In The

Supreme Court of Virginia

RECORD NO. 131974

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. 423-427, 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 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

Assignment of Error #1: The lower court erred when it entered a $350,000.00 judgment in favor of Appellee Hanback because it did not have the jurisdiction to award a monetary judgment.

Assignment of Error #2: The lower court erred when it entered a $350,000.00 judgment in response to Appellee Hanback's request for the issuance of a rule to show cause. The court did not have the authority by way of its contempt powers to award this judgment.

Assignment of Error #3: If, *arguendo*, the lower court had the jurisdiction and authority to entertain Appellee Hanback's demand for entry of a monetary judgment, it erred when it considered irrelevant evidence to come to this award.

Assignment of Error #4: The lower court erred when it entered a $350,000.00 judgment in favor of Appellee Hanback because the evidence it considered to come to this award establishes that no sum is due.

Appellant DRHI, Inc. preserved all 4 assignments of error on pp. 2-3 of the final order. (App. 305-06)

STANDARD OF REVIEW

Assignments of Error 1 and 2 are governed by a *de novo* standard of review because those assignments speak to whether the

lower court had the jurisdiction to entertain appellee's demand for a monetary judgment and, if it had this jurisdiction, whether it exercised this jurisdiction in accordance with the law. *Country Vintner, Inc. v. Louis Latour, Inc.*, 272 Va. 402, 410, 634 S.E.2d 745, 750 (2006) (citation omitted).

Assignment of Error No. 3 is governed by the "abuse of discretion" standard of review because it raises the issue of whether certain evidence relied upon by the lower court was admissible. *Beck v. Commonwealth*, 253 Va. 373, 384-85, 484 S.E.2d 898, 305 (1997).

Assignment of Error No. 4 is also subject to a *de novo* standard of review because it raises the issue 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 676, 618 (2004) (citations omitted)

ARGUMENT AND AUTHORITIES

I. The Lower Court Lacked Jurisdiction to Enter a Monetary Judgment.

There are three rules of law which, if they had been observed by the lower court, would have kept it from conducting an evidentiary hearing and later awarding a monetary judgment.

The first is the common law rule that a litigant cannot be awarded relief that is not pled nor 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…)"

In this instance, the parties' pleadings which gave rise to the 2004 decree 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 spoke 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 on account of any “bonus density” scenario and because Hanback did not then pray for such payments, according to the caselaw just cited the lower court could not in 2012 entertain any request for an evidentiary hearing to consider these belated claims.

A second reason why the circuit court could not conduct an evidentiary hearing in May of 2012 to determine Hanback’s varied claims for $35,000.00, $210,000.00, or $350,000.00 is that an award of any of them would require the rewriting of his contract with DRHI. According to multiple opinions issued by this Court, trial courts do not have the power to rewrite contracts.

This Court has 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 commercial 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 May 2004, it would not have had the jurisdiction to rewrite the parties' contract. Indeed, the trial court who heard the chancery suit in 2004 did not have the jurisdiction to do so. 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 proceeding 9 years after the entry of a final decree.

The fact that the court below entered a judgment in a case that was decided 9 years ago raises a third jurisdictional argument. Rule 1:1 of this Court 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 court below, moved by Hanback's "bonus density" argument, his counsel's constant references to DRHI's resources, and his counsel's accusations that Horton somehow concealed the results of a zoning hearing 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, this trial court did not have the jurisdiction to enter this post-decree monetary judgment. *Davis v. Mullins*, *supra.*

II. The Lower Court Did Not Have the Authority by Way of its Contempt Powers to Enter a Monetary Award.

A. The lower court had no authority to enter a monetary judgment in a non-domestic case.

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 has no 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 sale. In such a situation, the party seeking payment is left to his or her traditional post collection remedies, if any.

Virginia law has long provided that courts cannot use their contempt powers to enforce a monetary obligation arising from a judgment entered in a civil case. *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 marital 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 presiding over 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, <u>*are not mere debts or money judgments*</u> within the meaning of the constitutional and statutory provisions prohibiting imprisonment for debt." *Id.* (emphasis added)

This latter statement is significant for purposes of considering the issue of whether the court below had 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 contemptible 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.

[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).

If the legislature intended to authorize the use of a court's contempt powers 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 Constitution expressly prohibit it, the lower court's award of judgment must be dismissed.

B. The lower court had no authority by way of its contempt power to enter a monetary judgment because to reach this result the court impermissibly rewrote the decree.

Even in cases where trial courts are recognized as having authority to punish by way of fine or imprisonment a party who stands accused of willfully and without justification violating a court order,

[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 not 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."

trial courts lack such authority unless there is proof that the accused party has actually violated the express terms of a court order.

This Court has long and uniformly held that before a person can be held 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 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 which restricts a court's exercise of its contempt poses 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 247.

There are two clauses in the decree which expressly impose alternative duties upon DRHI. The first is that Mr. 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 lower court to have 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 by ***and 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 court below to have the authority to find DRHI in contempt are not found in the express language of the 2004 decree. This being so, the court had no authority to find DRHI in contempt and it could not take the action it did against DRHI, i.e., the entry of the judgment.

C. DRHI cannot be punished for allegedly violating the order because Hanback himself did not know what the order required.

Before a lower court can exercise its contempt powers, there must be a showing that a party knowingly violated "clearly defined duties imposed by the express terms of the order or decree." *Winn v. Winn*, *supra*, 218 Va. at 10, 235 S.E.2d at 309; *Board of Supervisors v. Bazile*, 195 Va. 739, 743, 80 S.E.2d 566, 570 (1954) (There must be proof of a "deliberate and studied purpose to evade the requirements of the order."). Throughout this litigation, Hanback himself did not know what the June 09, 2004 order required of DRHI.

When he instituted the proceeding which resulted in the entry of the judgment, he asked the Court to determine what amounts might be owed. See Hanback's November 2012 Petition, p.10. In his September 2013 prehearing brief, Hanback acknowledged how the court by way of the May 2013 evidentiary "clarified the parties' rights under the 2004 decree."

If Mr. Hanback did not know what DRHI had to do to be in compliance with the 2004 decree, DRHI cannot as a matter of law be punished by way of a $350,000 judgment for supposedly not complying with a 2004 decree.

D. Because DRHI'S actions were justified, the lower court could not enter the $350,000 judgment.

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" **or** "[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 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 lower court rejected these arguments and ordered the specific performance of the contract.

The contract required that DRHI pay at closing $400,000 to Hanback or $70,000 per lot if Mr. Hanback's property contained 6 or more building lots. Hanback himself acknowledged that his property never at any time had more than 5.5 lots on it. Given this fact, DRHI only had to pay $400,000. Having paid what the decree and the contract required, DRHI was justified in not making the $700,000.00 payment requested by Hanback in April of 2012. Because DRHI was justified in its action, the lower court had no authority to exercise its contempt powers. Because the $350,000 judgment is the result of this exercise, that judgment must be vacated.

III. 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’ contract and which was associated solely with post contract closing events. DRHI objected to the admission of this testimony at the commencement of the May 9, 2013 hearing.

Because the $350,000.00 judgment rests on post contract closing events and the notion of a “density bonus” which was never once mentioned in the parties’ contract, evidence which was therefore irrelevant and inadmissible, the judgment must be reversed.

IV. The Judgment Must Be Vacated Because Appellee’s Evidence Did Not Show a Violation Of The 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 never presented with evidence showing that these four events occurred. DRHI never submitted subdivision plan 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 Mr. Hanback's property (condition #4), Hanback's evidence did not show a violation of the decree. For these reasons, the judgment must be reversed.

CONCLUSION

Appellee Hanback requested an evidentiary hearing 9 years after a final decree had been entered ordering 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 had 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.

The lower court then ignored fundamental procedures and rules governing the exercise of its contempt power. At the end of this unlawful exercise, it entered a monetary judgment against DRHI, an award which is not only unsupported by and contrary to the evidence but also illegal according to the Constitution of this Commonwealth,

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

the statutory law of this Commonwealth, and the common law as announced by this Court and the Court of Appeals.

For all of these reasons, the judgment in favor of Appellee Hanback should be reversed and DRHI should have judgment and an award of its costs, including its reasonable 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), ten electronic versions of the Opening Appellate Brief and Appendix have 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 and ten printed copies of the appendix have been filed with office of the Clerk for the Supreme Court and three printed copies of the brief and one printed copy of the appendix 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 6,406.

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.