IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

Record No. 090254

UNITED LEASING CORPORATION,

Appellant,

v.

THE LEHNER FAMILY BUSINESS TRUST,

Appellee.

OPENING BRIEF OF APPELLANT

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To the Chief Justice and the Justices of the Supreme Court of Virginia: United Leasing Corporation, by counsel, seeks reversal of the judgment in this breach of contract action.

I. NATURE OF THE CASE

Appellant United Leasing Corporation (United Leasing) leased trucks and trash containers to Garcia's, Inc. (Garcia), a trash removal business, over a period of 15 years. Garcia's owners eventually had a falling out and left the company a wreck, causing Garcia to default on several of these leases. United Leasing, which had borrowed millions of dollars to purchase the leased equipment, foreclosed on the collateral securing the leases to attempt to recover its losses.

Several years later, a former director of Garcia, who had long since ceased to have anything to do with Garcia, was contacted by Appellee The Lehner Family Business Trust (Trust). The Trust was not a complete stranger to the relationship between United Leasing and Garcia. The Trust's principal, James Lehner (Lehner), was a disgruntled former United Leasing employee who had helped dispose of Garcia's collateral. Lehner contacted the former director after unsuccessfully trying to seize control of one of United Leasing's affiliates.

At Lehner's behest, the former director purported to assign to the Trust claims by Garcia against United Leasing. The Trust thereafter sued United Leasing, claiming that United Leasing realized a surplus from the disposition of Garcia's collateral. A jury returned a verdict for the Trust, and the trial court entered judgment accordingly.

The judgment is erroneous and should be reversed because the purported assignment is invalid. Garcia did not exist at the time of the purported assignment, and the undisputed trial testimony of the former director, appearing as the Trust's own—and only—witness on this point, established that the former director lacked authority to assign any claims on Garcia's behalf.

II. ASSIGNMENT OF ERROR

1. The trial court erred in denying United Leasing's motion to strike the Trust's evidence because the evidence does not establish that Hugo Garcia (Hugo) had authority to assign Garcia's alleged breach of contract claim to the Trust.

III. QUESTIONS PRESENTED

1. Was Hugo authorized to assign Garcia's alleged breach of contract claim to the Trust? (Relates to Assignment of Error No. 1).

2. Did United Leasing waive its motion to strike based on Hugo's lack of authority to assign Garcia's claims? (Relates to Assignment of Error No. 1).

IV. STATEMENT OF FACTS

A. Garcia's Leases

Founded by brothers Aurelio and Hugo Garcia, Garcia was a Virginia corporation that ran a trash collection and hauling business based in Triangle, Virginia. Starting in the 1980s, Garcia leased trucks, trash containers and other equipment from United Leasing pursuant to a series of leases. *See* Dx2 (JA079-JA128) (seven of the leases between United Leasing and Garcia). United Leasing borrowed substantial money to buy the items its leased to Garcia. JA190c-190d.

The leases were collateralized. In addition to the leased items, Garcia pledged as security its accounts receivables and proceeds. *E.g.*, JA120 (Lease 4388: including as collateral "All Debtors accounts, general intangibles, documents & chattel paper . . . whether the foregoing are now owned or hereafter acquired & wherever located, and the proceeds of the foregoing"). Garcia also provided a deed of trust to its place of business as additional security. *E.g.,* JA079 (Lease 4077: identifying as additional collateral deed of trust to 18417 Joplin Road, Triangle, Virginia). Further,

Aurelio and Hugo guaranteed the leases and gave a deed of trust to their respective residences as security. *E.g.,* JA084, JA090, JA096, JA102, JA110, JA119, JA129.

Aurelia and Hugo provided a stock pledge agreement as additional security in 2001 when Garcia experienced financial difficulty. Dx1 (JA062). Garcia was behind in its payments under the leases in the beginning of 2001. *See id* (3rd recital). Rather than foreclose on Garcia's collateral, United Leasing gave Garcia time to bring its payments current. *See id.* (6th recital). United Leasing even entered new leases with Garcia in 2001 notwithstanding its delinquency. JA149a. Aurelio and Hugo gave the stock pledge agreement in connection with United Leasing's forbearance to allow Garcia time to get back on its feet. JA150-150a.

The stock pledge agreement authorized United Leasing, among other things, to vote Aurelio's and Hugo's shares in Garcia in the event Garcia defaulted on the leases. Dx1 § 7 (JA063-64). The agreement also called for the appointment of United Leasing's president, Edward Shield, to become a director of Garcia. Dx1 § 13.B (JA065).

B. Garcia's Default And Hugo's Resignation

Garcia's problems persisted after execution of the stock pledge agreement. Aurelio and his son set up a competing business and,

according to Hugo, transferred Garcia's customer accounts to that competing concern. Hugo also testified that Aurelio pocketed customer payments instead of turning them over to Garcia. JA149c-150, 152.

Garcia again fell behind in its lease payments and eventually stopped making payments. United Leasing worked with Hugo and Aurelio to find an investor who could buy Garcia. JA151b-151c, JA182-183. Those efforts were not fruitful, and after months of non-payment, United Leasing declared Garcia in default in April 2002. JA179, JA182-183.

Upon Garcia's default, United Leasing called a board of director's meeting of Garcia. The stated agenda for the meeting included "[t]ermination of Hugo Garcia as President of Garcia's, Inc.," "[f]uture management of Garcia's Inc.", and any "[o]ther matters as may be appropriate." Px49 (JA061).

Upon receipt of the notice and without waiting for the board meeting, Hugo voluntarily resigned as a director and officer of Garcia and moved to Florida. JA152-153. In Hugo's words, he was "out" of Garcia from that point. JA153.

C. United Leasing's Liquidation Of Garcia

Assuming control of Garcia following Hugo's resignation, United Leasing discovered that Garcia was in "total chaos." JA187. Hugo had taken all the cash in Garcia's bank accounts when he resigned, and Garcia had no money to meet payroll and pay bills. JA183-186.

Garcia's tangible assets were no better. A number of its containers were missing, and many of its trucks were "worn out" and inoperable. Its office furniture consisted largely of 15- to 20-year-old desks and chairs and was mostly "junk." Its computers had been stripped of all data. JA185-188.

United Leasing faced an impossible situation. United Leasing relied on the lease payments to repay the money it borrowed to buy the trucks and containers leased to Garcia. Garcia, however, could not make the lease payments because of the disarray in which Hugo and Aurelio left it. JA190b-190d. Nor were investors willing to purchase Garcia because of fears over potential liability arising from Garcia's questionable waste disposal activities. JA190-190b.

United Leasing thus formed United Refuse LLC as a workout vehicle with the aim of establishing a viable concern that could be sold. JA184-185. Over the ensuing months, United Leasing repossessed the trucks and containers it had leased to Garcia and transferred them for value to United

Refuse. It conducted a properly noticed UCC Article 9 sale of Garcia's accounts receivables and tangibles in June 2002, at which United Refuse was the high bidder. It duly foreclosed on Garcia's realty. JA185-189.

Garcia had no other collateral and ceased active waste hauling operations in the summer of 2002. JA190e-190f.

D. The Dispute With James Lehner

Lehner was a United Leasing employee who oversaw the disposition of Garcia's collateral and the establishment of United Refuse. JA181, JA184-187, JA189-190. After United Leasing was unsuccessful in selling United Refuse, *see* JA190, Lehner claimed ownership of United Refuse and forced it into bankruptcy in a bid to seize control. Litigation ensued in multiple courts, all of which eventually confirmed United Leasing's ownership of United Refuse and resulted in Lehner's ouster from United Refuse. JA161b.

After his ouster, Lehner formed the Trust and in 2006 paid Hugo $50,000 for the purported assignment. JA148, JA160-161. The assignment purportedly encompasses claims that Garcia has against United Leasing for any surplus from disposition of Garcia's collateral. Although the assignment is critical to its claim, the Trust did not introduce the assignment into evidence at trial.

V. MATERIAL PROCEEDINGS BELOW

A. Pre-Trial Proceedings

The Trust first filed suit against United Leasing and United Refuse on January 10, 2006. The Trust's counsel in that suit had previously represented United Refuse (when Lehner was its manager) in the litigation against United Leasing and was still counsel of record for United Refuse in certain matters. The court disqualified the Trust's counsel, and the Trust thereafter non-suited the lawsuit.

The Trust re-filed suit with the same counsel on May 24, 2007. Its new complaint omitted United Refuse as a party and asserted three counts against United Leasing arising from an alleged surplus in the disposition of Garcia's collateral: breach of contract (Count I); accounting, unjust enrichment and constructive trust (Count II); and conversion (Count III). The complaint contained an additional aiding and abetting claim (Count IV) against Shield. JA001 (Complaint).

United Leasing and Shield filed demurrers and pleas in bar. One of the pleas maintained that the assignment to the Trust was invalid because Hugo ceased being a director of Garcia in 2002 and thus lacked authority to assign Garcia's claims in 2006. JA025 (Second Plea in Bar). The trial

court denied the pleas, holding that they raised factual disputes to be resolved at trial. JA027 (April 29, 2008 Order).

United Leasing and Shield also filed an answer and later an amended answer denying the material allegations of the complaint. The answer expressly denied the Trust's allegation that it was Garcia's assignee. *Compare* JA007 (Complaint ¶ 41, alleging that the Trust is Garcia's assignee) *with* JA021 (Answer ¶ 41, denying that allegation). United Leasing's amended answer made the same denial. JA032 (Amended Answer ¶ 41).

B. Trial Proceedings

Trial commenced on October 28, 2008. The Trust non-suited Shield at the beginning of trial, and the trial proceeded against United Leasing only.

United Leasing moved to strike the Trust's evidence at the close of the Trust's case-in-chief. One ground was that the Trust lacked a valid assignment because Hugo had resigned as a director and lacked authority to assign Garcia's claims. JA163-164. The other ground was that the evidence did not prove that United Leasing collected a surplus. JA164-167. The trial court denied that motion. JA177.

United Leasing renewed its motion to strike at the close of all the evidence. JA196, lines 5-6. The trial court denied the renewed motion as well. JA038 (Final Order).

The trial court refused jury instructions on the conversion count, and the Trust withdrew its unjust enrichment claim. JA208-209. The jury instructions were accordingly limited to the breach of contract claim. JA212-225 (Jury Instructions).

There was disputed evidence over the amount of Garcia's liability under the leases, with United Leasing claiming that Garcia still owed nearly $3 million and the Trust claiming United Leasing realized a $1.1 million surplus. The jury returned a verdict in the Trust's favor. JA037 (Verdict). The trial court overruled United Leasing's motion to set aside the verdict and entered judgment for the Trust. JA038 (Final Order).

United Leasing moved to reconsider the denial of its motion for judgment notwithstanding verdict or, alternatively, to set aside the verdict and for a new trial, or to reduce the judgment. JA040 (Motion). The trial court denied that motion. JA054 (Nov. 24, 2008 Order). This timely appeal followed. JA257(Notice of Appeal).

VI. ARGUMENT

A. The Assignment To The Trust Is Invalid

The undisputed evidence at trial established that Hugo lacked authority to assign Garcia's claims to the Trust. At the Trust's request, *see* JA205, lines 2-7, the trial court gave the following instruction on this issue: "You shall find that a valid assignment existed for Garcia's, Incorporated to Plaintiff, Lehner Family Business Trust, if you find that Hugo was a director and trustee in liquidation of Garcia's, Incorporated and that Mr. Garcia authorized or consented to the transfer of the company's rights, if any, to bring a legal action against Defendant, United Leasing Corporation." JA220, lines 4-12 (emphasis added).

Importantly, the instruction was phrased in the conjunctive, requiring proof that Hugo was both a director and a trustee in liquidation at the time of assignment. That agreed instruction is also law of the case. *T.L. Garden & Assocs. v. First Sav. Bank of Va.*, 262 Va. 28, 31, 546 S.E.2d 705, 706 (2001) ("This [jury] instruction was an agreed instruction and became the law of the case."). As law of the case, the agreed instruction governs this appeal even if it is an incorrect statement of law. *Supervalu, Inc. v. Johnson*, 276 Va. 356, 367, 666 S.E. 2d 335, 341 (2008) ("Jury instructions that contain incorrect statements of law but were agreed upon

by the parties become the law of the case. "), citing *Ulloa v. QSP, Inc.*, 271 Va. 72, 80, 624 S.E.2d 43, 48 (2006), and *King v. Sowers*, 252 Va. 71, 76-77, 471 S.E.2d 481, 485 (1996).

Hugo possessed neither capacity required by the agreed instruction. Hugo expressly testified that he was not a director at the time of the purported assignment in 2006. Hugo testified in his direct examination that when he received the April 2002 notice of board of directors' meeting and learned of United Leasing's intent to take over Garcia, he "left the company." JA151, lines 11-13. He was out as president and "everything of the company at that time." JA151, lines 15-16 (emphasis added).

Consistent with that testimony, Hugo expressly denied that he was a director of Garcia when he executed the assignment. The Trust's counsel specifically asked Hugo whether he was a director at the time of the assignment, and 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 did not waver from that testimony in cross-examination. Hugo reiterated in the following exchange that he resigned as a director of Garcia in 2002, some 4 years before the purported assignment:

> Q: Okay. Now, you said that you resigned all of your interests in the partnership, or you said you resigned all of your interests in Garcias Inc., is that correct, and left for Florida?
>
> A: Yes.
>
> Q: And so far as you understood, you were no longer an officer; is that correct?
>
> A: Yes, ma'am.
>
> Q: And as far as you intended, you were no longer a director; is that correct?
>
> [overruled objection omitted]
>
> A: Yes.

JA152-153.

There was no contrary evidence. No witness testified that Hugo was a director of Garcia in 2006. In fact, no other witness testified at all about Hugo's status as a director. Likewise, no exhibit showed that Hugo was reinstated as a director after he resigned in April 2002.

That Hugo was not a director of Garcia in 2006 is fatal to the Trust's claim under the agreed instructions, as those instructions required proof of Hugo's status as both a director and trustee in liquidation. But there is more. There is no evidence that Hugo was a trustee in liquidation either.

The sole bit of evidence at trial touching on the matter was the following question and answer from Hugo's direct examination by the Trust:

> Q: Mr. Garcia, you signed, you made the assignment to the Lehner Family Business Trust in January of 2006?
>
> A. Yes, I did.
>
> Q. And you signed that document as the trustee in liquidation?
>
> A. Well, whatever it was, I accepted because I needed money at this point.

JA149, lines 9-16. That exchange did not establish that Hugo was a trustee in liquidation of Garcia when he signed the assignment. Hugo's answer established his motive for signing the assignment, but it was non-responsive on whether he was a trustee in liquidation. As such, it does not constitute evidence that Hugo was a trustee in liquidation.

Indeed, the record indicates that Hugo could not have been a trustee in liquidation in light of his testimony that he resigned as a director in April 2002. The term "trustee in liquidation" is a term of art that applies to a terminated corporation. When a corporation's corporate existence is terminated, its properties and affairs pass to its then directors as "trustees in liquidation." Code § 13.1-752. "The assets of the corporation automatically pass to them in their new capacity." *Flip Mortgage Corp. v. McElhone*, 841 F.2d 531, 535 (4th Cir. 1988).

The record does not indicate the precise date Garcia's corporate existence was terminated. However, it occurred sometime after April 2002 as United Leasing disposed of Garcia's collateral by which time, according to Hugo, he was no longer a director. Hugo, therefore, could not have been a trustee in liquidation based on this record.

Because the Trust did not prove both of the requirements mandated in the agreed instruction, it failed to prove an essential element of its claim. The Trust's rights as a purported assignee cannot rise higher than those of its purported assignor. *Fidelity & Cas. Co. of N.Y. v. First Nat. Exch. Bank of Va.*, 213 Va. 531, 538, 193 S.E.2d 678, 684 (1973) ("The Bank, claiming as assignee of the subcontract proceeds, can have no greater rights than its assignor."); *Sutton Co. v. Wise Contracting Co.*, 197 Va. 705, 709, 90 S.E.2d 805, 808 (1956) (noting that defendant "concedes that as a general rule an assignee can rise to no greater height than his assignor").

Since Hugo had no right to make an assignment, the Trust has no rights as an assignee. And without such rights, the Trust cannot remain in possession of the judgment obtained in the trial court. *See also* Am. Jur. Corporations § 1238 ("The rights, duties, and liabilities of an officer or director of a corporation generally terminate with his or her resignation.").

B. United Leasing Did Not Waive Its Motion

The Trust argued in opposition to the petition for appeal—and presumably will argue again—that United Leasing failed to preserve its objection to the trial court's denial of its motion to strike. The Trust argues that a waiver occurred because United Leasing allegedly did not renew its motion to strike at the close of all the evidence. The Trust is mistaken.

Following the close of the Trust's rebuttal case on the second day of trial, United Leasing expressly renewed its motion to strike. United Leasing did so as follows: "Renew my motion to strike. For the record, I wanted to renew my motion to strike." JA196, lines 5-6.

That renewal was unqualified. It did not "renew in part" United Leasing's motion to strike or abandon as a ground Hugo's lack of authority to assign Garcia's claims.

Further, the trial court understood and expressly ruled that United Leasing renewed its motion to strike after the close of all the evidence. The trial court acknowledged this in its Final Order, which recounts: "After hearing plaintiff's rebuttal evidence, counsel for the defendant renewed their motion to strike." JA038.

The Trust rests its waiver argument on what transpired on the third day of trial, the day *after* United Leasing renewed its motion to strike. After

the jury retired on the third day, the trial court *sua sponte* took up United Leasing's renewed motion. JA244. The Trust contends that United Leasing did not re-argue the assignment issue on this occasion, but the Trust overlooks two critical matters.

First, United Leasing made an unqualified renewal of its motion to strike even on that occasion. At the beginning of the exchange on the third day of trial, the trial court again asked United Leasing if it wanted to renew its motion to strike and once again its answer was an unqualified yes:

> The Court: Ms. Elliott, you want to renew your motion to strike?
>
> Ms. Elliott: Yes.

JA 244, lines 19-21.

Second, United Leasing at no time withdrew or otherwise said it abandoned Hugo's lack of authority as a ground for the motion to strike. What happened instead was that the trial court interrupted United Leasing's argument and cut off further discussion, declaring that "there's factual issues in there that jury may have to look at and work out." JA248, lines 10-14.

Having previously expressed the grounds for its motion to strike, United Leasing was not required to repeat them. This follows from Code § 8.01-384(A) which 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."

As this Court held in *Helms v. Manpile*, 277 Va. 1, 671 S.E.2d 127 (2009), "[o]nce 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.'" *Id.* at 6, 671 S.E.2d at 129, citing, *Shelton v. Commonwealth*, 274 Va. 121, 127-28, 645 S.E.2d 914, 917 (2007); *King v. Commonwealth*, 264 Va. 576, 581, 570 S.E.2d 863, 865-66 (2002); *Chawla v. BurgerBusters, Inc.*, 255 Va. 616, 623, 499 S.E.2d 829, 833 (1998).

The record does not affirmatively show that United Leasing abandoned Hugo's lack of capacity as a ground for its motion to strike. To the contrary, United Leasing twice stated that it renewed that motion. That preserves United Leasing's right under Code § 8.01-384(A) to challenge the denial of that motion.

VII. CONCLUSION

The Court should reverse the judgment below and enter judgment for United Leasing. Proof of a valid assignment is a critical element of the Trust's claim. That proof failed, and the Trust is not entitled to any relief against United Leasing.

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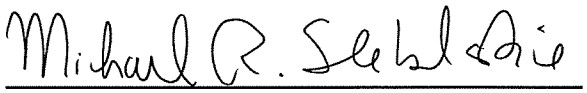
Certificate

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

1. Fifteen copies of the Opening Brief of Appellant and the Joint Appendix were filed by hand in the Office of the Clerk of this Court on July 14, 2009.

2. Three copies of the Opening Brief of Appellant and the Joint Appendix were mailed to Todd M. Ritter, Esq., Daniels & Morgan, 11901 Iron Bridge Road, P.O. Box 3570, Chester, Virginia 23831-8481, on July 14, 2009.

3. An electronic copy of the Opening Brief of Appellant and the Joint Appendix, on a CD in the PDF format, was filed by hand in the Office of the Clerk of this Court on July 14, 2009.