IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

RECORD NO. 092272

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

Appellant,

v.

RAJ MEHRA AND URVASHI MEHRA,

Appellees.

OPENING BRIEF OF APPELLANT

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JIMMIE D. JENKINS, DIRECTOR, FAIRFAX COUNTY DEPARTMENT OF PUBLIC WORKS AND ENVIRONMENTAL SERVICES,	:	
Appellant,	:	
v.	:	**RECORD NO. 092272**
RAJ MEHRA,	:	
and	:	
URVASHI MEHRA,	:	
Appellees.	:	

<u>OPENING BRIEF OF APPELLANT</u>

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

Appellant, Jimmie D. Jenkins, Director ("Director"), Fairfax County Department of Public Works and Environmental Services ("DPWES"), by counsel, asserts, for the reasons set forth below, that the Circuit Court of Fairfax County, Virginia, the Honorable Marcus D. Williams presiding ("Circuit Court"), erred when it failed to enforce

the September 12, 2008, Final Order ("Final Order") previously entered in this case by declining to hold Appellees Raj Mehra and Urvashi Mehra (the "Mehras") in contempt of court for their admitted failure to comply with the terms of the Final Order that required them to clear the violations of the Chesapeake Bay Preservation ("CBay") Ordinance (Chapter 118 of The Code of the County of Fairfax, Virginia ("Fairfax County Code")), the Erosion and Sediment Control ("E&S") Ordinance (Chapter 104 of the Fairfax County Code), and the Fairfax County Public Facilities Manual ("PFM") from their property. As a result of the Circuit Court's decision not to enforce its Final Order, the foregoing violations on the Mehras' property continue unabated. The Director therefore requests that this Court reverse the decision of the Circuit Court and remand this case to the Circuit Court for the imposition of appropriate remedial relief.

STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS

This is an enforcement action filed by the Director against the Mehras to compel them to comply with the Final Order. The Final Order requires the Mehras to remove from their property certain violations of the CBay Ordinance, the E&S Ordinance, and the PFM. On September 12, 2008, this case was resolved by the Final Order, which was entered by Fairfax County Circuit Court Judge David S. Schell and required, among other things, that the Mehras clear the violations from their property by obtaining approval of an Infill Lot Grading Plan ("Grading Plan"), applying for the necessary land-disturbing activity permits, posting all necessary bonds and/or escrow funds, implementing the approved Grading Plan, and passing all necessary County inspections. (App. at 52-53.)[1]

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[1] References to the Joint Appendix herein will be cited as "(App. at ____.)." Due to budgetary constraints, counsel for the Director compiled the Appendix from copies of relevant pleadings, motions, and orders taken from its own pleading index, rather than copied by an outside copying company

The Mehras failed to comply with the terms of the Final Order. As a result, on May 4, 2009, at the Director's request, the Circuit Court issued a Rule to Show Cause ("Rule") to the Mehras that required them to appear in court and show cause why they should not be held in contempt of court for violating the terms of the Final Order. (App. at 66-67.)

On June 26, 2009, after a hearing on the Rule, the Circuit Court entered an Order in which it ruled that the Mehras failed to comply with the Final Order but further found that such failure was not willful. The Circuit Court therefore concluded that the Mehras' conduct was not contemptuous, and it dismissed the Rule. (App. at 83.) On July 15, 2009, counsel for the Director filed a Motion for

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from the Record in the custody of the Supreme Court. As a result, the documents within the Appendix bear a handwritten page number, which corresponds with the page number of the document in the Record, as well as a number in a square, which is the page number assigned to the document in the Appendix. After having an opportunity to review the Appendix (before it was bound) on April 12, 2010, and April 15, 2010, counsel for the Mehras had no objection to it.

Reconsideration requesting that the Circuit Court reconsider and vacate its June 26, 2009, Order. (App. at 84-109.) In response, the Circuit Court entered an Order of Suspension on July 16, 2009. (App. at 110-111.) On August 10, 2009, the Circuit Court entered an Order vacating the Order of Suspension and reinstating the June 26, 2009, Order, finding that the Mehras did not comply with the Final Order but nevertheless dismissing the Rule. (App. at 112.) On September 8, 2009, the Director timely filed with the Clerk of the Fairfax County Circuit Court a Notice of Appeal to the Supreme Court of Virginia from the June 26, 2009, Order, which Order became final on August 10, 2009. (App. at 113-14.) On November 9, 2009, the Director filed his Petition for Appeal in this case. On December 10, 2009, the Supreme Court sent a letter to counsel for both parties directing them to file letter briefs addressing whether, under the facts of this case, the Director has standing to appeal a judgment of the Circuit Court declining to hold a party in civil contempt and, if so, whether the jurisdiction for appeal

is governed by Va. Code Ann. § 19.2-318 (2008), requiring transfer of the appeal to the Court of Appeals of Virginia, or by Va. Code Ann. § 8.01-670(A)(3) or (B)(3) (2007). Counsel for both parties timely filed letter briefs addressing the referenced issues. By order dated March 16, 2010, the Supreme Court granted the Petition for Appeal with respect to Assignments of Error Nos. 3 and 4, and it refused the Petition for Appeal with respect to Assignments of Error Nos. 1 and 2. In addition, the Supreme Court asked the parties to address again, on brief and at oral argument, the jurisdiction and standing issues raised by the Court in its December 10, 2009, letter.

ASSIGNMENTS OF ERROR

3. It was error for the Circuit Court to dismiss the Rule on the ground that the Mehras did not willfully violate the Final Order because civil contempt does not require a finding of willfulness.

4. Even if one assumes *arguendo* that willfulness is a relevant consideration in a civil contempt proceeding, the

Circuit Court erred in failing to find the Mehras in contempt of court when the evidence established that the Mehras failed to comply with the Final Order based on their own financial priorities.

QUESTIONS PRESENTED

1. Whether the Circuit Court erred when it did not hold the Mehras in contempt of court and dismissed the Rule on the ground that the Mehras did not willfully violate the Final Order because civil contempt is remedial in nature and does not require a finding of willfulness. (Assignment of Error No. 3.)

2. Whether, even if one assumes *arguendo* that willfulness is a relevant consideration in a civil contempt proceeding, the Circuit Court erred when it failed to find the Mehras in contempt of court after the evidence established that the Mehras failed to comply with the Final Order based on their own financial priorities. (Assignment of Error No. 4.)

STATEMENT OF FACTS

The property that is the subject of this lawsuit is located at 7736 Lewinsville Road, McLean, Virginia, and is shown on the Fairfax County Real Property Identification Map as Tax Map No. 29-2((1)) parcel 19 ("the subject property"). (App. at 2.) The subject property is owned by the Mehras. (App. at 2, 24, 50.)

By certified letter dated September 27, 2005, DPWES issued a notice of violation to the Mehras for violating PFM § 6-0202.4 because the drainage system on the subject property, which had excessive stormwater runoff, was adversely affecting neighboring properties. (App. at 5, 20, 30, 85.) By separate certified letter also dated September 27, 2005, DPWES issued to the Mehras a second notice of violation for violating Fairfax County Code § 118-3-2(f), which is part of the CBay Ordinance, because they constructed an impervious area on the subject property that was greater than 18 percent of the total area of the subject property. (App. at 5, 21, 30, 85.)

The Mehras failed to take any action to clear the violations from the subject property. Therefore, on September 25, 2007, the Director filed a Complaint for Declaratory Judgment and Injunctive Relief ("Complaint") against the Mehras in the Circuit Court of Fairfax County, Virginia, to bring the subject property into compliance with the CBay Ordinance, the E&S Ordinance, and the PFM. (App. at 1-23.)

Due to the Mehras' failure to appeal the September 27, 2005, Notices of Violation and thereby exhaust their administrative remedies, the Director filed a Motion for Summary Judgment against the Mehras on August 12, 2008. (App. at 27-45.) Prior to the hearing on the Director's Motion for Summary Judgment, the parties reached an agreement resolving most of the issues in dispute. (App. at 50-54 (see references to "Consent Order" within the Final Order).) On September 12, 2008, after a hearing on the remaining issues in dispute, Fairfax County Circuit Court Judge David S. Schell entered the Final Order in this case.

(App. at 50-54.) The Final Order found that this enforcement action was brought against the Mehras because they were

> (i) adversely affecting neighboring properties with excessive stormwater runoff caused by inadequate outfall and/or by constructing excessive impervious areas on the subject property, and (ii) constructing improvements on the subject property resulting in an impervious area that is greater than 18 percent of the total area of the subject property.

(App. at 51.) Judge Schell adjudged and ordered that the subject property was in violation of the CBay Ordinance, the E&S Ordinance, and the PFM and that it was specifically in violation of Fairfax County Code §§ 104-1-2, 104-1-5, and 118-3-2(f), and PFM § 6-0202.4. (App. at 51.)

The Final Order also granted the Director injunctive relief, which required the Mehras to permanently clear the violations from the subject property. (App. at 51-53.) The Final Order further required, among other things, that the Mehras, by October 12, 2008, request a waiver or modification of the requirements of Fairfax County Code

§ 118-3-2, which requires the establishment of a vegetative buffer. (App. at 51-52.) Upon receiving the response from DPWES regarding the waiver/modification request, the Final Order then required the Mehras to submit a Grading Plan to DPWES for approval. (App. at 52.)

On February 25, 2009, the Mehras' Grading Plan was approved by DPWES. (App. at 56, 64, 87.) Pursuant to the Final Order, within 14 days following approval of the Grading Plan, the Mehras were required to apply for all necessary land-disturbing activity permits and post all necessary bonds and/or escrow funds that were required by DPWES. (App. at 52-53.) The Final Order further required the Mehras, within 60 days following the issuance of all required permits, to fully implement the approved Grading Plan and pass all necessary County inspections. (App. at 53.)

The Mehras failed to submit the required permit applications, post the necessary bonds, and implement the approved Grading Plan. (App. at 56, 63, 64, 87, 121.) Therefore, the Director filed a Motion for Rule to Show Cause in

this case on April 29, 2009, to enforce the terms of the Final Order and require the Mehras to bring the subject property into compliance with the CBay Ordinance, the E&S Ordinance, and the PFM. (App. at 55-65.) In response to this motion, Fairfax County Circuit Court Judge Randy I. Bellows issued a Rule to Show Cause to the Mehras on May 4, 2009, which required the Mehras to appear in Court on May 29, 2009, to show cause, if any, why they should not be held in contempt of court for violating the terms of the Final Order. (App. at 66-67.) The hearing on the Rule was continued to June 19, 2009, because the Mehras had refused service of the Rule for the May 29, 2009, hearing, and it was continued again to June 26, 2009, due to the Mehras' unexpected claim of insolvency at the June 19, 2009, hearing. (App. at 68, 70.)

On June 26, 2009, a hearing was conducted on the Rule to Show Cause. (App. at 88, 121, 137.) At the hearing, counsel for the Mehras stipulated that the Mehras had not posted the required conservation escrow, had not picked up the approved Grading Plan, and had not implemented any

part of the Grading Plan, allegedly because the Mehras could not afford to do so. (App. at 88, 121.) During the hearing, Appellee Urvashi Mehra testified as to the Mehras' assets and expenditures, and she made the following admissions: (1) the Mehras own the property located at 7736 Lewinsville Road; (2) the photographs that were marked as Defendants' Exhibit 1 fairly and accurately represent the dwelling on the subject property (App. at 80-81, 104-105); (3) Appellee Urvashi Mehra is the Healthcare Information Technology Director for Pragmatics, Inc.; (4) Appellee Urvashi Mehra makes approximately $180,000 per year; (5) Appellee Raj Mehra is the President and Founder of Chelsea Advisory Services, a financial consulting company, which he operates from the subject property; (6) Appellee Urvashi Mehra allegedly does not know how much Appellee Raj Mehra makes from his financial consulting company; (7) Appellee Urvashi Mehra drives a Mercedes Benz, which the Mehras own; and (8) the Mehras have two children attending private

school. (App. at 88, 122.) Appellee Raj Mehra did not appear for this hearing. (App. at 88, 121.)

In addition, a document listing the Mehras' monthly income and expenditures was admitted into evidence at the June 26, 2009, hearing. (App. at 72, 107, 128.) The document shows that the Mehras' monthly net income is $11,100. (App. at 72, 107, 128.) This $11,100 net income does not include any money earned by Appellee Raj Mehra as a result of his ownership and operation of Chelsea Advisory Services, as no evidence was presented as to the amount earned by Appellee Raj Mehra, and Appellee Urvashi Mehra testified that she did not know how much money he earns. (App. at 88, 122.) The Mehras' list of expenditures reveals that the Mehras spend approximately $5,000 per month on the mortgage for their home in McLean, Virginia. (App. at 72, 107, 128.) The Mehras' mortgage payment is in addition to expenditures of over $8,000 per month, which amount includes, among other things, a lawn care service, maid service, a $480 per month car lease, an additional

payment each month of $400 over the required payment on their mortgage, $6,423 per month for private school tuition for their two children, and $240 per month on allowances for their children. (App. at 72, 107, 128.)

At the conclusion of the June 26, 2009, hearing on the Rule, the Circuit Court entered an Order finding that the Mehras had not complied with the Final Order, but it dismissed the Rule on the ground that the Mehras' failure to comply was not willful and therefore not contemptuous. (App. at 83.) The June 26, 2009, Order became final on August 10, 2009. (App. at 112.) On September 8, 2009, the Director timely filed with the Clerk of the Fairfax County Circuit Court his Notice of Appeal to the Supreme Court of Virginia from the August 10, 2009, Order. (App. at 113-14.) On October 23, 2009, the Circuit Court certified in part and rejected in part the Director's and the Mehras' Written Statement of Facts. (App. at 153-54.) On March 16, 2010, the Director's Petition for Appeal was granted as to Assignments of Error Nos. 3 and 4.

ARGUMENT

I. STANDING AND JURISDICTION

On December 10, 2009, this Court sent a letter to counsel for both parties directing them to file letter briefs addressing whether, under the facts of this case, the Director has standing to appeal a judgment of the Circuit Court declining to hold a party in civil contempt and, if so, whether the Court of Appeals of Virginia has jurisdiction to hear this appeal under Va. Code Ann. § 19.2-318. Counsel for both parties timely filed letter briefs addressing the referenced issues. By order dated March 16, 2010, the Supreme Court partially granted the Director's Petition for Appeal and requested that counsel for both parties again address, on brief and at oral argument, the jurisdiction and standing issues raised in the Court's December 10, 2009, letter.

For the reasons set forth more fully below, this appeal is governed by Va. Code Ann. § 8.01-670(A)(3) because the Director is an aggrieved party appealing from a final judgment in a civil case. The Director has standing to appeal the

judgment of the Circuit Court in this case declining to hold Appellees Raj and Urvashi Mehra in civil contempt precisely because he is an aggrieved party. Va. Code Ann. § 19.2-318 does not apply to this case because the Circuit Court declined to enter a judgment for civil contempt and, on its face, Va. Code Ann. § 19.2-318 only applies to cases where a judgment for civil contempt has been entered.

A. **The Director Has Standing to Appeal the Judgment of the Circuit Court Declining to Hold the Mehras in Civil Contempt Because He is an Aggrieved Party.**

In order for a party to have standing to seek court relief from an adverse decision, such party must be "aggrieved" by such decision. A party is aggrieved by a decision of a court if he or she had a direct interest in the subject matter of the proceeding that he seeks to attack. *Va. Beach Beautification Comm'n v. Board of Zoning Appeals*, 231 Va. 415, 419-20, 344 S.E.2d 899, 902-03 (1986) (holding that the word "aggrieved" in a statute means a "denial of some personal or property right, legal or equitable, or imposition of a burden or obligation upon the

petitioner different from that suffered by the public generally"); *see Nicholas v. Lawrence*, 161 Va. 589, 592-93, 171 S.E. 673, 674 (1933) (holding that standing requires a showing that the petitioner is aggrieved "in some manner peculiar unto himself, aside and apart from that of other taxpayers and residents").

The Director, as the official charged with enforcing the E&S Ordinance, the CBay Ordinance, and the PFM, has a statutorily recognized interest in the proper and uniform application of the Ordinances and the PFM and a governmental obligation to ensure compliance with such legislative enactments. *See Board of Supervisors v. Board of Zoning Appeals*, 268 Va. 441, 450, 604 S.E.2d 7, 11 (2004).

In *Board of Supervisors*, a landowner sought a variance from the Board of Zoning Appeals ("BZA") that would permit him to subdivide his parcel into two lots. *Id.* at 444, 604 S.E.2d at 8. The BZA granted the requested variance and the Board of Supervisors challenged the BZA's action in the

circuit court and later on appeal in this Court. *Id.* In holding that the Board of Supervisors was an aggrieved party with standing to challenge the BZA's granting of the variance, this Court stated as follows:

> The issuance of variances in disregard of the County's zoning ordinances and Virginia statutes has a direct impact upon the County because such acts will vitiate the County's zoning scheme. . . . [T]he Board of Supervisors has a strong interest in the valid implementation of its zoning authority, which is a police power conferred upon the County by the Commonwealth.

Id. at 450, 604 S.E.2d at 11.

Similarly, the Director is aggrieved by the Circuit Court's June 26, 2009, Order and therefore has standing to challenge it because that order authorizes the Mehras to continue violating the E&S Ordinance, the CBay Ordinance, and the PFM. The Director, as the agent of the Board of Supervisors responsible for enforcing these provisions, has a strong interest in their valid implementation.

The Director is also an aggrieved party because the Court's June 26, 2009, Order had the effect of vitiating the mandatory and prohibitory injunctions that had been

granted to the Director in the Final Order. *See Good v. Board of Supervisors*, 140 Va. 399, 405-06, 125 S.E. 321, 323 (1924) (determining that the appellants clearly had the right to appeal after a decree was entered dissolving an injunction and disposing of the whole case). The Director filed the Complaint for Declaratory Judgment and Injunctive Relief in this case seeking precisely the injunctive relief that he was granted in the Final Order. When the Circuit Court refused to enforce the injunctions, the Director was uniquely harmed because he was in essence precluded from carrying out his legal duty to enforce the PFM, E&S Ordinance, and the CBay Ordinance.

In their January 11, 2010, letter brief, the Mehras erroneously contend that the Director does not have standing to bring this appeal based on this Court's holding in *Wolfe v. Board of Zoning Appeals*, 260 Va. 7, 532 S.E.2d 621 (2000). In *Wolfe*, the Board of Supervisors and the Zoning Administrator filed in the trial court a petition for writ of certiorari challenging a decision of the Board of Zoning

Appeals ("BZA"), which reversed the Zoning Administrator's determinations regarding alleged zoning violations on the Wolfes' property. *Id.* at 12, 532 S.E.2d at 623. The Zoning Administrator subsequently moved for a nonsuit as to the claim of the Board of Supervisors because, as specifically stated in the Zoning Administrator's motion, the Board of Supervisors "did not authorize the filing of the Petition [for Certiorari] on its behalf." *Id.* at 12, 532 S.E.2d at 623.

Wolfe is inapposite to the facts of this case. In this case, unlike in *Wolfe*, at the Board's public hearing on September 14, 2009, the Board expressly authorized the Director to file this appeal. Moreover, the Director had the authority to litigate this case because the Board has explicitly delegated to him the authority to administer and enforce the CBay Ordinance, the E&S Ordinance, and the PFM pursuant to Fairfax County Code §§ 104-1-2, 104-1-5, 104-1-12, 118-1-8, 118-9-1, and PFM § 1-0100.7. Therefore, it is clear that *Wolfe* has no application to the

facts of this case and that it no way supports the Mehras' position in this case.

B. **The Director is an Aggrieved Party Appealing from a Final Order and This Appeal is Therefore Governed by Va. Code Ann. § 8.01-670(A)(3).**

Va. Code Ann. § 8.01-670(A)(3) provides that, "[e]xcept as provided by § 17.1-405, any person may present a petition for an appeal to the Supreme Court if he believes himself aggrieved . . . [b]y a final judgment in any other civil case."[2]

The Circuit Court's June 26, 2009, Order was a final order because it dismissed the Rule to Show Cause issued to the Mehras and left nothing further to be done by the court. A final order is one "'which disposes of the whole subject, gives all the relief that is contemplated, and leaves nothing to be done by the court.'" *Southwest Va. Hospitals, Inc. v. Lipps,* 193 Va. 191, 193, 68 S.E.2d 82, 83 (1951). In other words, an order is final when it either grants or refuses to

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[2] The Director is not appealing from a judgment that is governed by Va. Code Ann. § 17.1-405.

grant the relief sought by the party claiming such relief. *Jones v. Buckingham Slate Co.*, 116 Va. 120, 81 S.E. 28, 30 (1914).

In his Motion for Rule to Show Cause, the Director asked the Court to find the Mehras in contempt of court and order them to comply with the Final Order. The Circuit Court's Order dismissing the Rule, declining to find the Mehras in contempt, and declining to order the Mehras to comply with the Final Order is a Final Order. For the reasons set forth above, the Director is an aggrieved party under the purview of Va. Code Ann. § 8.01-670(A)(3). This appeal, therefore, is properly before this Court pursuant to Va. Code Ann. § 8.01-670(A)(3).

C. Jurisdiction for this appeal is Not Governed by Va. Code Ann. § 19.2-318 Because the Circuit Court's Order was a Judgment Declining to Hold the Mehras in Contempt of Court and Not a Judgment for Civil Contempt.

Va. Code Ann. § 19.2-318 provides, in relevant part, that an appeal from a judgment for civil contempt may be taken to the Court of Appeals. This statute does not apply in

this case because the Director is not appealing from a judgment for civil contempt; rather, he is appealing from an order declining to hold the Mehras in civil contempt, and Va. Code Ann. § 19.2-318 does not state that it applies to an appeal from a judgment declining to hold a party in civil contempt. It is noteworthy that none of the published cases in Virginia involving appeals filed pursuant to Va. Code Ann. § 19.2-318 involved a judgment declining to find a party in civil contempt.

When the language of a statute is unambiguous, courts are required to give the statute its plain meaning. *Jackson v. Fidelity & Deposit Co. of Maryland*, 269 Va. 303, 313, 608 S.E.2d 901, 906 (2005); *Simon v. Forer*, 265 Va. 483, 490, 578 S.E.2d 792, 796 (2003) (asserting that courts should presume that the "'legislature chose, with care, the words it used when it enacted the . . . statute'") (quoting *Barr v. Town & Country Properties, Inc.*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990)); *Loudoun County Dep't of Social Servs. v. Etzold*, 245 Va. 80, 85, 425 S.E.2d 800, 802

(1993). Moreover, “[w]here the General Assembly has expressed its intent in clear and unequivocal terms, it is not the province of the judiciary to add words to the statute or alter its plain meaning.” *Jackson*, 269 Va. at 313, 608 S.E.2d at 906.

The phrase "any civil contempt," given its plain meaning, refers to civil contempt of whatever kind. It does not, according to the plain meaning of the words, include a judgment failing to find a party in contempt. If the legislature wanted to provide for an appeal to the Court of Appeals whether or not there was a finding of civil contempt, it would have said so. Thus, according to the plain language of Va. Code Ann. § 19.2-318, the Virginia Court of Appeals does not have jurisdiction over an appeal from a judgment declining to find a party in civil contempt (with the exception of an appeal that falls within the categories of appeals set forth in Va. Code Ann. § 17.1-405, which are inapplicable in the present case).

The phrase "judgment for any civil or criminal contempt" appears in Va. Code Ann. § 19.2-319, which provides, in relevant part, that "in any case of judgment for any civil or criminal contempt, from which an appeal may be taken or to which a writ of error lies, the court giving such judgment may postpone the execution thereof for such time and on such terms as it deems proper." When a judgment is entered declining to find a party in civil contempt, there is nothing further to be done and, therefore, there would be no reason to postpone the execution of such a judgment. With that in mind, it is clear that Va. Code Ann. § 19.2-319 refers to judgments where there has been a finding of civil or criminal contempt and not to judgments declining to make a finding of civil or criminal contempt. Because the language in Va. Code Ann. § 19.2-318 regarding "judgment for any civil contempt" is almost identical to the language in Va. Code Ann. § 19.2-319, and there is no reason to believe that the General Assembly intended for the similar language in the two statutes to have different meanings, it is clear that

Va. Code Ann. § 19.2-318 was intended to apply only in those cases where a judgment for civil contempt been entered and that it has no application in cases like this one where a judgment for civil contempt has been refused. *See Commonwealth v. Jackson*, 276 Va. 184, 194, 661 S.E.2d 810, 814 (2008) (observing that it is a "common canon of statutory construction that when the legislature uses the same term in separate statutes, that term has the same meaning in each unless the General Assembly indicates to the contrary").

Notably, the phrase "judgment for" is used repeatedly in the Virginia Code to mean a judgment for something in particular. For example, Va. Code Ann. § 8.01-128 (2007) provides that when it appears that a plaintiff was forcibly or unlawfully turned out of possession, a judgment may be "for the plaintiff for the premises" and "for such damages as the plaintiff may prove to have been sustained by him." It would not make sense if, in the referenced example, the phrase "judgment for" could be construed to include either

judgment for the plaintiff and the damages to which he is entitled, or the opposite result, declining to find judgment for the plaintiff and declining to find damages. *See also* Va. Code Ann. § 20-78.2 (2008) (stating that "[t]he entry of an order or decree of support . . . shall constitute a final judgment *for any sum or sums* in arrears.") (Emphasis added.)

The Court of Appeals is a court of limited jurisdiction. Va. Code Ann. § 17.1-405. Pursuant to Va. Code Ann. § 17.1-405(3), the Court of Appeals has jurisdiction over final judgments of a circuit court involving only domestic relations matters, adoption, and final grievance hearings pursuant to Va. Code Ann. § 2.2-3007(B). It is clear that the Director's appeal in this case does not fall within the jurisdiction of the Court of Appeals. Instead, the Director is properly before this Court under Va. Code Ann. § 8.01-670(A)(3).

II. THE CIRCUIT COURT ERRED IN DISMISSING THE RULE ON THE GROUND THAT THE MEHRAS DID NOT WILLFULLY VIOLATE THE FINAL ORDER BECAUSE CIVIL CONTEMPT IS REMEDIAL IN NATURE AND DOES NOT REQUIRE A FINDING OF WILLFULNESS. (Assignment of Error No. 3.)

The Circuit Court refused to find that the Mehras were in contempt of court for violating the Final Order because it ruled that they did not willfully violate the Final Order. For the reasons set forth below, this ruling was plain error.

The purpose of a civil contempt proceeding is to provide remedial relief to the injured parties. *Leisge v. Leisge*, 224 Va. 303, 308, 296 S.E.2d 538, 540-41 (1982). Civil contempt, therefore, does not require a finding of willfulness. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949) (observing that civil contempt "is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance"); *Leisge*, 224 Va. at 309, 296 S.E.2d at 541 (observing that "'[a]n act does not cease to be a violation of a law and of a decree merely because it may have been done innocently'") (quoting *McComb*, 336 U.S. at 191)); *JTH*

Tax, Inc. v. Lee, 540 F. Supp.2d 642, 645 (E.D. Va. 2007) (stating that a court need not find that a defendant's actions were willful to find him in civil contempt of court); *see In re General Motors*, 61 F.3d 256, 258 (4th Cir. 1995) (finding civil contempt to be an appropriate sanction if a court order "set[s] forth in specific detail an unequivocal command" which a party has violated, regardless of whether the violation was willful). "Willful," as defined by Black's Law Dictionary, means "[v]oluntary and intentional, but not necessarily malicious." *Black's Law Dictionary* 666 (Pocket ed. 1996).

The Circuit Court's finding in this case that the Mehras' continuing violation of the Final Order was not willful is irrelevant. The Final Order set forth in specific detail its unequivocal command to implement the approved Grading Plan. After determining that the Mehras had violated the unambiguous terms of the Final Order, the Circuit Court should have enforced the Final Order and held the Mehras in contempt. As a result of the Circuit Court erroneously

concerning itself with whether the Mehras willfully violated the Final Order, the Circuit Court failed to enforce the injunctions in the Final Order and, therefore, denied remedial relief to the Director.

Moreover, the Circuit Court abused its discretion when it dismissed the Rule based on its determination that the Mehras did not willfully violate the Final Order. In *Frank Shop, Inc. v. Crown Central Petroleum Corp.*, 264 Va. 1, 564 S.E.2d 134 (2002), the trial court found the defendant's action to be in violation of the law, yet it failed to order the defendant to immediately cease the unlawful activity. *Id.* at 5, 564 S.E.2d at 136. On appeal, this Court declared that it is an abuse of discretion for the trial court to allow a party to continue violating the law until "it works itself out of the supposed hardship in which it finds itself." *Frank Shop,* 264 Va. at 7, 564 S.E.2d at 137.

The Court's June 26, 2009, Order, finding that the Mehras are in violation of the Circuit Court's Final Order and, therefore, in violation of the E&S and CBay Ordinances and

the PFM, but nevertheless failing to order the Mehras to abate the violations, is an abuse of discretion based on this Court's holding in *Frank Shop*. Under *Frank Shop,* it is clear that the Circuit Court does not have the authority to find that the Mehras are violating the law and nevertheless permit them to continue doing so, regardless of whether the Court considered the Mehras' violation of the Final Order to be voluntary and intentional. As in *Frank Shop*, the Circuit Court abused its discretion in failing to find the Mehras in contempt of court, and it was plain error for the Circuit Court to dismiss the Rule in this case on the ground that the Mehras' violations of the Final Order were not willful.

III. THE CIRCUIT COURT ERRED WHEN IT FAILED TO FIND THE MEHRAS IN CONTEMPT OF COURT AFTER THE EVIDENCE ESTABLISHED THAT THE MEHRAS CHOSE NOT TO COMPLY WITH THE FINAL ORDER BASED ON THEIR OWN FINANCIAL PRIORITIES. (Assignment of Error No. 4.)

In this case, the Mehras admit that they have not complied with the Final Order, and the Circuit Court so found. The Mehras did not allege any reason for their failure to comply with the Final Order other than their alleged

financial inability to comply. (App. at 90.) However, an alleged lack of funds does not constitute a defense to an action to enforce a court's order, particularly when the evidence establishes that the obligor made a conscious decision to fulfill one set of financial obligations and neglect the requirements of the court's order. *Epps v. Commonwealth*, 47 Va. App. 687, 704, 717, 626 S.E.2d 912, 920, 926 (2006) (observing that court orders would be meaningless if "the person under order can ignore the order based on his own priorities").

Only in the context of alimony and support cases have courts found that inability to comply with a court order due to "*poverty or insolvency* is an adequate excuse." *Lindsey v. Lindsey*, 158 Va. 647, 654, 164 S.E. 551, 553 (1932) (emphasis added). Unwillingness to comply, however, is not a substitute for inability. *Id.* at 654, 164 S.E. at 553; *Branch v. Branch*, 144 Va. 244, 250, 132 S.E. 303, 305 (1926) (finding the defendant's failure to pay alimony as decreed was due to unwillingness, not inability, to pay, and

this was contumacy). In *Lindsey*, the defendant claimed insolvency, but the Court upheld the trial court's finding of contempt on the grounds that the defendant was running a business of some magnitude and though allegedly "[u]tterly insolvent, he has been able to retain distinguished counsel and to prosecute, not *in forma pauperis*, an appeal to this court." *Lindsey*, 158 Va. at 654-55, 164 S.E. at 554.

This is not an alimony or support case, so the Mehras' alleged financial status has no relevance. Even if it were relevant, however, the evidence in this case reveals that the Mehras are far from impoverished or insolvent. They earn close to $200,000 per year (likely more, depending upon Mr. Mehra's unspecified income from owning and operating Chelsea Advisory Services), live in a house that has an assessed value of $1.9 million, educate two children in private school, drive two expensive cars, use a lawn service and a maid service, choose to pay $400 per month extra towards their $5,000 per month mortgage, and pay their children $240 per month for an allowance. (App. at 108,

109-10, 130.) The Mehras have been represented by competent counsel throughout this litigation, and there is no evidence that such counsel is rendering such service for free.

The Mehras have asserted that their inability to comply with the Final Order arose from Appellee Raj Mehra's loss of employment after the Final Order was entered. Notably, the Mehras have never identified the job that Appellee Raj Mehra allegedly lost or the amount of income he previously earned, and they have failed to produce any physical evidence of such job loss. Appellee Raj Mehra did not appear at the June 26, 2009, hearing to testify or be cross-examined, and no evidence was presented as to the amount of his income. Moreover, the Mehras admit that they still have a net monthly income of $11,100, despite Appellee Raj Mehra's alleged job loss, and that, as of the date of the June 26, 2009, hearing, Raj Mehra still owned and operated his consulting business, Chelsea Advisory Services, from the subject property.

According to their own reported income, the Mehras were still making a net income of $11,100 per month, even after Raj Mehra's alleged job loss. (App. at 72, 107, 128.) Between the date the Final Order was entered and the date of the hearing on the Rule, the Mehras' total *net* income amounted to $99,900. Again, this $99,900 does not include amounts earned by Raj Mehra as a result of his ownership and operation of Chelsea Advisory Services. If the Mehras had any real interest in complying with the Final Order, surely they could have set aside a portion of their net income of $99,900 to do so.

The evidence before the Circuit Court, therefore, clearly established that the Mehras elected not to comply with the Final Order and instead chose to spend their money on their own priorities. Choosing to spend more money than one makes is clearly not a defense to failing to comply with a court's order. Accordingly, the Circuit Court abused its discretion when it failed to find the Mehras in contempt of

court and failed to mandate that they comply with the Final Order.

CONCLUSION

For the reasons set forth above, the Circuit Court's judgment declining to find the Mehras in contempt of court despite their failure to comply with the Final Order was plain error and an abuse of discretion. Therefore, Appellant Jimmie D. Jenkins, Director, Fairfax County Department of Public Works and Environmental Services, by counsel, respectfully requests that the Court reverse the Circuit Court, vacate its June 26, 2009, and August 10, 2009, Orders, and remand this case to the Circuit Court for further proceedings and the imposition of appropriate remedial relief.

JIMMIE D. JENKINS, DIRECTOR,
DEPARTMENT OF PUBLIC WORKS
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CERTIFICATE OF COMPLIANCE WITH RULE 5:26(d)

I hereby certify that on this 23rd day of April 2010, fifteen copies of the foregoing Opening Brief of Appellant were mailed by certified mail, first-class postage prepaid, return receipt requested, to Patricia L. Harrington, Clerk, Supreme Court of Virginia, 100 N. Ninth Street, 5th Floor, Richmond, Virginia 23219, and on the same day, an electronic copy of the same was submitted via email to scvbriefs@courts.state.va.us, and on the same day, three copies of the foregoing Opening Brief of Appellant were mailed, first-class postage prepaid, to:

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