In The

Supreme Court of Virginia

RECORD NO. 140605

DRHI, INC.,

Appellant,

v.

WILLIAM W. HANBACK, JR.,

Appellee.

REPLY BRIEF OF APPELLANT

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Summary of Argument

In Record No. 131974, Mr. Hanback filed responses to the Assignments of Error I, III, IV, and VI found in this appeal (Record No. 14605). DRHI addressed these responses in the rebuttal it filed in Record No. 131974. Consequently, this brief only rebuts the arguments Hanback has made to Assignments of Error II, V, and VII.

This brief also responds to Hanback's two cross-assignments of error.

A. Assignment of Error II – The Lower Court impermissibly rewrote the Decree.

In response to this assignment of error, Hanback looks to the rule of law which says that trial courts have authority to interpret their own orders.

Before this rule of law can be invoked, a proponent must establish that an order is ambiguous and therefore in need of interpretation. *Commonwealth v. Williams*, 262 Va. 661, 668, 553 S.E.2d 760, 763 (2001) In *Fredericksburg Constr. Co. v. J.W. Wyne Excavation, Inc.*, 260 Va. 137, 530 S.E.2d 148 (2000), this Court noted that such action was necessary because the order at issue there was "not artfully drawn." 260 Va. at 144, 530 S.E.2d at 152. In *Commonwealth v. Williams*, this Court cited the *Fredericksburg*

Construction case as an instance where "a conflict or ambiguity exists between the language expressed in a transcript and a court's order." 262 Va. at 668, 553 S.E.2d at 763.

Here Hanback has never claimed that there was an ambiguity in the 2004 decree that required the lower court's interpretation in 2013. Consequently, the lower court had no grounds to "interpret" the decree and then "interpret" its language in a way that effectively rewrote the decree.

In *Roe v. Commonwealth*, 271 Va. 453, 628 S.E.2d 526 (2006) both the lower court and later the Court of Appeals effectively rewrote an order of dismissal to prevent the accused from avoiding reprosecution. This Court, refusing to allow this rewriting of the dismissal order, reversed. This Court must similarly reverse the lower court's rewriting of the 2004 decree.

B. Assignment of Error V – DRHI's failure to Pay Hanback was justified.

Hanback filed his petition for the issuance of a rule because of DRHI's refusal to honor his demand in April 2012 that DRHI pay him $700,000. In its opening brief, DRHI cited authorities which hold that contempt does not lie if the "offending" party was justified in his actions. *Carswell v. Masterson*, 224 Va. 329, 332, 295 S.E.2d 899,

901 (1982); *Commonwealth ex rel Graham v. Bazemore*, 32 Va. App. 451, 457, 528 S.E.2d 193, 195 (2000); *Frazier v. Commonwealth*, 3 Va. App. 84, 47, 348 S.E.2d 405, 407 (1986)

Hanback does not dispute those authorities but argues they should be ignored because DRHI acted dishonestly. *(Brief p. 42)* The "facts" he hurls at DRHI to support this allegation are themselves dishonest in that they are not just unsupported by the record but are contrary to it. His initial accusation that Horton nefariously came up with the idea of putting five lots on Hanback's property and "overdeveloping" an adjacent property is immediately contradicted by the testimony of his own witness, Mr. Jack Blevins, the Division Chief of Community Development for the City of Fairfax, and by papers filed with the City. Both said that it was the City who proposed putting 10 houses on the Whitmore parcel to calm neighbors irate over D.R. Horton's plan to clear cut and regrade Hanback's property.

Hanback also accuses DRHI of somehow concealing the rezoning and subdivision process. This accusation is groundless as Hanback, a former licensed realtor who tried to rezone the property in 2001, well knows. Any rezoning effort undertaken by any property owner must be the subject of a public notice and hearing.

Hanback even goes so far as to argue that DRHI should be held in contempt because it appealed the lower court's decision and refused to post "a legitimate supersedeas bond." *(Brief p. 42)*

There is no Virginia case which holds that appealing a judgment of contempt or posting a supposedly "illegitimate" supersedeas bond warrants a finding of contempt. There is Virginia law which holds, however, that contempt does not lie unless the offending party is guilty of bad faith or willful disobedience and was not justified in his actions. Since Hanback brought his petition because he was not paid a sum which he later abandoned and because even he did not know what DRHI had to pay, DRHI was clearly justified in not succumbing to his demands.

C. Assignment of Error VII – Lower Court erred when it effectively allowed Hanback to relitigate the 2002 Bill of Complaint by way of a contempt hearing.

In this assignment, DRHI complained of Hanback's use of a contempt proceeding to reform the terms of his contract with DRHI so that he could enjoy payments never contemplated by the contract. DRHI cited *Rison v. Newberry*, 90 Va. 513, 18 S.E. 916 (1984), a Virginia Supreme Court opinion which held that such conduct is not allowed. 90 Va. at 521, 18 S.E. at 919. Hanback's response to *Rison*

is to cite United States Supreme Court cases which did not involve and therefore do not speak to the type of conduct complained of here.

Hanback's concluding remark that "[i]t is immaterial whether Hanback sued for this relief or not before 2004" *(Brief p. 40)* is not only contrary to the Virginia cases cited by DRHI, but it is also contrary to the analysis of some of the various cases he cites for other reasons. *See.*, *e.g.*, *Bazzle v. Bazzle*, 37 Va. App. 737, 744, 561 S.E.2d 50, 53-54 (2002) ("A [party] may not reduce an obligation to a judgment, collect on the judgment in full, and then double dip by instituting another action based on the same obligation because he/she is unhappy with the amount received in satisfaction."); *Sands v. Roller*, 118 Va. 191, 193, 86 S.E. 857, 858 (1915) ("[A] cause of action [once tried] can never again become the basis of a suit between the same parties… All its power to sustain rights and enforce liabilities has terminated in the judgment.")

Cases not cited by Hanback underscore the rule that if a party seeks to invalidate or avoid contractual obligations that party must do so in the initial litigation where the enforceability of the contract is at issue. If the party does not do so before a decree is entered or within 21 days of the entry of decree, the party forever loses the opportunity

to avoid the obligations of the contract. And any later attempt by a court to revise or invalidate the contract is void for lack of jurisdiction. *Rook v. Rook*, 233 Va. 92, 95, 353 S.E.2d 756, 758 (1987) ("[Any] challenge to [an] agreement's validity could and should have been raised before the …decree was entered or within 21 days thereafter. After the expiration of 21 days from the date the decree was entered, the trial court loses jurisdiction of the case…".); *Kelley v. Kelley*, 17 Va. App. 93, 94, 435 S.E.2d 421, 424 (1993) ("[A]fter the expiration of twenty-one days immediately following the entry of the 1985 divorce decree… the trial court lacked jurisdiction to alter the terms of the PSA or the decree.") (Lower court's decision to invalidate reimbursement portion of a property settlement agreement reversed.)

In this instance, Hanback by way of a hearing in May 2013 invalidated the payment provisions set forth in the contract addendum of August 28, 2000 for a real estate transaction which closed in June of 2004 pursuant to a 2004 decree. These cases clearly hold that Hanback did not have the right and the lower court did not have the jurisdiction to do this.

Reply to Cross-Errors

A. Prejudgment Interest.

After devoting multiple pages of his brief arguing that courts have unbridled discretion to do what they please at contempt hearings, Mr. Hanback in his first cross-assignment of error changes tact by contending that the lower court's refusal to award prejudgment interest going back to January 8, 2010 was an abuse of its discretion.

None of the cases cited by Mr. Hanback involve an instance where an appellate court reversed a trial court's decision not to award interest. There is an immediate reason why this is so. The statute which provides for prejudgment interest, § 8.01-382, expressly declares that such an award is discretionary, not mandatory:

> "In any action at law or suit in equity, the verdict of the jury, or if no jury the judgment or decree of the court, ***may*** provide for interest on any principal sum awarded…"
>
> (emphasis supplied)

Mr. Hanback tries to circumvent this statutory language by citing that portion of the statute which declares that "the judgment or decree entered shall bear interest from the date of its entry." *(Brief p. 44)*

The problem with this argument is that Mr. Hanback is citing that portion of the statute which speaks to **post-**judgment interest, not **pre-**judgment interest. While post-judgment interest is indeed mandatory, pre-judgment interest is not. *Dairyland Ins. Co. v. Douthat*, 248 Va. 627, 631, 449 S.E.2d 799, 801 (1994)

Here, because Mr. Hanback himself did not know as late as 2013 what sums were due, $35,000, $210,000, or $350,000, and because DRHI vigorously contested that any sums were due, the trial court could and did properly decide not to award prejudgment interest. *Ragsdale v. Ragsdale*, 30 Va. App. 283, 292-93, 516 S.E.2d 698, 701-02 (1999) (Because there was no delay in the payment of money actually due and since the amount of money to be awarded could not be ascertained until a final verdict was rendered, trial court's decision not to award prejudgment interest affirmed.); *Pledger v. Pledger*, 6 Va. App. 627, 632, 371 S.E.2d 43, 45 (1988) (Trial court's award of prejudgment interest at a time when defendant's obligation to plaintiff was not established reversed.)

Another problem with Mr. Hanback's argument is that according to § 8.01-382's language the lower court did not have the authority to award prejudgment interest. According to the statute, such an award

can only be made “In any action at law or suit in equity.” In this instance, there was no action at law or suit in equity which was before the court for decision. What was before the court was a petition for a rule to show cause. Nothing in § 8.01-382 empowers a court to award prejudgment interest during an exercise of its contempt powers. Because the situation here does not fall within the 2 situations where the statute says prejudgment interest can be awarded, no award could have been made. *Accord*, *Shebelskie v. Brown*, Virginia Supreme Court, Record No. 130503, pp. 11-12 (January 10, 2014) (Sanctions could not be assessed against attorney who had neither signed a pleading nor made an oral motion, the only 2 instances under which § 8.01-271.1 of the Code allows an award of sanctions.)

While DRHI denies that any judgment necessary for an award of this ancillary relief validly exists in this instance, the aforementioned reasons all require the denial of this cross-error.

B. Attorneys Fees.

Mr. Hanback’s request for attorney’s fees fails for many of the same reasons his request for prejudgment interest does. First, there is no authority which requires that a court award attorneys fees. *Tauber v. Commonwealth*, 263 Va. 520, 547, 562 S.E.2d 118, 132-33

(2002) ("[T]he Commonwealth effectively asks us to conclude that … the chancellor was required as a matter of law to award attorney's fees… We decline to restrict the chancellor's discretion in this manner.")

Generally, the American Rule applies when it comes to awarding attorneys fees – absent a contractual provision or statutory mandate to the contrary, the prevailing party does not automatically recover his fees. *Nusbaum v. Berlin*, 273 Va. 385, 400, 641 S.E.2d 494, 501 (2007) (Award of attorneys fees for attorney's contemptuous behavior reversed.)

Mr. Hanback complains of the lower court's failure to award attorneys fees on a contractual basis. *(Brief p. 46)* Mr. Hanback, having initially refused to honor the contract and then having persuaded the lower court to ignore the payment terms of the contract in a wrongfully successful effort to get the highest of 3 potential "equitable" awards, cannot be heard to complain that the court was wrong to ignore the contractual provision regarding attorney fees. Under the circumstances, it is DRHI who is entitled to an award of fees for Hanback's second wrongful attempt to evade the terms of the contact.

Finally, Mr. Hanback's request for attorneys fees must fail because he only advanced 1 authority in support of this request, § 8.01-456, and he did not submit any other grounds or argument once the court stated to him that § 8.01-456 does not allow attorneys fees. By not providing the court with any other grounds upon which to provide this relief, Mr. Hanback is barred from seeking it on appeal. Rule 5:28.

Conclusion

For the reasons and authorities set forth DRHI's initial briefs, this rebuttal brief, and its rebuttal brief in Record No. 131974, DRHI respectfully requests that this Court reverse the lower court's finding of contempt and set aside the judgment awarded as a result of this finding, that it deny Appellee's requests for prejudgment interest and attorneys fees, that it award DRHI its costs and attorneys fees, and that it remand to the lower court the issue of determining the amount of attorneys fees and costs that should be awarded to DRHI.

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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.

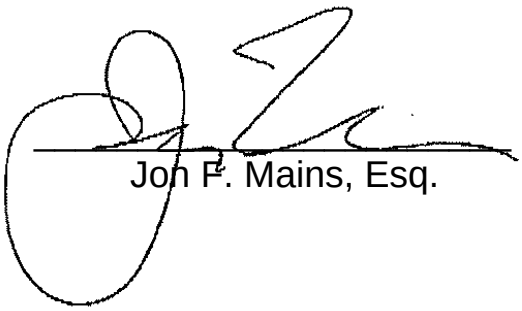
   The appellee, William W. Hanback, Jr., Virginia, is represented Mr. J. Chapman Petersen Esq., Mr. Jason Zellman, and Mr. Stephen Pierce, all of the firm Surovell, Isaacs, Petersen & Levy, 4010 University Drive, Fairfax, Virginia 22030, jpeterson@siplfirm.com

2) Pursuant to Rule 5:26(e), one electronic version of 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 2,229.

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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