In The

Supreme Court of Virginia

RECORD NO. 081863

EILEEN M. McLANE,
FAIRFAX COUNTY ZONING ADMINISTRATOR,

Appellant,

v.

DEREK B. VEREEN and
ANGELIQUE VEREEN,

Appellees.

BRIEF OF APPELLEES

Jerry K. Emrich (VSB No. 4732)
WALSH, COLUCCI, LUBELEY,
EMRICH & WALSH, P.C.
2200 Clarendon Boulevard, 13th Floor
Arlington, Virginia 22201
(703) 528-4700 (Telephone)
(703) 528-6050 (Facsimile)
jemrich@arl.thelandlawyers.com

Counsel for Appellees

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦www.thelexgroup.com

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V I R G I N I A:

IN THE SUPREME COURT OF RICHMOND

EILEEN M. McLANE, FAIRFAX COUNTY ZONING ADMINISTRATOR	**)**
	)
Appellant,	**)**
	)
v.	**)RECORD NO. 081863**
	)
DEREK VEREEN, *et al*	**)**
	)
Appellees.	**)**

BRIEF OF APPELLEES

Appellees, Derek B. Vereen and Angelique Vereen, by Counsel, assert this appeal should be dismissed for failure to comply with the Rules of the Supreme Court; or, alternatively, the decision of the Circuit Court should be affirmed.

I. ADDITIONAL QUESTIONS PRESENTED

1. Is the order ruling on a motion for reconsideration of what would otherwise be the final order, the actual final order?

2. Must an appellant appeal an order denying a motion for reconsideration when that order states additional grounds for the trial court's decision?

3. Must an Appellant assign error to and argue in its opening brief all of the grounds of a trial court's decision?

4. Did the Circuit Court err in interpreting its own Consent Decree when it applied the Consent Decree in a way to effect what the Zoning Administrator claimed was the purpose of the Consent Decree?

5. Did the Circuit Court suggest the Zoning Administrator waived the right to seek sanctions, when the Circuit Court merely observed that the actions of the Zoning Administrator were inconsistent with what the Zoning Administrator claims was the purpose of the Consent Decree?

6. May the Zoning Administrator avoid the argument in the future that sanctions are unenforceable penalties by simply including an express waiver of that claim in future consent decrees?

II. STATEMENT OF CASE AND MATERIAL PROCEEDINGS

In addition to the proceedings mentioned in the Zoning Administrator's opening brief, the Zoning Administrator filed a motion for reconsideration after the Circuit Court's order of June 18, 2008. This motion and the denial of the motion were mentioned in the facts section of her brief, but they were not otherwise referred to in the brief. The Circuit Court entered an order on July 9, 2008, denying the motion, but the Zoning Administrator neither states in her brief which order she considers to be the

final order, nor which order is being appealed. The July 9, 2008, order stated reasons for the ruling that were not contained in its June 18, 2008, letter opinion and order: the Consent Decree was not self-executing, and it was the Zoning Administrator's position that the Consent Decree is a written contract. Judge Ney entered all three orders involved in the case, the Consent Decree and the orders of June 18 and July 9, 2008.

The July 9, 2008, order has not been appealed to this Court.[1] The notice of appeal of the June 18, 2008 order, which was filed has not been included in the Appendix, but the Court is requested to consider it. Rule 5:32(h). A copy of the notice of appeal is included as Exhibit A to this brief. In addition, no objections were made to the July 9, 2008, order in the Circuit Court; and there have been no assignments of error relating to it. The July 9, 2008, order was entered within 21 days of the June 18, 2008, order.

[1] This conclusion is based on not having received a copy of a notice of appeal from the Zoning Administrator relating to the July 9, 2008 order, on her failing to include a copy in the Appendix in view of the fact that this issue was raised in the opposition to the petition for appeal, and on the fact that the opening brief does not identify which order is being appealed.

III. FACTS

The Circuit Court did not state during the June 13, 2008 hearing, as the Zoning Administrator's petition for appeal stated, that it had lost jurisdiction, although it observed that may be the case. (Petition 10 & 11). The Zoning Administrator repeated her statement in her brief, but this time she included in a footnote the Circuit Court's exact statement which was that the Circuit Court was not sure if he had the authority the Vereens argued he had. (App. 13).

The Vereens argued at the June 13, 2008, hearing that the Consent Decree was not self-executing, and the Circuit Court could refuse to enforce it if it was a penalty. (App. 24-5).

The following statement was made by the Zoning Administrator in her motion for reconsideration of the June 18, 2008, letter opinion and order: "The Consent Decree is a written contract between the Zoning Administrator and the Vereens." (App. 95). This position was repeated in the Zoning Administrator's opening brief in this Court: "The Consent Decree is a written agreement between the Zoning Administrator and the Vereens, which was memorialized in an order that was approved and entered by the Circuit Court on June 4, 2007." (Brief 9).

The Zoning Administrator argued in the Circuit Court that the Consent Decree did not provide for penalties or liquidated damages; she said they are a "prospective incentive intended to motivate the Defendants to comply with the agreement without delay." (App. 49-50). However, the Circuit Court noted, "The Vereens are now in compliance and have been in compliance with the Consent Decree for over two months, yet the Zoning Administrator is requesting sanctions in the amount of $20,600 for the 206 days which the Vereens did not comply with the Consent Decree. By seeking these sanctions now – after the Vereens are in compliance – the Zoning Administrator is no longer using them as an incentive to induce compliance, but rather as a penalty for the Vereens' delayed compliance." (App. 87).

During the June 18, 2008, hearing the Circuit Court asked counsel for the Zoning Administrator how the County was damaged by the delay in compliance. Counsel did not respond directly. Instead, he stated that the $100 a day charge was a "coercive sanction… to clean up the properties." (App. 80).

The Circuit Court, in his July 9, 2008, order commented on the effect of treating the Consent Decree as a written contract:

> It is the Zoning Administrator's position that the Consent Decree is a written contract. Were that so, a determination of whether the stipulated damages are a penalty or a liquidated damage award would be necessary. 'When the stipulated amount would grossly exceed actual damages, courts of law usually construe such a provision as an unenforceable penalty.' Perez v. Capital One Bank, 258 Va. 612, 616, 522 S.E.2d 874, 876 (1999). As a result, even if the Consent Decree were a contract, the court would find $100 per day to grossly exceed actual damages suffered by the Zoning Administrator and the County of Fairfax. (App. 109).[2]

While the Circuit Court found the sanctions requested by the Zoning Administrator were unenforceable penalties, the Zoning Administrator's motion for sanctions also asked the Circuit Court to "Grant such other relief as the Court may deem just and proper." (App. 24). The Consent Decree contemplated that the Circuit Court might impose sanctions in addition to the $100 per day claimed by the Zoning Administrator. (App. 20). The Circuit Court found a sanction of $3,500.00 was appropriate. (App. 87).

The Zoning Administrator states in the facts section of her opening brief that on March 14, 2008, she stated in Circuit Court that a continuance would not stay the $100 a day sanction. (App. 11); However, neither a transcript nor a narrative statement of the proceedings on March 14, 2008, has been prepared and made part of the record, so the statement may not

[2] If the provision of an agreement provides for unenforceable penalties, the aggrieved party may recover actual damages. O'Brien, 256 Va. at 552, 507 S.E. 363 (1998).

be considered by this Court. Rule 5:11. The Zoning Administrator did state in her motion for reconsideration that the statement mentioned in her brief had been made. (App. 92). However, that does not satisfy the Rule.[3]

IV. ARGUMENT

A. THE FINAL ORDER HAS NOT BEEN APPEALED NOR WERE OBJECTIONS MADE AND PRESERVED

When a motion for reconsideration of what otherwise would be a final order is made, the order ruling on that motion is the final order, not the order which was the subject of the motion for reconsideration. Wilcox v. Lauterbach Electric Co., 233 Va. 416, 357 S.E.2d 197 (1987). In that case, what otherwise would have been the final order was entered on August 26, 1985. A motion to vacate the judgment order of August 26, 1985, order was filed on September 5, 1985, which was within the twenty-one (21) day provision of Rule 1:1. An order suspending the August 26, 1985, was entered on September 16, 1985. On December 23, 1985, an order was entered which confirmed and ratified the August 26, 1985 order, and which denied the motion for reconsideration. A petition for appeal was filed within three months of the December 23, 1985 order but not within three months of the August 26, 1985 order. This Court held that the December 23, 1985,

[3] The Vereens did not respond to the motion for reconsideration, because prevailing parties are directed not to respond unless the court directs them to respond. Fairfax Circuit Court Practice Manual, Sec. E-2.04.

order was the final order and that the petition for appeal was timely, rejecting the argument that the date on which the three month period began to run was August 26, 1985.

In the instant case, the Zoning Administrator was required to appeal the final order within thirty (30) days of its entry, which she did not do. Rule 5:9. This rule is mandatory. Vaughn v. Vaughn, 215 Va. 328, 210 S.E.2d 140 (1974). The final order was entered in the instant case on July 9, 2008, when the motion for consideration was denied. (App. 109). This was within 21 days of the June 18, 2008, order.

In addition, the Circuit Court stated its conclusion in the July 9, 2008, order that "The main issue always presented here is whether a consent decree is self-executing. This court finds that it is not." (App. 109). The Circuit Court did not address in its June 18, 2008, letter opinion or its June 18, 2008, order the Vereens' argument that the Consent Decree the Zoning Administrator sought to enforce was not self-executing and that the Zoning Administrator was required to come back to court and ask the court to enforce the provisions of the Consent Decree.

The Zoning Administrator has not only failed to appeal the order of July 9, 2008, which included this finding, she did not object in the Circuit Court to the determination that the Consent Order was not self-executing

as she was required to do by Rule 5:25, nor has she assigned error to or argued the point in her petition for appeal or her brief. Rule 5:17(c) and Wolfe v. Commonwealth, 265 Va. 193, 576 S.E.2d 471 (2003). Thus, the Zoning Administrator is precluded from arguing on appeal that the Circuit Court erred.

B. THE CIRCUIT COURT DID NOT MODIFY THE CONSENT DECREE

The Circuit Court did not modify the Consent Decree, it interpreted its own decree, and applied it in a manner to effect the same purpose the Zoning Administration claims the Consent Decree was intended to serve: prospectively coerce compliance, not impose penalties. This is the same purpose of the Consent Decree of the Zoning Administrator asserted in the Circuit Court, as the Court stated in Pearsall v. Richmond R & H Authority, 218 Va. 892, 908, 242 S.E.2d 228, (1978). "This is an appellate court, and it hears cases on the theory upon which they were tried in the lower court, reviewing those points properly raised, decided, and preserved." Strauss v. Princess Anne Marine, 209 Va. 217, 221-22, 163 S.E.2d 198, 202 (1968).

Although the Circuit Court refused to enforce the penalty provision of the Consent Decree, he did, as requested by the Zoning Administrator,

"Grant such other relief as the Court may deem just and proper." It imposed a sanction of $3,500.00. [4]

C. THE CIRCUIT COURT CORRECTLY DETERMINED THE SANCTIONS WERE UNENFORCEABLE PENALTIES

The Zoning Administrator takes the position that the Consent Decree is an agreement. The Court held in O'Brien v. Langley School, 256 Va. 547, 507 S.E.2d 363 (1998) that a party to an agreement that provides for penalties may successfully oppose enforcement of the penalties by a court. The Zoning Administrator admits that she was required to go to court to enforce the Consent Decree. (App. 10). As this admission established, and as the Circuit Court ruled, the Consent Decree was not self-executing. The Circuit Court refused to do exactly what this Court held in O'Brien that Virginia Courts should not do: enforce an agreement providing for penalties. Again, the Zoning Administrator has not objected to nor appealed the ruling that the Consent Order was not self-executing.

D. THE CIRCUIT COURT DID NOT SUGGEST THE ZONING ADMINISTRATOR WAIVED THE CLAIM FOR SANCTIONS

The Circuit Court did not suggest the Zoning Administrator had waived a claim for sanctions by agreeing to a continuance nor did the Vereens argue that position. The Circuit Court merely observed that the

[4] The Zoning Administrator stated in her opening brief on page 14, that the Circuit Court had found the Vereens to be in contempt.

Zoning Administrator's argument for sanctions after the Vereens had brought the property into compliance suggested the sanctions were no longer being used as an incentive. "By seeking these sanctions now – after the Vereens are in compliance – the Zoning Administrator is no longer using them as an incentive to induce compliance, but rather as a penalty for the Vereen's delayed compliance." (App. 87). In making this statement, the Circuit Court was simply observing that the Zoning Administrator's actions were inconsistent with what she claimed was the purpose of the sanctions, and this confirmed the conclusion that they were penalties.

E. AFFIRMANCE WOULD NOT REQUIRE TRIAL OF EVERY CASE

The Zoning Administrator stated in her motion for reconsideration, "If the Court modifies the express terms of the Consent Decree, then the Zoning Administrator has no incentive to settle these cases in the future by entering into consent decrees, and this could result in the parties having to litigate all zoning enforcement actions in the future. This is why sanctions under the Consent Decree are not a penalty; they are simply an incentive to comply with the terms of the Consent Decree in a timely manner." (App. 94-5). All the Zoning Administrator needs to do in the future is to follow the teaching of Gordonsville Energy v. Virginia Power, 257 Va. 344, 512 S.E.2d 811 (1999), and include a provision in the consent decrees that the

property owner waives the right to assert the "sanction" is a penalty. A property owner who agrees to this provision could not assert the sanction is a penalty.

V. CONCLUSION

The appeal should be dismissed or; alternatively; the Circuit Court's decision should be affirmed.

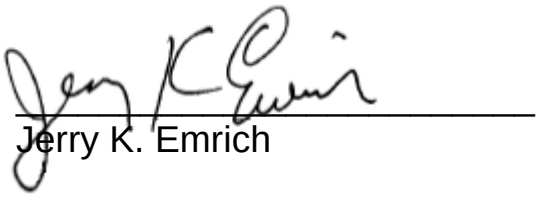
Respectfully Submitted,
DEREK VEREEN
ANGELIQUE VEREEN
By Counsel

Jerry K. Emrich, Esq. (VSB No. 4732)
WALSH, COLUCCI, LUBELEY,
EMRICH & WALSH, P.C.
2200 Clarendon Blvd., 13th Floor
Arlington, Virginia 22201
(703) 528-4700
Facsimile: (703) 528-6050
jemrich@arl.thelandlawyers.com

CERTIFICATE OF COMPLIANCE

Pursuant to Va. Sup. Ct. R. 5:26(d), on this 4th day of February, 2009, Twelve (12) copies of the foregoing Appellees' Brief were hand filed in the office of the clerk of the Supreme Court, and one copy was emailed to: scvbriefs@courts.state.va.us. Three copies of the foregoing were mailed via first-class mail to the following counsel:

David P. Bobzien, VSB No. 12027
County Attorney
R. Scott Wynn, VSB No. 22380
Senior Assistant County Attorney
Paul T. Emerick, VSB No. 33443
Assistant County Attorney
12000 Government Center Parkway, Suite 549
Fairfax, Virginia 22035
(703) 324-2421
Facsimile: (703) 324-2665



Jerry K. Emrich

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

EILEEN M. McLANE, FAIRFAX COUNTY ZONING ADMINISTRATOR,	
Plaintiff	
v.	**Case No. CL-2006-0009795**
DEREK B. VEREEN,	
and	
ANGELIQUE VEREEN,	
Defendants.	

NOTICE OF APPEAL

COMES NOW the Plaintiff, Eileen M. McLane, Fairfax County Zoning Administrator, by counsel, pursuant to Rule 5:9 of the Rules of the Supreme Court of Virginia (2008), and hereby gives notice of her appeal to the Supreme Court of Virginia from the Final Order entered by the Circuit Court in this case on June 18, 2008, and further states that the transcript for this case will be hereafter filed. The Zoning Administrator certifies, by counsel, that a copy of the transcript has been ordered from the Court reporter who reported the case.

EILEEN M. McLANE, FAIRFAX COUNTY
ZONING ADMINISTRATOR

By: _____
Counsel

EXHIBIT
A

DAVID P. BOBZIEN
COUNTY ATTORNEY

By _____

Paul T. Emerick (VSB No. 33443)
Assistant County Attorney
12000 Government Center Parkway, Suite 549
Fairfax, Virginia 22035-0064
(703) 324-2421; fax (703) 324-2665
Counsel for Plaintiff Eileen M. McLane,
Fairfax County Zoning Administrator

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of July 2008 a true copy of the foregoing Notice of Appeal was sent by first class mail, postage prepaid, to Jerry K. Emrich, Esquire, Walsh, Colucci, Lubely, Emrich & Walsh, P.C., 2200 Clarendon Boulevard, 13th Floor, Arlington, Virginia 22201, counsel for Defendants.

_____
Paul T. Emerick