In The

Supreme Court of Virginia

RECORD NO. 131974

DRHI, INC.,

Appellant,

v.

WILLIAM W. HANBACK, JR.,

Appellee.

REPLY BRIEF OF APPELLANT

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I. <u>Assignment of Error #1 – Lack of Jurisdiction.</u>

With respect to this assignment of error, DRHI advanced 3 arguments.

The first is that affirmative relief not pled nor prayed for in the 2002 lawsuit cannot be awarded in 2013. In support of this contention, DRHI cited 2 cases on page 11 of its brief. Hanback does not specifically respond to this argument nor does he distinguish/counter DRHI's authorities. Instead, he launches into a general discussion of the law governing contempt proceedings. At one point during this dissertation, he declares that "[c]ivil contempt proceedings are utilized to enforce the rights of private parties." *(Brief p. 23)*

But in order for a private party to enforce a right, he must according to Virginia law first plead and prove that he is entitled to the right. Hanback never pled nor proved that he was entitled to additional compensation based upon a bonus density argument. His failure to do so in 2004 bars him from doing so in 2013. *Higgins v. McFarland*, 196 Va. 889, 897, 86 S.E.2d 168, 173 (1955) (Party's failure to challenge the validity of a contract "before it was confirmed

and approved" in an earlier proceeding barred him from doing so at a post trial proceeding.)

The second argument advanced in DRHI's first assignment is that Hanback could not by way of contempt seek an award of $35,000, $210,000, or $350,000 because any such award requires a rewriting of the parties' contract. On pp. 12-15 of its brief, DRHI cited 17 cases which held that courts in general do not have the power to rewrite contracts and they particularly do not have this power in suits seeking specific performance. Hanback never addresses this argument.

Nor does Hanback address DRHI's third argument – that Rule 1:1 precludes his request that the lower court in 2013 rewrite the contract the decree ordered specifically performed in 2004.

What Hanback does is advance arguments which are contrary to the facts of this case, jurisprudentially inapplicable, or contrary to established law.

Hanback first argues that DRHI never raised the jurisdictional issue before the trial court. *(Brief p. 21)* A review of the record shows, however, that before the lower court issued its rule DRHI's counsel said it lacked the jurisdiction to do so. (App. 409) DRHI then briefed

the jurisdictional issue before the September 16, 2013 hearing. (App. 424) Consequently, it is incorrect for Hanback to say that "[T]he first time DRHI even mentioned the lack of jurisdiction as an 'Objection' was on the order entered on September 20th." *(Brief p. 21)*

Hanback's second argument is that Rule 5A:18 bars consideration of the jurisdiction argument. He does not explain how a Rule which governs the Court of Appeals controls an appeal filed with this Court. But even if 5A:18 governed this Supreme Court appeal, the Rule is inapplicable since the jurisdictional issue was raised.

After his 5A:18 argument, Hanback begins his discussion of rules generally governing contempt proceedings. But these general rules do not speak to a party's need to plead and prove a right before a court can commence a contempt hearing. Nor do they discuss whether contempt proceedings can be resorted to to create a right that was never the subject of a contract a decree ordered specifically enforced.

On p. 26 of his brief, Hanback ceases to discuss rules generally governing contempt proceedings and, after asserting that the lower court "had to take steps necessary to address the underlying equities," says that the lower court had jurisdiction to proceed with the

contempt hearing because the lower court was facing "some phase of the case [which] presents a good ground for equitable relief."[1]

The problem for Hanback is that none of the cases cited by him identify a contempt hearing as "an equitable cause" where the court is to award relief based on its perception of some "underlying equities." The cases he cites show that a contempt hearing is not an independent cause of action but a proceeding to enforce an equitable action that was previously decided based upon pleadings, evidence, and rules of law.

The law governing contempt proceedings has never permitted a losing party to ask the court to create new rights based on vague notions of equity.

Having not addressed DRHI's arguments or authorities and having shown that he has perverted the purpose and use of contempt hearings, Hanback's opposition to DRHI's first assignment must be rejected.

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[1] This argument quotes from a passage found in *Iron City Savings Bank v. Isaacsen*, 158 Va. 609, 625, 164 S.E. 520, 525 (1932).

II. **Assignment of Error #2 – Lower Court did not have authority to hold DRHI in contempt and enter a monetary judgment.**

As to this assignment of error, DRHI advanced 4 arguments: 1) the lower court did not have the authority to enter a monetary judgment in a non-domestic case; 2) to enter this judgment the lower court impermissibly rewrote the 2004 decree; 3) Hanback could not have DRHI held in contempt for not complying with the 2004 decree because his petition showed he did not know what was required; and 4) DRHI's was justified in rejecting Hanback's demands.

In response to the first argument, Hanback contends that "the monies owed to Mr. Hanback are not 'mere debts or money judgments,' arising from the real estate contract." *(Brief p. 27)* Chief Justice Carrico used to categorize arguments which disregarded the facts and circumstances pertinent to the litigation as "pure sophistry." It is pure sophistry to argue that the monies owed to Mr. Hanback do not come from the real estate contract. Absent the contract, DRHI had no obligation to pay Hanback anything.

Hanback next urges this Court to look at the decree and ignore the contract. But the decree expressly calls for the enforcement of the contract. As this Court said in *Federal Land Bank v. Jones*, 179

Va. 394, 406, 18 S.E.2d 917, 922 (1942): “We must look to the realities of the situation as they existed at the time of the decree.” *Accord*, *Wilson v. Collins*, 27 Va. App. 411, 422, 499 S.E.2d 560, 565 (1998) (Appellate court cannot accept an “argument [that] ignores the legal backdrop on which the parties negotiated and drafted an agreement.”) While Hanback clearly hopes that this Court will ignore the contract because it does not give him what he thinks he is “equitably” entitled to, the law prohibits a court from ignoring a contract that another court has ordered specifically enforced.

Hanback next argues that the doctrine of merger requires that this Court pretend that the contract ordered specifically performed never existed and that any circuit court at any time could come up with any remedy it wished. He cites *Sands v. Roller*, 119 Va. 191, 86 S.E. 857 (1915) But this case is inapplicable because it speaks to a rule of law which bars a **plaintiff** from asking for additional remedies he neglected to ask for in an earlier suit. DRHI is not asking for additional relief. Hanback is.

The other case Hanback relies on, *Bazzle v. Bazzle*, 37 Va. App. 737, 746, 561 S.E.2d 50, 55 (2002) is distinguishable for the same reason. That case cites *Bates v. Devers*, 214 Va. 667, 670,

202 S.E.2d 917, 920 (1974) ("Merger occurs when a valid and final personal judgment is entered for a plaintiff.") Again, DRHI is not seeking additional relief.

A later Court of Appeals' opinion reveals the fallacies of Hanback's arguments. In *Smith v. Smith*, 41 Va. App. 742, 589 S.E.2d 439 (2003), the Court held that the doctrine of merger does not make a "contract subject to judicial modification." *Id*. That Court also referenced the long recognized rule that a "court [has] no authority to modify a contract or to enforce it by its contempt power."[2] 41 Va. App. at 747, 589 S.E.2d at 441 (citing *Moore v. Crutchfield*, 136 Va. 20, 28, 116 S.E. 482, 484 (1923); *Martin v. Martin*, 205 Va. 181, 185, 135 S.E.2d 815, 818 (1964); *Higgins v. McFarland*, *supra*, 196 Va. at 895-97, 86 S.E.2d at 172-73; and *Shoosmith v. Scott*, 217 Va. 789, 793, 232 S.E.2d 787, 789 (1977)). All of these cases hold that contractual rights are "property rights that subsequent court decree or legislative enactments could not modify." 41 Va. App at 748, 589 S.E.2d at 442.

[2] This rule of law was later abrogated insofar as PSAs are concerned by the passage of § 20-109.1. But a similar law has not been passed for real estate contracts.

Because none of the cases cited by Hanback say that a court can use its contempt power to rewrite a sales contract – because these cases actually say that no court can rewrite a contract or use its contempt powers to enforce a contract – Hanback's opposition to assignment #2 fails.

III. <u>Assignment of Error #3 - Lower Court's reliance on irrelevant evidence.</u>

Hanback correctly recognizes that as to this assignment DRHI contends that the lower court "erred by considering evidence of the 'bonus density' which was not present in the parties' original contract, the 2002 pleading, or the proceeding which led to the 2004 Decree." *(Brief p. 41)*

Hanback argues that this evidence should have been considered in order to "address" the "language of the 2004 Decree <u>and</u> ensuring that the relief awarded to Mr. Hanback was commensurate with the benefits gained by DRHI… ." *(Id.)*

There is nothing in the language of the 2004 decree, however, which speaks of a "bonus density" or the right of Mr. Hanback to receive more money because of a "bonus density". There is no such language in the decree because, as Hanback recognizes, there is no "bonus density" trigger provision in the parties' 2000 contract.

If the bonus density payment trigger is not mentioned in the contract the trial court ordered specifically enforced in 2004 and if this payment trigger was not raised in the 2002 pleadings or the 2004 trial, then Hanback can not according to Virginia law use this argument, which is based on events that occurred in 2010, to obtain relief in 2013.

As for Hanback's alternative argument that the lower court had to consider this evidence to ensure "that the relief awarded to Mr. Hanback was commensurate with the benefits gained by DRHI" nowhere in the contract is there any provision which identifies "benefits gained by DRHI" and how the realization of those benefits translates into some monetary obligation to Mr. Hanback.

This secondary argument from Hanback is a perfect example of his repeated efforts to have the lower court ignore the terms of the contract and fashion a remedy that he thinks is "equitable". As evident by the opinions cited on pp 12-15 of DRHI's brief, this Court and the Court of Appeals have repeatedly held that courts lack the jurisdiction to rewrite contracts. Because Hanback's bonus density evidence does exactly that, this evidence as a matter of law was inadmissible. Because the trial court relied on this inadmissible

evidence to come to its finding of contempt and the $350,000 judgment, both of these rulings must be reversed.

IV. <u>Assignment of Error #4 – Hanback's evidence failed to establish a violation of the 2004 Decree.</u>

Hanback approaches this assignment by correctly recognizing that the law in Virginia requires that for "a contempt action to succeed, the moving party must show that the offending party violated a clearly defined and expressed term of the judicial decree." *(Brief p. 33)*

A rudimentary application of this rule of law would necessitate that Hanback cite an express provision of the decree which calls upon DRHI to pay $350,000 before he could ask a lower court to hold DRHI in contempt for non-payment. There of course is no such provision in the decree. As a matter of fact, Hanback himself did not know when he filed his petition what sum DRHI owed. If Hanback himself did not know what was owed, then DRHI cannot be said to have "violated a clearly defined and expressed term of the judicial decree."

DRHI on p.30 of its opening brief identified the terms of the decree that had to be satisfied in order for Hanback to avail himself of the per lot payment scheme provided by the contract. DRHI then laid

out how Hanback's evidence did not show the satisfaction of these terms.[3]

Rather than identify evidence that might show that these express terms were satisfied, Hanback declares that this assignment is governed by an abuse of discretion standard, which is both irrelevant and incorrect. When, as here, an appellant court is called upon to determine whether the terms of a contract have been complied with or not, the standard of review is *de novo. PMA Capital Insurance Co. v. US Airways*, 271 Va. 352, 357-58, 626 S.E.2d 369, 372 (2006) *(multiple citations omitted)*

Hanback next misstates the law when he says that "on appeal, DRHI bears the burden of proving that [the lower court] abused its discretion in finding that DRHI owes $350,000 to Mr. Hanback under the 2004 Decree." *(Brief p. 34)* For purposes of this assignment of error, it must be shown that Hanback at the May or September 2013 hearings bore his burden of proving that DRHI violated "a clearly

[3] The express terms of the decree required 1) submission of subdivision plans by DRHI; 2) for the development of "the property sold by Mr. Hanback"; 3) the approval of plans for the development of Hanback's property 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 6 or more residences on Hanback's property.

defined and expressed term of a judicial decree." *Taliafarro v. Horde's Adm'r*, 22 Va. (1 Rand.) 242, 247 (1822); *Alexander v. Alexander*, 12 Va. App. 691, 692, 406 S.E.2d 666, 669 (1991).

Even if Hanback's incorrect standard of review and burden of proof were accepted, it was questionably incumbent on Hanback to present evidence that the 5 express terms of the Decree had occurred.

Hanback never presented such evidence. Instead he presented evidence which in his mind established that "as a party *(sic)* of the Subdivision Plans, DRHI proffered 1.14 acres of the Hanback Parcel… in exchange for which DRHI received a 5 lots density bonus in its development of the Assembly." *(Brief p. 36)*[4]

Nowhere in the decree or the in contract the decree ordered specifically enforced is there any mention, however, of a certain payment being owed by DRHI because of a proffer supposedly made by it in exchange for which it received a 5-lot "bonus density".

This Court has rejected the argument that a lower court's impermissible rewriting of a contract constitutes "a finding that cannot be disturbed on appeal." *White v. White*, 257 Va. 139, 143-

[4] DRHI disputes that this evidence is relevant and, if relevant, that Hanback's recitation is accurate.

145, 509 S.E.2d 323, 325 (1999) That is ultimately what Hanback argues here.

Based on *White* and a host of other cases which declare that one party cannot have a court rewrite a contract and then hold another party in contempt for not recognizing the unlawfully rewritten contract, the lower court's finding of contempt and its subsequent entry of a money judgment must be reversed.

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Certificate

Pursuant to Rule 5:26(h) of the Virginia Supreme Court, 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) 591-7268, jmains@jonmainslaw.com.

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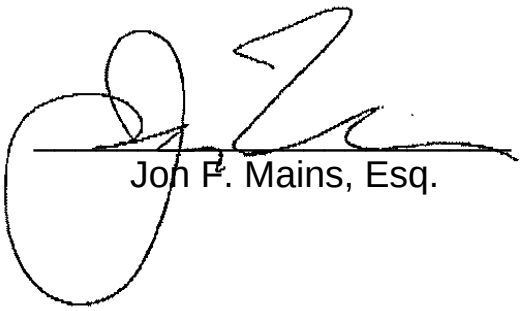
2) Pursuant to Rule 5:26(e), one electronic version of this Rebuttal Brief has been hand-filed with the Clerk of this Court and opposing counsel in Adobe Acrobat Portable Documents Format (PDF) format. In addition, fifteen printed copies of this brief had been hand-filed with office of the Clerk for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

3) That the word count of this brief as determined by subparagraph (b) of this Rule is 2,536.

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

   Given under my hand this 7th day of July, 2014.



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