In The

Supreme Court of Virginia

RECORD NO. 091661

VIRGINIAN-PILOT MEDIA COMPANIES, LLC,

Appellant,

v.

DOW JONES & COMPANY, INC.,

Appellee.

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Apparently recognizing that Section 8.01-324(a) does not provide jurisdiction for the petition it filed in the court below, Dow Jones for the first time on appeal argues that such jurisdiction can be found in a circuit court's "inherent authority." As will be noted below, no court has the inherent authority to assume jurisdiction which has not been provided to it, and if the court had inherent authority to adjudicate, it would have the authority to allow an adversary proceeding so that facts could be developed on which the court could base its decision.

ARGUMENT

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

A. Overview

In the Brief of Appellee ("Brief") submitted by Dow Jones & Company, Inc. ("Dow Jones"), Dow Jones says that if it cannot file a petition which the legislature did not authorize, it does not know how to proceed and asks this Court to ignore the statute and its past interpretation and "respectfully requests that the Court clarify the process by which the § 8.01-324(A) status of newspapers, like *The Wall Street Journal*, should be determined." Brief, p. 5. In making this request for alternative relief, the Dow Jones

ignores that (1) the Attorney General already has answered this question twice; (2) the General Assembly has indicated its approval of the Attorney General's interpretation by not amending the statute in the many years following these interpretations; and (3) this Court previously addressed how to select newspapers for legal notices in accordance with constitutional principles in *A.S. White & Co. v. Jordan*, 124 Va. 465, 98 S.E. 24 (1919), which precisely conforms to the Attorney General's interpretation.

Rather than address the issue, Dow Jones ignores it and claims that the process of administratively selecting of a newspaper for legal notice publication is nothing more than "the Virginian-Pilot's interpretation," which Dow Jones claims "would lead to an absurd result." In making this assertion, Dow Jones necessarily overlooks the fact that the process for selecting newspapers for legal publication has worked and not resulted in an "absurd result" for the entire 90-year period after this Court addressed the subject in *Jordan*.

Unable to find a basis for jurisdiction in the statute itself, Dow Jones now argues for the first time[1] that a circuit court has the "inherent authority" to consider petitions seeking relief under Section 8.01-324(A). Needless to

[1] Indeed, Dow Jones has not raised this argument in any of the cases it filed.

say, this is a novel argument that the circuit court did not address in this case. The argument plainly misapplies the doctrine of inherent authority, which is limited to controlling a court's docket and handling specific matters that are so basic to society as to be considered within the common law equitable powers of all courts. Moreover, this argument merely continues Dow Jones' Jekyll and Hyde approach to the entire matter, where the circuit court has the implied or inherent authority to consider petitions under Section 8.01-324(A) but not the implied or inherent authority to permit intervention to develop the record fully. As set forth in more detail below, Dow Jones' arguments have no merit.

B. <u>The Method for Selecting Newspapers Has Already Been Established</u>

In order to provide the clarification requested by Dow Jones, the Court need look no further than existing Attorney General opinions, and authority from this Court. The Attorney General addressed this precise issue in two 1982 opinions. *See* 1981-82 Va. Op. Atty. Gen 269. The first 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; *see also* 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").

This interpretation is not the "Virginian-Pilot's interpretation," as argued by Dow Jones. It is the interpretation of the official designated by the General Assembly to interpret statutes affecting localities. The Attorney General issued these opinions in 1982, and, in the intervening 27 years, the General Assembly has never amended the statute to mandate a different process. Under established law, "[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)).

Moreover, as noted in the Virginian-Pilot's opening brief, the Attorney General's interpretation, and the General Assembly's acquiescence to that interpretation, fit squarely into the justification for an administrative selection explained by this Court in *A.S. White & Co. v. Jordan*, 124 Va. 465, 98 S.E. 24 (1919), which Dow Jones does not mention in its brief, much less address. As this Court noted in *Jordan*, "[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. The Court further explained that, "[i]t 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). *Id.* 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.

This Court expressly held in *Jordan* that publication of notices must be made on a case-by-case basis, with "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." *Id.* Dow Jones' petition did not seek approval for a case-by-case selection, but rather sought blanket approval for the authority to publish all legal notices. That approach ignores the established method for selecting newspapers, and, if accepted, would bring into question the constitutionality of the legislatively approved notice mechanism. Dow Jones cites no authority to support its position, which is contrary to the plain language of the statute.

The plain language of Section 8.01-324 distinguishes between the relief available to newspapers. Subsection B expressly permits a petition to a circuit court, which is protected by procedural safeguards that permit interested parties to voice their opinions. Subsection A contains no similar grant of authority. The law of Virginia is clear 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).

C. The Circuit Court Did Not Rely on Its Inherent Authority, Which In Any Event Could Not Create Subject Matter Jurisdiction

Unable to address the Attorney General's interpretation and this Court's decision in *Jordan*, Dow Jones argues on appeal for the first time that this Court should uphold the circuit court's order based on upon the lower court's "inherent authority to administer cases on its docket." (Brief at 27). Ignoring the fact that the circuit court never mentioned, must less relied on such authority, Dow Jones claims that the court was merely administering a procedural aspect of a case on its docket. In support of this argument, Dow Jones cites a series of cases that have nothing to do with this case and in no way suggest that a circuit court has the inherent authority to create its own subject matter jurisdiction.

First, Dow Jones cites *Singleton v. Commonwealth*, 278 Va. 542, 685 S.E.2d 668 (2009), which involved a contempt finding when two criminal defense attorneys failed to appear in court after agreeing to continuances in their respective cases. Not only did the court reverse the contempt findings, it also addressed inherent authority with respect to continuances. *Singleton* has nothing to do with case.

Dow Jones next cites *Yarbrough v. Commonwealth*, 258 Va. 347, 519 S.E.2d 602 (1999), which again has nothing to do with the matter before the Court. *Yarbrough* involved the authority of a court to appoint a special prosecutor when the "clear import" of another statute contemplated that Commonwealth's attorneys could assist prosecutors in other jurisdictions. Dow Jones claims that because certain statutes require notice to be published by circuit courts, the "clear import" of those statutes is to permit a general authorization for newspapers under Section 8.01-324(A). Dow Jones further argues that the Court must recognize this inherent authority to close "any perceived interstitial gap." (Brief at 32).

There are several problems with this argument and Dow Jones' reliance on *Yarbrough*. First, the argument presumes a statutory gap or conflict that does not exist. As noted above, the current process anticipates an administrative selection of newspapers on a case-by-case basis, depending upon the notice required. There is a public official or body that has the authority to make each selection. Second, and more fundamentally, a circuit court's inherent authority does not extend beyond administering its docket and certain limited areas inherent within the court's equitable common law jurisdiction.

Contrary to Dow Jones' suggestion, this case is not procedural; it is a petition for affirmative, substantive relief. This is not a case of the court administering its docket, or controlling parties, lawyers, or witnesses. The notion that a circuit court can create subject matter jurisdiction by invoking its inherent authority, which, by the way, it did not do, has no support in the law.

This Court has repeatedly rejected similar arguments, especially where a statute speaks to certain issues but remains silent as to the authority claimed. *See*, *e.g.*, *Reid v. Reid*, 245 Va. 409, 412-14, 429 S.E.2d 208, 209-11 (1993) (finding no inherent authority to order retroactive restitution of spousal support payments made pursuant to an order that was later reversed where the statute only mentioned altering future payments); *Gunn v. Richmond Cmty. Hosp., Inc.*, 235 Va. 282, 286, 367 S.E.2d 480, 482-83 (1988) (finding no inherent authority to force a guardian to accept a settlement where the statute only provided for authority to approve a compromise and stating, "[e]xplicitly, the statute gives the court power to approve a compromise. Implicitly, the court has the power under the statute to disapprove a compromise. However, neither the statute nor any 'inherent' power the court may possess permits the court to create a settlement and then to impose such a settlement upon a guardian"); *White*

v. Perkins, 213 Va. 129, 135, 189 S.E.2d 315, 320 (1972) (finding no inherent authority to order relief beyond corporate dissolution where the statute provided for no other relief and stating, "[w]hile Code § 13.1-94 is remedial and should be liberally construed, we believe that the 1968 amendment clearly shows an intent by the General Assembly that the alternatives provided there are exclusive rather inclusive"); *Poole v. Poole*, 210 Va. 442, 444-45, 171 S.E.2d 685, 687 (1970) (finding no inherent authority to grant custody of a child where the court lacked subject matter jurisdiction to hear the case); *Bryant v. Commonwealth*, 198 Va. 148, 151-52, 93 S.E.2d 130, 132-33 (1956) (finding no inherent authority to order a husband to assist in overseeing his wife's probation where the legislature only authorized supervision by a probation officer and stating); *Ring v. Ring*, 185 Va. 269, 276, 38 S.E.2d 471, 474 (1946) ("It is significant that, though the statute provides for a lien upon the real estate, there is no suggestion that such a lien attaches to the personal property of the husband. This omission in the statute is fatal to the contention of appellee that a court of equity has the inherent power to impound the personal

property of the appellant to secure the payment of alimony and support money").[2]

II. IF THE COURT HAS SUBJECT MATTER JURISDICTION, THE VIRGINIAN-PILOT HAS STANDING TO INTERVENE

In support of its intervention and standing argument, Dow Jones claims that all of the other lower courts that addressed Dow Jones' petitions "unanimously" found no right of intervention. What Dow Jones fails to mention, however, is that all of these courts also unanimously found no subject matter jurisdiction even to entertain the petitions, which is absolutely consistent with the established principle that 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,

[2] The other cases cited by Dow Jones involve support and maintenance issues in domestic relations cases. They are based on common law equitable powers traceable to English law. The cases are plainly distinguishable on their face, and have nothing to do with this matter, which Dow Jones concedes is not based on the common law. Notice by publication is purely statutory.

657 S.E.2d 142, 145 (2008). A judgment entered without subject matter jurisdiction 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 v. Commonwealth*, 276 Va. 203, 228, 661 S.E.2d 415, 426 (2008), cert. denied, ___ U.S. ___, 129 S. Ct. 1999 (2009); *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).

On appeal, Dow Jones has shifted its primary argument for subject matter jurisdiction to a circuit court's "inherent authority." In doing so, Dow Jones only proves the inconsistency in its position and highlights the need for intervention if subject matter jurisdiction exists.

As noted in the Virginian-Pilot's opening brief, 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.

In its Brief, Dow Jones cannot explain the inconsistency in its position. If inherent authority exists under Section 8.01-324(A) to consider this type of petition based on process permitted in Section 8.01-324(B), then the inherent authority also must include the procedural protections of Section 8.01-324(B). Without meaningful participation, a circuit court would have no means of intelligently analyzing any petition under Section 8.01-324(A). The fact that Dow Jones was able to slip its petitions by so many courts that later reversed themselves proves the point.

The only persuasive authority on this issue comes from other jurisdictions and was cited by the Virginian-Pilot. Dow Jones claims that these cases are distinguishable in footnote 7 of its Brief but does not

explain why. These cases all support intervention under these circumstances. *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).

Although Dow Jones claims that *The Wall Street Journal* is a newspaper of general circulation, it does not contest (1) its limited circulation in Virginia Beach (less than .4% of the total population); (2) the makeup of those subscribers (*i.e.*, wealthy males); (3) its national, not local, focus; and (4) the fact that notices would be published in Washington and Baltimore edition. The Virginian-Pilot fully explained this issue in its opening brief and will not repeat it here, but the fact that these

characteristics were not fully developed before the lower court prior to entry of the order approving publication illustrates the need for intervention if the court has subject matter jurisdiction.

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.

Respectfully Submitted,

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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 Reply Brief of Appellant 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 12th day of January, 2010 to:

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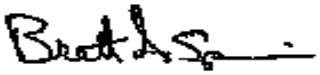

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