IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

Record No. 090254

UNITED LEASING CORPORATION,

Appellant,

v.

THE LEHNER FAMILY BUSINESS TRUST,

Appellee.

REPLY BRIEF OF APPELLANT

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I. THE TRUST'S WAIVER ARGUMENTS LACK MERIT

The Trust concedes that United Leasing moved to strike the Trust's evidence at the close of the Trust's case-in-chief based on "the insufficiency of the evidence of Hugo Garcia's authority" to assign the claims of Garcia's, Inc. Trust Brief at 15, n.7. The Trust also concedes that United Leasing made the following unqualified renewal of its motion to strike following all the evidence: "Renew my motion to strike. For the record, I want to renew my motion to strike." JA196. Nor does the Trust dispute that the trial court acknowledged in the Final Order its understanding that United Leasing renewed its motion to strike. JA038.

The Trust nonetheless contends that United Leasing waived its objection to the sufficiency of the evidence regarding the purported assignment's validity because, in renewing its motion to strike, United Leasing did not reiterate the already-stated grounds for its motion. No authority--whether a statute, rule, or case--supports the Trust's position that a motion to renew previously stated grounds for a motion to strike must be treated as a nullity unless the movant wastes the trial court's time with needless repetition of arguments the trial court has already heard. Indeed, the law is clearly to the contrary.

That law is Code § 8.01-384. The Trust completely ignores this statute, but it provides: "No party, after having made an objection or motion known to the court, shall be required to make such objection or motion again in order to preserve his right to appeal, challenge, or move for reconsideration of, a ruling, order, or action of the court." Code § 8.01-384(A). It further provides that arguments made at trial, "unless *expressly* withdrawn or waived, are preserved." *Id.* (emphasis added). "Once a litigant informs the circuit court of his or her legal argument, '[i]n order for a waiver to occur within the meaning of Code § 8.01-384(A), the record must affirmatively show that the party who has asserted an objection has abandoned the objection or has demonstrated by his conduct the intent to abandon that objection." *Helms v. Manspile,* 277 Va. 1, 6, 671 S.E.2d 127, 129 (2009).

The Trust's argument turns Code § 8.01-384 on its head. The Trust would have this Court construe an unqualified renewal of a motion as a waiver of previously stated arguments. Rather than require an express withdrawal of an argument, such construction would affirmatively require a party to repeat arguments previously made to the trial court, in contravention of the statute's command.

The Trust also complains that United Leasing's unqualified renewal violates Rule 5:25. Nothing in Rule 5:25, however, mandates that having stated the grounds for a motion, a party must repeat the grounds again when it later renews the motion. Moreover, Code § 8.01-384 overrides any requirement of Rule 5:25 in this context. *Helms,* 277 Va. at 7, 671 S.E.2d at 130 ("Code § 8.01-384(A) . . . is controlling over Rule 5:25, and we must apply the statutory provision.").

The cases the Trust cites do not support its position either. None holds that a party must restate grounds already communicated to the trial court when it renews a motion to strike. To the contrary, those cases hold merely that a defendant waives objections to the sufficiency of the evidence by making no motion to strike at all following the completion of the evidence. *Ortiz v. Commonwealth*, 276 Va. 705, 723, 667 S.E.2d 751, 762 (2008) (defendant did not move to strike after all the evidence); *Spangler v. Commonwealth*, 188 Va. 436, 438, 50 S.E.2d 265, 266 (1948) (defendant failed to renew his motion to strike after presenting evidence); *Rawle v. McIlhenny*, 163 Va. 735, 740, 177 S.E. 214, 216 (1934) (same). Because United Leasing renewed its motion to strike at the conclusion of all the evidence, these cases are inapposite.

The Trust's other waiver arguments are equally meritless:

- The Trust contends United Leasing did not satisfy Rule 5:25 because its motion to strike at the close of the Trust's case-in-chief allegedly "talks about the 'relinquishment' of 'rights', not removal of Hugo Garcia or his 'voluntary resignation' from *any* corporate position within Garcia's Inc." Trust Brief at 12, n.6 (emphasis in original). That argument misapprehends the record. United Leasing does not contend that Hugo was removed as a director, and thus it did not need to argue that point to preserve its objection. Rather, United Leasing contends that Hugo lacked authority to make the assignment because he resigned as director, and it expressly argued that point below. United Leasing argued: "Director, officer, any--he [Hugo] resigned as all of his titles. He resigned when he left." JA164. The Trust acknowledged that argument, stating in opposition: "Your Honor, two points I guess they have raised on their motion to strike. The first is that the assignment--Mr. Garcia was not a director at the time he executed the assignment." JA167. *See also* JA169 (Trust counsel discussing the evidence that Hugo resigned as director).

- The Trust asserts that United Leasing told the trial court that it renewed its motion to strike on "only" one ground - "that the Trust had failed to prove that there was a 'deficiency.'" Trust Brief at 18. The Trust refers

to the colloquy on the third day of trial, which is discussed on pages 16-17 of United Leasing's opening brief. That exchange occurred the day after United Leasing had already made an unqualified renewal of its motion to strike, and any suggestion that United Leasing's vigorous assertion of one ground on this occasion constitutes an affirmative withdrawal of its previously stated grounds is unsupported in both reason and law. The trial court short-circuited argument on that occasion before United Leasing finished. United Leasing never stated on that occasion--or any other time--that it renewed its motion to strike "only" on the ground that there was no deficiency. The use of the word "only" is an invention by the Trust.[1]

- Code § 8.01-384 precludes the Trust's contention that a waiver occurred because United Leasing's motions for new trial did not renew its challenge to the assignment's validity. That statute provides that the "failure to make a motion for new trial shall not be deemed a waiver of any

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[1] The Trust also alters the format of the transcript. The quotation recounted on page 18 of the Trust's brief is formatted as a single paragraph response by United Leasing. The transcript actually shows a new paragraph beginning after the answer "Yes." JA244. That reveals there was a pause after the answer and that counsel then began to discuss the first ground for the motion. The trial court terminated further argument without United Leasing ever saying that there was no other ground for its renewed motion to strike. JA248.

objection made during the trial if properly made a part of the record." Code § 8.01-384(B). The two cases the Trust cites are not to the contrary, because in those cases the defendant did not raise its objection in either a motion to strike or a post-trial motion. Neither case holds that having challenged the sufficiency of the evidence through a motion to strike, a defendant must renew that objection in a post-trial motion. *Little v. Cooke*, 274 Va. 697, 718, 652 S.E.2d 129, 141-42 (2007) (holding that defendants waived objection to the sufficiency of the evidence for punitive damage award because they did not raise the issue either by a motion to strike, a motion to set aside the verdict, or in their post-trial brief); *Schnupp v. Smith*, 249 Va. 353, 368, 457 S.E.2d 42, 50 (1995) (accord).

- The Court's decision in *Wright v. Norfolk & W. Ry. Co.*, 245 Va. 160, 427 S.E.2d 724 (1993), defeats the Trust's argument that United Leasing's agreement to the form of the jury instructions waived its objection to the sufficiency of the evidence. In that case, the Court held that a defendant's agreement to the form of instructions on contributory negligence did not waive its objection to the sufficiency of plaintiff's evidence on that issue. Distinguishing *Hilton v. Fayen*, 196 Va. 860, 86 S.E.2d 40 (1955), and the other decisions the Trust cites, the Court explained that those decisions concern the different situation where a party agrees to an instruction that

embodies a different substantive legal standard than advocated on appeal (such as agreeing to an instruction that provides that an individual partner is liable for an partnership debt but then arguing on appeal that only the partnership can be liable, as was the case in *Hilton*, or agreeing at trial that contributory negligence is a jury issue and then arguing on appeal that contributory negligence is a question of law, as in *City of Richmond v. Holt*, 264 Va. 101, 563 S.E.2d 690 (2002)). This Court has rejected the position that a defendant who objects to the sufficiency of the evidence on an issue cannot propose language for jury instructions on that issue, stating that such a view, "would require the harshest and most technically narrow interpretation of the law of waiver." *Wright*, 245 Va. at 168, 427 S.E.2d at 728.

The record here is clear. United Leasing moved to strike on the ground that the Trust failed to prove that Hugo had the authority to assign Garcia's claims. United Leasing twice renewed its motion to strike. The trial court heard and understood that United Leasing renewed its motion to strike. United Leasing was required to do no more to preserve this issue.

II. THE TRUST'S EVIDENTIARY ARGUMENTS LACK MERIT

The Trust faces an insuperable problem. The jury instructions required the Trust prove that Hugo was a director and trustee in liquidation

when he executed the purported assignment, yet the clear, unequivocal, and undisputed testimony by Hugo was that he was not. Hugo took the stand as the Trust's star witness on the validity of the assignment. To attempt to carry its burden of proof, the Trust's counsel specifically asked Hugo whether he was a director at the time of the assignment. Hugo denied it:

> Q: You were a director of the company at that time, correct?
>
> A. Not at that time, was before when the company was up.

JA149, lines 17-20. Hugo thereafter reiterated that he resigned as a director of Garcia in 2002, some 4 years before the purported assignment. JA152-153.

Faced with this definite and clear-cut testimony, the Trust asserts that the jury could reasonably infer the opposite of what Hugo testified--that is, the jury could rely on Hugo's testimony that he was ***not*** a director to conclude that he ***was***. The scope of inferences that juries reasonably may draw does not extend to inferences that negate plain, unambiguous, and undisputed testimony. *Ragland v. Rutledge*, 234 Va. 216, 219, 361 S.E.2d 133, 135 (1987) (because "inferences are never allowed to stand against ascertained and established facts," an inference may not "be employed to

contradict positive testimony that is otherwise unrebutted"); *Virginia Transit Co. v. Schain*, 205 Va. 373, 377, 137 S.E.2d 22, 25 (1964) (an inference "must be a fair inference, one which may reasonably be drawn. It must not be in derogation of, nor a stranger to, the evidence from which it allegedly emanates").

The Trust's other arguments fare no better. The Trust's main sufficiency argument is that there was no evidence that United Leasing "terminated" or "removed" Hugo as a director. That is beside the point. It does not matter why or how Hugo ceased to be a director. The only relevant issue is whether the Trust proved that Hugo was a director and trustee in liquidation when he executed the assignment. And on that issue, Hugo's testimony was plain and uncontradicted--he was not a director, having resigned some 4 years earlier.

The Trust also argues that "[a]ny 'voluntary resignation' by Hugo Garcia was ineffective as a matter of law" because Code § 13.1-679(A) requires that "every resignation by a director be 'written'" and delivered to the 'board of directors or its chairman or to the secretary of the corporation.'" Trust Brief at 27. Code § 13.1-679(A), however, imposes no such mandate. It provides merely that a director "may" resign through such written notice. Code § 13.1-679(A).

In any event, there is no evidence that Hugo's resignation was other than in due form. Hugo's testimony that he was not a director when he executed the assignment and that he resigned in April 2002 was competent evidence. That evidence was unrebutted, and no jury instruction required a written resignation to make Hugo's resignation effective.

The Trust cannot satisfy its burden of proof by complaining that United Leasing did not introduce additional evidence to show the method of Hugo's resignation. United Leasing did not have to introduce any evidence at all, and if the record were silent about Hugo's status, United Leasing would still be entitled to prevail. United Leasing had no burden to prove or disprove anything.

If the Trust believed that Hugo's resignation was ineffective because it allegedly was not in writing, it could have adduced that fact (if it is true) and then asked for an instruction on this issue. The Trust made the strategic decision not to pursue any such line of questioning or to challenge Hugo's testimony that he resigned as a director. Having acquiesced in that evidence at trial, the Trust cannot complain on appeal that the evidence is not competent.

And this does not even address the fact that under the agreed jury instruction, the Trust had to prove that Hugo was both a director and a

trustee in liquidation. The Trust utterly ignores that there was no evidence whatsoever that Hugo met this second requirement. The Trust's proof failed, therefore, irrespective of whether Hugo's resignation as director was ineffective.

The remaining evidence the Trust cites is likewise irrelevant. It fails to prove that Hugo was a director and trustee in liquidation at the time of the purported assignment:

- The Trust cites two documents--one from February 2001 (JA62) and one from March 2002 (JA55)--that refer to Hugo as a director. Those documents are irrelevant, because the jury instruction required the Trust to prove that Hugo was a director in 2006 when he executed the assignment and Hugo testified that he resigned in April 2002, after the two documents the Trust cites. Those two documents provide no evidence that Hugo was reinstated sometime after he resigned.

- The Trust argues that United Leasing's April 2002 letter (JA61) merely sought to remove Hugo as president of Garcia's, Inc. That letter was broader than the Trust contends. It included as agenda items the "[f]uture management" of Garcia's, Inc. and "[o]ther matters as may be appropriate." That encompassed potential removal of Hugo from the company's management as director, and in any event, the uncontradicted

evidence is that Hugo resigned as director after receiving this letter notwithstanding what the letter specifically states.

- The Trust asserts that Hugo said he left "in accordance with and pursuant to the terms of the" April 2002 letter. Trust Brief at 11. Hugo said no such thing, and the language the Trust uses in its brief does not appear on the referenced pages of the transcript, JA157-158. What appears there is Hugo's assent to the different question whether he "followed the terms of the letter" and "left the business." That he resigned as president and "left the business" does not contradict his testimony that he also resigned as director.

- Citing JA149, the Trust states that Hugo gave "direct testimony" that he made the assignment as the "trustee in liquidation." Trust Brief at 38. Hugo, however, never uttered those words. The Trust's lawyer used that phrase in asking Hugo if he had been a trustee in liquidation, but Hugo evaded the question. His answer was: "whatever it was, I accepted [the assignment] because I needed money at this point." JA149. The Trust's counsel elected not to follow-up and have Hugo answer the question. As it was left, Hugo's answer had no probative value on whether he was a trustee in liquidation. *Norfolk & P.B.L.R. Co. v. C.F. Mueller Co.*, 197 Va. 533, 90 S.E.2d 135 (1955) (evasive answer lacks probative value).

- The Trust contends that Hugo "confirmed to the Jury that he was offered $50,000 for the Assignment and that he 'accepted'" the money. Trust Brief at 9. That fact is irrelevant. That Hugo accepted money for the purported assignment does not prove that he had authority to make it.

- Likewise irrelevant is James Lehner's testimony. Lehner never testified one way or the other whether Hugo was a director and trustee in liquidation. The Trust notes that Lehner testified that he "asked [Hugo] would he sell me the rights to the company and he said he would," JA160-161, and that Lehner also "accepted" the assignment which he understood assigned all claims "the Garcias" had, JA193. That testimony proves nothing pertinent to this appeal. If Hugo agreed to sell Lehner the Brooklyn Bridge in response to Lehner's request, and Lehner accepted the sale and understood that it transferred all of Hugo's claims thereto, the Trust still would not own it.[2]

- The Trust wrongly seeks to rely on various statements from United Leasing's opening and closing statements. Those statements are not

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[2] It also should be noted that the Trust artfully did not ask Lehner whether he understood the assignment conveyed all the claims of Garcia's, Inc. He asked instead about the claims of "the Garcias." That is a reference to the brothers Hugo and Aurelio Garcia, whose purported rights also were included the attempted assignment.

evidence. *Westlake Properties, Inc. v. Westlake Pointe Property Owners Ass'n, Inc.*, 273 Va. 107, 119, 639 S.E.2d 257, 264 (2007) (noting that "opening statements are not evidence"); *Cook v. Hayden*, 183 Va. 203, 226, 31 S.E.2d 625, 634 (1944) ("The statements of counsel [concerning facts to be proved] . . . were not evidence"). Equally important, those statements do not address whether Hugo was a director and trustee in liquidation. They merely reference that the Trust acquired its claim from Hugo. None of those statements concedes that Hugo was authorized to assign any claims of Garcia's, Inc.

- The Trust asserts, at page 20 of its brief, that United Leasing "affirmatively conceded" the assignment's validity by stating in its post-trial motion: "The Trust allegedly was assigned rights by the Company, Garcia's Brothers and Hugo Garcia." JA51. Recitation of the Trust's allegation does not concede the truth of that allegation. Similarly, the two references in that motion to the Trust as "Hugo Garcia's assignee" does not concede that the Trust was a valid assignee of Garcia's, Inc. Those references (JA46 & JA51-52) were made in the context of discussing potential claims on behalf of Hugo individually that the purported assignment also allegedly conveyed in addition to any by the corporation.

- Finally, the Trust contends that the jury could believe Hugo was "kind of throwing up his hand" and left Virginia "in frustration." Trust Brief at 13. Hugo's reason for leaving is irrelevant. That has no bearing on his authority to make a valid assignment. At pages 38-39 of its brief, the Trust recounts Hugo's "kind of throwing up his hand" as evidence the jury considered. That is incorrect. The trial court made that statement outside the jury's presence. JA202.

III. CONCLUSION

The Trust's welter of arguments misstate the law and record. None overcomes the Trust's failure to prove a valid assignment, and the trial court should have granted the motion to strike.

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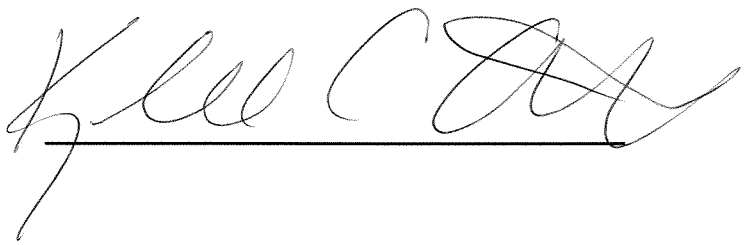
Certificate

I hereby certify that, in compliance with Va. Supreme Court Rule 5:26(d):

1. Fifteen copies of the Reply Brief of Appellant were filed by hand in the Office of the Clerk of this Court on August 17, 2009.

2. Three copies of the Reply Brief of Appellant were mailed to Todd M. Ritter, Esq., Daniels & Morgan, 11901 Iron Bridge Road, P.O. Box 3570, Chester, Virginia 23831-8481, on August 17, 2009.

3. An electronic copy of the Reply Brief of Appellant, on a CD in the PDF format, was filed by hand in the Office of the Clerk of this Court on August 17, 2009.