In The

Supreme Court of Virginia

RECORD NO. 150638

JSR MECHANICAL, INC.,

Appellant,

v.

AIRECO SUPPLY, INC.,

Appellee.

BRIEF OF APPELLEE

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SCV: Submitted on 01-11-2016 11:10:15 EST for filing on 01-11-2016

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IN THE SUPREME COURT OF VIRGINIA

JSR Mechanical, Inc.,	)	
	)	
Appellant,	)	
	)	
v.	)	**Record No. 150638**
	)	
Aireco Supply, Inc.,	)	
	)	
Appellee	)	

BRIEF ON APPEAL OF AIRECO SUPPLY, INC.

TO THE HONORABLE JUDGES OF THE VIRGINIA SUPREME COURT:

GREETINGS:

Appellee, Aireco Supply, Inc., by its undersigned counsel, hereby submits its Brief seeking dismissal of the appeal or affirmation of the Order of the Prince William Circuit Court entered January 30, 2015 denying Appellant's motion to reinstate the previously-dismissed action pursuant to Virginia Code § 8.01-335(B).

STATEMENT OF THE CASE

In July 2010 Appellant, JSR Mechanical, Inc. ("JSR"), filed suit against Appellee, Aireco Supply, Inc. ("Aireco"). Aireco filed its answer in August 2010 and discovery commenced shortly thereafter. There were no orders or other proceedings before the Court after August 19, 2010. By December 2010 Appellant stopped prosecuting the case and thereafter

abandoned it entirely. In March 2011 Appellant began ignoring deadlines for responding to Appellee's discovery requests. The case languished for years without any effort by Appellant to resume it, and Appellant never attempted to set a trial date or schedule other matters leading up to trial.

On January 31, 2014, almost 3 ½ years from the date of the last filing with the trial court, the Hon. Lon E. Farris of the Prince William County Circuit Court entered a Final Order dismissing the case (not just "discontinuing" it, as Appellant repeatedly states) pursuant to § 8.01-335(B). (JA20). As instructed in the Order, the clerk provided a copy of the Final Order "dismissing the case" to counsel for the plaintiff/appellant and defendant/appellee. (JA 21)

Almost a full year more passed, when, on January 23, 2015 (not January 18, as stated by Appellant), Appellant filed a Motion to Reinstate the action, after more than four years of inactivity and abandonment on the Appellant's part. (JA 22-23) On January 30, 2015 Judge Farris, after carefully considering the motion, including Appellant's written arguments and exhibits proffered in support thereof, and listening to both sides' arguments regarding reinstatement at the hearing, entered an Order denying Appellant's Motion to Reinstate the previously-dismissed, long-dormant case. (JA 24) Appellant noted objections on the Order (JA 25);

however, the statements made are his version only of what the Court allegedly said was the basis for its ruling, and for the reasons explained below have no evidentiary value and should carry no weight whatsoever with this Court.

On March 2, 2015, the very last possible day, Appellant filed its Notice of Appeal with the trial court. In the Notice of Appeal, Appellant specifically stated, "your plaintiff will not be filing a transcript; however, a statement of facts concerning the progress of the hearing on January 30, 2015 will be circulated to opposing counsel and the Court for review and entry." This was not done.

Instead, on March 30, 2015, four days after the 55-day deadline in Rule 5:11(e)(1) of the Rules of the Supreme Court of Virginia for filing a "written statement of facts, testimony, and other incidents of the case" in lieu of transcript had passed, Appellant filed a document with the trial court entitled "Statement Regarding Transcript." (JA 26-27) On April 9, 2015, Appellee filed a timely Objection to Appellant's "Statement Regarding Transcript." (JA 28-31) In this Objection, Appellee pointed out that Appellant's Statement Regarding Transcript did not comply with Rule 5:11(e)(1) because (1) it did not meet the requirements of a "written statement of facts, testimony, and other incidents of the case," and (2) no

notice was given regarding when it would be presented to the trial court. (JA 28-29)

On May 27, 2015, the trial court, Hon. Lon E. Farris, certified that, for purposes of this appeal, "the record is incomplete for the following reasons:

> 1. The Appellant has failed to file a complete written statement of facts, testimony, and other incidents of the case, as required by Rule 5:11(e)(1) of the Rules of the Supreme Court of Virginia; and
>
> 2. The Appellant has failed to give the requisite notice that the statement filed would be presented to the Court, as required by Rule 5:11(e)(1) of the Rules of the Supreme Court of Virginia." (JA 31)(emphasis added).

On April 30, 2015, again the very last day possible, Appellant filed a Petition for Appeal with this Court asserting three Assignments of Error, and service of the Petition for Appeal on counsel for the Appellee was effective as of May 4, 2015. Appellee timely filed its Brief in Opposition with this Court on May 22, 2015. On September 3, 2015 Appellant presented oral argument to the Writ Panel of this Court in support of its Petition for Appeal. On September 21, 2015, this Court awarded an appeal to Appellant limited to consideration of Assignment of Error No. 1, which reads as follows:

> 1. The motion to reinstate is a procedural motion for which the Circuit Court has limited discretion to deny. Once the plaintiff has shown that it has complied with the timeliness and notice requirements of §8.01-335(B) the Circuit Court does not have the discretion to deny the motion based on lack of good

cause since this is not a requirement provided in the statute for reinstatement following discontinuance of the case.

That Assignment of Error is the subject of this appeal.

STATEMENT OF THE FACTS

In the underlying action, which was dismissed for lack of prosecution, Appellant alleged that in 2007-08 an individual named Tyrone Fletcher used Appellant's account with Aireco to make unauthorized purchases of HVAC equipment totaling approximately $38,000. *Complaint* ¶¶ 18 - 30 (JA 5-7). Aireco did not know and had no connection to Fletcher. *Answer* ¶ 18 (JA 15). Aireco sent receipts for purchases made on the account to Appellant, including the purchases allegedly made by Fletcher, and Appellant reviewed, accepted, and paid those invoices without dispute. *Complaint* ¶¶ 22-24 (JA 5-6). Later, Appellant informed Aireco that it contended that the purchases were unauthorized and demanded a refund from Aireco. *Complaint* ¶¶ 27-28 (JA 6). Aireco denied liability and declined to refund money to Appellant. In August 2009 Fletcher pled guilty to aggregate theft over $500 and, as part of his sentence, was ordered to make restitution to Appellant in the amount of $35,000. *Motion to Reinstate Case* (JA 22). Thereafter, Appellant made efforts to collect from Fletcher. (JA 22) In July 2010 Appellant filed suit against Aireco, which Aireco maintains was and is without merit. *Complaint* (JA 1); *Answer* (JA 13).

On January 31, 2014, pursuant to § 8.01-335(B), the trial court dismissed the action against Appellee/Aireco for lack of prosecution by Appellant, as there had been no order or proceeding with the court for more than 3 years. (JA 20) A year later, on January 30, 2015, in support of its motion to reinstate, Appellant argued that the excuse for why it abandoned the case against Aireco for over 4 years was because it was attempting to recover from Fletcher, and that since it had not received adequate restitution from Fletcher, it wanted to reinstate its wholly separate (and unfounded) case against Appellee/Aireco, which was dismissed a year earlier. (JA 24)

On January 30, 2015 Judge Farris heard the Motion to Reinstate the case, which had been dismissed a year earlier. Judge Farris gave both parties a full opportunity to be heard and then, in his judicial discretion, denied the Motion to Reinstate. Counsel for the Appellant argued further against denial of its motion, but the trial court reiterated its ruling that the motion was denied and the case remains dismissed. (JA 24)

ARGUMENT

Standard of Review

If the appeal is not dismissed on the ground that the Assignment of Error is fatally defective and insufficient for the reasons explained in section I below, the Assignment of Error presents an issue of statutory construction, which is a question of law that this Court reviews *de novo*. *Lawes v. McIlroy*, 283 Va. 594, 598 (2012), citing *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104 (2007). It is worth noting, as this Court stated in *Ainslie v. Inman*, 265 Va. 347, 353 (2003), "although we review the matters involved in the case *de novo*, the trial court's judgment is presumed to be correct and stands until error has been pointed out." *Id.*, citing *Lavenstein v. Plummer*, 179 Va. 469, 471 (1942).

To the extent there is a legitimate "due process" question within the Assignment of Error, see section III below as to why Appellant believes there is not, "'constitutional arguments are questions of law [and, therefore, the standard of review by this Court is] *de novo*.'" *Copeland v. Todd*, 282 Va. 183, 193 (2011), quoting *Shivaee v. Commonwealth*, 270 Va. 112, 119 (2005).

I. THE APPEAL SHOULD BE DISMISSED BECAUSE THE ASSIGNMENT OF ERROR IS FATALLY DEFECTIVE AND INSUFFICIENT

Rule 5:9(b) of the Rules of the Supreme Court of Virginia requires that the Appellant state in its notice of appeal whether a "transcript or statement of facts, testimony and other incidents of the case will be filed." Appellant's Notice of Appeal stated that "a statement of facts concerning the progress of the hearing on January 30, 2015 will be circulated to opposing counsel and the Court for review and entry." This was not done.

Rule 5:10(a)(7) states that the record on appeal consists of, *inter alia*, "the transcript of any proceeding or a written statement of facts, testimony, and other incidents of the case when made a part of the record as provided in Rule 5:11." Rule 5:11(a)(1) states:

> "It is the obligation of the petitioner/appellant to ensure that the record is sufficient to enable the Court to evaluate and resolve the assignments of error. <u>When the appellant fails to ensure that the record contains</u> transcripts or <u>a written statement of facts necessary to permit resolution of appellate issues related to the assignments of error, any assignments of error affected by the omission shall not be considered</u>." (Emphasis added).

Because there was no transcript of the hearing, and based on the representation made in the Notice of Appeal, pursuant to Rule 5:11(e)(1) Appellant was obligated to file with the trial court a "written statement of facts, testimony, and other incidents of the case." Appellant did not do so,

and therefore the trial court certified that the record for purposes of appeal was "incomplete." (JA 32)(emphasis added).

Instead, Appellant erroneously stated that "no statement of facts is necessary" because the trial "Court did not conduct an evidentiary hearing." (JA 26) This statement is fundamentally incorrect. In the absence of a transcript, Appellant was obligated to present to the trial court a proposed written statement containing its version of the facts regarding what occurred at the hearing resulting in the denial of its Motion to Reinstate (i.e., a summary of what Appellant said, what Appellee said, what the Court said, and how the Court ruled). Appellant's failure to submit a proposed written statement in lieu of transcript made the record incomplete and deprived both the trial court and Appellee of the opportunity to ensure that an accurate and complete statement of what had occurred was in the record for purposes of this appeal. That is why the trial court certified that the record was incomplete. (JA 32)

When Appellant filed its Petition for Appeal and stated what it considers to be the "Assignments of Error," each Assignment of Error was required to relate to matters set forth in the written statement, but there is no written statement. Appellant essentially has said, contrary to the Rules of this Court, that no written statement is necessary, and Appellant takes

the position that the Order entered (with only Appellant's counsel's self-serving notations regarding what allegedly occurred) is all that is needed. That is simply incorrect and does not comply with the applicable Rules.

Pursuant to Rule 5:11(a)(1), the Assignment of Error that Appellant has presented on appeal is fatally deficient because it is not supported by a complete record. No facts were alleged in Appellant's "Statement Regarding Transcript," and there is no written statement in lieu of transcript. The trial judge was never given the opportunity to review a written statement in lieu of transcript presented by Appellant setting forth what Appellant alleges happened and was said at the hearing resulting in denial of its motion for reinstatement, and the trial court never certified the statements that are now being alleged by Appellant as having been uttered by Judge Farris himself. Therefore, the Assignment of Error is insufficient, and any purported quotes or "facts" now being put forward by Appellant are improper as they are not based upon, nor supported by, any evidence, transcript, or written statement. In accordance with Rule 5:17(c)(1)(iii), "if the assignments of error are insufficient, the petition for appeal shall be dismissed."

In *Towler v. Commonwealth*, 216 Va. 533, 535 (1976), and other cases, this Court has ruled that:

> These are simple, easily understood rule provisions. But they are jurisdictional, and failure to comply therewith will result, as in the present case, in dismissal, either before or after appeal is awarded. We dislike dismissing appeals for jurisdictional defects even where, as here, we would likely affirm the judgment of the trial court. ... Nevertheless, dismissal will continue to be the price of failure to comply with mandatory rule provisions. (Emphasis added).

If, notwithstanding Appellant's failure to include a written statement in lieu of transcript as part of the record, the Court declines to dismiss the Appeal on this basis, at a minimum, the Appellant should not be allowed to use its self-serving notations on the trial court's order as extrinsic evidence of what occurred at the hearing. In *Smith v. Commonwealth*, 281 Va. 464, 470 (2011), this Court held that Smith waived his challenge to the trial court's denial of his motion to suppress certain evidence because he failed to timely file a transcript necessary to resolve the issue.

II. THE TRIAL COURT PROPERLY EXERCISED ITS JUDICIAL DISCRETION, PURSUANT TO VIRGINIA CODE § 8.01-335(B)

Virginia Code § 8.01-335(B), by its plain meaning, permits the trial court to exercise its sound judicial discretion in deciding whether or not to grant a motion to reinstate a previously dismissed case, and nothing in the statute prohibits the trial court, in the exercise of its sound judicial discretion, from considering the totality of the facts and circumstances before it, including whether or not the movant has shown just cause or

other sufficient grounds to warrant reinstatement of a long-dormant, previously-dismissed case.

The law in Virginia pertaining to statutory interpretation is well established. In *Eberhardt v. Fairfax County Employees' Retirement System Bd*, 283 Va. 190, 194-95 (2012), this Court stated:

> When a statute is clear and unambiguous, "a court may look only to the words of the statute to determine its meaning." *Hubbard v. Henrico Ltd. P'shp*, 255 Va. 335, 339 ... (1998). It may not "consider rules of statutory construction, legislative history, or extrinsic evidence." *Perez v. Capital One Bank*, 258 Va. 612, 616 ... (1999). ....
> ...
> Likewise, consideration of the entire statute ... to place its terms in context to ascertain their plain meaning does not offend the rule because "it is our duty to interpret the several parts of a statute as a consistent and harmonious whole so as to effectuate the legislative goal. A statute is not to be construed by singling out a particular phrase." *Virginia Electric & Power Co. v. Board of County Supervisors*, 226 Va. 382, 387-88 ... (1983).

(Emphasis added). Further, "the plain, obvious, and rational meaning of a statute is to be preferred over any curious, narrow, or strained construction." *Meeks v. Commonwealth*, 274 Va. 798, 802 (2007).

The statute, Va. Code § 8.01-335(B), states, in its entirety, as follows:

> B. Any court in which is pending a case wherein for more than three years there has been no order or proceeding, except to continue it, **may**, in its discretion, order it to be struck from its docket and the action shall thereby be discontinued. The court **may** dismiss cases under this subsection without any notice to the parties. The clerk shall

> provide the parties with a copy of the final order discontinuing or dismissing the case. Any case discontinued or dismissed under the provisions of this subsection **may** be reinstated, on motion, after notice to the parties in interest, if known, or their counsel of record within one year from the date of such order but not after.

(Emphasis added).

The statute is clear and unambiguous, and the plain meaning of the last sentence of § 8.01-335(B) is that, if, as here, a case was previously dismissed by the court under § 8.01-335(B) and a "motion" to reinstate is filed, and notice is given to all parties, the trial court is permitted ("may"), but not obligated, in the sound exercise its judicial discretion, to grant (or deny) the motion to reinstate, within one year from the date of the prior order dismissing the case, but not after that.

First, the words "may be reinstated" directly and clearly indicate the legislature's intent that the trial court has discretion in deciding if the case should be reinstated. Otherwise, the statute would say that the case "shall be reinstated." As a side note, Appellant's argument that the word "may" relates to the movant's right to file a motion is obviously incorrect for multiple reasons. Reading all of the sentences in the statute as a whole, as stated in *Eberhardt*, there is no doubt that every use of the word "may" in this provision (there are three of them) is referring to the trial court.

Moreover, the full phrase in the last sentence is “may be reinstated,” which clearly is the province of the trial court, not the moving party.

Second, the words “on motion, after notice” plainly mean that a “motion” is required, and that the elements of motion practice will ensue; namely, the right of the movant to submit written arguments in support of the motion, the right of other parties to oppose and object to the motion, and a hearing at which the parties may argue the merits of the motion, after which the court, having considered all of the foregoing elements, is required to exercise its judicial discretion, soundly and reasonably, and without doing anything that would constitute an abuse of discretion, and render a decision on the motion to reinstate, which decision “may” be to either grant or deny said motion. If this was not what the legislature intended, and instead it wanted to make reinstatement “automatic” (assuming the timing and notice requirements are met, as Appellant argues), the legislature could have (and would have) simply written the last sentence of § 8.01-335(B) to provide for the filing of a “praecipe” or “notice” or the submission of some “form” or “application” with the court, perhaps even to be acted upon by the clerk, as opposed to a judge, and resulting in automatic, mandatory (“shall”) reinstatement of the previously-dismissed case. Of course, the legislature did no such thing with this statute, and

wisely chose to require motions practice to be followed, and then vested the trial court with permissive discretion ("may") to decide whether or not to grant the motion to reinstate, based on the merits and taking into account the totality of the facts and circumstances before the court.

Furthermore, there is nothing to support the distinction that Appellant is trying to draw between "procedural motions," which Appellant asserts, in the Assignment of Error, the trial court has "limited discretion to deny," versus "substantive motions," which Appellant apparently believes give the trial court more discretion to deny. Moreover, what could be more "substantive" than a motion denying reinstatement of a case dismissed for lack of prosecution? The legislature recognized that reinstatement of a previously dismissed case is a serious matter with consequences to the defendant and to the court and its docket and the efficient administration of justice, and the legislature clearly and unambiguously, in plain language, gave the trial court discretion ("may" and "on motion") to decide whether or not to allow reinstatement on the totality of the facts and circumstances before the court.

Third, the right of the trial court to consider whether or not "just cause" or other "sufficient grounds" exist for the granting of a motion to

reinstate is inherent in the sound exercise of judicial discretion, and it is fully supported by prior precedent in the decisional law of this Court.

Appellant and the Amicus Curiae attempt to make something out of nothing by pointing to changes, additions and deletions, made to § 8.01-335(B) over time, but the reality is that, even if this Court were to consider those evolutionary changes, which Appellee maintains would mean that the Court is thereby ignoring the clear and unambiguous language and plain meaning of the statute as currently written and contradicting the principles of statutory construction articulated by this Court in *Eberhardt*, *Hubbard*, and *Perez*, *supra*, those changes do not support what the Appellant and Amicus Curiae are attempting to argue. Indeed, the changes would show that in 1992 the legislature shortened the timeframe for the trial court to consider a case abandoned from 5 years to 3 years and added the right of the trial court to dismiss such a case. In 1997, the legislature took out the concept of dismissal, put in the right to discontinue the case, and added that such a case may be reinstated, upon motion and for cause. In 1999, the legislature added back the right of the trial court to outright dismiss a long-dormant case without notice, and revised the last sentence providing that a case may be reinstated, upon motion, by deleting the words "and for cause." Contrary to what the Appellant is trying to argue this means (i.e.,

that the legislature intended that the trial court was no longer allowed to consider whether or not there is "cause" to support reinstatement), it is just as likely, if not more so, that the legislature intended no such thing, and instead wanted to afford the trial court more latitude in evaluating the merits of motions for reinstatement, rather than constraining the trial court in such a manner as to make it an ironclad requirement in every instance that a party moving for reinstatement must show "cause." This view is entirely consistent with the concept of judicial discretion, so that the court "may" consider the totality of the facts and circumstances in ruling on the merits of the "motion." In other words, the effect of this particular change was that it is no longer mandatory for the trial court to require every movant to show "cause" when other sufficient grounds might exist such that the court, in the sound exercise of its judicial discretion, may deem reinstatement warranted, even though those factors might or might not rise to the level of "cause." Nowhere does the language of the statute either expressly or impliedly prohibit the trial court from considering whether the movant has shown just cause or other sufficient grounds for granting a motion to reinstate, nor does that statute make reinstatement automatic simply because the timing and notice elements are met.

This makes sense, and is consistent with public policy and sound case management, so that after a case has been dismissed for lack of prosecution and progress for over 3 years, it is appropriate and necessary that the moving party be required to give an explanation for the delay and then allow the judge to make a ruling, based upon the totality of the facts and circumstances, and decide if a case should go forward after so many years of inactivity. Defendants have a right to know that a case that has languished for so long is finally over, just as much as a plaintiff has the right, and obligation, to diligently pursue the case.

Regardless of the deliberations that may or may not have occurred in the legislature, or the reasoning that led different legislators to approve these changes, the fact remains that the current version of the statute enacted by the legislature contains these "permissive" words ("may" and "on motion"), not automatic or mandatory words, which means that the trial court has judicial discretion to grant or deny a motion for reinstatement based on the totality of the facts and circumstances of each such motion.

The precedential decisional law of this Court supports the view that the trial court may, in the sound exercise of its judicial discretion in ruling on a motion for reinstatement, consider whether or not there is just cause or

other sufficient grounds to grant such motion. In *Nash v. Jewell*, 227 Va. 230, 236-37 (1984), this Court stated:

> In *Wickham v. Green*, 111 Va. 199, 68 S.E. 259 (1910), we stated that "the prevailing rule is that motions to set aside a non-suit, or to reinstate a suit after dismissal, are addressed to the judicial discretion of the court." *Id*. at 203, 68 S.E. at 261. Nevertheless, under the facts of that case, we reversed the judgment of the trial court permitting the Appellant to avoid dismissal of his action by filing his declaration late. We held that the Appellant had the ***duty of showing good cause*** for his motion to reinstate his suit, and that he had failed to do so.

(Emphasis added).

Again, nothing in the clear and unambiguous language of § 8.01-335(B), contradicts, undercuts, or reverses these decisions. In *Wickham v. Green*, this Court stated, in connection with a suit that was dismissed under a similar statute in effect at the time:

> The suit is dismissed ... because of apparent neglect of duty upon the part of the Appellant, and it should be reinstated only upon explanation, showing that the neglect of duty was only apparent, or, if really existing, that there was excuse or extenuation for it. It is not to be reinstated merely upon showing that the Appellant would suffer inconvenience or loss by reason of its dismissal, as that would as effectually repeal the statute as though its enforcement were left entirely to the arbitrary discretion of the court.

111 Va. at 203. Similarly, this Court should make it clear that, under the statute at issue here (§ 8.01-335(B)), the trial court does have discretion to deny a motion to reinstate on the ground that the moving party has failed to

show just cause or other sufficient grounds to reinstate a case after dismissal.

This Court has made it clear that the trial court is permitted to, and in the best position to, decide whether or not to deny a motion for reinstatement of a particular case that it has previously dismissed, based on the underlying facts and circumstances of that case. *Id*.

In *Nash v. Jewell*, this Court recognized why it is important for the statute to be read in this manner:

> It is apparent that the purpose of this subsection of the statute is to enable trial courts to eliminate from their dockets cases for which there is no reasonable prospect of trial. In summarily dismissing such cases, trial courts may thus promote efficiency in the administration of justice by saving the time of court personnel which would otherwise be required to preserve on the courts' dockets actions long forgotten or abandoned by litigants and lawyers.

227 Va. at 234.

That is exactly what occurred in this case. Appellant willfully allowed the case to languish and be long forgotten and abandoned; therefore, the administration of justice is served by not allowing cases to continue to languish for years to come, much less be reinstated without just cause or other sufficient grounds, as determined by the trial court in the sound exercise of its judicial discretion.

Further, Appellant already has a remedy for its alleged harm, i.e., continued efforts to collect on the restitution order in its favor against Tyrone Fletcher. However, because Appellant has allegedly not yet been able to collect the full amount from Fletcher it now seeks to set aside the trial court's decision in this action to deny reinstatement of a case that has already been dormant and long forgotten after 4 years of inactivity. If Appellant felt its case was worth pursuing, it had 3 years prior to the dismissal to do so, but chose not to do so. It would be contrary to the administration of justice and court efficiency to allow this matter to be dragged out further.

III. DUE PROCESS CONSIDERATIONS HAVE BEEN MET

Appellant's argument regarding a purported due process issue is specious and a red herring. This Court has already found that the provisions of § 8.01-335(B) satisfy due process requirements because the statute provides a post-deprivation remedy. See *Milot v. Milot*, 62 Va. App. 415, 423 (2013), citing *Fun v. Virginia Mil. Inst.*, 245 Va. 249, 253 (Va. 1993). In Milot, the Court of Appeals held:

> Code § 8.01–335(B) provides that "any case dismissed under ... this subsection may be reinstated, on motion ... within one year from the date of such order." Generally, a trial court only retains jurisdiction over a matter for 21 days after a final order in the case has been entered. Rule 1:1. The General Assembly, however, extended this jurisdiction to one year when a case is

> dismissed under Code § 8.01–335(B). This extension of the trial court's jurisdiction serves as an adequate post-deprivation remedy sufficient to satisfy constitutional due process concerns.

Id.

Appellant is mistaken in its argument that due process requires that its motion for reinstatement must be granted, assuming it was timely filed and notice was given to the other parties. There is no such requirement. Due process requires "notice and an opportunity to be heard" on the subject, see *U.S. v. James Daniel Good Real Prop.*, 510 U.S. 43, 46 (1993), and that is exactly what the "on motion, after notice" language in the statute provides. Due process does not require that reinstatement be automatically granted, and the statute does not require that either. Like all motions, the decision on whether or not to grant or deny the motion is within the sound discretion of the court; hence, the word "may" is used in the statute, not "shall." The motion procedure affords the parties sufficient "notice and opportunity to be heard." In addition to Appellant's written arguments in support of its motion for reinstatement, the trial court listened carefully to arguments from both sides before making a determination based on the totality of the facts and circumstances. This is exactly what the court is supposed to do.

The use of the word "may" in the statute clearly is not intended to be referring to the right of the moving party to file a motion; rather, the plain language means that the case "may be reinstated" by the court, "on motion" and "after notice," if the court, in the sound exercise of its judicial discretion, determines that sufficient grounds exist to grant the motion. The statute does not provide for automatic reinstatement by simply giving notice, or filing a praecipe, or submitting an application. The statute expressly requires a "motion." The motion, and any written arguments submitted in support of (or opposition to) the motion, and any arguments put forth by either side at any hearing on the motion affords both sides sufficient opportunity to present their positions prior to the court making its determination based on the totality of the facts and circumstances before it. In this case, the trial court, after careful consideration of Appellant's motion and written arguments and the oral arguments of counsel for both sides, decided to deny the motion to reinstate the previously-dismissed, long-dormant case. There is no transcript, no written statement in lieu of transcript (Appellant's self-serving rendition of what was supposedly said has no evidentiary value), and there is no evidence of any kind that the trial court abused its discretion in any way. Appellant was accorded due

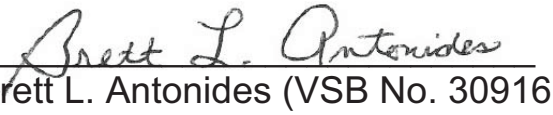
process, and the trial court acted within the clear language and meaning of the statute.

CONCLUSION

For the foregoing reasons, the Appeal filed by the Appellant should be dismissed or the trial court's order denying Appellant's motion for reinstatement should be affirmed.

Respectfully Submitted,

Aireco Supply, Inc., Appellee,
By Counsel



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CERTIFICATE

Pursuant to Rule 5:26(h), I certify that the foregoing Brief of Appellee complies with Rule 5:26, and further that on this 11th day of January, 2016, an electronic copy of the Brief of Appellee was filed, via VACES, and ten paper copies of the Brief of Appellee were hand-filed with the Clerk of this Court. On this same day, an electronic copy of the Brief of Appellee was served, via email, upon:

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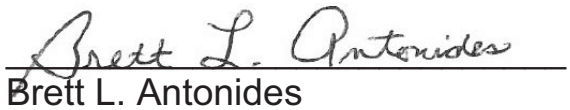

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