IN THE

Supreme Court of Virginia

RECORD NO. 122069

THOMAS RALEY,

Appellant,

v.

NAIMEER HAIDER,
MINIMALLY INVASIVE PAIN INSTITUTE, PLLC
and
WISE, LLC.,

Appellees.

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. THE APPELLEES' CONTENTION THAT THE APPEAL SHOULD BE DISMISSED FOR ALLEGED FAILURES TO COMPLY WITH RULES 5:17(C)(1) & 5:27 (C) SHOULD BE REJECTED.

Appellees argue that Dr. Raley's appeal should be denied in its entirety on grounds that Dr. Raley allegedly failed to comply with Rule 5:17 (c)(1) and Rule 5:27(c) of the Rules of the Supreme Court of Virginia.[1] The Court should reject these arguments because (a) Dr. Raley complied with both rules and, (b) any such defects, even if true, would not warrant dismissal of the appeal.

A. Dr. Raley's Petition & Brief Complied With All Rules

Rule 5:17(c) requires that an appellant "list, clearly and concisely and without extraneous argument, the specific errors in the rulings below upon which the party intends to rely."[2] Rule 5:27(c) requires references to where in the record the assigned errors were preserved.[3] Dr. Raley clearly identified the trial court's errors upon which Dr. Raley relies as the basis for his appeal in full compliance with the requirements of these rules.[4]

The Assignments of Error correctly cited to the Order granting the defendants' Demurrer and to Dr. Raley's arguments pertaining to each

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[1] *See* Appellees' Brief at pp. 7-8.
[2] VA. SUP. CT. R. 5:17(c).
[3] VA. SUP. CT. R. 5:27(c).
[4] JA at 199; Opening Brief of Appellant at p. 5.

Assignment of Error as the basis of the appeal, including where each error was preserved.[5] The Order entered by the trial court clearly reflects and incorporates the "arguments and briefs of counsel admitted before this Court on August 24, 2012."[6] Both the Court and the appellees have been fully apprised as to "the points on which appellant intends to ask a reversal of the judgment." *Yeatts v. Murray*, 249 Va. 285, 290, 455 S.E.2d 18, 21 (1995) (citations omitted).

The appellees also waived any argument relating to alleged defects at the petition stage, by failing to raise these claims in its Rule 5:18 Brief In Opposition.[7] The appellees filed a detailed Brief in Opposition to the granting of the petition as to the merits of the appeal, but made no note or argument regarding this supposed procedural defect.[8]

B. Even If The Brief Of Appellant Had Minor Technical Defects, They Would Not Warrant The Extreme Sanction of Dismissal.

Appellees concede in their Brief that violations of Rules 5:17 and 5:27 do not typically warrant dismissal.[9] Appellees were unable to cite to any authority holding that such technical shortcomings would ever merit

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[5] *See* Opening Brief of Appellant, pp. 5, 10-17, 18-20, 21-23, 21-23; *See also*, JA at pp. 148, 56-70, 107-119, 120-147; *See infra* Section II.
[6] JA at pp. 148, 56-70, 107-119, 120-147.
[7] *See generally*, JA at pp. 178-196.
[8] *Id.*
[9] Appellees' Brief at p. 7-8 (citing *Jay v. Commonwealth*, 275 Va. 510, 520, 659 S.E.2d 311, 317 (2008).

dismissal. [10] Appellees cite only to *Jay v. Commonwealth*, a case where this Court explicitly noted the extreme nature of dismissal for technical defects, and held that the defects alleged there did not warrant that extreme sanction. 275 Va. 510, 520, 659 S.E.2d 311, 319 (2008).

Dismissal is only appropriate in cases where a party severely disregards the requirements and purposes of the rules. *See e.g., Estate of Parfitt v. Parfitt*, 277 Va. 333, 344, 672 S.E.2d 827,831(2009) (holding that the appellant waived its right to pursue claims because it violated Rule 5:27 "by failing to include ***any*** "principles of law," "argument," or "authorities" relating to this granted assignment of error"); *see also, John Crane, Inc. v. Hardick*, 283 Va. 358 (2012)(holding that the appellant waived arguments on appeal by failing to state ***any*** legal authority in support of the assignment of error asserted, in violation of Rule 5:27). The technical defects alleged by the appellees, when taken as true, do not remotely rise to the level where dismissal would be warranted.

II. RALEY HAS PROPERLY PRESERVED HIS OBJECTIONS.

Contrary to the appellees' arguments,[11] Dr. Raley properly preserved his objections through pleadings, memoranda and oral arguments. To the

[10] Appellees' Brief at pp. 7-9.
[11] Appellees' Brief at pp. 9-10.

extent there might be any minor shortcoming, both Virginia Code § 8.01-384 and Rule 5:25 provide that the Court should address the trial court's errors for good cause and to enable this Court to attain the ends of justice.[12]

A. Dr. Raley Properly Preserved His Objections.

In determining whether or not an appellant properly preserved his or her objections, the Court first considers the basis of the adverse ruling that is being challenged. In this case, the trial court granted the Demurrer to all Counts of the Complaint[13] solely on the grounds of res judicata.[14] Dr. Raley articulated his arguments and objections against this ruling in his pleadings, his memoranda[15] and at oral argument before the trial court.[16] The trial court, as will be discussed in detail below, did not allow the appellant an opportunity to object to the entry of its Order.[17] However, the trial court noted the arguments preserved by the appellant against the ruling through

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[12] VA. SUP. CT. R. 5:27(c); VA. CODE § 8.01-384.
[13] JA at pp. 15-33; *see also*, JA at 1-9 (the garnishment action was consolidated into Count I of the Complaint).
[14] *See* JA at p. 148. ("[B]ased on the arguments and briefs of counsel admitted before this Court on August 24, 2012, that Counts I, II, III, IV, V, VII and VIII of the Plaintiffs Complaint are barred by res judicata...").
[15] *See* JA at pp. 56-70, 107-119.
[16] *See Generally*, JA at pp. 120-147; *See e.g.*, JA at pp. 140-142, 132-136.
[17] *See infra,* Section II; *See also*, Exhibit A.

incorporation of the "arguments and briefs of counsel admitted before this Court on August 24, 2012" into the Final Order.[18]

Virginia Code § 8.01-384 (a) provides that:

> Formal exceptions to rulings or orders of the court shall be unnecessary; but for all purposes for which an exception has heretofore been necessary, it shall be sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objections to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection shall not thereafter prejudice him on motion for a new trial or on appeal. No party, after having made an objection or motion known to the court, shall be required to make such objection or motion again in order to preserve his right to appeal, challenge, or move for reconsideration of, a ruling, order, or action of the court. No party shall be deemed to have agreed to, or acquiesced in, any written order of a trial court so as to forfeit his right to contest such order on appeal except by express written agreement in his endorsement of the order. Arguments made at trial via written pleading, memorandum, recital of objections in a final order, oral argument reduced to transcript, or agreed written statements of facts shall, unless expressly withdrawn or waived, be deemed preserved therein for assertion on appeal.

Dr. Raley made clear to the trial court through his written pleadings, memoranda[19] and oral argument,[20] at the time the ruling of the trial court

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[18] JA at p. 148.
[19] *See* JA at pp. 56-70, 107-119.
[20] *See Generally,* JA at pp. 120-147; See e.g., JA at pp. 140-142, 132-136.

was sought "the action which he desire[d] the Court to take." [21] *See Newtown v. City of Richmond*, 198 Va. 869, 96 S.E. 2d 775 (1957) (holding that the trial court and opposing counsel were aware of the basis of the objection, and therefore, even though it was not explicitly stated, it was entertained by the Court).

This case also falls squarely into the scenario contemplated by the General Assembly, as Dr. Raley had no opportunity to object to the Order entered by the trial court. The trial court entered its Final Order on September 4, 2012. The trial court elected to waive endorsement of the order by the parties pursuant to Rule 1:13.[22] Having taken the Demurrer under advisement at the close of the hearing,[23] the trial court then did not notify Dr. Raley or his counsel that a ruling had been made.[24] Dr. Raley and his counsel first learned of the trial court's decision on October 2, 2012, when counsel for Dr. Raley inquired with the trial court via telephone.[25] The clerk for the trial court provided a copy of the Order via email and apologized for not having provided a copy when it was entered.[26] As Dr. Raley did not receive notice of the Order until the matter was beyond the

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[21] VA .CODE § 8.01-384 (a); *See* JA at pp. 56-70, 107-119, 120-147.
[22] JA at p. 148; VA. SUP. CT. R. 1:13.
[23] *See* JA at p. 145.
[24] JA at p. 14; *See also*, Exhibit A.
[25] *See* Exhibit A.; See also JA at p. 148.
[26] See Exhibit A.

jurisdiction of the trial court, Dr. Raley was not provided with an opportunity to object.[27]

B. The Appeal Should Proceed To Consideration On The Merits To Enable The Court To Attain The Ends Of Justice.

The trial court granted the demurrer based solely on grounds of res judicata.[28] The appellees and trial court were both made well aware of the appellant's arguments against and objections to those supposed grounds.[29] While Raley maintains that he met the standards set by Rule 5:25, *see Riverside Hosp., Inc. v. Johnson*, 272 Va. 518, 526, 636 S.E.2d 416, 420 (2006), Raley would also qualify under the rule's clause allowing relief "for good cause shown or... to attain the ends of justice."[30] Surely, the trial court's failure to provide the appellant with any opportunity to explicitly object to the final Order cannot be the basis upon which the appellant's appeal would be dismissed.

III. THE DISMISSAL OF DR. HAIDER FROM THE 2010 ACTION WAS BASED SOLELY UPON STANDING.

The Amended Complaint[31] in the 2010 action consisted of three counts: Breach of Contract (Count I);[32] Tortious Violation of Va. Code §

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[27] VA. SUP. CT. R. 1:1.
[28] *See* JA at pp. 148, 114-119, 105; *See infra*, Section III.
[29] JA at pp. 148, 56-70, 107-119, 120-147.
[30] VA. SUP. CT. R. 5:25.
[31] JA at pp. 99-104.

13.1-105 (Count II);[33] and *Quantum Meruit*/Unjust Enrichment (Count III).[34] Only Count II, the Tortious Violation of Va. Code § 13.1-105, was asserted against and sought relief against Dr. Haider.[35]

The *quantum meruit*/unjust enrichment claim (Count III) was explicitly asserted only against Minimally Invasive Spine Institute and not Dr. Haider.[36] Only MISI was alleged to be liable under that Count,[37] to have improperly retained benefits,[38] or to have been unjustly enriched.[39] No such allegations were made with respect to Dr. Haider. Indeed, his name does not appear anywhere in Count III.

The appellees' contention is not only clearly false. It also contradicts Dr. Haider's previous filings.[40] The appellees now argue that their new contention is supported by (a) the order dismissing Dr. Haider from the 2010 suit, and (b) the prayer for relief of the

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[32] JA at pp. 101-102.
[33] JA at pp.102-103.
[34] JA at p. 103.
[35] *Id.*; See also, JA at pp.114-119 (Defendants' Demurrer to Count II of the Plaintiff's Amended Complaint)
[36] JA at pp. 45, 103.
[37] Id. (See ¶ 26)
[38] Id. (See ¶ 29)
[39] Id. (See ¶ 30)
[40] JA at pp.114-119 (Defendants' Demurrer to Count II of the Plaintiff's Amended Complaint)

Amended Complaint.[41] Both of these arguments should be rejected by the Court.

A. The Order Dismissing Dr. Haider From The 2010 Suit Granted the Only Relief Sought By Dr. Haider.

The Order entered on April 1, 2011 clearly dismissed Count II (Tortious Violation of Va. Code § 13.1-105) of the Amended Complaint, and as a result, Dr. Haider was excused from the case.[42] The Order was entirely consistent with the limited relief sought by Dr. Haider in the Defendants' Demurrer to Count II of the Plaintiff's Amended Complaint.[43] That demurrer challenged only Count II of the Amended Complaint, and explicitly requested that Dr. Haider be dismissed from the case on that argument alone.[44] Dr. Haider made it quite clear that the only Count pending against him in that action was Count II, arguing, "Plaintiff [Dr. Raley] nevertheless seeks to maintain a claim against Dr. Haider personally. *See* Amended Compl. Count II."[45] Despite the fact the Demurrer did not reference anything but Count II, the appellees' misrepresented to the trial court in the 2012 action that "we asked for the

[41] JA at p. 103.
[42] JA at p. 105.
[43] JA at pp.114-119 (Defendants' Demurrer to Count II of the Plaintiff's Amended Complaint)
[44] JA at p. 114.
[45] JA at p. 114.

demurrer on both issues."[46] That misrepresentation now is repeated before this Court.

There was no mention of the *quantum meruit* claim in the Defendants' Demurrer to Count II of the Plaintiff's Amended Complaint, because that claim was not asserted against Dr. Haider in the Amended Complaint.[47] The Order dismissing Count II of the Amended Complaint, and as result, dismissing Dr. Haider, as a defendant, was consistent with the way both sides presented the issue to the trial court at that time.[48]

B. The Amended Complaint's Prayer For Relief Is Consistent With The Fact That Only Count II Of The 2010 Amended Complaint Sought Relief Against Dr. Haider.

Appellees contend that the prayer for relief, found at the end of the 2010 Amended Complaint, supports their newfound interpretation.[49] A review of the Amended Complaint as a whole reveals that the appellees' assertion is simply untrue.

Count I (Breach of Contract) sought damages only from MISI.[50] Count II (Tortious Violation of Va. Code § 13.1-105) sought relief against both Dr. Haider and MISI, stating, "The tortious actions of Haider, for which

[46] JA at p. 145 (5); Compare JA 114-119.
[47] JA at pp.114-119 (Defendants' Demurrer to Count II of the Plaintiff's Amended Complaint)
[48] JA at pp.114-119,105, 99-104.
[49] Appellee's Brief at p. 12.
[50] JA at p. 102.

MISI is vicariously liable, have damaged Raley by an estimated $1,000,000.00, plus interest from the date the payments should have been remitted to Raley. Haider and MISI are jointly and severally liable for these acts."[51] Count III (*Quantum Meruit*/Unjust Enrichment), as discussed above,[52] sought relief only against MISI.

The Amended Compliant had only one prayer for relief, which of course appeared at the end of that pleading.[53] For that reason alone, it is juxtaposed to the end of Count III.[54] There is no inference to be drawn that the prayer's reference to Dr. Haider reflected any intention to subject him specifically to Count III (nor to Count I, for that matter). The prayer merely reflects how Dr. Raley believed that an ultimate final judgment should grant relief, considering all three counts together at that juncture.

IV. THE STANDING ARGUMENT WAS PROPERLY PRESENTED

Standing is defined as "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right." BLACK'S LAW DICTIONARY 1413 (7th ed. 1999). Dr. Raley clearly presented the standing argument before the trial court, and the appellees' assertion that it was not raised before the trial

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[51] JA at p. 103.
[52] *See infra* pp. 7-9.
[53] JA at p. 103.
[54] JA at p. 103.

court is unsupported by the record.[55] The trial court was unequivocally informed that the dismissal of the Dr. Haider from the 2010 suit was based solely on the grounds of the standing.[56]

Dr. Raley actually did use the word "standing" in his memoranda.[57] The standing argument was also presented to the Court in substance.[58] The appellees' submissions below also used the term "standing".[59]

Both the court and appellees were aware of the standing arguments and therefore, they were properly presented and preserved for appeal. *Newtown v. City of Richmond*, 198 Va. 869, 96 S.E. 2d 775 (1957) (holding that because the trial court and opposing counsel were aware of the basis of the objection, and therefore, even though it was not explicitly stated, it was entertained by the Court).

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[55] JA at pp. 58 & 108 ("In other words, Haider contended that Raley as mere creditor of MISI could not bring any actions directly against him; only MISI could do that."); 59 ("While this court's prior ruling in the 2010-filed action makes clear that MISI is the only party with rights against Haider...); JA at 129-130 ("Judge Ney dismissed Count 2 as to Dr. Haider saying that Dr. Raley could not bring a direct action against Dr. Haider. In other words, Dr. Raley had no direct rights [standing] against Dr. Haider."); 134-135.
[56] *Id.*
[57] *See* JA at pp. 59 and 109.
[58] *See supra* note 55.
[59] *See generally* JA at pp.114-119 (Defendants' Demurrer to Count II of the Plaintiff's Amended Complaint); *See e.g.*, JA at 117 ("Even if Plaintiff [Raley] had standing to bring Count II...")

V. THE APPELLEES INACCURATELY REPRESENT THE CLAIMS SET FORTH AGAINST MIPI AND WISE.

The Appellees' Brief argues that the "only theory the plaintiff [Appellant] asserts for MIPI and Wise's liability is that of vicarious liability deriving from defendant Haider."[60] This is simply not true, as the plaintiff/appellant has also alleged that these separate legal entities are also independently liable as the recipients of improper transfers.[61]

VI. WHEN EVALUATING THE POTENTIAL APPLICATION OF RES JUDICATA TO SEPARATE PARTIES, THE APPROPRIATE ANALYSIS IS NOT WHETHER THE SECOND ACTION "COULD HAVE BEEN FILED" SOONER.

Appellees argue that this court should apply a "could-have-been-brought-should-have-brought" test to the application of res judicata to separate parties who are not in privity. But the idea that claims which could have been brought, should have been brought, applies only to causes of action, and then only when the parties in the current case are the same as in the prior case. This approach has never been applied to suggest that a plaintiff must sue all conceivable defendants in one, initial action. Clearly, a plaintiff may sue different defendants separately, or even sequentially. The extension of this type of analysis to claims against separate parties is not

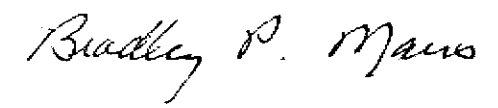
[60] Appellees' Brief at p. 23.
[61] JA at pp. 20-26.

supported by Court precedent, and would constitute an improper extension of the doctrine of res judicata.

CONCLUSION

For the foregoing reasons, appellant Thomas J. Raley, M.D., prays that this Court will reverse the decision of the circuit court below, as established by its Order of September 4, 2012, and that this Court will remand appellant's consolidated cases with instructions for trial on the merits.

THOMAS J. RALEY



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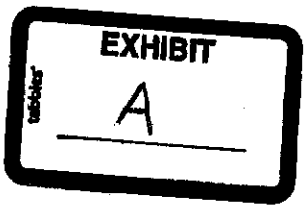
CERTIFICATE

I hereby certify that on this 23rd day of May, 2013, this Reply Brief of Appellant has been filed by hand with the Clerk of the Supreme Court of Virginia, and that copies of it have been served upon all other counsel of record, all in compliance with Rules 5:28(g) and 5:26(d).

Bradley P. Mains

Counsel



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Mr. Henry,

Attached please find the Order Judge Brodie entered on September 4th. Again, my apologies for now sending this to you then.

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VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

THOMAS RALEY, M.D.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CL 2012-0007905
	)	
NAMEER HAIDER, M.D., et al.	)	
	)	
Defendants.	)	

ORDER

THIS CAUSE came before the Court upon the Defendants' Demurrer, Plea in Bar, and Motion for Bill of Particulars. By agreement of both parties, only Defendants' Demurrer was heard; and

IT APPEARING that, based on the arguments and briefs of counsel admitted before this Court on August 24, 2012, that Counts I, II, III, IV, V, VII and VIII of the Plaintiff's Complaint are barred by *res judicata*; now therefore it is hereby

ADJUDGED AND ORDERED that the Defendants' Demurrer as to all parties is sustained and this case is dismissed with prejudice.

ENTERED on September 4, 2012.

Jan L. Brodie

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.