In The

Supreme Court of Virginia

RECORD NO. 140605

DRHI, INC.,

Appellant,

v.

WILLIAM W. HANBACK, JR.,

Appellee.

BRIEF OF APPELLANT

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NATURE OF CASE AND MATERIAL PROCEEDINGS

In June of 2002, Appellant DRHI, Inc. ("DRHI") sued Appellee William W. Hanback, Jr. ("Hanback") due to his refusal to sell a 2.14 acre property which was the subject of a July 2000 contract.

DRHI's complaint called upon Hanback to specifically perform the written July contract. The contract provided that Hanback would be paid $400,000 for the property if the property contained 5 or fewer buildable lots. In the event that the property contained 6 or more lots, Hanback would instead receive $70,000 per lot.

In October of 2002, Hanback filed an answer which argued that the contract could not be enforced because DRHI had allegedly not performed certain conditions precedent.

In June of 2004, after the conclusion of a bench trial, the trial court, the Honorable Stanley P. Klein presiding, rejected Hanback's defenses and ordered Hanback to proceed to settlement/closing.

The parties later that month appeared at closing. Hanback's property only contained 5 lots at that time. Consequently, Hanback was paid pursuant to the $400,000 lump sum payment clause of the contract.

Approximately 8 ½ years after this closing, i.e., on November 21st, 2012, Hanback through new counsel filed a Verified Petition for Rule to Show Cause.

He alleged that in 2010 the City of Fairfax approved plans that placed 5.5 houses on Hanback's property and 9.5 on another neighboring parcel that DRHI had purchased. Hanback asked the Court to determine how many lots were "attributable" to his property so that he could be paid $70,000.00 for each such lot.

Although the Petition's title said it was "Verified", the petition was not accompanied by any affidavit. The lower court did not issue a Rule.

Hanback thereafter requested an evidentiary hearing. On May 9th, 2013, the Honorable Robert J. Smith conducted this hearing. At this hearing, Hanback, relying upon a "bonus density" argument, argued that he should receive 1) an additional $35,000.00 or 2) "the more equitable" option of $350,000.00,[1] or 3) $210,000 because of events which occurred between 2006-2012.

On July 16th, 2013, Judge Smith issued a letter opinion which declared that Hanback should be paid the more "equitable" option of

[1] Hanback's May 8th, 2013 hearing brief, pp. 9-10.

$350,000. He did not, however, authorize the issuance of a Rule to Show Cause.

On August 9th, 2013, Judge Smith, at Hanback's request, did authorize the issuance of a Rule to Show Cause and made the return date September 16th, 2013.

On September 16th, 2013, the parties appeared and DRHI argued that the Court did not have the jurisdiction to proceed with a Rule to Show Cause. (App. 423-27, 432-39) The basis for this argument was that Hanback was essentially pursuing a breach of contract action for a purported failure to pay the full price for a piece of land, as evident by Hanback's constant demand for judgment interest pursuant to § 8.01-382 and attorney's fees pursuant to the contract. Hanback's counsel response – that "[DRHI was] required to pay a specific amount for the land. They had to pay put $400,000 down and then they had to pay an extra $70,000 for each lot" – while an incorrect recitation of the parties' contract supported DRHI's argument that what Hanback was pursuing was a breach of contract claim. (App. 428)

The court rejected DRHI's jurisdictional argument and, without first taking evidence as to willfulness or bad faith by DRHI that would

justify an order of contempt, declared that its "remedy" for the violation was that DRHI shall "pay them (*sic*) $350,000." (App. 445)

On September 20th, 2013, the lower court accepted Hanback's order which "entered judgment for Hanback against DRHI in the amount of $350,000" (App. p. 468) and rejected DRHI's alternative order which requested the dismissal of the Rule.

STATEMENT OF FACTS

By written contract, Mr. Hanback in July of 2000 promised to sell 2.14 acres to DRHI, Inc. An amendment to the contract specified 2 potential payment scenarios. If Hanback's property contained 6 or more lots, Hanback would be paid $70,000 per lot at closing. If his property contained only 5 or fewer lots, he would be paid $400,000 at closing. (App. 20)

The terms of these 2 payment scenarios were not subject to any contingencies or conditions.

On June 5th, 2002, DRHI filed a bill seeking the specific performance of the contract. (App. 1-24) Alleging that Mr. Hanback had received another offer of $850,000 and consequently no longer wished to sell his property to DRHI, DRHI prayed that the Court "enter a decree ordering Defendant William W. Hanback, Jr. to

perform the agreement entered into with your Plaintiff as aforesaid." (App. p. 3)

On December 30th, 2002, Hanback filed his Answer and Grounds of Defense. (App. 25-28) While admitting that he had entered into the contract alleged and that a true and accurate copy of it was attached as Exhibit 1 to the bill of complaint, Hanback denied that the contract was valid or enforceable because DRHI had allegedly failed to satisfy 2 conditions precedent. (App. 25)

Other than asking for the dismissal of the complaint and an award of costs, Hanback did not ask for nor allege that he was entitled to any other relief.

By way of a final decree entered by the Honorable Stanley P. Klein on June 9th, 2004, Hanback's affirmative defenses were rejected and he was ordered to close on the sale by June 9th, 2004. (App. 29-30) The parties appeared for settlement on June 21, 2004. (App. 49)

On the day of the June 2004 closing, "the only development permissible under the City's then existing zoning ordinance was the construction of five lots." (App. p. 232) Multiple previous efforts in 2001 to rezone the property to obtain more lots, either townhouse or

single family, had failed. (App. 231) According to a handwritten exception written by Mr. Hanback's trial counsel on the 2004 decree, the development plan Horton had for Hanback's property in 2004 contemplated the construction of 4 lots. (App. 30)

Because Hanback's property yielded only 5 lots at the time of closing, Hanback was paid $400,000 and "signed a HUD 1 Settlement Statement declaring that this was the price for his property." (App. p. 232)

In 2005, DRHI acquired another parcel contiguous to the Hanback parcel, the Whitman parcel. DRHI also attempted to acquire more land in the area, but these efforts proved unsuccessful. (App. 131) The then present zoning laws of Fairfax City potentially permitted the construction of 5 houses on the Whitman parcel. (App. 148)

DRHI conveyed the Hanback and Whitman parcels to D.R. Horton, Inc. DRHI's business involves purchasing parcels of land upon which multiple residences can be constructed. Horton is in the business of constructing residential housing which it markets for sale to the general public. (App. 232)

In 2005, Horton hired the Engineering Groupe, Inc. to design a lot layout for the 2 parcels. (App. 226-227) The layout the Engineering Groupe provided to Horton sited 5 houses on the Whitman Parcel and 4 houses on the Hanback parcel. (App. 227 and 229) This by right development would require the clear cutting and regrading of both parcels. (App. 148) The Hanback parcel in particular would be cleared of some old growth trees and would require major regrading given its topography and the development plan envisioned by Horton. (App. 149-50)

Horton's proposed by right development plan was met with a huge outcry from neighboring communities in the City of Fairfax, where both parcels are located. (App. 147 and 149) These neighboring communities put pressure on City authorities to do something that would save the old growth trees on Hanback's property. The City Mayor approached Horton's Division President and asked Horton to agree to a buffer zone on the Hanback parcel. (App. 124) Mr. Jack Blevins, the Division Chief of Community Development, also testified that he proposed to Horton that instead of proceeding with the 10 lot by right development for both parcels that Horton agree to an alternative development concept created by the

City which would put more lots on the Whitman parcel. (App. p. 142) This alternative proposal advanced by the City would "preserve a lot of very tall, old trees that had been the center of attention of the 3 failed zoning attempts before." (App. p. 143)

The rezoning application submitted in 2007 for the City's approval declared that it was the City, not Horton, which was the moving force behind the idea of putting additional houses on the Whitman parcel. "The applicant [Horton] submitted the subject application for rezoning and variances *at the request of the City* after finding opposition to a by right subdivision now pending on the same property." (App. p. 234, Hanback Exhibit 7). (emphasis supplied) The rezoning concept authored and pressed by the City was, after properly noticed public hearings, approved by the City.

The City subsequently approved in 2011 lot plans which reflected its concept. (App. 308-09) Horton thereafter built 15 houses, 9.5 of which were on the Whitman parcel and 5.5 of which can be found on the Hanback parcel. (App. p. 45)

In 2012, Hanback demanded that he be paid $700,000.00, or $70,000 for each house built on the Whitman parcel. This demand was rejected for a variety of reasons, the most simple and irrefutable

being that Hanback had accepted without protest or reservation $400,000 in 2004 and only 5.5 houses were ever built on Hanback's land. (App. p. 48-50) When DRHI rejected Hanback's demand, Hanback by way of new counsel filed in November of 2012 a petition for the issuance of a rule to show cause.

ASSIGNMENTS OF ERROR

1. The lower court erred when in August 2013 it issued a rule to show cause against DRHI, Inc. and thereafter found it in contempt for its failure to pay a sum allegedly due from a 2001 real estate contract which closed in 2004.

2. The lower court erred when it issued a rule and found DRHI in contempt because these actions came as a result of its redrafting of the 2004 decree.

3. The lower court erred when it issued a rule and found DRHI in contempt because these actions came as a result of the court's redrafting of a 2001 contract which the 2004 decree ordered be specifically enforced.

4. The lower court erred when it found DRHI in contempt because Hanback's evidence did not show a violation of the terms of the decree.

5. The lower court erred when it found DRH in contempt because DRHI's failure to pay was justified.

6. The lower court erred when it found DRHI in contempt because it relied upon irrelevant evidence to come to this finding.

7. The lower court erred when it allowed Hanback to relitigate the 2002 bill of complaint and awarded relief not requested in that litigation.

Each of these assignments of error is expressly preserved by DRHI on the order entered on September 20, 2013. (App. 305-06)

STANDARDS OF REVIEW

Assignments of Error 1, 2, 3, and 7 are governed by a *de novo* standard of review because those assignments speak to whether the trial court had the jurisdiction or authority to issue a rule to show cause and thereafter find DRHI in contempt. *Country Vintner, Inc. v. Louis Latour, Inc.*, 273 Va. 402, 410, 634 S.E.2d 745, 450 (2006) (citation omitted)

Assignments of Errors No. 4 and 5 are also subject to a *de novo* standard of review because they raise the questions of whether the trial court correctly applied the controlling law to the undisputed evidence before it. *Quatennens v. Tyrrell*, 268 Va. 360, 365, 601 S.E.2d 616, 618 (2004) (citations omitted)

Assignment of Error No. 6 is governed by the “abuse of discretion” standard of review because it raises the issue of whether certain evidence relied upon by the trial court was admissible.

ARGUMENT

I. The Lower Court Did Not Have the Jurisdiction or Authority to Issue a Rule to Show Cause and Find DRHI in Contempt for its Failure to Pay a sum Allegedly Due From a 2001 Real Estate Contract Which Closed in 2004.

While a court can fine or imprison a person who has willfully and without justification refused to comply with a decree that calls upon him to do an affirmative act or pay a sum of money awarded in the course of a domestic proceeding, it does not have the power to fine, imprison, or alternatively to enter a judgment against a party for that party's alleged failure to pay sums associated with a real estate contract. In such a situation, the party seeking compensation is left to pursue or prosecute any recognized cause of action he might have.

Virginia law has long provided that courts cannot use their contempt powers to enforce a monetary obligation, even one that may or may not be associated with a previously entered judgment. *See*, *e.g. Makarov v. Commonwealth*, 217 Va. 381, 383-384, 228 S.E.2d 573, 574-75 (1977):

> "In Virginia the system of imprisonment for debt was abolished in 1849, when the predecessor to Code § 8.01-400 [now, § 8.01-467], which prohibits issuance of a writ of *capias ad satisfaciendum*, was enacted… There is no doubt that imprisonment for debt offends the fundamental principles of justice in today's ordered society. Indeed, as early as 1849, imprisonment for debt in Virginia was

> regarded as "inconsistent with the liberal and enlightened spirit of the age.'" (citations omitted)

Granted, appellate courts have agreed that with respect to one type of financial obligation – that arising from or associated with the martial relationship – a court can issue an order of contempt for non-payment. In *Eddens v. Eddens*, 188 Va. 511, 50 S.E.2d 397 (1948), this Court cited a number of earlier Virginia cases which recognized that "a court of equity in a divorce proceeding [can] enforce its decrees for the payment of alimony by attachment for contempt." 188 Va. at 516, 550 S.E.2d at 400. *Eddens* then went one step further. After reviewing a number of opinions from other jurisdictions, it declared that a court of equity in a divorce proceeding could enforce a decree for the payment of attorney's fees incurred in an effort to obtain or protect an award for maintenance and support. The stated rational for this holding was that:

> "[A]llowances for counsel fees and costs are incidental to and part of the alimony decreed to be paid to the wife, in that they *are a means of enforcing a legal duty owed by the husband to the wife in which the public has an interest;* and *such allowances*, like alimony, *are not <u>mere debts **or** money judgments</u> within the meaning of the <u>constitutional</u> and <u>statutory provisions</u> prohibiting imprisonment for debt." Id.* (emphasis added)

This latter statement is significant for purposes of considering the issue of whether the lower court here had the jurisdiction or the authority to take the action it did. According to *Eddens*, because "of the constitutional and statutory provisions prohibiting imprisonment for debt", the nonpayment of "mere debts or money judgments" is not contemptable unless these debts or money judgments arose in a domestic case. Here, any alleged "debt" owed to Hanback by DRHI did not arise in a domestic case. If it arose, it arose by way of a real estate contract. Therefore, the lower court did not have the authority to hold DRHI in contempt and enter a judgment for that purported contempt.

Even in the divorce context, the appellate courts recognize that there is a limit to when a court can use its contempt powers. In *Brown v. Brown*, 5 Va. App. 238, 361 S.E.2d 364 (1987), an equitable distribution award of $173,310.65 was entered against the husband pursuant to Code § 20-107.3. The trial court declared that the sum had to be paid within 120 days.

The Court of Appeals held that "the trial court exceeded its authority in ordering mandatory payment of that monetary award within 120 days. While it was authorized to fix a date upon which the

award was due and payable, *the trial court lacked authority to order mandatory payment subject to enforcement by its contempt powers*." 5 Va. App. at 246, 361 S.E.2d at 368 (emphasis added)

The rationale for its holding was that "satisfaction of a monetary award granted under Code § 20-107.3 is governed by Code § 8.01-426. Under that statute *"[A] decree … requiring the payment of money*, *shall have the effect of a judgment for . . . money*, and be embraced by the word "judgment" where used in this chapter or in Chapters 18, 19 or 20 of this Title or in Title 43." (emphasis added) *Id.*[2]

If a monetary award as to property granted during the course of a divorce suit was not in the eyes of the *Brown* Court an award subject to enforcement by a court's contempt powers, then certainly any award made outside a divorce proceeding, where special divorce statutes and rules do not apply, cannot be the subject of a court's contempt power. Such an award is simply a monetary judgment to be enforced by the regular modes of enforcement – levy, garnishment, debtor's interrogatories, commissioner's sales, etc.

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[2] The legislature later amended § 20.1-107.3 by providing that equitable distribution awards were enforceable by way of contempt. See, § 20.1-107.3K(2).

In this instance, Hanback complains that he has not been paid the entire amount due under a July 2000 real estate contract. If his belief that he had been short-changed were correct, then it was incumbent upon him to file suit against the party he alleged was guilty of this breach, to serve it upon that party, and to give that party an opportunity before a jury of its peers, or a judge if a jury were waived, to present evidence on whether it was liable for the breach complained of.

There is no statute, caselaw, or Supreme Court Rule which permits a party who complains of being short-changed under a contract to ask for an evidentiary hearing by way of a petition seeking the issuance of a rule to show cause rather than by way of a complaint as Rule 3:1 requires.

Even if there had been a statute, case, or Rule of Court which allowed such a proceeding, the Constitution of Virginia and § 8.01-467 of the Virginia Code expressly bar a party to a commercial contract from resorting to a rule to show cause in an effort to collect a sum which an evidentiary hearing might find is due.

If the legislature had ever intended to authorize the use of a court's contempt powers as an extraordinary means of determining a

monetary obligation or as an extraordinary means of judgment collection, it could easily have done so.[3] Instead of doing so, it passed § 8.01-467.

Because there is no statute which gave the lower court the authority to enter the judgment Hanback was awarded and because Virginia caselaw, § 8.01-467 of the Virginia Code, and the Virginia Constitution expressly prohibit it, the evidentiary hearing of May 9th, 2013 was a nullity as were the lower court's later decisions to issue a rule and thereafter to find DRHI in contempt.

II. The Lower Court had no Authority by Way of its Contempt Power to Find DRHI in Contempt Because to Reach this Result the Court Impermissibly Rewrote the 2004 Decree.

Even in cases where lower courts are recognized as having the jurisdiction and/or authority to punish by way of fine or imprisonment a party who stands accused of violating a court order, appellate courts have consistently held that lower courts lack such authority

[3] When the legislature has been given the opportunity to provide a court with authorization to utilize its contempt powers when faced with a situation where a person has received a monetary award made by a trial court, it has declined to do so. Code § 19.2-305.1 gives a trial court the power to order a defendant to give monetary restitution to a victim who has suffered property loss. When that award is not paid, § 19.2-305.2 provides that the beneficiary of the award is to enforce the award "in the same manner as a judgment in a civil action."

unless there is proof that the accused party has actually violated the express terms of a court order.

This Court and the Court of Appeals have long and uniformly held that before a person can be found in contempt a lower court must have before it a violation of clearly defined duties imposed by the express terms of an order or decree. *Taliaferro v. Horde's Adm'r*., 22 Va. (1Rand.) 242, 247 (1822) ("[B]efore 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) (Husband could not be held in contempt for not obtaining a medical insurance policy that would pay all hospital costs incurred by the wife. The decree only required that he obtain a policy, which he did.); *Petrosinelli v. PETA*, 273 Va. 700, 643 S.E.2d 151 (2007) (Attorney could not be held in contempt for violating several pretrial orders by subpoenaing an out-of-state individual for deposition since none of the orders expressly prohibited such action.); *Michaels v. Commonwealth*, 32 Va. App. 601, 609, 529 S.E.2d 822, 826 (2000) (Trial court's finding of contempt reversed.

Order did not explicitly require action [transfer of prisoner] moving party complained had not been performed.)

In *Petrosinelli*, this Court declared that the rationale for this rule of law is "the judicial contempt power is a potent one." 273 Va. at 706, 643 S.E.2d at 155. (citation omitted)

An alternative way to express the above referenced rule of law is that "a duty that arises by implication cannot sustain a finding of contempt". *Petrosinelli*, *supra*, *Id*; *Winn v. Winn*, *supra*, 218 Va. 10-11, 235 S.E.2d 309; *Taliaferro v. Horde's Adm'r*, *supra*, 22 Va. at 24.

There are two clauses in the decree which expressly impose alternative duties upon DRHI. The first is that Hanback be paid "$400,000.00 minus the $10,000.00 already paid by DRHI". This payment was received. This duty was therefore complied with.

The second potentially alternative duty requires "at the time any subdivision plans submitted by DRHI, Inc. for the development of the property *sold by Mr. Hanback* are approved by the City of Fairfax, in the event that the plans submitted by DRHI, Inc. permit the construction of six or more individual residences, DRHI, Inc. shall pay to Mr. Hanback $70,000.00 for each of the six lots and $70,000.00 for each additional approved lot thereafter." (emphasis supplied)

In order for the court below to enjoy the authority necessary to hold DRHI in contempt and thereafter take any action against it, the 2004 decree would have to read "for the development of property sold by Mr. Hanback ***and by any other third party*"**. The decree would also have to read that ***"such a payment must be made even if the additional lots fall on property other than that sold by Mr. Hanback."***

As the above cited caselaw makes clear, a party can be found in contempt only when it is shown that that party has intentionally violated the *express* terms of an order or decree. The two terms necessary for the lower court to have the authority to find DRHI in contempt are not found in the express language of the 2004 decree. The lower court in order to find DRHI in contempt both inserted new language into the 2004 decree and at the same time ignored the express language of the decree.

The caselaw cited above holds that the lower court was not empowered to do either. Because the lower court did not have this power, it had no authority to find DRHI in contempt.

III. The Lower Court Lacked the Jurisdiction/ Authority to Issue a Rule and Later Find DRHI in Contempt Because These Actions Came as a Result of its Redrafting of a 2001 Contract which the 2004 Decree Directed Be Specifically Enforced.

A third reason why the circuit court could not as a matter of law 1) conduct an evidentiary hearing in May of 2012 to determine Hanback's various claims for $35,000.00, $210,000.00, or $350,000.00, 2) issue a rule for the failure to pay the number it selected, and 3) hold DRHI in contempt for not paying that number is that these actions required the lower court to rewrite the contract that was to be specifically performed. According to a number of cases issued over many decades, courts do not have the power to rewrite contracts.

Appellate courts have repeatedly held that parties are governed by the terms of their contract and it is the courts' duty to enforce those terms. Courts cannot, at the request of one party, add to or ignore the terms of the parties' contract. *Blue Cross & Blue Shield v. Keller*, 248 Va. 618, 626, 450 S.E.2d 136, 140 (1984) ("It is not our function to 'make a new contract for the parties… and thus create a liability not assumed…'".); *Ayres v. Harleysville Mutual Casualty Co*., 172 Va. 383, 389, 2 S.E.2d 303, 305 (1939) (Courts cannot make a

contract for the parties which they did not make themselves and never intended to make.); *Westchester Insurance Co. v. Rose*, 159 Va. 633, 639-40, 166 S.E. 469, 471 (1932) ("The effect of [the court's instruction] was to make a new contract for the parties. This the court was without authority to do.") (citation omitted); *Waikoloa Ltd. Partnership v. Arkwright*, 268 Va. 40, 47, 597 S.E.2d 49, 53 (2004) ("A Chancellor's function is to construe the contracts made by the parties, not to make new contracts for them.") (citations omitted); *BlueCross and Blue Shield v. Wingfield*, 239 Va. 599, 602, 391 S.E.2d 73, (Trial court could not, by applying principals of equity, effectively rewrite parties' contract and require payment not called for by the contract.); *White v. White*, 257 Va. 139, 145, 509 S.E.2d 323, 326 (1999) (Trial court could not find husband in contempt for failing to pay support when agreement at issue only required him to pay mortgage payments, not spousal support to his ex-wife, and the language in the decree treating the mortgage payment obligation as a support obligation constituted impermissible rewriting of agreement.); *Stacy v. Stacy*, 53 Va. App. 38, 669 S.E.2d 348 (2008) (Trial court without authority to rewrite terms of PSA.); *Rutledge v. Rutledge*, 45 Va. App. 56, 608 S.E.2d 504 (2005) (Appellant's request for relief

denied because awarding it would require ignoring express terms of PSA, which is impermissible.)

While this rule of law has been often applied in breach of contract cases, *see*, *e.g*., *Meade v. Wallen*, 226 Va. 465, 311 S.E.2d 103 (1984) (Trial court erred in establishing pricing method for plaintiff's use of defendant's right of way to haul timber where new pricing method was contrary to express provisions of their contract.); *Graphic Arts Mutual Ins. v. C.W. Warthen Co*., 240 Va. 457, 397 S.E.2d 876 (1990) (Trial court's decision to award $40,000.00 to plaintiff against defendant insurer reversed because terms of insurance policy limited potential awards to $10,000.00.); *Christopher Associates v. Sessoms*, 245 Va. 18, 425 S.E.2d 795 (1993) (Trial court's decision to award more than the liquidated damage provision in parties' real estate contract allowed reversed.), this rule of law had been applied to specific performance suits in particular. *Sale v. Swann*, 138 Va. 198, 209, 120 S.E. 870, 873 (1924) ("*Whenever specific performance is justified*, and the question raised is covered by the contract, *it is the agreement of the parties which controls and is enforced*. In such a case these is no occasion *or jurisdiction* for the

application of an equitable rule.") (citation omitted) (emphasis supplied)

See also, *Rison v. Newberry*, 90 Va. 513, 521, 18 S.E. 916, 919 (1894) ("Equity cannot make or alter a contract for the parties and then execute it."); *Dickenson v. Scott*, 119 Va. 497, 498, 89 S.E. 869, 870 (1916) (In cases involving an award of specific performance, a trial court's material departure from the terms of a contract "to the detriment of the purchaser constitutes reversible error.") (citations omitted); *Verling v. Quarles*, 217 Va. 188, 191, 227 S.E.2d 684, 685-86 (1976) (Trial court cannot when decreeing specific performance "make a material departure from the terms of the contract and in effect [make] an agreement for the parties and then [seek] to execute it" even if in trial court's mind its contract was "a more equitable one."); *Eascalco v. Caulfield*, 220 Va. 475, 477, 259 S.E.2d 821, 822 (1979) ("A court cannot alter the terms of a contract and then enforce it, when specific performance is granted.") *Bissett v. Realty, Inc. v. Moyer*, 223 Va. 475, 477-78, 290 S.E.2d 851, 852 (1982) ("In decreeing specific performance, a court may not alter a contract in the process of executing it.") (citations omitted).

According to these cases, even if the lower court here who agreed to hold an evidentiary hearing in May 2013 had had original jurisdiction over the specific performance case in June 2004, it would not have had the jurisdiction to rewrite the parties' contract. If the lower court did not have the jurisdiction to rewrite the parties' contract if it had been the court who had presided over the case seeking specific performance, it certainly did not have the jurisdiction to rewrite the parties' contract at any post decree proceeding.

IV. The Lower Court's Order of Contempt was Erroneous Because Hanback's Evidence Did Not Establish a Violation of the 2004 Decree.

At a show cause hearing, the moving party must "prove that the offending party failed to comply with an order of the trial court." *Commonwealth ex rel Graham v. Bazemore*, 32 Va. App. 451, 455-56, 528 S.E.2d 193, 195 (2000).

Hanback accused DRHI of violating an alternative payment scenario found in the parties' contract and set forth in the decree. This paragraph speaks to payments owed upon the occurrence of certain events:

1) the submission of subdivision plans by DRHI;

2) for the development of “the property sold by Mr. Hanback”;

3) the approval of these plans by the City of Fairfax;

4) the plans submitted by DRHI for the development of the property sold by Mr. Hanback permitted the construction of six or more residences on Hanback’s property.

The trial court was not presented with any evidence showing that these four events occurred. The evidence which was presented by Hanback himself showed that DRHI never submitted subdivision plans that were approved by the City of Fairfax which permitted six or more residences on the property sold by Mr. Hanback. At most, Mr. Hanback’s evidence showed that the City of Fairfax, more than 7 years after Mr. Hanback closed on the sale, approved plans submitted by another corporation, D.R. Horton, Inc., with respect to an Assemblage.

Because the plans approved by the City of Fairfax were not submitted by DRHI (condition #1), because these plans were not limited to the development of Hanback’s property but included the development of an Assemblage (condition #2), because the City of

Fairfax never approved plans that only involved Hanback's property (condition #3)[4], and because these plans by a different company which spoke to an Assemblage only allowed the construction of 5 full houses on Hanback's property (condition #4), Hanback's evidence did not show a violation of the decree. For these reasons, the lower court's order of contempt must be reversed.

V. The Lower Court's Order of Contempt Cannot Stand Because DRHI's Failure to Pay Hanback Was Justified.

The abilities of a court to hold a party in contempt and to punish the party for contempt do not arise if the "offending" party was justified in his actions. *Frazier v. Commonwealth*, 3 Va. App. 84, 87, 348 S.E.2d 405, 407 (1986). If the "offending party" was not justified in his actions, but was "acting in bad faith" **<u>or</u>** "[in] willful disobedience" of [the] order, contempt lies. *Carswell v. Masterson*, 224 Va. 329, 332, 295 S.E.2d 899, 901 (1982); *Commonwealth ex rel Graham v. Bazemore*, *supra*, 32 Va. App. at 457, 528 S.E.2d at 195. (citation omitted)

Not only is the record devoid of any bad faith or willful disobedience of the order on DRHI's part, the record shows that

[4] The only plans submitted by DRHI which solely involved Hanback's property were rejected by the City of Fairfax in November 2001.

DRHI was fully justified in rejecting Mr. Hanback's April 2012 demand.

DRHI filed a specific performance suit against Mr. Hanback because he refused to honor his contractual obligation to convey his property to DRHI. Mr. Hanback refused to convey because he hoped to sell his property to a higher bidder. At trial, Mr. Hanback attempted to justify his refusal to convey by arguing that DRHI had breached the contract. The trial court rejected these arguments and ordered the specific performance of the contract.

The contract required that DRHI pay at closing $400,000 to Hanback if his property had 5 or fewer lots or $70,000 per lot if Mr. Hanback's property contained 6 or more building lots. Hanback's evidence showed that Hanback's property was never approved for more than 5 building lots and that DRHI's efforts to put more than 5 lots on it were rejected by the City in order to save old growth trees. Given this fact, DRHI only had to pay $400,000.

Having paid what the contract and the decree required, DRHI was justified in not making the $700,000.00 payment requested by Hanback in April of 2012. When Hanback later filed his Petition, DRHI was still justified in not paying any sum to Hanback because

Hanback himself did not know what was due. Because DRHI was justified in its actions, the lower court had no authority to issue a rule and find DRHI in contempt.

VI. The Lower Court Erred in Considering Hanback's Evidence Regarding Post Closing Events.

"It is a fundamental principle of jurisprudence that evidence which is not relevant is not admissible." *Davis v. Marshall Homes*, 265 Va. 159, 166, 576 S.E.2d 504, 507 (2003) (Allegations of fraudulent conduct inadmissible at trial for breach of contract claim because irrelevant.); *C & P Telephone Co. of Va. v. Sisson and Ryan, Inc.*, 234 Va. 492, 503, 362 S.E.2d 723, 729-30 (1987) (Certain evidence properly excluded because operative terms of contract made the proffered evidence irrelevant.)

In this instance, Hanback sought additional compensation because of a "bonus density" argument that was never mentioned once in the parties' 2000 contract, in the parties' 2002 pleadings, or at the 2004 trial.

This "bonus density" argument depended on post closing events that were not even contemplated by the parties when they entered into the contract the trial court ordered specifically enforced. Because this bonus density argument was never the subject of the

July 2000 contract, the 2002 pleadings, the 2004 litigation, or the 2004 decree, DRHI repeatedly objected to the admission of this testimony at the commencement of the May 9, 2013 hearing.

Since the lower court's finding of contempt rests on a "bonus density" argument that was never the subject of the earlier litigation, and depended upon evidence that was irrelevant and therefore inadmissible, the order of contempt must be reversed.

VII. The Lower Court Erred When It Allowed Hanback to Relitigate the 2002 Bill of Complaint and Seek Relief Not Requested in that Litigation.

When Hanback asked for his May 9th, 2013, evidentiary hearing it was for the purpose of trying to convince the lower court that he, as compared to Whitman, was entitled to 1 of 3 potential, "equitable" sums insofar as the development of the Assemblage was concerned. Essentially, he was trying to get more than his contract which was the subject of the 2004 decree said he could get.

There are 2 reasons why he is barred from realizing the fruits of this evidentiary hearing.

The first is the common law rule that a litigant cannot be awarded relief that was never pled or prayed for. *Jenkins v. Bay House Associates*, 266 Va. 39, 43, 581 S.E.2d 510, 512 (2003) ("A

litigant's pleadings are as essential as its proof, and a court may not award particular relief unless it is substantially in accord with the case asserted in those pleadings."); *Harrell v. Harrell*, 272 Va. 652, 656, 636 S.E.2d 391, 394 (2006) ("No court can… render its judgment upon a right, however meritorious, which has not been pleaded and claimed…)"

This rule is particularly applicable to the situation here, where Hanback years after losing to DRHI's bill to specifically enforce the contract later moved to essentially reform the contract to give him payments never contemplated.

> "Equity cannot make or alter a contract for the parties and then execute it. If the contract must be reformed before it can be executed, it can only be reformed in a suit for that purpose or upon a bill particularly praying for that relief."
>
> *Rison v. Newberry*, *supra*, 90 Va. at 521, 18 S.E. at 919

The rationale behind this rule of law is simple:

> "[Ordering specific performance] is a legitimate branch of a [court's jurisdiction], and in its exercise highly beneficial to society. [Making contracts] is without a [court's] authority, and it would not only be a usurpation of power, but would be highly mischievous in its consequences." *Id*. (citation omitted)

In this instance, the parties' 2002 pleadings are wholly devoid of any allegations that further payments were available to Mr.

Hanback post closing because of a “density bonus.” DRHI’s bill for specific performance requests the specific performance of a written contract which speaks only of the 2.14 acres owned by Hanback. This contract provided that the “Purchase Price for the Property” could be $70,000.00 per approved lot as long as there were a minimum of 6 lots. But if Hanback’s Property only yielded 5 or fewer lots, “the Purchase Price shall be $400,000.00 for the 2.14 acres.” Mr. Hanback in his Answer did not request that the court reform this payment provision or declare that he had other payment options post closing because of a “bonus density”.

Because Hanback did not allege in his 2002 pleading that he was entitled to additional payments post closing because of some “bonus density” and because Hanback did not then pray for such payments, according to the caselaw just cited the lower court could not in 2013 entertain any request for an evidentiary hearing to consider these belated claims.

The fact that the trial court entered a judgment in a case that was decided 10 years ago constitutes a second reason why the lower court’s ruling in favor of Hanback must be set aside. Rule 1:1 declares that “All… decrees… shall remain under the control of the

trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer."

The application of this Rule has often resulted in the vacating on appeal any decree or order that was entered after the 21 day period runs on the ground that the trial court did not have jurisdiction. "Once a final judgment has been entered and the twenty-one day time period of Rule 1:1 has expired, the trial court *is without jurisdiction in the case*." *Super Fresh Food Mkts of Va., Inc. v. Ruffin*, 263 Va. 555, 563-64, 561 S.E.2d 734, 739 (2002) (emphasis supplied); *Davis v. Mullins*, 251 Va. 141, 149, 466 S.E.2d 90, 94 (1996) (Orders which provided additional relief that were entered over a span of years after the first final order, which the parties mistakenly thought had been vacated, all reversed because trial court was without jurisdiction to enter them.)

Here, the lower court, moved by Hanback's "bonus density" argument, his counsel's constant references to the resources of DRHI, and perhaps his counsel's accusation that the City and Horton somehow conspired to conceal the rezoning of the two parcels, a proceeding which is open to the public after posted notice, held an evidentiary hearing and awarded Hanback an additional $350,000.

According to Rule 1:1 and the cases which have interpreted and applied that Rule, the lower court did not have the jurisdiction to do either.

CONCLUSION

Appellee Hanback requested an evidentiary hearing 9 years after a final decree had been entered that ordered him to specifically perform a written contract. By way of this evidentiary hearing, he was able to get the court below to rewrite a contract that he signed 14 years ago which another court ordered specifically enforced 10 years ago and obtain relief he never asked for in the initial litigation. Both the common law and Rule 1:1 prohibit such action by the lower court.

Throughout these proceedings, the lower court ignored fundamental procedures and rules governing the exercise of its contempt power and indeed it went so far as to ignore the Constitution and the Code of Virginia when it decided to give Mr. Hanback, as opposed to the owner of the other lot of the assemblage, more money.

For all of these reasons, the orders in favor of Mr. Hanback should be reversed and DRHI should have judgment and an award of its costs, including its attorneys fees, entered in its favor.

DRHI, Inc., by Counsel

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CERTIFICATE

Pursuant to Rule 5:27 of the Supreme Court of Virginia, counsel for DRHI, Inc. certifies as follows:

1) The appellant is DRHI, Inc. and is represented by Jon F. Mains, Esq. (VSB #25437),10511 Judicial Drive, Suite 107, Fairfax, Virginia 22030, telephone (703) 273-2005 , fax (703) 591-2573, jmains@jonmainslaw.com.

   The appellee, William W. Hanback, Jr., Virginia, is represented Mr. J. Chapman Petersen Esq., Mr. Jason Zellman, and Mr. Stephen Pierce, all of the firm Surovell, Isaacs, Petersen & Levy, 4010 University Drive, Fairfax, Virginia 22030, jpeterson@siplfirm.com.

2) Pursuant to Rule 5:26(e), one electronic version of the Opening Appellate Brief has been filed with the Clerk of this Court and an opposing counsel in Adobe Acrobat Portable Documents Format (PDF) format. In addition, fifteen printed copies of this brief have been filed with office of the Clerk for the Supreme Court and three printed copies have been served, via UPS Ground Transportation to opposing counsel.

3) That the word count of this brief as determined by subparagraph (f) of this Rule is 6,885.

4) This brief had been filed in compliance with Rule 5:26(h).

   Given under my hand this 29th day of May, 2014.

Jon F. Mains, Esq.