In The

Supreme Court of Virginia

RECORD NO. 150638

JSR MECHANICAL, INC.,

Appellant,

v.

AIRECO SUPPLY, INC.,

Appellee.

BRIEF OF APPELLANT

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SCV: Submitted on 11-20-2015 12:51:32 EST for filing on 11-20-2015

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In the Supreme Court of Virginia

JSR Mechanical, Inc.,	)	
	)	
Plaintiff	)	
	)	
v.	)	**Record No. 150638**
	)	
Aireco Supply, Inc.,	)	
	)	
Defendant.	)	

BRIEF ON APPEAL OF JSR MECHANICAL, INC.

TO THE HONORABLE JUDGES OF THE VIRGINIA SUPREME COURT:

GREETINGS:

Appellant JSR Mechanical, Inc. hereby submits its Opening Brief on Appeal, by and through undersigned counsel, seeking reversal of the Order of the Prince William Circuit Court entered January 30, 2015 by which that Court refused to restore this matter to the active docket pursuant to Virginia Code § 8.01-335(B) despite plaintiff's apparent compliance with the statutory requirements therein.

Statement of the Case

The Circuit Court of Prince William County erred in denying plaintiff's motion to reinstate its litigation discontinued pursuant to Virginia Code § 8.01-335(B) following timely motion and notice. At the hearing on the motion to reinstate, plaintiff preserved its objections to denial thereof in its

written objections on the face of the order. The Supreme Court has awarded a writ of appeal limited to whether the Circuit Court correctly interpreted this statute.

Statement of Material Proceedings Below and the Facts

1. JSR Mechanical, Inc. ("JSR") filed its complaint in Prince William County Circuit Court on July 23, 2010, seeking damages for breach of contract. (JA 1) Aireco Supply, Inc. ("Aireco") answered. (JA13)

2. The case remained at issue for three years, whereupon on January 31, 2014, in accordance with Virginia Code § 8.01-335(B), by Order of the Circuit Court of Prince William County, the matter was discontinued and stricken from the court's active docket. (JA 20)

3. On January 18, 2015, JSR, through its counsel, timely filed its motion to reinstate pursuant to Virginia Code § 8.01-335, and provided the required notice to Aireco. (JA 22) On January 30, 2015, the motion was heard and denied. (JA 24) The Circuit Court's Order of January 30, 2015 contains a typo misidentifying the applicable Virginia Code section as "355" instead of "335;" however, the import of the Order remains the same – denial of plaintiff's motion to reinstate.

4. The January 30th hearing was not recorded, and no testimony was obtained. The Court entertained representations and arguments of

counsel regarding the motion for reinstatement, whereupon it overruled plaintiff's motion, stating that "just cause and sufficient grounds do not exist for granting Plaintiff's motion."

5. Prior to entry of the order, counsel for JSR noted three objections thereon, thus preserving his objection to denial of reinstatement as alleged error for the purpose of this appeal. (JA 25)

6. JSR thereafter noted its appeal, indicating therein that a statement of facts concerning the progress of the hearing of January 30th would be circulated to opposing counsel and the Court for review and entry. Thereafter, JSR filed a Statement Regarding Transcripts on March 30, 2015 reiterating that there was no transcript available and no statement of facts necessary, since the matter had not been before the Circuit Court for an evidentiary hearing, and that the matter would proceed simply upon the pleadings and order entered in this case. (JA 26)

7. On April 9, 2015, Aireco objected to JSR's Statement Regarding Transcripts (JA 28) and obtained a further order from the Circuit Court on May 27, 2015 that purports to certify that the record on appeal is incomplete for want of the Rule 5:11(e)(1) statement of facts, testimony and other incidents of the case. (JA 32)

8. On September 21, 2015, the Virginia Supreme Court awarded JSR a writ of appeal, limited to the first of three assignments of error noted in its petition for appeal, specifically, whether the Circuit Court correctly interpreted and applied Virginia Code § 8.01-335 in denying reinstatement. (JA 33) This appears to involve a question of first impression before the Virginia Supreme Court.

Assignment of Error

9. The writ of appeal limits this brief to discussion of a single assignment of error as noted in JSR's petition for appeal, previously preserved in the record at JA 25:

> 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. (JA 33)

Standard of Review

10. It is a judicial maxim that statutory interpretation is subject to *de novo* review by the Virginia Supreme Court. *Conger v. Barrett*, 280 Va. 627, 630 (2010). This matter involves the interpretation of the requirements of Virginia Code § 8.01-335 regarding reinstatement of cases discontinued pursuant to either part A. or B. of that statute.

Argument

Introduction

11. Rule 5:26(g) prohibits attempts to incorporate within a party's brief arguments made below by reference to those arguments contained in filings previously made in the lower court. In this appeal, a substantial argument, indeed, a treatise regarding the interpretation and legislative history of Virginia Code § 8.01-335 has been articulated by the Virginia Trial Lawyers Association in their brief *amicus curiae* to which this prohibition does not appear to apply. Since the VTLA argument has been lodged in the Virginia Supreme Court, and not in the action below, undersigned counsel will incorporate, by reference, the entirety of their argument as if more fully reiterated and set forth here in JSR's opening brief.

12. However, JSR believes that it is also important for the Virginia Supreme Court to consider how Virginia Code § 8.01-355(B) protects litigants' right of procedural due process exactly as written. Procedural due process is impaired when additional requirements are imposed when the Circuit Court, acting as gate keeper to prevent a matter from being restored to the active docket, imposes additional requirements when the effort to reinstate is otherwise in compliance with the terms of that statute.

13. Also, although the Circuit Court entered an order declaring that the record was incomplete (SA 32), this is not grounds for dismissal of the appeal. The panel appears to have already determined the impact the said failure would have on the disposition of this case, as provided by *Smith v. Commonwealth*, 281 Va. 464, 706 S.E.2d 889 (2011), and nonetheless awarded a writ of appeal.

Statutory Interpretation and Legislative History

14. As stated above, your appellant incorporates by reference the arguments contained in the lodged brief *amicus curiae* of the Virginia Trial Lawyers Association. In particular, JSR points to the discussion of the 1997 and 1999 amendments of the statute whose interpretation is at issue – Virginia Code § 8.01-335(B) – and which amendments are highlighted therein.

15. The Virginia Supreme Court should apply the maxim of statutory interpretation by which the expression of one thing is to the exclusion of another. Known as the doctrine of "*expressio unius*," the full Latin phrase is *expressio unius est exclusio alterius*. Basically, if it ain't broke, don't fix it.

16. Indeed, the Circuit Court's adding a "good cause" requirement to the statute, where that exact requirement was tested for two years and

thereafter removed by the legislature, ought to be a very strong indicator that there's something wrong with imposing a good cause requirement in the context of reinstating litigation discontinued for want of prosecution. It's been tried and rejected.

8.01-335(B) Protects Procedural Due Process as Written

17. This Honorable Supreme Court has considered the matter of procedural due process in *Norfolk 102, LLC v. City of Norfolk*, 285 Va. 340, 738 S.E.2d 895 (2013), quoting *Zinermon v. Burch*, 494 U.S. 113, 125 (1990): "In procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law." In other words, "individuals whose property interests are at stake are entitled to notice and an opportunity to be heard. *Dusenbery v. United States*, 534 U.S. 161, 167 (2002)" (internal quotation marks omitted).

18. It follows, then, that just because a party's claim may be stricken from the docket pursuant to the house-keeping provisions of Virginia Code § 8.01-335, such action is not inherently unconstitutional. However, since this occurs without notice or opportunity to be heard, it effectively deprives a person of their property without due process. "The

root requirement of the Due Process Clause is that an individual be given an opportunity for a hearing before he is deprived of any significant protected interest"; *Parham v. J. R.*, 442 U.S. 584, 606-607 (1979). A chose in action is such an interest.

19. The holding in *Zinermon*, *supra*, however, goes on to say that "in some circumstances, however, the Court has held that a statutory provision for a postdeprivation hearing, or a common-law tort remedy for erroneous deprivation, satisfies due process. See, e. g., *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982) ("`[T]he necessity of quick action by the State or the impracticality of providing any predeprivation process'" may mean that a postdeprivation remedy is constitutionally adequate, quoting *Parratt*, 451 U.S., at 539); *Memphis Light*, 436 U.S., at 19 ("[W]here the potential length or severity of the deprivation does not indicate a likelihood of serious loss and where the procedures . . . are sufficiently reliable to minimize the risk of erroneous determination," a prior hearing may not be required); *Ingraham v. Wright*, 430 U.S. 651, 682 (1977) (hearing not required before corporal punishment of junior high school students); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 619-620 (1974) (hearing not required before issuance of writ to sequester debtor's property)."

20. Virginia Code § 8.01-335(B) provides the necessary postdeprivation remedy to protect a litigant against erroneous termination of their cause of action by its unilateral discontinuance by the court. This remedy is the essence of procedural due process and is stated plainly and simply.

21. The permissive language of the statute does not imply that a litigant has to have the Court's permission to reinstate their case. It simply means that a litigant has the option to choose not to reinstate following discontinuance. The flexibility of the remedy of reinstatement that is embodied in the word "may," subject to the notice and timing provisions of the statute, flows in favor of the party whose case has been discontinued from the docket without notice or hearing. It is not intended to provide an opportunity for the other interested party to block reinstatement unless the time and notice provisions have not been met.

22. Were this not so, and were each Circuit Court allowed to divine their own good cause standard for reinstatement, it is not unreasonable to posit that this would not meet the minimum test for procedural due process. That is because the deprivation has already happened without a hearing. At this point, the case is already discontinued and the action risks being

unconstitutional but for the remedial postdeprivation opportunity to reinstate. It's essential that this opportunity be simple and straightforward.

23. Leaving it up individual circuit judges to impose their own "good cause" requirement after deprivation risks requiring a party in one circuit to prepare for and argue the merits of their case and explain the reasons for the delay in prosecuting their claim. In another, the local requirement may be far less imposing.

24. Not only does reading in a "good cause" requirement unwittingly risk inconsistent reinstatement standards among the circuits, the Supreme Court must consider the flip side. Aggrieved parties will appeal reinstatements on grounds that a discontinued case was allowed back on the docket with no showing of any good cause at all. It will take a minesweeper to navigate through this uncertainty and safely preserve procedural due process.

Practical Remedies Exist to Countervail Reinstatement

25. A party aggrieved by reinstatement is not bereft of remedies to countervail that action. For example, where a litigant's position has materially been altered by an unseasonal delay of progress in a case, such as the death or unavailability of a key witness in opposition to the claim, the

circuit court may enter such protective orders concerning discovery or witnesses as may be necessary to maintain a level playing field.

26. Finally, it is important to remember that a case does not become stale by the inaction of only one party. It's from the inaction of the other side, too. Although the plaintiff bears the burden of moving forward, when a defendant senses that a delay is prejudicial, they should proactively seek to move a case forward to conclusion. They may demand scheduling for trial, move for dismissal for want of prosecution, or take such other steps, including preservation of testimony, which will avoid what may be a prejudicial effect of having a case linger indefinitely during which time witnesses make themselves scarce, sometimes permanently.

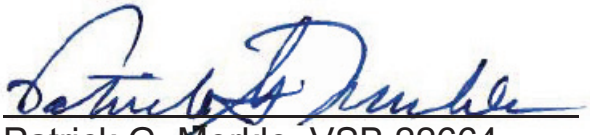
Conclusion and Relief Sought

In consideration whereof, JSR respectfully submits its Opening Brief and requests that this Court reverse the Circuit Court's order denying reinstatement of its litigation against Aireco, and that the case be remanded to the Circuit Court for further proceedings consistent with reinstatement.

Respectfully submitted,

JSR MECHANICAL, INC.

By Counsel



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Rule 5:26(h) Certificate

Pursuant to Rule 5:26(h), I certify that, on this 20th day of November, 2015, an electronic copy of the Brief of Appellant and Appendix were filed, via VACES, and ten paper copies of the Brief of Appellant and three paper copies of the Appendix were hand-filed with the Clerk of this Court. On this same day, an electronic copy of the Brief of Appellant was served, via email, and an electronic copy on CD of the Brief of Appellant and Appendix was served, via UPS Ground Transportation, upon:

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