)	
Defendant.)	

ORDER

THIS CAUSE came to be heard on the motion by Defendant and Counterclaim Plaintiff Fredericksburg Construction Company, Inc., ("FCCI"), for a continuance or stay of the proceedings in this case, and was argued by counsel.

UPON CONSIDERATION WHEREOF, defendant/counterclaim plaintiff's motion is **GRANTED**, and it appearing to the Court that it is appropriate to grant the relief set forth herein, it is hereby

ORDERED, that all further proceedings in this case are to be **CONTINUED**, until after such time as the United States District Court for the Eastern District of Virginia has decided on FCCI's pending motion for leave to intervene as a defendant/counterclaim plaintiff in the case styled United States of America for the Use and Benefit of J.W. Wyne Excavating, Inc. v. The American Insurance Company, Civ. Action No. 3:94cv501, now proceeding before the United States District Court for the Eastern District of Virginia, and it is further

ORDERED that the clerk of the court remove this case from the trial docket for October 27, 1994.

ENTERED:

J. Peyton Farmer
J. Peyton Farmer
Circuit Court Judge

DATED: 11-3-94

I ASK FOR THIS:

Brian P. Sullivan

Brian P. Sullivan, VSB #35268
ARENT FOX KINTNER PLOTKIN & KAHN
1050 Connecticut Ave., N.W.
Washington, D.C. 20036

Counsel for Defendant/Counterclaim Plaintiff
Fredericksburg Construction Co., Inc.

**SEEN AND OBJECTED TO FOR THE REASONS
SET FORTH ON ORAL ARGUMENT:**

R. Scott Pugh

R. Scott Pugh, Esq.
9108 Courthouse Road
Spotsylvania, Virginia 22553

Counsel for Plaintiff/Counterclaim Defendant
J.W. Wyne Excavating, Inc.

V I R G I N I A:

IN THE CIRCUIT COURT OF SPOTSYLVANIA COUNTY

J. W. WYNE EXCAVATING, INC.,

Plaintiff,

v. At Law No.: L-94-8

FREDERICKSBURG CONSTRUCTION COMPANY, INC.,

Defendant.

ORDER

THIS DAY came R. Scott Pugh who moved to withdraw as counsel for J. W. Wyne Excavating, Inc., the plaintiff in this action.

UPON CONSIDERATION WHEREOF, it is ORDERED that the motion to withdraw as counsel be, and it hereby is, granted.

And this matter shall be removed from the Court's trial calendar until it is reset.

ENTER:

Milton Lamm
JUDGE

DATE:

February 10, 1995

I ASK FOR THIS:

R. Scott Pugh

R. Scott Pugh, Attorney at Law
9108 Courthouse Road
Spotsylvania, VA 22553-0999
Counsel for the defendant

SEEN:

Bonnie H. Wyne

Bonnie Wyne, for J. W. Wyne Excavating, Inc.

SEEN:

/s/ BRIAN D. SULLIVAN

Brian D. Sullivan
ARENT FOX
1050 Connecticut Avenue NW
Washington, DC 20036-5339
Counsel for the plaintiff

VIRGINIA:

IN THE CIRCUIT COURT FOR SPOTSYLVANIA COUNTY

J.W. WYNE EXCAVATING, INC.

Plaintiff,

v.

FREDERICKSBURG CONSTRUCTION
COMPANY, INC.

Defendant.

AT LAW NO. L-94-8

PRAECIPE

PLEASE TAKE NOTICE that on Term Day, Monday, April 17, 1995, at 10:00 a.m., Plaintiff/Counterclaim Defendant, Fredericksburg Construction Co., Inc., by counsel, will move the Court to set this case for trial, without a jury.

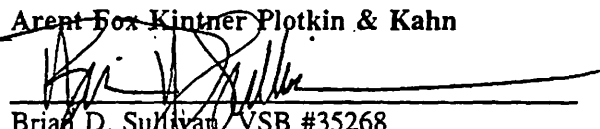
Respectfully submitted,

Fredericksburg Construction Co., Inc.

By Counsel

Counsel:


~~Arent Fox Kintner Plotkin & Kahn~~


Brian D. Sullivan, VSB #35268
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
202/857-6257

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of April 1995, a true and accurate copy of the foregoing
Praecipe was sent by facsimile and regular first class mail:

Sean Gregg, Esq.
Shackleford, Honenberger, Thomas, Willis & Gregg
Post Office Box 871
Orange, Virginia 22960



Brian D. Sullivan, Esq.

V I R G I N I A:

IN THE CIRCUIT COURT OF SPOTSYLVANIA COUNTY

J. W. WYNE EXCAVATING, INC.,

Plaintiff,

v.

FREDERICKSBURG CONSTRUCTION COMPANY, INC.,


Defendant.

AT LAW NO. L-94-8

PRAECIPE

Comes now, Rex L. Edwards, Jr., and notes his
appearance as counsel of record for the Plaintiff herein.

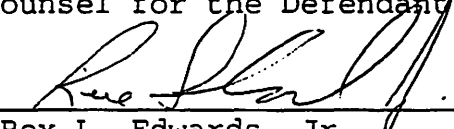
Respectfully submitted this 21st day of March, 1996.



Rex L. Edwards, Jr.

Rex L. Edwards, Jr.
Virginia State Bar No. 31212
DAVIES & BARRELL, P.C.
122 West Cameron Street
P. O. Box 1147
Culpeper, Virginia 22701
(540) 825-6000
Counsel for Plaintiff

CERTIFICATE: I hereby certify that on this the 21st day of
March, 1996, I mailed, postage prepaid, a true and correct copy
of the foregoing to Brian D. Sullivan, Esquire, Arent, Fox,
Kintner, Plotkin & Kahn, at 1050 Connecticut Avenue, N.W.,
Washington, D.C. 20036-5339, Counsel for the Defendant/Counter
Claim Plaintiff.



Rex L. Edwards, Jr.

RECORDED - DOCKETED
MAR 25 11:11 AM '96

VIRGINIA:

IN THE CIRCUIT COURT FOR SPOTSYLVANIA COUNTY

FREDERICKSBURG CONSTRUCTION COMPANY, INC.)	
)	
Plaintiff,)	AT LAW NO. L-94-8
)	
v.)	
)	
J.W. WYNE EXCAVATING, INC.)	
)	
Defendant.)	

MOTION TO WITHDRAW AS COUNSEL

The law firm of Arent, Fox, Kintner, Plotkin & Kahn ("Arent Fox") by R. Steve Holt, a partner therein, moves for permission to withdraw as counsel for plaintiff, Fredericksburg Construction Company, Inc. ("FCCI") in the above styled action, and for the grounds of this motion says as follows:

1. FCCI has failed substantially to fulfill obligations to Arent Fox regarding its services, and FCCI has been given reasonable warning that Arent Fox will withdraw unless the obligations are fulfilled, thereby justifying withdrawal pursuant to VA Code of Professional Responsibility DR2-108(B)(3).


Arent Fox met with FCCI and it was agreed between FCCI and Arent Fox that Arent Fox would withdraw from this case. Arent Fox informed plaintiff that Arent Fox would move for permission from this court to withdraw, since such permission was required by the Rules of the Supreme Court of Virginia before such withdrawal could be final. Petitioner agreed to seek to employ other counsel in this matter subject to final approval by the Court of Arent Fox's withdrawal from the case.

WHEREFORE, the law firm of Arent Fox Kintner Plotkin & Kahn, prays that it be permitted to withdraw as counsel for FCCI herein.

By:  R.S. Holt
R. Steven Holt, a partner


Arent Fox Kintner Plotkin & Kahn
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5339
202/857-6032

CERTIFICATE OF SERVICE

I hereby certify that on this  day of April 1996, a true and accurate copy of the foregoing Motion to Withdraw as Counsel was sent by first class mail, postage prepaid to:

Mr. Bill Barnes
Fredericksburg Construction Co.
P.O. Box 172
Lorton, Virginia 22079

Rex Edwards, Jr., Esq.
Davies & Barrell, P.C.
122 W. Cameron St.
Culpeper, Virginia 22701
Counsel for J.W. Wyne Excavating


Brian D. Sullivan

J. W. Wayne, Exc. Inc. at Law
v
Ind. Construction Co Inc L-94-8

Martin Marietta Material, Inc.
v
J. W. Wayne, Exc. Inc. at Law
v
Ind. Construction Co, Inc L-94-464

RECEIVED - 1440
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JAN 12 11 9 22

OFFICE
JAN 12 11 9 22

DAVIES & BARRELL, P.C.

CHRISTIAN A. BRASHEAR
ATTORNEY AT LAW

(540) 825-6000
(540) 825-1989 FAX

122 WEST CAMERON STREET
P.O. BOX 1147
CULPEPER, VIRGINIA 22701

VIRGINIA:

IN THE CIRCUIT COURT FOR SPOTSYLVANIA COUNTY

FREDERICKSBURG CONSTRUCTION
COMPANY, INC.

Plaintiff,

v.

J.W. WYNE EXCAVATING, INC.

Defendant.

AT LAW NO. L-94-8

ORDER GRANTING LEAVE TO WITHDRAW AS COUNSEL

Brian D. Sullivan, counsel for Fredericksburg Construction Company, Inc., requested that he be allowed to withdraw as counsel of record.

It is ordered that motion to withdraw as counsel be granted and further that Brian D. Sullivan, VSB #35268 be and is hereby granted leave to withdraw his appearance as counsel for FCCI in the action.

Enter

By:

W. H. Edwards
April 15, 1996

We ask for this:



Brian D. Sullivan, VSB #35268
Arent Fox Kintner Plotkin & Kahn
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5339
202/857-6257
Counsel for Plaintiff Fredericksburg Construction Co., Inc.

W. H.
Edwards

P. 07

1 202 857 6395

03-25-1996 06:34PM

SEEN AND AGREED:

Bill Barnes, Inc.
Bill Barnes, President
Fredericksburg Construction Co., Inc.

SEEN AND AGREED:

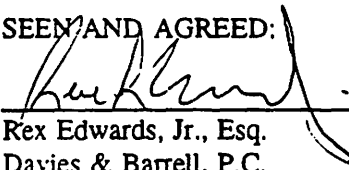
Rex Edwards, Jr., Esq.
Davies & Barrell, P.C.
122 W. Cameron St.
Culpeper, Virginia 22701
Counsel for Defendant J.W. Wyne Excavating

*Endorsement on
supplemental sheet.*
WAT

SEEN AND AGREED:

Bill Barnes, President
Fredericksburg Construction Co., Inc.

SEEN AND AGREED:



Rex Edwards, Jr., Esq.
Davies & Barrell, P.C.
122 W. Cameron St.
Culpeper, Virginia 22701
Counsel for Defendant J.W. Wyne Excavating

CLERK'S OFFICE
RECEIVED - FILED
RECORDED - DOCKETED
OCT 10 11 11:41

V I R G I N I A:

IN THE CIRCUIT COURT OF SPOTSYLVANIA COUNTY

FREDERICKSBURG CONSTRUCTION
COMPANY, INC.,

Plaintiff

vs.

AT LAW NO. L-94-8

J. W. WYNE EXCAVATING, INC.,

Defendant


PRAECIPE

Please place this matter on the Court's term day docket,
January 20, 1997, at 10:00 a.m., for the purpose of setting a date
for trial.

Estimated Time: Five (5) Minutes.

Respectfully submitted this 10th day of January, 1997.

J. W. WYNE EXCAVATING, INC.

By: 
Of Counsel

Rex L. Edwards, Jr.
Virginia State Bar No. 30067
DAVIES, BARRELL, WILL,
LEWELLYN & EDWARDS, P.C.
122 West Cameron Street
P. O. Box 1147
Culpeper, Virginia 22701
(540) 825-6000
Counsel for Defendant.

CERTIFICATE: I hereby certify that on this the 10th day of
January, 1997, I mailed, postage prepaid, a true and correct copy
of the foregoing to Bill Barnes, President, Fredericksburg
Construction Company, Inc., at P. O. Box 172, Lorton, Virginia
22079.


Rex L. Edwards, Jr.

16. JAN 21 1997
JAN 21 1997
JAN 21 1997

V I R G I N I A:

IN THE CIRCUIT COURT OF SPOTSYLVANIA COUNTY

FREDERICKSBURG CONSTRUCTION
COMPANY, INC.,

Plaintiff

vs.

AT LAW NO. L-94-8

J. W. WYNE EXCAVATING, INC.,

Defendant

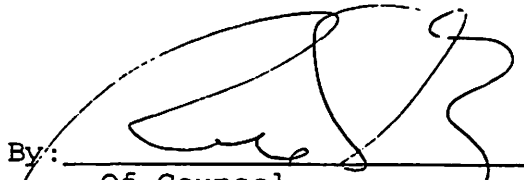
NOTICE

TO: FREDERICKSBURG CONSTRUCTION COMPANY, INC.
c/o Bill Barnes, President
P. O. Box 172
Lorton, Virginia 22079

Please take notice that on Monday, January 20, 1997, at 10:00 a.m., or as soon thereafter as it may be heard, counsel for J. W. Wyne Excavating, Inc. will move the Court to establish a trial date herein.

Respectfully submitted this 10th day of January, 1997.

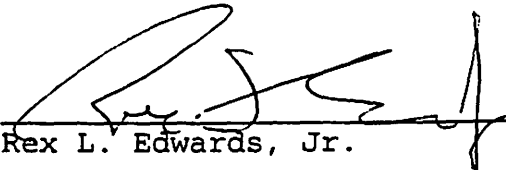
J. W. WYNE EXCAVATING, INC.

By:  _____
Of Counsel

Rex L. Edwards, Jr.
Virginia State Bar No. 30067
DAVIES, BARRELL, WILL,
LEWELLYN & EDWARDS, P.C.
122 West Cameron Street
P. O. Box 1147
Culpeper, Virginia 22701
(540) 825-6000
Counsel for Defendant.

16. JAN 21 1997
JAN 21 1997
JAN 21 1997

CERTIFICATE: I hereby certify that on this the 10th day of January, 1997, I mailed, postage prepaid, a true and correct copy of the foregoing to Bill Barnes, President, Fredericksburg Construction Company, Inc., at P. O. Box 172, Lorton, Virginia 22079.


Rex L. Edwards, Jr.

RECEIVED
JAN 13 12 20 PM '97
FEDERAL BUREAU OF INVESTIGATION
U.S. DEPARTMENT OF JUSTICE

January
21, 1997
Term
Day

VIRGINIA:

IN THE CIRCUIT COURT OF SPOTSYLVANIA COUNTY

Fredericksburg Const.

VS

CASE NUMBER: L94-8

J W Wyne

THIS DAY CAME:

- () PLAINTIFF IN PERSON
- () DEFENDANT IN PERSON
- () COUNSEL FOR PLAINTIFF
- () COUNSEL FOR DEFENDANT

THIS CASE IS:

- () SET FOR TRIAL WITH/WITHOUT A JURY ON
- () CONTINUED TO
- () SET FOR A PRE-TRIAL CONFERENCE ON
- () PRE-TRIAL MOTIONS SET ON

CERTIFIED COPY(IES) OF THIS NOTICE MAILED THIS _____ DAY OF _____, 1996 TO:

- () PLAINTIFF
- () DEFENDANT
- () COUNSEL FOR PLAINTIFF
- () COUNSEL FOR DEFENDANT

LINDA JO JOHNSON, CLERK

BY:

M. Lisa Wolfrey
DEPUTY CLERK

V I R G I N I A:

IN THE CIRCUIT COURT OF SPOTSYLVANIA COUNTY

FREDERICKSBURG CONSTRUCTION
COMPANY, INC.,

Plaintiff

vs.

AT LAW NO. L-94-8

J. W. WYNE EXCAVATING, INC.,

Defendant

PRAECIPE

Dec
Please place this matter on the Court's term day docket,
April 21, 1997, at 10:00 a.m., for the purpose of setting a date
for trial.

Estimated Time: 5 Minutes.

Respectfully submitted this 23rd day of January, 1997.

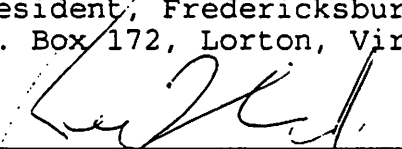
J. W. WYNE EXCAVATING, INC.

By: 

Of Counsel

Rex L. Edwards, Jr.
Virginia State Bar No. 31212
DAVIES, BARRELL, WILL,
LEWELLYN & EDWARDS, P.C.
122 West Cameron Street
P. O. Box 1147
Culpeper, Virginia 22701
(540) 825-6000
Counsel for Defendant.

CERTIFICATE: I hereby certify that on this the 23rd day of
January, 1997, I mailed, postage prepaid, a true and correct copy
of the foregoing to Bill Barnes, President, Fredericksburg
Construction Company, Inc., at P. O. Box 172, Lorton, Virginia
22079. *WLS*


Rex L. Edwards, Jr.

V I R G I N I A:

IN THE CIRCUIT COURT OF SPOTSYLVANIA COUNTY

FREDERICKSBURG CONSTRUCTION)
COMPANY, INC.,)

Plaintiff)

vs.)

AT LAW NO. L-94-8

J. W. WYNE EXCAVATING, INC.,)

Defendant)

NOTICE

TO: Fredericksburg Construction Company, Inc.
c/o Bill Barnes, President
P. O. Box 172
Lorton, Virginia 22079

PLEASE TAKE NOTICE that on April 21, 1997, at 10:00 a.m.,
or as soon thereafter as it may be heard, counsel for J. W. Wyne
Excavating, Inc. will move the Court to establish a trial date
herein.

Respectfully submitted this 23rd day of January, 1997.

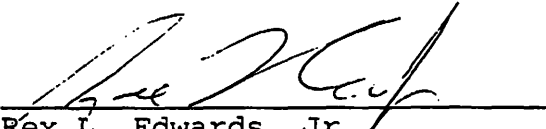
J. W. WYNE EXCAVATING, INC.

By: 

Of Counsel

Rex L. Edwards, Jr.
Virginia State Bar No. 31212
DAVIES, BARRELL, WILL,
LEWELLYN & EDWARDS, P.C.
122 West Cameron Street
P. O. Box 1147
Culpeper, Virginia 22701
(540) 825-6000
Counsel for Defendant

CERTIFICATE: I hereby certify that on this the 23rd day of January, 1997, I mailed, postage prepaid, a true and correct copy of the foregoing to Bill Barnes, President, Fredericksburg Construction Company, Inc., at P. O. Box 172, Lorton, Virginia 22079.


Rex L. Edwards, Jr.

April
21, 1997
Term
Day

VIRGINIA:

IN THE CIRCUIT COURT OF SPOTSYLVANIA COUNTY

Fredericksburg Construction

VS

CASE NUMBER: L 94-8

JW Wyne Excavating

THIS DAY CAME:

- () PLAINTIFF IN PERSON
- () DEFENDANT IN PERSON
- () COUNSEL FOR PLAINTIFF
- (X) COUNSEL FOR DEFENDANT Rex Edwards

THIS CASE IS:

- (X) SET FOR TRIAL WITH/ WITHOUT A JURY ON 9-25-97 10:00
- () CONTINUED TO _____
- () SET FOR A PRE-TRIAL CONFERENCE ON _____
- () PRE-TRIAL MOTIONS SET ON _____

CERTIFIED COPY(IES) OF THIS NOTICE MAILED THIS _____ DAY OF _____, 1996 TO:

- () PLAINTIFF
- () DEFENDANT
- () COUNSEL FOR PLAINTIFF _____
- () COUNSEL FOR DEFENDANT _____

LINDA JO JOHNSON, CLERK

BY: Melissa Wolfrey
DEPUTY CLERK

**DAVIES, BARRELL, WILL,
LEWELLYN & EDWARDS, P.C.**

ATTORNEYS AT LAW

JOHN J. DAVIES, III
CHARLES D. BARRELL
STEPHEN P. WILL
STEPHEN K. LEWELLYN
CYNTHIA CORNETT EDWARDS
REX L. EDWARDS, JR.

P. O. BOX 1147
122 WEST CAMERON STREET
CULPEPER, VIRGINIA 22701

TELEPHONE (540) 825-6000
TELECOPIER (540) 825-1989
E-MAIL dbwie@erols.com

CHARLOTTESVILLE OFFICE:
THE COMMERCE BUILDING
101 E. WATER STREET, SUITE 103
CHARLOTTESVILLE, VIRGINIA 22902
TELEPHONE (804) 984-2020
TELECOPIER (804) 977-0250

CHRISTIAN A. BRASHEAR

April 21, 1997

LEGAL ASSISTANTS:
DORIS B. BREEDEN
LORI T. DEANE
HEATHER T. CLARK

Mr. Bill Barnes, President
Fredericksburg Construction Company, Inc.
*P. O. Box 172
Lorton, Virginia 22079

and

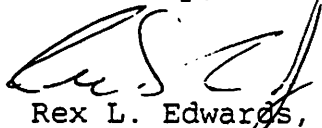
*7000 E. Newington Road
Lorton, Virginia 22079

RE: **Fredericksburg Constructions Company, Inc. v.
J. W. Wyne Excavating, Inc.
Spotsylvania Circuit Court - Case No.: L-94-8**

Dear Mr. Barnes:

Please take NOTICE that the above-referenced matter is
scheduled for trial before the bench on September 25, 1997 at
10:00 a.m.

Sincerely,



Rex L. Edwards, Jr.
For the Firm

RLEjr/pah

cc: Ms. Linda Jo Johnson, Clerk ✓
Circuit Court of Spotsylvania County
P. O. Box 96
Spotsylvania, Virginia 22553-0096

(*mailed to both addresses)

V I R G I N I A:

IN THE CIRCUIT COURT OF SPOTSYLVANIA COUNTY

J. W. WYNE EXCAVATING, INC.,)
)
Plaintiff/Counter-Claim Defendant)
)
vs. AT LAW NO.: L-94-8)
)
FREDERICKSBURG CONSTRUCTION COMPANY, INC.)
)
Defendant/Counter-Claim Plaintiff)

ORDER

On the 25th day of September, 1997, at 10:00 a.m., the Court called this case for trial of the Amended Motion for Judgment filed by J. W. Wyne Excavating, Inc. herein, and the counter-claim filed by Fredericksburg Construction Company, Inc. herein. J. W. Wyne Excavating, Inc. appeared, by its counsel, Rex L. Edwards, Jr. Fredericksburg Construction Company, Inc. did not appear.

WHEREAS, the trial had previously been set by the Court at the calling of its term day docket on January 20, 1997; and

WHEREAS, at the trial herein J. W. Wyne Excavating, Inc. presented evidence sufficient for a finding by the Court that Fredericksburg Construction Company, Inc. was duly indebted to J. W. Wyne Excavating, Inc. in the amount of Eighty-Five Thousand Sixty-Eight and 62/100 Dollars (\$85,068.62), together with interest from August 9, 1993 at 9%; and

WHEREAS, the Court, heard no evidence in support of Fredericksburg Construction Company, Inc.'s counter-claim herein, and further, heard evidence from J. W. Wyne, Excavating, Inc. in

Judgment
Docketed
9-24-98

defense thereto;

It is thereby ADJUDGED, ORDERED and DECREED that judgment in the amount of Eighty-Five Thousand Sixty-Eight and 62/100 Dollars (\$85,068.62), with interest at the rate of 9% from August 9, 1993 be entered in favor of J. W. Wyne Excavating, Inc. against the Defendant Fredericksburg Construction Company, Inc., and that the counter-claim filed by Fredericksburg Construction Company, Inc. herein against J. W. Wyne Excavating, Inc. be dismissed, with prejudice.

The Court announced its ruling as contained herein in open Court so that endorsement of this Order by the parties is not required.

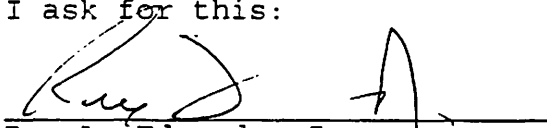
There being nothing further this matter is ENDED.

ENTER: J. Peyton Farmer

J. Peyton Farmer, Judge

DATE: 10-7-97

I ask for this:


Rex L. Edwards, Jr.
Virginia State Bar No 31212
DAVIES & BARRELL, P.C.
122 West Cameron Street
P. O. Box 1147
Culpeper, Virginia 22701
(703) 825-6000
Counsel for J. W. Wyne Excavating, Inc.

VIRGINIA:

IN THE CIRCUIT COURT FOR SPOTSYLVANIA COUNTY

**FREDERICKSBURG CONSTRUCTION
COMPANY, INC.,**

Plaintiff,

v.

J.W. WYNE EXCAVATING, INC.,

Defendant.

AT LAW NO. L-94-8

**FREDERICKSBURG CONSTRUCTION COMPANY INC.'S
MOTION TO VACATE JUDGMENT**

Plaintiff, Fredericksburg Construction Company, Inc. ("FCCI"), by counsel, hereby files its Motion to Vacate the Judgment Order entered by the Honorable J. Peyton Farmer on October 7, 1997 on the following grounds:

1. FCCI's counsel never received notice of the trial date as required under Virginia law.
2. FCCI was not served with process in accordance with the requirements of Section 8.01-299.
3. FCCI's Registered Agent never received process in this action.
4. FCCI had never received actual notice of the term day or trial date.
5. Wyne's conduct establishes that no procedural safeguards were taken to ensure service or notice on FCCI.
6. The Court's October 7, 1997 Judgment Order is void for failure to comply with Rule 1:13.
7. FCCI is entitled to a trial on the merits of its claim and to defend Wyne's claim.

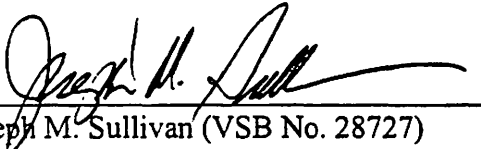
These grounds are more fully set forth in FCCI's Memorandum of Points and Authorities in Support of Motion to Vacate Judgment filed herein.

WHEREFORE, Fredericksburg Construction Company, Inc. respectfully requests that this Court grant its Motion to Vacate the October 7, 1997 Judgment; that this Court quash the garnishments issued in CL98-444 and CL98-445; that all funds held by this Court in the garnishment actions filed by J.W. Wyne Excavating, Inc. be returned to FCCI forthwith; that it be awarded its costs and attorney's fees for this Motion; and for such other and further relief as this Court deems appropriate.

Respectfully submitted,

FREDERICKSBURG CONSTRUCTION
COMPANY, INC.

By Counsel


Joseph M. Sullivan (VSB No. 28727)
THE LAW OFFICES OF JOSEPH M. SULLIVAN, P.C.
4010 University Drive, Suite 101
Fairfax, Virginia 22030
(703) 277-3390

Counsel for Fredericksburg Construction Company, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of November 1998, a true and accurate copy of Fredericksburg Construction Company, Inc.'s Motion to Vacate Judgment was sent via facsimile and first class mail to Rex L. Edwards, Jr., Esq., Davies, Barrell, Will, Lewellyn & Edwards, P.C., 122 West Cameron Street, P.O. Box 1147, Culpepper, Virginia 22707.


Joseph M. Sullivan

c:\joe\fcci\jwyne\pleadings\vacate.motion

VIRGINIA:

IN THE CIRCUIT COURT FOR SPOTSYLVANIA COUNTY

FREDERICKSBURG CONSTRUCTION)
COMPANY, INC.,)
)
Plaintiff,)
)
v.)
)
J.W. WYNE EXCAVATING, INC.,)
)
Defendant.)

AT LAW NO. L-94-8

**FREDERICKSBURG CONSTRUCTION COMPANY INC.'S
MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF ITS MOTION TO VACATE JUDGMENT**

Fredericksburg Construction Company, Inc., by counsel, hereby files its Memorandum of Points and Authorities in support of its Motion to Vacate the judgment which was entered on October 7, 1997 ("Judgment Order") by the Honorable J. Peyton Farmer in the above-styled action, and in support thereof, states as follows:

FACTUAL AND PROCEDURAL BACKGROUND

On January 19, 1994, Fredericksburg Construction Company, Inc. ("FCCI") filed a Motion for Judgment against J.W. Wyne Excavating, Inc. ("Wyne") in the Circuit Court of Spotsylvania County alleging, among other things, that Wyne had breached the subcontract agreement which it entered into on November 2, 1992 with FCCI for the Electronics Warfare Integration Laboratory located in Dahlgreen, Virginia (the "Project"). FCCI was represented by R. Steven Holt, Esq., and Brian D. Sullivan, Esq., of the Law Firm of Arent Fox Kintner Plotkin & Kahn ("Arent Fox"). On February 25, 1994, Wyne filed a Demurrer, Grounds of Defense, and

Counterclaim to FCCI's Motion for Judgment. On March 21, 1994, FCCI filed its Grounds of Defense to Wyne's Counterclaim.

On April 18, 1994, Wyne filed a Term Day Praecipe to set the matter for trial. A bench trial was subsequently set for October 27, 1994. On May 19, 1994, the Honorable William H. Ledbetter, Jr. entered an Order sustaining Paragraph 1 of Wyne's Demurrer to FCCI's Motion for Judgment and granting FCCI leave to file an Amended Motion for Judgment and/or to file an Amended Grounds of Defense to the Counterclaim. On May 3, 1994, FCCI filed an Amended Grounds of Defense to Wyne's Counterclaim.

On September 9, 1994, Wyne filed an Amended Motion for Judgment alleging breach of the subcontract by FCCI. On September 27, 1994, FCCI filed its Answer, Grounds of Defense, and Counterclaim to the Amended Motion for Judgment filed by Wyne. R. Steven Holt, Esq., and Brian D. Sullivan, Esq., of Arent Fox filed the Answer, Grounds of Defense, and Counterclaim to Wyne's Amended Motion for Judgment on behalf of FCCI. On October 11, 1994, Wyne filed its Grounds of Defense to FCCI's Counterclaim.

On October 11, 1994, FCCI filed a Motion for Continuance of the trial date. FCCI requested a continuance or stay in the action until the United States District Court for the Eastern District of Virginia (Richmond Division) ruled on FCCI's Motion to Intervene in the case styled, United States of America f/u/b/o J.W. Wyne Excavating, Inc. v. The American Insurance Company, Civil Action No. 3:94CV501. FCCI's Motion for Continuance was granted and the trial date was rescheduled for February 23, 1995 before the Honorable J. Peyton Farmer.

On November 17, 1994, Wyne filed a Stipulation of Dismissal of the Federal Court action against FCCI's bonding company, The American Insurance Company. Wyne never refiled the action against The American Insurance Company.

Following the completion of depositions by both FCCI and Wyne, R. Scott Pugh, counsel for Wyne, filed a Motion to Withdraw as Counsel. On February 10, 1995, Judge Farmer entered an Order granting Mr. Pugh's Motion to Withdraw and removing the case from the Court's trial calendar until it was reset.

On April 7, 1995, counsel for FCCI filed a Term Day Praeipie to set the matter for trial on April 17, 1995. Wyne was represented at this time by Sean Gregg, Esq., of the Law Firm of Shackleford, Honenberger, Thomas, Willis & Gregg in Orange, Virginia. On April 9, 1996, Arent Fox filed a Motion to Withdraw as counsel for FCCI. On April 15, 1996, the Honorable William H. Ledbetter, Jr. entered an Order granting Brian D. Sullivan, Esq., leave to withdraw as counsel for FCCI. The Court's Order did not grant leave for R. Steven Holt, Esq. or Arent Fox to withdraw as counsel for FCCI.

On March 21, 1996, Rex L. Edwards, Jr., Esq., entered his appearance as counsel of record for Plaintiff, J.W. Wyne in this action. On January 10, 1997, Mr. Edwards filed a Praeipie to place the matter on the Court's Term Day docket on January 20, 1997 at 10:00 a.m. Mr. Edwards mailed the Praeipie to Bill Barnes, President of FCCI, at P.O. Box 172 in Lorton, Virginia. Mr. Edwards did not mail the Praeipie to FCCI's counsel, Mr. Holt.

On January 20, 1997, Joseph M. Sullivan, Esq., of the Law Firm of Ritzert & Leyton, P.C., appeared on behalf of FCCI at the Term Day in accordance with the Praeipie and Notice received by FCCI. Mr. Sullivan appeared because Mr. Holt was unavailable for the Term Day.

Mr. Edwards, counsel for Wyne, did not appear at the January 20, 1997 Term Day nor did he contact the Court or FCCI to inform them that he was not going to appear. Mr. Sullivan requested that the case be passed until the end of the Term Day docket in order to provide Mr. Edwards sufficient time to appear at the Term Day. At the conclusion of the Court's docket, Judge Ledbetter indicated that he would pass the case and not set it for trial until Mr. Edwards was present.

On January 23, 1997, following the failure of counsel for Wyne to appear, Mr. Edwards allegedly sent a Praecipe and Notice (hereinafter "Term Day Notice") to Mr. Barnes to set this matter for trial at the Court's April 27, 1997 Term Day. Neither Mr. Barnes nor FCCI ever received copies of the Notice or Praecipe. FCCI never received any telephone calls or other contact from Mr. Edwards.

On April 21, 1997, Mr. Edwards allegedly sent a letter to Mr. Barnes (hereinafter "April 21, 1997 letter") with notice of the unilaterally-set trial date. The letter was allegedly sent to FCCI's post office box and to an address located at 7000 E. Newington Road, Lorton, Virginia. FCCI did not receive the letter from Mr. Edwards and did not maintain at that time an office at 7000 E. Newington Road, Lorton, Virginia. A trial date was subsequently set for this matter on September 25, 1997. It appears from the Court records that the case was set for trial at the April 21, 1997 Term Day.

On September 25, 1997, Wyne and its counsel appeared before the Court for the trial date which it had unilaterally set. FCCI did not appear at the trial since it had never received and had never been served with any notice of the trial date. On October 7, 1997, Judge Farmer entered an Order granting a judgment in favor of Wyne against FCCI in the amount of \$85,068.62 with

interest thereon from August 9, 1993 at nine percent (9%). The Court also dismissed FCCI's Counterclaim without ever hearing any evidence from FCCI on the Counterclaim due to the fact that it never received notice of the trial date.

On September 24, 1998, Wyne docketed the judgment entered on October 7, 1997. Wyne subsequently requested and the Clerk issued garnishments and levies against FCCI. Wyne now seeks to collect in the garnishments, \$126,768.56. FCCI first received notice of the judgment when it was served with two (2) garnishments on October 12, 1998, nearly thirteen (13) months after entry of the judgment by the Court.

I. FCCI's Counsel Never Received Notice Of
The Trial Date As Required Under Virginia Law

FCCI had been represented throughout this litigation by attorneys, R. Steven Holt and Brian D. Sullivan of the Law Firm of Arent Fox. On April 15, 1996, Judge Ledbetter entered an Order granting Brian D. Sullivan leave to withdraw as counsel for FCCI. The Order did not grant Mr. Holt or Arent Fox leave to withdraw as counsel for FCCI and was specifically limited to the representation by Mr. Sullivan. Following the entry of the Order by Judge Ledbetter, FCCI was still represented by Mr. Holt and Arent Fox in these proceedings. A copy of the Order granting Brian D. Sullivan, Esq. leave to withdraw is attached hereto as Exhibit 1.

Rule 1:5 of the Rules of The Supreme Court of Virginia provides "counsel of record shall not withdraw from a case except by leave of court after notice to the client of the time and place of a motion for leave to withdraw." While a Motion filed by Arent Fox may have well intended to withdraw both Mr. Holt and Mr. Sullivan, the Order entered by the Court only granted leave to withdraw to Brian D. Sullivan.

“... [A] court may speak only through its written orders.” Clephas v. Clephas, 1 Va. App. 209, 211, 336 S.E.2d 897, 899 (1985). There is no written Order in the Court’s records granting leave to withdraw by Mr. Holt or Arent Fox who had originally entered their appearance in this action on January 19, 1994. Mr. Holt and Arent Fox never withdrew their appearance at any time prior to entry of the Judgment Order in this action.

The 1950 Code of Virginia § 8.01-314, as amended, provides that

When an attorney authorized to practice law in this Commonwealth has entered a general appearance for any party, any process, order or other legal papers to be used in this proceeding may be served on such attorney of record.

Wyne never served on counsel for FCCI copies of the Term Day Notice or April 21, 1997 letter. Accordingly, Wyne failed to comply with the requirements of § 8.01-314 because it did not serve FCCI’s counsel of record. Wyne’s failure to serve FCCI’s counsel renders the Judgment Order void.

II. FCCI Was Not Served With Process In Accordance With The Requirements Of Section 8.01-299

The Code of Virginia sets forth specific procedures for service on domestic corporations. Assuming, *inter alia*, that FCCI was not represented by counsel following the Motion to Withdraw, Wyne was required to serve FCCI in accordance with the 1950 Code of Virginia, § 8.01-299, as amended.

Section 8.01-299, as amended, provides in pertinent part:

[P]rocess may be served on a corporation created by the laws of this State as follows: (1) by personal service on any officer, director, or registered agent of such corporation; or (2) by substituted service on stock corporations in accordance with the

requirements of Section 13.1-637 and on nonstock corporations in accordance with Section 13.1-836.

The term “process” is defined in the 1950 Code of Virginia § 8.01-285. Section 285 provides: “1. The term ‘process’ shall be deemed to include notice; ...”. The Term Day Notice which Wyne allegedly sent on January 23, 1997 for the April 21, 1997 Term Day and April 21, 1997 letter constitute notice under the requirements of § 8.01-285. Sections 8.01-285 and 8.01-299 required Wyne to serve the Notice and all other pleadings on FCCI through service of process.

The Court record in this action establishes that no sheriff or private process server served the Term Day Notice or the April 21, 1997 letter on FCCI. The Court record further establishes a *prima facie* case on behalf of FCCI that the requirements of these statutes were not met since counsel for Wyne allegedly, at best, mailed the Term Day Notice and April 21, 1997 letter to FCCI at a post office box.

FCCI has attached as Exhibit 2 to this Memorandum of Points and Authorities an Affidavit of Billy W. Barnes, President of FCCI, which establishes that FCCI was not served with either the Term Day Notice or the April 21, 1997 letter. Mr. Barnes’ Affidavit further establishes that FCCI never received any notice of any type relative to the September 27, 1997 trial date, trial, or entry of judgment.

III. FCCI’s Registered Agent Never Received Process In This Action

The 1950 Code of Virginia § 13.1-637, as amended, sets forth the procedure for substituted service on a stock corporation under Virginia law. Subsection (a) provides as follows:

[A] corporation's registered agent is a corporation's agent for service of process, notice, or demand required or permitted by law to be served on the corporation.

In John Deere Industrial Equipment Co. v. J.W. Wyne Excavating, Inc., 32 Va. Cir. 309

(1993), Judge Ledbetter ruled:

A non-governmental domestic corporation is served with process by personal service on any officer or director of the corporation. A corporation is a fiction, a creature of the law. Its officers and directors may be numerous, they may be scattered, and they may have little or nothing to do with the day-to-day operations of the business being conducted by the corporation. Therefore, in addition to officers and directors, the law requires that every corporation have a 'registered agent,' whose sole duty is to accept service of process, notices, and demands, and forward such papers on to the corporation. The registered agent's business office is the 'registered office' of the corporation. See Virginia Code § 13.1-634 and § 13.1-637. Thus, in addition to officers and directors, service on the corporation may be by personal service on the registered agent. Virginia Code § 8.01-299. These provisions protect the corporation in that only persons in key positions (the officers and directors) and the person specifically designated for such purpose (the registered agent) accept important papers, such as pleadings in a law suit, for the corporation. The provisions also lift a burden from persons attempting to sue a corporation by mandating that someone is always designated and specifically listed in a centrally located directory, as an agent for service of process on the corporation.

Hence, if the person listed with the State Corporation Commission as the registered agent for Wyne Excavating had been personally served by the deputy sheriff with John Deere's motion for judgment, it would not have mattered that such person was not 'running the business,' that he did not live at the address of the registered office, that he was not involved in the routine affairs of the corporation, or that the corporation's actual business address was at 18 Shannon Drive. Such service would have effectively constituted service on the corporation, giving the court personal jurisdiction to adjudicate the claim.

The registered agent for FCCI is John J. Sabourin, Esq., of the Law Firm of Hazel & Thomas, P.C. Mr. Sabourin has been FCCI's Registered Agent since 1990.

Mr. Sabourin never received any process, notice, letters, communications, either written or oral, from Wyne in this action, including the Term Day Notice or April 21, 1997 letter. Further, Mr. Sabourin never received any process, communication, or telephone calls from counsel for Wyne, including Mr. Edwards, Wyne's current counsel. FCCI has attached as Exhibit 3 to this Memorandum the Affidavit of John J. Sabourin, Esq., which establishes that no process or notice of any type was ever received by him as Registered Agent for FCCI in this action. Wyne's failure to serve FCCI's Registered Agent renders the Judgment Order void.

IV. FCCI Had Never Received Actual Notice Of The Term Day Or Trial Date

The Affidavits of Mr. Barnes and Mr. Sabourin clearly establish that there was no service of process or notice of any type to FCCI relative to the Term Day Notice or April 21, 1997 letter. Further, FCCI never had actual notice of the April 21, 1997 Term Day or the subsequent trial date which was unilaterally set by Wyne.

Had FCCI received actual or any other form of notice of the April 21, 1997 Term Day or the trial date, it would have taken the steps necessary to protect its interests in this action. See Affidavit of Billy W. Barnes. FCCI sent counsel to the January 20, 1997 Term Day even though it was never properly served through either its counsel, officers or directors, or registered agent with the Term Day Notice. If FCCI had received actual notice of the Term Day or trial date, even if it had not been properly served as required under Virginia law, it would have taken the steps necessary to protect its interests in this matter by having counsel appear on its behalf.

However, since Wyne never properly served FCCI or took any steps necessary to ensure that FCCI received actual notice, FCCI was unable to protect its interests in this matter which resulted in Wyne obtaining the judgment against FCCI.

**V. Wyne's Conduct Establishes That No Procedural
Safeguards Were Taken To Ensure Service Or Notice On FCCI**

The Court record in this matter establishes that FCCI was never served in any manner with the Term Day Notice, April 21, 1997 letter, trial date, or entry of the Judgment Order. Wyne's own documents further establish that service was not made on FCCI as required under Virginia Code §§ 8.01-314, 8.01-299, and 13.1-637. There is no return in the Court record which establishes Wyne's compliance with any of these statutes. Accordingly, service on FCCI was not made in accordance with the requirements of Virginia law rendering the judgment void.

Even if the Court were to put aside each of these arguments, it is clear from the record that Wyne and its counsel made absolutely no effort to ensure that FCCI received notice of the Term Day, trial date, or entry of the Judgment Order. It is also clear from the record that Wyne took affirmative steps to ensure that FCCI did not receive notice in this action.

The Term Day Notice and April 21, 1997 letter which Wyne allegedly sent, were not sent by certified or registered mail. Counsel for Wyne did not send via facsimile, overnight delivery or express mail the Term Day Notice, April 21, 1997 letter, or notice of trial date. There is no evidence in the record which establishes that these documents were even sent to FCCI.

From the time period of March 21, 1996 through the service of the garnishments on FCCI on October 12, 1998, a period of more than two and a half (2-1/2) years, Wyne's counsel has affirmatively stated that it never made any attempt to contact, via telephone or by any other

means, any representative of FCCI. It is clear that Wyne's intentions were to ambush FCCI in this action. Further evidence of this is set forth in the Judgment Order which Wyne's counsel drafted following the unilaterally-set trial in this matter. The Order states "the Court announced its ruling as contained herein in open court and endorsement of this Order by the parties is not required." This, again, establishes Wyne's intent to deprive FCCI of its rights to pursue its claims in this action and defend the claims brought by Wyne.

VI. The Court's October 7, 1997 Judgment Order Is
Void For Failure To Comply With Rule 1:13

Rule 1:13 of the Rules of The Supreme Court of Virginia provides as follows:

Endorsements. Drafts of orders and decrees shall be endorsed by counsel of record, or reasonable notice of the time and place of presenting such drafts together with copies thereof shall be served by delivering or mailing to all counsel of record who have not endorsed them. Compliance with this Rule and with Rule 1:12 may be modified or dispensed with by the court in its discretion.

The Judgment Order entered on October 7, 1997 is void because it fails to comply with the requirements of Rule 1:13. The requirements of Rule 1:13 and the effect of a party's failure to comply with this Rule have been clearly established by The Supreme Court of Virginia. In Smith v. Stanaway, 242 Va. 286, 410 S.E.2d 610 (1991), the Supreme Court held as follows:

We said in *State Highway Commissioner v. Easley*, 215 Va. 197, 201, 207 S.E.2d 870, 873 (1974), that 'Rule 1:13 is designed to protect parties without notice.' And, 'one of the essentials of due process is notice.' *Walt Robbins, Inc. v. Damon Corp.*, 232 Va. 43, 47, 348 S.E.2d 223, 226 (1986) (citation omitted). Accordingly, where a counsel-drafted order is entered in violation of Rule 1:13, it is void. *Rosillo v. Winters*, 235 Va. 268, 272-73, 367 S.E.2d 717, 719.

The Order drafted by Wyne's counsel violates Rule 1:13. The Court's record establishes that FCCI's due process rights were violated by Wyne's failure to provide notice of entry of the Judgment Order. Wyne took affirmative action to ensure that FCCI would not receive notice of entry of the Judgment Order.

In Rosillo v. Winters, 235 Va. 268, 367 S.E.2d 717 (1988), the Virginia Supreme Court reversed the entry of an order where the endorsement of defendant's counsel should have been obtained or counsel should have been furnished with reasonable notice of the time and place of presenting the draft for entry pursuant to Rule 1:13. In Rosillo, the attorneys in the case had actually reviewed the order but disagreed as to the language to be used in the order. The Virginia Supreme Court held that,

[S]ubstantial rights of the defendant were affected by the action of the court embodied in the order and the court should not have dispensed with notice and an opportunity for the defendant to be heard.

The facts in this case are even more egregious than in Rosillo. In this case, FCCI never received the Term Day Notice or April 21, 1997 letter, and was never furnished with a draft of the Judgment Order entered in this action. FCCI never received notice of entry of this Judgment Order due to the actions taken by Wyne in drafting and presenting the Judgment Order. Further, there is nothing in the Court record which indicates that the Court notified FCCI that it was modifying or dispensing with the requirements of Rule 1:13. The Judgment Order entered in this action is void because it was not properly endorsed, and notice was not provided to FCCI as required under Rule 1:13.

VII. FCCI Is Entitled To A Trial On The Merits
Of Its Claim And To Defend Wyne's Claim

FCCI initially filed the Motion for Judgment in this action against Wyne to recover substantial damages it had incurred as a result of Wyne's breach of the subcontract on the Project. Throughout the course of this action, FCCI took affirmative steps to pursue its claim and defend the claims brought by Wyne.

There is a presumption in favor of trying cases on the merits in Virginia. In this action, the failure of Wyne to serve FCCI with notice has denied FCCI its right to a trial on the merits of its claim and the right to defend the claims brought by Wyne at a trial. Wyne's unilateral setting of the trial date and failure to notify FCCI of the trial date precluded FCCI from defending Wyne's claim at trial. Wyne took affirmative steps at the unilaterally-set trial to ensure that FCCI's substantive rights to its Counterclaim were extinguished by providing *ex parte* testimony which FCCI was never provided an opportunity to refute. Following the conclusion of the unilaterally-set trial, Wyne again deprived FCCI of its rights by violating Rule 1:13.

FCCI respectfully submits that the Judgment Order entered in this action is void. FCCI is entitled to have the Judgment Order vacated and to a trial on the merits of its claim.

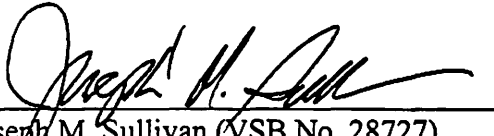
WHEREFORE, Fredericksburg Construction Company, Inc. respectfully requests that this Court vacate the Order entered on October 7, 1997; set this matter for trial; quash the garnishment summons issued by J.W. Wyne Excavating, Inc. in Case Nos. CL98-444 and CL98-445, Circuit Court of Spotsylvania County; that all funds held by this Court in the garnishment actions filed by J.W. Wyne Excavating, Inc. be returned to FCCI forthwith; quash the levies issued by J.W. Wyne Excavating, Inc.; that all property levied by J.W. Wyne

Excavating, Inc. be released from the levies; award FCCI its costs, interest, and attorney's fees in filing this Motion; and such other and further relief as this Court deems appropriate.

Respectfully submitted,

FREDERICKSBURG CONSTRUCTION
COMPANY, INC.

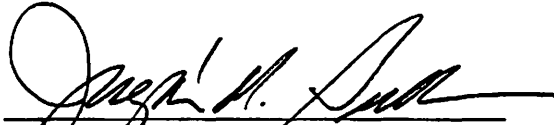
By Counsel


Joseph M. Sullivan (VSB No. 28727)
THE LAW OFFICES OF JOSEPH M. SULLIVAN, P.C.
4010 University Drive, Suite 101
Fairfax, Virginia 22030
(703) 277-3390

Counsel for Fredericksburg Construction Company, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of November 1998, a true and accurate copy of Fredericksburg Construction Company, Inc.'s Memorandum of Points and Authorities in Support of Motion to Vacate Judgment was sent via facsimile and first class mail to Rex L. Edwards, Jr., Esq., Davies, Barrell, Will, Lewellyn & Edwards, P.C., 122 West Cameron Street, P.O. Box 1147, Culpepper, Virginia 22701.


Joseph M. Sullivan

c:\joe\fcci\jww\pleadings\vacate.memo

VIRGINIA:

IN THE CIRCUIT COURT FOR SPOTSYLVANIA COUNTY

FREDERICKSBURG CONSTRUCTION
COMPANY, INC.

Plaintiff,

v.

J.W. WYNE EXCAVATING, INC.

Defendant.

AT LAW NO. L-94-8

ORDER GRANTING LEAVE TO WITHDRAW AS COUNSEL

Brian D. Sullivan, counsel for Fredericksburg Construction Company, Inc., requested that he be allowed to withdraw as counsel of record.

It is ordered that motion to withdraw as counsel be granted and further that Brian D. Sullivan, VSB #35268 be and is hereby granted leave to withdraw his appearance as counsel for FCCI in the action.

Enter

By:

Withdrew - 1
April 15, 1996

We ask for this:


Brian D. Sullivan, VSB #35268

Arent Fox Kintner Plotkin & Kahn

1050 Connecticut Avenue, N.W.

Washington, DC 20036-5339

202/857-6257

Counsel for Plaintiff Fredericksburg Construction Co., Inc.

Handwritten:
Sullivan
leaves

P.07

1 202 857 6395

03-25-1996 06:34PM

SEEN AND AGREED:

Bill Barnes, Inc.
Bill Barnes, President
Fredericksburg Construction Co., Inc.

SEEN AND AGREED:

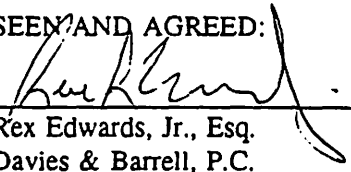
Rex Edwards, Jr., Esq.
Davies & Barrell, P.C.
122 W. Cameron St.
Culpeper, Virginia 22701
Counsel for Defendant J.W. Wyne Excavating

*Endorsement on
supplemental sheet.*
WWE

SEEN AND AGREED:

Bill Barnes, President
Fredericksburg Construction Co., Inc.

SEEN AND AGREED:



Rex Edwards, Jr., Esq.
Davies & Barrell, P.C.
122 W. Cameron St.
Culpeper, Virginia 22701
Counsel for Defendant J.W. Wyne Excavating

RECORDED - DEPOSITED
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CLERK OF COURT
JUL 10 2011

VIRGINIA:

IN THE CIRCUIT COURT FOR SPOTSYLVANIA COUNTY

**FREDERICKSBURG CONSTRUCTION
COMPANY, INC.,**

Plaintiff,

V.

J.W. WYNE EXCAVATING, INC.,

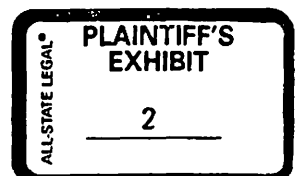
Defendant.

AT LAW NO. L-94-8

AFFIDAVIT

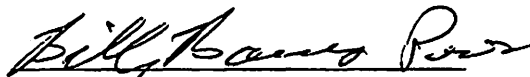
I, Billy W. Barnes, being duly sworn, depose and state as follows:

1. I am over eighteen (18) years of age and am competent to make this Affidavit.
2. I am the President of Fredericksburg Construction Company, Inc. ("FCCI").
3. I have been the President of FCCI since its inception in July 1977 to the present.
4. I have never been contacted in any manner by Rex L. Edwards, Jr., Esq., of the law firm of Davies, Barrell, Will, Lewellyn & Edwards, P.C. or any other attorney associated with that firm during the course of this litigation.
5. I was never contacted by anyone associated with J.W. Wyne Excavating, Inc. ("Wyne") from the time Mr. Edwards entered his appearance on behalf of Wyne until the present.
6. Neither I nor FCCI received a copy of the Praeceptum dated January 23, 1997 which is attached hereto as Exhibit 1 to this Affidavit.
7. Neither I nor FCCI received a copy of the Notice dated January 23, 1997 which is attached hereto as Exhibit 2 to this Affidavit.




8. Neither I nor FCCI received a copy of the letter dated April 21, 1997 which is attached hereto as Exhibit 3 to this Affidavit.
9. On April 21, 1997, FCCI did not maintain an office at 7000E Newington Road in Lorton, Virginia.
10. I never received any communication of any type relative to the date of the trial which was held in the above-referenced action on September 25, 1997.
11. If I or FCCI had received any type of notice or communication from Wyne, Mr. Edwards or the Court relative to the Term Day Notice, trial date or entry of the judgment on October 7, 1997, FCCI would have had our counsel take steps to appear on our behalf, pursue our Counterclaim, and defend the claim filed by J.W. Wyne.

Further the Affiant sayeth not.


Billy W. Barnes

Subscribed and sworn to before me this 18 day of November 1998.


Notary Public

My Commission Expires: 9/30/99

c:\fcci\jwwyne\pleadings\barnes.affidavit

V I R G I N I A:

IN THE CIRCUIT COURT OF SPOTSYLVANIA COUNTY

FREDERICKSBURG CONSTRUCTION
COMPANY, INC.,

Plaintiff

vs.

AT LAW NO. L-94-8

J. W. WYNE EXCAVATING, INC.,

Defendant

PRAECIPE

Mc
Please place this matter on the Court's term day docket,
April 21, 1997, at 10:00 a.m., for the purpose of setting a date
for trial.

Estimated Time: 5 Minutes.

Respectfully submitted this 23rd day of January, 1997.

J. W. WYNE EXCAVATING, INC.

By: *[Signature]*

Of Counsel

Rex L. Edwards, Jr.
Virginia State Bar No. 31212
DAVIES, BARRELL, WILL,
LEWELLYN & EDWARDS, P.C.
122 West Cameron Street
P. O. Box 1147
Culpeper, Virginia 22701
(540) 825-6000
Counsel for Defendant.

CERTIFICATE: I hereby certify that on this the 23rd day of
January, 1997, I mailed, postage prepaid, a true and correct copy
of the foregoing to Bill Barnes, President, Fredericksburg
Construction Company, Inc., at P. O. Box 172, Lorton, Virginia
22079. *WS*

[Signature]
Rex L. Edwards, Jr.

EXHIBIT

1

ALL-STATE INTERNATIONAL

105

V I R G I N I A:

IN THE CIRCUIT COURT OF SPOTSYLVANIA COUNTY

FREDERICKSBURG CONSTRUCTION
COMPANY, INC.,

Plaintiff

vs.

AT LAW NO. L-94-8

J. W. WYNE EXCAVATING, INC.,

Defendant

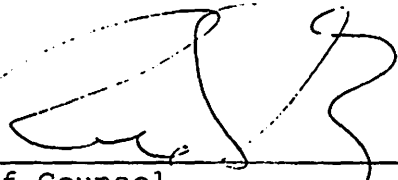
NOTICE

TO: FREDERICKSBURG CONSTRUCTION COMPANY, INC.
c/o Bill Barnes, President
P. O. Box 172
Lorton, Virginia 22079

Please take notice that on Monday, January 20, 1997, at 10:00
a.m., or as soon thereafter as it may be heard, counsel for J. W.
Wyne Excavating, Inc. will move the Court to establish a trial date
herein.

Respectfully submitted this 10th day of January, 1997.

J. W. WYNE EXCAVATING, INC.

By: 
Of Counsel

Rex L. Edwards, Jr.
Virginia State Bar No. 30067
DAVIES, BARRELL, WILL,
LEWELLYN & EDWARDS, P.C.
122 West Cameron Street
P. O. Box 1147
Culpeper, Virginia 22701
(540) 825-6000
Counsel for Defendant.

EXHIBIT

2

106

ALL-STATE® INTERNATIONAL

15. JAN 21 1997
10:00 AM
JAN 21 1997

CEPTIFICATE: I hereby certify that on this the 10th day of January, 1997, I mailed, postage prepaid, a true and correct copy of the foregoing to Bill Barnes, President, Fredericksburg Construction Company, Inc., at P. O. Box 172, Lorton, Virginia 22079.



Rex L. Edwards, Jr.

**DAVIES, BARRELL, WILL,
LEWELLYN & EDWARDS, P.C.**

ATTORNEYS AT LAW

JOHN J. DAVIES, III
CHARLES D. BARRELL
STEPHEN P. WILL
STEPHEN K. LEWELLYN
CYNTHIA CORNETT EDWARDS
REX L. EDWARDS, JR.

P. O. BOX 1147
122 WEST CAMERON STREET
CULPEPER, VIRGINIA 22701

TELEPHONE (540) 825-6000
TELECOPIER (540) 825-1989
E-MAIL dbwle@erols.com

CHARLOTTESVILLE OFFICE:
THE COMMERCE BUILDING
101 E. WATER STREET, SUITE 103
CHARLOTTESVILLE, VIRGINIA 22902
TELEPHONE (804) 984-2020
TELECOPIER (804) 977-0250

CHRISTIAN A. BRASHEAR

April 21, 1997

LEGAL ASSISTANTS:
DORIS B. BREEDEN
LORI T. DEANE
HEATHER T. CLARY

Mr. Bill Barnes, President
Fredericksburg Construction Company, Inc.
*P. O. Box 172
Lorton, Virginia 22079

and

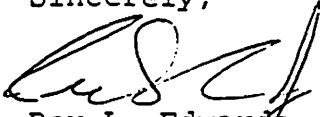
*7000 E. Newington Road
Lorton, Virginia 22079

RE: Fredericksburg Constructions Company, Inc. v.
J. W. Wyne Excavating, Inc.
Spotsylvania Circuit Court - Case No.: L-94-8

Dear Mr. Barnes:

Please take NOTICE that the above-referenced matter is
scheduled for trial before the bench on September 25, 1997 at
10:00 a.m.

Sincerely,


Rex L. Edwards, Jr.
For the Firm

RLEjr/pah
cc: Ms. Linda Jo Johnson, Clerk ✓
Circuit Court of Spotsylvania County*
P. O. Box 96
Spotsylvania, Virginia 22553-0096

(*mailed to both addresses)

35
APR 23 11 53 AM '97
CLERK'S OFFICE
SPOTSYLVANIA CIRCUIT COURT
SPOTSYLVANIA CO., VA.
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241

VIRGINIA:

IN THE CIRCUIT COURT FOR SPOTSYLVANIA COUNTY

**FREDERICKSBURG CONSTRUCTION
COMPANY, INC.,**

Plaintiff,

v.

AT LAW NO. L-94-8

J.W. WYNE EXCAVATING, INC.,

Defendant.

AFFIDAVIT

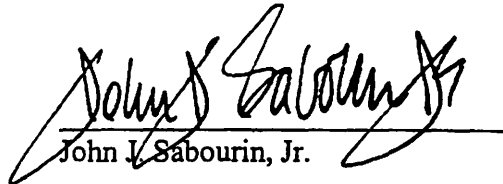
John J. Sabourin, Jr., being duly sworn, deposes and says:

1. I am over 18 years of age, competent to make this affidavit and have personal knowledge of the matters stated herein.
2. I am an attorney and owner in the law firm of Hazel & Thomas, P.C. in Falls Church, Virginia. I have been engaged in the practice of law with Hazel & Thomas, P.C. and its predecessor firm, Hazel, Beckhorn & Hanes, since January 1974.
3. I have been the registered agent for Fredericksburg Construction Company, Inc. ("FCCI") from prior to 1990 to the present. I have reviewed my files on FCCI to confirm the statements made in this affidavit.
4. I have never been served with process in the above action. I am advised that Rex L. Edwards, Jr., of the law firm of Davies, Davies, Barrell, Will, Lewellyn & Edwards, P.C., represents Defendant, J.W. Wyne Excavating, Inc., in the above action. I



have never been contacted by Mr. Edwards or any other attorney from his firm concerning the above lawsuit.

5. I am advised that the above suit was filed on January 19, 1994. I have not had any contact with any employees of Defendant, J.W. Wyne Excavating, Inc., during the time this suit has been pending.
6. Counsel for FCCI recently provided me with a praecipe served in this action on January 23, 1997, a notice served on January 10, 1997, and a letter dated April 21, 1997, from Mr. Edwards to Mr. Bill Barnes, President of FCCI. Those documents are attached to this affidavit as Exhibits A, B, and C, respectively. Prior to receiving those Exhibits from counsel for FCCI for the purpose of preparing this affidavit, I had not seen those documents.
7. I am advised that there was a trial in the above case on September 25, 1997. I did not receive any written or oral communication concerning that trial or that trial date.
8. It is my normal practice, upon receipt of notice concerning an action involving FCCI, to contact the offices of FCCI and then forward by mail, with a transmittal letter, the notice or other communication. My review of the FCCI file indicates that I did not receive or forward to FCCI any notification of the trial in the above action on September 25, 1997. Further Affiant sayeth not.


John I. Sabourin, Jr.

Subscribed and sworn to before me this 18th day of November 1998.

Diane E. Roa
Notary Public

My Commission Expires: 12/31/99

c:\fcc\jwwyne\pleadings\sabourin.affidavit

V I R G I N I A:

IN THE CIRCUIT COURT OF SPOTSYLVANIA COUNTY

FREDERICKSBURG CONSTRUCTION
COMPANY, INC.,

Plaintiff

vs.

AT LAW NO. L-94-8

J. W. WYNE EXCAVATING, INC.,

Defendant

PRAECIPE

Mc
Please place this matter on the Court's term day docket,
April 21, 1997, at 10:00 a.m., for the purpose of setting a date
for trial.

Estimated Time: 5 Minutes.

Respectfully submitted this 23rd day of January, 1997.

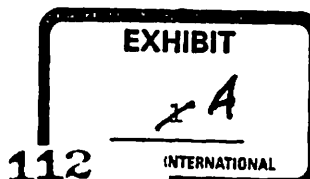
J. W. WYNE EXCAVATING, INC.

By: *[Signature]*
Of Counsel

Rex L. Edwards, Jr.
Virginia State Bar No. 31212
DAVIES, BARRELL, WILL,
LEWELLYN & EDWARDS, P.C.
122 West Cameron Street
P. O. Box 1147
Culpeper, Virginia 22701
(540) 825-6000
Counsel for Defendant.

CERTIFICATE: I hereby certify that on this the 23rd day of
January, 1997, I mailed, postage prepaid, a true and correct copy
of the foregoing to Bill Barnes, President, Fredericksburg
Construction Company, Inc., at P. O. Box 172, Lorton, Virginia
22079. *WS*

[Signature]
Rex L. Edwards, Jr.



V I R G I N I A:

IN THE CIRCUIT COURT OF SPOTSYLVANIA COUNTY

FREDERICKSBURG CONSTRUCTION
COMPANY, INC.,

Plaintiff

vs.

AT LAW NO. L-94-8

J. W. WYNE EXCAVATING, INC.,

Defendant

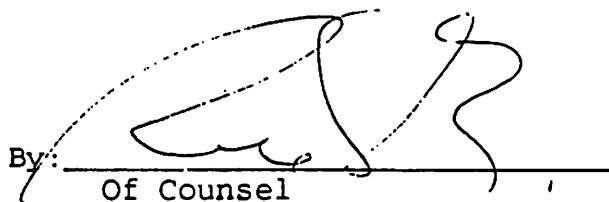
NOTICE

TO: FREDERICKSBURG CONSTRUCTION COMPANY, INC.
c/o Bill Barnes, President
P. O. Box 172
Lorton, Virginia 22079

Please take notice that on Monday, January 20, 1997, at 10:00 a.m., or as soon thereafter as it may be heard, counsel for J. W. Wyne Excavating, Inc. will move the Court to establish a trial date herein.

Respectfully submitted this 10th day of January, 1997.

J. W. WYNE EXCAVATING, INC.

By: 
Of Counsel

Rex L. Edwards, Jr.
Virginia State Bar No. 30067
DAVIES, BARRELL, WILL,
LEWELLYN & EDWARDS, P.C.
122 West Cameron Street
P. O. Box 1147
Culpeper, Virginia 22701
(540) 825-6000
Counsel for Defendant.



113

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JAN 15 1997
CLERK OF COURT

CERTIFICATE: I hereby certify that on this the 10th day of January, 1997, I mailed, postage prepaid, a true and correct copy of the foregoing to Bill Barnes, President, Fredericksburg Construction Company, Inc., at P. O. Box 172, Lorton, Virginia 22079.


Rex L. Edwards, Jr.

DAVIES, BARRELL, WILL,
LEWELLYN & EDWARDS, P.C.

ATTORNEYS AT LAW

JOHN J. DAVIES, III
CHARLES D. BARRELL
STEPHEN P. WILL
STEPHEN K. LEWELLYN
CYNTHIA CORNETT EDWARDS
REX L. EDWARDS, JR.

P.O. BOX 1147
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TELEPHONE (540) 825-6000
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CHARLOTTESVILLE OFFICE:
THE COMMERCE BUILDING
101 E. WATER STREET, SUITE 103
CHARLOTTESVILLE, VIRGINIA 22902
TELEPHONE (804) 984-2020
TELECOPIER (804) 977-0250

CHRISTIAN A. BRASHEAR

April 21, 1997

LEGAL ASSISTANTS:
DORIS B. BREEDEN
LORI T. DEANE
HEATHER T. CLARY

Mr. Bill Barnes, President
Fredericksburg Construction Company, Inc.
*P. O. Box 172
Lorton, Virginia 22079

and

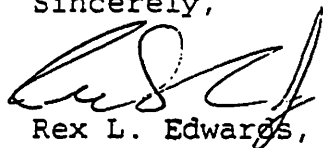
*7000 E. Newington Road
Lorton, Virginia 22079

RE: Fredericksburg Constructions Company, Inc. v.
J. W. Wyne Excavating, Inc.
Spotsylvania Circuit Court - Case No.: L-94-8

Dear Mr. Barnes:

Please take NOTICE that the above-referenced matter is
scheduled for trial before the bench on September 25, 1997 at
10:00 a.m.

Sincerely,


Rex L. Edwards, Jr.
For the Firm

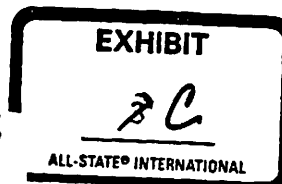
RLEjr/pah

cc: Ms. Linda Jo Johnson, Clerk ✓
Circuit Court of Spotsylvania County*
P. O. Box 96
Spotsylvania, Virginia 22553-0096

(*mailed to both addresses)

35
APR 23 11 59 AM '97
CLERKS OFFICE
SPOTSYLVANIA CIRCUIT COURT
SPOTSYLVANIA CO., VA.

115



8/4/21

V I R G I N I A

IN THE CIRCUIT COURT OF SPOTSYLVANIA COUNTY

FREDERICKSBURG CONSTRUCTION)	
COMPANY, INC.,)	
)	
Plaintiff,)	
)	
v.)	AT LAW NO.: L-94-8
)	
J. W. WYNE EXCAVATING, INC.,)	
)	
Defendant.)	

and

J. W. WYNE EXCAVATING, INC.)	
)	
Plaintiff,)	
)	
v.)	AT LAW NOS: L-98-444
)	L-98-445
)	
FREDERICKSBURG CONSTRUCTION)	
COMPANY, INC.,)	
)	
Defendant.)	

J.W. WYNE EXCAVATING, INC.'S OPPOSITION TO
MOTIONS TO VACATE JUDGMENT AND QUASH GARNISHMENTS

J. W. Wyne Excavating, Inc. ("Wyne"), by counsel, hereby files this opposition to the Motion to Vacate Judgment and Motions to Quash Garnishments filed by Fredericksburg Construction Company, Inc. ("FCCI") herein, and in opposition thereto states as follows:

FACTUAL AND PROCEDURAL BACKGROUND

Wyne admits to the accuracy of the factual and procedural background set forth by FCCI in its Memorandum of Points and Authorities in support of its Motion to Vacate Judgment ("FCCI's Memorandum") through the statement on Page 3 thereof indicating that on April 9, 1996, Arent, Fox filed a Motion to Withdraw as.

Counsel for FCCI. Thereafter, Wyne contests the accuracy of FCCI's factual statement, and reports the relevant facts as follows:

According to the Certificate of Service on the aforesaid Motion to Withdraw and the accompanying Praecipe, copies of said Motion and Praecipe were mailed by Brian D. Sullivan to Mr. Bill Barnes, Fredericksburg Construction Company, P. O. Box 172, Lorton, Virginia 22079. On April 15, 1996, the Honorable William H. Ledbetter, Jr. entered an Order granting the law firm of Arent, Fox, Kintner, Plotkin & Kahn ("Arent, Fox") leave to withdraw as counsel for FCCI. FCCI, then a pro se party, at no time thereafter filed any written statement of its place of residence or mailing address with the Clerk of the Court, and never advised the Clerk of the Court, Wyne or Wyne's Counsel of Record of any change of address or residency during the pendency of this action. FCCI had previously listed its principal place of business as 7000E Newington Road, Lorton, Virginia in Paragraph 2 of its counterclaim filed herein, and in its response to Wyne's Interrogatories propounded upon FCCI herein.

On March 21, 1996, Rex L. Edwards, Jr., Esquire, on behalf of Davies and Barrell, P.C., entered the law firm's appearance as counsel of record for Wyne in this action. On January 10, 1997, Mr. Edwards filed a Praecipe to place the matter on the Court's Term Day docket on January 20, 1997 at 10:00 a.m. Mr. Edwards mailed the Praecipe to Bill Barnes, President of FCCI, at P. O. Box 172, in Lorton, Virginia (the same address which Arent, Fox had used to serve Notice of its Motion to withdraw).

The Circuit Court for Spotsylvania County was not in session on January 20, 1997 due to the observance of a state holiday. Mr. Edwards, counsel for Wyne, was not conscious of the fact that the Spotsylvania Circuit Court would not be in session on January 20, 1997 until the morning of that date. Any appearance made by Joseph M. Sullivan, Esquire in the Spotsylvania County Circuit Court would have occurred on January 21, 1997, and not January 20, 1997 as set forth in FCCI's Memorandum at Page 3. FCCI, or a representative thereof, appears to have received the January 1997 Praecipe pursuant to its delivery at P. O. Box 172, in Lorton, Virginia.

Neither Joseph M. Sullivan, Esquire, or any other attorney associated with the law firm of Ritzert & Leyton, P.C., Bill Barnes, or any representative of FCCI, contacted Mr. Edwards anytime prior to October, 1998.

On January 23, 1997, Mr. Edwards, on behalf of Wyne, filed a Praecipe and Notice to set this matter for trial at the Court's April 21, 1997 Term Day. The Praecipe and Notice were also mailed, postage prepaid, to Bill Barnes, President, Fredericksburg Construction Company, Inc., at P.O. Box 172, Lorton, Virginia 22079. The Notice and Praecipe were never returned by the United States Postal Service to Mr. Edwards.

On April 21, 1997, Mr. Edwards appeared at the Term Day in accordance with the Praecipe and Notice. When the case was called the Court set the matter for trial on September 25, 1997, and directed Mr. Edwards, counsel for Wyne, to send written notice of the trial date to FCCI at the post office box reflected on the

Certificate affixed to the aforesaid Praecipe and Notice, and the physical address (7000E Newington Road) set forth in FCCI's pleadings. The Court further directed that Mr. Edwards send a copy of the aforesaid written notice to the Clerk of the Spotsylvania Circuit Court to be filed herein upon its receipt.

Pursuant to the Court's direction, counsel for Wyne mailed the April 21, 1997 letter, a copy of which is attached as Exhibit 3, to FCCI's Memorandum. A copy of the April 21, 1997 letter was received by the Clerk of the Spotsylvania County Circuit Court and filed herein on April 23, 1997. Neither of the mailings to FCCI were ever returned by the United States Postal Service to Mr. Edwards.

On September 25, 1997, Wyne and its counsel appeared before the Court for trial. On October 7, 1997, Judge Farmer entered the Judgment Order herein. Wyne subsequently requested and the Clerk issued the garnishments and levies which are currently pending against FCCI.

I. FCCI WAS NOT REPRESENTED BY COUNSEL AS A RESULT OF THE APRIL 15, 1996 ORDER GRANTING LEAVE TO WITHDRAW

FCCI argues in Section I of its Memorandum that the Order entered on April 15, 1996 had the limited effect of granting leave to Brian D. Sullivan to withdraw as counsel, but did not result in the withdrawal of R. Steve Holt and Arent, Fox. FCCI's argument is without merit, and the company was, in fact, not represented by counsel following the Court's entry of that Order.

Arent, Fox's Motion to Withdraw As Counsel (attached hereto as Exhibit 1) and the Praecipe accompanying the Motion to

Withdraw As Counsel (attached as Exhibit 2 hereto) make it clear that "The Law Firm of Arent, Fox, Kintner, Plotkin, & Kahn ("Arent, Fox") by R. Steve Holt, a partner therein, moves for permission to withdraw as counsel for Plaintiff, Fredericksburg Construction Company, Inc...". The order granting leave to withdraw as counsel, attached as Exhibit 1 to FCCI's Motion, orders that the Motion to Withdraw As Counsel (emphasis added) be granted and further (emphasis added) grants Brian D. Sullivan specific leave to withdraw his appearance as counsel for FCCI.

While FCCI quotes a portion of Rule 1:5 of the Rules of the Supreme Court of Virginia in its Memorandum, it fails to recite that the word "counsel", is defined in Rule 1:5 to include "a partnership, a professional corporation or an association of members of the Virginia State Bar practicing under a firm name". Rule 1:5 further states that "when such firm name is signed into a pleading, notice or brief, the name of at least one individual member or associate of such firm must be signed to it... Service on one member or associate of such firm shall constitute service on the firm."

Rule 1:5 clearly indicates that Arent, Fox and all of the attorneys associated with that firm were permitted leave to withdraw as counsel pursuant to the April 15, 1996 Order. FCCI's alternative construction would result in a finding that Arent, Fox is still counsel of record for FCCI herein since no subsequent order has been entered on that issue. Yet FCCI, and its current counsel, Mr. Sullivan, do not currently reflect any involvement by Arent, Fox in these proceedings. Arent, Fox is not currently

counsel of record for FCCI herein and has not been since April 15, 1996.

Thus, as a result the Court's April 15, 1996 order, Section 8.01-314 of the 1950 Code of Virginia, as amended, is inapplicable, and Wyne was not required, and would have had no legitimate reason, to serve copies of the Term Day Notice or April 21, 1997 letter to Arent, Fox or any attorneys associated with that firm.

II. FCCI RECEIVED PROPER NOTICE AS DETERMINED BY THE COURT PURSUANT TO SECTION 8.01-319

Once FCCI became a pro se party following the April 15, 1996 order granting Arent, Fox's Motion for Leave to Withdraw, Section 8.01-319 of the 1950 Code of Virginia, as amended, required FCCI to provide information to the Clerk of the Court, and grants discretion to the Court to determine what notice, if any, a pro se party may be entitled for failing to comply with that Section.

Section 8.01-319.A provides, in relevant part, that

... a party, who appears pro se in an action, shall file with the Clerk of the Court in which the action is pending a written statement of his place of residence and mailing address, and shall inform the Clerk in writing of any changes of residence and mailing address during the pendency of the action. The Clerk and all parties to the action may rely on the last written statement filed as aforesaid. The court in which the action is pending may dispense with such notice for failure of the party to file the statement herein provided for or may require notice to be given in such manner as the court may determine.

FCCI never filed the written statement required under the aforesaid statute. On April 21, 1997, the Court, in accord with Section 8.01-319, chose not to dispense altogether with notice to FCCI of the trial date, but in turn required counsel for Wyne to

provide notice to FCCI by sending written notice of the September 25, 1997 trial date to both the post office box address utilized by Arent, Fox in its Motion to Withdraw and the 7000E Newington Road address set forth in Paragraph 2 of FCCI's counterclaim filed herein (a copy of said Answer, Grounds of Defense and Counterclaim are attached hereto as Exhibit 3).

Counsel for Wyne complied with the Court's direction, and thereafter mailed the Notice dated April 21, 1997, a copy of which was received in the Clerk's Office pursuant to the Court's direction.

Based on the failure of FCCI to file the written statement required by Section 8.01-319, the Court was authorized to require notice to be given to FCCI in the manner hereinbefore described. See Eddine v. Eddine, 12 Va. App. 760, 460 S.E.2d 914 (1991) and Lutes v. Alexander, 14 Va. App. 1075 421 S.E. 2d 857 (1992).

Thus, FCCI received due and proper notice of the September 25, 1997 trial date, so that the judgment entered thereafter on October 7, 1997 is valid. FCCI's Motion to Vacate that judgment, and subsequent Motions to Quash the Garnishments and levies issued thereon are without merit and should be denied.

III. ASSUMING ARGUENDO THAT SECTION 8.01-319 IS NOT DISPOSITIVE OF THIS ISSUE, THEN FCCI WAS SERVED IN ACCORDANCE WITH SECTION 8.01-299 AS MODIFIED BY SECTION 8.01-288

FCCI argues that it was entitled to service in accordance with Section 8.01-299 of the 1950 Code of Virginia, as amended. As previously stated herein, Wyne submits that FCCI would

have only been entitled to service pursuant to Section 8.01-299 if it had filed the written statement required by Section 8.01-319. FCCI did receive proper notice pursuant to the Court's direction in accordance with Section 8.01-319 of the 1950 Code of Virginia, as amended. Assuming arguendo that Section 8.01-319 is not dispositive of the issue, then a substantial question of fact would need be resolved to determine whether FCCI had received proper service pursuant to Section 8.01-229 as modified by Section 8.01-288 of the 1950 Code of Virginia, as amended.

While the record and factual statements do not indicate compliance by Wyne with Section 8.01-299, counsel for Wyne mailed a Notice of the April 21, 1997 Term Day, and the accompanying Praecipe setting the matter on that date for the purpose of setting a trial date, to Bill Barnes, President, Fredericksburg Construction Company, Inc. at P. O. Box 172, Lorton, Virginia 22079 (see Exhibits 4 and 5 attached hereto, executed copies of which are of record in the court file herein). The April 21, 1997 letter notifying FCCI of the September 25, 1997 court date was also mailed by counsel for Wyne to the aforesaid post office box and the aforementioned 7000E Newington Road address.

"The mailing of a letter, properly addressed and stamped, raises a presumption of receipt of the letter by the addressee, and a denial by the addressee of the receipt of the letter raises an issue of fact for the jury". Development Company v. Offutt, 203 Va. 382, 385, 124 S.E. 2d 29, 31 (1962).

Section 8.01-288 of the 1950 Code of Virginia states that:

Except for process commencing actions for divorce or annulment of marriage or other actions wherein service of process is specifically prescribed by statute, process which has reached the person to whom it is directed within the time prescribed by law, if any, shall be sufficient although not served or accepted by provided in this chapter.

Based on the mailing by counsel for Wyne, Wyne is entitled to the presumption that the aforesaid Notices and Praecipe were received by FCCI. At an evidentiary hearing hereon, Wyne avers that it could produce evidence and proof of the normal course of the mails and the time usually required to convey a letter from counsel's office in Culpeper, Virginia to FCCI's address in Lorton, Virginia, and that such evidence would establish that FCCI's receipt would have been timely and in compliance with Section 8.01-288. See also, Davis v. American Inter. Exch. 228, Va. 1, 319 S.E.2d 723 (1984).

While the Barnes' Affidavit denies receipt of the aforesaid Notices, Development Company v. Offutt, supra, makes it clear that Barnes' denial, under these circumstances, creates an issue of fact for resolution.

It is interesting to note that FCCI received the January, 1997 Notice sent to the Lorton post office box and arranged for Mr. Sullivan to appear in court at that time. Mr. Sullivan did not, however, note his appearance as Counsel of Record for FCCI at that time or subsequent thereto. Wyne suspiciously views FCCI's statement of fact on Page 3 of its Memorandum that "Mr. Sullivan appeared because Mr. Holt was unavailable for the Term Day", since Mr. Holt had not had any active role in the case since the entry of

the April 15, 1996 Order granting Arent, Fox's Motion to Withdraw as Counsel of Record.

It is incumbent upon FCCI to rebut the presumption that the aforesaid Notices and Praecept were received. If the Court were to determine it necessary to resolve these issues, Wyne hereby requests that any such evidentiary hearing on the relevant issues be scheduled at such a time so as to allow Wyne to conduct discovery on these issues and to offer proof of timely receipt by FCCI.

IV. RESPONSE TO SECTIONS IV AND V OF FCCI'S MEMORANDUM

FCCI argues in Section IV and V of its Memorandum that it never received actual notice of the Term Day or trial date. It additionally argues that neither Wyne nor its counsel made any effort to ensure (emphasis added) that FCCI receive notice of the relevant dates.

As set forth previously herein, Wyne and its counsel did, in fact, make reasonable efforts to provide FCCI with the notice to which it was due. Neither Wyne nor its counsel, however, is an insurer of FCCI's well being. Notwithstanding the fact that Wyne's counsel, Mr. Edwards, had made an appearance of record in March 1996, had endorsed the order granting withdrawal of FCCI's counsel in April 1996, and that FCCI had received the Praecept and Notice delivered to it from Mr. Edwards in January 1997, no representative on behalf of FCCI, including legal counsel, ever contacted Mr. Edwards until October of 1998 following the filing of the garnishment summonses herein.

As in Lutes v. Alexander and Eddine v. Eddine, supra, FCCI's failure to receive notice herein, assuming that it did in fact fail to receive notice, is the result of its own neglect. The Court can reasonably conclude that FCCI made absolutely no effort to keep abreast of this pending litigation from January 21, 1997, and prior to that date, had failed to take the necessary steps to afford itself the luxury of such indifference.

FCCI goes as far as to argue that "is also clear from the record that Wyne took affirmative steps to ensure that FCCI did not receive notice in this action." This statement is simply not true and unsupported by the record. FCCI's inference, or direct allegation, of fraudulent behavior on the part of Wyne is nothing more than an unsubstantiated, and blatant attempt to evoke the sympathy of the Court in an attempt to overcome the outcome brought about by FCCI's own neglect of this matter.

V. THE COURT'S OCTOBER 7, 1997 JUDGMENT ORDER IS VALID AND COMPLIES WITH RULE 1:13

FCCI's argument that the Judgment Order entered on October 7, 1997 is void because of its failure to comply with the requirements of Rule 1:13 of the Rules of the Supreme Court of Virginia is also inaccurate and misstated.

FCCI was a pro se party and had no Counsel of Record at the time of the Order's entry. As previously set forth herein, FCCI had received reasonable and due notice of the September 25, 1997 court date. Accordingly, the Order is compliant with Rule 1:13 and the Court did not in any way abuse its discretion in entering that valid Order.

WHEREFORE, J. W. Wyne Excavating, Inc. respectfully requests that the Court deny FCCI's Motion to Vacate, and Motions to Quash Garnishments filed in Case Numbers L98-444 and L98-445; and order that all funds held by the Court in the aforesaid garnishment actions be delivered to J. W. Wyne Excavating, Inc.; order that Wyne be permitted to pursue, as appropriate, the levies currently pending herein; award Wyne its costs, interest and attorney's fees in responding to the Motions filed by FCCI herein, and grant Wyne such other and further relief as the Court deems appropriate.

Respectfully submitted,

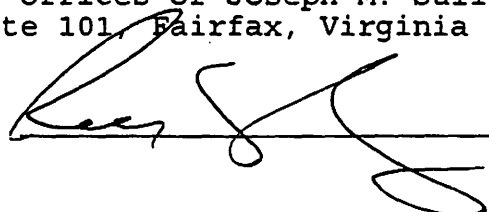
J. W. WYNE EXCAVATING, INC.

BY: 

Of Counsel

Rex L. Edwards, Jr.
Virginia State Bar No. 31212
DAVIES, BARRELL, WILL,
LEWELLYN & EDWARDS, P.C.
122 West Cameron Street
P. O. Box 1147
Culpeper, Virginia 22701
(540) 825-6000
Counsel for Plaintiff

CERTIFICATE: I hereby certify that on this the 4th day of December, 1998, a true and correct copy of J. W. Wyne Excavating, Inc.'s Opposition to Motions to Vacate Judgment and Quash Garnishments was sent via facsimile and first class mail to Joseph M. Sullivan, Esquire, the Law Offices of Joseph M. Sullivan, P.C., at 4010 University Drive, Suite 101, Fairfax, Virginia 22030. .



VIRGINIA:

IN THE CIRCUIT COURT FOR SPOTSYLVANIA COUNTY

**FREDERICKSBURG CONSTRUCTION
COMPANY, INC.**

Plaintiff,

v.

J.W. WYNE EXCAVATING, INC.

Defendant.

AT LAW NO. L-94-8

MOTION TO WITHDRAW AS COUNSEL

The law firm of Arent, Fox, Kintner, Plotkin & Kahn ("Arent Fox") by R. Steve Holt, a partner therein, moves for permission to withdraw as counsel for plaintiff, Fredericksburg Construction Company, Inc. ("FCCI") in the above styled action, and for the grounds of this motion says as follows:

1. FCCI has failed substantially to fulfill obligations to Arent Fox regarding its services, and FCCI has been given reasonable warning that Arent Fox will withdraw unless the obligations are fulfilled, thereby justifying withdrawal pursuant to VA Code of Professional Responsibility DR2-108(B)(3).


Arent Fox met with FCCI and it was agreed between FCCI and Arent Fox that Arent Fox would withdraw from this case. Arent Fox informed plaintiff that Arent Fox would move for permission from this court to withdraw, since such permission was required by the Rules of the Supreme Court of Virginia before such withdrawal could be final. Petitioner agreed to seek to employ other counsel in this matter subject to final approval by the Court of Arent Fox's withdrawal from the case.

WHEREFORE, the law firm of Arent Fox Kintner Plotkin & Kahn, prays that it be permitted to withdraw as counsel for FCCI herein.

By: 
R. Steven Holt, a partner

Arent Fox Kintner Plotkin & Kahn
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5339
202/857-6032

CERTIFICATE OF SERVICE

I hereby certify that on this  day of April 1996, a true and accurate copy of the foregoing Motion to Withdraw as Counsel was sent by first class mail, postage prepaid to:

Mr. Bill Barnes
Fredericksburg Construction Co.
P.O. Box 172
Lorton, Virginia 22079

Rex Edwards, Jr., Esq.
Davies & Barrell, P.C.
122 W. Cameron St.
Culpeper, Virginia 22701
Counsel for J.W. Wyne Excavating


Brian D. Sullivan

VIRGINIA:

IN THE CIRCUIT COURT FOR SPOTSYLVANIA COUNTY

**FREDERICKSBURG CONSTRUCTION
COMPANY, INC.**

Plaintiff,

v.

J.W. WYNE EXCAVATING, INC.

Defendant.

AT LAW NO. L-94-8

PRAECIPE

PLEASE TAKE NOTICE that on Term Day, Monday, April 15, 1996, at 10:00 a.m., the law firm of Arent Fox Kintner Plotkin & Kahn, will move to withdraw as counsel for Fredericksburg Construction Co., plaintiff in this action.

Respectfully submitted,

Fredericksburg Construction Co., Inc.

By Counsel

Counsel:

Arent Fox Kintner Plotkin & Kahn



Brian D. Sullivan, VSB #35268
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
202/857-6257

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of April 1996, a true and accurate copy of the foregoing

Praecipe was sent by facsimile and regular first class mail:

Bill Barnes, President
Fredericksburg Construction Co., Inc.
Post Office Box 172
Lorton, Virginia 22079

Rex Edwards, Jr., Esq.
Davies & Barrell, P.C.
122 W. Cameron Street
Culpeper, Virginia 22701



Brian D. Sullivan, Esq.

V I R G I N I A:

IN THE CIRCUIT COURT FOR SPOTSYLVANIA COUNTY

J.W. WYNE EXCAVATING, INC.

Plaintiff,

vs.

FREDERICKSBURG CONSTRUCTION
CO., INC.

Defendant.

AT LAW NO. L-94-8

ANSWER, GROUNDS OF DEFENSE AND COUNTERCLAIM

Defendant and Counterclaim Plaintiff Fredericksburg Construction Company, Inc., ("FCCI"), for its Answer and Grounds of Defense to Plaintiff, J.W. Wyne Excavating Inc.'s Amended Motion for Judgment states as follows:

FIRST DEFENSE

The Amended Motion for Judgment fails to state a claim upon which relief may be granted, in whole or in part.

SECOND DEFENSE

For its answers to the numbered allegations of the Amended Motion for Judgment, FCCI states as follows:

1. Neither admits nor denies that Wyne is a Virginia corporation, as FCCI does not have sufficient information to affirm or deny this allegation.
2. Admits.
3. The referenced "project contract" speaks for itself. FCCI denies any allegations in § 3 of the Motion for Judgment to the extent that they are inconsistent with the referenced contract.

4. The referenced "construction contract" speaks for itself. FCCI denies any allegations in ¶ 4 of the Motion for Judgment to the extent that they are inconsistent with the referenced contract.

5. Denies.

6. Denies.

7. Denies.

8. Denies.

9. Denies.

FCCI further denies each and every allegation of the Amended Motion for Judgment not specifically admitted herein to be true, and denies that Plaintiff is entitled to any of the relief requested.

THIRD DEFENSE

Wyne's claims are precluded by the doctrines of waiver and estoppel.

FOURTH DEFENSE

Wyne's claims are barred by a failure of consideration.

FIFTH DEFENSE

Wyne's claims are barred by payment.

SIXTH DEFENSE

FCCI's actions were not the legal cause of any injury which may have been suffered by Plaintiff.

SEVENTH DEFENSE

Wyne's Counterclaim is barred by setoff and/or recoupment.

EIGHTH DEFENSE

Wyne committed the first breach of the contract upon which it seeks to recover, and therefore is not entitled to bring an action to enforce its rights under the contract.

NINTH DEFENSE

Wyne was terminated for default under the contract upon which it seeks recovery, and therefore cannot recover.

TENTH DEFENSE

FCCI incorporates by reference herein its allegations of its counterclaim, as an additional basis for defense.

WHEREFORE, having responded fully, FCCI requests that the Amended Motion For Judgment be dismissed in its entirety with prejudice, and that FCCI be awarded its attorneys' fees and costs incurred in defending this action, and such further relief as the Court may deem proper.

COUNTERCLAIM

Defendant and Counterclaim Plaintiff, Fredericksburg Construction Company, Inc., ("FCCI"), for its Counterclaim against plaintiff J.W. Wyne Excavating Co., hereby alleges as follows:

1. This is an action for, among other things, breach of contract, against the counterclaim defendant, J.W. Wyne Excavating ("Wyne"), for its failure and refusal to perform its obligations under subcontract executed by the FCCI and the counterclaim defendant in connection with a construction project

located at the Electronics Warfare Integration Laboratory, in Dahlgren, Virginia (the "Project").

2. FCCI is a Virginia corporation, having its principal place of business located at 7000E Newington Road, Lorton, Virginia. FCCI is engaged in the business of general contracting, and, among other things, acts as general contractor for civil and defense related projects for the federal government.

3. On or about November 2, 1992, FCCI was retained by the federal government as the general contractor to construct the Electronics Warfare Integration Laboratory, a two-story building of approximately 65,000 square feet, contract #N62477-89-C-0126 (the "Prime Contract"), located in Dahlgren, Virginia.

4. On or about November 20, 1992, FCCI entered into a subcontract (the "Subcontract"), with Wyne, for certain demolition and excavation work to be done at the site where the Laboratory was to be constructed, pursuant to specifications contained in the Prime Contract.

5. The original contract amount for the work to be performed by Wyne under the Subcontract was \$374,500. Subsequently five change orders to the Subcontract were authorized by FCCI, which increased the cost of the work to be performed by Wyne under the Subcontract to a total of \$398,829.

6. Wyne did not complete all of the site and excavation work called for by the Subcontract and the specifications included therein.

7. FCCI has notified Wyne of its failure to complete the work specified in the Subcontract and demanded that Wyne finish the work pursuant to its obligations under the Subcontract. Wyne never responded to FCCI's demands and has not returned to the Project to complete its work under the Subcontract. On or about October 12, 1993, pursuant to paragraph 8 of the Subcontract FCCI notified Wyne that the Subcontract was terminated due to Wyne's default on its obligation to complete the work specified therein and due to Wyne's failure to pay its subcontractors and materials suppliers in accordance with the Prime Contract and Subcontract.

8. Since October 12, 1993, FCCI has expended \$173,757 to complete the work that Wyne failed to perform before it was terminated for default under the Subcontract. FCCI has executed a change order to the Subcontract in the amount of \$173,757 which reduced the contract price of the Subcontract from \$398,829 to \$225,072.

9. FCCI has made payments totalling \$199,800 directly to Wyne for work performed pursuant to the Subcontract. In addition, FCCI made payment of \$13,320 to the Internal Revenue Service on behalf of Wyne and pursuant to a Notice of Levy served on FCCI by the IRS, which has been charged against the amount owed Wyne under the Subcontract. FCCI has also made payments totalling \$13,774.59 to Wyne's suppliers and/or subcontractors who notified FCCI that Wyne had failed to make payment to them for materials and/or labor supplied to Wyne in connection with work performed on the Project. Finally, FCCI has received

notices from several of Wyne's subcontractors and/or suppliers that Wyne owes them at least \$43,608.38, for labor and supplies provided to the Project.

COUNT I

(Breach of Contract)

10. FCCI realleges and incorporates by reference the allegations contained in paragraphs 1-9 inclusive, of this Counterclaim.

11. Wyne has breached material terms of the Subcontract by failing to complete its work specified under the Subcontract and by failing to pay its subcontractors and suppliers in accordance with the terms of the Subcontract.

12. As a result of Wyne's contractual breaches, FCCI has suffered damages. FCCI had to complete the work Wyne had not finished as of the date it was terminated for default under the Subcontract. Likewise FCCI has paid or will be caused to pay Wyne's subcontractors and suppliers who performed work or provided materials for the Project, and who have not been paid by Wyne for such work or materials.

Prayer for Relief

WHEREFORE, Fredericksburg Construction Company, Inc., respectfully requests that this Court award the following relief:

(1) Declare that defendant J.W. Wyne Excavating Co., breached the Subcontract;

(2) Enter judgment in favor of FCCI against plaintiff and counterclaim defendant J.W. Wyne Excavating, in the amount of

\$45,451.76 (FORTY-FIVE THOUSAND, FOUR HUNDRED FIFTY-ONE DOLLARS AND SEVENTY-SIX CENTS). This amount reflects the amount FCCI overpaid Wyne under the Subcontract (\$1,843.38) plus the amounts FCCI has expended or will expend to pay Wyne's subcontractors for work performed or materials supplied to the Project (\$43,608.38). FCCI also requests plus pre-judgment interest at the rate of 9% per annum from October 12, 1993, the date the Subcontract was terminated due to Wyne's default.

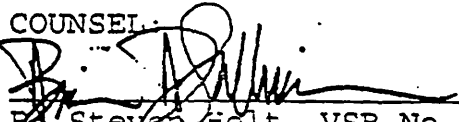
(3) Award such other and further relief as the Court deems proper, including without limitation FCCI's attorney's fees and costs in this action.

Respectfully Submitted,

Fredericksburg Construction Company
Inc.

By Counsel

COUNSEL:



By Steven Holt, VSB No. 23420
Brian D. Sullivan, VSB No. 35268
ARENT FOX KINTNER PLOTKIN & KAHN
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
202/857-6257

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of September, 1994, a true and accurate copy of the foregoing Answer, Grounds of Defense and Counterclaim was sent by facsimile and first class mail, postage prepaid to:

R. Scott Pugh, Esq.
9108 Courthouse Rd.
P.O. Box 999
Spotsylvania, Virginia 22553-0999


Brian D. Sullivan

V I R G I N I A:

IN THE CIRCUIT COURT OF SPOTSYLVANIA COUNTY

FREDERICKSBURG CONSTRUCTION)
COMPANY, INC.,)

Plaintiff)

vs.)

AT LAW NO. L-94-8

J. W. WYNE EXCAVATING, INC.,)

Defendant)

NOTICE

TO: Fredericksburg Construction Company, Inc.
c/o Bill Barnes, President
P. O. Box 172
Lorton, Virginia 22079

PLEASE TAKE NOTICE that on April 21, 1997, at 10:00 a.m.,
or as soon thereafter as it may be heard, counsel for J. W. Wyne
Excavating, Inc. will move the Court to establish a trial date
herein.

Respectfully submitted this 23rd day of January, 1997.

J. W. WYNE EXCAVATING, INC..

By: _____
Of Counsel

Rex L. Edwards, Jr.
Virginia State Bar No. 31212
DAVIES, BARRELL, WILL,
LEWELLYN & EDWARDS, P.C.
122 West Cameron Street
P. O. Box 1147
Culpeper, Virginia 22701
(540) 825-6000
Counsel for Defendant

CERTIFICATE: I hereby certify that on this the 23rd day of January, 1997, I mailed, postage prepaid, a true and correct copy of the foregoing to Bill Barnes, President, Fredericksburg Construction Company, Inc., at P. O. Box 172, Lorton, Virginia 22079.

Rex L. Edwards, Jr.

V I R G I N I A:

IN THE CIRCUIT COURT OF SPOTSYLVANIA COUNTY

FREDERICKSBURG CONSTRUCTION)
COMPANY, INC.,)

Plaintiff)

vs.)

AT LAW NO. L-94-8

J. W. WYNE EXCAVATING, INC.,)

Defendant)

PRAECIPE

Please place this matter on the Court's term day docket,
April 21, 1997, at 10:00 a.m., for the purpose of setting a date
for trial.

Estimated Time: 5 Minutes.

Respectfully submitted this 23rd day of January, 1997.

J. W. WYNE EXCAVATING, INC.

By: _____
Of Counsel

Rex L. Edwards, Jr.
Virginia State Bar No. 31212
DAVIES, BARRELL, WILL,
LEWELLYN & EDWARDS, P.C.
122 West Cameron Street
P. O. Box 1147
Culpeper, Virginia 22701
(540) 825-6000
Counsel for Defendant.

CERTIFICATE: I hereby certify that on this the 23rd day of
January, 1997, I mailed, postage prepaid, a true and correct copy
of the foregoing to Bill Barnes, President, Fredericksburg
Construction Company, Inc., at P. O. Box 172, Lorton, Virginia
22079.

Rex L. Edwards, Jr.

**DAVIES, BARRELL, WILL,
LEWELLYN & EDWARDS, P.C.**

ATTORNEYS AT LAW

JOHN J. DAVIES, III
CHARLES D. BARRELL
STEPHEN P. WILL
STEPHEN K. LEWELLYN
CYNTHIA CORNETT EDWARDS
REX L. EDWARDS, JR.

P. O. BOX 1147
122 WEST CAMERON STREET
CULPEPER, VIRGINIA 22701

TELEPHONE (540) 825-6000
TELECOPIER (540) 825-1989
E-MAIL dbwlc@erols.com

CHARLOTTESVILLE OFFICE:
THE COMMERCE BUILDING
101 E. WATER STREET, SUITE 103
CHARLOTTESVILLE, VIRGINIA 22902
TELEPHONE (804) 984-2020
TELECOPIER (804) 977-0250

CHRISTIAN A. BRASHEAR

April 21, 1997

LEGAL ASSISTANTS:
DORIS B. BREEDEN
LORI T. DEANE
HEATHER T. CLARY

Mr. Bill Barnes, President
Fredericksburg Construction Company, Inc.
*P. O. Box 172
Lorton, Virginia 22079

and

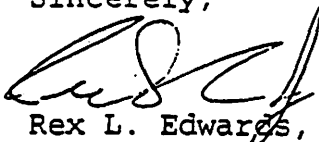
*7000 E. Newington Road
Lorton, Virginia 22079

RE: Fredericksburg Constructions Company, Inc. v.
J. W. Wyne Excavating, Inc.
Spotsylvania Circuit Court - Case No.: L-94-8

Dear Mr. Barnes:

Please take NOTICE that the above-referenced matter is
scheduled for trial before the bench on September 25, 1997 at
10:00 a.m.

Sincerely,


Rex L. Edwards, Jr.
For the Firm

RLEjr/pah

cc: Ms. Linda Jo Johnson, Clerk ✓
Circuit Court of Spotsylvania County*
P. O. Box 96
Spotsylvania, Virginia 22553-0096

(*mailed to both addresses)

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APR 23 11 58 AM '97
CLERKS OFFICE
SPOTSYLVANIA CIRCUIT COURT
SPOTSYLVANIA CO., VA.
RECORDED - FILED

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VIRGINIA:

IN THE CIRCUIT COURT FOR SPOTSYLVANIA COUNTY

FREDERICKSBURG CONSTRUCTION)	
COMPANY, INC.,)	
)	
Plaintiff,)	
)	
v.)	AT LAW NO. L-94-8
)	
J.W. WYNE EXCAVATING, INC.,)	
)	
Defendant.)	

And

J.W. WYNE EXCAVATING, INC.,)	
)	
Plaintiff,)	
)	
v.)	AT LAW NO. L-98-444
)	AT LAW NO. L-98-445
FREDERICKSBURG CONSTRUCTION)	
COMPANY, INC.,)	
)	
Defendant.)	

**FREDERICKSBURG CONSTRUCTION COMPANY INC.'S
REPLY TO J.W. WYNE EXCAVATING, INC.'S OPPOSITION
TO MOTIONS TO VACATE JUDGMENT AND QUASH GARNISHMENTS**

Plaintiff, Fredericksburg Construction Company, Inc. ("FCCI"), by counsel, hereby files its Reply to the Opposition filed by J.W. Wyne Excavating, Inc. ("Wyne") to FCCI's Motion to Vacate Judgment and Motions to Quash Garnishments, and in response thereto states as follows:

FACTUAL AND PROCEDURAL BACKGROUND

FCCI contests the accuracy of the Factual Statement and Background set forth in Wyne's Opposition. FCCI further states that the "relevant facts" as stated by Wyne are inaccurate and erroneous.

I. FCCI Was Represented By Counsel Following The April 15, 1996 Order

FCCI has attached to Exhibit 1 to this Reply the Affidavit of R. Steven Holt, Esq. Mr. Holt's Affidavit undisputedly establishes that he was counsel of record for FCCI following entry of the Order permitting the withdrawal of Brian D. Sullivan, Esq. as counsel for FCCI.

Mr. Holt's Affidavit further establishes that he never received the January 23, 1997 Term Day Notice allegedly sent by counsel for Wyne, never received the January 23, 1997 Praeceptum filed by Wyne, and never received the April 27, 1997 letter allegedly sent by Wyne's counsel. The Court need look no further than the Certificate of Service filed by Wyne's counsel which clearly establishes that Mr. Holt was not served with any of these documents as required under § 8.01-314. The failure by Wyne to serve Mr. Holt renders the judgment void.

II. Wyne's Reliance on Section 8.01-319 Is Erroneous

Wyne attempts to argue in its Opposition that FCCI became a *pro se* party following the April 15, 1996 Order granting Brian Sullivan leave to withdraw. Wyne's argument is both erroneous and misleading. Wyne attempts to quote out of context § 8.01-319(a) regarding a party who appears *pro se*.

FCCI is a Virginia corporation. Corporations in the Commonwealth of Virginia are required to be represented by counsel in any court proceedings with the exception of certain limited actions in General District Courts which are not applicable here. Corporations cannot

appear through their officers or directors in court. In fact, it is standard practice in the courts of this Commonwealth that a judge will direct a corporation who attempts to appear “*pro se*” to obtain counsel prior to proceeding with any hearing. Therefore, Wyne’s contention that FCCI was a *pro se* party is simply without merit.

Wyne’s position is also erroneous as it chooses to ignore in its entirety the requirements for service upon corporations under Va. Code §§ 8.01-299 and 13.1-637, as amended. Wyne’s Opposition also fails to rebut Judge Ledbetter’s holding in *John Deere Industrial Equipment v. J.W. Wyne Excavating, Inc.*, 32 Va. Cir. 309 (1993) which clearly sets forth the requirements for service upon a corporation.

III. Wyne Admits That It Failed To Serve FCCI As Required Under § 8.01-299

On page 8 of Wyne’s Opposition, it admits that it has failed to comply with § 8.01-299. This, in and of itself, provides the basis for the Court’s granting of FCCI’s Motion to Vacate the Judgment and quash the garnishments.

IV. FCCI Never Received Actual Notice As Required Under § 8.01-288

Wyne’s Opposition erroneously attempts to raise a presumption relative to its mailing of the Term Day Notice, Praecipe, and April 27, 1997 letter. This presumption is both erroneous and rebutted by the Affidavit of Billy W. Barnes, President of FCCI, which is attached as Exhibit 2 to FCCI’s Memorandum of Points and Authorities in Support of its Motion to Vacate. Further support for FCCI’s position that it did not receive actual notice of any type of the Term Day Notice, Praecipe or April 27, 1997 letter is included in the Affidavit of John J. Sabourin, Esq., FCCI’s registered agent, which is attached as Exhibit 3 to FCCI’s Memorandum of Points and Authorities.

Wyne's Opposition seeks an evidentiary hearing on its ability to "produce evidence and proof of the normal course of the mails and the time usually required to convey a letter from counsel's office in Culpeper, Virginia to FCCI's address in Lorton, Virginia." Wyne erroneously asserts that such evidence would establish that FCCI's receipt would have been timely and in compliance with § 8.01-288. The Affidavits of Billy W. Barnes and John J. Sabourin directly contradict this attempt by Wyne to prove FCCI had actual notice.

Wyne's Opposition then goes on to concede that even though FCCI's counsel and FCCI were not properly served with the January 1997 Notice, that FCCI requested that Mr. Sullivan appear at the January 1997 Term Day. Since FCCI had actual notice of the January 1997 Term Day, it took all steps necessary and required of it under Virginia law to protect its interest and appear at the Term Day. Due to the failure of Wyne's counsel to appear at the January 1997 Term Day, this matter was not set for trial at that time.

V. Wyne Took Affirmative Steps To Deny FCCI Notice Of The Action

In response to Sections 4 and 5 of FCCI's Memorandum, Wyne attempts to shift the responsibility for its conduct to FCCI by contending that FCCI was negligent in this action. Wyne's contention is both erroneous and contradicted by its own conduct.

Mr. Edwards, counsel for Wyne, entered his appearance in this action on March 21, 1996. From the period of March 21, 1996 until the filing of the Term Day Praeipe in January 1997, Mr. Edwards and Wyne did absolutely nothing in this action. Further, from the period of March 21, 1996 through the "trial" of this action, Mr. Edwards never issued any interrogatories, requests for production of documents, admissions, or took any depositions in this action.

Mr. Edwards never even attempted to telephone FCCI regarding this matter from April 15, 1996 through October 31, 1998.

It is a standard practice throughout the courts of this Commonwealth to require parties in an action, either directly or through their counsel, to discuss matters which are set for trial. This is routinely done in actions throughout the Commonwealth and is generally a requirement in many courts with respect to both motions and trials. It is hard to fathom why Wyne's counsel would have conducted absolutely no discovery in this action and made no contact with FCCI at all prior to the "trial" of this action. It is interesting to note that Wyne's Opposition fails to rebut and, in fact, admits that it never once took any affirmative actions to contact FCCI regarding the trial of this action. FCCI never neglected its rights in this action and Wyne's contention to this effect is erroneous. FCCI could not neglect this action when it had no notice of the proceedings being unilaterally conducted by Wyne.

VI. The Judgment Order Is Void For Failure To Comply With Rule 1:13

Wyne's Opposition makes the bald contention that "FCCI was a *pro se* party and had no counsel of record at the time of the orders [October 7, 1997 Judgment Order] entry." Wyne further contends without support that FCCI had reasonable notice and due diligence of the September 25, 1997 court date. Wyne's position is erroneous and ignores the requirements of Rule 1:13.

Rule 1:13 required that FCCI receive notice of entry of the October 7, 1997 Judgment Order. As set forth in FCCI's Opposition, the Supreme Court ruled in Rosillo v. Winters, 235 Va. 268, 367 S.E.2d 717 (1988), that a party's counsel is entitled to "reasonable notice of the time and place of presenting the draft for entry pursuant to Rule 1:13." Wyne's Opposition

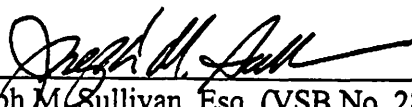
erroneously states that FCCI had notice of the September 25, 1997 court date. Assuming, *arguendo*, that such was true, Wyne ignores the fact that the Judgment Order was unilaterally drafted by its counsel without notice to FCCI. The Judgment Order was not entered at the “trial” on September 25, 1997, it was entered on October 7, 1998. Wyne’s Opposition further fails to rebut the fact that FCCI was never furnished with notice of entry of the order or a draft of the Judgment Order prior to entry. Further, FCCI never received notice of entry of the Judgment Order due to the actions taken by Wyne in drafting and presenting the Judgment Order. Wyne also fails to rebut in any way, shape, or form the fact that there is nothing in the Court record which indicates that the Court notified FCCI that it was modifying or dispensing with the requirements of Rule 1:13. Therefore, the Judgment Order entered in this action is void because it was not properly endorsed and notice was not provided to FCCI as required under Rule 1:13.

WHEREFORE, Fredericksburg Construction Company, Inc. respectfully requests that this Court grant its Motion to Vacate the October 7, 1997 Judgment; that this Court quash the garnishments issued in CL98-444 and CL98-445; that all funds held by this Court in the garnishment actions filed by J.W. Wyne Excavating, Inc. be returned to FCCI forthwith; that it be awarded its costs and attorney’s fees for this Motion; interest on the funds held in the garnishment proceedings; and for such other and further relief as this Court deems appropriate.

Respectfully submitted,

FREDERICKSBURG CONSTRUCTION
COMPANY, INC.

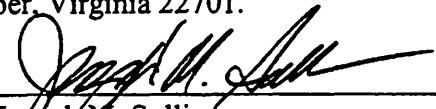
By Counsel


Joseph M. Sullivan, Esq. (VSB No. 28727)
THE LAW OFFICES OF JOSEPH M. SULLIVAN, P.C.
4010 University Drive, Suite 101
Fairfax, Virginia 22030
(703) 277-3390

Counsel for Fredericksburg Construction Company, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of March 1999, a true and accurate copy of Fredericksburg Construction Company, Inc.'s Reply to J.W. Wyne Excavating, Inc.'s Opposition to Motions to Vacate Judgment and Quash Garnishments was sent first class mail, postage prepaid, to Rex L. Edwards, Jr., Esq., Davies, Barrell, Will, Lewellyn & Edwards, P.C., 122 West Cameron Street, P.O. Box 1147, Culpeper, Virginia 22701.



Joseph M. Sullivan

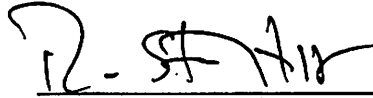
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CLERKS OFFICE
CIRCUIT COURT
SPOTSYLVANIA CO., VA.
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5. On September 27, 1994, I filed, together with Brian D. Sullivan, an Answer, Grounds of Defense and Counterclaim to the Amended Motion for Judgment filed by J.W. Wyne Excavating, Inc. in the Spotsylvania action.
6. As I read the Order entered on April 15, 1996, which is attached hereto as Exhibit 1, only Brian Sullivan was removed as counsel for FCCI.
7. I did not receive a copy of the Praeipce dated January 23, 1997 which is attached hereto as Exhibit 2 to this Affidavit.
8. I did not receive a copy of the Notice dated January 23, 1997 which is attached hereto as Exhibit 3 to this Affidavit.
9. I did not receive a copy of the letter dated April 21, 1997 which is attached hereto as Exhibit 4 to this Affidavit.
10. If the law firm of Arent Fox had received the Praeipce dated January 23, 1997, the Notice dated January 23, 1997, and/or the letter dated April 21, 1997, I would have received these documents as Chairman of the Litigation Section.
11. I never received any communication of any type relative to the date of the trial which I now understand was held in the above-referenced action on September 25, 1997.
12. If I had received any type of notice or communication from Wyne, Mr. Edwards or the Court relative to the Term Day Notice, trial date or entry of the judgment on October 7, 1997, I would have contacted FCCI, made sure that FCCI had answered or, if necessary, appeared on behalf of FCCI at trial.

Further the Affiant sayeth not.

I hereby affirm under penalty of perjury that the foregoing facts are true and correct.

A handwritten signature in black ink, appearing to read "R. Steven Holt", is written over a horizontal line.

R. Steven Holt
Senior Vice President
General Counsel
The Clark Construction Group, Inc.

Executed this 2nd day of March 1999.

c:\fcci\jwwyne\pleadings\holt.affidavit

. VIRGINIA:

IN THE CIRCUIT COURT FOR SPOTSYLVANIA COUNTY

**FREDERICKSBURG CONSTRUCTION
COMPANY, INC.**

Plaintiff,

AT LAW NO. L-94-8

v.

J.W. WYNE EXCAVATING, INC.

Defendant.

ORDER GRANTING LEAVE TO WITHDRAW AS COUNSEL

Brian D. Sullivan, counsel for Fredericksburg Construction Company, Inc., requested that he be allowed to withdraw as counsel of record.

It is ordered that motion to withdraw as counsel be granted and further that Brian D. Sullivan, VSB #35268 be and is hereby granted leave to withdraw his appearance as counsel for FCCI in the action.

Enter

By:

We ask for this:

~~Brian D. Sullivan, VSB #35268~~
Arent Fox Kintner Plotkin & Kahn
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5339
202/857-6257
Counsel for Plaintiff Fredericksburg Construction Co., Inc.



P.07

1 202 857 6395

03-25-1996 06:34PM

SEEN AND AGREED:

Bill Barnes, President
Bill Barnes, President
Fredericksburg Construction Co., Inc.

SEEN AND AGREED:

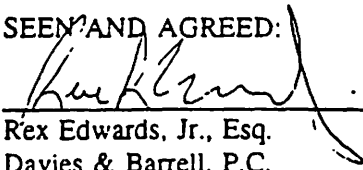
Rex Edwards, Jr., Esq.
Rex Edwards, Jr., Esq.
Davies & Barrell, P.C.
122 W. Cameron St.
Culpeper, Virginia 22701
Counsel for Defendant J.W. Wyne Excavating

*Endorsement on
supplemental sheet.*
WAT

SEEN AND AGREED:

Bill Barnes, President
Fredericksburg Construction Co., Inc.

SEEN AND AGREED:


Rex Edwards, Jr., Esq.
Davies & Barrell, P.C.
122 W. Cameron St.
Culpeper, Virginia 22701
Counsel for Defendant J.W. Wyne Excavating

V I R G I N I A:

IN THE CIRCUIT COURT OF SPOTSYLVANIA COUNTY

FREDERICKSBURG CONSTRUCTION
COMPANY, INC.,

Plaintiff

vs.

AT LAW NO. L-94-8

J. W. WYNE EXCAVATING, INC.,

Defendant

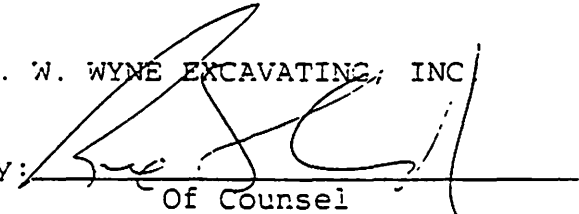
PRAECIPE

Dec
Please place this matter on the Court's term day docket,
April 21, 1997, at 10:00 a.m., for the purpose of setting a date
for trial.

Estimated Time: 5 Minutes.

Respectfully submitted this 23rd day of January, 1997.

J. W. WYNE EXCAVATING, INC.

By: 
Of Counsel

Rex L. Edwards, Jr.
Virginia State Bar No. 31212
DAVIES, BARRELL, WILL,
LEWELLYN & EDWARDS, P.C.
122 West Cameron Street
P. O. Box 1147
Culpeper, Virginia 22701
(540) 825-6000
Counsel for Defendant.

CERTIFICATE: I hereby certify that on this the 23rd day of
January, 1997, I mailed, postage prepaid, a true and correct copy
of the foregoing to Bill Barnes, President, Fredericksburg
Construction Company, Inc., at P. O. Box 172, Lorton, Virginia
22079. *WJ*


Rex L. Edwards, Jr.

V I R G I N I A:

IN THE CIRCUIT COURT OF SPOTSYLVANIA COUNTY

FREDERICKSBURG CONSTRUCTION)
COMPANY, INC.,)

Plaintiff)

vs.)

AT LAW NO. L-94-8)

J. W. WYNE EXCAVATING, INC.,)

Defendant)

NOTICE

TO: Fredericksburg Construction Company, Inc.
c/o Bill Barnes, President
P. O. Box 172
Lorton, Virginia 22079

PLEASE TAKE NOTICE that on April 21, 1997, at 10:00 a.m.,
or as soon thereafter as it may be heard, counsel for J. W. Wyne
Excavating, Inc. will move the Court to establish a trial date
herein.

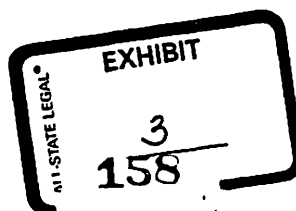
Respectfully submitted this 23rd day of January, 1997.

J. W. WYNE EXCAVATING, INC.


By: 

Of Counsel

Rex L. Edwards, Jr.
Virginia State Bar No. 31212
DAVIES, BARRELL, WILL,
LEWELLYN & EDWARDS, P.C.
122 West Cameron Street
P. O. Box 1147
Culpeper, Virginia 22701
(540) 825-6000
Counsel for Defendant



CERTIFICATE: I hereby certify that on this the 23rd day of January, 1997, I mailed, postage prepaid, a true and correct copy of the foregoing to Bill Barnes, President, Fredericksburg Construction Company, Inc., at P. O. Box 172, Lorton, Virginia 22079.


Rex L. Edwards, Jr.

WS

RECEIVED
JAN 24 1997

DAVIES, BARRELL, WILL,
LEWELLYN & EDWARDS, P.C.

ATTORNEYS AT LAW

JOHN J. DAVIES, III
CHARLES D. BARRELL
STEPHEN P. WILL
STEPHEN K. LEWELLYN
CYNTHIA CORNETT EDWARDS
REX L. EDWARDS, JR.

P. O. BOX 1147
122 WEST CAMERON STREET
CULPEPER, VIRGINIA 22701

TELEPHONE (540) 825-6000
TELECOPIER (540) 825-1989
E-MAIL dbwle@erols.com

CHARLOTTESVILLE OFFICE:
THE COMMERCE BUILDING
101 E. WATER STREET, SUITE 103
CHARLOTTESVILLE, VIRGINIA 22902
TELEPHONE (804) 984-2020
TELECOPIER (804) 977-0250

CHRISTIAN A. BRASHEAR

April 21, 1997

LEGAL ASSISTANTS:
DORIS B. BREEDEN
LORI T. DEANE
HEATHER T. CLARY

Mr. Bill Barnes, President
Fredericksburg Construction Company, Inc.
*P. O. Box 172
Lorton, Virginia 22079

and

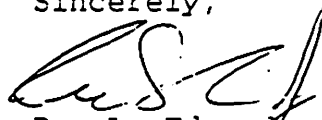
*7000 E. Newington Road
Lorton, Virginia 22079

RE: Fredericksburg Constructions Company, Inc. v.
J. W. Wyne Excavating, Inc.
Spotsylvania Circuit Court - Case No.: L-94-8

Dear Mr. Barnes:

Please take NOTICE that the above-referenced matter is
scheduled for trial before the bench on September 25, 1997 at
10:00 a.m.

Sincerely,



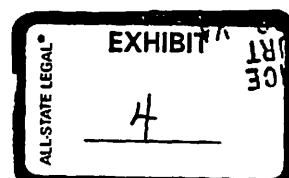
Rex L. Edwards, Jr.
For the Firm

RLEjr/pah
cc: Ms. Linda Jo Johnson, Clerk ✓
Circuit Court of Spotsylvania County*
P. O. Box 96
Spotsylvania, Virginia 22553-0096

(*mailed to both addresses)

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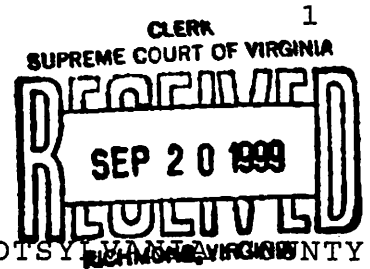
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1 VIRGINIA:
2 IN THE CIRCUIT COURT FOR SPOTSYLVANIA COUNTY
3
4 FREDERICKSBURG CONSTRUCTION)
5 COMPANY, INC.,)
6 Plaintiff,)
7 vs.) At Law L-94-8
8 J. W. WYNE EXCAVATING, INC.,) CL98-444
9 Defendant.) CL98-445

10
11
12

13 REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS

14

15 MOTION TO VACATE JUDGMENT

16 MARCH 12, 1999

17

18 BEFORE:

19 THE HONORABLE J. PEYTON FARMER

20

21 REPORTER:

22 SUSANNE Q. TATE, RMR

For The Record, Inc.
Suburban Maryland (301)870-8025
Washington, D.C. (202)833-8503

1 A P P E A R A N C E S

2

3 ON BEHALF OF THE PLAINTIFF:

4 JOSEPH M. SULLIVAN, ESQ.

5 Law Offices of Joseph M. Sullivan, P.C.

6 4010 University Drive

7 Suite 101

8 Fairfax, Virginia 22030

9 (703) 277-3390

10

11

12 ON BEHALF OF THE DEFENDANT:

13 REX L. EDWARDS, JR., ESQ.

14 Davies, Barrell, Will, Lewellyn &

15 Edwards, P.C.

16 122 West Cameron Street

17 P.O. Box 1147

18 Culpeper, Virginia 22701

19 (540) 825-6000

20 -and-

21

22

1 A P P E A R A N C E S (cont.)

2

3 JERE M. H. WILLIS, III, ESQ.

4 Shackelford, Honenberger, Thomas,

5 Willis & Gregg, P.L.C.

6 147 West Davis Street

7 Culpeper, Virginia 22701

8 (540) 825-0305

9

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22

For The Record, Inc.
Suburban Maryland (301)870-8025
Washington, D.C. (202)833-8503

1 C O N T E N T S

2

3	ARGUMENT	PAGE
4	By Mr. Sullivan	5, 42
5	By Mr. Willis	24
6	Judge's ruling	51

7

8

9

10 E X H I B I T S

11	EXHIBIT NO.	MARKED/REFERENCED
----	-------------	-------------------

12 Plaintiff's:

13 None

14

15 Defendant's:

16 None

17

18

19

20

21

22

1 P R O C E E D I N G S

2 - - - - -

3 (9:13 a.m.)

4 MR. SULLIVAN: Joe Sullivan on behalf of
5 Fredericksburg Construction Company, Your Honor.

6 THE COURT: Mr. Sullivan, yes, sir.

7 MR. SULLIVAN: Mr. Barnes from
8 Fredericksburg is also here today, Your Honor.
9 He is president of the company.

10 Thank you, Your Honor.

11 MR. WILLIS: I'm Jere Willis on behalf
12 of J. W. Wyne Excavating. I am making a special
13 appearance only for the purpose of arguing this
14 motion here today.

15 THE COURT: Your name again?

16 MR. WILLIS: Jere Willis.

17 THE COURT: Long time no see.

18 MR. WILLIS: Yes, sir.

19 MR. EDWARDS: Your Honor, Rex Edwards,
20 counsel of record, I am here representing Wyne on
21 the other issues.

22 THE COURT: I apologize for being 12 or

Motions Hearing -- 3/12/99

1 13 minutes late, so you can add that to your
2 time. I had a dental appointment they said would
3 take 15 minutes, it took 30. I apologize for
4 that. I'm usually very prompt.

5 I have read the pleadings. I understand
6 the case to the extent that one can understand
7 it, but it's been in litigation for a long time,
8 and I was involved in it for a long time, but I'm
9 prepared to hear your motion.

10 MR. SULLIVAN: Okay, thank you, Your
11 Honor. I will then try and summarize our points
12 since Your Honor has read the pleadings that have
13 been filed by the parties.

14 Your Honor, I think there's seven
15 grounds on which the Court should look at to
16 vacate this judgment, and the grounds are listed
17 in our motion as follows:

18 First off, Fredericksburg Construction
19 or what I will sometimes refer to as FCCI, so I
20 don't get tongue-twisted, was represented by
21 counsel throughout this proceeding. Wyne
22 disputes that. I think I'll be able to explain

Motions Hearing -- 3/12/99

1 why their position is wrong.

2 Secondly, FCCI was never was served,
3 even if Wyne -- even if Fredericksburg wasn't
4 represented by counsel as required under
5 8.01-299, which provides for service on
6 corporations. In the same sense,
7 Fredericksburg's registered agent was never
8 served, as well.

9 If you went to the substitute service
10 provisions under 13.1-637, the registered agent
11 was also not served --

12 THE COURT: You are talking about
13 service now on setting a trial date?

14 MR. SULLIVAN: I am talking about
15 service on --

16 THE COURT: That was set in court.

17 MR. SULLIVAN: What I'm talking about is
18 they never received a copy of the notice --

19 THE COURT: Notice of what? Notice of
20 what?

21 MR. SULLIVAN: Notice of the trial date
22 or notice of the term day precipe that had been

Motions Hearing -- 3/12/99

1 set out. What I'm trying to walk you through is
2 the procedure that --

3 THE COURT: That's all right, you go
4 ahead. I'll listen.

5 MR. SULLIVAN: Finally, Your Honor,
6 number four, we never had any actual notice under
7 8.01-288. The affidavits filed in this case
8 clearly establish that there was no actual notice
9 of the precipe, which was sent out for the
10 January 23rd, 1997 date, is the notice that was
11 sent out for the January 23rd, 1997 date, and
12 then no notice was received of the April 21, 1997
13 letter, which was sent out.

14 Also, I think, Your Honor, that the
15 record is clear when you look at the court
16 record, there is nothing in there that has a
17 return of service from a private process server,
18 there is no certified mail return receipt, there
19 is no Federal Express receipt or UPS or any other
20 mechanism by which there would be a receipt of
21 any of these notices of precipe by Fredericksburg
22 Construction and nothing that was done to ensure

Motions Hearing -- 3/12/99

1 that there were safeguards for that.

2 Number six, Your Honor, I would look and
3 I would say one of the more compelling reasons is
4 the failure to comply with Rule 113, and 113
5 clearly requires that a party receive notice of
6 the entry of an order or the opportunity to be
7 heard on that, and if the Court's going to modify
8 or waive those requirements -- which the Court
9 can do under the rule and the rule is clear on
10 that -- the cases say that the Court must notify
11 the party that they are dispensing of that
12 requirement under the rule.

13 The order you entered, which I have a
14 copy here, was entered, and there is no notice
15 that was provided to Fredericksburg at all in any
16 way, shape or form. They weren't copied on the
17 cover letter to you. They weren't copied on the
18 order. The order has no line, in fact, for them
19 to sign or note their appearance or anything on
20 Rule 113, to say they waive that, none of that.

21 And finally, Your Honor, this is a case
22 that should be tried on the merits. As Your

Motions Hearing -- 3/12/99

1 Honor pointed out at the beginning, this
2 litigation went on for three-plus years before
3 the term day issues ever came up. Fredericksburg
4 initially filed this case January 19th, 1994.

5 I'd like to back up for a minute, if I
6 could, to the issues of the representation by
7 counsel. There were two attorneys of record,
8 Brian Sullivan and Steve Holt from Arent Fox, and
9 Your Honor had dealings with them throughout this
10 case. Mr. Sullivan moved to withdraw on April
11 16th, 1996.

12 The order entered by Judge Ledbetter is
13 specific to Brian Sullivan. His order says,
14 "Brian Sullivan, counsel for Fredericksburg,
15 requested permission to be allowed to withdraw as
16 counsel of record. It is ordered that motion to
17 withdraw as counsel be entered and that Brian
18 Sullivan is hereby granted leave to withdraw."
19 This order says absolutely nothing about Mr.
20 Holt.

21 The requirements of Rule 1:5 is
22 attorneys come in and out of court through

Motions Hearing -- 3/12/99

1 pleadings. When you want to get out of the court
2 proceeding, you get leave of court. The
3 defendants want -- Wyne wants to argue in this
4 case that counsel, because Arent Fox is a firm --
5 and that's also defined in here under 1:005, that
6 counsel includes a law firm -- that when Sullivan
7 moved to withdraw, Brian Sullivan, it withdrew
8 the firm. I think that's just plain wrong for
9 both legal reasons and practical issues.

10 There are two attorneys of record. When
11 one gets out, one is left. If a law firm enters
12 their appearance, they enter their appearance
13 through specific attorneys. I work by myself, so
14 I'm not a good example. Let's use McGuire
15 Woods. There is 324 lawyers in that firm
16 according to the February 22nd Virginia Lawyers
17 Weekly. When McGuire Woods comes in to appear
18 before you, are 324 lawyers appearing before
19 you? No. The specific lawyers from McGuire
20 Woods, whether there be two, four, six or eight,
21 however many they have got in a specific case,
22 are here before you, and if one withdraws, the

Motions Hearing -- 3/12/99

1 others are still in the case, unless they all
2 withdraw.

3 Most orders will say that the law firm
4 of Arent Fox and Brian Sullivan and Steve Holt
5 have withdrawn out of the case. Therefore, they
6 would all be out of the case, and I wouldn't
7 dispute that, but Holt's not withdrawn by virtue
8 of this order at all. I mean, he was still
9 counsel of record.

10 He's filed an affidavit as part of our
11 reply, and he says in paragraph 6 that as he
12 reads the order and his understanding is, he was
13 still in this case. And I think that that's
14 clear as to what was done here. And if Judge
15 Ledbetter had intended to allow Mr. Sullivan and
16 Mr. Holt to get out, the order should have said
17 that.

18 Maybe the purpose of the motion was to
19 get them out, but the order doesn't accomplish
20 that. I think a good analogy is a motion to
21 compel. I come before you, I ask you to compel
22 ten interrogatory answers from a party. You hear

Motions Hearing -- 3/12/99

1 the arguments. You say, Gentlemen, I'm going to
2 require as part of my order that you answer and
3 supplement one through five.

4 That's your ruling. That's what goes
5 into the order. The motion may well have asked
6 for ten. You have given us permission to get
7 five supplemental answers. That's what the order
8 will say. That's the ruling of the Court, not
9 the motion itself.

10 We asked for a lot of things in
11 different motions, and this motion right here is
12 an example as far as leave to withdraw. They may
13 have asked for something broader. What they got
14 in this order is simply a ruling to allow only
15 Mr. Sullivan to get out of this case. Therefore,
16 Steve Holt was still counsel of record.

17 Mr. Holt should have been served with
18 the precipes and the notice and the letters under
19 8.01-314. I think that's clear from the statute,
20 that when one is counsel of record, you serve
21 counsel of record. It should have been done. It
22 wasn't done. The judgment is void on that

Motions Hearing -- 3/12/99

1 alone.

2 Let's take for the next couple of
3 arguments here an assumption that they were out
4 of the case and there was no counsel. You know,
5 I think there's a requirement, because you have a
6 corporation here, that the corporation be served
7 with the notice. I think there has to be some
8 kind of procedural safeguarding under 8.01-299 or
9 13.1-636, the registered agent service, to ensure
10 that there is service upon the corporation.

11 Corporations are entities that appear
12 before a court through counsel, with the
13 exception of general district court issues, which
14 are not applicable here. When a corporation
15 comes before the Court, they may come for an
16 original proceeding before you, and you will say
17 to them, Mr. and Mrs. So and So, your corporation
18 needs to be represented by an attorney. You need
19 to get an attorney and bring them to court with
20 you in order to go forward in this proceeding.

21 The same applies here. There has to be
22 an attorney who is going to represent the

Motions Hearing -- 3/12/99

1 corporation or there has to be service on an
2 officer or director, which then would put the
3 corporation on notice that they would have to
4 come in to -- to get an attorney in order to go
5 forward in the proceeding.

6 That wasn't done here. Judge Ledbetter
7 ruled in a case actually involving Wyne in 1993
8 in which he said that it's a very simple matter
9 to go forward and serve a registered agent. You
10 don't have to hunt down the officers or
11 directors. There's a registered agent in
12 Richmond. If they had properly done this, you
13 get the name of the registered agent, you have a
14 sheriff or private process server serve them.

15 Wyne used that same argument for Judge
16 Ledbetter to overrule -- actually, I think he
17 reversed a default judgment that had been entered
18 against them. It was John Deere versus J. W.
19 Wyne Excavating Company, the decision we cite in
20 our memorandum, and I think that's instructive as
21 far as what should have been required.

22 Next is the issue of actual notice. Mr.

Motions Hearing -- 3/12/99

1 Barnes' affidavit clearly states that we didn't
2 get notice of any of these different documents
3 that were sent here. We did get notice of the
4 term day, it was in January of 1997, and Mr.
5 Edwards is correct, they put the wrong date in my
6 document. It was January 21st that the term day
7 was called.

8 The court file says that -- there's a
9 note on there. I appeared, because Mr. Holt
10 wasn't available and I was on my way to Richmond
11 to argue before Judge Kulp the next day and came
12 right through the county, and I appeared. Mr.
13 Edwards did not appear. The Court had not heard
14 from him. We waited for two hours.

15 At the end of the case, Judge Ledbetter
16 asked me what I would like to do, and I said I do
17 not have dates with me, I have not heard from
18 these people, I am standing in, and what
19 essentially happened was I said I believe it
20 would be appropriate to pass the case rather than
21 setting it without the other party being here.

22 THE COURT: I don't like to interrupt

Motions Hearing -- 3/12/99

1 you, because I want to let you lay your
2 groundwork, but Mr. Holt, is he -- was he at that
3 time with Arent Fox?

4 MR. SULLIVAN: Yes, he was.

5 THE COURT: A member of that firm?

6 MR. SULLIVAN: He was a member of that
7 firm.

8 THE COURT: You were not a member of
9 that firm.

10 MR. SULLIVAN: No, I was not.

11 THE COURT: And you were not counsel of
12 record in this case.

13 MR. SULLIVAN: No, I was not. I was not
14 counsel of record. I was simply called by Mr.
15 Barnes, he said he talked to Mr. Holt, Holt's not
16 available, would I come down there and do it, and
17 I said I can go down and appear that day. Holt
18 needs to obviously handle everything else,
19 because I'm not counsel of record, and basically
20 he asked me to do him a favor, because I had
21 known him from some other dealings, and I said I
22 would, and I had no other involvement after that

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1 until I got the call on the garnishments 13
2 months after the judgment was entered.

3 Your Honor, again, on the procedural
4 safeguards, it would have been a simple matter to
5 send any of this certified mail, return receipt
6 requested. The Secretary of the Commonwealth,
7 when they serve anyone, uses certified mail,
8 return receipt requested. It's a very simple
9 process to get that. That wasn't done.

10 I think one of those safeguards should
11 have been taken in order to ensure there was
12 actual notice, aside from either directly trying
13 to contact Fredericksburg through a telephone
14 call or faxing them a letter or something like
15 that. None of that was done, and I think that
16 should have been done in order to ensure that
17 there was, you know, actual notice as the
18 defendants want to argue. And clearly there is
19 no actual notice.

20 Next, Your Honor, I think 113 is very
21 compelling in this case. 113 says that orders
22 have to be endorsed by counsel of record or in

1 this case, if you want to say there was no
2 counsel of record, either way, it doesn't really
3 matter, the outcome's the same. They have to
4 have -- the other side has to have notice of an
5 order being entered in order to review the draft,
6 in order to take a look and see what the other
7 side contends the ruling is from the Court.

8 Mr. Edwards argues in his opposition
9 that essentially because the, quote unquote, "The
10 Court announced its rule as contained herein in
11 Open Court, so the endorsement of this order by
12 the parties is not required."

13 That's a misstatement of the law, Your
14 Honor. If there's going to be a modification or
15 a dispensing of the requirements of Rule 113, the
16 case law in this state, particularly the
17 Rosoillio v. Winters case, clearly establishes
18 that there has to be notice to the other side
19 that you're going to do that, because there's
20 substantive rights that are going to be affected
21 when you enter that order, and I -- and that
22 wasn't done in this case, because we had no

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1 notice of this at all.

2 We had no notice of it at all until 13
3 months afterwards when the garnishments were --
4 were served on us in this case, and I think that
5 in and of itself requires the Court to -- I would
6 respectfully submit -- to vacate the judgment.

7 I think we should have been given an
8 opportunity to look at that order. We should
9 have been notified that there was going to be an
10 order entered. The -- Wyne says that basically
11 we had notice of the entry of the order by virtue
12 of the fact that they sent a notice of the trial
13 date, the September 25th trial date. Well, this
14 order was not entered by you at the trial.

15 I think the problem with their argument
16 is as follows: When a court makes a ruling, a
17 court usually does it one of two ways. Either
18 Your Honor will rule from the Bench and say,
19 Counsel, my ruling is as follows, A, B, C and D;
20 or Your Honor will issue a letter opinion which
21 he at the end says, Mr. Jones will draft an order
22 consistent with this opinion and present it to

1 opposing counsel and present it to the Court
2 finally for entry.

3 In this case, that simply was not done.
4 There simply was no opportunity to review this
5 order. There is nothing in the record that shows
6 it was ever sent to us. The defendants don't --
7 Wyne doesn't contend that they ever sent it to
8 us. What they're trying to rely on is, again,
9 this misstatement of the law relative to the fact
10 that you announced your ruling.

11 Well, if you didn't announce your ruling
12 in Open Court that day or issue it in a letter
13 opinion, we would have no way of knowing what
14 your opinion -- what your ruling was. You have
15 to do it one of two ways for an order to be
16 prepared. This is merely just a statement as to
17 what you did procedurally. That's all it is.

18 It doesn't say you modified or waived or
19 dispensed with the requirements of 113. It
20 doesn't address that issue at all. And, in fact,
21 I find nothing in the record which would
22 establish that, in fact, that was done in this

1 case. And I think, you know, this in and of
2 itself, Your Honor, is a basis for the Court to
3 vacate the judgment and have a trial in this
4 case.

5 Finally, Your Honor, getting back to the
6 merits of this case, Fredericksburg filed this
7 case first. There was a demurrer that was
8 subsequently filed. Basically the parties
9 reversed positions. Wyne became the plaintiff,
10 we became the defendant and counterclaim-
11 defendant at that time.

12 The parties pursued this.
13 Fredericksburg pursued this with Arent Fox. The
14 -- Wyne had three -- has three different counsel
15 of record in this case. This went on for three
16 years. It was almost four years by the time you
17 entered the order in this case.

18 Fredericksburg didn't ignore their
19 rights, as Wyne tries to suggest. They pursued
20 the claims here and went after it. There were
21 long periods of time in this case, as Your Honor
22 is well aware having handled the case, we had a

1 stay for the Federal Court action in Richmond.

2 We had delays due to the fact that
3 Wyne's counsel, Mr. Pugh, withdrew from the case
4 after certain discovery was taking place. We had
5 other delays, long periods of time, between the
6 time Mr. Edwards entered his appearance and the
7 January precepe and notice was sent out. There
8 were long and lengthy delays in this case.

9 We didn't abandon this case. We didn't
10 know anything about what was being conducted
11 here, because we didn't receive the notice. The
12 one notice we received, which wasn't sent
13 properly, we responded. I showed up. I
14 protected our interests. I protected our
15 rights. We did not fail to address the Court and
16 to be responsive to what was going on in this
17 Court.

18 I would submit, Your Honor, that these
19 reasons taken together and 113, in and of itself,
20 are the basis to vacate this judgment. We're
21 entitled to have a trial on the merits. We have
22 a substantive counterclaim which we believe we

1 will prevail on at trial. We also think we can
2 defeat Wyne's claim based on what I know about
3 the claim at this time, and I'd ask you to vacate
4 the judgments. If the Court's inclined to do
5 that, then to set aside the cost of these
6 garnishments as well as the levies.

7 And I'd respectfully ask my right to
8 rebuttal. Thank you.

9 THE COURT: Thank you.

10 Mr. Willis?

11 MR. WILLIS: Yes, Your Honor.

12 Your Honor, Fredericksburg Construction
13 comes here today, and even though they don't
14 allege it in their motion, I think we're here
15 under Section 8.01-428, which is their motion to
16 vacate, and Judge, that section provides for
17 three grounds to set aside a default judgment.

18 The first ground is fraud; there is no
19 allegation of that here today. I'll skip to the
20 third ground, which is proof of accord and
21 satisfaction; there is no allegation of that here
22 today. The second ground, the middle ground that

1 the statute sets out, is a void judgment. I have
2 not been successful in finding out what a void
3 judgment constitutes. It's not defined in the
4 statute. It's not defined in the case law that
5 is set out in the annotations in the statute, but
6 that's what they are alleging here today, that
7 there's a void judgment.

8 The judgment isn't void. The facts of
9 this case are fairly simple and fairly
10 straightforward. Fredericksburg Construction was
11 before this Court. They had been properly served
12 process and a notice for judgment. They had
13 retained counsel and filed an answer and a
14 counterclaim, and as Mr. Sullivan has pointed
15 out, this matter had a multitude of preliminary
16 procedures and motions go forward.

17 Subsequently, Fredericksburg
18 Construction had a falling out with their law
19 firm, Arent Fox, and Arent Fox requested leave to
20 withdraw as counsel, and that motion, if the
21 Court would take judicial notice, is filed with
22 the Court in the court file, and it clearly sets

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1 out that Arent Fox is seeking leave to withdraw
2 as counsel of record.

3 It doesn't mention either Mr. Holt's
4 name or Mr. Sullivan's name in particular, but
5 that the law firm is seeking to withdraw as
6 counsel of record. Mr. Holt and Mr. Sullivan
7 were participating in this case as members of
8 that law firm. That motion was accompanied by a
9 precipe that again is in the court file that
10 gives notice that they will appear on April the
11 15th of '96 to request the Court to enter the
12 order granting the motion.

13 And Judge, I also will point out, in the
14 motion, it recites that Arent Fox had discussed
15 this matter with Fredericksburg Construction and
16 had received their permission to withdraw as
17 counsel of record.

18 On April the 15th, Brian Sullivan of
19 Arent Fox appeared before the Court, and the only
20 matter that was before the Court that day with
21 proper notice was Arent Fox's motion, and to
22 withdraw as counsel of record, Rule -- the rule

1 requires that you give your client notice, and
2 you can't withdraw as counsel of record unless
3 you have given your client notice, and so the
4 only motion with notice before the Court on April
5 the 15th was Arent Fox's motion to withdraw as
6 counsel of record.

7 And Your Honor, Judge Ledbetter entered
8 an order that day that says, "The motion to
9 withdraw as counsel be granted." Again, the only
10 motion before the Court was Arent Fox's motion.
11 And then it goes on to say, "And further, that
12 Brian D. Sullivan, is hereby granted leave to
13 withdraw."

14 I don't know why that was put in there.
15 I wasn't there. I don't think anybody in the
16 courtroom here today was there, but it was clear
17 that the motion by Arent Fox to withdraw had been
18 granted by that order, and that order is, again,
19 part of the court record, and we would ask that
20 the Court take judicial notice of that.

21 Judge, we object to any affidavits that
22 have been presented by Fredericksburg

1 Construction to this Court. They are not in
2 evidence. We object to them coming into
3 evidence. We don't have the opportunity to cross
4 examine any of the affiants, and we would take --
5 ask the Court not to take any notice of those
6 affidavits in this matter.

7 Also, if Mr. Sullivan's position is
8 correct and Arent Fox and its lawyers were not
9 released as counsel of record on April the 15th
10 of '96, where are they today? They have never
11 been released as counsel of record in this cause,
12 then, and they should be here today, and there is
13 no one here today, and the reason for that is
14 they are not in this case.

15 So, that -- that's the first issue,
16 Judge, and quite frankly, if -- if you find that
17 Arent Fox is still counsel of record, then Wyne
18 did not give proper notice, and we need to go
19 back to trial; however, I don't think that's
20 factually the case, because Arent Fox is not here
21 today, and that's because they were relieved as
22 counsel of record from their obligations on April

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1 15th of 1996.

2 So, then we have to move on to if they
3 -- if Arent Fox is not counsel of record, where
4 is Fredericksburg Construction Company, Inc. in
5 this case at that time? They are still before
6 the Court, because they have been properly served
7 the motion for judgment, filed an answer,
8 appeared with counsel. They are still before the
9 Court.

10 And pursuant to Section 8.01-319, they
11 were required as a pro se litigant at that time
12 to supply the Court and file with the Court their
13 mailing address, and the Court -- again, I would
14 ask the Court to take judicial notice of the
15 court file. Fredericksburg Construction Company
16 never did that. They never filed their mailing
17 address as they were required under 8.01-319.

18 Mr. Sullivan in his response has
19 indicated that 8.01-319 doesn't apply in this
20 case, that it only applies to parties who come
21 before the Court initially as pro se. Now, I
22 would submit to the Court that that's an overly

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1 restrictive reading of that statute and its
2 requirement.

3 If you interpreted the statute in that
4 fashion, then the Court would be stymied by
5 parties who initially appear with counsel,
6 discharge their counsel, don't file a mailing
7 address, and then we can't go forward. The
8 purpose of this requirement in Section 8.01-319
9 is to allow the court proceedings to go forward
10 and to ensure that a party gets notice of the
11 proceedings as they go forward.

12 If they fail to file that mailing
13 address, then they do that at their peril, and
14 the Court at that time has the authority, in that
15 same section, to either dispense with all further
16 notice to the pro se party or to require notice
17 as the Court thinks is appropriate at the time.

18 In this case, when Mr. Edwards on behalf
19 of Wyne Excavating appeared at the April term,
20 Judge Ledbetter directed him to mail a copy of
21 notice of the date of trial to Fredericksburg
22 Construction at the last known addresses, and the

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1 last known addresses were a P.O. Box, P.O. Box
2 172, Lorton, Virginia, 22709, which was the
3 address that formal counsel -- former counsel for
4 Fredericksburg Construction used, Arent Fox, that
5 they mailed their certificate of mailing to
6 Fredericksburg Construction, and also to 7000
7 East Newington Road, Lorton, Virginia, 22709,
8 which was address -- an address given in the
9 discovery by Fredericksburg Construction.

10 And the judge, Judge Ledbetter, deemed
11 that that was the appropriate notice to give to
12 Fredericksburg Construction at that time, who had
13 failed to file a mailing address with the Court,
14 and the Court should have in its file the notice
15 that Mr. Edwards sent, it was copied to the Clerk
16 of Court, the notice to Fredericksburg
17 Construction Company at both the P.O. Box in
18 Lorton and the street address in Lorton of the
19 trial date that was set forth for September 25th,
20 1997 at 10:00 a.m.

21 Again, we would ask the Court to take
22 judicial notice of that letter contained in the

1 file. That's all that had to be done in this
2 case, and that's what this case is all about.

3 The corporation was before the Court.
4 The corporation had failed to file its mailing
5 address. Judge Ledbetter deemed what type of
6 notice would be appropriate under the
7 circumstances. Mr. Edwards, pursuant to the
8 Court's instructions, gave that notice. It was
9 given properly, and therefore, the judgment of
10 this -- that you entered, Your Honor, is a valid
11 judgment, and it's not a void judgment.

12 Everything else that Fredericksburg
13 alleges as procedural deficiencies are red
14 herrings I would submit to the Court.
15 Fredericksburg makes a great deal about Rule
16 1:13, about the endorsement of the order. Judge,
17 that doesn't say the word "party" in the order
18 anywhere. It says, "Drafts of orders shall be
19 endorsed by counsel of record," not parties, "or
20 reasonable notice of the time and place presented
21 in such drafts, together with copies thereof,
22 shall be delivered by service or mailing to all

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1 counsel of record," not parties, "who have not
2 endorsed them. Compliance with this rule with
3 Rule 1:12 may be modified or dismissed by the
4 Court in its discretion."

5 Well, Judge, there is no counsel of
6 record in this case for Fredericksburg
7 Construction. So, there wasn't a need to have
8 endorsement of counsel or mailing of notice to
9 them.

10 In addition, the Court may not recollect
11 this, but Mr. Edwards is here today and would
12 testify that the language concerning the
13 endorsement and the waiver was included in that
14 order at the direction of the Court, and so that
15 is in compliance with the very last sentence of
16 this provision.

17 Fredericksburg Construction also argues
18 that Section 8.01-314 applies. Well, Section
19 314, Judge, deals with service of pleadings,
20 motions and notices upon counsel of record. It
21 doesn't have anything to do with pro se
22 litigants. It's a substitute service that's

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1 allowed on counsel of record if there's counsel
2 of record. It has nothing to do with pro se
3 litigants.

4 They also say that Section 8.01-299 was
5 violated and that that requires -- excuse me,
6 that sets out who may be served in a
7 corporation. Your Honor, if Fredericksburg
8 Corporation had given a mailing address to this
9 Court, then that section would have had to have
10 been complied with. You would have had to give
11 notice to the corporation or one of those
12 parties, the officers, directors or the
13 registered agent, if they had given us and filed
14 with the Court a mailing address pursuant to
15 Section 8.01-319.

16 They had not done that required filing
17 with the Court; therefore, the Court instructed
18 Mr. Edwards how to give them notice. Mr. Edwards
19 did that. And because they had not filed with
20 the Court, they are not entitled to the notice
21 under Section 8.01-299.

22 Plaintiff also -- excuse me,

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1 Fredericksburg Construction also argues that
2 their registered agent was never served, and
3 because of that, that's a deficiency. There's no
4 absolute requirement that the registered agent be
5 served. There is alternative methods of service,
6 either on directors or officers of the
7 corporation or the registered agent. It's a red
8 herring. You don't have to serve them, the
9 registered agent. There are alternative methods
10 of serving.

11 They also argue that they never had
12 actual notice. Actual notice is not a
13 requirement in litigation. They were before the
14 Court. There is no statutory requirement of
15 actual notice. It's a red herring.

16 They also argue that Wyne Excavating has
17 some fiduciary duty to them to ensure that they
18 get notice. They don't have that duty. They are
19 litigants. They are opposing parties. What Wyne
20 Excavating has a duty to do is to follow the
21 statutes, the rules and the procedures and the
22 directives of the Court, which they did in this

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1 case.

2 And finally, Your Honor, they argue that
3 the corporation, as a corporation, cannot be
4 before the Court unrepresented, and that's just
5 not true either, Judge. Corporations come before
6 this Court, the general district court and other
7 courts throughout this country unrepresented all
8 the time. They get served with motions for
9 judgments, injunctions, warrants and debts, and
10 they are before the Court, and they are properly
11 before the Court, and judgments can be entered
12 against them if they don't appear and defend
13 their interests or prosecute their case.

14 Now, I know it is standard procedure in
15 -- that corporations appear -- excuse me,
16 prosecute their cases through their attorneys,
17 but it doesn't mean the corporation is not
18 properly before the Court. Default judgment can
19 be entered against a corporation that has been
20 properly served, process and notice of the motion
21 for judgment, and it is before the Court.

22 If they want to prosecute their case,

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1 then they have to hire a lawyer to come in and do
2 that for them, but that's not a requirement for a
3 judgment to be entered against them. If it is,
4 Your Honor, then plaintiffs would be having to
5 hire lawyers for defendant corporations just so
6 they could get a judgment against them. That's
7 not the case.

8 Your Honor, in conclusion, I'd like to
9 call the Court's attention to a couple cases.
10 The first case is Eddine versus Eddine -- Your
11 Honor, if I could approach the Bench -- this is a
12 Court of Appeals case, and it's a divorce case,
13 but that doesn't mean it's not appropriate --
14 that it's not applicable to the case before the
15 Court.

16 In this case, Your Honor, the husband
17 participated in the divorce proceedings. He then
18 subsequently moved and failed to file with the
19 Court his new mailing address. The Court then
20 subsequently, upon the wife's motion, dispensed
21 with any further necessity to give the husband
22 notice and ultimately entered a monetary award of

1 \$289,540, against the husband.

2 And I'm looking at page 763 of the case
3 and reading from the third full paragraph: The
4 Court, in making its decision, says,
5 "Unquestionably, the husband received such
6 notice. He was served in process, made an
7 appearance and had an opportunity to present his
8 objections. Husband appeared and actively
9 participated in proceedings prior to the entry of
10 the decree of divorce and thereafter on appeal.
11 Notice to him was dispensed with only after he
12 had absented himself from the jurisdiction of the
13 Court without providing the clerk with his new
14 address as required by the statute."

15 It goes on in the next paragraph, "Due
16 process does not require actual notice to the
17 party of the date of a trial or hearing after he
18 or she has been properly made party to the
19 proceeding. The legislature can prescribe what
20 kind of notice and manner in which service will
21 be -- notice will be given. Since he was a pro
22 se litigant, the husband was required to file

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1 with the Clerk of the Court a written statement
2 of his place of residence and mailing. The wife
3 was entitled to rely on such statement, and since
4 the statement was not filed, the Court was
5 authorized to dispense with the notice to the
6 husband.

7 "The failure to provide --" and I'm
8 skipping down to the middle of the next paragraph
9 -- "the failure to provide an address sufficient
10 to ensure such notice may prevent a case from
11 proceeding in an orderly manner. If a --" and
12 this is important -- "if a litigant wishes to be
13 informed of the proceedings, he or she must
14 either keep the Court advised of where service
15 may be accomplished or be represented by counsel
16 upon whom service may be had. Husband's failure
17 to receive the notice because he moved from his
18 residence without notifying the Clerk of his new
19 address did not deprive him of due process of
20 law. To hold otherwise would allow a litigant to
21 disappoint -- disappointed in the direction the
22 litigation might be taking to thwart the

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1 authority of the Court by leaving the area
2 without notifying the Court of his or her new
3 address."

4 Your Honor, that is exactly what we have
5 in the case at Bar. Change the names from Wyne
6 Excavating and Fredericksburg Construction --
7 substitute those in for husband and wife, and you
8 have the same situation.

9 The corporation, upon discharging Arent
10 Fox, basically became pro se, and at that time,
11 it was incumbent upon the corporation to file the
12 mailing address with the Clerk. They didn't do
13 it. Judge Ledbetter then said, Here's what you
14 need to do. Give notice of the trial pursuant to
15 Section 8.01-319. Mr. Edwards did that.

16 If Fredericksburg Construction was so
17 overly concerned about this lawsuit, they would
18 have given that address to the Court, they would
19 have had counsel involved in the case. If they
20 were so overly concerned with the suit, when they
21 got the notice of January of '96 -- excuse me,
22 '97, and that's undisputed, to come to court in

1 January of '97 for that term day hearing, they
2 would have been in touch with Mr. Edwards,
3 particularly when there was no apparent confusion
4 about term day and there was a holiday in there
5 and it was set off on another date.

6 They never did that, but they were so
7 overly concerned with this litigation. The fault
8 that this judgment was entered by default against
9 Fredericksburg Construction lies with
10 Fredericksburg Construction.

11 Your Honor, there is another case I
12 would ask the Court to look at. I am not going
13 to belabor the point, but it's a Supreme Court
14 case, Byrum versus Low & Gordon, 2.5 Virginia
15 362. It's a 1983 case. This case is cited by
16 the Virginia Court of Appeals in Eddine versus
17 Eddine.

18 So, Your Honor, the motion of
19 Fredericksburg Construction under 8.01-428 to set
20 aside the default judgment on the grounds that it
21 is a void judgment is misplaced, and we would ask
22 the Court to deny it.

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1 THE COURT: Mr. Sullivan, your
2 response?

3 MR. SULLIVAN: I'm sorry? Thank you.

4 THE COURT: Your response.

5 MR. SULLIVAN: Your Honor, first off, I
6 think with respect to the issues of counsel, the
7 Court can take judicial notice of the motion.
8 The fact of the matter is the order says what it
9 says, and there was only one attorney that was
10 let out of the case.

11 There was counsel of record here by Mr.
12 Holt, and I think -- I think it's clear from that
13 order the only person who got out was Mr.
14 Sullivan, not Mr. Holt. His affidavit clearly
15 establishes that here today. I think you can
16 take notice of those affidavits today relative to
17 what they have provided to the Court with respect
18 to the representation by Mr. Holt and also Mr.
19 Barnes and Mr. Sabourin with respect to failure
20 to receive any of these notices that were
21 provided.

22 I would also point out to you that Mr.

1 Sullivan withdrew from this case, he also
2 withdrew from another case. Mr. Sullivan left
3 Arent Fox after withdrawing from those cases.
4 He, I understand, moved to Georgia or Florida to
5 practice law, and that is the reason that has
6 been explained to me as to why he himself left,
7 and that's what I was told when I went to
8 investigate this case.

9 Next, Your Honor, most of the argument
10 was spent about the addresses here, and I think
11 what they've done is they've misconstrued what we
12 have said in their -- in our pleading. What we
13 said with respect to the January 23rd precipe,
14 the January 23rd notice and the April 21 letter,
15 was as follows:

16 It says -- and we state it really
17 specifically as to the letter. We say, "The
18 letter that was allegedly sent to FCCI's post
19 office box and to an address located at 7000-E
20 Newington Road, FCC did not receive the letter,"
21 and we said, "and we did not maintain an office
22 at 7000-E. The P.O. Box is the correct

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1 address."

2 The real issue here is we still have the
3 P.O. Box. We have had it for 15 years. They
4 want to call it a red herring, call everything a
5 red herring. The bottom line is they were
6 supposed to send the notice to us at an address
7 where we would receive it. The P.O. Box was the
8 correct address. That's a rebuttable presumption
9 that they are arguing to maintain the basis of
10 their opposition here, a rebuttable presumption
11 that we have rebutted through Mr. Barnes'
12 affidavit.

13 They have come in and said we mailed it,
14 the burden shifts to them. Professor Friend
15 says, if the other party comes in, as
16 Fredericksburg has done, and rebuts that, there
17 is no presumption that -- that it was taken care
18 of. We had the P.O. Box. We are not debating
19 the issue of the fact that it went to 7000-E to
20 ride our entire case on.

21 The fact of the matter is, Your Honor,
22 we moved from 7000-E to 7000-D, next door. If,

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1 in fact, it had taken -- we had received it or
2 the persons next door, who I believe were leasing
3 from Fredericksburg at the time, had received
4 some of their mail, which I understand they did
5 during the course of, you know, the mail being
6 brought to the new address next door, they would
7 have given it to them. The fact of the matter is
8 we never got any of these.

9 As counsel accurately points out, we got
10 the notice in January. We showed up to protect
11 our rights. Had we gotten these other notices,
12 no matter how they came to us, Mr. Barnes would
13 have responded through Mr. Holt or somebody
14 else. That simply isn't true.

15 They want to make this address issue the
16 entire issue to ride their opposition to, and it
17 fails. It simply is not the basis upon which you
18 can deny the motion, because the fact of the
19 matter is we didn't have notice.

20 They want to -- they want to tell you,
21 too, to ignore 8.01-288 relative to actual
22 notice. That's the only thing they really have

1 to ride on, that we have some kind of actual
2 notice, because they have no proof in this case
3 that we received any of these documents. They
4 mailed it. The rebuttable presumption has been
5 rebutted.

6 They said that 8.01-288 isn't required
7 here. Well, in fact, in many instances, when
8 people come before Your Honor, whether it's
9 companies or individuals or whoever it might be,
10 if someone says, this wasn't properly served on
11 me, Judge, the sheriff didn't serve it on me or
12 it was posted or something, well, if that person
13 is standing before you and they have got the
14 process sitting in their hand and you say to
15 them, Sir, don't you actually have notice of this
16 proceeding? The answer is yes, and the answer is
17 8.01-288 applies, and they are before the Court.

18 We never had actual notice. We didn't
19 have any of these. We would have been here. We
20 would have defended the case. We would have
21 prosecuted the counterclaim that we're entitled
22 to prosecute in this case.

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1 Their reading of Rule 1:13 is
2 restrictive. I've never heard of such a
3 reading. I was a judicial clerk for the judges
4 in Fairfax. They use a domestic case as an
5 example here. When I clerked for the judges in
6 Fairfax, in many domestic cases, one of the
7 parties was pro se. The orders came before the
8 Court. The judges said if it's not either
9 endorsed by either -- if both parties were pro se
10 or if there was one attorney and a pro se
11 litigant, as there is here they are arguing in
12 this case, they would require the pro se litigant
13 to sign off and/or to put it up for a hearing, to
14 have the order entered at a hearing with proper
15 service of the hearing date so that the party
16 could come before the Court and listen to the
17 Court rule on what they're going to do vis-a-vis
18 the order they asked to be entered.

19 And if the other side didn't show up,
20 they would write in the block -- which there
21 isn't one in this order. There isn't even room
22 for us to sign here, because they didn't give it

1 to us. They never sent it to us. They never
2 intended to send it to us. What there should
3 have been, if they really wanted to be
4 procedurally correct, is a block here with notice
5 to Fredericksburg, and if we didn't show up for
6 that, Your Honor would have wrote in here, "Rule
7 1:13 waived, The Honorable J. Peyton Farmer."

8 That's the way it's done and that's the
9 way I saw it done for the entire year that I
10 clerked up there and the ten years I've been
11 practicing. To restrict this to a rule that was
12 applicable only to lawyers, it's simply not done
13 that way, because everyone isn't represented by
14 counsel. In fact, many people are not
15 represented by counsel. That reading is just
16 erroneous, to construe it that way.

17 They admit they didn't send it to our
18 registered agent. I think that's not an issue,
19 because we all agree that it didn't take place.

20 With respect to corporations appearing,
21 corporations can appear initially in proceedings
22 without counsel. After that, they have to appear

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1 with counsel. The practice in this state is that
2 you have to come in and you have to have an
3 attorney represent the corporation. That's
4 simply the way it is.

5 I also would point out, too, Your Honor,
6 that Wyne has agreed that if counsel -- if Holt
7 is counsel of record, that the judgment is void,
8 because they didn't comply with 8.01-314. I
9 think they have admitted here today that if you
10 construe the order the way we believe it should
11 be construed and the way the Supreme Court says
12 you should look at orders, which is the Court
13 only speaks through its orders -- again, I go
14 back to my analogy and example on the motion to
15 compel -- that the judgment is void. That's
16 their admission in and of itself.

17 And I would, if Your Honor would like, I
18 have a copy of that order -- I don't know if Your
19 Honor has had a chance to --

20 THE COURT: I have read it. I put my
21 finger on it right away.

22 MR. SULLIVAN: Okay. I think that order

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1 is pretty clear here, too, Your Honor, with
2 respect to Rule 1:13.

3 Your Honor, we believe for all the
4 reasons we've stated today as well as our
5 memorandum in reply, we would ask the Court to
6 vacate this judgment. We would want an
7 opportunity to try this case. You know, if Wyne
8 feels so strongly about their case, then we
9 should be able to come in and have a trial on the
10 merits. We didn't get an opportunity to do
11 that.

12 Not only did we not get an opportunity
13 to defend, we didn't get an opportunity to put on
14 testimony relative to our counterclaim. They
15 came in in what I believe is an ex parte fashion
16 and moved to dismiss our counterclaim because we
17 weren't here. We're entitled to have a trial on
18 the merits, Your Honor.

19 It's what the courts in this state like
20 to have done and procedurally should be done, and
21 I would ask you to vacate the judgment and give
22 us an opportunity to try the case.

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1 THE COURT: Well, I'll address Rule
2 1.13. I understand that rule. I use it most
3 frequently. In this case, when I appeared in
4 Spotsylvania on trial date, which I think was
5 September of 1997, the case having had been
6 assigned to me and had been set for trial for
7 some time, I was totally shocked to find out that
8 one side was not even present.

9 Having heard motions to continue this
10 case, because there was pending federal
11 litigation that might resolve it, over the
12 strenuous objections of Mr. Scott Pugh, counsel
13 at that time, the Court granted that continuance,
14 and certainly he walked into Spotsylvania Circuit
15 Court anticipating a vigorous trial. I reviewed
16 of all of the papers that were before me, heard
17 the evidence, and entered the judgment.

18 The Court requested Mr. Edwards to
19 prepare the order simply as an accommodation to
20 the Court. If the Court had gone on and told the
21 Clerk to enter the order, no matter in what form
22 it was, it's the Court's responsibility to do it,

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1 but time-wise, the Judge doesn't have time to sit
2 down and write orders. The clerk does orders,
3 but sometimes the Court attempts to help the
4 Clerk by having counsel prepare them.

5 It certainly was the intent of the Court
6 that -- there was no counsel involved, so there
7 was no requirement of any endorsement of counsel
8 on the other side or any notice to counsel of the
9 other side, because the Court found at that time
10 -- and the Court finds here again today -- that
11 the corporation was not represented by Arent
12 Fox.

13 The corporation was without counsel and
14 before the Court properly from the time of entry
15 of the order of withdrawal of counsel in April of
16 1996 through, I think it was, November of 1998,
17 and it certainly was without counsel and properly
18 before the Court when the judgment was entered.

19 And the Court finds that that
20 corporation had all of the notice that it was
21 entitled to, that the judgment was not void. The
22 Court denies the motion to vacate the judgment,

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1 and the Court denies the motion to quash the --
2 the garnishment.

3 Mr. Willis?

4 MR. WILLIS: Yes, sir.

5 THE COURT: You can prepare a sketch
6 order.

7 MR. WILLIS: Yes, sir.

8 THE COURT: Present it to the other side
9 for endorsement and noting of exceptions to the
10 Court's ruling and present it to the Court for
11 entry.

12 MR. WILLIS: Yes, sir. Your Honor, what
13 address should that order be mailed to?

14 THE COURT: Yes, if you will mail it to
15 me at P.O. Box 917, Bowling Green, Virginia,
16 22427, I will see on its receipt that it is
17 properly entered and taken to the Clerk's Office
18 in Spotsylvania, as I will do with the file that
19 has been brought here today.

20 MR. WILLIS: Thank you, Your Honor.

21 THE COURT: I thank you for your
22 arguments. I understand them. The Court has to

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1 make its rulings.

2 MR. SULLIVAN: Thank you, Your Honor.

3 We do note our exceptions on the record --

4 THE COURT: So noted.

5 MR. SULLIVAN: -- and we will note them
6 in the order accordingly for purposes of appeal.

7 THE COURT: Yes, sir.

8 MR. EDWARDS: May I address the Court?

9 THE COURT: Yes, sir.

10 MR. EDWARDS: Judge, also before the
11 Court, now that the Court has ruled on the motion
12 to vacate and has overruled the motion to quash,
13 is the entry of the order for payment of
14 garnishment funds, and I would simply ask the
15 Court -- make the request that the order be
16 entered now and provide an opportunity for the
17 Court to give some direction as to how it intends
18 to deal with that issue.

19 THE COURT: Well, it would seem to me
20 that I have to enter this order first. I
21 requested counsel to prepare it.

22 MR. EDWARDS: Certainly.

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1 THE COURT: And if there's a motion to
2 stay the proceedings, that type of thing, posting
3 a bond for appeal and that type of thing, we have
4 to deal with that. I -- as long as that is an
5 option, I'm not going to order the money paid to
6 you.

7 MR. EDWARDS: Sure.

8 MR. SULLIVAN: Thank you, Your Honor.
9 And we will, once when we receive the order and
10 we are able to note our exceptions and get it to
11 the Court, we will be filing an appeal, and we
12 will move to stay the proceedings while we appeal
13 at the Supreme Court.

14 THE COURT: Yes. I will entertain those
15 orders when they are presented.

16 MR. SULLIVAN: Thank you very much, Your
17 Honor.

18 MR. EDWARDS: Judge, I apologize for
19 asking, but given the representation of counsel
20 with regard to his intent to file an appeal,
21 would the Court entertain addressing the issue of
22 an appeal bond at this time?

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1 THE COURT: Well, it is in advance, but
2 I'd be glad to do it.

3 MR. SULLIVAN: Your Honor, I think I
4 would rather wait until such time as we see the
5 order and can properly address it. I think it's
6 premature right now until the order is
7 presented.

8 THE COURT: I will give you a time and
9 place to have that hearing.

10 MR. EDWARDS: Thank you, Your Honor.

11 (Whereupon, at 10:15 a.m., the hearing
12 was adjourned.)

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1 CERTIFICATE OF REPORTER

2

3 I, Susanne Q. Tate, do hereby certify

4 that the foregoing proceedings were taken by me

5 in stenotype and thereafter reduced to

6 typewriting under my supervision; that I am

7 neither counsel for, related to, nor employed by

8 any of the parties to the action in which these

9 proceedings were taken; and further, that I am

10 not a relative or employee of any attorney or

11 counsel employed by the parties hereto, nor

12 financially or otherwise interested in the

13 outcome of the action.

14

15 *Susanne Q. Tate*

16

17 Susanne Q. Tate, RMR

18 Notary Public

19

20

21

22

VIRGINIA:

IN THE CIRCUIT COURT OF SPOTSYLVANIA COUNTY

**FREDERICKSBURG CONSTRUCTION
COMPANY, INC.,**

Plaintiff,

v.

J.W. WYNE EXCAVATING, INC.,

Defendant.

Law No. L-94-8

J.W. WYNE EXCAVATING, INC.,

Plaintiff,

v.

**FREDERICKSBURG CONSTRUCTION
COMPANY, INC.,**

Defendant.

Law No. L-98-444

and

Law No. L-98-445

ORDER

On March 12, 1999, Fredericksburg Construction Company, Inc. ("FCCI"), by counsel, and J.W. Wyne Excavating, Inc. ("J.W. Wyne"), by counsel, appeared on FCCI's Motion to Vacate Judgment and Motion to Quash Garnishment filed in the above-styled matters.

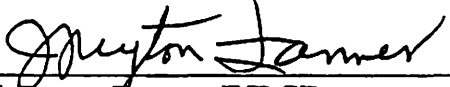
WHEREFORE, upon consideration of: FCCI's Motions; FCCI's Memorandum of Points and Authorities in Support of its Motion to Vacate Judgment, including the exhibits and affidavits attached thereto; J.W. Wyne's Reply in Opposition to Plaintiff's Motions, including the exhibits attached thereto; FCCI's Reply to Defendant's Opposition, including the exhibits

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Edwards
Willis
Sullivan
6-30-99


and affidavit attached thereto; and the representations and argument of counsel, the Court, for the reasons stated from the bench on March 12, 1999, DENIES FCCI's Motion to Vacate Judgment filed in Law Number L-94-8 and DENIES its Motions to Quash Garnishment filed in Law Numbers L-98-444 and L-98-445.


The Court DIRECTS the Clerk to place the papers of *Fredericksburg Construction Company, Inc. v. J.W. Wyne Excavating, Inc.*, Law Number L-94-8, among the ended causes. The Court further DIRECTS the Clerk to retain the garnishments summonses styled *J.W. Wyne Excavating, Inc. v. Fredericksburg Construction Company, Inc.*, Law Numbers L-98-444 and L-98-445, on the docket of this Court for further proceedings.

Entered this 23rd day of June 1999.


J. Peyton Farmer, JUDGE
Circuit Court of Spotsylvania County

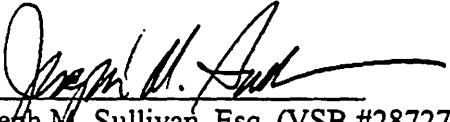
~~WE ASK FOR THIS:~~


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Counsel for J.W. Wyne Excavating, Inc.

**SEEN AND OBJECTED TO ON THE BASIS
OF THE POSITIONS STATED IN FCCI'S
MOTIONS, MEMORANDA, REPLY, AND
ARGUMENT OF COUNSEL:**


Joseph M. Sullivan, Esq. (VSB #28727)
THE LAW OFFICES OF JOSEPH M. SULLIVAN, P.C.
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Fairfax, VA 22030
(703) 277-3390

Counsel for Fredericksburg Construction Company, Inc.
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ASSIGNMENTS OF ERROR

1. The trial court erred when it entered final judgment on a trial conducted without legally sufficient notice of the setting of the trial date to counsel of record or to FCCI, if unrepresented.
2. The trial court erred when it entered the final judgment order without endorsement of counsel for FCCI or FCCI itself.
3. The trial court erred when it denied FCCI's Motion to Vacate Judgment.