

IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 921223

VANSANT AND GUSLER, INCORPORATED,

Appellant,

v.

**JAMES R. WASHINGTON and
ROBERT E. WASHINGTON,**

Appellees.

JOINT APPENDIX

**M. T. Bohannon, Jr.
BOHANNON, BOHANNON
& HANCOCK, P.C.
870 N. Military Highway
Suite 334
Norfolk, VA 23502
(804) 466-7899**

Counsel for Appellant

**Robert E. Brown
HOWELL, DAUGHERTY, BROWN
& LAWRENCE
One East Plume Street
P.O. Box 3929
Norfolk, VA 23514
(804) 623-7334**

Counsel for Appellees

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VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK
VANSANT AND GUSLER, INCORPORATED,

Plaintiff,

v.

AT LAW NO. _____

JAMES R. WASHINGTON
501 Front Street
Norfolk, Virginia 23510,

ROBERT E. WASHINGTON
501 Front Street
Norfolk, Virginia 23510,

and

WASHINGTON DESIGN GROUP, LTD.
Serve: Any Officer
501 Front Street
Norfolk, Virginia 23510,

Defendants.

MOTION FOR JUDGMENT

The plaintiff hereby moves the Court for judgment against the defendants, jointly and severally, in the amount of \$308,553.07, with interest from the 1st day of March, 1991, until paid, due by reason of the following:

1. The defendant, Washington Design Group, Ltd., is a professional corporation, and the individual defendants are professional architects and officers and directors of the defendant, Washington Design Group, Ltd. Washington Design Group, Ltd. was general contractor for services furnished the United States Government, the Commonwealth and City Governments and others on numerous jobs.

2. On said jobs, the defendant, Washington Design Group, Ltd., through the individual defendants, contracted with the plaintiff as subcontractor to perform certain work which it had obligated itself to furnish.

3. As a result, the defendants are obligated to the plaintiff for the sum of \$308,553.07, interest from the 1st day of March, 1991, until paid, as set forth on the enclosed affidavit and statement of account.

4. The defendants have received, as general contractor, payment for all or practically all of the work which the plaintiff has performed as a subcontractor but the defendants have failed to pay said funds, as required by law, to the plaintiff. Instead, the defendants have used the funds for other matters. As a result, each of the defendants is liable to the plaintiff for the amounts set forth above.

5. The individual defendants are liable to the plaintiff as principals in a professional corporation who personally dealt with the plaintiff. The individual defendants are also liable to the plaintiff as principals in a corporation acting as general contractor who received and controlled the payments to the general contractor, Washington Design Group, Ltd., for work done by the plaintiff but diverted said funds to other purposes and failed to pay for the work done by the plaintiff as required by law.

WHEREFORE, judgment is demanded against the defendants, jointly and severally, in the amount of \$308,553.07, with interest thereon from the 1st day of March, 1991, until paid, and all costs

incurred herein by plaintiff.

VANSANT AND GUSLER, INCORPORATED

BY *M. T. Bohannon, Jr.*

Of Counsel

M. T. Bohannon, Jr., Esq.
Bohannon, Bohannon & Hancock, P.C.
870 N. Military Hwy., Suite 334
Norfolk, Virginia 23502



Vansant And Gusler Incorporated Consulting Engineers
6330 Newtown Road, Suite 400, Norfolk, Virginia 23502 (804) 461-6757 FAX (804) 461-8516

August 5, 1991

STATEMENT

Mr. James R. Washington
Mr. Robert E. Washington
Washington Design Group, Ltd.
501 Front Street
Norfolk, Virginia 23510

**RE: Statement Of Accounts Payable To Vansant and Gusler, Inc.
And Note Payable to Vansant and Gusler, Inc.**

Gentlemen:

Outstanding accounts payable to Vansant and Gusler, Inc., are as follows:

<u>Project Number</u>	<u>Statement/ Receipt Date</u>	<u>Days Old</u>	<u>Project Name</u>	<u>Statement Increase (Payments)</u>	<u>Present Unpaid Balance</u>	<u>Total Unpaid On Project</u>
84005.2			BEACH GROUP 2 PHASES 1 & 2			
4/30/89	827	Statement		1,053.00	1,053.00	
7/31/91	5	Statement		491.00	491.00	1,544.00
84005.5			OMSI MANUAL BEACH GROUP 2			
1/31/91	186	Statement		13,050.00	13,050.00	13,050.00
84005.6			OWNER REQUESTED CHANGES BEACH GROUP 2			
3/09/90	514	Statement		4,787.00	4,787.00	
7/31/91	5	Statement		332.00	332.00	5,119.00
86039			ELECTRONIC INTELLIGENCE CENTER ADDN			
1/31/90	551	Statement		5,064.00	5,064.00	
8/24/90	346	Statement		909.00	909.00	5,973.00

Project Number	Statement/ Receipt Date	Days Old	Project Name	Statement Increase (Payments)	Present Unpaid Balance	Total Unpaid On Project
86039.1			OMSI MANUAL /ELECTRONIC INTELLIGENCE			
	8/10/90	360	Statement	3,763.00	3,763.00	
	3/08/91	150	Statement	5,914.00	5,914.00	9,677.00
86052			CENTRAL CONCOURSE EXPANSION NORFOLK INT. AIRPORT			
	9/30/90	309	Statement	6,020.00	6,020.00	
	7/31/91	5	Statement	10,180.00	10,180.00	16,200.00
86052.3			NEW ELEC SERVICE NORFOLK INTERNATIONAL AIRPORT			
	3/31/90	492	Statement	6,181.00		
	4/09/91		Payment	(1,162.00)	5,019.00	
	6/30/90	401	Statement	317.00	317.00	
	8/31/90	339	Statement	380.00	380.00	
	7/31/90	370	Statement	465.00	465.00	
	11/30/90	248	Statement	1,158.00	1,158.00	
	12/27/90	221	Statement	1,584.00	1,584.00	
	1/31/91	186	Statement	1,163.00	1,163.00	10,086.00
86052.6			TWA HOLDING/STORAGE ROOM NIA			
	1/31/91	186	Statement	194.00		
	4/09/91		Payment	(97.00)	97.00	97.00
86052.7			NORTHWEST TERMINAL IMPROVEMENTS NIA			
	1/31/91	186	Statement	349.00	349.00	
	3/06/91	152	Statement	78.00	78.00	427.00
86052.8			SMOKING LOUNGE CONCOURSE NIA			
	1/31/91	186	Statement	194.00		
	4/09/91		Payment	(78.00)	116.00	116.00

Project Number	Statement/ Receipt Date	Days Old	Project Name	Statement Increase (Payments)	Present Unpaid Balance	Total Unpaid On Project
86052.9			ELECTRICAL ROUGH IN - NIA			
	8/31/90	339	Statement	698.00	698.00	
	10/31/90	278	Statement	620.00	620.00	
	11/30/90	248	Statement	388.00	388.00	
	1/31/91	186	Statement	233.00	233.00	1,939.00
86052.10			DELTA TENANT WORK NIA			
	12/20/90	228	Statement	15,400.00	15,400.00	
	7/31/91	5	Statement	3,550.00	3,550.00	18,950.00
86052.11			DOOR ACCESS CONTROL NIA			
	9/30/90	309	Statement	350.00	350.00	
	10/31/90	278	Statement	310.00	310.00	
	11/30/90	248	Statement	78.00	78.00	
	1/31/91	186	Statement	78.00	78.00	816.00
86052.12			FIRE ALARM SYSTM REVISIONS NIA			
	8/31/90	339	Statement	957.00	957.00	
	11/30/90	248	Statement	233.00	233.00	
	1/31/91	186	Statement	155.00	155.00	1,345.00
86052.13			OGDEN ALLIED SPACE NIA			
	10/31/90	278	Statement	617.00	617.00	
	11/30/90	248	Statement	310.00	310.00	927.00

Project Number	Statement/ Receipt Date	Days Old	Project Name	Statement Increase (Payments)	Present Unpaid Balance	Total Unpaid On Project
86052.14			NW GATE SOUND SYSTEM NIA			
1/31/91	186	Statement		620.00	620.00	620.00
88026.1			REDESIGN POLICE FACILITY - STANWICK BUILDING			
1/31/89	916	Statement		2,895.00	2,895.00	2,895.00
88029			WASHINGTON HALL - DESIGN			
7/31/90	370	Statement		8,000.00	8,000.00	
3/20/91	138	Statement		12,000.00	12,000.00	20,000.00
88029.1			ADDITIONAL SERVICES WASHINGTON HALL			
10/31/89	643	Statement		531.00	531.00	531.00
88029.2			DEPT OF MODERN LANGUAGES, WASHINGTON HALL			
11/30/90	248	Statement		5,263.00	5,263.00	
1/31/91	186	Statement		720.50	720.50	5,983.50
88029.3			ECMS - WASHINGTON HALL			
12/26/90	222	Statement		3,000.00	3,000.00	3,000.00
90020.1			26 HOUSING UNITS NORFOLK NAVAL SHIPYARD			
9/30/90	309	Statement		13,812.00	13,812.00	
7/31/91	5	Statement		24,032.00	24,032.00	37,844.00
90020.2			8 HOUSING UNITS ST JULIENS CREEK			
9/30/90	309	Statement		5,322.00	5,322.00	
11/30/90	248	Statement		2,051.00	2,051.00	
7/31/91	5	Statement		945.00	945.00	8,318.00
90023			ADDITIONN TO BLDG CEP-113, NOB			
8/30/90	340	Statement		14,395.00		

<u>Project Number</u>	<u>Statement/ Receipt Date</u>	<u>Days Old</u>	<u>Project Name</u>	<u>Statement Increase (Payments)</u>	<u>Present Unpaid Balance</u>	<u>Total Unpaid On Project</u>
	6/11/91		Payment	(8,000.00)		
	8/05/91		Payment	(4,000.00)	2,395.00	
	3/22/91	136	Statement	15,636.00	15,636.00	
	7/31/91	5	Statement	2,777.00	2,777.00	20,808.00
90055			OGDEN FACILITIES CONCOURSE B, NIA			
	1/31/91	186	Statement	11,250.00	11,250.00	
	7/31/91	5	Statement	3,450.00	3,450.00	14,700.00
90056			W.H. SMITH NEWSSTAND CONCOURSE B, NIA			
	1/31/91	186	Statement	1,078.00	1,078.00	
	3/06/91	152	Statement	1,778.00	1,778.00	2,856.00

Subtotal: Outstanding On Projects:

\$ 203,821.50

Principal Balance On Note Payable To Vansant and Gusler, Inc.

104,731.57

Total Amount Due To Vansant and Gusler, Inc.

\$ **308,553.07**

I certify that this statement of account is true, just and correct to the best of my knowledge and belief.

VANSANT AND GUSLER, INC.

STATE OF VIRGINIA
CITY OF NORFOLK, to-wit:

Subscribed and sworn to before me by
Francis L. Schulte, P.E., this 5th
day of August, 1991.

Francis L. Schulte
Francis L. Schulte, P.E.
Vice President

Wm. M. Williams
Notary Public

My commission expires: 2/28/94

FLS/jb

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

VANSANT AND GUSLER, INCORPORATED,

Plaintiff,

v.

AT LAW NO. L91-2590

JAMES R. WASHINGTON,

ROBERT E. WASHINGTON,

and

WASHINGTON DESIGN GROUP, LTD.,

Serve: ROBERT E. BROWN, Registered Agent
One East Plume Street
Norfolk, Virginia 23510,

Defendants.

AMENDED MOTION FOR JUDGMENT

The plaintiff hereby moves the Court for judgment against the defendants, jointly and severally, in the amount of \$308,553.07, with interest from the 1st day of March, 1991, until paid, due by reason of the following:

1. The defendant, Washington Design Group, Ltd. (WDG), is a Virginia corporation, and the individual defendants are professional architects and officers and directors of the defendant WDG. WDG was general contractor for services furnished the United States Government, the Commonwealth and City Governments and others on numerous jobs.

2. On said jobs, the defendant, WDG, contracted with the plaintiff as subcontractor to perform certain work which it had obligated itself to furnish.

3. As a result, the defendant, WDG, is obligated to the plaintiff for the sum of \$308,553.07, interest from the 1st day of March, 1991, until paid, as set forth on the enclosed affidavit and

statement of account.

4. The defendant, WDG, has received, as general contractor, payment for all or practically all of the work which the plaintiff has performed as a subcontractor. The defendants, all of whom had control over said payments received, with intent to defraud, have failed to pay said funds, as required by law, to the plaintiff. Instead, the defendants have used the funds for other matters. As a result, each of the individual defendants is liable to the plaintiff for the amounts set forth above.

WHEREFORE, judgment is demanded against the defendants, jointly and severally, in the amount of \$308,553.07, with interest thereon from the 1st day of March, 1991, until paid, and all costs incurred herein by plaintiff.

VANSANT AND GUSLER, INCORPORATED

BY 

Of Counsel

M. T. Bohannon, Jr., Esq.
BOHANNON, BOHANNON & HANCOCK, P.C.
870 N. Military Hwy., Suite 334
Norfolk, Virginia 23502
(804) 466-7899

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

VANSANT AND GUSLER, INCORPORATED,

Plaintiff,

v.

JAMES R. WASHINGTON,
ROBERT E. WASHINGTON
and WASHINGTON DESIGN GROUP, LTD.,

Defendants.

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AT LAW NO. L91-2590

DEMURRER TO AMENDED MOTION FOR JUDGMENT

NOW COME the defendants, James R. Washington and Robert E. Washington ("the Washingtons"), by counsel, and demur to the Amended Motion for Judgment exhibited against them, as same is insufficient as a matter of law, because:

1. The Washingtons, as professional architects, officers and directors of the corporate defendant, Washington Design Group, Ltd. ("WDG"), have no civil liability for the debts of WDG under the facts alleged by the plaintiff herein.

2. In paragraph 4 of the Amended Motion for Judgment, the plaintiff alleges: "The defendants, all of whom had control over said payments received, with intent to defraud, have failed to pay said funds, as required by law, to the plaintiff." For purposes of this demurrer the facts alleged in the Amended Motion for Judgment are deemed admitted, but in filing this demurrer the Washingtons deny that

any funds received by WDG as a general contractor were used for matters others than the payment of WDG's subcontractors, with intent to defraud. Further, the civil law of Virginia does not require payments received by a general contractor to be paid to its subcontractors on the particular job unless the subcontractor has given notice to the general contractor pursuant to Virginia Code §43-11 ("How owner or general contractor made personally liable to subcontractor, laborer or materialman") or the general contractor contracts directly with the subcontractor to make such payment; there is no allegation in the Amended Motion for Judgment that the plaintiff as a subcontractor filed any such notice provided by Virginia Code §43-11 or otherwise directly contracted with the general contractor, WDG, for the payment to it from funds received by the general contractor from the owner for a particular job.

3. The basis of the plaintiff's civil claim against the Washingtons, as officers and directors of the general contractor, WDG, is essentially a claim that the Washingtons have violated Virginia Code §43-13, which is a criminal statute, not a civil statute. That statute makes it a crime for a contractor or its subcontractors (or any officer, director or employee of such contractor or general contractor) to retain or use funds paid by the owner while any amount still remains unpaid for labor or materials. The statute goes further by making such use of funds received by the contractor prima facie evidence of intent to defraud. However, this criminal statute creates

no civil liability on the part of the contractor or subcontractor receiving the funds, nor on any officer, director or employee of such contractor or subcontractor. The Virginia Supreme Court examined this statute in Overstreet v. Commonwealth, 193 Va. 104 (1985) and the court pointed out that: "A prosecution, under the statute, does not affect the debt." supra. at 110. In the more recent case of Kayhoe v. UVB, 220 Va. 285 (1979) the court stated, at page 289:

While this criminal statute creates a moral obligation, it contains no language creating a legal trust for the benefit of materialmen and laborers. Nor does the statute purport to affect or extend the rights and remedies otherwise available in a civil proceeding to materialmen and workmen under the mechanics lien statutes.

Virginia Code §43-13, a criminal statute, simply does not create a private civil right of action. If the legislature had chosen to do so it could have done so explicitly, as it did with Virginia Code §18.1-499 and §18.1-500. §18.1-499 makes it a crime to conspire to injure another in his trade or business and §18.1-500 provides for a civil action for damages against a party violating the criminal statute. The legislature failed to take such action with §43-13. An officer or director of a corporation is not liable in a civil action for the debts of the corporation even if the corporation and its officers and directors are deemed to have violated §43-13.

WHEREFORE, the defendants, James R. Washington and Robert E. Washington, pray that the Amended Motion for Judgment exhibited against them herein be dismissed, with prejudice.

JAMES R. WASHINGTON
AND ROBERT E. WASHINGTON

By 
Robert E. Brown, Of Counsel

CERTIFICATE

I hereby certify that on September 20, 1991 I delivered (VIA FAX: 461-5451) and also mailed a true copy of the foregoing pleading to M. T. Bohannon, Jr., Esquire, Bohannon, Bohannon & Hancock, P. C., 870 North Military Highway, Norfolk, Virginia 23502, counsel of record for the plaintiff herein.


Robert E. Brown

Robert E. Brown, Esquire
HOWELL, DAUGHERTY, BROWN & LAWRENCE
One East Plume Street
Post Office Box 3929
Norfolk, Virginia 23514
September 20, 1991
4P:D.JRW

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

VANSANT AND GUSLER, INCORPORATED,

Plaintiff,

v.

JAMES R. WASHINGTON,
ROBERT E. WASHINGTON
and WASHINGTON DESIGN GROUP, LTD.,

Defendants.

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AT LAW NO. L91-2590

GROUND OF DEFENSE
TO AMENDED MOTION FOR JUDGMENT

NOW COMES the defendant, Washington Design Group, Ltd. ("WDG"), by counsel, and for its grounds of defense to the Amended Motion for Judgment exhibited against it herein by the plaintiff, states as follows:

1. The allegations in Paragraph 1 are admitted.
2. The allegations in Paragraph 2 are admitted.
3. The allegations in Paragraph 3 are admitted but WDG denies that the Affidavit is correct in including James R. Washington and Robert E. Washington, together with Washington Design Group, Ltd., as persons liable for the amount set for on the Statement of Account.
4. With regard to the allegations in Paragraph 4:
 - (a) WDG denies that it has received "all or practically all" payment for work performed.


(b) WDG denies that it failed to pay any funds to the plaintiff with intent to defraud.

(c) Any use of the funds used "for other matters" (i.e. for matters other than payment to Vansant and Gusler, Incorporated) was generally with the knowledge and acquiescence of Vansant and Gusler, Incorporated.

(d) WDG denies that it is liable to the plaintiff for the amount claimed on the basis set forth in Paragraph 4.


WHEREFORE, the defendant, Washington Design Group, Ltd., having stated its Grounds of Defense to the Amended Motion for Judgment, asks that no further orders be entered herein inconsistent with the position of WDG stated in the foregoing Grounds of Defense.

WASHINGTON DESIGN GROUP, LTD.

By 
Robert E. Brown, Of Counsel

CERTIFICATE

I hereby certify that on October 7, 1991 I mailed a true copy of the foregoing pleading to M. T. Bohannon, Jr., Esquire, Bohannon, Bohannon & Hancock, P. C., 870 North Military Highway, Norfolk, Virginia 23502, counsel of record for the plaintiff herein.


Robert E. Brown

Robert E. Brown, Esquire
HOWELL, DAUGHERTY, BROWN & LAWRENCE
One East Plume Street
Post Office Box 3929
Norfolk, Virginia 23514
October 7, 1991
4P:GD.WDG

7

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

VANSANT AND GUSLER, INCORPORATED, :
 :
Plaintiff, :
 : AT LAW NO. L91-2590
v. :
 :
JAMES R. WASHINGTON, :
ROBERT E. WASHINGTON :
and WASHINGTON DESIGN GROUP, LTD., :
 :
Defendants. :

MEMORANDUM OF JAMES R. WASHINGTON AND ROBERT E. WASHINGTON
IN SUPPORT OF THEIR
DEMURRER TO THE AMENDED MOTION FOR JUDGMENT

The defendants, James R. Washington and Robert E. Washington ("the Washingtons"), have demurred to the Amended Motion for Judgment on the basis of it being insufficient as a matter of law on these grounds:

1. The Washingtons, as professional architects, officers and directors of the corporate defendant and general contractor, Washington Design Group, Ltd. ("WDG"), have no civil liability for the debts of WDG to the plaintiff, Vansant and Gusler, Incorporated ("Vansant & Gusler").

2. The civil law of Virginia does not require payments received by a general contractor to be paid to its

subcontractors on the particular job unless the subcontractor has given notice to the general contractor pursuant to Virginia Code §43-11 ("How owner or general contractor made personally liable to subcontractor, laborer or materialman") or the general contractor contracts directly with the subcontractor to make such payment; there is no allegation in the Amended Motion for Judgment that the plaintiff, Vansant and Gusler, as a subcontractor filed any such notice provided by Virginia Code §43-11 or otherwise directly contracted with the general contractor, WDG, for the payment to it from funds received by WDG, as a general contractor, from the owner for a particular job.

3. The basis of the plaintiff's civil claim against the Washingtons, as officers and directors of the general contractor, WDG, is essentially a claim that the Washingtons have violated Virginia Code §43-13, which is a criminal statute, not a civil statute. That statute makes it a crime for a contractor (or any officer, director or employee of such contractor) to retain or use funds paid by the owner while any amount still remains unpaid for labor or materials. However, this criminal statute creates no civil liability on the part of the contractor receiving the funds, nor on any officer, director or employee of such contractor.

THE LAW AND THE ARGUMENT

The amount owed to Vansant and Gusler is owed by the corporation, WDG. That obligation is not in issue. But there is simply no basis for asserting a claim against the Washingtons as individual officers or shareholders of the corporation. The Amended Motion for Judgment, while not referring to Virginia Code §43-13 tracks the language of that statute, referring to an "intent to defraud", and a failure to pay "as required by law", allegedly rendering the individuals liable (A. Motion for Jdmt. ¶4). The statute provides:

§ 43-13. Funds paid to general contractor, subcontractor, etc., must be used to pay persons performing labor or furnishing material. — Any contractor or subcontractor or any officer, director or employee of such contractor or subcontractor who shall, with intent to defraud, retain or use the funds, or any part thereof, paid by the owner or his agent, the contractor or lender to such contractor or by the owner or his agent, the contractor or lender to a subcontractor under any contract for the construction, removal, repair or improvement of any building or structure permanently annexed to the freehold, for any other purpose than to pay persons performing labor upon or furnishing material for such construction, repair, removal or improvement, shall be guilty of larceny in appropriating such funds for any other use while any amount for which the contractor or subcontractor may be liable or become liable under his contract for such labor or materials remains unpaid, and may be prosecuted upon complaint of any person or persons who have not been fully paid any amount due them.

The use by any such contractor or subcontractor or any officer, director or employee of such contractor or subcontractor of any moneys paid under the contract, before paying all amounts due or to become due for labor performed or material furnished for such building or structure, for any other purpose than paying such amounts, shall be prima facie evidence of intent to defraud. (1932, p. 483; Michie Code 1942, § 6429b; 1968, c. 568; 1980, c. 390; 1982, c. 391.)

This statute, however, in no way speaks to the question of liability for the underlying obligation. Rather, it declares that a person, in violation of its provisions, shall be guilty of a larceny, and may be prosecuted upon complaint of a person not paid.

The Virginia Supreme Court has twice declared that this statute does not have any impact on the civil relations of the parties. In Overstreet v. Commonwealth, 193 Va. 104, 67 S.E.2d 875 (1951), the court stated that: "A prosecution, under the statute, does not affect the debt." supra, at 110. In the more recent case of Kayhoe v. UVB, 220 Va. 285, 257 S.E.2d 837 (1979) the court stated, at page 289:

While this criminal statute creates a moral obligation, it contains no language creating a legal trust for the benefit of materialmen and laborers. Nor does the statute purport to affect or extend the rights and remedies otherwise available in a civil proceeding to materialmen and workmen under the mechanics lien statutes.

Thus, the entire basis of the plaintiff's claim is negated by the very law on which it relies, and by the most authoritative statements construing that statute.

Virginia Code §43-13, a criminal statute, simply does not create a private civil right of action. If the legislature had chosen to do so it could have done so

explicitly, as it did with Virginia Code §18.1-499 and §18.1-500. §18.1-499 makes it a crime to conspire to injure another in his trade or business and §18.1-500 provides for a civil action for damages against a party violating the criminal statute. The legislature failed to take such action with §43-13. An officer or director of a corporation is not liable in a civil action for the debts of the corporation even if the corporation and its officers and directors are deemed to have violated §43-13, as the legislature did not pass a further statute creating civil liability for violation of the criminal statute.

Moreover, Vansant and Gusler's claim would be ineffectual even had the Virginia Supreme Court never had occasion to construe Virginia Code §43-13. The general rule is that if an act is not independently actionable, a statute making it criminal gives no private right of action, in the absence of a provision authorizing a civil remedy, or in the absence of a clear implication that the legislature intended the statute to create one. 1A C.J.S. "Actions" § 27 (1985); 1 Am. Jur. 2d "Actions" § 57 (1962). Here, of course, there can be no question as to the existence of an independent action. It requires no citation to establish that a corporate officer or employee has no obligation to a creditor of the corporation. In Messer v. Shannon & Luchs

Co., 15 Va. Cir. 18 (Fairfax County 1985), the court applied the principle stated. The court held that a criminal statute prohibiting the unauthorized practice of law could not support a civil action against one violating said statute. The court noted that the penalty for violation is a misdemeanor, and that no provision of the statute provides for the recovery of monetary damages.

In addition, the Virginia Supreme Court is especially strict in its construction of legislative acts, and is not inclined to recognize an entitlement that has not been clearly legislated. In Commonwealth v. County Board of Arlington County, 217 Va. 558, 232 S.E.2d 30 (1977), the court stated:

In determining legislative intent, the rule is clear that where a power is conferred and the mode of its execution is specified, no other method may be selected; any other means would be contrary to legislative intent and, therefore, unreasonable.

232 S.E.2d at 42.

The court in A&E Supply Co. v. Nationwide Mutual Fire Insurance Co., 798 F.2d 669 (4th Cir. 1986), refused to find an implied private cause of action under a Virginia statute proscribing certain unfair insurance practices. The statute provided for penalties for violations. The court held that it was clear that the Virginia Supreme Court would not read

the statute so as to create a private right of action. Relying on Commonwealth v. County Board of Arlington County, supra, the court noted that the Virginia Supreme Court "has long regarded the State Legislature as a repository of Sovereign powers, whose dispensation must in any context be strictly construed." A&E Supply Co. v. Nationwide Mutual Fire Insurance Co., supra, 798 F.2d at 674.

Accordingly, there is no basis, at any level, for finding an implied private cause of action in this matter. The statute creates no such right; it is a criminal enactment. The Virginia Supreme Court has specifically addressed the scope of the enactment, in language that completely belies the plaintiff's contention. The general rule is contrary to plaintiff's position, and the Virginia Supreme Court is careful to limit statutory entitlements to those clearly legislated.

In addition, no other state has gone so far as the plaintiff would suggest. Indeed, all indications are that only a specifically legislated private action would be entertained under the facts of this matter.

The closest analogy to the claim asserted here is afforded by the claim made in Trustees of Local 478 Trucking & Allied Industries Pension Fund v. Pirozzi, 198 N.J. Super. 297k 486 A.d 1288 (Law Div. 1983), aff'd, 198 N.J. Super.

318, 486 A.2d 1299 (App. Div. 1984). There, the plaintiff relied on a statute providing for criminal responsibility for officers of corporations. The statute made it a criminal offense for a corporation to fail to pay wages to employees, or to fail to pay contributions to pension and welfare funds. It provided further that the officer or employee of the corporation responsible for the failure was criminally responsible. The defendants were officers of a corporation which had, in a period of financial distress, paid only certain creditors, such as taxing authorities, and had not paid certain contributions due to pension and welfare funds. The lower court noted the general rule that a private civil remedy will not be implied from a criminal statute. In addition, the facts presented would not give rise to a cause of action under the common law. Accordingly, no civil action against the officers of the corporation could be implied. The Appellate Court affirmed, substantially on the opinion below. That court also noted that a line of authority under New York law, which had favored the plaintiff, had been overruled following the lower court decision. The plaintiff had urged the lower court to consider New York case law that seemingly supported the private cause of action. The lower court refused to follow those cases, citing differences in the New York

approach to implying causes of action. Subsequent to that decision, the highest court in New York affirmed an intermediate appellate decision that rejected the implication of a private cause of action under a statute similar to that at issue in New Jersey. Stoganovic v. DiNolfo, 61 N.Y.2d 812, 462 N.E.2d 149 (1984), aff'g 92 A.D.2d 729, 461 N.Y.S.2d 121 (1983). Thus, the courts of two states with statutes imposing criminal sanctions on corporate officers have held that such statutes give rise to no civil remedy. It is noteworthy that those statutes are, if anything, more likely to elicit judicial sympathy than the one in question here. The statutes concerning wage and contribution requirements are intended to proscribe conduct that directly affects individual workers. The statute here proscribes conduct that affects those in the construction industry, generally subcontractors and material suppliers. Such entities, being primarily businesses, are in a much better position to protect themselves than would be ordinary workers.

In sum, there is no support for plaintiff's position, while that position is negated on multiple grounds.


WHEREFORE, the demurrer of the defendants, James R. Washington and Robert E. Washington, should be sustained and the Amended Motion for Judgment exhibited against them herein should be dismissed, with prejudice.

JAMES R. WASHINGTON
AND ROBERT E. WASHINGTON

By 
Robert E. Brown, Of Counsel

CERTIFICATE

I hereby certify that on November 7, 1991 I delivered (VIA FAX: 461-5451) and also mailed a true copy of the foregoing pleading to M. T. Bohannon, Jr., Esquire, Bohannon, Bohannon & Hancock, P. C., 870 North Military Highway, Norfolk, Virginia 23502, counsel of record for the plaintiff herein.


Robert E. Brown

Robert E. Brown, Esquire
HOWELL, DAUGHERTY, BROWN & LAWRENCE
One East Plume Street
Post Office Box 3929
Norfolk, Virginia 23514
November 7, 1991
4P:M1-5

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

VANSANT AND GUSLER, INCORPORATED,

Plaintiff,

v.

JAMES R. WASHINGTON,
ROBERT E. WASHINGTON
and WASHINGTON DESIGN GROUP, LTD.,

Defendants.

AT LAW NO. L91-2590

JUDGMENT ORDER

THIS CAUSE came on this day to be heard upon the pleadings and it appears that the defendant, Washington Design Group, Ltd., admits that it owes the amount set forth in the affidavit filed with the Motion for Judgment but it has expressly denied that failure to make payment to the plaintiff was with any intent to defraud;

It is ADJUDGED, ORDERED and DECREED that the plaintiff recover of the defendant, Washington Design Group, Ltd., the sum of \$308,553.07, together with interest thereon from the 1st day of March, 1991, until paid, together with its costs herein expended.

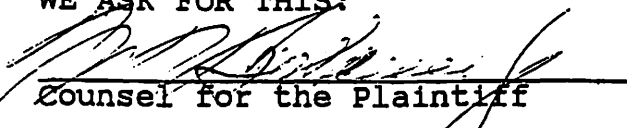
This cause shall be retained on the docket.

ENTERED: NOV 14 1991

John C. Morrison, Jr., Judge

Judge

WE ASK FOR THIS:


Counsel for the Plaintiff

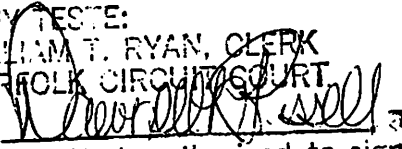
SEEN:


Counsel for the Defendants

A COPY TESTE:

WILLIAM T. RYAN, CLERK
NORFOLK CIRCUIT COURT

BY


Deputy Clerk authorized to sign
on behalf of William T. Ryan.

4P:OR2

857.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

VANSANT AND GUSLER, INCORPORATED,

Plaintiff,

v.

JAMES R. WASHINGTON,
ROBERT E. WASHINGTON
and WASHINGTON DESIGN GROUP, LTD.,

Defendants.

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AT LAW NO. L91-2590

O R D E R

UPON MOTION of the Plaintiff, Vansant and Gusler, Incorporated, leave is hereby granted to same to file herein its Second Amended Motion for Judgment. And the Defendants, James R. Washington and Robert E. Washington, (having heretofore filed a Demurrer to the Amended Motion for Judgment) are granted leave to file a further Demurrer to the Second Amended Motion for Judgment.

ENTERED:

3-12-92

Monahan

Judge

WE ASK FOR THIS:

M. T. Bohannon, Jr.
M. T. Bohannon, Jr., Esquire
Counsel for the Plaintiff

SEEN AND AGREED TO:

Robert E. Brown
Robert E. Brown, Esquire
Counsel for the Defendants

A COPY TESTE:

WILLIAM T. EVAN, CLERK
NORFOLK CIRCUIT COURT

BY *William T. Evan*, a
Deputy Clerk of the Circuit Court
on behalf of William T. Evan.

4P:OR3

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

VANSANT AND GUSLER, INCORPORATED,

Plaintiff,

v.

AT LAW NO. L91-2590

JAMES R. WASHINGTON
501 Front Street
Norfolk, Virginia 23510,

ROBERT E. WASHINGTON
501 Front Street
Norfolk, Virginia 23510,

and

WASHINGTON DESIGN GROUP, LTD.
Serve: Any Officer
501 Front Street
Norfolk, Virginia 23510

SECOND AMENDED MOTION FOR JUDGMENT

The plaintiff hereby moves the Court for Judgment against the defendants, jointly and severally, in the amount of \$308,553.07, with interest from the 1st day of March, 1991, until paid, due by reason of the following:

1. The allegations relative to the liability of the defendant, Washington Design Group, Ltd., (WDG) in the Amended Motion for Judgment are hereby incorporated herein as Judgment has already been entered against this defendant. No further relief is asked against it.

2. The defendants, James R. Washington (JRW) and Robert E. Washington (REW), are professional architects, the sole stockholders of WDG, its principal officers and sole directors. As such they personally controlled all receipts and disbursements of WDG during the period which the charges by the plaintiff as

subcontractor shown on the affidavit attached as Exhibit "A" were incurred and have continued in such capacity to this day.

3. The job set forth on Exhibit "A" were for the construction, removal, repair or improvement of buildings or structures permanently annexed to the free hold. The plaintiff on such jobs acted as a subcontractor under WDG which was a general contractor. The amounts set out by each job description are the balances due on such jobs for which the plaintiff has obtained Judgment against WDG.

4. WDG received payment for all of the jobs described on Exhibit "A", from the owner including payment for all of the work performed by the plaintiff as subcontractor under WDG.

5. The defendants, JRW and REW, controlled the funds paid WDG set out in the previous paragraph. Such funds having been paid WDG for the labor performed and materials furnished by plaintiff, the defendants, REW and JRW, with intent to defraud, used such funds for purposes other than paying the plaintiff and other persons performing labor or furnishing materials for the jobs for which the funds had been received. As a result, such persons or entities, performing labor or furnishing materials, were unpaid.

6. As a result of the foregoing the plaintiff suffered damages in the amount of \$308,553.07, such amount representing the total due on the various jobs described on Exhibit "A" and described above.

7. The defendants, JRW and REW, violated Virginia Code 43-13 by the actions described above as a result of which the plaintiff suffered the damages set out above and described

above as a result of which the plaintiff suffered the damages set out above and described on Exhibit "A" attached hereto.

WHEREFORE, Judgment is demanded against the defendants, James R. Washington and Robert E. Washington, jointly and severally, in the amount of \$308,553.07 with interest thereon from the 1st day of March, 1991, until paid, and all costs incurred herein by plaintiff.

VANSANT AND GUSLER, INCORPORATED

BY


of Counsel

M. T. Bohannon, Jr.
Bohannon, Bohannon & Hancock
870 N. Military Highway, Suite 334
Norfolk, Virginia 23502
(804) 466-7899

CERTIFICATION

I certify that a true copy of the foregoing Second Amended Motion for Judgment was mailed to all counsel of record this the 29th day of January, 1992.



VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

VANSANT AND GUSLER, INCORPORATED,

Plaintiff,

v.

JAMES R. WASHINGTON,
ROBERT E. WASHINGTON
and WASHINGTON DESIGN GROUP, LTD.,

Defendants.

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AT LAW NO. L91-2590

DEMURRER TO SECOND AMENDED MOTION FOR JUDGMENT

NOW COME the defendants, James R. Washington and Robert E. Washington ("the Washingtons"), by counsel, and demur to the Second Amended Motion for Judgment exhibited against them, as same is insufficient as a matter of law, on the grounds set forth below. For purposes of this demurrer the facts alleged in the Second Amended Motion for Judgment are deemed admitted, but in filing this demurrer the Washingtons deny that any funds received by WDG as a general contractor were used, with intent to defraud, for matters other than the payment of WDG's subcontractors.

1. The Washingtons, as professional architects, stockholders, officers or directors of the corporate defendant, Washington Design Group, Ltd. ("WDG"), or as persons who controlled all receipts and disbursements of WDG, have no civil liability for the debts of WDG under the facts alleged by the plaintiff herein.

2. The civil law of Virginia does not require payments received by a general contractor to be paid to its subcontractors on the particular job unless the subcontractor has given notice to the general contractor pursuant to Virginia Code §43-11 ("How owner or general contractor made personally liable to subcontractor, laborer or materialman") or the general contractor contracts directly with the subcontractor to make such payment; there is no allegation in the Second Amended Motion for Judgment that the plaintiff as a subcontractor filed any such notice provided by Virginia Code §43-11 or otherwise directly contracted with the general contractor, WDG, for the payment to it from funds received by the general contractor from the owner for a particular job.

3. The basis of the plaintiff's asserted civil action (in both paragraphs 5 and 7) that the Washingtons, as officers and directors of the general contractor, WDG, "negligently and with intent to defraud" misused certain funds is the claim that the Washingtons have violated Virginia Code §43-13, which is a criminal statute, not a civil statute. That statute makes it a crime for a contractor or its subcontractors (or any officer, director or employee of such contractor or general contractor) to retain or use funds paid by the owner while any amount still remains unpaid for labor or materials. The statute goes further by making such use of funds received by the contractor prima facie evidence of intent to defraud. However, this criminal statute creates no civil liability on the part of the

contractor or subcontractor receiving the funds, nor on any officer, director or employee of such contractor or subcontractor. The Virginia Supreme Court examined this statute in Overstreet v. Commonwealth, 193 Va. 104 (1985) and the court pointed out that: "A prosecution, under the statute, does not affect the debt." supra. at 110. In the more recent case of Kayhoe v. UVB, 220 Va. 285 (1979) the court stated, at page 289:

While this criminal statute creates a moral obligation, it contains no language creating a legal trust for the benefit of materialmen and laborers. Nor does the statute purport to affect or extend the rights and remedies otherwise available in a civil proceeding to materialmen and workmen under the mechanics lien statutes.


Virginia Code §43-13, a criminal statute, simply does not create a private civil right of action. If the legislature had chosen to do so it could have done so explicitly, as it did with Virginia Code §18.1-499 and §18.1-500. §18.1-499 makes it a crime to conspire to injure another in his trade or business and §18.1-500 provides for a civil action for damages against a party violating the criminal

statute. The legislature failed to take such action with §43-13. An officer or director of a corporation is not liable in a civil action for the debts of the corporation even if the corporation and its officers and directors are deemed to have violated §43-13.

4. There can be no civil tort action founded on negligence which is also founded on an asserted violation of Virginia Code §43-13 as that section by its very terms defines a crime of specific intent. Hence the plaintiff's allegations that the Washingtons misused certain funds "negligently and with intent to defraud" is so inherently contradictory as to be meaningless; and hence it is impossible for such allegations to state a civil action at law based on negligence.

WHEREFORE, the defendants, James R. Washington and Robert E. Washington, pray that the Amended Motion for Judgment exhibited against them herein be dismissed, with prejudice, and adopt their Memorandum in Support of Their Demurrer to the Amended Motion for Judgment, heretofore filed, as a memorandum in support of this Demurrer to the Second Amended Motion for Judgment.

JAMES R. WASHINGTON
AND ROBERT E. WASHINGTON

By 

Robert E. Brown, Of Counsel

CERTIFICATE

I hereby certify that on March 11, 1992 I delivered (VIA FAX: 461-5451) and also mailed a true copy of the foregoing pleading to M. T. Bohannon, Jr., Esquire, Bohannon, Bohannon & Hancock, P. C., 870 North Military Highway, Norfolk, Virginia 23502, counsel of record for the plaintiff herein.



Robert E. Brown

Robert E. Brown, Esquire
HOWELL, DAUGHERTY, BROWN & LAWRENCE
One East Plume Street
Post Office Box 3929
Norfolk, Virginia 23514
March 11, 1992
4P:D.JRW1-2



FOURTH JUDICIAL CIRCUIT OF VIRGINIA
CIRCUIT COURT OF THE CITY OF NORFOLK

MORRIS B. GUTTERMAN
JUDGE, Retired

100 ST. PAUL'S BOULEVARD
NORFOLK, VIRGINIA 23510

March 20, 1992

M. T. Bohannon, Jr., Esquire
Bohannon, Bohannon & Hancock
870 North Military Highway
Suite 334
Norfolk, Virginia 23502

Robert E. Brown, Esquire
Howell, Daugherty, Brown & Lawrence
One East Plume Street
Post Office Box 3929
Norfolk, Virginia 23514

Re: Vansant and Gusler, Inc.
vs. James R. Washington,
Robert E. Washington and
Washington Design Group, Ltd.
At Law No. L-91-2590

Gentlemen:

The Court sustains demurrer for the reasons stated by defense counsel in his memorandum in support of demurrer to the Amended Motion for Judgment.

Leave is hereby granted for plaintiff to file a Third Amended Motion for Judgment, otherwise the demurrer stands as final judgment if Third Amended Motion for Judgment is not filed on or before April 17, 1992.

Counsel will please prepare sketch of an order for entry by the Court in accordance with the Court's ruling.

Very truly yours,

Morris B. Gutterman
Judge Designate

MBG:se

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

VANSANT AND GUSLER, INCORPORATED,

Plaintiff,

v.

AT LAW NO. L91-2590

JAMES R. WASHINGTON,
ROBERT E. WASHINGTON and
WASHINGTON DESIGN GROUP, LTD.,

Defendants.

O R D E R

THIS ACTION came to be heard on March 12, 1992 on the Demurrer of the Defendants, James R. Washington and Robert E. Washington, to the Second Amended Motion for Judgment. Upon consideration of the pleadings, the memorandum of the Defendants, the Brief of the Plaintiff and the argument of counsel,

It is ADJUDGED, ORDERED and DECREED that the Demurrer of James R. Washington and Robert E. Washington to the Second Amended Motion for Judgment be and hereby is SUSTAINED for the reasons stated in the memorandum filed in support of the Demurrer.

It appearing that the Plaintiff does not wish to file a Third Amended Motion for Judgment, this action shall stand DISMISSED with prejudice. The exception of the Plaintiff to this Order of the Court is duly noted.

MAY - 1 1992


ENTERED: _____

Morris B. Gutterman, Judge

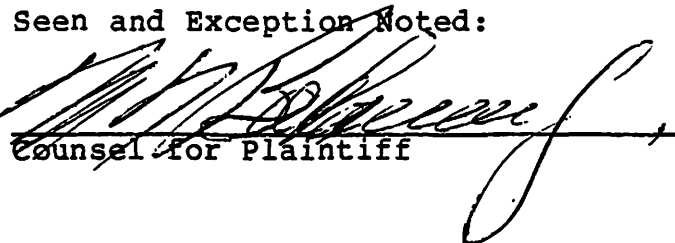
Morris B. Gutterman
Judge Designate

A COPY TESTE:
WILLIAM T. RYAN, CLERK
NORFOLK CIRCUIT COURT
BY *William T. Ryan*, a
Deputy Clerk authorized to sign
on behalf of William T. Ryan.

We Ask For This:


Counsel for James R. Washington and
Robert E. Washington

Seen and Exception Noted:


Counsel for Plaintiff

ASSIGNMENT OF ERROR

The Trial Court erred in its final judgment of May 1, 1992 by sustaining the Demurrer of the Defendants to the Second Amended Motion for Judgment.