In The

Supreme Court of Virginia

RECORD NO. 091661

VIRGINIAN-PILOT MEDIA COMPANIES, LLC,

Appellant,

v.

DOW JONES & COMPANY, INC.,

Appellee.

BRIEF OF APPELLANT

Conrad M. Shumadine (VSB No. 4325)
Brett A. Spain (VSB No. 44567)
WILLCOX & SAVAGE, P.C.
One Commercial Place, Suite 1800
Norfolk, Virginia 23510
(757) 628-5500 (Telephone)
(757) 628-5566 (Facsimile)
cshumadine@wilsav.com
bspain@wilsav.com

Counsel for Appellant

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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THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

Virginian-Pilot Media Companies, LLC ("Virginian-Pilot") brought this appeal to resolve a conflict as to whether circuit courts have the authority to determine if a newspaper qualifies to publish legal advertisements pursuant to Virginia Code § 8.01-324(A). In the past year, Dow Jones & Company, Inc. ("Dow Jones") filed at least eleven (11) separate petitions seeking to have *The Wall Street Journal* (the "WSJ") qualified as a newspaper of "general circulation" for the purposes of publishing legal advertisements in Virginia. Dow Jones began each of these proceedings by filing *ex parte* petitions without notice to the public or any interested party. Along with each petition, Dow Jones presented a form order for entry certifying that the WSJ meets the qualifications of a newspaper of "general circulation" as set forth in Virginia Code § 8.01-324(A). Without any opponent to engage in the adversarial process and fully and faithfully develop the issues, Dow Jones succeeded in obtaining orders in all eleven courts without any substantive discussion as to whether these courts had subject matter jurisdiction to even consider the petitions.

The present matter comes before the Court from a Motion to Intervene and Set Aside Order filed by the Virginian-Pilot in the Circuit Court for the City of Virginia Beach. The Virginian-Pilot filed a similar

motion in the City of Norfolk along with its parent company Landmark Media Enterprises, LLC ("Landmark"). In addition to these challenges, the Washington Post filed an action in Prince William County seeking a declaratory judgment that the WSJ does not meet the requirements of Section 8.01-324. Media General Operations, Inc. filed three separate motions in Richmond, Henrico County, and Chesterfield County arguing that those courts did not have subject matter jurisdiction to entertain the original petitions. The Free Lance-Star filed similar motions in Stafford County and Spotsylvania County. In total, eight courts were asked to reconsider the prior rulings.[1]

As of the filing of this brief, six courts have vacated their prior orders, finding that Section 8.01-324(A) does not provide subject matter jurisdiction to grant the relief requested by Dow Jones.[2] Copies of these orders are included in the attached addendum. In addition, one court (Prince William

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[1] Dow Jones also filed petitions in Arlington County, Loudoun County, and Fairfax County. The Washington Post is still considering whether to challenge these petitions.

[2] These include the courts (1) in Richmond, Henrico County, Spotsylvania County, and Stafford County, which found no standing to intervene by the respective parties but *sua sponte* held that jurisdiction did not exist; and (2) in Norfolk and Chesterfield County, where the courts found no jurisdiction and, accordingly, did not address standing.

County) has yet to rule. The matter presently before the Court is the sole opinion upholding an order authorizing Dow Jones to publish legal notices.

ASSIGNMENTS OF ERROR

1. The trial court erred in holding that it had subject matter jurisdiction to consider Dow Jones' Petition for Authority To Publish Legal Notices and Other Legal Business Pursuant to Virginia Code § 8.01-324(A).
2. The trial court erred in holding that the Virginian-Pilot did not have standing to intervene to challenge Dow Jones' Petition or the trial court's order granting the Petition.

QUESTIONS PRESENTED

1. Did the trial court err in ruling that Virginia Code § 8.01-324(A) gives a circuit court the subject matter jurisdiction to determine whether a particular newspaper meets the qualifications of the statute? (Ass. of Err. 1)
2. Did the trial court err in ruling that the Virginian-Pilot did not have standing to intervene to challenge Dow Jones' Petition or the trial court's order granting the Petition? (Ass. of Err. 2)

STATEMENT OF FACTS

On May 7, 2009, Dow Jones filed its Petition pursuant to Va. Code § 8.01-324(A) seeking an order authorizing its newspaper, the WSJ, to publish "legal notices, ordinances, resolutions, notices or advertisements." (Joint Appendix, hereinafter "JA," at 44). Dow Jones did not serve its Petition or provide notice to any other parties. *Id.* Along with its Petition, Dow Jones filed a Praecipe to place the matter on the court's docket for the following Friday, May 15, 2009. *Id.*

On May 14, 2009, the court entered an Order finding that Dow Jones met the requirements of Va. Code § 8.01-324(A) and "that it is proper to authorize Petitioner to publish legal notices in the City of Virginia Beach," and authorizing the WSJ "to publish ordinances, resolutions, notices and advertisements required by law in the City of Virginia Beach." *Id.* at 44-45. The court entered the Order as proposed and submitted by counsel for Dow Jones. *Id.* at 45. The court did not hold a hearing on the Petition prior to entry of the Order on May 14, 2009. *Id.*

On June 4, 2009, exactly 21 days after entry of the court's Order, counsel for the Virginian-Pilot discovered the Order after reviewing online court records. *Id.* Counsel immediately contacted the Court to determine whether a hearing could be scheduled, and contacted counsel for Dow

Jones to request a telephonic hearing time. *Id.* The Virginian-Pilot filed a brief Motion to Intervene and to Set Aside Order (the "Motion") shortly thereafter requesting that the court set aside its prior order to allow the Virginian-Pilot to present arguments in opposition to the Petition, including without limitation whether the court had the authority to enter the order, whether the WSJ qualified as a newspaper of "general circulation," and whether Dow Jones could properly file a lawsuit in Virginia without first having obtained a certificate of authority to transact business in the Commonwealth. *Id.*

The Virginian-Pilot scheduled a telephonic hearing with the court at 2:30 p.m. that same day, June 4, 2009, within hours of filing its Motion with the court. *Id.* Given time constraints, neither the Virginian-Pilot nor Dow Jones filed a brief prior to the hearing. *Id.* at 45-46. During the hearing, counsel for the Virginian-Pilot argued in favor of intervention to raise the arguments identified in its Motion. *Id.* at 46. Counsel also pointed out that the Circuit Court of the City of Norfolk had previously permitted Dolan's Business Observer to intervene in a similar matter filed on behalf of *Inside Business*, a publication affiliated with the Virginian-Pilot. *Id.* Counsel also noted that Judge Poston in Norfolk had determined that Va. Code § 8.01-

324(A) did not provide the court with the authority to consider this type of petition. *Id.*

After hearing argument from counsel, the court denied the Virginian-Pilot's Motion and reaffirmed that it had subject matter jurisdiction to consider Dow Jones' Petition and enter its May 14, 2009 Order. *Id.* An Order setting forth the court's ruling on June 4, 2009 was entered on June 11, 2009. *Id.* at 46-47. The Virginian-Pilot timely filed its Notice of Appeal on June 12, 2009. *Id.* at 47.

ARGUMENT

I. THE COURT LACKED SUBJECT MATTER JURISDICTION TO CONSIDER DOW JONES' PETITION UNDER SECTION 8.01-324(A)

A. Subject Matter Jurisdiction Is Never Implied and Can Only be Created by the Constitution or by Statute

In its Brief in Opposition to the Virginian-Pilot's Petition for Appeal, Dow Jones all but ignores the primary question as to whether the circuit court had the subject matter jurisdiction necessary to consider its Petition. Subject matter jurisdiction is a "threshold" question. *Spencer v. City of Norfolk*, 271 Va. 460, 462, 628 S.E.2d 356, 357 (2006). Without subject matter jurisdiction, a circuit court has no power to act and any order rendered is a complete nullity that can be impeached "directly or collaterally by all persons, anywhere, at any time, or in any manner." *Barnes v. Am.*

Fertilizer Co., 144 Va. 692, 705, 130 S.E. 902, 906 (1925), *accord Singh v. Mooney*, 261 Va. 48, 52, 541 S.E.2d 549, 551 (2001); *Hicks v. Mellis*, 275 Va. 213, 219, 657 S.E.2d 142, 145 (2008).

Relying on Virginia Code § 17.1-513, Dow Jones argues that, unless a statute carves out an exception to jurisdiction, circuit courts have subject matter jurisdiction over any case filed by any party. This formulation inverts the law of Virginia and violates the fundamental principle of our constitutional system that courts acquire subject matter jurisdiction only by constitutional or statutory grant:

> "'By jurisdiction over the subject matter is meant the nature of the cause of action and of the relief sought, and this is conferred by sovereign authority which organizes the court and is to be sought for in the general nature of its powers, or in the authority specifically conferred.' *Cooper v. Reynolds*, 77 U.S. 308, 10 Wall. 308, 19 L.Ed. 931. If not fixed by the Constitution, the legislature alone can determine of what subjects the several courts of the State shall have jurisdiction. No consent of parties can confer it, and a judgment outside the jurisdiction is simply void." *Thacker v. Hubard*, 122 Va. 379, 94 S.E. 929, 21 A.L.R. 414.

Barnes, 144 Va. at 706, 130 S.E. at 906; *see also In re Commonwealth*, 278 Va. 1, 11, 677 S.E.2d 236, 240 (2009).

Article VI, Section 1 of the Constitution of Virginia states, in relevant part:

> The judicial power of the Commonwealth shall be vested in a Supreme Court and in *such other courts of original or appellate jurisdiction subordinate to the Supreme Court as the General Assembly may from time to time establish*. Trial courts of general jurisdiction, appellate courts and such other courts as shall be so designated by the General Assembly shall be known as courts of record.
>
> The Supreme Court shall, by virtue of this Constitution, have original jurisdiction in cases of habeas corpus, mandamus, and prohibition; to consider claims of actual innocence presented by convicted felons in such cases and in such manner as may be provided by the General Assembly; in matters of judicial censure, retirement, and removal under Section 10 of this article, and to answer questions of sate law certified by a court of the United States or the highest appellate court of any other state. All other jurisdiction of the Supreme Court shall be appellate. Subject to such reasonable rules as may be prescribed as to the course of appeals and other procedural matters, the Supreme Court shall, by virtue of this Constitution, have appellate jurisdiction in cases involving the constitutionality of a law under this Constitution or the Constitution of the United States and in cases involving the life or liberty of any person.
>
> The General Assembly may allow the Commonwealth the right to appeal in all cases, including those involving the life or liberty of a person, provided such appeal would not otherwise violate this Constitution or the Constitution of the United States.
>
> *Subject to the foregoing limitations, the General Assembly shall have the power to determine the original* and appellate *jurisdiction of the courts of the Commonwealth*.

(Emphasis added).

The Constitution of Virginia directs the General Assembly to confer jurisdiction on the circuit courts by statute. The General Assembly has by statute conferred upon the circuit courts "original and general jurisdiction of *all civil cases*," with certain exceptions. *See* Va. Code Ann. § 17.1-513 (2003 & Supp. 2009). Civil "cases" do not arise simply because someone files a lawsuit. The power to render a declaratory judgment illustrates the point. Prior to the enactment of the declaratory judgment statute, Va. Code § 8.01-184, common law dictated that no declaration of rights could be judicially addressed until a right had been violated. *Am. Nat'l Bank & Trust Co. v. Kushner*, 162 Va. 378, 386, 174 S.E. 777, 780 (1934). The declaratory judgment statute vested circuit courts with jurisdiction "to afford relief from the uncertainty and insecurity attendant upon controversies over legal rights." *Erie Ins. Group v. Hughes*, 240 Va. 165, 170, 393 S.E.2d 210, 212 (1990). In other words, the declaratory judgment statute supplemented the legislature's grant of common law-based jurisdiction by giving circuit courts the jurisdiction to provide the right of "preventative relief" where an actual controversy exists but a harm has not yet resulted. *Liberty Mut. Ins. Co. v. Bishop*, 211 Va. 414, 419, 177 S.E.2d 519, 522 (1970). Under Dow Jones' view, the declaratory judgment statute is meaningless.

Contrary to Dow Jones' assertion, legal remedies have two sources in Virginia--common law and statute. The General Assembly, through the "reception statute," adopted the common law of England as the basis of the common law in Virginia. Va. Code Ann. § 1-200 (2008). Case law and treatises are the sources for the subject matter of the common law and for the extent of its jurisdiction, except where modified by statute. *See* W. Hamilton Bryson, *Bryson on Virginia Civil Procedure* § 2.02 (4th ed. 2005) (discussing the origins of subject matter jurisdiction and common law in Virginia). Common law cases providing for legal or equitable rights and remedies define the limits of the subject matter that may be heard and decided by the circuit courts of Virginia unless the General Assembly expands (or restricts) that jurisdiction by statute.

Dow Jones cites no common law basis for asserting jurisdiction over its Petition, which exists, if at all, pursuant to Section 8.01-324. That section, however, does not contain any express grant of jurisdiction, nor can jurisdiction be implied under established Virginia law.

B. <u>The Inclusion of a Jurisdictional Basis To Seek Court Approval in Subsection B and a Corresponding Omission in Subsection A Is Fatal to Dow Jones' Petition</u>

Courts begin with the plain language of a statute. Where the language does not create an ambiguity, it simply means what it says.

Travelers Prop. Cas. Co. of Am. v. Ely, 276 Va. 339, 344, 666 S.E.2d 523, 526 (2008). It is not the task of the courts to infer a meaning that is not plain on the face of the statute, or to substitute a reading that prefers a result not plainly contemplated by the General Assembly. *Temple v. City of Petersburg*, 182 Va. 418, 422, 29 S.E.2d 357, 359 (1944).

This case involves the interpretation and application of Virginia Code § 8.01-324, which states as follows:

> **§ 8.01-324. Newspapers which may be used for legal notices and publications.** – A. Whenever any ordinance, resolution, notice, or advertisement is required by law to be published in a newspaper, such newspaper, in addition to any qualifications otherwise required by law, shall:
>
> 1. Have a bona fide list of paying subscribers;
>
> 2. Have been published and circulated at least once a week for twenty-four consecutive weeks without interruption for the dissemination of news of a general or legal character;
>
> 3. Have a general circulation in the area in which the notice is required to be published;
>
> 4. Be printed in the English language; and
>
> 5. Have a second-class mailing permit issued by the United States Postal Service.
>
> B. However, a newspaper which does not have a second-class mailing permit may petition the circuit court for the jurisdiction in which the newspaper is located for authority to publish ordinances, resolutions, notices or advertisements. Prior to filing the petition, the newspaper shall publish a notice of intention to file a petition pursuant to this section in a newspaper published or having general circulation in the

> jurisdiction in which the petition will be filed. The court shall grant the authority for a period of one year upon finding that the newspaper (i) meets the requirements of subdivisions A 2, A 3, and A 4; (ii) has been continually published for at least one year, employs a full-time news staff, reports local current events and governmental meetings, has an editorial page, accepts letters to the editor and is, in general, a news forum for the community in which it is circulated; (iii) has a circulation within the community to which the publication is directed and maintains permanent records of the fact and substance of the publication; and (iv) has an audit of circulation certified by an independent auditing firm or a business recognized in the newspaper industry as a circulation auditor. The authority shall be continued for successive one-year periods upon the filing of an affidavit certifying that the newspaper continues to meet the requirements of this subsection.

Id. The plain language of Section 8.01-324 separates newspapers into two categories. Newspapers with a second class mailing permit fall into one category (Subsection A), and newspapers without such a permit fall into another (Subsection B).

Section 8.01-324(B) expressly states that "a newspaper which does not have a second-class mailing permit may petition the circuit court for the jurisdiction in which the newspaper is located for authority to publish ordinances, resolutions, notices or advertisements." In contrast, Section 8.01-324(A) contains no similar grant of jurisdiction. Dow Jones attempts to justify the omission in Subsection A by arguing that because Section 8.01-324(B) requires a petition to the circuit court, the statute somehow suggests that a party proceeding under Subsection (A) at least has the

option of petitioning the court for approval. That argument, however, conflicts with settled rules of statutory construction that the inclusion of enumerated rights in a statute and a corresponding omission of other rights indicates a positive legislative intention to exclude the omitted matters. *Turner v. Wexler*, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992). A review of similar cases from this Court makes this point clear.

In *Garrett v. Majied*, 252 Va. 46, 471 S.E.2d 479 (1996), for example, this Court rejected an attempted extension of a right to exhume a body beyond the grounds permitted by statute in Virginia Code § 32.1-286. Subsection (A) of the statute only permitted a court to enter an order of exhumation where a body and been buried without investigation to determine the cause of death and where the Chief Medial Examiner authorized the subsequent investigation. Subsection (B) stated that, "[a]ny party in interest may petition the judge of the circuit court exercising jurisdiction over the place of internment and, upon proper showing of sufficient cause, such judge may order the body exhumed." *Id.* at 48 n.1, 471 S.E.2d at 480. The plaintiff sought an order to exhume a body to conduct a paternity test. Although the lower court and the parties assumed that Subsection (B) permitted the lower court to enter such an order, the Court reversed finding a lack of subject matter jurisdiction:

> The statute provides the grounds and procedures for the issuing of an exhumation order under very specific circumstances. Subsection A authorizes exhumation only when death was the result of one of the causes listed in Code §32.1-283, such as trauma, injury, or violence or where the death occurred under any suspicious, unnatural, or unusual manner. Furthermore, Subsection A restricts exhumation under this section to circumstances where the Chief Medical Examiner authorizes investigation of the death. Subsection B provides the procedural conditions for implementing Subsection A; it does not create blanket statutory authority to order exhumation regardless of the reason.
>
> * * *
>
> Based on the analysis set out above, we conclude that Code § 32.1-286 does not authorize an exhumation order for the purpose of establishing paternity. Brown's death was not alleged to have resulted from any cause listed in Code § 32.1-283, and no medical examiner authorized further investigation of the circumstances of Brown's death. Therefore, the trial court was without subject matter jurisdiction to enter an exhumation order based on Code § 32.-286.

Id. at 48-49, 471 S.E.2d at 480.

Garrett demonstrates the appropriate analysis for subject matter jurisdiction. As noted above, jurisdiction is not a default rule from which the General Assembly carves exceptions. Subject matter jurisdiction only exists pursuant to "the Constitution or some statute." *Afzall v. Commonwealth*, 273 Va. 226, 230, 639 S.E.2d 279, 282 (2007). Where a statute creates jurisdiction for a court to address certain enumerated matters, implicit jurisdiction does not exist over related, but non-

enumerated matters simply because a party files suit and thus starts a "case." The General Assembly, not a circuit court, can supply the missing jurisdiction as it later did with the exhumation statute. *See Martin v. Howard*, 273 Va. 722, 725, 643 S.E.2d 229, 231 (2007) (affirming an order of exhumation to conduct a paternity test and noting that the General Assembly had amended the statute following *Garrett* to give circuit courts jurisdiction to enter such orders).

Courts have applied this basic analysis to any number of cases to reject claims of implied or inherent jurisdiction. *See*, *e.g.*, *Norton v. City of Danville*, 268 Va. 402, 407-08, 602 S.E.2d 126, 129 (2004) (finding no authority to question the underlying constitutionality of a zoning ordinance in a review of a locality's decision because the review statute only granted limited jurisdiction to review such decisions, which did not include questioning the constitutionality of the ordinance); *Earley v. Landsidle*, 257 Va. 365, 370-71, 514 S.E.2d 153, 156 (1999) (finding no subject matter jurisdiction to entertain a case by the Attorney General pursuant to Virginia Code § 8.01-653 to declare proposed spending by the General Assembly

unconstitutional when that statute only provides jurisdiction for the Attorney General to defend the constitutionality of proposed spending).[3]

C. The Official Charged with Selecting a Newspaper Has the Right To Make the Selection with the Presumption that the Official Will Select the Newspaper that Is Most Likely To Give Notice

Dow Jones does not dispute that Section 8.01-324(A) lacks any express mechanism for petitioning a court for approval to publish legal notices. Instead, Dow Jones argues that the statute simply does not make "sense" without a petitioning process. Dow Jones points to a number of statutes that require the publication of legal notices and asserts that it would be illogical to impose the requirement but not grant circuit courts the authority to determine which newspapers qualify for publication. Accordingly, Dow Jones asks the Court to apply the "*in pari materia*"

[3] In its various filings, Dow Jones has cited Va. Code § 8.01-216.8, Va. Code § 3.2-3942(E), and Va. Code § 13.1-813(B) as examples of statutes that carve out exceptions to the "broad" grant of subject matter jurisdiction. Each of those statutes, however, limit express grants of authority found elsewhere in the code. Section 8.01-216.8 contains a limitation on jurisdiction provided in Section 8.01-216.5. Section 3.2-3942(E) similarly limits jurisdiction provided by subsections B and F of that statute. The last statute limits the injunctive power of a circuit court, which is an express power provided by Section 8.01-620 of the Virginia Code. Under Dow Jones' backward view of jurisdiction, none of these express grants were required because they would be implied under the language of Section 17.1-513.

doctrine to resolve the "conflict" between the statutes. This argument, however, presumes a conflict that does not exist.

The absence of a petitioning process was not a mistake, but rather reflects a conscious plan to allow the public body responsible for the notice to determine the best publication. The Attorney General addressed this precise issue in a 1982 opinion. *See* 1981-82 Va. Op. Atty. Gen 269. That opinion provides as follows:

> Occasionally, the particular statute requiring publication will specify the identity of the official who shall select the newspaper. In those cases, the designated officials should determine whether the newspaper meets the prescribed qualifications. In the absence of a statute, the law generally provides that the official within whom the law has vested the duty to cause a notice to be published is the proper person to select a newspaper through which the notice is to be published. *See New Haven Publishing Co. v. County Court of Mason County*, 124 W.Va. 513, 20 S.E.2d 675 (1942); *Creek County v. Robinson*, 114 Okl. 163, 245 P. 584 (1926), and 66 C.J.S. Newspapers § 10 (1950). Accordingly, unless a particular statute specifies otherwise, I am of the opinion that the public official or body that is required to cause the notice to be published has the authority to designate the newspaper in which that notice is to be published.

Id. In a second opinion issued the same year, the Attorney General reached the same conclusion in opining that the Board of Supervisors of York County was the correct body to determine whether the *York Town Crier* qualified as a newspaper of general circulation. 1982-83 Va. Op. Atty. Gen. 372 ("With regard to your second question, whether or not a

newspaper proposed to be used for publication of official notices is one of 'general circulation' is a factual determination to be made by the public official or body that is required to cause the notice to be published"). As this Court has repeatedly held, "[t]he legislature is presumed to have had knowledge of the Attorney General's interpretation of the statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General's view." *Beck v. Shelton*, 267 Va. 482, 492, 593 S.E.2d 195, 200 (2004) (*quoting Browning-Ferris, Inc. v. Commonwealth*, 225 Va. 157, 161-62, 300 S.E.2d 603, 605-06 (1983)).

The rationale for an administrative selection process rather than a judicial determination stems from the tension that exists between legislatively mandated notice in newspapers and the need to protect the rights of affected individuals. The Supreme Court of Virginia explained this tension in *A.S. White & Co. v. Jordan*, 124 Va. 465, 98 S.E. 24 (1919), and the importance of the administrative selection process in balancing the power of the court and the legislature. As the Court noted, "[t]he courts cannot run a race of opinions of right reason and expediency with the law-making power." *Id.* at 468, 98 S.E. at 25. Importantly, though, the Court recognized that the judicial deference accorded to legislatively created notice procedures was only proper where the statute mandating the

specific notice requirement is reasonably calculated to provide notice. *Id.* ("It is agreed that the courts cannot condemn any method of service which the legislature prescribes, *if it appears reasonably probable that the method prescribed will give the defendant notice of the proceeding and afford him an opportunity to defend*") (emphasis added). The court later repeated the same concept in different words, stating, "[i]f the legislature has prescribed a kind of notice by which it is reasonably probable that the party proceeded against will be apprised of what is going on against him, and an opportunity is given him to defend, and the notice is given as the law required, this will be held sufficient, and due process of law." *Id.*

Applying those principles, the court held that the law presumes that the official charged with selecting the newspaper will pick the publication most likely to give notice. In the court's words, it is only when a statute is "so safeguarded" that it will be deemed valid, and any construction of the statute that requires less must be avoided:

> Thus construed, the statute does not authorize publication to be made at the option of the plaintiff "in any newspaper of the State," as is claimed, but only in such newspaper as may be directed by the judge or clerk in the order. There is a presumption that the impartial officials charged with this duty will require the publication to be made in such newspaper as is most likely to give notice to the defendant. Under a statute so safeguarded, the courts should not run a race of opinion with the legislature and say that it is not probable that such a publication will give sufficient notice. If the language of the

> statute is fairly susceptible of two constructions, under one of which it is valid and under the other invalid, the courts should adopt the construction which sustains its validity rather than the other, for there is always the presumption that the legislature intended to respect constitutional inhibitions and to pass a valid statute.

Id. at 470, 98 S.E. at 26.

Jordan is useful in several respects relevant to this case. First, it rejects the notion of jurisdiction to approve newspapers generally to publish legal advertising and instead provides jurisdiction on a case-by-case basis when publication is actually mandated. Thus, there is no conflict in the statutory scheme as the law permits a specific public official or body to select an appropriate newspaper for publication. Second, it incorporates, as it must, the rule of statutory construction that would uphold the constitutionality of constructive notice through publication in the only manner possible – with a presumption that the notice will be published in the newspaper most likely to give notice. As the Court also noted, in order for notice to satisfy due process it must be "reasonably probable that the party proceeded against will be apprised of what is going on against him, and an opportunity is given him to defend …." *Id.* at 468, 98 S.E. at 25.

When viewed in the context of these decisions, the jurisdictional question becomes clear. Courts simply do not have the authority to issue orders certifying newspapers to publish legal notices under Section 8.01-

324(A). The selection of a newspaper and the determination of whether it meets the statutory criteria is left to the public official or body responsible for publishing the notice. The law presumes that the public official or body will exercise that discretion consistent with due process. When operated in that fashion, the statute is constitutional and can exist without judicial interference.

II. THE VIRGINIAN-PILOT HAS STANDING TO INTERVENE

A. If the Court Implies Jurisdiction Based on Subsection B, It Must Also Imply the Procedural Requirements

The inconsistency in Dow Jones' position continues with respect to its argument concerning standing and intervention. Recognizing that Section 8.01-324(A) does not contain any express grant of jurisdiction, Dow Jones asks the Court to find an implied grant. Incredibly, however, Dow Jones asks the Court to borrow the petitioning process in Section 8.01-324(B), while at the same time arguing that the Court should not give any effect to the procedural protections included that section. As a result, Dow Jones argues that it is entitled to an *ex parte* proceeding, filed without notice, which has no discovery and no adversary to assist the circuit court (which has no inherent power to investigate) in addressing the issues before it.

The WSJ's position is without legal or logical support. Because the statute does not authorize an evaluative process by a circuit court, it is

reasonable to conclude that no such process is permissible. *See*, *e.g.*, *In re Petition of Landmark Commc'ns, Inc.*, 58 Va. Cir. 433 (Norfolk 2002). If inherent authority to make a judicial determination exists, then the circuit court plainly has the authority, and perhaps the duty, to authorize the participation of other parties, which is the essence of standing under Virginia law. As this Court explained in *Cupp v. Board of Supervisors*, 227 Va. 580, 589, 318 S.E.2d 407, 411 (1984), "[i]n asking whether a person has standing, we ask, in essence, whether he has a sufficient interest in the subject matter of the case so that the parties will be actual adversaries and the issues will be fully and faithfully developed." If the Virginian-Pilot does is not an adversary, and does not meet the standard for a party that will "fully and faithfully" develop the issues, then no party meets the standard.

The constitutional mandate of courts is to adjudicate, not to investigate. Courts have limited expertise in investigations and lack the basic tools necessary for initiating and implementing such a process on their own. Litigants develop and present facts, and courts evaluate and adjudicate based on what has been presented. There is no basis for assuming that when it passed § 8.01-324(A), the General Assembly intended to authorize courts to investigate and issue decrees in a situation

where the court would only hear from one side and would have no practical alternative but to rubber stamp whatever the petitioner proposed.

If a circuit court has jurisdiction to make a determination, then it plainly has the jurisdiction and authority to permit the participation of adverse parties and to allow a record to be developed through the adversarial process. If there were an implied right to make an adjudication, then that implied right would necessarily include a grant of authority to make an adjudication in a constitutionally appropriate manner involving multiple parties in an adversary proceeding. When the General Assembly did provide for court action in subsection (B) of the statute, it built in procedural due process by authorizing an adversary proceeding. Under Dow Jones' position, no party would have the right to intervene to object to a petition filed pursuant to Subsection B, which expressly requires notice by publication. This would render the notice meaningless, and would mean that once Dow Jones has obtained its *ex parte* order, no party can later challenge that order.

To accept this proposition, the Court would have to agree that the General Assembly, which built procedural due process into Subsection B, intended by its silence in Subsection A to create a process that: (1) proceeds *ex parte*; (2) requires no notice; (3) is not reconsidered

annually to determine whether the statutory criteria continue to be met; and (4) has not afforded any right of action or challenge where authority to a periodical is granted. There is no authority to imply a result so inconsistent with the fundamental concept of the adversarial process.

Rule 3:14 permits intervention "to assert any claim or defense germane to the subject matter of the proceeding." The Virginian-Pilot, as a newspaper of general circulation, as a corporate citizen and as an affiliate of an entity that was denied the exact same certification that Dow Jones obtained, plainly has a claim to assert that is germane to this proceeding.[4] Dow Jones is not entitled to relief requested and denied to a Virginian-Pilot publication, without the Virginian-Pilot at least being given the opportunity to intervene and object. *See generally Black & White Cars, Inc. v. Groome Transp., Inc.*, 247 Va. 426, 442 S.E.2d 391 (1994) (finding standing to challenge a competing company's use of the word "taxi" or "taxi-cab" in advertisements).

[4] The decision in *In re Landmark Communications* resulted from a petition seeking court approval for *Inside Business* to publish legal advertising. Judge Poston, however, ruled *sua sponte* that Section 8.01-324(A) did not provide the court with the authority to issue that approval. Having been previously denied relief on the exact same issue, principles of due process, fairness, and comity require the opportunity to at least be heard in these proceedings.

Although this Court has not directly addressed the issue, courts throughout the country have regularly permitted intervention in these types of cases. *See*, *e.g. Daily Journal of Commerce, Inc. v. Daily Journal Corp.*, 936 P.2d 1179, 1185 (Wash Ct. App. 1997) (competing newspaper permitted to contest *ex parte* order obtained by another publication); *Record Publ'g Co. v. Kainrad*, 551 N.E.2d 1286 (Ohio 1990) (competing publication brought suit against judges to set aside orders designating another publication); *Gulf Coast Media, Inc. v. Mobile Press Register, Inc.*, 470 So. 2d 1211 (Ala. 1985) (declaratory judgment by one publication to determine the qualification of another); *Press-Journal Publ'g Co. v. St. Peters Courier-Post*, 607 S.W.2d 453, 457-58 (Mo. Ct. App. 1980) (declaratory judgment action filed by a competitor); *Times Printing Co. v. Star Publ'g Co.*, 99 P. 1040 (Wash. 1909) (action by one publication to enjoin another from entering into a publishing contract with the locality).

B. <u>An Order Entered Without Subject Matter Jurisdiction Can Be Attacked by any Party at any Time</u>

Intervention is also appropriate to challenge an order entered without subject matter jurisdiction. An order entered without subject matter jurisdiction is void *ab initio* an can be challenged by any person at any time. Such a judgment cannot be cured by reissuance of process, passage of time, waiver, or agreement by the parties. *Porter v. Commonwealth*, 276

Va. 203, 228, 661 S.E.2d 415, 426-27 (2008), *cert. denied*, ___ U.S. ___, 129 S. Cst. 1999 (2009). Because orders rendered without subject matter jurisdiction are "complete nullities," they may be impeached "directly or collaterally by all persons, anywhere, at any time, or in any manner." *Barnes v. Am. Fertilizer Co.*, 144 Va. 692, 705, 130 S.E. 902, 906 (1925), *accord Singh v. Mooney*, 261 Va. 48, 52, 541 S.E.2d 549, 551 (2001); *Hicks v. Mellis*, 275 Va. 213, 219, 657 S.E.2d 142, 145 (2008). Such a judgment may be declared void by any and every court in which it is called into question, *Barnes*, 144 Va. at 705-06, 130 S.E. at 906, and may even be raised *sua sponte* by this Court. *Porter*, 144 Va. at 228, 661 S.E.2d at 229; *accord Earley v. Landsidle*, 257 Va. 365, 371, 541 S.E.2d 153, 156 (1999); *Garrett v. Majied*, 252 Va. 46, 48, 471 S.E.2d 479, 480 (1996).

C. <u>The Need for Intervention</u>

The facts of this case demonstrate the need for intervention to ensure the operation of the adversarial process. By filing *ex parte* petitions, without notice, Dow Jones was able to submit uncontested orders to eleven courts. Six of those courts have since reconsidered the issue at the request of various media agencies, and all six have vacated the orders *sua sponte* after considering for the first time whether the courts, in fact, had

jurisdiction. Prior to that time, the issue had not been briefed or even brought to the courts' attention.

In addition to jurisdictional issues, there is a legitimate question as to whether the WSJ meets the qualifications of a newspaper of "general circulation" within the meaning of Section 8.01-324. The eleven courts that entered Dow Jones' form order did so on Dow Jones' representation that it met the standard, but not one has substantively addressed the matter. The Virginian-Pilot was denied the opportunity to address this issue on the merits, but it deserves careful consideration.[5]

Statutes like Section 8.01-324 exist in every jurisdiction in the United States and have been the subject of many decisions. "The primary purpose of the printing of legal notices is to give the widest publicity practicable." 58 Am. Jur. 2d *Newspapers, Periodicals, and Press Associations* § 37 (2002); 66 C.J.S. *Newspapers* § 4 (2009) ("[I]t is the general policy of the law to

[5] In its Brief in Opposition, Dow Jones misinterprets the relevance of this discussion and argues that it is not properly before the Court. The Virginian-Pilot sought to address this issue as part of its Motion to Intervene, but the trial court's ruling prevented any discussion on the subject. The trial court did not consider the Virginian-Pilot's arguments and, therefore, there was nothing to appeal other than the court's ruling as to whether the Virginian-Pilot had the right to intervene and subsequently argue the merits. The discussion regarding the WSJ's failure to meet the minimum standards is offered simply to illustrate the importance of the adversarial process in bringing relevant facts to the trial court's attention.

require that the newspaper selected or designated should have such circulation as will give the notice or advertisement published the widest publicity….”). Notice that, by design, reaches only a portion of the community or is not reasonably calculated to reach affected individuals is meaningless. *See Daily Journal of Commerce, Inc. v. Daily Journal Corp.*, 936 P.2d 1179, 1185 (Wash Ct. App. 1997) (“And if published notices are to be meaningful, the publications in which they appear must, by design, appeal to general readership”); *Record Publ’g Co. v. Kainrad*, 551 N.E.2d 1286, 1290 (Ohio 1990); *McDowell v. David*, 276 P. 419, 421 (Cal. Dist. Ct. App. 1929).

While the phrase “general circulation” and the requirement for paid subscribers do not necessarily impose any specific minimum amount of circulation, courts agree that they include a quantitative element. *See In re Petition of Landmark Commc’ns, Inc.*, 54 Va. Cir. 248, 249 (Norfolk 2000); *In re Wash. Newspaper Publ’g Co.*, 72 Va. Cir. 186, 190 (Fairfax County 2006); *Wahl v. Hart*, 332 P.2d 195,196-97 (Ariz. 1958); 1982-83 Va. Op. Atty. Gen 372 n.2 (“It must have more than a *de minimis* number of readers in the jurisdiction, in order to satisfy quantitative considerations inherent in the term ‘general circulation.’ This is to be determined in context”); 1972-73 Va. Op. Atty. Gen 295 (opining that a newspaper with a circulation of

1300 in a county with a population over 110,000 did not qualify as a newspaper of general circulation). This quantitative element operates on a sliding scale because what qualifies as general circulation in one jurisdiction may not qualify as general circulation in another. 66 C.J.S. *Newspapers* § 4 (2009) ("The term 'general circulation' is a relative one, and its meaning must be determined by a process of inclusion and exclusion. That which will be of general circulation in a town of a small population cannot be said to be general in a populous city"); *Times Printing Co. v. Star Publ'g Co.*, 99 P. 1040, 1042 (Wash. 1909); 1982-83 Va. Op. Atty. Gen 372 n.2.

In its Petition, the WSJ admits that it has a grand total of 1,839 paying subscribers in all of Virginia Beach – or .4% of the total population of 425,257.[6] Although 1,839 subscribers might suffice in some rural areas as a "general circulation," that number is *de minimis* by any standard in Virginia Beach. The make-up of the 1,839 subscribers further illustrates the WSJ's failure to meet the general circulation standard. The readership of the WSJ is 81% male, and the average household net worth of its readers is $2,489,000. (Mot. to Intervene, Ex. 1 ¶ 13). Dow Jones offers

[6] This is based on the official 2000 census. The most recent estimate of the population in Virginia Beach as of 2008 is 433,746.

no evidence, nor could it, that it is distributed in any meaningful way to any group other than the wealthy. Dow Jones offers no evidence that it has circulation in any low-income areas or minority neighborhoods or that it carries news or features directed to such neighborhoods. Indeed, Dow Jones boasts that over 20% of its readers have the means to become real estate investors themselves, and that more than 1 million readers out of its total circulation of 1,656,326 own second homes. If a litigant wanted to take an action adverse to the interests of a poor member of the community, the litigant could think of no better means to minimize the likelihood of actual notice than advertising in the WSJ.

This is particular true for notices in Virginia Beach. The statute does not simply require "general circulation" but rather "general circulation *in the area* in which the notice is required to be published." Va. Code § 8.01-324(A) (emphasis added). While the WSJ undoubtedly has a general circulation nationally, that is not the same thing as a general circulation in a particular jurisdiction. A national publication without any local nexus or focus cannot be considered to have a general circulation in the local area. *See* 58 Am. Jur. 2d *Newspapers, Periodicals, and Press Associations* § 50 (2002) ("Legal notice statutes are principally designed to assure that notice of a legal or official proceeding is given to those persons

who have or may have an interest therein. This purpose is best served by a newspaper with a fixed local character"); *Press-Journal Publ'g Co. v. St. Peters Courier-Post*, 607 S.W.2d 453, 457-58 (Mo. Ct. App. 1980) ("We believe the phrase 'general circulation' requires a sufficient nexus to the county. This interpretation is supported both by the purpose and object of § 493.050 as well as its historical development"); *Gulf Coast Media, Inc. v. Mobile Press Register, Inc.*, 470 So. 2d 1211, 1215 (Ala. 1985) ("In this case the statutory classification is rationally related to the promotion of a valid legislative purpose; that being dissemination of public official notices in a *bona fide newspaper* which has a fixed local character and nexus to the county, so that individuals are not required to search widely to find official notices").

No rational individual in the city of Virginia Beach would ever consider the WSJ a possible outlet for local news or events, much less about topics addressed in legal notices. Unless local news happens to have relevance nationally, it does not appear in the WSJ. Moreover, no local advertising appears in the WSJ. *See* 1980-81 Va. Op. Atty. Gen. 345 ("Section 8.01-324 establishes the standards qualifying newspapers for purposes of legal advertisement; 'The Valley Shopper' does not meet those requirements. It is not a publication to which one would normally turn to find legal notices")

Dow Jones claims that these legal ads will run in a paper with a circulation of 115,000 copies, but the edition it refers to is the Washington/Baltimore edition. These 115,000 copies do not go to Virginia Beach; they go to other areas in Virginia plus all of Maryland, all of the District of Columbia, all of Delaware, two counties in West Virginia, and four counties in Pennsylvania. The fact that the wealthy citizens of Pennsylvania receive notice of events in Virginia Beach offers no help to the person whose rights are actually being affected in Virginia Beach. And by the same token, a citizen of Virginia Beach has no interest in learning about forfeitures of property in random states and counties in the mid-Atlantic. The only use for multi-state, regional legal advertising is to bury ads from one state in copies sent to the entire region under the fiction that the combined multi-state circulation somehow makes the situation better, not worse.

The plain facts are that the WSJ has a circulation of 1,839 in Virginia Beach (less than 1% of the population), its target audience is the business community, and its readers are primarily and perhaps exclusively within the wealthiest segments of society. The WSJ's circulation is too small, its subject too narrow, its readership too uniform, and its focus too national to meet the criteria set forth in Section 8.01-324(A). The purpose of Section

8.01-324 and similar statutes is to provide notice. *See* 58 Am. Jur. 2d *Newspapers, Periodicals, and Press Associations* § 42 (2002); 66 C.J.S. *Newspapers* § 4 (2009). Publishing legal notices in the WSJ would merely ensure that a notice would not be seen.

CONCLUSION

The Virginian-Pilot respectfully requests that the Court reverse the decision of the Virginia Beach Circuit Court on each Assignment of Error listed above. The Virginian-Pilot requests that the Court find that the trial court lacked the subject matter jurisdiction to enter the Order. Alternatively, the Virginian-Pilot requests that the Court find that the trial court should have permitted the Virginian-Pilot to intervene in this matter to present arguments in opposition to the Petition. The Virginian-Pilot requests oral argument in person in support of this appeal.

Respectfully Submitted,

VIRGINIAN-PILOT MEDIA
COMPANIES, LLC

By: _____
Of Counsel

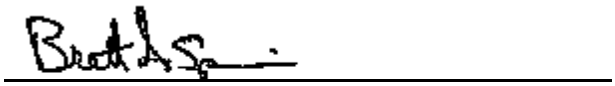
Conrad M. Shumadine (VSB No. 4325)
Brett A. Spain (VSB No. 44567)
Willcox & Savage, P.C.
One Commercial Place, Suite 1800
Norfolk, Virginia 23510
(757) 628-5500 (T)
(757) 628-5566 (F)
cshumadine@wilsav.com
bspain@wilsav.com
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that Rule 5:26(d) of the Supreme Court of Virginia has been complied with and pursuant to the Rule, fifteen (15) copies and one (1) electronic copy on CD of this Brief of Appellant and Joint Appendix have been hand-filed with the Clerk of the Supreme Court of Virginia and three (3) paper copies of the same have been served, via U.S. Mail, postage prepaid, on this 4th day of December, 2009 to:

Kenneth M. Vorrasi (VSB #68749)
Drinker Biddle & Reath, LLP
1500 K Street, N.W., Ste. 1100
Washington, DC 20005-1208
Telephone: (202) 842-8800
Kenneth.vorrasi@dbr.com

John D. V. Ferman (VSB #70980)
Drinker Biddle & Reath, LLP
1500 K Street, N.W., Ste. 1100
Washington, DC 20005-1208
Telephone: (202) 842-8800
John.ferman@dbr.com



Brett A. Spain