

Record No. 5355

In the
Supreme Court of Appeals of Virginia
at Richmond

W. F. MAGANN CORPORATION,
ET AL.

v.

VIRGINIA-CAROLINA ELECTRICAL
WORKS, INC.

FROM THE COURT OF LAW AND CHANCERY OF THE CITY OF NORFOLK

RULE 5:12—BRIEFS

§5. NUMBER OF COPIES. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. SIZE AND TYPE. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

IN THE
Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 5355

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 20th day of April, 1961.

W. F. MAGANN CORPORATION, ET AL.,
Plaintiffs in Error,
against

VIRGINIA-CAROLINA ELECTRICAL WORKS, INC.,
Defendant in Error.

From the Court of Law and Chancery of the City of Norfolk

Upon the petition of W. F. Magann Corporation and Royal Indemnity Company, a corporation, a writ of error and *supersedeas* is awarded them to a judgment rendered by the Court of Law and Chancery of the City of Norfolk on the 24th day of October, 1960, in a certain motion for judgment then therein depending wherein Virginia-Carolina Electrical Works, Inc., was plaintiff and the petitioners were defendants.

And it appearing from the certificate of the clerk of the said court that a suspending and *supersedeas* bond in the penalty of eleven thousand dollars, conditioned according to law, has heretofore been given in accordance with the provisions of sections 8-465 and 8-477 of the Code, no additional bond is required.

RECORD

* * * * *

MOTION FOR JUDGMENT.

Virginia-Carolina Electrical Works, Inc., plaintiff in the above-entitled cause, hereby moves the Court of Law and Chancery of the City of Norfolk, Virginia, for a judgment against W. F. Magann Corporation and Royal Indemnity Company, defendants, for the sum of Eight Thousand, Three Hundred, Sixty-four and 39/100 Dollars (\$8,364.39), with interest thereon from the 1st day of March, 1959, plus the Court costs of the plaintiff. The amount herein claimed is due the plaintiff by the defendants by reason of the following:

1. That on or about November 1st, 1956, the defendant, W. F. Magann Corporation, entered into a contract with Hampton Roads Sanitation District Commission for the construction of a "Combined Pumping Station and Office Building" to be located at the northwest corner of Plume and Atlantic Streets, Norfolk, Virginia.

2. That on or about the same date W. F. Magann Corporation, as principal, and Royal Indemnity Company, as surety, executed and delivered to Hampton Roads Sanitation District Commission an owner's protective bond as required by Section 11-23 of the Code of Virginia 1950, and which insured to the said Hampton Roads Sanitation District Commission the full payment by said W. F. Magann Corporation, as prime contractor, of all materialmen and subcontractors under the said contract.

3. That on or about January 15th, 1957, plaintiff entered into a subcontract with the defendant W. F. Magann Corporation, of which a true copy is hereto annexed marked "EXHIBIT A" and made a part hereof.

4. That plaintiff has duly performed all of the conditions of said contract on its part to be performed.

5. That no part of said sum called for by said subcontract and by change orders thereto, to-wit, the aggregate sum of Thirty-one Thousand, Seven Hundred, Thirty-four and 69/100 Dollars (\$31,734.69) has been paid to the plaintiff by said W. F. Magann Corporation except the sum of Twenty-three Thousand, Three Hundred, Seventy and 30/100 Dollars (\$23,370.30), all as shown on statement of account duly sworn to by plaintiff hereto annexed marked "EXHIBIT B" and made a part hereof.

WHEREFORE plaintiff moves the Court for a judgment against the said defendants in the said amount of Eight Thousand, Three Hundred, Sixty-four and 39/100 Dollars (\$8,364.39), with interest and costs as aforesaid.

VIRGINIA-CAROLINA ELECT-
RICAL WORKS, INC.,
By WILLIAM C. COUPLAND
Of Counsel.

JETT, SYKES & COUPLAND,
701 Citizens Bank Building,
Norfolk 10, Virginia.

Attorneys for Plaintiff.

Filed in the Clerk's Office the 17 day of December, 1959.

Teste:

W. L. PRIEUR, JR., Clerk
H. L. STOVALL, D. C.

* * * * *

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EXHIBIT A.

W. F. MAGANN CORPORATION
Concrete Construction

Portsmouth, Virginia
2420 High Street

Telephones:
92468-92469

January 15, 1957.

SUB-CONTRACT.

To: Virginia-Carolina Electrical Works, Inc.
1007 Main Street
Norfolk 10, Virginia

Project: Norfolk System Combined Pumping Station and
Office Building for the Hampton Roads Sanitation
District Commission, Norfolk, Virginia

Gentlemen:

We hereby accept your proposal of January 10, 1957 for the following item in strict accordance with the ADVERTISEMENTS, INSTRUCTIONS TO BIDDERS, SPECIFICATIONS, PROPOSAL, CONTRACT and BOND, for the construction of Norfolk System Combined Pumping Station and Office Building for the Hampton Roads Sanitation District Commission, Norfolk, Virginia as designed by Buck, Seifert & Jost, Consulting Engineers, New York, N. Y., dated August 1956, a copy of each of which is hereto attached, including Addendum No. 1:

Item No. 13: For furnishing, installing and testing the electric power and light wiring, controls and accessories, as specified or required, for the sum of THIRTY ONE THOUSAND TWO HUNDRED THIRTY TWO DOLLARS (\$31,232.00).

page 4 } The sub-contractor agrees to indemnify and save harmless the contractor, W. F. Magann Corporation, from and against all claims, suits, judgments and damages brought, recovered, or exacted against the contractor for or on account of any claim growing out of any injury to or the death of any person or persons by reason of any act, omission or negligence of the sub-contractor, its agents, employees or sub-contractors, whether such injury, death or damage shall be contributed to by any failure of the contractor to comply with any law, ordinance or regulation relating to any work to be performed under this contract; and the sub-contractor further agrees to indemnify and save harmless the contractor from any and all loss, damage or expense which it may sustain or to which it may be put, by reason of any injury or damage to its property or that of any other person arising out of the performance of this work, or by or on account of any act, omission, or negligence of the sub-contractor, its agents, employees, sub-contractors, vendors, materialmen, or any other person having anything whatsoever to do in connection with the work of the sub-contractor. 11

The sub-contractor hereby, for consideration hereinabove named, waives and releases all lien or right of lien that may hereafter arise for work and/or labor performed or material furnished under this contract under any lien laws. Sub-contractor agrees to furnish sufficient waiver of lien on said project from every person or persons and corporation furnishing labor and material for this project under the sub-contractor.

The sub-contractor agrees to indemnify and save harmless the contractor against all damages which it may sustain by reason of anything to be supplied hereunder being covered by a patent not owned by this sub-contractor, and at the expense of the sub-contractor to defend any action brought against the contractor, founded upon the claim that any such thing, or any part thereof, infringed any such patent.

page 5 } Work by the sub-contractor to be carried on at such points, in such sequence and at such rates as may be determined from time to time by the contractor. It is agreed that this order is accepted with the understanding that you will use no labor that will cause a conflict with other labor and result in a cessation of work on the above project. It is also agreed that there will be no stoppage of work unless directed by us. If the sub-contractor fails in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, the contractor shall be at liberty to provide any such labor or material, and deduct the cost thereof from any money due or thereafter to become due to the sub-contractor under this order.

The contractor shall have the right to cancel this contract upon written notice to the sub-contractor to cease work thereon, in which case, the contractor shall indemnify the sub-contractor against any damages directly resulting from such cancellation, except that the sub-contractor shall not be entitled to prospective profit on work unperformed and/or material unfurnished. All the above work to be performed to the satisfaction of the Construction Engineer.

It is agreed that you assume full responsibility relative to compliance with Federal, State and Municipal laws, including Workmen's Compensation Insurance and Unemployment Social Security laws.

The sub-contractor shall at all times provide and maintain, and cause to be provided and maintained, until the completion of the work and final payment therefor, the following insurance:

(i) Workmen's Compensation covering the employees of sub-contractor and of its sub-contractors.

page 6 } (ii) Employers' Liability in limits of \$50,000.00.
(iii) Comprehensive Public Liability Bodily Injury Insurance in limits of \$100,000.00 single person and \$200,000.00 single accident.

(iv) Comprehensive Public Liability Property Damage Insurance (including risks of explosion, collapse, and damage to

underground structures, where applicable) in limits of \$100,000.00 each accident and \$100,000.00 aggregate.

(v) Where sub-contractor sublets or sub-contracts any part of the work hereunder, Contractor's Protective Liability Bodily Injury Insurance, in the limits of \$100,000.00 single person and \$200,000.00 single accident, in favor of W. F. MAGANN CORPORATION, and Contractor's Protective Liability Property Damage Insurance in the limits of \$100,000.00 each accident and \$100,000.00 aggregate, in favor of W. F. MAGANN CORPORATION.

(vi) Automobile Bodily Injury Liability in limits of \$100,000.00 \$200,000.00 and Automobile Property Damage Liability in single limit of \$100,000.00 with respect to all trucks and automobiles which may be operated on the site of work by sub-contractor.

Before commencing work sub-contractor shall deliver to contractor evidence of compliance with this provision in the form of certificates of insurance or copies of policies or otherwise as contractor may request. Each policy and certificate shall provide that there shall be no cancellation of or change in the insurance coverage until at least ten days' prior written notice to contractor. At least five days before expiration of any such insurance coverages, renewal thereof with similar coverages shall be provided for at least an additional one-year term, and such evidence thereof as contractor may request shall be furnished.

page 7 } The sub-contractor further agrees that he will within ten days from date, at the option of the contractor, provide the contractor with a bond in the sum of \$31,232.00 conditioned for the faithful performance of this contract in all its particulars, duly executed with Surety company acceptable to the contractor, as surety, and in form and contents acceptable to the contractor.

Any defects in your work that may occur during the period of guarantee noted in specifications shall be repaired and made good, free of cost to owner or to us, at the convenience of the owner. Final payment shall not be construed to be an acceptance of defective work or improper materials.

This agreement shall bind the executors, administrators, successors, and assigns of the parties hereto.

W. F. MAGANN CORPORATION
(Contractor)

By W. F. MAGANN, President.

We hereby acknowledge receipt of this confirmation of our proposal of January 10, 1957, and will be governed by the terms thereof.

VIRGINIA-CAROLINA ELECTRICAL WORKS, INC.

(Name of Firm) Sub-contractor

By W. T. S.

(Authorized Signature).

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EXHIBIT B.

Virginia:

In the Court of Law and Chancery of the City of Norfolk.

Virginia-Carolina Electrical Works, Inc., Plaintiff,

v.

W. F. Magann Corporation, 219 Fifth Avenue, West Norfolk,
Portsmouth, Virginia, and Royal Indemnity Company, a
corporation, 150 William Street, New York, New York,
Defendants.

AFFIDAVIT AND STATEMENT OF ACCOUNT.

State of Virginia,
City of Norfolk, to-wit:

This day personally appeared before me, A. S. Forbes, a Notary Public in and for the City aforesaid, in the said State, Walter C. Beaman and made oath before me in my said City that he is Secretary and Treasurer of Virginia-Carolina Electrical Works, Inc., plaintiff in the foregoing Motion for Judgment, and has been duly authorized to make this proof, and that to the best of his knowledge and belief, plaintiff's claim against the defendants in the said action is Eight Thousand, Three Hundred, Sixty-four and 39/100 Dollars (\$8,364.39) in accordance with the following statement of account; that said amount is justly due, and that plaintiff claims interest thereon from the 1st day of March, 1959, until paid.

page 9 }

Amount of Basic Contract		\$31,232.00
Plus Change Orders: #4		392.00
#5		41.00
#13		53.50
#14		16.19
		<hr/>
		31,734.69

Payments Received

6-25-57	\$4,650.30	
10-11-57	4,320.00	
2-28-58	14,400.00	23,370.30
	<hr/>	<hr/>
BALANCE DUE ON CONTRACT		\$8,364.39

WALTER C. BEAMAN.

Subscribed and sworn to before me this 16th day of December, 1959.

A. S. FORBES
Notary Public.

My Commission Expires: April 13th, 1963.

* * * * *

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* * * * *

This day came the plaintiff by counsel and moved for judgment in accordance with its Motion for Judgment, and the defendants having heretofore filed their Special Plea in avoidance thereof, and upon the further motion of the defendant W. F. Magann Corporation for counsel fees and costs in the sum of \$1,000.00 be allowed it as assessable damages under the agreement of the plaintiff to indemnify the defendant and save it harmless from loss or damage, the whole matter of law and fact was heard and determined by the Court without the intervention of a jury and the Court being of the opinion that:

(1) The subject damages complained of in the Special Plea were not caused or contributed to by any negligence of the plaintiff, the Court having struck the defendants' evidence in

this regard at the conclusion thereof on motion of counsel for the plaintiff;

(2) The plaintiff did not, as alleged in the Special Plea, agree to indemnify and save harmless the defendant, W. F. Magann Corporation, against the damages complained of:

(3) The plaintiff is not legally chargeable with a pro-rata share of the penalty assessed against the defendant,
page 20 } W. F. Magann Corporation, as a result of delay in
the completion of the prime contract as alleged in
the Special Plea; and

(4) The plaintiff is entitled to judgment in the amount sued for in its Motion for Judgment.

(5) The defendant is not entitled to the counsel fees and costs.

It is, therefore, ADJUDGED and ORDERED that the Special Plea heretofore filed herein by the defendants be disallowed and that the Plaintiff, Virginia-Carolina Electrical Works, Inc., do recover and have judgment against the defendants, W. F. Magann Corporation and Royal Indemnity Company, in the sum of Eight Thousand, Three Hundred Sixty-four Dollars and Thirty-nine Cents (\$8,364.39), with interest from the 1st day of March, 1959, and its costs in this behalf expended, to which action of the Court, the defendants, by counsel, duly excepted.

Entered this 24th day of October, 1960.

W. A. P., Judge.

Seen and objected to as to the inclusion of ruling on atty's. fees for defendant.

W. C. COUPLAND
Of Counsel for Plaintiff.

Asked for.

JOHN MacKENZIE
Of Counsel for Defendants.

Seen:

HARVEY E. WHITE, JR.
Of counsel for Defendants.

W. F. Magann.

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NOTICE OF APPEAL.

THE DEFENDANTS, W. F. Magann Corporation and Royal Indemnity Company, hereby give notice of their intention to apply to the Supreme Court of Appeals of Virginia for a writ of error and *supersedeas* to a judgment heretofore entered by the Court in favor of the plaintiff.

ASSIGNMENTS OF ERROR.

1. The Court erred in entering judgment for the plaintiff against the defendants.

2. The Court erred in determining that the plaintiff did not agree to indemnify and save harmless the defendant, W. F. Magann Corporation, against the damages complained of.

3. The Court erred in determining that the plaintiff was not assessable for a pro-rata share of the penalty levied against the defendant, W. F. Magann Corporation.

4. The Court erred in determining that the defendant, W. F. Magann Corporation, was not entitled to counsel fees and costs.

5. The Court erred in striking the evidence of the defendants with regard to the negligence of the plaintiff.

W. F. MAGANN CORPORATION
AND ROYAL INDEMNITY
COMPANY

By JOHN A. MacKENZIE
Of counsel.

Filed 12-15-60 Court of Law and Chancery.

By L. M. CALVERT, D. C.

* * * * *

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W. F. MAGANN,
called as a witness on behalf of the defendants,
and having been first duly sworn, testified as follows:

W. F. Magann.

Examined by Mr. White:

Q. Now, Mr. Magann—first of all, you are W. F. Magann, is that correct, sir?

A. (The witness nodded).

Q. What is your office with W. F. Magann Corporation?

A. I am the president and manager.

Q. Where are the offices of the Magann Corporation located?

A. In West Norfolk. That is Portsmouth, Virginia.

Q. For the record, what kind of work do they engage in?

A. In general and in heavy construction work.

Mr. Coupland: Excuse me. I can't hear.

The Court: You will have to talk a little louder.

A. We engage in general and heavy construction work.

By Mr. White:

Q. Now, did you in the year 1957 have the general contract for the combination pumping station and office building for the Hampton Roads Sanitation District Commission at Plume and Atlantic Streets in the City of Norfolk, Virginia?

A. Yes, sir.

Q. I hand you a copy of a subcontract, the original page 7 } of which is in the—

The Court: It is filed with the motion for judgment, is it not?

Mr. White: Filed with the motion for judgment and incorporating by reference the specifications and other proposals.

By Mr. White:

Q. And ask you, if you will, please, sir, to explain the contractual relationship between Magann and Virginia-Carolina Electrical Works. First of all, did they get the subcontract for the electrical work?

A. Yes, sir.

Q. And would you, if you care to, refer to anything there and tell us specifically what they were to do on this job?

A. The Virginia-Carolina Electrical Works had the subcontract to do the electrical work as it was specified in that section of the specifications. In addition to the specific work as described under that section, they were obligated to all of the general terms of our contract under a contractual relation to us as you just read, which meant that regardless

W. F. Magann.

of what responsibilities that we had with the Commission, inasmuch as any of their acts might have caused this damage subsequent to the Commission—

Mr. Coupland: I object to Mr. Magann stating page 8 } conclusions.

Mr. White: Let me make this comment—

Mr. Coupland: It seems to me the documents speak for themselves.

Mr. White: I would take the position that he is expressing the language contained in these.

The Witness: Yes, sir.

Mr. White: In this contractual agreement.

By Mr. White:

Q. But for the record, will you please read just exactly what the contractual relationship was with Magann? What did they say, if anything, that they would do?

A. (Reading).

“The subcontractor agrees to indemnify and save harmless the contractor, W. F. Magann Corporation, from and against all claims, suits, judgments and damages brought, recovered or exacted against the contractor for, on account of, any claim growing out of any injury to or the death of any person or persons by reason of any act, omission or negligence of the subcontractor, its agents, employees or subcontractors, whether such injury, death or damage shall be contributed to or by any failure of the contractor to comply with the law, ordinance or regulations relating to any work to be page 9 } performed under this contract.

“And the subcontractor further agrees to indemnify and save harmless the contractor from any and all loss, damage or expense which it may sustain or to which it may be put by reason of any injury or damage to its property or that of any other person arising out of the performance of this work or by or on account of any act, omission or negligence of the subcontractor, its agents, employees, subcontractors, vendors, material men or any other person having anything whatsoever to do in connection with the work of the subcontractor.”

Q. Now, Mr. Magann, in the event of a delay, is there anything in the construction contract for penalty to be assessed?

A. Shall I refer to the original writing?

W. F. Magann.

The Court: Is this the contract?

Mr. White: I am referring to the subcontract.

By Mr. White:

Q. Is there anything in the subcontract, in that page or later pages?

A. (Reading).

“If the subcontractor fails in any respect to page 10 } prosecute the work with promptness and diligence or fails in the performance of any of the agreements herein contained, the contractor shall be at liberty to provide any such labor or material and deduct the cost thereof from any money due or thereafter to become due to the subcontractor under this order.”

Q. Now, that contract was entered into between Magann Corporation and Virginia-Carolina Electrical Works?

A. Yes, sir.

Q. As far as you know, all of the requirements were meant to make this a binding contract, is that correct?

A. Yes, sir.

Q. Could you tell us, in October of 1957, what the stage of the construction of this Sanitation District office and pumping station building was?

A. (Witness pointing to document).

Q. It is not too important. Approximately. Of your own knowledge can you tell us? In October, was it half completed or two-thirds or a third?

A. At this date, approximately this date, the walls had been constructed, the floors had been constructed up to grade and the superstructure was under construction. The backfill had been completed to substantially the under edge of this duct.

Q. Now, could you tell us about the doors or page 11 } windows or steps, any exterior entrances, if you know?

A. There are no other apertures in the wall below a grade that is approximately three feet above the sidewalk, except these ducts and other pipe that entered the building at a lower elevation.

Q. What about the front entrance? Do you know what the step situation is there?

A. The front elevation is approximately three feet above the sidewalk. The wall had been constructed and the door is recessed.

W. F. Magann.

Q. Now, of your own knowledge do you know what the situation was in the basement in the first week of October, 1957?

A. The substructure, all that work that is under the ground, had been—structurally it had been completed. It was suitable for working. The mechanics that were installing the pump, under suitable conditions were, for all practical purposes it was dry. And the work was progressing normally.

Q. I call your attention to the date of October 5, 1957, and ask you if that brings to mind any event.

The Court: October 5th?

Mr. White: October 5th.

A. I can't keep up with the dates. If you give me my letter—

The Court: I was not correcting you, I was just page 12 } trying to ascertain if that is what you said.

Mr. White: Yes, sir. (Handing document to witness).

A. You say October 5th?

By Mr. White:

Q. (Indicating affirmatively) Let me ask a question this way. When did you first get knowledge of the flooding damage in the building?

A. On Sunday morning, October 6th, my superintendent, Mr. Twiford, called me at home and it was after daybreak but very early in the morning, and he reported to me what had happened.

Q. You can't go into just what he told you, but as a result of this conversation with him what did you do, if anything?

A. I can't answer you unless I tell you what he told me.

Q. Well, what did you learn?

A. I learned that the water was flowing through the four ducts at a very great rate. In fact, it was told me that the water was flowing so, under so much head—and it is reasonable that at certain times the flow would be greater than others because the tide was high and you have a hydraulic head and it went almost over to the wall is what I was—

Q. As a result of learning this information, did page 13 } you go down to the building?

A. No, sir.

W. F. Magann.

Q. You did not?

A. No, sir.

Q. What did you do in response to this message?

A. I got in touch with my superintendent who, in turn, he went.

By The Court:

Q. Who is that?

A. Mr. Lipscomb.

By Mr. White:

Q. Would you for the record state what happened after that? In other words, did you talk with anyone from any of the other subcontractors? Did you have any meetings or conferences or anything in connection with this—

A. As a result—

Q. —of your own knowledge?

A. —of an appraisal of the work, and our immediate interest was to stop the water and pump it out. I had telephone conversations with Mr. Dorey, Bob Dorey, Jr., to appraise him of the situation and to advise him to make such corrections as was necessary, rapidly, so that the work could proceed.

Q. What if anything did he state to you about this?

A. Mr. Dorey told me that he realized that—I page 14 } ~~can't say this verbatim.~~

Q. All right.

A. He realized that it was his responsibility because he knew that he should have capped the conduit. He knew that he was responsible for connecting the conduit from the man-hole to the duct—the conduit. Inadvertently, it was done by someone else, and in view of the fact that he had an important position, interest in Norfolk, and in view of the fact that the Virginia Electric & Power Company was occasionally a customer of his and that it probably didn't amount to much, anyway, to go on and get Coley & Petersen to do the work and that he would wire the motors.

Q. He told you to let Coley & Petersen go ahead with the work?

A. Yes, sir.

Q. Why would he do that?

A. The pumps actually belonged to and were under the custody of the Coley & Petersen company, under their contract.

W. F. Magann.

Q. What role did they play in the building of this pumping station?

A. They did the mechanical work.

Q. They did the mechanical work? Did you have—

By The Court:

Q. I don't want to interrupt you but I am not sure that I understand by the language "to go ahead with the page 15 } work" what is meant. To what work do you refer?

A. To the recovery and repair and replacing the damaged motors.

Q. I see. Not any contract as a whole but as to this particular thing?

A. Yes, sir.

The Court: All right.

Q. And I take it that the authorization to go ahead was a firm commitment on his part until he learned that it was larger than it was? Is that what you would say?

A. Yes, I could say that. I may want to say it in different words but that is what I would say, yes, sir.

Q. All right. Now, is there anything else that you would care to state that is of your own knowledge? The rest of the story, of course, will come out by other people but is there anything else at this time that you know of with regard to this situation?

A. If you don't mind, I would like to state that the condition of construction and installation of those conduits was as was stated. However, they could have been and should have been capped at the time they were installed, because they were accessible, had to be in order to install them. It has been stated that the subcontractor had no knowledge of the connecting of the manhole to this conduit; but it page 16 } was in his contract to do it. If, inadvertently, somebody else did it, as far as I was concerned I observed the work going on and I had no reason to think it wasn't his men, because it was his work.

Q. Was anyone else to do this particular—

A. No, sir.

Q. —work?

A. No, sir. It was under his contract to do it. The ends of these pipe inside were always accessible because there is a floor approximately four or five or six feet lower. You could

W. F. Magann.

reach up and touch it. So there was no valid reason for not capping these pipes.

Mr. White: Your witness.

CROSS EXAMINATION.

By Mr. Coupland:

Q. Mr. Magann, I understood you to say on direct examination that the subcontract between your corporation and Virginia-Carolina provided for a penalty upon any delay of the work?

A. Yes, sir.

Q. Did you read from that subcontract?

A. Yes, sir.

page 17 } Q. Would you mind showing me where there is such a provision in the subcontract?

A. (Witness referring to document and indicating on it to counsel)

The Court: Did he indicate that it was?

Mr. Coupland: He indicated a passage that I want to further—

The Court: If you would indicate the page and paragraph in your question, it would help me to follow it.

Mr. Coupland: Yes, sir. He has indicated that it is in there on Page 3, the last sentence of the first paragraph.

The Court: All right, sir.

By Mr. Coupland:

Q. Now that, Mr. Magann, reads I believe: (Reading)

“If the subcontractor fail in any respect to prosecute the work with promptness and diligence or fail in the performance of any of the agreements herein contained, the contractor shall be at liberty to provide any such labor or material and deduct the cost thereof from any money due or thereafter to become due to the subcontractor under this order.”

That, Mr. Magann, relates to the performance of
page 18 } work contracted to be done by the subcontractor,
does it not?

A. Yes, sir. But not just that. It relates to any nonperformance of anything that is under his contract because—

Q. It doesn't say that, Mr. Magann.

W. F. Magann.

A. Well, if you excuse me—

Q. That is your conclusion?

A. No, sir. If you would excuse me, if you will go back to Page 2 in the first paragraph, you will see that he is responsible to repair or to replace any damaged equipment, which goes on to relate to the other paragraph would mean that he is just as liable to do, to replace or fix anything that he had damaged as he was anything that he installed.

Q. In other words, you refer to the indemnity provisions of the subcontract as covering anything regardless of whether it is work to be performed by the subcontractor or not?

A. I don't understand your question, sir.

Q. Well, I asked you, Mr. Magann, if the provision which I read and which you referred to on direct examination—giving you authority to proceed with the work yourself and collect from the subcontractor charged with that work—did not relate solely to the work that was to be performed by the subcontractor, and you said no that the other provisions of the contract relating to the indemnification of the prime contractor would cover work outside of the work page 19 } to be performed by the subcontractor, Virginia-Carolina?

A. I didn't say that.

Q. Well, explain; what did you say?

A. He is under contract to me to do the work that I am required to do under the general conditions of my contract, by his contract with me. In addition to that, he is also responsible for any damage and to the repair of any damage that he may do as a result of any negligence or whatever fault that may be attributed to him under this contract.

Q. That may be attributed to him?

A. Yes, sir.

Q. As a result of his act?

A. Yes, sir.

Q. Well, that explains it. Now, you have stated that Mr. Robert Dorey felt that he had some responsibility in this matter. Didn't he tell you, Mr. Magann, that he wanted to talk to his father, and also wanted to talk to his insurance agent?

A. Yes, sir.

Q. Didn't you write to Mr. Dorey and ask him to respond in writing accepting responsibility for any damages?

A. Yes, sir.

Q. Did you get a response to that?

W. F. Magann.

A. No, sir, not in writing.

Q. Didn't you, Mr. Magann, state that you and page 20 } Mr. Dorey were in general agreement on these facts, that when Virginia-Carolina originally installed the ducts, Virginia-Carolina stuffed them with oakum and boards from the outside; that this precaution was ample because there had been several tides since then which would have flooded the building if it had not been tight?

A. Yes, sir.

Q. This is all in agreement between you and Mr. Dorey?

A. Yes, sir.

Q. That after Virginia-Carolina had installed the packing and after you, W. F. Magann Corporation, had back-filled the hole, the Virginia Electric & Power Company constructed a new manhole on Plume Street and a new duct line from the manhole to the ducts that Virginia-Carolina had placed in the wall of the building?

A. I don't understand your question. I understand your statement but I don't—

Q. My question, as I go along, is that a part of your agreement that you had with Mr. Dorey, of the Virginia-Carolina Electrical Works?

A. I had no agreement with Virginia-Carolina about any work.

Q. Did you state you were in general agreement?

A. I am sorry but I can't follow you closely.

Q. Well, Mr. Magann, I started out by asking page 21 } you if you had stated to Mr. Dorey that you and he were in general agreement on the following facts, and I have just been reciting those facts.

A. Well, you lost me when you brought in the fact that Virginia Electric & Power Company did some work.

Q. All right. I will go back to that. After Virginia-Carolina had installed the packing and after W. F. Magann Corporation had backfilled the hole, the Virginia Electric & Power Company constructed a new manhole on Plume Street and a new duct line from the manhole to the ducts that Virginia-Carolina had placed in the wall in the station?

A. Yes, sir.

Q. That is correct?

A. Yes, sir.

Q. In doing this, they, the Virginia Electric & Power Company, removed the packing that Virginia-Carolina Electrical Works had placed and did not notify W. F. Magann Corpora-

W. F. Magann.

tion or Virginia-Carolina that they had removed it, nor did they replace such a plug in the manhole; as a result, the water came in the station unimpeded?

A. Now, I have to qualify that a little. I can't say they pulled the packing out of the duct. I say it never leaked before then, and the packing was in it before they went to work there.

Q. That is a qualification, Mr. Magann. And you page 22 } say the packing was there and you don't know of your own knowledge just who removed it?

A. That is right.

Q. I believe I asked you, Mr. Magann, whether you had requested Mr. Dorey to acknowledge in writing any responsibility for the resulting damages?

A. Yes, you did, and he did not.

Q. And he did not?

A. No, sir.

Q. And isn't that so because Mr. Dorey wanted to talk to his father, who was the president of Virginia-Carolina Electrical Works, and he wanted to talk to his insurance company?

A. But that is not the whole answer.

Q. Well, would you finish it?

A. This thing—there never was a final precise reason why we never got the letter. It was just drug out and drug out until I was forced to write a letter to tell him that in view of the fact they had not done this and in view of the fact he hadn't done a lot of things, I was forced to do certain things; and I have a copy of the letter.

Q. Yes. I have, too. How was the work performed or to be performed by Virginia Electric & Power Company? Was that on the subcontract with you, the prime contractor?

A. I had no relations either—nor obligations to page 23 } the Commission under my contract, nor any connection whatsoever between the Virginia Electric & Power Company and me, nor did the Commission that involved my contract; and I had no reason to contact or work with or discuss any phase of this job with the Virginia Electric & Power Company.

Q. But it was your obligation under your contract with the Commission, and the obligation of the Virginia-Carolina Electrical Works under its subcontract with you, to install those ducts through the wall of the building and extend and tie into the manhole.

A. Yes, sir.

Q. —when and as constructed?

W. F. Magann.

A. That is right.

Mr. Coupland: That is all, Mr. Magann. Thank you.

RE-DIRECT EXAMINATION.

By Mr. White:

Q. A couple of questions for the record. Mr. Robert Dorey, what is his capacity, if you know, with Virginia-Carolina? Is he an officer of the company?

A. He is an official. I don't know any more.

Q. Now, much has been said about the oakum and the boards that were placed up there. It was still your un-
page 24 } derstanding that this contract was in force, this subcontract was in force where it says that "the damage to property by or on account of any act, omission or negligence of the subcontractor, its agents, employees or subcontractors, or any other person having anything to do in connection with the work of the subcontractor" was applicable, is that correct?

A. Nothing was ever said or done to relieve him of the responsibility or any part of his work.

Q. And your statement about the caps still applies?

A. Yes, sir.

Q. And your statement about what had happened in previous floodings was, in fairness to Virginia-Carolina Electrical Works, as to what had happened prior to this particular incident?

A. It is exactly, yes, sir.

By The Court:

Q. I am not sure whether your testimony indicated whether you know of your own knowledge, as of the time, the time when this work was done by Virginia-Carolina. You testified, I believe, as to the status of the construction in October 1957?

A. I am very familiar with the job, sir.

Q. Do you know when the—it has been referred to as pipe nipples; I assume that is what they are.

A. Sleeves.

page 25 } Q. —when they were installed, approximately?
I don't mean exactly.

A. I would say these sleeves had been installed two months prior to this.

Q. Two months prior?

A. Yes, sir.

W. F. Magann.

Q. And do you know the status of the construction at the time they were installed?

A. When they were installed, they had to be installed as the forms went in and before the concrete was poured; but the floor just under them had been poured. In other words, these sleeves were in reach, physically in reach of somebody walking along the inside putting their hands up.

Q. But they were installed in the form?

A. Yes, sir.

Q. Before the pouring?

A. But the ends of the sleeves projected beyond the forms and they could have been capped upon installation and they should have been.

Q. They projected, in effect, then, on both sides?

A. Yes, sir.

Q. Because they have to be connected to something?

A. From both sides.

Q. As I understand it.

A. Yes.

page 26 } Q. Is that correct? Now, when was the actual connection made, as close as you know?

A. On the outside—

Q. Between the manhole and these particular—

A. Unfortunately, it was probably just a week or so before the storm.

Q. Would that mean it was a week or so before October 5th?

A. Yes, sir.

Q. I am not sure if I fully followed the question that was asked you with relationship to your company, what part the power company was to play in this. Did you notify them that the time had arrived for putting in the new manhole and connecting it?

A. No, sir. They had no contract with me at all.

Q. How did they know when to come to do it? Was that just at their will?

A. They were moving a manhole. They were moving facilities from one to another and when they got one manhole in such a condition as they could do it, they were on their own to do that and we couldn't do anything until then.

Q. And as I understand it, from your statement, no water had come in in this manner to your knowledge before this occasion?

A. Yes, sir.

page 27 } Q. Of October 5th?

A. That is right.

W. F. Magann.

Q. Is that correct?

A. Yes, sir.

The Court: I think that is all I care to ask him.

Mr. White: I have one more question, but go ahead.

RE-CROSS EXAMINATION.

By Mr. Coupland:

Q. I have just one question.

The Court: I didn't mean to interrupt you. I thought you were through.

Mr. Coupland: That is all right.

The Court: I don't generally ask any question when I have a jury, but when I don't have, it is my responsibility.

Mr. Coupland: Yes, sir.

By Mr. Coupland:

Q. I believe you stated, Mr. Magann, on direct examination that your corporation had backfilled the area embraced within that construction ditch along the Plume Street side of the building?

A. It had been backfilled to approximately the elevation of the bottom of this work. I can't—

page 28 } Q. Elevation of the bottom of what, sir?
A. It had been backfilled to, say, approximately here (indicating), just under this ditch that this duct was in.

Q. Just under the wall nipples that were in?

A. Yes, sir.

Q. Did you see that situation yourself?

A. Yes, sir.

Q. And you saw the backfilling below the wall ducts?

A. I would have to qualify that only in this way, that in a backfill job this way it is possible—and it does happen—that the backfill isn't even, that it could be sloped up against the walls, and that sort of thing.

Q. I asked you if you saw that location yourself.

A. I saw it to the extent—I know for a fact that it was not filled up. I would rather say approximately three feet below the sidewalk, since I didn't measure it.

Q. But did you see—could you see the exposed wall nipples themselves?

A. No, sir. But I would like to say that that could have been

W. F. Magann.

just covered up inadvertently by an irregularity in the fill and it doesn't change the statement that I made that it was filled approximately that grade.

Q. The specifications would call for it to approximately that grade?

A. No, sir, not necessarily. It is just the way it was done.

Q. But it could have been filled to a higher level page 29 } covering these outer openings?

A. I wouldn't deny that. That is right. But—

Q. They were not visible to you when you were at the location—

A. I never saw them.

Q. —after backfilling?

A. Yes, sir.

Q. Just one question. I hate to keep on. The Court made an inquiry of you about what Virginia-Carolina Electrical Works had to do. Do I understand it that they had the responsibility of putting those sleeves or conduits in the wall?

A. Yes, sir.

Q. And under the contract they had the responsibility of making the conduit extension to the manhole?

A. Yes, sir.

The Court: As I understand it from the opening statement of counsel for the plaintiff, that is admitted.

Mr. Coupland: That is correct, sir.

RE-DIRECT EXAMINATION II

By Mr. White:

Q. And that the Virginia-Carolina Electrical page 30 } Works was dealing with Vepco and that you had no dealings with Harrison Wright of Vepco, only with Virginia-Carolina?

A. I don't know—

Mr. Coupland: If Your Honor please, I have not heard any testimony to that effect. There have been no negotiations or agreements between Virginia-Carolina and—

The Court: Are you objecting to his question?

Mr. Coupland: Yes, sir.

The Court: I sustain the objection.

Mr. White: Well, I will ask it in this way.

C. C. Petersen.

By Mr. White:

Q. Did you have any dealings with Vepco?

A. No, sir.

Q. Did you have any dealings with Harrison Wright?

A. No, sir.

C. C. PETERSEN,
called as a witness on behalf of the defendant, and having
been first duly sworn, testified as follows:

Examined by Mr. White:

* * * * *

page 33 }

* * * * *

Q. When did you first learn about this flooding damage?

A. I had a telephone call from my father on Sunday morning, I assume October 6th.

page 34 } Q. As a result of that telephone call, what did
you do?

A. I left immediately and went down to the job site.

Q. That same day?

A. Yes, sir.

Q. Do you recall the hour?

A. It was after church. I would guess somewhere in the neighborhood of 11:00 o'clock in the morning.

Q. Describe in as much detail as you can for the Court's benefit, what you found down there when you went down that morning.

A. Well, I found the pump room, as we call it, or the deepest part where the three pumps are located, was completely submerged in water. And as I recall, the floor of the intermediate floor level was covered with water, with a plywood sheet covering the area and braced where these sleeves in question—have been previously mentioned—would be located.

Q. Why was that done, if you know?

A. Well, I would certainly assume it was done as a temporary, immediate measure to prevent the influx of water.

Q. How about the conduits? Could you describe?

A. I am speaking of the conduit.

C. C. Petersen.

Q. Were there any rags there, as present?

A. I couldn't say, sir.

Q. Burlap bags?

page 35 } A. Not that I was able to see.

Q. Do I gather that the water completely submerged the bottom basement all the way to the ceiling; it was impossible to go down to the basement?

A. Yes, sir. I couldn't get down into the area.

* * * * *

page 37 } By Mr. White:

Q. Did you talk with anyone from Virginia-Carolina about this matter?

A. Not on that day, no, sir.

Q. Subsequently, did you have occasion to talk with anyone?

A. Yes, sir.

Q. Tell us about any conversations that you might have had.

By The Court:

Q. Tell us when it was.

By Mr. White:

Q. When it was and who was there.

A. To the best of my recollection, it was within one or two days after this Sunday, the 6th of October.

Q. All right. With whom did you talk?

A. Mr. Magann had a meeting with myself and Mr. Bob Dorey, Jr.

Q. All right.

A. And some of Mr. Dorey's representatives, I think.

Q. What transpired?

A. The purpose of the meeting was called to correct the damage and have any inspections or requirements that we would have to make to Mr. Magann and to the Commission later corrected as quickly as possible.

page 38 } Q. Tell us about some of the conversation, or can you be a little more specific? What did Mr. Dorey say, for example, if anything? What did you say, if anything?

A. I said that I had been advised by my father that from past experience that question of who was responsible should

C. C. Petersen.

be settled before commencement of work was undertaken—specific to Mr. Magann at the time.

Q. All right. What took place after that? You don't have to remember the exact words but you can give us your best recollection.

A. As I best recall, Mr. Bob Dorey acknowledged the fact that the water had come in through the sleeves that we have previously mentioned here. And Mr. Magann then said that he would resolve the thing as quickly as possible and would let me know as to when we should go ahead and proceed with the correction.

Q. Did Mr. Dorey make any further comments?

A. Not that I recall, sir.

Q. What about any instructions about billing for these damaged pumps?

A. As I recall, Mr. Dorey said that they, Virginia-Carolina, were field representatives for the Fairbanks-Morse Company, who were the manufacturers of the pumps in question, and that therefore they, Virginia-Carolina, would take care of any of the electrical damage that had been done.
page 39 } Q. Meaning the pumps?

By Mr. Coupland:

Q. Who said that?

A. Sir?

Q. Who said that, that Virginia-Carolina would take care of it?

A. Mr.—well, Mr. Bob Dorey, Jr., sir, the best of my recollection.

Q. In your presence?

Mr. Coupland: I didn't mean to—

The Court: All right, Mr. White, finish.

By Mr. White:

Q. And that he agreed to finish it?

A. Well, would you be a little more specific?

Q. I am trying to get a full understanding of what took place at this meeting. I know it has been a long time ago but what else, if anything, did Mr. Dorey say? You have just said that he was going to talk to the folks at Fairbanks-Morse but what about the completion of this work? Did he make any comment about that?

A. I will have to speak in generalities if I may. I can't

C. C. Petersen.

quote verbatim but as I recall, Mr. Dorey said that he or Virginia-Carolina would take care of the expenses incurred.

Q. Did Mr. Dorey make the suggestion that they would do the work and bill Coley & Petersen, so that Coley page 40 } & Petersen in turn could bill the insurance company of Virginia-Carolina? Was there any conversation like that at this meeting?

A. As I recall, sir, it was.

Mr. Coupland: If Your Honor please, I don't like to interrupt counsel. I want the Court to hear everything. But counsel is definitely putting into the mouth of this witness, reviewing briefly—and as briefly as he can—particular incidents that he wants this witness to say. I think the witness has clearly indicated that he has no recollection of such things and I don't think that counsel should ask the question in that manner.

The Court: Rephrase the question. I think you probably should.

By Mr. White:

Q. Was anything else said at this meeting, I mean about all aspects of this question of repairs and who was to do what, if anything? That is what the Court is very much interested in. You don't have to have the exact words. If you don't know, say so, but if you do recall, you have certain definite recollections about it, then you may testify to that. That is what I am getting at.

A. Yes, sir. Well, as I recall, sir, it could have been at this meeting or a subsequent one, Mr. Dorey did say, "We will perform" or "We will do the electrical requirements necessary, and then we in turn will bill you, Coley & page 41 } Petersen, for the work involved."

Q. Did you just earlier testify that they said that they would take care of it? I don't want to—it is the only way I can ask you. I think that is what you said.

A. Take care of it, by "it" you mean the whole damage?

Q. The expense.

A. Yes, sir.

Q. The expense of this damage?

A. Yes, sir.

Q. You heard Mr. Dorey say that?

A. In so many words, yes sir.

Q. Either at this meeting or subsequently. That is all.

C. C. Petersen.

CROSS EXAMINATION.

By Mr. Coupland:

Q. Mr. Petersen, at this conference that you said that representatives of Mr. Magann were present and Mr. Dorey, Jr., was present on behalf of Virginia-Carolina, wasn't that a conference to see what could be done to get the job on the way, overcome what had happened because of the flooding and get this work progressing? Wasn't that the reason for the conference?

page 42 } A. Well, if—that, of course, sir, reflects on the overall completion of the job, yes, sir. But this particular conference was called in a hurry because of the unknown damage that no one knew at the time.

Q. And because the work on the overall proposition could not proceed until this was taken care of, isn't that right?

A. I wouldn't say so. No, sir. Because the pumps that we are referring to here, sir, were submerged and under water but the rest of the construction, of course, allowed the progress—

Q. Didn't Mr. Dorey say at that conference that the water “undoubtedly came through the ducts; I think that as a matter of good relations and to get this job started”—

Mr. White: He is doing exactly what he said I was doing.

The Court: He is cross examining. He has a right to do so. Go ahead, sir.

By Mr. Coupland:

Q. That “I am willing to pull these motors and see what can be done. Perhaps we can take care of it in our own shops.” Didn't Mr. Dorey say that in your presence?

A. That could very possibly be, sir. I would elaborate a little bit more.

Q. All right, sir. And—

page 43 } Mr. White: Let him elaborate. All right, you may elaborate.

By Mr. Coupland:

Q. Yes, you may elaborate.

A. Our prime concern was not just with the motors themselves but if any more damage beyond the motors were done to the pumps, that is the mechanical mechanism of the pumps, which eventually turned out that there was some damage.

C. C. Petersen.

Q. That was going to be my next question.

A. Oh, I beg your pardon.

Q. Mr. Petersen, that discussion was with reference to the motors and Mr. Dorey's discussion was with reference to the motors? It wasn't even known that the pumps were damaged, isn't that correct?

A. No one knew, sir. As a matter of fact, we—

Q. That is right, so the discussion centered on the motors?

A. I wouldn't say so. No, sir.

Q. Or possible damage to the pumps; but you knew that the motors had to be pulled, didn't you, and examined?

A. I suspected they would, sir, but please, I was in no position to know.

Q. Isn't that all that Mr. Dorey said that he would do, that he wasn't obligated to do it but that he would pull those motors?

page 44 } A. No, sir.

Q. And didn't he bill you, along with several other contractors, for work done on the motors, for electrical work?

A. Yes, sir.

Q. So that he billed you and you understood you were going to be billed; Mr. Dorey couldn't have undertaken to tell you he would take care of the damages and at the same time bill you for it, would he?

A. No, sir. I think you and I are talking of two different phases of the work, Mr. Coupland.

Q. All right.

A. I am speaking in general features, the overall pump to me was the item for which I was concerned, where Mr. Dorey naturally would be concerned with the electrical motor which drives the pumps.

Q. That is correct.

A. Does that help you?

Q. That explains it. It has been a long time, hasn't it, Mr. Petersen, and what one person said to another person is not very clear at this late date, isn't that correct?

A. I don't think anyone could quote verbatim, sir, any of the conversation and be certain of it. In generality—

Q. Didn't you know it was a conference by all of the interested contractors primarily to take care of damages that had occurred from the flooding? That is about the ex-
page 45 } tent of it, isn't it?

A. That is so, yes.

Richard Petersen.

Mr. Coupland: That is all. Thank you.

By The Court:

Q. I am not certain that I am clear; counsel seem to feel that they are. As I understood your statement, you said that it was your recollection of the conversation that Mr. Dorey said that they were the field representatives of Fairbanks-Morse and that they would take care of any electrical work?

A. (The witness nodded)

Q. I believe that is verbatim?

A. Yes, sir.

Q. I am not sure of what you said. Is that correct?

A. Yes, sir.

Q. When you used the words "electrical work" in that sense, to what would that be referring?

A. I would refer there, Your Honor, specifically to the motors which drive the pumps, yes, sir.

Q. To the motors. And that is the work, as I understand your statement, he said he would bill your firm for?

A. Yes, sir.

Q. Now then, you answered a further question I think that Mr. White asked you and said that it was your recollection that Mr. Dorey either at that meeting or a later page 46 } meeting stated that he would take care of the expenses incurred?

A. That is correct.

Q. Can you be a little clearer on what you are talking about there, what expenses? The same things we have referred to or just what did that conversation involve?

A. Well, to me that statement, Your Honor, meant that any expense to which we, Coley & Petersen, had to go to, to put these pumps back in the acceptable condition that they were when they first arrived on the job, would be absorbed by Virginia-Carolina Electric.

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RICHARD PETERSEN,
called as a witness on behalf of the defendants, and having
been first duly sworn, testified as follows:

Richard Petersen.

Examined by Mr. White:

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Q. All right. What did you find when you got down there? You told us a little bit but give us the whole story. I mean what did you find when you got down to the building?

A. Well, I went down and looked and I could see that the water was coming in through these pipes, like I say, and running over the steps down into the lower part of the building, pump room.

Q. These same conduits that have been described?

A. Yes, sir, that is right.

page 51 } Q. Could you give a fuller description of this water? Was it just seeping out or poring out?

A. No, it was running out through these four conduits, four-inch pipes from the manhole into the basement.

Q. How far out was it coming from the wall onto the floor?

A. Oh, I would say about five or six feet, something like that.

Q. In an arc?

A. Circle, yes.

Q. Did you follow this water down to see where it was going?

A. I could see it was running on through the different floor levels to the lower pump room, yes, sir.

Q. Did you peer down and observe the level of the water in the bottom basement floor?

A. No. I could see, just it rising there, I couldn't determine how high it was. It hadn't covered the pumps at that time or the motors.

Q. Did you observe water from any other sources?

A. No. The area, immediate area, was wet. It had been raining from this northeast *storm*, but there wasn't no particular damage from that I would see, outside everything was wet.

Q. How many years have you been in this type of business?

page 52 } A. About 45.

Q. Based on your experience, is it accepted practice to cap or uncapped open conduits?

Richard Petersen.

A. In our—

Mr. Coupland: If Your Honor please, I object to the question as asking for an opinion, unless the witness is qualified—which has not been indicated thus far—and unless the question is predicated upon a complete statement of the facts surrounding the wall ducts and the situation upon installation of those wall ducts and who was to do the work on the outside and on the inside, and why those wall ducts may have been open on the inside.

Mr. White: You want a full hypothetical question?

The Court: As I understand his first objection is based upon the question of a proper foundation to qualify him to answer the question as an expert; and secondly as to the form of the question.

Mr. White: All right. Let me get the second one first.

By Mr. White:

Q. Mr. Petersen, did you observe any caps or anything over the ends of the conduits?

A. It was nothing. It was not capped, no, sir.

Q. And had you been outside to see what the physical situation was from the exterior of the building with page 53 } reference to the water?

A. Well, it had been raining from this north-east storm we had and water was, of course, all over the street and sidewalk. But from the manhole into the building it had been filled so I got into the building easy enough.

Q. Have you ever installed any conduit sleeves through any buildings?

A. Yes, sir.

Q. You have? The exact type of work; that was like this?

A. Well, our work is similar. We put conduits through walls and we put pipes through there. We usually cap them off to keep from having trouble.

Q. When you went down to the building that morning, that particular morning, what if anything was on your mind about your aspect of the work?

A. Well, I had asked my man if our work was secure and it wasn't any question of water getting through our piping; I just as a matter of check went by to see about that. That was my reason for going there.

Q. You looked to see whether your work was capped?

A. That is right.

P. J. Lipscomb.

Mr. White: Do you want to rule, Your Honor, whether I can ask him this question about whether it is accepted practice? Do you want to hear further on that? He page 54 } says he has done it.

Mr. Coupland: If Your Honor please, all that this witness is being asked is "If you saw conduits open at one end, is it established practice to cap them?"

The Court: I think the question should be related to this particular situation if he has seen it. I don't think you need to have a whole lot of hypothetical questions about it. This man has observed it himself.

Mr. White: I want to ask him specifically if in his expert opinion it is accepted practice in the trade in the construction field to cap or not cap, or stuff or not stuff, the interior of an open sleeve or an open conduit. That is my question.

The Court: I think that is proper. It appears to me that he has testified sufficiently as to his own experience. I don't think there is any question about his qualifications. All right. You may answer the question.

A. Yes, sir. We do that. Any opening that is liable to have any trouble from any outside source, we see that the openings are closed properly.

By Mr. White:

Q. And the converse of that question would be that it would be bad practice not to do it?

A. In my opinion, it would.

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page 70 }

P. J. LIPSCOMB,

called as a witness on behalf of the defendants, and having been first duly sworn, testified as follows:

Examined by Mr. White:

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Q. Would you describe the situation with reference to the conduits when you saw them?

P. J. Lipscomb.

A. Well, when I first saw them on first arriving over there, the water was coming through and it was coming in gushes at times; gush, you, know, maybe—maybe four to six feet, and then it would slow down some and come out. But it made a terrific roar. You could hear it as soon as you went in the building, started down the steps and into the control room, you could hear this terrific roar.

Q. Did you look around further to see whether there was any other water leakage or seepage?

A. I didn't see anything coming in anywhere else.

Q. Have you had any conversations with anyone from Virginia-Carolina about this work?

A. No, sir.

page 72 } Q. And who called you to first report this water damage to you?

A. Mr. E. D. Twiford.

Q. Who is he?

A. He was superintendent on the job at the time.

Mr. White: Your witness.

CROSS EXAMINATION.

By Mr. Coupland:

Q. Mr. Lipscomb, as general superintendent of W. F. Magann Corporation did you know who was to extend the wall conduits that tie into this manhole?

A. That was in Virginia-Carolina's subcontract to us.

Q. Virginia-Carolina's subcontract to you?

A. Yes, sir.

Q. Did you expect Virginia-Carolina to provide that tie-in?

A. Yes, sir.

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page 73 }

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Q. Did you go into the manhole on the morning of this flooding?

A. I went by it; I didn't go into it, no, sir.

Q. Do you recall whether the flooding was at about maximum high stage or just what was the state of the flooding, the tide situation at the time you visited the premises?

Earl W. Twiford.

A. I don't recall what the tide was doing. The manhole top had not been poured, the top that the ring sets in had not been poured. They had a temporary barricade around.

Q. The manhole top had not been poured?

A. No, sir.

Q. So that the manhole was completely open to the entrance of any water?

A. From the best of my recollection.

Q. Either rain or tidal water?

page 74 } A. Yes, sir.

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page 79 }

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EARL W. TWIFORD,

called as a witness on behalf of the defendants, and having been first duly sworn, testified as follows:

Examined by Mr. White:

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Q. Could you tell us about what hour it was that you arrived?

A. I would say it was something around 6:00 or 6:30.

Q. What did you find upon your arrival?

A. Well, I heard this awful roar in the basement. I went down and saw the water coming through these
page 80 } four pipes, electric pipes.

Q. Was there anyone else down there at the time of your arrival?

A. No, sir.

Q. I didn't hear.

A. No, sir.

Q. Did you see any evidence of anyone having been there?

A. Not at that time, no.

Q. Could you describe the flow of water through these conduits?

A. Well, full force I would say. It was coming there seven or eight feet, to my knowledge, right at that time.

Q. Was there anyone else down there with you at the time you went down? You said you didn't see anyone?

Robert C. Dorey, Jr.

A. No, sir.

Q. Did anyone else arrive after you got there?

A. After awhile, I don't remember how long it was, a little while after I was there.

Q. Did you make any effort to do anything about the water flowing or what did you do?

A. Went out on the manhole in the street, took a piece of plywood and got down and tried to stop the flow from going inside the building. And it was too much pressure come from the other duct line coming in the manhole, pushed page 81 } the board away. I couldn't keep it up there.

Q. There was what? Pressure of water?

A. Coming in the manhole.

Q. Coming from—

A. Duct lines from the other manhole.

Q. From the other manhole?

A. Yes, sir.

Q. The water was rising within the manhole itself?

A. Well, right then holding by its own. It was going in the pumping station. I mean it wasn't rising in the manhole.

Q. Draining off?

A. In the pumping station.

Q. The conduits were draining off the water?

A. That is right.

Q. Were you on the job before this happened?

A. Yes, sir.

Q. Do you know of your own knowledge whose work that was for the conduits?

A. Virginia-Carolina.

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page 87 } ROBERT C. DOREY, JR.,
having been first duly sworn, testified as follows:

Examined by Mr. White:

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page 91 }

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Q. Now, Mr. Dorey, with reference to the project at this pumping station, would you tell us, please, when it was that

Robert C. Dorey, Jr.

you estimated or got into the job? When was it that you started work out there?

A. Personally?

Q. Well, company-wise. When did the company come out there?

A. I do not recall the exact date that the company started work. We started when Mr. Magann needed us out there on the job to start.

Q. Based on the contract, what was the work to be done by Virginia-Carolina Electrical Works?

A. All of the electrical work covered by the plans and specifications for that contract.

Q. That would include this aspect of the plans, is that correct, sir?

page 92 } A. That is right, Section or Item 13.

Q. Item 13. And in Item 13 are the things that had to be done. Would you tell us if you had to install the ducts and wiring from the existing manhole of VEPCO into the building as shown on the drawings? Was that part of the work?

The Court: I don't like to interfere with your case and the way you are handling it, but as I understand it that is admitted by the parties, isn't that correct?

Mr. White: Is that admitted?

Mr. Coupland: That is admitted on those specifications in there.

The Court: I think the pertinent parts have been read into evidence. I am not sure whether or not—

Mr. Coupland: That is what I was going to suggest. I don't recall.

Mr. White: I should like to put this in evidence.

The Court: All right. That will be P-2.

(The document referred to was marked Defendant's Exhibit 2.)

By Mr. White:

Q. Mr. Dorey, what I am getting around to is specifically what was it that you and Virginia-Carolina Electrical Works had to do out there between the manhole and wall?

A. According to the specifications, it was our requirement

Robert C. Dorey, Jr.

to run a group of fiber ducts from the Virginia
page 93 } Electrical Power Company manhole into or to the
building where we picked them up on the outside
with steel conduits, and from then into the switch gear.

Q. And had you completed your work on October 6, 1957?

A. No.

Q. You still had further work to do?

A. Yes.

Q. Now, was it the job of Virginia-Carolina to put the
~~sleeves in there and to supervise that work?~~

A. Yes.

Q. And Magann looked to the Virginia-Carolina Electrical
Works, is that correct? They looked to you to complete the
work?

A. I am sure he did.

Q. Did your company put the extension sleeves in, in the
area from the manhole into the wall?

A. No.

Q. Do you care to make any explanation about that?

A. You are speaking of the ducts from the manhole to the
nipples we had placed through the wall?

Q. Yes, sir.

A. I think it has been pointed out by every witness here
before me that someone else had placed the ducts there, and
I agree with all that.

Q. But that was your work, isn't that correct?
page 94 } A. According to the specifications, that was to
be our work.

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“Q. Did you cap or not cap both ends of those open con-
duits?”

Mr. White: Pipe nipples.

A. From my own experience I couldn't tell you whether we
capped one or both ends.

page 95 } By Mr. White:

Q. You don't know whether you did or didn't
cap one or both ends?

A. I did not see the nipples prior to being connected to by
others.

Robert C. Dorey, Jr.

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Q. Well, I mean you heard Mr. Magann on the stand and he made the statement, and Mr. Petersen made the statement, something about responsibility, that you had assumed responsibility. My question to you is: Do you recall any conferences with Mr. Magann in which that statement was made and the statement was made that also you wanted to talk to your father about that? Did you have any kind of conference like that?

A. We had similar conferences. That is true.

Q. All right. That is what I am getting at. Is that all you are going to say?

A. No. We had no conference that I know of
page 100 } after considerable damage had been—

Q. —ascertained?

A.—ascertained or discovered, that we assumed the responsibility or the liability for the damage.

Q. Of course, that was later on when it was found out that there was a good deal of damage done. But I mean in the initial stages did you have any conversations with anybody?

A. In the initial stages we were willing and so let Mr. Magann know or I was, in order to progress with the job, in order not to have an argument with the VEPCO, that we have always had good and close relationships with, and not to have an argument with the general contractor whom we have always had good close relationships with, we were willing to take the motors out, to do what we felt was necessary to restore them and to put the motors back.

Q. And at that time you were pulling the motors and repairing them voluntarily, in the first stages of this thing? Did anyone tell you to pull these motors when you did, in the first stages of this damage?

A. No.

Q. You went on down and took these motors out on your own? Magann didn't tell you or Coley & Petersen didn't tell you?

A. Not that I recall.

Robert C. Dorey, Jr.

Mr. White: All right. That is all. Do you
page 101 } want to reserve your cross examination?

Mr. Coupland: I think I am entitled to cross
examination.

Mr. White: It looks like it.

CROSS EXAMINATION.

By Mr. Coupland:

Q. Mr. Dorey, as I understand your testimony, in your several conferences with Mr. Magann and whoever else may have been present, you wanted to show cooperation between one contractor and another or several others all of whom had experienced friendly relations and were willing to co-operate; and this being in the early stages, you thought that perhaps you could pull the motors, not the pumps, and remedy them at slight cost in your own shops? Isn't that correct?

A. That is correct.

Q. Even then, at the time of these talks, did you know that the extension and tie-in into the manhole had been done by someone other than Virginia-Carolina?

Mr. White: Your Honor, I object to that because under the contract it was their responsibility. It doesn't make any difference whether somebody else had gotten in there or not,
it was their job to do that extension.

page 102 } Mr. Coupland: There is testimony—

The Court: I think the question is material. You may answer it. The Court overrules the objection. Did you understand the question? If not, I will have it read back.

The Witness: Yes, sir.

A. These discussions were several and they extended over a period of time. When the accident or whatever you might call it first happened, I was not cognizant that we had not tied in to the manhole.

By Mr. Coupland:

Q. You just assumed—

A. —that we had.

Q. —that the manhole having been tied into, that Virginia-Carolina had done it?

Robert C. Dorey, Jr.

A. That is correct, because I knew it was our work and we were intending to do it.

Q. And when you observed the flooding conditions, you knew that the water had to enter from the manhole, is that correct?

A. That was my feeling, yes, sir.

Q. And entering through the manhole, it had to go through extensions which were a part of your contract performance, isn't that right?

page 103 } A. That is correct.

Q. And you assumed at that time that Virginia-Carolina, the men on the job, had actually extended and tied into the manhole?

A. Until I was told otherwise. Now, I don't know just when that was but I know at first it was my assumption that we had tied into the manhole.

Q. Well, particularly at the time of the flooding?

A. Yes, sir.

Q. At the time of the flooding you had no knowledge that the manhole had been tied into, is that correct—until you went down and observed the scene?

A. Prior to the flooding we had no knowledge, no, sir, not until the flooding.

Q. And at that time, knowing that it had been tied in, you assumed that it had been done by Virginia-Carolina?

A. That is correct, sir.

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Q. Well, assuming, Mr. Dorey, that at the time these nipples were installed there was a construction ditch on the Plume Street side of the building extending from the ground level some 30 feet down and an open area of approximately two feet and these nipples extending through the wall some three and a half feet below the ground level. If either end were not capped, they would of course be open from the outside to the inside. Could tidal water ever enter under those conditions?

A. If neither end were capped?

Q. If neither end were capped and nothing but the nipples extending through the wall and the outside entrances in an

Robert C. Dorey, Jr.

open area some 30-feet deep and two feet wide, three and a half feet from the ground level?

A. If the water came up high enough, it certainly could, yes, sir.

page 108 }

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Q. Now, Mr. Dorey, why weren't the nipples extended by Virginia-Carolina into the manhole? Why didn't Virginia-Carolina do that work?

A. We had to wait until VEPCO constructed the manhole before we could do that work, and it was not necessary to immediately do the work after they had so constructed the manhole. We could do it at any time after they constructed their manhole and prior to the time we needed the cable service coming into the building. We did not do it because someone else beat us to it.

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page 110 }

* . . . *

Q. Now, if Virginia-Carolina had extended the wall nipples into the manhole, what would have been the proper practice in the trade with respect to plugging or capping the duct entrances in the manhole?

A. They would be plugged with wooden plugs.

Q. Because you would then have a ready access of water from the manhole into the ducts, is that correct?

A. That is true, sir.

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page 111 }

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Q. And you say that because you knew you were going to tie into the manhole and you knew when you tied into the manhole that you would plug on the inside of the manhole?

Robert C. Dorey, Jr.

A. That is correct. Anyone who ties into the manhole should have plugged on the inside of the manhole.

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page 115 }

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By The Court:

Q. I am not sure that you have answered the question he asked you. I was going to ask the same thing if counsel hadn't. Let's assume that this manhole had been put in place and that the duct work had not, and you were to complete it. The question is: What arrangement, if any, was made so that you would know that you had to proceed? I can more or less assume your answer but I don't think you have answered it. How would you know when to send somebody back to finish the job? That is what I want to know.

A. Well, I think I answered it prior to this. We were not expecting VEPCO to tie in. We were not worrying about them trying in. And the manhole could have—their part of the manhole could have been done and sat there for two or three weeks and unless there was other work for us to do in the building, we probably still would not have come back to the building to tie that duct line in. That was not important at the time. It could be done any time within a relatively short period of time.

Q. As to the other things that had to be done, had everything that you could do been done?

A. Yes.

Q. At the time that these nipples were in place?
page 116 }

A. Yes, sir.

Q. So that until you had occasion to go back there, either were notified that it was time to proceed—

A. Yes, sir.

Q. —or ascertained on your own that it was time to proceed—

A. I am not saying that it was Mr. Magann's responsibility by any means, and I am sure he understands this, to tell us everything to do and when to do it and so forth; but in the way we have worked with Mr. Magann on this job and on past jobs, he or his superintendent works very well with our mechanics or our superintendents or our project managers by letting us know when men will be required. They look

Robert C. Dorey, Jr.

that far ahead and know what is to be required, and it saves us time and money and them—for them it speeds up the job, too.

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page 119 }

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RE-DIRECT EXAMINATION II.

By Mr. White:

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page 120 }

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Q. Didn't you make the statement that if you
page 121 } weren't going to continue all the way through to
the manhole you would have plugged it up from
the inside? Didn't you make that statement?

A. I made the statement that if we knew someone else was
to pick it up outside—

Q. —that you would have capped?

A. —we would have capped it on the inside as well as
placed some protection on the outside.

Q. And you knew that a manhole had to be dug—

A. Correct.

Q. —outside?

A. Yes.

Q. And you knew that either VEPCO or its agent was going
to do some work outside?

A. Was going to build the manhole.

Q. And you knew that there was a possibility of backfill or
other work going on at the exterior of the building?

Mr. Coupland: He didn't say that.

Mr. White: All right; let me ask him that, then.

By Mr. White:

Q. What did you think was going to happen after you finished
your work there and sat around waiting for VEPCO

Robert M. Reed.

to do some work? What did you think was going to take place before you came back, pulled the wires through and worked on the switchboard?

page 122 } A. Would you—I am—

Q. If you know, what did you think was going to happen outside under the sidewalk or off from the exterior of the basement wall below the sidewalk level? Did you have any idea what was going to be done? What was VEPCO going to do?

A. VEPCO was going to build a manhole outside of the building.

Q. And you knew that there would be certain digging operations?

A. There has got to be digging operations if you build a manhole.

Q. And that dirt was going to be pitched around?

A. Yes.

Q. Just a little bit earlier you said that if you had known that you weren't going to run the extension, you would have capped it on the inside?

A. We would have capped it on the inside and the outside.

Q. Why?

A. We would have capped it on the outside to prevent any dirt from coming in. We would have capped it on the inside to be sure that when someone else picked it up and extended it that whether they capped it on the inside of the manhole or not it would be capped on the inside of the building; a double precaution.

Q. All right. And you knew that you were going to be away from that job site at certain intervals of time, a week or more or several days while work was going on there?

A. Mr. White, if you are trying to prove neglect on those terms—

The Court: Just answer his questions.

Mr. White: All right; that is all.

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ROBERT M. REED,
called as a witness on behalf of the defendants, and having
been first duly sworn, testified as follows:

Robert M. Reed.

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By The Court:

Q. Well, without getting into, involved in the procedure, in any event they submitted to you a bill which you refused to pay, that—

A. Not to us, to Coley, Peterson. Coley, Petersen had advised us that they had presented a bill to them for repairs to the motor of this one-thousand-dollar, one thousand forty-one—

Q. As I understand it, you did not pay that to Coley & Petersen?

A. That is correct.

Q. And, in effect, informed this plaintiff that you were charging this other amount against their account?

A. That is correct.

Q. All right. What is this \$1,411.91?

A. That is the amount that Virginia-Carolina invoiced Coley & Petersen.

Q. For what?

A. For repairs to the motor, which is over and page 127 } above the \$5,808.96.

Q. I think we are getting confused with what they may claim as due them and what you claim, your company may claim as due it. As I understand it, that matter of \$1411.91 has not been in any way paid by you?

A. That is correct, sir.

Q. So if anybody is concerned about that, that is the plaintiff in this case and Coley & Petersen, is that right?

Mr. White: And it is not a part of this problem.

The Court: Not a part at all.

Mr. Coupland: Not involved in this case at all.

The Court: Forget that. Let's get on with the other.

By Mr. White:

Q. We have the basic figure, \$5808.96 basic because that is what Coley & Petersen did in connection with the pumps, with Fairbanks-Morse Company, is that right?

A. That is correct.

James M. Etheridge, Jr.

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page 137 }

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JAMES M. ETHERIDGE, JR.

called as a witness on behalf of the defendants, and having been first duly sworn, testified as follows:

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CROSS EXAMINATION.

By Mr. Coupland:

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Q. Did the Virginia Electric & Power Company instruct their contractor, Harrison Wright, not only to construct the manhole but to connect up with the wall nipples?

A. Yes, sir. It was not—he was not so instructed on the job as work. The job as work called for the manhole being built exactly opposite the nipples so the nipples would be right into a window in the manhole. But when we went down to construct the manhole, we didn't realize at the time we assigned that location that the entrance to the Hampton Roads Sanitation was going to be just above the nipple. And to prevent the opening of the manhole being right in the front door of the Hampton Roads Sanitation building, we moved the manhole approximately seven feet west and extended the duct to pick up the nipple.

page 143 } Q. Did you know that Virginia-Carolina on its subcontract was to connect up with the manhole after you had installed it?

A. No, sir. We didn't have nothing to do with it. In other words, we had given them a new point of cut-in from the original plans that they had bid. They had no duct work in this new point of cut-in as assigned.

Q. You didn't know that wherever the manhole might be installed that it was a part of Virginia-Carolina's obligation

James M. Etheridge, Jr.

under its subcontract with the prime contractor to tie in and connect with that—

A. That is against the general policy of the company.

Q. Of what company?

A. Virginia Electric & Power Company.

Q. Electric & Power?

A. The power company gives the point of service at the property line as near as possible, usually makes connection at that point.

Q. Do you always do that?

A. Yes, sir.

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page 148 }

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Q. If you put the wall nipples in, would you cap?

A. I think I would, yes.

Q. Why would you cap those any more than capping inside the manhole?

A. Because if I put the wall nipples in, I would probably have some responsibility to work inside the building—
page 149 } ing if there was anything could be damaged.

Q. Well, but if you come along and permit something to be installed by you that would permit the entrance of water into the building and damage the building, wouldn't you feel that you ought to protect the openings on the outside to prevent that, or would you just assume that that is such a speculative thing that there is no reason to close up those holes, there can't be any water going through there that would damage this building?

A. Well, we don't assume that there can be no water damage to anything. But we assume that the customer is going to provide some means of retaining—

Q. When you speak of the customer, you speak of the prime contractor or the owner?

A. Right, sir. I will say prime contractor. That—

Q. Building contractor?

A. The customer primarily or whoever was working for him.

Q. Well, that—

A. Before—

Charlie M. Killian.

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EXHIBIT D-3.
DEPOSITION OF CHARLIE M. KILLIAN.

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Dep.

page 2 }

PROCEEDINGS.

CHARLIE M. KILLIAN,
upon being first duly sworn, was examined and testified as
follows:

DIRECT EXAMINATION.

By Mr. White:

Q. You are Charlie M. Killian, K-i-l-l-a-n, is that correct?

A. That's right.

Q. Mr. Killian, what is your age?

A. Forty-seven.

Q. And what is your address? Where do you reside?

A. Mount Holly, Route 1.

Q. Mount Holly, North Carolina?

A. That's right.

Q. Now, Mr. Killian, for whom do you work?

A. Harrison-Wright Company.

Q. What type of business are they in?

A. Contracting business.

Q. Electrical contracting business?

A. Well, they do electrical contracting, telephone contracting—variety of construction, utilities construction mostly.

Q. Now what is your capacity with this company?

A. At the present I'm company representative. I

Dep. handle all the equipment for the company now,
page 3 } purchasing agent.

Q. Now back in the Fall of 1957, were you working
for this company in the Norfolk, Virginia, area?

A. Yes.

Q. And what did you do when working in the Norfolk area?

A. I was general superintendent for the Harrison-Wright
Company for the Norfolk area.

Q. Do you recall the project known as the Hampton Roads
Sanitation Commission Building?

A. Yes.

Charlie M. Killian.

Q. Where was that located?

A. On the corner of Plume and Atlantic Streets.

Q. In downtown Norfolk?

A. Right.

Q. Now do you recall when you first went to that job? Was it sometime in the Fall of 1957?

A. Yes; as well as I remember, it was the last of September or it might have been the first of October. I don't recall the exact date.

Q. Just exactly what was it that Harrison-Wright Company had to do with this project?

A. Well, we actually didn't have anything to do with that particular project. We coupled conduit lines onto conduits that were placed through the wall of that building and carried them around into a manhole that we also built in the sidewalk by the building.

Dep. sidewalk by the building.
page 4 } Q. Do you recall who engaged the services of Harrison-Wright?

A. Do you mean who actually did the work?

Q. No, who asked Harrison-Wright to do this? When did you learn that you were to go to the Hampton Roads Sanitation Building and do this work?

A. Oh, the Virginia Power and Light Company.

Q. Did they call you personally?

A. Yes.

Q. Where was your office then?

A. Well, I was located in Norfolk. I actually didn't maintain an office there; we don't have field offices. Mostly, where we maintain our residence at when we're working out of town, that's usually what we use as an office.

Q. All right. What I'm getting at is, who called you to do this job?

A. Well, Mr. S. P. Edwards with the Virginia Power and Light Company just handed me the prints and told me where the job was and where to go do it.

Q. Handed you some prints, or plans?

A. Yes, sir.

Q. Handed you those plans. Then did he go with you down to the building?

A. I wouldn't say he went that particular day, no. He was down there and showed me where the—

Q. He showed you this particular area where you were to work?

A. That's right.

Charlie M. Killian.

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Dep.
page 10 }

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Q. Now, will you tell us exactly what Harrison-Wright Company was supposed to do there on the project?

A We were supposed to build a manhole, pick up four conduits that were stubbed out through the wall of the building and carry them into the manhole that we built; that was our job.

Q. Were you supposed to tie in the conduits to the electric manhole?

A. Yes.

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Dep.
page 28 }

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CROSS EXAMINATION.

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Dep.
page 31 }

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By Mr. Coupland:

Q. With that particular area back-filled almost up to the level of the street and with earth against the openings of the conduits, could water have entered those conduits

Dep. or would the earth obstruction prevent that?
page 32 } A. It would probably have prevented it.

Q. So that if the ends were open, the most that could happen would be some dirt could get into the conduits, dirt or sand?

A. Yes, and some seepage water could go through there.

Q. Some seepage?

A. Yes.

Charlie M. Killian.

Q. Now, how far west—remembering that Plume Street extends west from Atlantic Avenue—approximately how far west of these wall conduits did you install the manhole?

A. Twelve to fifteen feet, somewhere in that neighborhood.

Q. Twelve or fifteen feet?

A. Probably, less or more maybe.

Q. When you extended the fiber conduits, the nipples extending through the wall into the manhole, you completely closed up the openings on the outside of the wall—that is, when I say closed up, you connected those by fiber pipes of equal dimensions with the wall nipples, did you not?

A. That's right, yes.

Q. So that after the pipes were extended and tied in to the manhole, certainly no water could enter at the outside entrance openings of these nipples that extended beyond the wall some 1 1/2 inch because they were connected up with the manhole, isn't that true?

Dep. page 33 } A. Yes, they were connected with the manhole, but I wouldn't say there couldn't any water get in there because there could some seepage get through.

Q. But any water that would enter thereafter would have to come from the manhole, wouldn't it?

A. Come through that conduit line, yes.

Q. Now, Mr Killian, if these wallnipples had been capped on the outside, you would have had to remove these caps in order to extend them into the manhole, would you not?

A. That's right, yes.

Q. Now I understand—(interrupted).

A. (continuing) They were not capped. They had thread protectors on them; that's all there was on there, or in them either one.

Q. But if they had been capped, you would have had to remove the caps?

A. That's right, yes.

Q. Now, when you had this area dug so that the outside openings of these wall nipples were exposed, you testified that there was no oakum or any boarding on those outside ends and that all you saw in the pipes was some sand?

A. Yes.

Q. So that you looked through the pipes?

A. That's right.

Q. And in looking through the pipes you could see they were not capped on the inside?

Dep. page 34 } A. No, I couldn't see; I mean, I didn't get down in the ditch, lay down and look through the pipe.

Charlie M. Killian.

I could see that there was sand in there. I couldn't see the other end of the pipe, not through the wall, no. But I was told that they weren't capped.

Q. Who told you that?

A. Well, the foreman, Joiner.

Q. Mr. Joiner told you?

A. Yes.

Q. That they were not capped on the inside?

A. Yes.

Q. And that was at the time that these pipes were exposed by digging?

A. That's right, yes.

Q. Now, Mr. Killian, did you know what was to be done on the building—that is, you must have known that there was to be some connection from the inside openings of the wall pipe to some point inside the building that would require an extension of the conduit, did you not?

A. Yeah, I figured there must have been.

Q. As a matter of fact, you knew that they had to be connected up with a switch box?

A. That's right, yes.

Q. After you tied into the manhole, then did you fill in that area level or almost with the street?

Dep. A. Yes.

page 35 } Q. So that neither the nipples, the wall nipples
or the extension into the manhole could be seen
after you filled in?

A. That's right, neither one of them could be seen.

Q. You first constructed and installed the manhole?

A. Right.

Q. And you then tied into the manhole?

A. Yes.

• • • • •

A Copy—Teste:

H. G. TURNER, Clerk.

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