In The

Supreme Court of Virginia

RECORD NO. 161095

JAMES K. WOOLFORD and ELIZABETH P. WOOLFORD, AS TRUSTEES OF THE WOOLFORD TRUST U/A DTD 13 APRIL 2008, and WILLIAM W. WOOLFORD, IV and JANICE B. WOOLFORD,

***Appellants*,**

v.

VIRGINIA DEPARTMENT OF TAXATION,

Appellee.

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

A fatal flaw in the Department's brief is that it fails to provide a principled, judicially-explainable answer to the central legal question posed by this case: At what level of specificity should the term "type of property" be defined for purposes of the applicable federal law? It is a question that must be answered in a way that will not only decide this appeal, but guide future cases as well.

The Woolfords answered this question by noting that real estate is recognized throughout the law as a "type of property" distinct from other types. In a federal statute meant to cover not just real estate, but every conceivable sort of property, real estate is the relevant "type of property." The Woolfords also pointed to the interpretation placed on the term by federal tax authorities in the 2006 IRS Notice. The Department does not deny that, under the federal interpretation of federal law, the Woolfords prevail.

Although the Department uses the phrase "statutory interpretation" in referring to the Circuit Court's decision, that decision actually contains no "statutory interpretation," as that term is generally understood. There is no review of any statutory language or context, no comparison of alternative meanings, no discussion of the 2006 IRS Notice or why the Circuit Court

rejected it, and no explanation of principles that could inform the next case. In short, there is nothing in the Order to explain why something as narrow and discrete as "mineral property" should be the relevant "type of property." There is simply the Circuit Court's own *ad hoc ipse dixit.* Clearly, this will not do.

STATEMENT OF FACTS

Confronted by its overbearing unfairness, the Department tries to dodge the criticism, claiming (for the first time) that the tax credits were really not important to the Woolfords, that they would have donated the easement anyway, and that the Woolfords did not receive the appraiser's conclusions until after they had already made the donation. Dept. Br. at 2–3. It is an implausible position, and the record does not support it.

The Department quotes Jim Woolford as saying "he 'would have' proceeded with the easement even in the absence of a favorable appraisal." Dept. Br. at 2. This is misleading. Jim Woolford may have been less focused than his brother, Bill Woolford, on the mining potential of their farmland; but, nowhere did he suggest that he would have proceeded with the easement if the tax credit was going to be *zero* – which is what the Department now says the Woolfords should receive.

Moreover, the Department leaves out Jim Woolford's testimony that it "wasn't solely [his] decision" because he and his brother are "joint owners." JA-653. And, as Bill Woolford explained, when he was "making the decision to donate," he "needed to know what the property would be worth as mining property" because he was "weighing the potential mining value against the potential tax credits." JA-691.

The Department acknowledges that the Woolfords did not record the easement until after they received the appraisal, but it claims the Woolfords actually granted the easement a few days earlier. Dept. Br. at 3 n.4.[1] Their discussion of dates ignores the testimony of Bill Woolford, who explained that, at the date he signed the easement, he had *not* yet made the final decision to move forward with the donation, but was going on vacation out of state for two weeks, indicating that he was placing the document, in effect, in escrow. *See* JA-689 ("I would have told them to absolutely destroy it if I didn't agree [with it]".). This is consistent with the fact that the fully-signed easement was not taken to the courthouse and recorded by the grantee, Virginia Outdoors Foundation, but by the Woolfords' attorney,

[1] The record is silent on whether and when the Woolfords may have received appraisal numbers or preliminary information from Simerlein in advance of receiving his formal, written report; however, on summary judgment, all inferences must be drawn in favor of the Woolfords.

Peter Glubiak, *see* JA-21, and, only after the appraisal report was received.[2]

In sum, it was manifestly unfair for state tax agents to revoke *every penny* of tax credits, while the Commonwealth kept the easement, leaving the Woolfords forever subject to its burdens. Something is amiss and, as the Woolfords have explained, the law does not support such an unfair and unjust result. Nothing in the Department's brief shows otherwise.

ARGUMENT

I. Simerlein is a "Qualified Appraiser." The Circuit Court Erred by Ruling Otherwise

The Department discusses the federal statute as if it only applied to donations of real property.[3] Were it so, then the statutory phrase "type of property" might very well mean some subcategory of real property, as the Department contends. But, as the Woolfords have noted, the federal statute sweeps far more broadly than real property. It is all-inclusive. *See* Appellant Br. at 23. Although ignoring it here, the Department correctly recognized the point in an earlier case:

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[2] In its "Statement of Facts," the Department also tries to interject various concerns and allegations unrelated to the issues on which this appeal has been granted. *See* Dept. Br. at 3 n.5 & 4. These extraneous matters should be disregarded.

[3] *See, e.g.,* Dept. Br. 9–11.

> [D]onors can claim federal deductions upon properly donating *virtually any kind of property* to a federally recognized charity. Thus, in addition to the real property interests that fall under the purview of [Virginia law], the donation of boats, lithographs, medical equipment, movie memorabilia, Indian artifacts, closely held stock, animal mounts, rugs, art supplies and diagnostic & lab supplies, etc., can generate federal deductions.

Tax Dept Opp'n to Taxpayers' Claim of Substantial Compliance at 4, *Rosenblum v. Va. Dep't of Taxation*, Case Number CL12-183 (Cir. Ct. Albemarle Cnty. June 1, 2012) (citing authorities) (emphasis added). In the context of such a wide statutory sweep, the term "type of property" means nothing more specific than real property.

Acknowledging that the state law is supposed to work in tandem with the federal, the Department claims that the only reason why the IRS has not challenged Simerlein's qualifications is that the Woolford's "won the audit lottery." Dept. Br. at 14. But, this ignores the plain truth: The IRS has not challenged Simerlein's qualifications because he meets the definition of "qualified appraiser" as explained in the 2006 IRS Notice. The IRS is simply following federal law. The Department should do the same.

The Department seeks to disparage the 2006 IRS Notice and cites cases in which courts have not followed IRS interpretive statements that are not formal regulations. *See* Dept. Br. at 7–8. But, there are many problems with this argument:

First, none of the Department's cases involved a situation where, as here, tax authorities wanted to disregard an IRS statement creating a safe harbor for taxpayers.

Second, none of those cases involved a state statute reflecting a legislative policy of federal-state uniformity. *See* Appellant Br. 25.

Third, the Department points to no case where, as here, the federal statute at issue expressly gives the force of law not only to "regulations" but also to "other guidance." The 2006 IRS Notice constitutes "other guidance" and, thus, cannot be disregarded. *See* Appellant Br. at 19 n.8.

Fourth, even the Department concedes that courts will look to IRS statements that are not formal regulations when the statute is ambiguous. *See* Dept. Br. at 9. The Woolfords maintain that the federal statute here is not ambiguous because "type of property" clearly means real estate. But, if this Court is not persuaded on that point, then there is nothing in the statute to explain at what level of specificity "type of property" is to be defined. *See* Appellant Br. at 23–24. In that situation, the statute would be ambiguous, making reliance on the 2006 IRS Notice appropriate even under the Department's approach.

The Department argues that "type of property" in the federal statute means the same thing as "specific type of property" under the Uniform

Standards of Professional Appraisal Practice ("USPAP"). *See* Dept. Br. at 11. But, as the Department admits, the Circuit Court did not rely on USPAP. Likewise, Simerlein's testimony about what "specific type of property" may mean under USPAP does not explain what the federal statute means. In any event, USPAP actually supports the Woolfords' position. *See* Appellant Br. at 32.[4]

Attacking a straw man, the Department attributes to the Woolfords the view that compliance with the 1996 Reporting Regulation, 26 C.F.R. § 1.170A-13(c)(5), is all that is required for an appraiser to be qualified under federal law. *See* Dept. Br. at 12. The Woolfords never expressed such a view. There must be compliance with the 2006 Federal Statute as well, and that statute's requirements were met. *See* Appellant Br. 16–34. The Woolfords discussed the 1996 Reporting Regulation merely "[to] round out the analysis of applicable federal law" and show compliance by Simerlein, while noting that "neither the Department nor the Circuit Court

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[4] In a footnote, the Department argues that, contrary to the 2006 IRS Notice, the federal "qualified appraiser" requirement cannot be satisfied by Simerlein's state-issued real estate appraiser's license because the holding of such a license is a separately-stated requirement of Virginia law. *See* Dept. Br. at 17 n.11. This is a *non sequitur.* Virginia made state licensure a requirement in 2005. *See* 2005 Va. Acts, ch. 940. It was not until 2006 that Congress amended the federal law and the IRS made the holding of such a state-issued license a safe harbor. *See* 2006 Federal Statute and 2006 IRS Notice. The fact that the IRS followed Virginia's lead supports the Woolfords' position, not the Departments'.

relied on the 1996 Reporting Regulation in proceedings below." Appellant Br. at 27–28. Even now, the Department stops short of claiming that Simerlein failed to comply with that regulation. *See* Dept. Br. at 6. Thus, it does not furnish a basis for affirming the decision below.[5]

II. Simerlein's Appraisal Was Not "False or Fraudulent" and, thus, Cannot Be Disregarded in an Audit.

The Department obviously has the right to reject an appraisal that is not a "qualified appraisal," including one not performed by a "qualified appraiser." So, that is not the issue. The issue is *when* the Department may exercise that right and *what steps* it must take after it does so. With one exception, if the Department is going to reject an appraisal – contending, for example, that the appraiser is not qualified – it must do so within 30 days after receiving the application for tax credits, and it must then determine "the fair market value of the donation." Code § 58.1-512(D)(4). The one exception is when an audit reveals the appraisal to be "false or fraudulent" and, even then, the Department must "determin[e] the fair market value of the property and the amount of tax credit to be allowed

[5] Regarding the 2008 *Proposed* Regulation, the Department correctly notes that it refers to education and experience requirements in the conjunctive, not in the disjunctive as the Woolfords' opening brief indicated. But, that correction does nothing to refute the fundamental point that a *proposed* regulation carries no weight. Indeed, a proposed regulation that has lingered in limbo for nine years has essentially been abandoned.

. . . ." Code § 58.1-512(B).[6] In neither circumstance can the Department just disallow the credits and leave the taxpayers with *nothing*.

The Department claims, however, that it has a third option. The Department claims that, if it expresses no disagreement during the initial 30-day period and, in a subsequent audit, stops short of making a "false or fraudulent" finding but finds the appraiser unqualified, then the Department may take away *all* the credits. The perverseness of such an outcome has been highlighted by the Woolfords. *See* Appellant Br. at 39. In a telling omission, the Department fails to address this point.

Thus, even if the Department correctly disregarded Simerlein's appraisal at the audit stage, it still should not be allowed to take away the Woolfords' tax credits in their entirety. Instead, the Court should require the Department to determine the fair market value of the Woolfords' donation and the tax credit to be allowed under the law. In other words, if the Department can object to the appraiser at the audit stage, it must follow the same process as where it objects during the initial 30 days: it must require another appraisal. *See* Appellant Br. at 37 (alternative argument).

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[6] If the Department may do in an audit (initiated years later) what the statute says must be done within 30 days, then the 30-day requirement is effectively negated. Such an approach would violate the well-known maxim that "every provision in or part of a statute shall be given effect if possible." *Tilton v. Commonwealth*, 196 Va. 774, 784 (1955).

III. The Circuit Court Erred By Excluding Expert Testimony.

The Department wants to have it both ways. On the one hand, the Department suggests that whether Simerlein is a qualified appraiser can be determined by looking at industry standards, especially USPAP. *See* Dept. Br. at 11. On the other hand, it tries to defend the Circuit Court's decision to exclude expert evidence on those *same* industry standards. It does so, in part, by denying that the Woolfords ever proffered such evidence. *See* Dept. Br. at 21 n.14. But, clearly they did. The proffers for Boykin and Kern included: "Testimony regarding the qualification of the appraiser . . . based on . . . applicable USPAP standards . . . ." JA-457–58.

Whether compliance with USPAP constitutes compliance with federal law is, of course, a legal question.[7] But the preliminary questions – what USPAP requires and whether there has been compliance with USPAP – are factual issues on which expert testimony is appropriate and necessary. *See* Appellant Br. at 42. The Circuit Court erred by treating testimony on those preliminary questions as offering a legal opinion and excluding it.

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[7] This Court should conclude that Simerlein is a "qualified appraiser" under federal law without considering USPAP standards. *See supra* at 4–8, Appellant Br. at 16–40. If the Court agrees, then the Circuit Court's error in excluding expert testimony is less important (though guidance on this point may help avoid error on any issues remaining on remand). But, if the Court concludes that industry standards, such as USPAP, are relevant to the "qualified appraiser" issue, then the Circuit Court's error in excluding these experts assumes critical importance.

The Department also tries to defend the exclusion of the Woolfords' experts on the theory that the Circuit Court did not just rely on the "legal opinion" explanation in its Order. The Department says the Circuit Court also relied on its general discretion with respect to use of experts, and it quotes what the trial judge said from the bench (most of which are actually unrelated to the "qualified appraiser" issue). *See* Dept. Br. at 21.

Under the circumstances of this case, it would have been an abuse of discretion for the Circuit Court to have relied on such grounds; however, that issue need not be addressed. "This Court has said on numerous occasions that trial courts speak only through their written orders . . . ." *McMillion v. Dryvit Sys.*, 262 Va. 463, 469 (2001) (rejecting party's reliance on comments from the bench differing from written order). The written Order excluding testimony from the Woolfords' experts – the same Order that the Department tendered – contains *only one* reason for the exclusion: the Circuit Court's view that those experts would be offering legal conclusions. JA-563. Because that view was erroneous, so was the exclusion. The expert testimony should have been allowed.

IV. Summary Judgment Must Be Vacated Because the Circuit Court Erred When It Cut Short the Woolfords' Case-In-Chief.

As the Woolfords have explained, the Circuit Court erred when it granted summary judgment against them before they rested their case.

Appellant Br. at 43–47. In response, the Department claims that the Woolfords rely on case law and treatises (as if that were some shortcoming) and not on any provision of the Rules. They are mistaken. The Rule at issue, Rule 3:20 – which the Woolfords cited – allows a court to grant summary judgment mid-trial only "upon sustaining a motion to strike the evidence." The Department does not claim that any motion to strike was made here.[8] Thus, the trial court violated the Rule, and the case law and treatises cited by the Woolfords merely strengthen the point.

The Department says that *Durham v. Nat'l Pool Equip. Co.*, 205 Va. 441 (1964) involved "an alleged oral contract." Dept. Br. 22 n.15. So, it did. Every case involves something. But, there is nothing in *Durham* suggesting that only plaintiffs who allege oral contracts have the right to complete their case-in-chief before the court may grant a motion to strike (or, as here, a motion for summary judgment). The right recognized in *Durham* applies here as well, and the trial court erred by violating it.

The Department then tries to minimize *Rouse v. Great Atl. & Pac. Tea Co.*, 216 Va. 293, 294 n.1 (1975), where this Court held that the trial court "should have allowed the plaintiff to complete his case in chief." As

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[8] Nor would such a motion have been appropriate. As the Woolfords pointed out – without contradiction by the Department – a motion to *strike* the evidence cannot be made until the plaintiff has finished *presenting* his evidence. *See* Appellant Br. at 45–46.

the Department notes, the Court also said that any error *in that case* was harmless, but the important point is *why* that error was harmless. As the Court explained:

> Any possible error is rendered harmless *in this instance*, however, because as the result of a stipulation at the Bar of this Court we are able to consider *all of the additional evidence* which the plaintiff would have offered had he been permitted to complete his case. Such additional evidence is contained in *discovery depositions* which are a part of the record before us.

Id. (emphasis added). No such circumstances are present here, especially since there are no discovery depositions showing what Diana Gaston would have said.[9]

Having prevented the Woolfords from obtaining the testimony of Gaston, the Department now says it is "far from clear" what Gaston would have said that could have helped the Woolfords' case. Dept. Br. at 23.[10] But, the lack of clarity does not help the Department.

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[9] The Department quashed the Woolfords' attempt to depose a Department representative, who presumably would have been Gaston. *See* JA-271, JA-351.

[10] If Gaston had been required to testify – either in depositions or at trial – she very well may have confirmed that, in rejecting Simerlein's appraisal, the Department was departing from its general practice. Her testimony may have shown that the general practice has been (i) to treat appraisers as qualified if they are licensed by the Commonwealth (or have other credentials comparable to Simerlein's), and (ii) *not* to define "type of property" as narrowly as it did here, all of which would tend to show not only industry practice but also the Department's arbitrariness here.

"Well established principles require that error be *presumed prejudicial* unless the record clearly shows that the error *could not have* affected the result." *Dandridge v. Marshall*, 267 Va. 591, 597 (2004) (emphasis added). *Accord Spence v. Miller*, 197 Va. 477, 482 (1955). Thus, it is the Departments' burden to show what Gaston's testimony would have been and that the error was harmless. It is a burden they cannot meet.[11]

The Department also tries to gloss over the Woolfords' remaining three exhibits, which were identified but not yet admitted into evidence when the trial court cut short the Woolfords' case-in-chief. JA-684 (Exhibit 4); JA-749 (Exhibit 5); JA-816 (Exhibit 6). Chief among them was Exhibit 6, a February 2014 letter from Simerlein to the Department (Diana Gaston), outlining his personal study in preparation for the Woolford appraisal and the lack of any readily available formal coursework in "mineral rights evaluation." JA-919–21. If this exhibit had been in evidence, the result

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[11] In addition, the Woolfords are entitled to an adverse inference against the Department. When a witness can only be called to testify by the government, the failure to call that witness permits an "instruction or inference that the missing witness' testimony would be unfavorable to the government." *United States v. Tarantino*, 846 F.2d 1384, 1404 (D.C. Cir. 1988). *See Meruelo v. Comm'r*, 691 F.3d 1108, 1115 (9th Cir. 2012) ("[W]hile the IRS held exclusive control of the evidence of its intentions, it never presented any evidence, thereby creating an adverse inference that such evidence would support the [taxpayer]."). A similar inference should be applied where, as here, the taxpayer's attempt to call the government witness was deliberately and repeatedly blocked by the government.

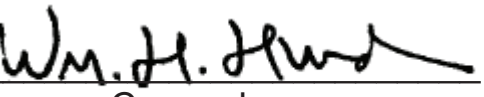
might have been different.[12] Indeed, the result *should* have been different, even if the Circuit Court's standardless, *ad hoc* approach to the "qualified appraiser" question were somehow appropriate.

This Court has repeatedly "disapprove[d] the grant of motions which 'short circuit' the legal process thereby depriving a litigant of his day in court and depriving this Court of an opportunity to review a thoroughly developed record on appeal." *Seyfarth*, *Shaw*, *Fairweather & Geraldson v. Lake Fairfax Seven Ltd. P'ship*, 253 Va. 93, 95 (1997) (citing cases). This is what happened here. The judgment of the Circuit Court cannot stand.

CONCLUSION

The Court should grant the relief sought by the Woolfords as set forth in the Brief of Appellants.

Respectfully submitted,
JAMES K. WOOLFORD, *et al*.
Appellants

By: 
Counsel

[12] Although Simerlein testified about parts of his letter to Gaston, JA-814–15, trial counsel did not move to admit the letter into evidence at that time; however, there were other ways to move to admit Exhibit 6 into evidence (*e.g.* during the testimony of the recipient, Gaston). Additionally, because the Circuit Court cut off the Woolfords case-in-chief, trial counsel was not afforded the opportunity to ensure all previously identified exhibits were admitted into evidence before resting.

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CERTIFICATE

Pursuant to Va. Sup. Ct. R. 5:26(h), I hereby certify the following:

1. I have complied with Rule 5:26(h) and have included the signature, Virginia State Bar number, address, telephone number, facsimile number, and email address of at least one counsel of record.

2. This Brief complies with the page limitations contained in Rule 5:26(b).

3. Three printed copies of the foregoing Reply Brief of Appellants were hand-filed with the Clerk of the Supreme Court of Virginia, one copy was electronically filed, via VACES, pursuant to Va. Sup. Ct. R. 5:26(e), and one copy was served via electronic mail upon Counsel for Appellee, J. Duncan Pitchford, Assistant Attorney General, Office of the Attorney General, 202 North 9th Street, Richmond, Virginia 23219, jpitchford@oag.state.va.us, on this 9th day of June, 2017.

By: _____
Counsel