In The

Supreme Court of Virginia

RECORD NO. 092272

JIMMIE D. JENKINS, DIRECTOR, FAIRFAX COUNTY DEPARTMENT OF PUBLIC WORKS AND ENVIRONMENTAL SERVICES,

Appellant,

v.

RAJ MEHRA and URVASHI MEHRA,

Appellees.

BRIEF OF APPELLEES

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BRIEF OF APPELLEES

TO: THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE VIRGINIA SUPRMEME COURT

The Appellees, Raj Mehra and Urvashi Mehra, respectfully submit their Appellees' Brief and request that this Court dismiss the appeal for the following reasons.

APPELLEES' STATEMENT OF MATERIAL FACTS

The September 12, 2008 Order required that the Defendants request a waiver or modification of the requirements of Fairfax County Code Section 118-3-2 to establish a vegetative buffer on or before October 12, 2008. The Mehras did this.

The Order required that upon a response to the request for a waiver or modification, the Mehras were required to submit to DPWES for an infill lot grading plan. The Mehras did this.

Within fourteen (14) days of approval of the grading plan the Mehras were supposed to apply for the necessary permits and post all necessary bonds and/or escrow funds required by DPWES. The Mehras did not do this, because Mr. Mehra had lost his job and they did not have the funds to do so.

The Order required implementation of the grading plan within sixty (60) days of issuance of all permits. The permits could not be issued until

the escrow was posted. The Mehras did not do this because the escrow had to be posted before the permits could be issued and the Mehras no longer had the funds to post the escrow and implement the plan.

Ms. Mehra presented an income/expense statement (App. 128) showing monthly income and expenses. She also presented a list of expenses, exceeding $235,000.00 – an amount that the Mehras had already incurred in attempting to satisfy the Fairfax County's previously overlooked landscaping requirements. (App. 82)

ARGUMENT

I. Standing and jurisdiction.

The Director has no standing under Va. Code § 8.01-670(A)(3) to appeal the Trial Court's decision declining to hold the Mehras in contempt because he is not an aggrieved party as to the Trial Court's August 10, 2009 Order. Furthermore, this Court does not have jurisdiction to hear appeals in contempt proceedings, as jurisdiction is proper in the Court of Appeals pursuant to Va. Code § 19.2-318.

A. THE DIRECTOR HAS NO STANDING TO APPEAL A TRIAL COURT'S DECISION DECLINING TO HOLD THE MEHRAS IN CIVIL CONTEMPT.

The final order from which the Director appeals is a dismissal of a Rule to Show Cause for contempt and the subsequent denial of his Motion

for Reconsideration of that June 26, 2009 ruling. The Director argues that he is "aggrieved" under the meaning of Va. Code § 8.01-670(A)(3) because he is allegedly the official charged with enforcing the various ordinances that were at issue in the underlying litigation. However, the issue before this Court is not the validity of the underlying litigation or the resulting final order. This is simply an appeal from Judge Williams' determination that the Mehras' failure to fully comply with the September 12, 2008 order was not contemptuous and his dismissal of the Rule to Show Cause. While the Director may have a statutory interest in compliance with the underlying ordinances, he is not aggrieved as to the August 10, 2009 order. "[A] person is aggrieved by a judgment, order or decree, so as to be entitled to appeal… whenever it operates prejudicially and directly upon his property or pecuniary rights or interest or upon his personal rights, and only when it has such effect." *Virginia Employment Commission v. City of Virginia Beach*, 222 Va. 728, 732, 284 S.E.2d 595, 597 (1981) citing *Insurance Association v. Commonwealth,* 201 Va. 249, 253,110 S.E.2d 223, 226 (1959). (Where this Court found that the Virginia Employment Commission was not an aggrieved party within the meaning of Va. Code § 8.01-670(A)(3) and therefore lacked standing to appeal a Circuit Court's decision reversing awards of unemployment benefits.)

The trial judge's decision to dismiss the Rule to Show Cause does not amount to a denial of a personal property right owed to the Director, legal or equitable, nor is there an imposition of a burden or obligation on the Director. The underlying order is still in effect and the Director is free to move forward with another Rule to Show Cause or to pursue other means to enforce the September 12, 2008 order. Contrary to the Director's assertions, Judge Williams' August 10, 2009 decision did not absolve the Mehras of their obligations under the September 12, 2008 order, nor does it authorize them to violate any ordinances. He simply found their actions not contemptuous.

The only argument made by the Director that he has standing is the Director's assertion that he is authorized by the Erosion and Sediment Control Ordinance and the Chesapeake Bay Ordinance to enforce the provisions of those ordinances as the agent of the Board of the Supervisors. Fairfax County Erosion and Sediment Control Ordinance § 104-1-12(d) states that "[T]he **County may** apply for injunctive relief…" (emphasis added), but does not give the Director standing to pursue a finding of contempt. Section 118-9-1 of the County's Chesapeake Bay Preservation Ordinance states in subparagraph (f) that "the Director, on behalf of the Board of Supervisors, may apply to the Fairfax County Circuit

Court for injunctive relief to enjoin a violation or a threatened violation of any provision of this chapter." This section is specific and is limited to giving the Director authority to pursue injunctive relief only. The cases cited by the Director have no bearing on the Director's standing in the instant case.

The Director further claims standing because he alleges the Circuit Court's decision was an abuse of discretion, citing *Frank Shop, Inc. v. Crown Central Petroleum Corp*., 264 Va. 1, 564 S.E.2d 134 (2002). The *Frank* case does not stand for this proposition and whether the Circuit Court's decision was or was not an abuse of discretion provides no underpinning for a claim of standing.

B. IF THE COURT FINDS THAT THE DIRECTOR HAS STANDING THEN THIS APPEAL SHOULD BE GOVERNED BY VIRGINIA CODE § 19.2-318.

The Director asserts that Va. Code § 19.2-318 does not apply because it only refers to appeals from a judgment for civil contempt. He argues that because the statute is silent as to an appeal from a judgment declining to hold a party in contempt, it is not applicable. Under his analysis, the Court of Appeals has jurisdiction over appeals from a judgment for civil contempt, while this Court has jurisdiction over appeals from a judgment declining to find contempt. This would be an illogical and

inconsistent jurisdictional arrangement. See *Virginia Beach Beautification Commission v. Board of Zoning Appeals*, 231 Va. 415, 418, 344 S.E.2d 899, 903 (1986) (where this Court determined that the General Assembly did not intend that jurisdiction of appeals stemming from land use decisions of boards of zoning appeals would be in the Court of Appeals while jurisdiction of appeals on the same subject from decisions of governing bodies would be in the Supreme Court). There is no indication that the General Assembly contemplated this bifurcation with respect to appeals on matters of contempt.

There is no dispute with the statement that when the language of a statute is unambiguous, courts are bound by the express language of the statute. But The Director's conclusion is not the only one supported by his argument. An equally fair inference from the language of the statute is that an appeal only lies from a judgment for civil contempt and does not lie when a judge does not find contempt. Furthermore, if the Director's argument that it is not the province of the judiciary to add words to the statute or alter its plain meaning is applied to the question of whether the Director has standing, then the question of which court has jurisdiction is never reached because the clear and unequivocal terms of the Chesapeake Bay Preservation Ordinance limits the Director's authority to

seeking an injunction. If the Director had standing, this appeal should have been filed in the Court of Appeals pursuant to Va. Code § 19.2-318.

II. The Circuit Court did not err in dismissing the Rule to Show Cause.

The purpose of civil contempt is to procure the imposition of a punishment which will afford remedial relief to the parties injured by the violation of the injunction. *Leisge v. Leisge*, 224 Va. 303, 308, 296 S.E.2d 538, 540-541(1982) citing *Deeds v. Gilmer*, 162 Va. 157, 262, 174 S.E. 37, 78-79 (1934).

The imposition of a fine in this case affords no remedial relief to the Director. In fact, the initial notices of violation state that if the Mehras do not perform the work, "… the County shall utilize the conservation deposit funds to complete the work upon expiration of the time allotted by this notice." (App. 20, 21) Thus, the Director had the ability to obtain the relief sought by the DPWES even before bringing the suit for the injunction. Moreover, with the Mehras unable to post the bond, a fine is not coercive but only punitive and does nothing to afford remedial relief.

The Director argues that the trial court's refusal to impose a fine is permitting the Mehras to violate the law. In support of his position, the Director cites *Frank Shop, Inc. v. Crown Central Petroleum Corporation*, 264 Va. 1, 564 S.E.2d 134 (2002) where this court reversed a trial court's

decision to delay imposition of an injunction after Crown's conduct had been determined to be unlawful. In the instant case, the issue is whether non-compliance with the injunction is excusable and whether imposition of a fine would serve to compensate the Director or hasten compliance. Since a fine would neither compensate the Director nor coerce compliance under the circumstances, Judge Williams did not err in denying the relief sought. In *Petrosinelli v. People for the Ethical Treatment of Animals Inc.*, 273 Va. 700, 706, 643 S.E.2d 151, 154 (2007) this Court stated:

> A court has discretion in the exercise of its contempt power. *Sapp v. Commonwealth*, 263 Va. 415, 425, 559 S.E.2d 645, 650 (2002); *see also Leisge v. Leisge*, 224 Va. 303, 309-310, 296 S.E.2d 538, 541 (1982), It "is within the discretion of the trial court" to conduct civil contempt proceedings, *Avrin, Inc. v. Sony Corp. of America*, 215 Va. 704, 706, 213 S.E.2d 753, 755 (1975), thus we review the exercise of a court's contempt power under an abuse of discretion standard. *Tonti v. Akbari*, 262 Va. 681, 687, 553 S.E.2d 769, 772 (2001).

Judge Williams found that the Order had been violated; he merely declined to impose a sanction under the circumstances, which was appropriately within his discretion.

Furthermore, the order of September 12, 2008 does not explicitly direct specific conduct other than to direct the Mehras to do something, the sufficiency of which is solely determined, not by the court, but by the Director. "As a general rule, 'before a person may be held in contempt for violating a court order, the order must be definite in its terms as to the

duties thereby imposed upon him and the command must be expressed rather than implied." *Winn v. Winn*, 218 Va. 8, 10, 235 S.E.2d 307, 309 (1977); *Mardula v. Mendelson*, 34 Va. App. 120, 128 (2000). While the Order of September 12, 2008 did direct the Mehra's to perform certain acts, (approval of a revised grading plan, posting a bond and completing the work) it left what constituted satisfactory compliance, entirely up to the Director. The Order contained no standards against which the court could measure the Mehras' performance. This resulted in allowing the Director to substitute its discretion for that of the court in determining what the Mehras were required to do to satisfy the Order.

III. The Circuit Court did not find that the Mehras chose not to comply with the final order and Judge Williams' dismissal of the Rule was a proper exercise of his discretion.

Judge Williams was the trier of fact in this case who not only weighed the evidence, but had the opportunity to evaluate the credibility of Ms. Mehra, the only witness to testify in the case. Whether to make a finding of contempt is a matter within the discretion of the trial judge. *Petrosinelli*, *supra*. Judge Williams' findings in this case are presumed correct and his ruling and the exercise of his discretion should not be second guessed because the Director thinks the Mehras' failure to act is contemptable. While a different court or judge may have reached an opposite conclusion,

this does not mean that Judge Williams abused his discretion in making the decision he made. "It is axiomatic that a chancellor's finding on conflicting evidence, heard ore tenus, will not be disturbed on appeal unless it is plainly wrong or without evidence to support it." *Ivy Construction Company v. Booth*, 226 Va. 299, 301, 309 S.E.2d 300 (1983).

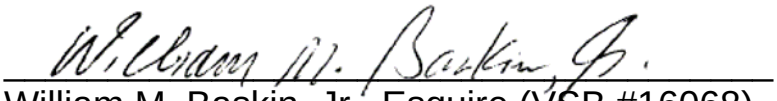
The Director insists that willfulness is not relevant to a question of civil contempt, but then argues that the Mehras willfully chose not to complete their obligations under the order by giving other financial obligations priority. This argument was considered by Judge Williams and rejected. Now, the Director asks this Court to substitute its judgment for that of Judge Williams as to the credibility of the witness, and to also substitute its view of the evidence for that of the trial court.

CONCLUSION

For the foregoing reasons, the Mehras ask that this appeal be dismissed.

Respectfully submitted,

RAJ MEHRA and
URVASHI MEHRA
By Counsel



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CERTIFICATE

Pursuant to Rule 5:26(d), fifteen bound copies and one electronic copy of CD of the foregoing Brief of Appellees were hand-filed with the Clerk of the Supreme Court of Virginia, and three bound copies of the same were sent via U.S. mail, postage prepaid, to opposing counsel this 21st day of May 2010 at the address listed below.

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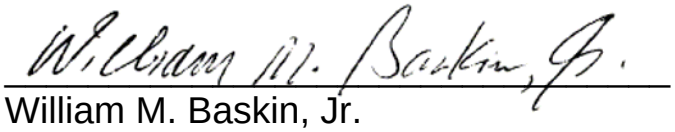

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