IN THE

Supreme Court of Virginia

RECORD NO. 161066

HEATHER GRAHAM,

Appellant,

v.

COMMUNITY MANAGEMENT CORPORATION,

Appellee.

BRIEF OF APPELLEE

From the Circuit Court for the County of Fairfax
No. CL-2016-4334

David L. Greenspan (VSB No. 45420)
John E. Thomas, Jr. (VSB No. 81013)
McGuireWoods LLP
1750 Tysons Blvd., Suite 1800
Tysons, Virginia 22102
Telephone: (703) 712-5407
Facsimile: (703) 712-5217
dgreenspan@mcguirewoods.com
jethomas@mcguirewoods.com

Robert W. Loftin (VSB No. 68377)
McGuireWoods LLP
Gateway Plaza
800 East Canal Street
Richmond, Virginia 23219
Telephone: (804) 775-1000
Facsimile: (804) 775-1061
rloftin@mcguirewoods.com

Counsel for Community Management Corporation

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

SCV: Submitted on 01-05-2017 14:44:26 EST for filing on 01-05-2017

Table of Contents

Table of Authorities iii

Statement of the Case 1

Statement of the Facts 1

Standard of Review 4

Argument and Authorities 4

I. Rule 3:25 Required Graham to Demand Fees in the First Litigation or Waive Entitlement Thereto 4

A. The Trial Court Correctly Applied a Plain Reading of Rule 3:25 5

B. The Trial Court's Ruling is Consistent with the History of the Rule 6

C. The Trial Court's Ruling is Consistent with Other Courts' Rulings 8

II. Despite Neither Party Yet Being the Prevailing Party, Rule 3:25 Required Both to Demand Fees Else Waive Entitlement to Those Fees. 11

III. The Trial Court Did Not Read Rule 3:25's Subparts in Isolation. 14

IV. Rule 3:25 Does Not Create Compulsory Counterclaims 15

V. Graham's Waiver of Fees Vitiates Her Argument Regarding Accrual of her Right to Sue for Breach of Contract 16

VI. *Reinick v. Lemen* Undermines Graham's Arguments 17

VII. Graham's Invocation of the 2007 Confidentiality Agreement in the Second Litigation Violates the Prohibition Against Approbation and Reprobation 20

A. Graham Challenged Enforceability of the 2007 Confidentiality Agreement and Failed to Plead in the Alternative 20

B. Graham is Estopped from Now Invoking the 2007 Confidentiality Agreement 22

Conclusion…… 24

Table of Authorities

Page(s)

VIRGINIA CASES

Babcock & Wilcox Co. v. Areva NP, Inc.,
2016 Va. LEXIS 103 (Va. 2016) 23

Cangiano v. LSH Bldg. Co.,
271 Va. 171 (2006) 23

Commonwealth v. Herring,
288 Va. 59 (2014) 4

Daggett & Grigg, Architects, P.C. v. Daggett,
90 Va. Cir. 442 (Charlottesville Cir. Ct. 2015) 21

Ey v. Blume,
2016 Va. Cir. LEXIS 6 (Fairfax Cir. Ct. 2016) 8

Goode v. Courtney,
200 Va. 804 (1959) 6

Holtzman Oil Corp. v. Green Proj.,
2016 Va. Unpub. LEXIS 13 (Va. 2016) 8, 11, 13, 15, 19

Landsdowne Dev. Co., LLC v. Xerox Realty Corp.,
257 Va. 392 (1999) 13

Lofton Ridge, LLC v. Norfolk S. Ry.,
268 Va. 377 (2004) 23

Martin v. Ziherl,
269 Va. 35 (2005) 12

McLesky v. Ocean Park Inv'rs, Ltd.,
242 Va. 51 (1991) 21

Perry v. Commonwealth,
280 Va. 572 (2010) 4, 22

RECP IV WG Land Investors, LLC v. Capital OneBank, N.A.,
2016 Va. Cir. LEXIS 122 (Fairfax Cty. Cir. Ct. 2016) 9

Reineck v. Lemen,
2016 Va. LEXIS 178
No. 151917 (Va. 2016) 17, 18, 19

Rollins v. Hicks,
13 Va. Cir. 44 (Caroline Cty. Cir. Ct. 1987) 22

School Board v. Payne,
151 Va. 240 (1928)..... 24

Shea v. Spinicci,
2013 Va. App. LEXIS 356 (Va. Ct. App. 2013)..... 9, 10

Sheets v. Castle,
263 Va. 407 (2002)..... 13

Shen Valley Masonry, Inc. v. Thor, Inc.,
81 Va. Cir. 89 (Roanoke City Cir. Ct. 2010) 8

Thornton v. Glazer,
271 Va. 566 (2006)..... 5, 6

Van Dam v. Gay,
280 Va. 457 (2010)..... 4

Wooten v. Bank of Am., N.A.,
777 S.E.2d 848 (Va. 2015)..... 22, 23, 24

OTHER CASES

Barco v. Sch. Bd.,
975 So. 2d 1116 (Fla. 2008)..... 11

Stockman v. Downs,
573 So. 2d 835 (Fla. 1991)..... 10, 11

Virginia Statutes

Code § 8.01-3 6

Code § 8.01-281 21

Code § 17.1-700 6

Rules of the Supreme Court of Virginia

Rule 1:4 21

Rule 3:8 ..... 5, 16

Rule 3:25 ..... *passim*

Rule 5:25 11

Other Virginia Authorities

Va. Const. art. VI, § 5 6

Judicial Council of Virginia's
Draft Report on Rule 3:25 (Sept. 26, 2008) 6, 7

STATEMENT OF THE CASE

Appellant Heather Graham ("Graham"), through counsel, made the tactical decision to challenge the enforceability of a contract without pleading in the alternative her own entitlement to the remedies that contract offered. When the lower court deemed the contract enforceable but the jury held Graham had not breached it, Supreme Court of Virginia Rule 3:25 ("Rule 3:25") foreclosed Graham from subsequently requesting attorneys' fees pursuant to that contract in a second, subsequent lawsuit.

On appeal, Graham contends that the Trial Court should have disregarded the plain text of Rule 3:25, the history animating Rule 3:25, and all case law interpreting Rule 3:25 to allow her to claim attorneys' fees from a case that had ended ten (10) months earlier. The Trial Court correctly applied Rule 3:25 in barring Graham from claiming such fees and, for the reasons below, this Court should dismiss her appeal.

STATEMENT OF THE FACTS

On June 27, 2014, Appellee Community Management Corporation ("CMC") sued Graham, its former Chief Executive Officer, in the Circuit Court for Fairfax County, Case No. CL-2014-08589, for breach of contract and tortious interference with contract (the "First Litigation"). (JA 1.) One of the two contracts at issue (the "2007 Confidentiality Agreement")

included a "prevailing party" clause: "In the event that an action is brought for relief under the provisions of this paragraph, the prevailing party shall be entitled to an award of its attorney's fees." (JA 28 ¶ 2(c).)

Pursuant to Rule 3:25, CMC requested its attorneys' fees in its Amended Complaint in the First Litigation. (JA 1 ¶¶ 47, 95; 16 ¶ (g).) Rule 3:25, entitled "Claims for Attorney's Fees," provides in pertinent part:

> A. *Scope of Rule.* This rule applies to claims for attorney's fees, excluding (i) attorney's fees under § 8.01-271.1 of the Code of Virginia, and (ii) attorney's fees in domestic relations cases.
>
> B. *Demand.* A party seeking to recover attorney's fees ***shall include a demand*** therefor ***in the complaint*** filed pursuant to Rule 3:2, in a counterclaim filed pursuant to Rule 3:9, in a cross-claim filed pursuant to Rule 3:10, in a third-party pleading filed pursuant to Rule 3:13, or ***in a responsive pleading filed pursuant to Rule 3:8***. The demand must identify the basis upon which the party relies in requesting attorney's fees.
>
> C. *Waiver.* The failure of a party to file a demand as required by this rule ***constitutes a waiver*** by the party of the claim for attorney's fees, unless leave to file an amended pleading seeking attorney's fees is granted under Rule 1:8.
>
> D. *Procedure.* Upon the motion of any party, the court shall, or upon its own motion, the court may, in advance of trial, establish a procedure to adjudicate any claim for attorney's fees.

See Rule 3:25 (emphasis added). After CMC filed its Amended Complaint in the First Litigation, Graham filed *five* responsive pleadings.[1] Despite the plain language of Rule 3:25(C) & (D), Graham did not request her attorneys' fees in any of the five responsive pleadings she filed. (JA 59, 70, 77, 79, 85.) Graham prevailed at the conclusion of a three-day jury trial in the First Litigation and the Trial Court entered the Final Order in her favor on May 6, 2015. (JA 108.)

Ten months after entry of the Final Order in the First Litigation, Graham filed the present action (the "Second Litigation") against CMC invoking for the first time the 2007 Confidentiality Agreement's prevailing party clause and requesting payment of the attorneys' fees she incurred in the First Litigation. (JA 30.) In response, CMC timely filed a Demurrer or, in the Alternative, Plea in Bar ("Plea in Bar"). (JA 55.) CMC argued that: (1) Graham's request for attorneys' fees violated Rule 3:25, and (2) Graham's invocation of the 2007 Confidentiality Agreement violated the doctrine prohibiting approbation and reprobation. (JA 58.) After oral argument, the Trial Court correctly granted CMC's Plea in Bar on the ground that Graham's belated request for attorneys' fees violated Rule

[1] Graham filed a First Demurrer (on November 21, 2014); a Second Plea in Bar (on January 26, 2015); a Second Demurrer (on March 4, 2015); a Third Plea in Bar (on March 4, 2015); and an Answer (on April 17, 2015). (JA 59, 70, 77, 79, 85.)

3:25, which required Graham to request her attorneys' fees in a responsive pleading in the First Litigation. (JA 221.) Graham's appeal followed.

STANDARD OF REVIEW

This Court reviews de novo the Trial Court's decision on CMC's Plea in Bar and the interpretation of Rule 3:25. *See Van Dam v. Gay*, 280 Va. 457, 460 (2010); *Commonwealth v. Herring*, 288 Va. 59, 66 (2014). This Court can dismiss Graham's appeal for any reason apparent in the record. *See Perry v. Commonwealth*, 280 Va. 572, 581–82 (2010).

ARGUMENT AND AUTHORITIES

I. Rule 3:25 Required Graham to Demand Fees in the First Litigation or Waive Entitlement Thereto.[2]

All of Graham's arguments focus on her contention that she was not required to demand fees in her responsive pleadings in the First Litigation. Graham's arguments ignore the plain reading of Rule 3:25, the Judicial Council of Virginia's rationale in drafting Rule 3:25, and relevant case law.

---

[2] Graham designates two Assignments of Error (Opening Br. 11–12), but the arguments in her Opening Brief are not organized in accordance with the Assignments of Error. The argument pertaining to Assignment of Error No. 1 appears to begin on page 13 of the Opening Brief. Graham further divides her Opening Brief with two more headings (Opening Br. 24 & 30), neither of which addresses Assignment of Error No. 2. For ease of navigation, the argument below combines the two Assignments of Error and topically addresses Graham's various arguments.

A. The Trial Court Correctly Applied a Plain Reading of Rule 3:25.

Rule 3:25 required Graham to demand her attorneys' fees "in a responsive pleading filed pursuant to Rule 3:8" or else waive her claim for fees. *See* Rule 3:25(B), (C) (using mandatory language "shall"). Rule 3:8 identifies three types of responsive pleadings that Graham filed in the First Litigation: demurrers, pleas, and answers. *See* Sup. Ct. Va. R. 3:8. Although Graham filed five (5) responsive pleadings, Graham failed to demand fees in any of them. (JA 59, 70, 77, 79, 85.) Graham's failure thus triggered Rule 3:25(C), which unambiguously explains that Graham's failure "constitutes a waiver . . . of the claim for attorney's fees." Rule 3:25(C). Accordingly, the Trial Court correctly held that Graham waived any entitlement to fees she may have had under a plain reading of Rule 3:25. *See Thornton v. Glazer*, 271 Va. 566, 570 (2006) ("When applying our rules, we adhere to the plain language used in the rule.").

Graham asks this Court to read an exception into Rule 3:25 that does not appear in its text. Specifically, Graham wants the Rule to include a special carve-out for cases involving "prevailing party" contract clauses. Notably, Rule 3:25 already has two specific "carve-outs" for fees sought as sanctions and fees sought in domestic relations cases, neither of which are applicable in this case. *See* Rule 3:25(A). No interpretive room exists to

permit Graham's requested additional carve-out for prevailing-party fees. Although Graham may urge Rule 3:25 to be rewritten, the appropriate method for doing so is by petitioning the General Assembly or this Court for a prospective change to the Rules. *See* Va. Const. art. VI, § 5; Va. Code Ann. § 8.01-3. Until then, this Court should apply a plain-text interpretation of Rule 3:25. *See Thornton*, 271 Va. at 570.

B. The Trial Court's Ruling is Consistent with the History of the Rule.

Setting aside the fact that the plain text of Rule 3:25 required Graham to demand legal fees in her responsive pleadings in the First Litigation, the carve-out Graham urges for "prevailing parties" was considered and rejected by the Judicial Council of Virginia[3] as expressed in its Draft Report on Rule 3:25. (JA 125.) *See Goode v. Courtney*, 200 Va. 804, 807 (1959) (relying on commentary prepared by the Judicial Council of Virginia for interpretation of a Rule of the Supreme Court of Virginia).

---

[3] The Judicial Council of Virginia is composed of 14 members consisting of the Chief Justice of the Supreme Court of Virginia, one judge of the Court of Appeals of Virginia, six circuit court judges, one general district court judge, one juvenile and domestic relations district court judge, two attorneys qualified to practice in the Supreme Court of Virginia, and the Chairmen of the Committees for Courts of Justice of the Senate and the House of Delegates or their designees who are members of the Courts of Justice committees. *See* Va. Code Ann. § 17.1-700.

Adopted on May 1, 2009, Rule 3:25 "intended to require that the issue of the availability of attorney's fees be addressed ***early in the litigation***." (JA 127 (emphasis added).) The Rule was promulgated to address a disparity in the manner in which trial courts handled the timing of demands for fees. (JA 125.) The Rule resolved those conflicts by "lay[ing] out a clear road map" and instituting a "pleading requirement" for fees on penalty of waiver. (JA 127.) The Report on the Draft Rule provided an example of the Rule's applicability that ***precisely mirrors*** the situation in the case at bar:

> If a defendant intends to seek attorney's fees but without filing a counterclaim (such as where a statute or contract upon which the plaintiff has sued provides for the recovery of attorney's fees by the '***prevailing party'***), the defendant must identify the claim in the responsive pleading filed under Rule 3:8.

(JA 127 (emphasis added).) The Judicial Council of Virginia emphasized an important rationale for this rule: "The opposing party is thereby placed on notice of the claim," such that an early challenge to the demand can be raised to "facilitate[] prompt resolution." (JA 127.) Accordingly, contrary to Graham's assertions, Rule 3:25's stated purpose (in addition to the Rule's text) conclusively establishes that the trial court correctly granted CMC's plea in bar.

C. The Trial Court's Ruling is Consistent with Other Courts' Rulings.

Notwithstanding Graham's claim to the contrary, this is *not* an issue of first impression in this Court. (Opening Br. 13.) In *Holtzman Oil Corp.*, this Court recognized that Rule 3:25 "requires a party to state in its responsive pleading the basis on which it relies on recovery of attorneys' fees." *Holtzman Oil Corp. v. Green Proj.*, No. 141863, 2016 Va. Unpub. LEXIS 13, at *15 (Va. Apr. 21, 2016). Like the case at bar, *Holtzman* was a case involving a contract that allowed for an award of fees to the prevailing party. *Id.* Notably, Graham does not cite *Holtzman*, let alone offer any explanation for deviating from this Court's approach in that case.

Consistent with this Court's pronouncement in *Holtzman*, lower courts across the Commonwealth have likewise applied Rule 3:25 to require a defendant to demand fees in a responsive pleading. For example, in *Ey v. Blume*, No. CL-2014-10534, 2016 Va. Cir. LEXIS 6, at *5–9 (Fairfax Cir. Feb. 5, 2016), the circuit court demonstrated that claiming entitlement to fees in a defendant's Answer is a necessary prerequisite to claiming such fees in a subsequent demand. Likewise, in *Shen Valley Masonry, Inc. v. Thor, Inc.*, 81 Va. Cir. 89, 91 (Roanoke City 2010), the circuit court explained that Rule 3:25 became effective May 1, 2009 and concluded that if the defendant's responsive pleading had been filed after that date, no

claim for fees would be permissible because the defendant insufficiently requested fees in his responsive pleading. Similarly, in *RECP IV WG Land Investors, LLC v. Capital One Bank, N.A.*, No. CL-2015-9182, 2016 Va. Cir. LEXIS 122, at *6–7 (Fairfax Cir. July 27, 2016), the circuit court explained that Rule 3:25 "requires that [a defendant's] demand for fees be made in a responsive pleading" in a prevailing-party case.

Indeed, even the Court of Appeals of Virginia has analyzed Rule 3:25's requirement that a prevailing party demand attorneys' fees in a responsive pleading. *See Shea v. Spinicci*, No. 0399-13-4, 2013 Va. App. LEXIS 356, at *6–11 (Ct. App. Va. Dec. 3, 2013). In *Shea*, the Court of Appeals of Virginia considered the propriety of a verbal demand for attorneys' fees by a prevailing party who filed no responsive pleading at all. Although Rule 3:25 did not apply because it was a domestic relations case, *see* Rule 3:25(A), the Court of Appeals of Virginia explained why defendants must request fees in a pleading:

> Fundamental rules of pleading provide that no court can base its judgment or decree upon a right which has not been pleaded and claimed. The office of pleadings is to give notice to the opposing party of the nature and character of the claim, without which the most rudimentary due process safeguards would be denied. This Court has consistently held that pleadings must contain specific prayers for relief in order for a court to obtain subject matter jurisdiction over the request.

Shea, 2013 Va. App. LEXIS 356, at *6–7 (citations omitted). The Court of Appeals of Virginia reversed the award of fees because the defendant had not requested them in a responsive pleading. *Id.* at *8.

The well-reasoned *Shea* opinion followed the logic articulated 22 years earlier by the Supreme Court of Florida in a case involving prevailing-party defendants who had not demanded fees in their responsive pleading. *See Stockman v. Downs*, 573 So. 2d 835, 837 (Fla. 1991). In *Stockman*, prior to Florida's enactment of its equivalent to Rule 3:25, the Supreme Court of Florida explained that:

> The fundamental concern [concerning a claim for attorneys' fees] is one of notice. Modern pleading requirements serve to notify the opposing party of the claims alleged and prevent unfair surprise. Raising entitlement to attorney's fees only after judgment fails to serve either of these objectives. The existence or nonexistence of a [demand] for attorney's fees may play an important role in decisions affecting a case. For example, the potential that one may be required to pay an opposing party's attorney's fees may often be determinative in a decision on whether to pursue a claim, dismiss it, or settle. A party should not have to speculate throughout the entire course of an action about what claims ultimately may be alleged against him.

Stockman, 573 So. 2d at 837. Thus, the Supreme Court of Florida held that a demand for fees must be pled in an Answer in the underlying litigation; "[f]ailure to do so constitutes a waiver of the claim." *Id.* at 838.[4]

The Virginia cases cited above show that the Trial Court's ruling is consistent not only with a plain reading of Rule 3:25, its enacting history, and this Court's pronouncement in *Holtzman*, but also with other courts across the Commonwealth to have considered this issue. The rationale undergirding the cases dovetails with the Judicial Council of Virginia's interest in placing parties on early notice of claims for attorneys' fees. Graham, notably, cites no case law in support of her proposition to the contrary.

II. Despite Neither Party Yet Being the Prevailing Party, Rule 3:25 Required Both to Demand Fees Else Waive Entitlement to Those Fees.

Graham contends that she had no obligation to demand attorneys' fees because, as the defendant, her right to make such a claim had not accrued until she was declared the prevailing party. As an initial matter, Graham did not present this argument in her opposition to CMC's Plea in Bar, and thus waived the argument for appeal. *See* Sup. Ct. Va. R. 5:25;

---

[4] Florida subsequently enacted Florida Rule of Civil Procedure 1.525 which "did not overrule *Stockman*'s pleading requirement or the underlying objective of early, detailed notification of claims for fees and costs." *Barco v. Sch. Bd.*, 975 So. 2d 1116, 1119 (Fla. 2008).

Martin v. Ziherl, 269 Va. 35, 39 (2005) ("[A]rguments made for the first time on appeal will not be considered.").

Nevertheless, Graham's obligation to demand fees was identical to that of CMC's, both of whom were required to comply with Rule 3:25 before either party was declared the prevailing party. Indeed, at the time CMC filed the Amended Complaint, neither party had been declared the "prevailing party." CMC, however, followed Rule 3:25(B) and made a claim for fees, despite the fact that CMC's entitlement to those fees at that time "had not yet accrued and might not ever accrue." (JA 1 ¶¶ 47, 95; 16 ¶ (g); Opening Br. 17.)

CMC lost nothing by making the demand for fees, but did give Graham the benefit of *notice* pursuant to Rule 3:25, such that Graham was able to evaluate her approach to the litigation and settlement discussions knowing that CMC would claim entitlement to fees if it were the prevailing party. CMC, on the other hand, received no reciprocal notice and modified its approach to litigation and settlement discussions with the understanding that Graham was making no such demand as required by Rule 3:25. As the enacting history and case law discussed above demonstrates, this is precisely why Rule 3:25 requires that *both parties* demand fees early in

litigation; no greater burden is placed on a defendant to demand fees than a plaintiff.

Despite Rule 3:25's plainly applying to both plaintiffs and defendants equally, Graham takes the position that CMC (***but not Graham***) was required to claim fees in its Complaint else CMC would be splitting its cause of action. (Opening Br. 31.) Notably, Graham does not cite Rule 3:25 in support of her argument. Indeed, no authority exists for Graham's proposition that Rule 3:25's mandatory requirements apply only to plaintiffs. Graham's mere insistence to the contrary is insufficient to reject the plain language of Rule 3:25, its thoughtful drafting, and its consistent application.

Finally, it is worth noting that Graham experienced no obstacle to demanding fees prior to being declared the prevailing party. Litigants in Virginia routinely make demands for attorneys' fees pursuant to prevailing party clauses before the prevailing party is declared. *See, e.g.*, *Holtzman*, 2016 Va. Unpub. LEXIS 13, at *15 (providing example of defendant claiming attorneys' fees in a responsive pleading pursuant to "prevailing party" contract clause); *Sheets v. Castle*, 263 Va. 407, 409 (2002) (same); *Landsdowne Dev. Co., LLC v. Xerox Realty Corp.*, 257 Va. 392, 399 (1999) (same). Graham offers no rationale for disturbing this recognized practice.

III. The Trial Court Did Not Read Rule 3:25's Subparts in Isolation.

Graham argues that the Trial Court "read Rule 3:25(C) in isolation from Subsections (A) and (B)" and "ignore[d]" the language in Rule 3:25(A) that the Rule applies to a "claim" for attorneys' fees. (Opening Br. 18.) At bottom, Graham argues that Rule 3:25 applies only to a party who makes a "claim" for attorneys' fees, and therefore the Rule did not apply to her in the First Litigation because she did not make a claim for attorneys' fees in the First Litigation. (Opening Br. 18–20.) This strained reading of Rule 3:25, if adopted, ignores the plain text of the Rule and eviscerates the mandatory nature of its language.

Under Graham's theory, a party is not required to follow Rule 3:25 until that party decides to make a "claim" for attorneys' fees. Thus, according to Graham, she had a choice: She could demand fees in her responsive pleadings in the First Litigation, or at her option she could simply wait and file a new lawsuit for those fees. This understanding cannot be reconciled with the fact that Rule 3:25 *requires* a defendant (using mandatory language "shall") to make a demand for fees "in a responsive pleading." A defendant who chooses not to demand fees in a responsive pleading, has only one other option: Waive entitlement to those fees. *See* Rule 3:25(C) ("The failure of a party to file a demand as required

by this rule constitutes a waiver by the party of the claim for attorney's fees . . . .").[5] Thus, Graham's argument that she had a choice throughout to demand fees in the First Litigation or file an independent lawsuit cannot be reconciled with Rule 3:25. Indeed, Graham's counsel admitted as much in the Trial Court. (JA 199:8–22 ("THE COURT: Where does it say in Rule 3:25 that you can file an independent claim? MR. SILVER: It doesn't but it doesn't preclude it either.").)

IV. Rule 3:25 Does Not Create Compulsory Counterclaims.

Graham argued at length in the Trial Court, and argues on appeal, that application of Rule 3:25 is tantamount to a new rule creating compulsory counterclaims. (JA 194:11–196:19, 199:20–200:5, 204:15–22; Opening Br. 3, 4, 17, 20–24, 28.) This is not the case.

Rule 3:25 provides an exhaustive list of five pleadings in which a party must demand attorneys' fees. *See* Rule 3:25(B). If a defendant files a counterclaim, she is required to make a demand for fees in the counterclaim, just like a plaintiff must make such demand in a complaint.

---

[5] An exception to the waiver rule exists only if the trial court had granted her leave to file an amended responsive pleading under Rule 1:8. *See* Rule 3:25(C); *Holtzman Oil Corp.*, 2016 Va. Unpub. LEXIS 13, at *16–17. Graham never sought to amend her responsive pleadings. Thus, the exception is inapplicable.

See Rule 3:25(B) (listing "counterclaim filed pursuant to Rule 3:9" as one pleading in which a demand must be made).

If a defendant does not file a counterclaim—like Graham in this case—she is required to file a demand for fees in her responsive pleading pursuant to Rule 3:8. Contrary to Graham's insistence, nothing in Rule 3:25 requires a defendant to file a counterclaim. Rule 3:8 requires a defendant to file a responsive pleading and Rule 3:25 merely requires that a demand for fees be included therein, if at all. The Judicial Council of Virginia specified that Rule 3:25 "does not create a new pleading to be filed by the party seeking attorneys' fees." (JA 127.) Graham offers no support for her argument to the contrary.

V. Graham's Waiver of Fees Vitiates Her Argument Regarding Accrual of her Right to Sue for Breach of Contract.

Graham argues that her contract action in the Second Litigation did not accrue until after the First Litigation had concluded, she had been declared the prevailing party, she had made a demand on CMC for her fees, and CMC refused to pay. (Opening Br. 16.) In support, she cites Va. Code Ann. § 8.01-230 for the proposition that a contract action accrues from the date of breach. (Opening Br. 17.) Graham's argument, however, ignores the doctrine of waiver.

Rule 3:25(C) states that a defendant's failure to demand fees in a responsive pleading "constitutes a waiver by the party of the claim for attorney's fees." *See* Rule 3:25(C). Attorneys' fees are the only quantum of damages Graham sought in the Second Litigation. (JA 37.) Thus, notwithstanding Graham's argument that a claim for breach of contract against CMC did not accrue until March 2016 (JA 36), her waiver "of the claim for attorney's fees" pursuant to Rule 3:25(C) is dispositive of this matter and the Trial Court correctly dismissed her Complaint.

VI. *Reinick v. Lemen* Undermines Graham's Arguments.

After Graham's Petition for Appeal was granted, this Court issued its opinion in *Reineck v. Lemen*, No. 151917, 2016 Va. LEXIS 178 (Va. Nov. 23, 2016). *Reineck* presented a similar issue as the present case. There, Reineck filed a first lawsuit in his personal capacity as a contingent beneficiary of a trust against Lemen for breach of fiduciary duty. Lemen, in response, made no demand for attorneys' fees. The lower court dismissed the case with prejudice on the ground that Reineck lacked standing to bring suit in his personal capacity.

Subsequently, Reineck qualified as a curator of the estate and filed a second lawsuit against Lemen in that capacity. In response to this second lawsuit, Lemen did request attorneys' fees. The lower court ultimately ruled

in Lemen's favor and awarded fees against Reineck not only from the second lawsuit, but also from the first lawsuit. One question presented on appeal was whether a trial court can grant in a second lawsuit attorneys' fees generated in a first lawsuit when the fees were not requested in that first lawsuit. *See Reineck v. Lemen*, Assignment of Error No. 6 (arguing Lemen "waived any claim for attorneys' fees in the First Litigation under Rules 3:25(B) and 3:25(C)").

Ultimately, this Court reversed the award of fees on the ground that Reineck in his personal capacity was not a party to the second lawsuit and therefore was not before the lower court in the second lawsuit to have fees taxed against him. Thus, this Court declined to address the issue presented by Rule 3:25. *See Reineck*, 2016 Va. LEXIS 178, at *20 n.5 ("We express no opinion concerning whether a litigant may seek an attorney's fee award in a second related suit against the same party when the litigant did not ask for fees in a first, concluded suit."). At oral argument in *Reineck* on September 13, 2016, however, this Court expressed significant skepticism at Lemen's argument that Lemen was not required to make a demand for fees in the underlying litigation:

> How is it possible to get the fees from the first litigation? There was no claim for fees, obviously there were a couple rules that were blown off, there was a final judgment, the case is over. It

> is in fact a separate proceeding. I'm not understanding that part of your fee request. . . .
>
> Let's assume that all that's right and if you had made a request for fees you would have clearly gotten fees. But you didn't. . . .
>
> But generally speaking courts don't award fees on prior cases, even if the prior cases come and go and they are in a series of abusive cases.

See Oral Argument at 29:55, 30:26, 32:45, *Reineck*, http://www.courts.state.va.us/courts/scv/oral_arguments/2016/sep/151917.MP3.

While the Court's comments from the bench certainly are not precedential, the rationale underlying them are persuasive support for CMC's position in this case, particularly when coupled with the Court's *Holtzman* opinion. Graham, like Lemen, ignored her duty under Rule 3:25 to make a demand for fees in a responsive pleading in the First Litigation. Graham "blew off" the rule, waited for a final judgement, and initiated a separate proceeding. This Court should now reinforce the principle articulated from the *Reineck* bench, consistent with Rule 3:25, that "generally speaking courts don't award fees on prior cases."

VII. Graham's Invocation of the 2007 Confidentiality Agreement in the Second Litigation Violates the Prohibition Against Approbation and Reprobation.

Graham argued in her Petition for Appeal that she was placed in the "untenable position" in the underlying litigation of either requesting her attorneys' fees pursuant to the 2007 Confidentiality Agreement *or* challenging the enforceability of that contract. (Petition for Appeal 20.) As described below, Graham could have pleaded in the alternative, yet she failed to do so. Accordingly, her newfound assertion of entitlement to fees constitutes a violation of the prohibition against approbation and reprobation.

A. Graham Challenged Enforceability of the 2007 Confidentiality Agreement and Failed to Plead in the Alternative.

Throughout the First Litigation, Graham challenged the enforceability of the 2007 Confidentiality Agreement on a variety of grounds. (Opening Br. 6–8 (describing just one failed argument).) Specifically, Graham unequivocally maintained in the First Litigation that the 2007 Confidentiality Agreement "is no longer a viable document," "is no longer an enforceable agreement," and "was superseded." (JA 85 ¶¶ 7, 13, 38, 40–41, 43–49, 51–53, 61, 91–95, 97.) In fact, she specifically maintained that the attorneys' fee provision "is no longer operable." (*Id.* ¶ 49.) Graham

claimed in her Petition for Appeal that this was a tactical decision that foreclosed her ability to simultaneously claim entitlement to the contract's remedies. (Petition for Appeal 19–20.) Graham, however, was permitted to plead in the alternative in the First Litigation and failed to do so.

Supreme Court of Virginia Rule 1:4(k) provides that "[a] party asserting . . . a defense may plead alternative facts . . . . A party may also state as many separate . . . defenses as he has regardless of consistency." Rule 1:4(k); *see also* Va. Code Ann. § 8.01-281. Accordingly, Graham could have claimed in her Answer that the 2007 Confidentiality Agreement was unenforceable and also pleaded in the alternative entitlement to attorneys' fees in the event the 2007 Confidentially Agreement was held to be enforceable against her.[6] *See McLesky v. Ocean Park Inv'rs, Ltd.*, 242 Va. 51, 55 (1991) (holding that a party must plead in the alternative for both rescission of a contract and specific performance); *Daggett & Grigg, Architects, P.C. v. Daggett*, 90 Va. Cir. 442, 446–47 (Charlottesville 2015) ("[I]t is permissible for the Plaintiff to allege in one count that the MOU is valid and then allege in another count that, if it is not valid, relief is

[6] Graham knew how to plead in the alternative because her attorney admitted as much in the Trial Court. (JA 191:8–12, 202:4–14; 176 ("In accordance with Rule 1:4(k), Ms. Graham, pleaded numerous alternative legal theories under which the Contract would be unenforceable against her.").)

nonetheless available because of another theory."); *Rollins v. Hicks*, 13 Va. Cir. 44, 45 (Caroline Cty. 1987) (permitting defendant to deny the existence of a contract and in the alternative to claim the plaintiff also breached the contract). Thus, Graham ignored Rule 1:4(k)'s clear permission to plead in the alternative and only claimed that the 2007 Confidentiality Agreement was void.

B. Graham is Estopped from Now Invoking the 2007 Confidentiality Agreement.

Given Graham's adamant arguments in the First Litigation that the 2007 Confidentiality Agreement was unenforceable, without pleading in the alternative, she is estopped from arguing in the Second Litigation entitlement to fees pursuant to that contract. This violation of the prohibition against approbation and reprobation constitutes an alternative ground to dismiss her appeal even if the Trial Court erred with respect to Rule 3:25. *See Perry v. Commonwealth*, 280 Va. 572, 581–82 (2010) (explaining that this Court can dismiss an appeal for any reason apparent in the record).

The doctrine of approbation and reprobation, a type of judicial estoppel, is "fully viable." *Wooten v. Bank of Am., N.A.*, 777 S.E.2d 848, 850 n.1 (Va. 2015). The doctrine estops a party from "assuming successive positions in the course of a . . . series of suits, in reference to

the same fact or state of facts, which are inconsistent with each other, or mutually contradictory." *Lofton Ridge, LLC v. Norfolk S. Ry.*, 268 Va. 377, 380–81 (2004); *see also Babcock v. Wilcox Co. v. Areva NP, Inc.*, 292 Va. 165, 204–05 (2016). It "may act as a bar to maintaining a new cause of action." *Lofton Ridge, LLC*, 268 Va. at 382. Approbation and reprobation is distinguished from judicial estoppel, among other ways, in that "the approbate-reprobate prohibition can apply even if a court does not rely upon the earlier representation." *Wooten*, 777 S.E.2d at 850 n.1.

This Court recently explained that the doctrine "protects a basic tenet of fair play": "No one should be permitted, in the language of the vernacular, to talk through both sides of his mouth. Doing so in the judicial context is thought to be 'playing fast and loose' with the courts, or 'blowing hot and cold' depending on perceived self-interest." *Wooten*, 777 S.E.2d at 850 (citations omitted); *see also Babcock & Wilcox Co.*, 292 Va. at 204–05.

Graham's new attempt in the Second Litigation to invoke the prevailing-party remedy of the contract, after repeatedly claiming without reservation that the contract was void and unenforceable, violates the prohibition on approbation and reprobation. *See Cangiano v. LSH Bldg. Co.*, 271 Va. 171, 181 (2006) (demonstrating a party may not take a subsequent, inconsistent position on the enforceability of contractual

language); *School Board v. Payne*, 151 Va. 240, 249 (1928) ("A person cannot accept and reject the same instrument . . . ."). This is classic example of Graham completely changing her position "depending on perceived self-interest." *Wooten*, 777 S.E.2d at 850. Accordingly, the Trial Court appropriately granted CMC's Plea in Bar and this Court should dismiss Graham's appeal.

CONCLUSION

For the foregoing reasons, this Court should dismiss Graham's appeal.

Dated: January 5, 2017

Respectfully submitted,

Community Management Corporation

/s/ John E. Thomas, Jr.

David L. Greenspan (VSB No. 45420)
John E. Thomas, Jr. (VSB No. 81013)
McGuireWoods LLP
1750 Tysons Blvd., Suite 1800
Tysons, Virginia 22102
Telephone: (703) 712-5096
Facsimile: (703) 712-5214
dgreenspan@mcguirewoods.com
jethomas@mcguirewoods.com

Robert W. Loftin (VSB No. 68377)
McGuireWoods LLP
Gateway Plaza
800 East Canal Street
Richmond, Virginia 23219
Telephone: (804) 775-1000
Facsimile: (804) 775-1061
rloftin@mcguirewoods.com

CERTIFICATE

The undersigned hereby certifies on this 5th day of January, 2017 that the foregoing Brief of Appellee complies with Supreme Court of Virginia Rules 5:6, 5:26, and 5:28, and further certifies as follows:

(1) The Appellee filing this Brief of Appellee is Community Management Corporation.

(2) Counsel for the Appellee are:

David L. Greenspan (VSB No. 45420)
John E. Thomas, Jr. (VSB No. 81013)
McGuireWoods LLP
1750 Tysons Blvd., Suite 1800
Tysons, Virginia 22102
Telephone: (703) 712-5407
Facsimile: (703) 712-5217
dgreenspan@mcguirewoods.com
jethomas@mcguirewoods.com

Robert W. Loftin (VSB No. 68377)
McGuireWoods LLP
Gateway Plaza
800 East Canal Street
Richmond, Virginia 23219
Telephone: (804) 775-1000
Facsimile: (804) 775-1061
rloftin@mcguirewoods.com

(3) The Appellant is Heather Graham.

(4) Counsel for the Appellant is:

Glenn H. Silver (VSB No. 15722)
Erik B. Lawson (VSB No. 79656)
Silver & Brown, P.C.
10621 Jones St., Suite 101
Fairfax, Virginia 22030
Telephone: (703) 591-6666
Facsimile: (703) 591-5618
ctbghs@aol.com
erik@virginia-lawyers.net

(5) On this 5th day of January, 2017, ten (10) copies of the foregoing Brief of Appellee were hand delivered to the Clerk's Office of the Supreme Court of Virginia for filing, and one copy of the foregoing Brief of Appellee was emailed to counsel of record for the appellant. On this day, an electronic version of this Brief of Appellee was filed with the clerk of the Court and served on counsel for all parties via electronic mail pursuant to Rule 5:26(e).

/s/ John E. Thomas, Jr.
John E. Thomas, Jr.