In The

Supreme Court of Virginia

RECORD NO. 141277

WILLIAM D. EVANS, in his Capacity as Trustee of the Wanda S. Evans Trust,

Appellant,

v.

WAYNE L. EVANS, Individually and as the Personal Representative of Douglas E. Evans, Deceased, LLOYD D. EVANS, LISA M. EVANS, and JASON L. EVANS,

Appellees.

REPLY BRIEF OF APPELLANT

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Personal Representative of Douglas E. Evans,
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LLOYD D. EVANS,

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JASON L. EVANS,

Appellees.

APPELLANT'S REPLY BRIEF

Pursuant to Rule 5:29, the Appellant, William D. Evans, Trustee, sets forth the following reply to new issues raised in the Appellee's Opening Brief:

ARGUMENT

1. Enforcement of the November 30, 1995, Settlement Agreement is not barred by the procedural issues raised by the Evans Defendants.

In their effort to avoid the consequences of having previously settled the very same claims that are now before the Court, the Evans Defendants raise certain procedural issues, alleging:

> The Trustee did not plead in his original complaint or in his amended complaint a cause of action for breach of contract or equitable estoppel based on the 1995 agreement . . .

and citing Ted Lansing Supply Company vs. Royal Aluminum and Construction Corp., 221 Va. 1139 S.E.2d (1981), for the proposition that "no court can base its judgment or decree upon facts not alleged or upon a right which has not been pleaded or claimed."

This procedural thicket obscures the actual proceedings in the case and the law applicable to cases such as this.

The action was filed by William Evans as Trustee to quiet title to the Fairview Street property and for declaratory judgment in the face of adverse claims asserted by Wayne Evans and the other Evans Defendants after the recent death of their father, Douglas Evans. The complaint sought specific declarations as to the transactions involved and sought general relief allowed by law. On March 26, 2013, the Trustee filed a motion for

summary judgment (App. 61 ff), and the Evans Defendants responded with their own motion for summary judgment (App. 81 ff). In response to the motion filed by the Evans Defendants, the Plaintiff Trustee Evans responded, and as part of that response, filed and set up the "Mutual Release and Settlement Agreement dated November 30, 1995" as a basis of avoiding the Evans Defendants' claims.

The Trial Court held a hearing on July 9, 2013, and the parties fully argued all the issues, including those presented by the Settlement Agreement. The excerpt of the transcript appearing at Pages 111--113 of the Appendix indicates that the Trial Court considered the Settlement Agreement to be pertinent and necessary to consider in reaching his conclusion:

> . . . and, Mr. Black, the Court is of the mind to believe as I sit here today that the 1995 Settlement Agreement is relevant, and the Court does need to read that. If the Court makes that finding that there are issues of fact to be resolved beyond that, I recognize your position in that regard, however, I think it's a relevant document. The Court intends, as part of its preparation to make this ruling, to examine that document. . . .

App. 111, line 24, through page 112, line 13.

No objection was made by the Evans Defendants to this ruling.

After the Trial Court's adverse decision of October 10, 2013, the Trustee filed a motion to reconsider, arguing, among other things, that the November 30, 1995, Settlement Agreement had not been given effect and that it constituted a valid contract that bound the Evans Defendants as privies of Douglas Evans or parties in their own right to that Agreement, an agreement that had been executed almost twenty years previously to resolve litigation filed by the Evans Defendants' predecessors to raise the same issues on the tenancy by the entirety deed as are present in the current litigation. This was also the action in which Wayne Evans undertook and failed in his duty to present a final order of dismissal of the tenancy by the entireties claims raised in the original litigation.

In response, the Evans Defendants filed a brief (App. 187 ff) in which they presented arguments on the merits concerning the issues raised by the Settlement Agreement. (See App. 189--191) No objection was lodged to any variance between the complaint and the evidentiary matters that had come before the Court in its consideration of the summary judgment motions.

Again, beginning at Page 212 of the Appendix, the Trial Court, in announcing its ruling on the motion to rehear, pointed to the 1995

Settlement Agreement and held on the merits that it did not provide the Trustee with a basis for relief. (App. 212, line 22--page 213, line 1)

Based upon the foregoing, the Evans Defendants' procedural arguments are without merit:

A. The Trustee's "Response to Defendants' Motion for Summary Judgment" is a "pleading."

The Evans Defendants' complain that the issues arising out of the Settlement Agreement are not set forth in a "pleading" as seemingly required by Ted Lansing and related cases. A motion for summary judgment, or a response to such a motion, is, however, a "pleading." See Rule 3:18(a), **Pleadings,** which states ". . .all motions in writing are pleadings." See also Blair, Inc. vs. Housing Authority, 200 Va. 815, 108 S.E.2d 259 (1959). This case involved the interpretation of a "no damage clause" in a construction contract. The facts and circumstances giving rise to the summary judgment motions involved complex issues of fact concerning the performance of the construction contract and understanding of the parties. After the appellee set forth his detailed summary judgment motion, the appellant filed a written "response" that provided the factual basis of his opposition. Finding that this "response" was a "pleading," the Court stated "appellant's written motion to reject appellee's motion for summary judgment is a pleading." (Rule 3:18), 200 Va. at 818. In the Blair

case, as in the instant case, this pleading was sufficient to mature the case for decision. The purpose of pleadings is to apprise the adverse party of the nature of the claims involved and to avoid surprise. The Evans Defendants were fully apprised of the claims arising out of the Settlement Agreement and made no claim of surprise.

B. Under Code Section 8.01-377, and the circumstances of this case, the Trial Court correctly considered the effect of the November 30, 1995, Settlement Agreement.

Code Section 8.01-377 provides in material part:

> **8.01-377 Remedy when variance appears between evidence and allegations:**
> If at the trial of any action there appears to be a variance between the evidence and allegations or recitals, the court, if it considered that a substantial justice will be promoted, and that the opposite party cannot be prejudiced thereby, may allow the pleadings to be amended . . .[O]r instead of the pleadings being amended, the court may direct the jury to find the facts and after such finding, if it consider the variance such as could not have prejudiced the opposite party, shall give judgment according to the right of the case.

In the instant case, it was the trial judge who found the facts, and it is clear from the proceedings that he gave judgment in accordance with what he determined to be the "right of the case." The Evans Defendants did not and could not have suffered any prejudice since they prevailed on the merits of the issues arising under the Settlement

Agreement. Even if there were a "variance" presented by the pleadings as alleged by the Evans Defendants in their brief, their reliance upon the "variance" is misplaced and ineffective.

The case law supports this conclusion. Considering a case that involved the application of the "claim must be set forth in the pleadings" rule, this court held the following in Kennedy vs. Mullins, 155 Va. 166, 154 S.E. 568 (1930):

> The rule that the proofs must correspond with the allegation is fully recognized, but like every other rule, it should be reasonably applied. Its purpose is to prevent surprise. Where there is no surprise to the party invoking it, there is no good reason for enforcing the rule.

155 Va. at 180.

The Evans Defendants must show surprise and prejudice before they can complain about the supposed variance between the pleadings and proof. In Hensley vs. Dreyer, 247 Va. 45, 439 S.E.2d 376 (1994), the plaintiff alleged fraud in his complaint as the basis of relief, but actually proved a mutual mistake of fact. The trial judge applied § 8.01-377 and was reversed, the court holding that after the evidence had closed and the court made its ruling, that the defendant was prejudiced by not being able to present evidence in defense to the mutual mistake claim.

In T. M. Graves Construction, Inc. vs. National Cellulose Corp., 226 Va. 164, 306 S.E.2d 898 (1983), the variance relied upon arose out of a construction contract, and the court stated "in this case, the question of variance between pleading and proof is not difficult to resolve. The central focus is whether National was fairly on notice of the claim against it so that it was not surprised by Graves' proof."

226 Va. at 167.

See also Caputo vs. Old Dominion Freight Lines, 217 Va. 302, 228 S.E.2d 134 (1976), (solace damages allowed even though not plead) and Bennet vs. Sage Payment Solutions, 282 Va. 49, 710 S.E.2d 736 (2011), in which the defendant was allowed to rely on a defense of "repudiation of contract" that had not been set out in the pleadings since there was no prejudice, the facts being known by all parties. It is similar to the Evans case in that all parties were actual signatory parties to the Settlement Agreement, and all had equal knowledge as to its provisions.

The cases cited by the Evans Defendants, Ted Lansing, Dabney vs. Augusta Mutual, and Fein vs. Payandeh, did not involve the application of Section 8.01-377 and its underlying principles. Footnote 3 of the Dabney decision specifically pointed out that counsel had not raised that issue, 282 Va. at 87. In each of these cases which were tried to

conclusion, there was an element of surprise or prejudice which might have been suffered by the defendants--i.e., the difference between express warranty and the implied warranty case that was proven--the difference between the date of notice of claim alleged and actual date proven, and the complexities of the Fauquier County Zoning Ordinance.

The Evans case is completely different. Wayne Evans and his children were parties to the Settlement Agreement and had full knowledge of it. Lloyd Evans and Wayne Evans were in privity with Douglas Evans who signed the Settlement Agreement. All these parties, or their privies, were parties plaintiff to the 1993 lawsuit that first raised the issues of the tenancy by the entireties deed. The Settlement Agreement of November 30, 1995, provided direct benefits to these parties, including the payment of $80,000.00 to Douglas Evans. It was only the failure of Wayne Evans, who was a practicing West Virginia attorney, to fulfill his contractual obligation to present the court with a with-prejudice dismissal order that prevented the application of a *res judicata* defense. When the Settlement Agreement was accepted by the court as a basis for decision, there could have been no claim of surprise, and in fact, there were no such claims. There were no objections in the trial court and no objections voiced by the Evans Defendants in their brief in opposition to the Petition for Appeal. There was

no prejudice because the trial court ruled in their favor in the settlement agreement issue. The issue of the Settlement Agreement was properly and fairly before the court.

C. The failure of the Evans Defendants to object in the trial court constitutes a waiver of the variance issue.

This case was fully heard on the merits, with each side arguing and debating the 1995 Settlement Agreement and its application to this case. As indicated, the Evans Defendants did not object on the ground that there was a variance between pleadings and evidence. Under these circumstances, they cannot rely upon the issue of variance on appeal. See Burruss vs. Suddith, 187 Va. 473, 47 S.E.2d 546 (1948); Dupont Energy vs. Blair, 129 Va. 423, 106 S.E. 328 (1921); and Morris vs. Peyton, 148 Va. 812, 139 S.E. 500 (1927).

> The first assignment of error is to the refusal of the court to grant an instruction founded upon an alleged variance between the declaration and proof. Of that assignment it is sufficient to observe that no objection having been made to the admission of the evidence, or no motion made to exclude it on account of the supposed variance, the objection must be considered to have been waived.

Burruss, 187 Va. at page 483.

> In support of this assignment [regarding the variance] it is contended first that the plaintiff failed to prove any actionable negligence on the part of the defendant. The gist of the argument is that

> there was no proof of any defect in the machinery, rendering the place unsafe, and that as these were the only allegations of negligence in the declaration, the plaintiff has failed to make out his case . . . [I]t may be said as a general proposition of law that there would be no liability in the absence of an allegation and proof that the defendant failed properly to warn and instruct the plaintiff in respect to such hazards of operation as he would not be bound to know because of their open and obvious character. It is elementary and familiar law that the proof must correspond to the allegations, but to avail itself of this rule, the defendant was required to make timely objection to the variance.

Dupont, 129 Va. at page 429 and 430.

D. Assignment of Error No. 3 was properly preserved.

The Evans Defendants argue that the Trustee should have assigned error to the failure of the trial court to grant leave to file a second amended complaint. The purpose for seeking an amendment to the complaint was to set up causes of action for breach of warranty based upon disseison following the court's ruling that the Evans Defendants were the rightful owners of the property. Without objection from the Evans Defendants, the court had already ruled on the issue of the 1995 Settlement Agreement. Anticipating an appeal as to the underlying issues and guardedly confident in the outcome of that appeal, the Trustee did not challenge the discretion of the trial court with respect to that amendment. Error to the underlying ruling of the trial court, however, as to the

Settlement Agreement was preserved at many points in the record as shown by the preservation references appended to the assignment of error.

CONCLUSION

For reasons stated in the Trustee's opening brief, and for the reasons outlined herein, the May 27, 2014, final order should be reversed, and final judgment should be granted to the Trustee, William D. Evans.

WILLIAM D. EVANS, TRUSTEE
OF THE WANDA S. EVANS
TRUST
BY COUNSEL

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CERTIFICATE REQUIRED BY RULE 5:26(h)

I HEREBY CERTIFY THAT:

A. The names of the Appellants and Appellees, the names, addresses and telephone numbers of counsel for each party, and the names, addresses and telephone numbers of any party not represented by counsel are as follows:

Appellant:	William D. Evans, in his capacity as Trustee of the Wanda S. Evans Trust
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B. On February 27, 2015, fifteen printed copies of the Reply Brief of Appellant, with one electronic copy on CD, were hand-filed with the Clerk of this Court. On this same day, three printed copies of the Brief and, with one electronic version on CD, were served, via U.S. Mail, postage prepaid, at the foregoing address.

Respectfully submitted this 27th day of February, 2015.

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