IN THE

Supreme Court of Virginia

RECORD NO. 161290

ELIZABETH SHIFFLETT, *et al.*,

Appellants,

v.

LATITUDE PROPERTIES, INC., *et al.*,

Appellees.

REPLY BRIEF OF APPELLANTS

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REPLY BRIEF

I. Appellees' Wielding of Facts Not in the Record is Improper.

This Court must not consider allegations in the appellees' brief that are not sustained by the record. *Riddick v. Com.*, 135 Va. 724 (1923).

a. The Illusion of Refund Expectation

Latitude and Shifflett contend that "[b]oth Shifflett and Deane answered their respective interrogatories that they both expected to receive state and/or federal tax refunds for the tax year 2015, based on tax overpayments" (Br. App. 3.)[1] Their assertion, however, represents an exaggeration of the record's contents.

The circuit court found the facts of the case to be those set forth in Shifflett's and Deane's motions for summary judgment and found them to be uncontested. (Appx. 75 at lines 11-13; 82 at lines 2-8 and 20-24; 83 at 2-8). When the circuit court asked the creditors' counsel for confirmation "that the facts are as accurately asserted in the memorandum for summary judgment, motion for summary judgment," he responded, "I believe they are." (Appx. 82 at lines 21-24.) Both cases were in the same posture. (Appx

[1] Counsel for Latitude and Shen Valley also asserted, "It is uncontroverted that both Shifflett and Deane answered that they are entitled to state and/or federal tax refunds." (Br. App. 18.) Such statement is an unfortunate and utter fabrication without citation to anywhere in the record.

83 at lines 2-9.) The record presents no other documentary or testimonial evidence.

The relevant facts in the motion are that Latitude and Shen Valley admitted that Shifflett and Deane had not filed any tax return for the 2015 tax year by the interrogatory summons return date of January 5, 2016, and that neither had received any tax refund by that date. (Appx. 8-9, 12-13, 26-27, 30-31.) In their brief, they again concede the lack of receipt of any refund by January 5. (Br. App. 3.)

In the record, the creditors' opinion is that the debtors expected refunds (Appx. 13-14, 31), but no testimony from either debtor and no document in the record provides a basis for that opinion. The general district court orders are no exception: they equivocate that Shifflett and Deane "may be entitled" to tax refunds and perhaps "will receive no refund(s)." (Appx. 6, 19.)

The creditors place great weight upon their own declarations that the debtors expected refunds, but the record is devoid of the debtors' responses to interrogatory questions at the general district court and even of the questions themselves. "Did you get a tax refund last year?" or "Do you think you might get a tax refund this year?" were possible questions, though we cannot be sure. But even affirmative responses to such

questions would provide no proof that Shifflett and Deane were *certain* to receive any fixed sum in the form of a tax refund, especially not before they filed any tax return. Their expectation, if they had any, would have been akin to the expectation of a potential heir under a will or of a beneficiary of a life insurance policy before the death of a relative, expectations easily frustrated by the occurrence of contingencies.

b. Concession Not Made

In addition, Latitude and Shen Valley assert that Shifflett and Deane have conceded that the creditors are authorized under Virginia law to execute against intangible property that a person expects to receive at a future date. (Br. App. 3.) Not only is the *a priori* assumption of expectation problematic as it relates to Shifflett and Deane, as just discussed, but no such concession exists. The creditors do not assist examination of the matter by citing any specific part of the record.

c. Too Late to Add Evidence

Latitude and Shen Valley proffer that Shifflett and Deane did not provide evidence of the potential of any governmental offset of their hypothetical tax overpayments. (Br. App. 3.) Notably, the record does not reveal whether such information was provided during the interrogatory proceedings in general district court, and the creditors did not object or

assign cross-error to the circuit court's ruling that it needed no additional evidence. It is too late for them now to argue the supposed implications of alleged facts that they failed to develop in the trial court.

The creditors further argue that neither Shifflett nor Deane deny that they subsequently received tax refunds. (Br. App. 3-4.) The record, however, is devoid of any hearing or discovery request that might have provided an opportunity for the debtors to refute the insinuation of the receipt of tax refund. Moreover, the insinuation is irrelevant. Because no *fieri facias* lien attached to the uncertain interests in tax overpayment or refund by January 5, no transfer order could issue. The writ of *fieri facias* cannot be a lien on intangible personal estate unless a judgment debtor had a possessory interest in it sometime between the issuance of the writ and its return day. VA. CODE ANN. § 8.01-501; *Int'l Fid. Ins. Co. v. Ashland Lumber Co., Inc.*, 250 Va. 507, 511 (1995). This Court is accordingly not concerned with events after the January 5 return day, not to mention events that are only conjecture and not in the record.

d. Which "Debt" is Relevant

In their brief, Latitude and Shen Valley seem concerned that this appeal challenges the two judgments underlying the executions in this case. Neither the record nor Appellants' opening brief, however, should

give rise to this concern. The relevant issue under consideration is whether Shifflett or Deane had any possessory interest on January 5, 2016, in what amounted to an uncertain liability purportedly owed to them by the state or federal government.

II. Latitude and Shen Valley Misapply the Law

a. Certainty of Debt, Not Vague Expectation, Required for Lien

The creditors rely on a federal case, *In re Lamm*, 47 B.R. 364 (E.D. Va. 1984), to argue that the writ of *fieri facias* creates a lien upon "a mere future expectancy of [a] property interest." It is critical to distinguish between an actual present entitlement to a debt and a vain hope or expectation, loosely so termed, that depends upon the occurrence of a contingency. The binding precedent in this case clarified this distinction over a century ago: "When a debt has a present existence, . . . it is subject to the lien of a fi. fa., . . . but the rule is otherwise where the debt rests upon a contingency that may or may not happen." *Boisseau v. Bass' Adm'r*, 100 Va. 207, 40 S.E. 647, 649 (1902). Before Shifflett and Deane filed any tax return, if they were even required to file and chose to do so, and before the government had a chance thereafter to check and approve their calculation and to offset any potential tax overpayment with tax or nontax liability, they had no present entitlement to a refund debt.

In *In re Lamm*, 47 B.R. 364, the court was not dealing with a contingent property interest, but rather with a garnishment of funds already earned by the judgment debtor and held by his employer. The main issue for the court was whether the judgment in garnishment that was within 90 days of the debtor's filing of a bankruptcy petition meant the transfer of garnished wages was avoidable as a preferential transfer even though the *fieri facias* lien attached to the wages outside the 90-day period. *Id.* The court held that no preference occurred because the garnishee employer held the wages subject to the fieri facias lien more than 90 days before the bankruptcy petition was filed. *Id.* at 368-70.

To the extent *In re Lamm* stands for the proposition advanced by the creditors—that a liability that is contingent during the life of the *fieri facias* is subject to the lien under Virginia Code § 8.01-501—it is nonbinding and runs afoul of the principle enunciated by this Court in *Boisseau*, 40 S.E. 647, 649 (Va. 1902), which controls. That principle, that the lien of an execution cannot affect subjects that do not exist during the life of the execution, including a so-called debt which rests upon a contingency for its existence, *Boisseau v. Bass' Adm'r*, 100 Va. 207, 40 S.E. at 649-50 (Va. 1902), this Court has repeatedly reaffirmed. *Virginia Nat. Bank v. Blofeld*, 234 Va. 395, 400–01 (1987) (indebtedness arose while lien still alive);

Lynch v. Johnson, 196 Va. 516, 521 (1954) (judgment debtor's claim to insurance fund not certain and absolute against garnishee); *Coalter v. Willard*, 156 Va. 79, 82-83 (1931) (insurance policy without cash surrender value outside creditor's reach); *White v. Pac. Mut. Life Ins. Co.*, 150 Va. 849, 864 (1928) (creditor lacked right to insurance proceeds except for premiums paid during debtor's insolvency); *Combs v. Hunt*, 140 Va. 627 (1924) (present, fixed liability required); *Fentress v. Rutledge*, 140 Va. 685 (1924) (obligation must be absolute); *see also In re Andrews*, 210 B.R. 719 (Bankr. E.D. Va. 1997), *subsequently dismissed*, 153 F.3d 718 (4th Cir. 1998) (contrary to dicta in *Lamm*, § 8.01-501 does not to encompass unliquidated malpractice claim to create lien on later post-bankruptcy settlement proceeds); *Eanes v. Shepherd,* 33 B.R. 984, 988 (W.D.Va.1983), *rev'd on other grounds,* 735 F.2d 1354 (4th Cir.1984) (not extending § 8.01-501 lien to contingent and unliquidated causes of action).

b. Bankruptcy Cases are Consistent with Shifflett's and Deane's Position

That Shifflett and Deane had not filed tax returns by January 5, 2016, alone suffices to make any interest they had in potential 2015 tax refund contingent, not possessory, at that time. Latitude and Shen Valley argue, however, that all that was necessary for the creation of a *fieri facias* lien upon an interest in income tax refund was the ending of tax year 2015. To

support their position, they cite *U.S. Department of Agriculture v. Sexton*, 529 B.R. 667 (W.D. Va. 2015); *In re Addison*, 2016 WL 223771, No. 1:15CV00041 (W.D. Va. Jan. 19, 2016); *In re Benson*, 566 B.R. 800 (Bankr. W.D. Va. 2017); *In re Copley*, 547 B.R. 176 (Bankr. E.D. Va. 2016). Although the cited bankruptcy cases support the proposition that the ending of a tax year makes an interest in tax overpayment part of a bankruptcy estate for a bankruptcy trustee to administer, they do not support the contention that such interests are noncontingent.

None of the bankruptcy cases refers to Virginia Code § 8.01-501, to personal estate, to when a property interest is possessory, *Int'l Fid. Ins. Co.*, 250 Va. at 511, or to the controlling principles this Court established in *Boisseau v. Bass' Adm'r*. Their focus was the operation of the automatic stay or the government's set-off right. *Sexton*, 529 B.R. at 667 (stay violated); *In re Addison*, at *2 (setoff against non-tax debt); *In re Benson*, 566 B.R. at 814, (stay inapplicable to offset for tax liability); *In re Copley*, 547 B.R. at 185 (exemption superseded set-off right).

The creditors miss the critical distinction between the vesting of property interests in a bankruptcy estate, which includes contingent interests, 11 U.S.C. § 541(a); *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205 (1983) (bankruptcy estate includes property without possessory

interest); *In re Addison*, at *2 ("estate" defined liberally); *Ricketts v. Strange*, 293 Va. 101, 106 (2017) (bankruptcy estate includes debtor's inchoate claims), and the inability of a *fieri facias* lien to attach to contingent personal estate, whether inside or outside of bankruptcy. This Court should recognize the distinction (in the table below) that the bankruptcy court decisions leave intact and even tacitly acknowledge, *see In re Sexton*, 508 B.R. 646, 664 (Bankr. W.D. Va. 2014) *appeal dismissed sub nom. U.S. Dept. of Agric. v. Sexton*, 529 B.R. 667 (W.D. Va. 2015) (agreeing that, outside bankruptcy, government's set-off power makes debtor's interest in tax refund contingent and may eliminate the interest entirely).

Contrasting Treatment of Intangible Property Interests	Does § 8.01-501 *fieri facias* lien attach?	Does property vest in bankruptcy estate?
Property in debtor's possession	Yes	Yes
Property that debtor is entitled to	Yes	Yes
Contingent property interest (and no possession)	No	Yes

c. Assertion of Control over Intangible Interests Not Justified

Because Shifflett and Deane did not possess any refunds, Virginia Code § 8.01-507 required that they have control over them before a court could order transfer of their interests. Without elaborating, the creditors assert that Shifflett and Deane had such control. The problem is that nobody could say on January 5, 2016, whether a refund would follow the

filing of a tax return for either debtor, and, even if so, what amount it might be for. And nobody knew whether, if they had filed, the government might send nothing, leaving them the hope of uncertain relief in court. At the time, there was nothing—like a stock certificate—that a sheriff could seize. *See Dorer v. Arel*, 60 F. Supp. 2d 558, 561 n.8 (E.D. Va. 1999). On that day, the debtors had no control and were worse off than a beneficiary under a spend-thrift trust, who, despite having a vested right, has no control over disbursement of the trust funds.

d. Existence of State Exemptions Does Not Support the Logical Leap to Finding Possessory Interest in Tax Refund

Latitude and Shen Valley argue that because Virginia law provides, under paragraph 9 of Virginia Code § 34-26, that a taxpayer may exempt from creditor process certain portions of a tax refund, a taxpayer's interest in tax refund must be noncontingent in the eyes of the law. However, a review of the statute reveals that it does not bar a debtor from claiming an exemption in a contingency. Under bankruptcy law, as discussed above, potential tax refunds are treated as part of the bankruptcy estate, and bankruptcy trustees routinely insist that those potential refunds are part of the bankruptcy estate, even in advance of the filing of any tax return, for potential turnover of funds to the trustee later unless they have been exempted by the debtor. As a result, bankruptcy debtors routinely exempt

their anticipated tax refunds for the coming year under paragraph 9 of Virginia Code § 34-26, if applicable, or under their general Virginia homestead exemption, without challenge. The Virginia exemption statutes do not limit the debtor's ability to exempt contingent property claims if they wish to do so. Accordingly, the creditors' reliance on this statute is misplaced.

e. Filing of Tax Return Removes Only One Brick in the Wall of Contingencies Barring the Way to a Tax Refund

The creditors miss the import of contingencies that would have remained even if Shifflett and Deane had filed tax returns and awaited the federal and state governments' response. Latitude and Shen Valley seem to consider the filing of a tax return as the mere asking of the government for money just lying around with the taxpayer's name on it. Their position overlooks several unknowns:

- upon completing a tax return, the taxpayer may realize that it reveals that no tax overpayment exists—there may even be tax liability owed;
- once a tax return is filed that seeks refund of an apparent tax overpayment, the government may disagree with the taxpayer's calculation and determine that no overpayment exists;
- even if an overpayment exists, the government may choose to offset it due to a past tax or nontax liability.

After filing a tax return, a taxpayer simply cannot be certain of the outcome. That the government is bound by law to make a proper calculation does not make the property interest less contingent: If the taxpayer believes the government has erred in its determination of no refund, the taxpayer would still lack possession and control of any interest in overpayment or refund.

f. Not Inequitable to Require Creditors to Follow the Law

Latitude and Shen Valley argue that it would be unfair to allow taxpayers to hold their tax refunds out of reach of creditors by delaying or foregoing the filing of a tax return. The faulty premise of the argument is, however, that it assumes without basis that a debtor necessarily will obtain a refund if only a return were filed. Furthermore, it overlooks that a creditor has other collection tools available, like an account garnishment and a notice of lien. The apparent practical inability of the creditors to use garnishment procedures against the IRS is not a justification for allowing them to bend the law and create a procedural shortcut, not authorized by statute, that places debtors under the threat of contempt of court under a void transfer order.

g. Intangible Property Held by a Third Party is Not Subject to *Fieri Facias* Lien if Not a Liability

Latitude and Shen Valley point to *Network Solutions, Inc. v. Umbro Int'l, Inc.*, 259 Va. 759 (2000), for the general proposition that a *fieri facias* lien may be a lien on intangible property. While it is true that intangible interests are not off the hook, it is not true that every intangible interest is subject to the *fieri facias* lien; the interest must still be possessory. VA. CODE ANN. § 8.01-501 (present entitlement required); *Int'l Fid. Ins. Co.*, 250 Va. at 511.

Network Solutions is more relevant to the present case for its holding that an intangible property interest was not subject to the *fieri facias* lien. *Id.* at 770. The case concerned an attempted garnishment of a domain name, and this Court held that the domain name was not subject to garnishment because, as a product of a contract of services, it did not constitute a liability on a third person, as required by Virginia Code § 8.01-511. *Id*. The intangible failed to be a "liability" because it was not a debt enforceable by civil remedy. *Id.* at 768. In the case at bar, because Shifflett and Deane had no right to any actual refund on January 5 that was civilly enforceable, their interests were likewise not subject to the *fieri facias* lien.

h. No Right to Sue Meant No Entitlement

The creditors seemingly fail to see how *United States v. Clintwood Elkhorn Mining*, 553 U.S. 1 (2008), *George v. Com.*, 276 Va. 767 (2008), and the statutes they discuss are pertinent to the issues in this case when Shifflett and Deane are not suing the government for tax refund. Although the debtors have filed no such lawsuits against the government, the relevance of the cited cases is clear. The cases demonstrate that a taxpayer has no civil claim for tax refund before filing a return. *Clintwood*, 553 U.S. at 7; *George*, 276 Va. at 772. The lack of a right to claim refund strikes at the heart of the possessory interest required by Virginia Code § 8.01-501. *Int'l Fid. Ins. Co.*, 250 Va. at 511. On January 5, Shifflett and Deane lacked an immediate right to claim a refund, and they were therefore not "entitled" to any tax refund. That they later could fill out and submit a claim for refund in the form of a return would not suffice because to have a right to something requires more than a bare assertion. *Manu v. GEICO Cas. Co.*, ___ Va. ___, 798 S.E.2d 598, 607 & n.7 (2017) (insured's legal entitlement to recover damages a condition to claim against insurer); *Burrell v. Com.*, 50 Va. App. 72, 83 (2007) (no entitlement to food stamps outside county of residence).

CONCLUSION

It was improper for the trial court to compel transfer of Shifflett's and Deane's interests in income tax refund that were uncertain before they had even filed any tax return. The circuit court lacked the power, as did the general district court, over Shifflett's and Deane's contingent interests in potential tax refunds because neither debtor had a possessory interest (i.e., no possession or entitlement) by the return day of the writ of *fieri facias*. Without a *fieri facias* lien under Virginia Code § 8.01-501, the trial courts were without subject matter jurisdiction over the intangible property interests. Even if they had had the power, they lacked authority to exercise it under Virginia Code § 8.01-507 because Shifflett and Deane lacked control over taxes paid and held by the government.

The appellants ask this Court to reverse the circuit court, grant them summary judgment, and enter final judgment in their favor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In compliance with Rule 5:26, I hereby certify that on July 11, 2017, the correct number of true and accurate copies of this Reply Brief were hand-filed with the Supreme Court of Virginia, an electronic copy was filed via VACES in PDF format, and an electronic copy was served via email in PDF format upon counsel for the appellees:

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