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IN THE

Supreme Court of Virginia

RECORD NO. 161290

ELIZABETH SHIFFLETT, *et al.*,

Appellants,

v.

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

Appellees.

OPENING BRIEF OF APPELLANTS

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INTRODUCTION

The issue in this case is whether a trial court may compel the transfer of a judgment debtor's uncertain interest in income tax refund before the debtor has filed any tax return.

The circuit court should have granted Shifflett's and Deane's motions for summary judgment on this issue. Instead of allowing the general district court's transfer orders to stand, it should have ruled that neither court had subject matter jurisdiction to make any order directing the disposition of Shifflett's and Deane's uncertain property interests in potential tax refunds. Their interests in potential refunds were not more than contingent interests because neither had filed a 2015 income tax return. The courts lacked the power over such contingent property interests because no *fieri facias* lien under Virginia Code § 8.01-501 attached to them.

Because no liens arose, the courts lacked the power to resort to Virginia Code § 8.01-507 for lien enforcement.

Jurisdiction concerns aside, the courts lacked authority to exercise power under § 8.01-507 because Shifflett and Deane lacked possession and control of paid taxes held by the government.

STATEMENT OF THE CASE

Material Proceedings Below

The appellees, Latitude Properties, Inc., and Shen Valley Band Instrument Service, Inc., separately sought execution on their judgments by writs of *fieri facias* and summonses to answer interrogatories issued to the appellants, Elizabeth Shifflett and Cassandra Deane, respectively. (Appx. 3-4,[1] 22, 24.) At the returns thereon, the general district court separately ordered Shifflett and Deane to turn over any income tax refund they might receive for tax year 2015 (Appx. 6, 19) even though neither had yet filed a tax return for the year (Appx. 12-13, 30-31).

Shifflett and Deane each appealed the transfer orders to circuit court (Appx. 2, 18) and moved for summary judgment based on their creditors' admissions (Appx. 8, 26). The circuit court required no additional evidence (Appx. 75 at lines 8-13; 82 at lines 2-9 & 17-25; 83 at lines 1-9), denied the debtors' motions, and granted the creditors summary judgment (Appx. 36-8, 53-54).

[1] A writ of certiorari is pending regarding the addition of Appendix pages 3-4 to the record. Appellants refer to them here in good faith belief that they will be added, given that their omission from the record was inadvertently caused when the general district court did not include them upon transfer of its file to circuit court.

Shifflett and Deane appealed. Initially, this Court granted the debtors' first assignment of error in their petition for appeal. (Va. Sup. Ct. order Feb. 23, 2017). On a petition for rehearing, the Court also granted their second and third assignments of error. (Va. Sup. Ct. order May 8, 2017.)

Statement of Facts

On the January 5, 2016, return date on the summonses to answer interrogatories, Shifflett and Deane separatley appeared and answered under oath that they had not filed federal or state income tax returns for tax year 2015 and had received no income tax refunds. (Appx. 12-13, 30-31.) Latitude and Shen Valley presented no evidence to the general district court that either Shifflett or Deane had filed a tax return or received any refund for tax year 2015, but the creditors hung their hopes on the expectation of refunds. (Appx. 13, 15, 31, 33.)

Even though neither Shifflett nor Deane had filed tax returns, the general district court ruled that they were potentially entitled to income tax refunds and entered an order in each case requiring the transfer of tax refunds that might be received, stating:

> "It appearing to the Court from such answers that Defendant(s) is/are or may be entitled to state and/or federal income tax refunds for the tax year 2015, the Court doth ORDER as follows: 1. That the Defendant(s), upon receipt of such refund(s), pay over and deliver such refund(s) to Plaintiff or to Plaintiff's Attorney . . . or pay over and deliver such portion of

> the refund(s) as the Plaintiff or Plaintiff's Attorney . . . informs the Defendant(s) will be sufficient to pay the judgment in this case in full. Plaintiff shall have a lien upon such refunds until paid."

(Appx. 6, 19.)

Upon *de novo* appeal in the circuit court, Shifflett and Deane both sought summary judgment, contending that the general district court lacked subject matter jurisdiction to enter the transfer orders. (Appdx. 8-11, 26-29.) At a hearing on their motions, the circuit court determined that the facts articulated in the motions were not disputed and that no additional evidence was needed. (Appx. 75 at lines 8-13; 82 at lines 2-9 & 17-25; 83 at lines 1-9.) The creditors did not object to the finding that the material facts were undisputed. (Appx. 36; 53-54; 75 at lines 11-13; 82 at lines 20-24.) The court combined the two cases in his ruling. (Appx. 36; 53; 60; 82 at lines 14-25; 83 at lines 1-9.)

The circuit court ruled that the lower court was authorized to enter its transfer orders, reasoning that both judgment debtors had fixed property interests in their potential 2015 tax refunds at midnight on December 31, 2015, even before filing any tax return; their interests were therefore subject to the *fieri facias* lien under Virginia Code § 8.01-501 and enforceable by transfer order under § 8.01-507. (Appx. 36-38.)

As an independent justification for jurisdiction, the court ruled that such a transfer order could be proper under Virginia Code § 8.01-507 even without a lien arising under § 8.01-501 when the debtor has control over the subject personal estate. (Appx. 37-38.) The court ruled that Shifflett and Deane had such control over their potential refunds. (Appx. 36-38.)

ASSIGNMENTS OF ERROR

1. The Circuit Court committed reversible error when it granted Latitude and Shen Valley, instead of Shifflett and Deane, summary judgment by ruling that Shifflett and Deane had fixed property interests subject to a *fieri facias* lien under Va. Code § 8.01-501 instead of contingent property interests in uncertain income tax refunds before either had filed a return for the tax year. (Appx. 8-10, 26-28, 39-43, 54, 57, 63-66, 71-72, 75, 77-81.)

2. The Circuit Court committed reversible error when it granted Latitude and Shen Valley, instead of Shifflett and Deane, summary judgment by ruling that Va. Code § 8.01-507 provides a trial court with jurisdiction over intangible property not subject to a lien under Va. Code § 8.01-501. (Appx. 8-10, 26-28, 39-43, 54, 57, 63-66, 71-72, 75, 77-81.)

3. The Circuit Court committed reversible error when it granted Latitude and Shen Valley, instead of Shifflett and Deane, summary judgment by ruling that Shifflett and Deane had tax refunds under their control under Va. Code § 8.01-507 when they had not filed any tax returns. (Appx. 8-10, 26-28, 39-43, 54, 57, 63-66, 71-72, 75, 77-81.)

ARGUMENT

I. <u>The circuit court lacked subject matter jurisdiction over Shifflett's and Deane's uncertain interests in income tax overpayment because no lien under Virginia Code § 8.01-501 attached to their interests that were contingent during the entire life of the writs of *fieri facias*.</u>

<u>Standard of Review</u>

Subject matter jurisdiction is a threshold question of law reviewed *de novo*. *Parrish v. Fed. Nat'l Mortgage Ass'n*, 292 Va. 44, 49 (2016). An appellate court reviews the application of law to undisputed facts *de novo* in an appeal of a circuit court's decision to grant or deny summary judgment. *St. Joe Co. v. Norfolk Redevelopment & Hous. Auth.*, 283 Va. 403, 407 (2012).

<u>Law</u>

Subject Matter Jurisdiction

"Subject matter jurisdiction 'is the authority granted through constitution or statute to adjudicate a class of cases or controversies.'" *Parrish*, 292 Va. at 49 (quoting *Morrison v. Bestler*, 239 Va. 166, 169–70 (1990)). When exercising its appellate jurisdiction in a *de novo* appeal, a circuit court's subject matter jurisdiction is limited to the jurisdiction of the general district court from which the case was appealed. *Id.* "[A] judgment

on the merits made without subject matter jurisdiction is null and void." *Morrison*, 239 Va. at 170.

Interrogatories and Writ of Fieri Facias

In general district court—as in circuit court—a judgment creditor wanting to know the extent of a judgment debtor's personal estate may request that the clerk issue a summons to answer interrogatories, but such summons must be preceded or accompanied by a writ of *fieri facias*. VA. CODE ANN. §§ 16.1-98, 16.1-103, 8.01-506. Notably, the clerk is authorized to issue an interrogatory summons under § 8.01-506 and the judge is authorized with the powers of §§ 8.01-506 and 8.01-507 only after a judgment creditor has requested the issuance of the writ. VA. CODE ANN. § 16.1-103.

Lien and Possessory Interest

A writ of *fieri facias* creates a lien on a judgment debtor's intangible personal estate, but only to the extent the judgment debtor possesses or is entitled to the intangible property after a process server's acceptance of the writ and before the end of the writ's return day:

> Every writ of fieri facias shall . . . be a lien from the time it is delivered to a sheriff or other officer . . . to be executed, on all the personal estate of or to which the judgment debtor is, or may afterwards and on or before the return day of such writ . . . become, possessed or entitled, in which, from its nature is not capable of being levied on . . . .

VA. CODE ANN. § 8.01-501. This Court has called the requisite possession or entitlement under § 8.01-501 a "possessory interest." *Int'l Fid. Ins. Co. v. Ashland Lumber Co., Inc.*, 250 Va. 507, 511 (1995). When a judgment debtor lacks a possessory interest, a writ of *fieri facias* creates no lien. *Id*. at 511. And without a *fieri facias* lien, the court lacks authority over the purported interest at issue. *See id.* (garnishment failed without valid lien).

"[L]ien enforcement remedies authorizing seizure of property [are] creature[s] of statute unknown to the common law, and hence the provisions of the statute[s] must be strictly satisfied." *Network Sols., Inc. v. Umbro Int'l, Inc.*, 259 Va. 759, 767 (2000) (discussing garnishment).

Under Virginia Code § 8.01-501, the personal estate to which one is entitled does not include contingent property interests:

> When a debt has a present existence, although payable at some future day, it is subject to the lien of a fi. fa., and may be reached by garnishment or other appropriate proceeding; *but the rule is otherwise where the debt rests upon a contingency that may or may not happen, and over which the court has no control*.

Boisseau v. Bass' Adm'r, 100 Va. 207, 40 S.E. 647, 649 (1902) (construing predecessor statute) (emphasis added); *accord 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 but for amount of premiums paid by debtor during insolvency); *Combs v. Hunt*, 140 Va. 627 (1924) (present, fixed liability required); *Fentress v. Rutledge*, 140 Va. 685 (1924) (obligation must be absolute); *cf. Virginia Nat. Bank v. Blofeld*, 234 Va. 395, 400–01 (1987) (indebtedness arose while lien still alive). "[N]o lien can be acquired upon a debt the very existence of which is dependent upon a contingency, for the very satisfactory reason that it is no debt." *Boisseau*, 40 S.E. at 649 (quoting 1 Freem. Ex'ns, § 164).

Contingency versus Entitlement

A contingent right is a right that is either subject to the exercise of discretion or subject to the occurrence of a specified event that is not certain to occur. *See* 2017 Va. Acts ch. 592 (establishing new § 64.2-779.8 that defines "noncontingent right" under the Uniform Trust Decanting Act); *see also Manu v. GEICO Cas. Co.*, __ Va. __, 798 S.E.2d 598, 606–07 (Apr. 27, 2017) (discussing when insurance carrier's duty of good faith arises).

As opposed to having a contingent interest, to be *entitled* means to have an absolute right when a legal requirement is met. BLACK'S LAW

DICTIONARY 649 (10th ed. 2014). "To 'entitle' means 'to give a right or legal title to; qualify (one) for something; furnish with the proper grounds for seeking or claiming something.'" *Manu*, 798 S.E.2d at 602–03 (quoting Webster's Third New International Dictionary 758 (1993)). To have a right to something requires more than a claimant's bare assertion. *See id.* at 607 & n.7; *Burrell v. Com.*, 50 Va. App. 72, 83 (2007) (no entitlement to food stamps outside county of residence).

Tax Overpayment and Contingency

Before an income tax return is filed, a taxpayer's right to a hoped-for refund of federal tax overpayment is contingent. *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) (when bankruptcy stay is not in effect, government may offset tax overpayment by unpaid tax or other liabilities); *see United States v. Puyallup Tribe of Indians*, C13-5122 BHS, 2014 WL 1386553, at *3 (W.D. Wash. Apr. 9, 2014), *appeal dismissed* (Oct. 16, 2014) (future payments to tribal member not subject to levy because payments by tribe discretionary, rather than fixed, determinable, or guaranteed); *Bowles v. Goss*, 309 P.3d 150, 157 (Okla. Civ. App. 2013) (funds under line of credit secured by reverse mortgage contingent because lender not obligated to pay absent debtor's request

which might never occur). "[B]efore the IRS exercises its discretion . . . and determines the amount of the tax *refund,* the amount is an *overpayment,* which is simply a contingent property right held by the taxpayer." *U.S. Dept. of Agric. Rural Hous. Serv. v. Riley*, 485 B.R. 361, 365 (W.D. Ky. 2012).

The IRS determines a federal tax refund is due, if at all, only after a return is filed, checked, and (if necessary) corrected. 26 C.F.R. § 601.105(a). The IRS may disallow a claim for an income tax refund and may offset any tax overpayment for several reasons, including debts owed by the taxpayer for federal or state taxes, past-due support, debt to other federal agencies, and overpaid unemployment compensation. 26 U.S.C.A. § 6402; 26 C.F.R. § 301.6402-6. In fact, a taxpayer cannot claim a right to a federal tax refund by a lawsuit until the taxpayer files a return. 26 U.S.C. § 7422(a); *United States v. Clintwood Elkhorn Min. Co.*, 553 U.S. 1, 7 (2008) (unanimous).

> The outcome here is clear given the language of the pertinent statutory provisions. Title 26 U.S.C. § 7422(a) states that "*[n]o suit* ... shall be maintained in *any court* for the recovery of *any internal revenue tax* alleged to have been erroneously or illegally assessed or collected, or of *any penalty* claimed to have been collected without authority, or of *any sum* alleged to have been excessive or *in any manner* wrongfully collected, until a claim for refund . . . has been duly filed with" the IRS.

Id. (emphasis in original) ("Five 'any's' in one sentence and it begins to seem that Congress meant the statute to have expansive reach.").[2]

A taxpayer's interest in Virginia income tax overpayment also is contingent before the filing of a return: An employee does not have a property interest in amounts withheld for tax purposes, *George v. Com.*, 276 Va. 767, 772 (2008); a refund can be claimed only on a return for the applicable year, 23 VA. ADMIN. CODE § 10-20-200; a refund of tax overpayment requires discovery by the Department of Taxation or a written taxpayer application, 23 VA. ADMIN. CODE § 10-110-320(D); and any refund may be offset for debts owed to the government, *e.g.,* VA. CODE ANN. §§ 58.1-524, 58.1-528.

Bankruptcy Estate versus Personal Estate

The "personal estate" relevant to Virginia Code § 8.01-501 is distinct from the "bankruptcy estate" that arises upon the filing of a bankruptcy petition. For purposes of § 8.01-501, a debtor must have a noncontingent (i.e., possessory) interest in the personal estate. *Int'l Fid. Ins. Co.*, 250 Va. at 511. A bankruptcy estate, in contrast, includes contingent property

[2] A taxpayer who receives a deficiency notice from the IRS—a scenario distinct from this case—may file a claim in Tax Court, though not in U.S. District Court or the Court of Federal Claims, before filing a tax return. *C.I.R. v. Lundy*, 516 U.S. 235, 244–45 (1996). Any credit or refund, however, hinges on the Tax Court's determination. 26 U.S.C. § 6512.

interests, e.g., uncertain interests in future inheritance, future marital property to be settled, and future life insurance proceeds. 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 by debtor); *In re Addison*, 2016 WL 223771, No. 1:15CV00041, slip opin. at *2 (W.D. Va. Jan. 19, 2016) ("The [Bankruptcy] Code defines 'estate' liberally . . . ."); *Ricketts v. Strange*, 293 Va. 101, 106 (2017) (bankruptcy estate includes debtor's inchoate claims).

The Bankruptcy Code does not create substantive property rights. *In re Columbia Gas Sys. Inc.*, 997 F.2d 1039, 1066 (3d Cir. 1993). "Property interests are created and defined by state law." *Butner v. United States*, 440 U.S. 48, 55 (1979); *accord In re Nejberger*, 934 F.2d 1300, 1302 (3d Cir. 1991) ("Although section 541 defines property of the estate, we must look to state law to determine if a property right exists and to stake out its dimensions.")

Even though "a debtor's interest in her tax overpayment becomes fixed at the close of the relevant tax year," *In re Sexton*, 508 B.R. at 662-63; *In re Addison*, 533 B.R. 520, 528-29 (Bankr. W.D. Va. 2015), *aff'd*, No. 1:15CV00041, 2016 WL 223771 (W.D. Va. Jan. 19, 2016); *see In re Copley*, 547 B.R. 176, 181, 185 (Bankr. E.D. Va. 2016); it is notably a

contingent interest in tax overpayment that becomes fixed as part of the bankruptcy estate that arises after a bankruptcy petition is filed, not a possessory one, *In re Buttrill*, 549 B.R. 197, 204 (Bankr. E.D. Tenn. 2016) (citing *Addison*, 533 B.R. at 529); *see e.g., In re Sexton*, 508 B.R. at 663–64.

Analysis

a. Because Shifflett and Deane had not filed tax returns, they were not entitled to any tax refunds; their interests were contingent.

i. The transfer orders reveal that the property interests at issue were contingent.

Shifflett and Deane were not entitled to any income tax refunds on January 5, 2016, when they appeared as summonsed at the return day of their writs of *fieri facias.* The parties do not dispute that Shifflett and Deane possessed no refunds and had not filed any tax return by January 5. (Appx. 8-9, 12-15, 26-27, 30-33, 75, 82-83.) The general district court could not tell on that day whether they were so entitled; rather, it simply speculated that the "Defendant(s) is/are *or may be* entitled to state and/or federal income tax refunds." (Appx. 6, 19—emphasis added.)

When the general district court entered its transfer orders based upon a guess that entitlement to property *might* occur after January 5, it attempted to transfer property interests that were entirely contingent

between the service of the writs and the return dates thereon. The orders show that the debtors did not have an absolute right or legal title to any tax refund at the time. *Manu*, 798 S.E.2d at 602–03. Virginia Code § 8.01-501 requires the existence of a possessory interest by the time of the return on the writ ("is, or may afterwards and on or before the return day of such writ . . . become, possessed or entitled"). Because no possessory interests existed, the court did not strictly satisfy the provisions of § 8.01-501, as required. *See Network Sols., Inc.*, 259 Va. at 767.

ii. <u>The judgment debtors could not claim a right to contingent tax refunds before filing tax returns.</u>

No court could have found the creditors were entitled to Shifflett's and Deane's 2015 tax refunds. Because they had not filed any federal return, the government had processed none. *See* 26 C.F.R. § 601.105(a). On January 5, the general district court could only speculate as to refund potential.[3] The court could not know whether the IRS might disallow a claim for refund or apply a setoff under 26 U.S.C. § 6402. Certainly, not having filed any return, neither Shifflett nor Deane could claim in litigation that they were entitled to any federal refund. 26 U.S.C. § 7422(a); *Clintwood Elkhorn*

[3] It is unclear whether, by January 5, either debtor had in hand all necessary documentation from employers, recipients of charitable donations, depository institutions, and other sources to file an accurate return.

Min. Co., 553 U.S. at 7. Similarly, they were not entitled to any refund for paid Virginia taxes. *George*, 276 Va. at 772; *see also* 23 VA. ADMIN. CODE §§ 10-20-200 & 10-110-320(D); VA. CODE ANN. §§ 58.1-524, 58.1-528.[4]

Even if they had already filed returns and awaited a response, Shifflett and Deane would have had no guarantee of a tax refund. Despite a belief or expectation that tax overpayment existed, the IRS could have disagreed with their calculations, 26 C.F.R. § 601.105(a), or exercised an offset for various federal or state liabilities, 26 U.S.C.A. § 6402; 26 C.F.R. § 301.6402-6.

b. <u>The closing of tax year 2015 did not remove the contingency of any tax overpayment.</u>

As of January 5, 2016, when Shifflett and Deane appeared for interrogatories, their 2015 tax liability—and thus their chances for any refund for tax overpayment—was still subject to potential fluctuation. For at least three months after January 5, they still could make Individual Retirement Arrangement (IRA) contributions for tax year 2015. *See* "IRA Year-End Reminder," https://www.irs.gov/retirement-plans/ira-year-end-reminders. Similarly, they still could make contributions to other types of accounts that applied to the already ended tax year. *E.g.,*

[4] Their income and filing status may have exempted them from any requirement to even file tax returns. *See, e.g.,* IRS 1040 Instructions (2016) at 7-10, https://www.irs.gov/pub/irs-pdf/i1040gi.pdf.

https://www.irs.gov/publications/p970/ch07.html (Coverdell ESA), https://www.irs.gov/publications/p969/ar02.html#en_US_2016_publink1000204127 (Archer MSA). If they chose to make such contributions, however, they could exceed contribution limits for 2015, causing them retroactively to incur additional taxes for 2015. *IRS Instr. to Form 5329* (2016), pp.4-7, https://www.irs.gov/pub/irs-pdf/i5329.pdf. Increasing their taxes would reduce their interest in any potential federal tax overpayment—all after the close of the tax year.

c. <u>That the debtors' contingent interests in tax overpayment and tax refund would vest in a bankruptcy estate does not alter their contingent nature.</u>

As discussed in part I.b. above, even the ending of the tax year could not conclusively determine Shifflett's or Deane's rights to tax overpayment. But even if, *arguendo*, their tax overpayment interests were fixed at the end of 2015, *In re Sexton*, 508 B.R. at 662-63; *In re Addison*, 533 B.R. at 528-29; *In re Copley*, 547 B.R. 176 at 181, 185, their interests in tax refund were not, *In re Buttrill*, 549 B.R. at 204 (citing *Addison*, 533 B.R. at 529); *see In re Sexton*, 508 B.R. at 663–64.

The main issue in *In re Sexton* was whether the government violated the bankruptcy stay when it set off a debtor's interest in tax overpayment by non-tax governmental debt after the debtor had filed a bankruptcy petition.

508 B.R. at 649. The government argued that the debtor had no interest in refund because the debtor's nontax government debt exceeded any amount of tax overpayment, leaving no remainder to constitute an interest for the bankruptcy estate. *Id.* at 653. Judge Connelly rejected this argument because the debtor had had an interest in tax overpayment at the time of filing the bankruptcy petition and before the government had exercised a setoff. *Id.* at 662. The stay was violated because the debtor's interest in tax overpayment belonged to the bankruptcy estate when the debtor filed the petition. *Id.* at 667-68.

A debtor's interest in overpayment and a debtor's right to a refund are both property interests that vest *in the bankruptcy estate*. *In re Sexton*, 508 B.R. at 665. Although the distinction between tax *refund* and tax *overpayment* was not relevant to Judge Connelly's ruling, *id.* at 658 n.14, she acknowledged that outside of bankruptcy, the distinction matters: "Generally, outside of bankruptcy, the tax intercept provisions of [26 U.S.C.] section 6402 authorize the government to intervene and defer the taxpayer's right to the overpayment until after the Secretary of the Treasury complies with the offset provisions," *id.* at 663-64. Judge Connelly agreed that, outside of bankruptcy, the government's authority makes the right to a

tax refund limited and the property interest in refund contingent. *Id.* at 664; *Riley*, 485 B.R. at 365.

Because state law—not bankruptcy law—determines the creation of substantive property rights, *Butner v. United States*, 440 U.S. at 55; *In re Columbia Gas Sys. Inc.*, 997 F.2d at 1066; *In re Nejberger*, 934 F.2d at 1302, cases construing the reach of a bankruptcy estate, which includes contingent interests, 11 U.S.C. § 541(a); *Whiting Pools, Inc.*, 462 U.S. at 205; *In re Addison*, 2016 WL 223771 at *2; *Ricketts v. Strange*, 293 Va. at 106, do not determine when Shifflett's and Deane's contingent interests in tax overpayment or refund lose their contingent nature.

In rendering its erroneous decision below, the circuit court conflated the scope of a *bankruptcy estate* with that of Virginia Code § 8.01-501's *personal estate*. To call a right to recover *overpayment* fixed is to advance the inquiry from one contingency to the next—whether interest in tax *refund* remains conditional—but does not determine, whether inside or outside of bankruptcy, if the interest is possessory. Regardless whether Shifflett and Deane had fixed interests in tax overpayment on January 5, 2016, their interests in tax refunds did not rise to the level of entitlement.

d. **Shifflett's and Deane's uncertain interests in tax overpayments remained contingent despite their ability to file tax returns.**

i. **The *Boisseau* principle**

The principle enunciated in *Boisseau v. Bass' Adm'r*, 100 Va. 207, 40 S.E. 647 (1902)—that a debtor's interest in property that is uncertain is contingent and not subject to a statutory *fieri facias* lien—is controlling in this case. This Court has continued to apply this principle since *Boisseau*. *Virginia Nat. Bank*, 234 Va. at 400–01; *Lynch*, 196 Va. at 521; *Coalter*, 156 Va. at 82-83; *White*, 150 Va. at 864; *Combs*, 140 Va. 627; *Fentress*, 140 Va. 685.

In *Boisseau*, an insured's policy required him to pay premiums for twenty years before he could make any claim upon his insurer; his interest in the policy was entirely contingent upon his continual payment of the premiums. *Id.*, 40 S.E. at 648-49. Because the insured could not be compelled to pay the premiums, this Court ruled that the policy did not constitute a present, fixed liability upon the insurer to pay the insured anything. *Id.* at 649. It was not "absolutely payable, at present or future." *Id.* The Court reasoned further that no lien arises on a contingent obligation owed to a debtor because the contingency makes it no debt. *Id*. *at 649.*

Accordingly, the statutory execution lien (under § 8.01-501's predecessor) had no subject to operate upon. *Id.* at 650.

This Court was unmoved in its *Boisseau* analysis despite a provision in the insurance policy allowing the insured to surrender the policy after three years in exchange for a payment. 40 S.E. at 650. The Court concluded that a creditor cannot ordinarily compel its debtor to change a contract or to make a new one. *Id.* Because the insured died without electing to surrender the policy mid-term, there never was an existing indebtedness against the insurer for the creditor to claim in the insured's stead. *Id.* Simply put, "the conditions necessary to enable the execution creditor to avail himself of the provision . . . did not arise." *Id.*

ii. *Boisseau* applied

Shifflett's and Deane's interests in tax refunds remained uncertain regardless of their ability to file tax returns that remained unfiled. Because for them, as in *Boisseau*, the necessary condition—the filing of tax returns by January 5—was never fulfilled, the government owed no indebtedness to Shifflett and Deane. Because no tax refund was absolutely payable during the period leading up to the return date on the summonses and writs of *fieri facias*, *id.*, 40 S.E. at 649, Latitude and Shen Valley, standing in their debtors' shoes, had no claim to any debt owed by the government.

That Shifflett and Deane had the ability to act to remove this contingency by filing returns,[5] without more, did not make their inchoate interests in tax overpayment any less contingent. *See Boisseau*, 40 S.E. at 650 (no steps taken to amend or make new contract). A judgment debtor should not be compelled by her judgment creditor to file a tax return any more than she should be compelled to change a contract, *Boisseau*, 40 S.E. at 650, or to borrow money, *Bowles*, 309 P.3d at 157.

e. <u>Without a noncontingent (or possessory) interest in tax overpayment, no § 8.01-501 lien arose and none could be enforced.</u>

Because Shifflett and Deane did not possess and were not entitled to tax refunds on or before January 5—their interests being merely contingent—their lack of possessory interest precluded attachment of any execution lien under Virginia Code § 8.01-501. *Int'l Fid. Ins. Co.*, 250 Va. at 511; *see Boisseau*, 40 S.E. at 650 ("It is impossible to conceive the existence of a lien without a subject for it to operate upon."). A possessory interest had to exist by the January 5 return day; the trial courts could not look further. VA. CODE ANN. § 8.01-501. Without a § 8.01-501 *fi. fa.* lien, there was nothing to enforce under § 8.01-507. Therefore, the general

[5] Even after filing a return, the contingency of government action would remain. Would the IRS disagree with their calculations, 26 C.F.R. § 601.105(a), or exercise a setoff, 26 U.S.C.A. § 6402; 26 C.F.R. § 301.6402-6?

district court lacked subject matter jurisdiction to enter the transfer orders, which were consequently void. *Morrison*, 239 Va. at 170. Accordingly, the circuit court should have granted Shifflett's and Deane's motions for summary judgment and overturned the transfer orders.

II. Without subject matter jurisdiction over intangible personal estate under Virginia Code § 8.01-501, resort to § 8.01-507 could not provide such jurisdiction.

Standard of Review

Whether a circuit court had subject matter jurisdiction is subject to *de novo* review upon appeal, *Parrish v. Fed. Nat'l Mortgage Ass'n*, 292 Va. 44 (2016), as is whether its determination of summary judgment upon undisputed facts was proper, *St. Joe Co. v. Norfolk Redevelopment & Hous. Auth.*, 283 Va. 403, 407 (2012).

Law

In Virginia, seizure of property to enforce judgments is not authorized by the common law, but by statutory provisions, which must be strictly satisfied. *Network Sols., Inc. v. Umbro Int'l, Inc.*, 259 Va. 759, 767 (2000).

Statutes are to be construed in a way to give full effect to all the statutory language. *City of Virginia Beach v. Siebert*, 253 Va. 250, 253 (1997); *Lillard v. Fairfax County Airport Authority,* 208 Va. 8, 13 (1967).

> [S]tatutes addressing the same subject are to be read *in pari materia. In pari materia* is the rule of statutory construction that

> "statutes which relate to the same subject matter should be read, construed and applied together so that the legislature's intention can be gathered from the whole of the enactments."

Alger v. Com., 19 Va. App. 252, 256 (1994) (citing *Lillard,* 208 Va. at 12; quoting Black's Law Dictionary 791 (6th ed. 1990)). Related statutes "are not to be considered as isolated fragments of law, but as a whole, or as parts of a great, connected, homogeneous system, or a single and complete statutory arrangement." *Lillard*, 208 Va. at 13 (internal citation omitted).

Any order based on § 8.01-507 depends on a debtor's interrogatory answers and the underlying writ of *fieri facias*:

> Any real estate out of this Commonwealth to *which it may appear by such answer* that the debtor is entitled shall, upon order of the court or commissioner, be forthwith conveyed by him to the officer *to whom was delivered such fieri facias,* and any money, bank notes, securities, evidences of debt, or other personal estate, tangible or intangible, *which it may appear by such [interrogatory] answers* are in possession of or under the control of the debtor or his debtor or bailee, shall be delivered . . . to such officer . . . .

VA. CODE ANN. § 8.01-507 (emphasis added); *see also* § 8.01-506 (interrogatories meant for ascertaining personal estate of judgment debtor "named in a judgment and fieri facias"). The language of § 8.01-507 alone shows that proceeding thereunder presumes that a summons to answer

interrogatories was issued. Such summons must be preceded or accompanied by a writ of *fieri facias*. VA. CODE ANN. §§ 8.01-506, 16.1-103.

Whether the *fi. fa.* writ becomes a lien on intangible property is determined by Virginia Code § 8.01-501.

> Every writ of fieri facias shall . . . be a lien from the time it is delivered to a sheriff or other officer . . . to be executed, on all the personal estate of or to which the judgment debtor is, or may afterwards and on or before the return day of such writ or before the return day of any wage garnishment to enforce the same, become, possessed or entitled, in which, from its nature is not capable of being levied on . . . .

VA. CODE ANN. § 8.01-501. To determine when a lien on possessory intangibles ceases, one must know when "[t]he lien [was] acquired under § 8.01-501." VA. CODE ANN. § 8.01-505.

This Court has relied on the *fi. fa.* lien that Virginia Code § 8.01-501 governs when deciding the outcome of garnishment proceedings even though the garnishment statutes do not explicitly reference § 8.01-501. *Int'l Fid. Ins. Co. v. Ashland Lumber Co., Inc.*, 250 Va. 507, 511 (1995); *Virginia Nat. Bank v. Blofeld*, 234 Va. 395, 400 (1987); *see* VA. CODE ANN. §§ 8.01-511, 8.01-512.3. As part of garnishment proceedings, a judgment debtor may claim that income or amounts in an account are exempt. VA. CODE ANN. §§ 8.01-512.5; 8.01-517, 34-4 (homestead), 34-4.1 (veteran), 34-4.2 (dependent children), 34-26(9) (child tax credits; earned income tax credit),

34-28.2 (support), 34-29 (portions of wages). Resort to § 8.01-507 in circumvention of garnishment exemptions is improper. *See Physical Distributions Sys., Inc. v. Wood*, Va. Cir. Ct. No. 77389, 1991 WL 834968, at *1 (Fairfax County May 15, 1991) (order to assign or tender pay not yet forthcoming prohibited and renders exemption meaningless).

The lien under Virginia Code § 8.01-501 has limits. For an interrogatory proceeding, it must arise between service of the writ of *fieri facias* and the return date of the summons. VA. CODE ANN. §8.01-501. The lien does not extend to intangibles located outside the Commonwealth. VA. CODE ANN. § 8.01-481. And despite the existence of a lien, a third party may not be held liable for making a payment to a judgment debtor without proper notice of the lien. VA. CODE ANN. § 8.01-502.

When no lien arises under Virginia Code § 8.01-501, a court lacks jurisdiction over the purported property interest, *Int'l Fid. Ins. Co.*, 250 Va. at 511, and a court order transferring a property interest when subject matter jurisdiction is absent is void, *Morrison v. Bestler*, 239 Va. 166, 170 (1990).

Analysis

a. The trial court could exercise no power under § 8.01-507 to enter transfer orders when the very existence of that power required a *fieri facias* lien under § 8.01-501 that was lacking.

When read together, Virginia's judgment enforcement statutes manifest the legislative intent that to exercise authority over personal estate under Virginia Code § 8.01-507 first requires prerequisite power under § 8.01-501. The general district court could not exercise jurisdiction over Shifflett's and Deane's future (and uncertain) tax refunds in the absence of a lien under § 8.01-501, and the circuit court erred to so find. Because § 8.01-507 must be construed not in a vacuum but along with other statutes addressing the same subject, *Lillard,* 208 Va. at 12-13, any resort to § 8.01-507 alone for such jurisdiction fails. Section 8.01-507 depends upon § 8.01-501.

Virginia Code § 8.01-507 is properly construed only if considered alongside of § 8.01-501. They must be read *in pari materia* because they both address stages along the path to seizure of a judgment debtor's intangible personal estate. *Lillard,* 208 Va. at 12; *Alger*, 19 Va. App. at 256. Section 8.01-501 reads in pertinent part: "Every writ of fieri facias shall . . . be a lien . . . on all the personal estate . . . in which, from its nature is *not capable of being levied on* . . . ." (Emphasis added.) Section 8.01-507

involves “any money, bank notes, securities, evidences of debt, or other personal estate, *tangible or intangible*, which it may appear by such answers are in possession of or under the control of the debtor or his debtor or bailee . . . .” (Emphasis added.)

The *in pari materia* rule of construction also requires reading Virginia Code § 8.01-507 together with § 8.01-506, which reinforces the need to construe it with § 8.01-501. Any transfer order under § 8.01-507 regarding the intangible personal estate of Shifflett and Deane must have been based on their answers to interrogatories. VA. CODE ANN. § 8.01-507 (“which it may appear by such answers”). They appeared in general district court to give answers because a summons was issued. VA. CODE ANN. § 8.01-506(D). But the issuance of their summonses required—and actually included (Appx. 3, 24)—the issuance of a writ of *fieri facias*. VA. CODE ANN. §§ 8.01-506(A), (B), (E); 16.1-103. Because § 8.01-501 is the only Virginia statute to describe when a writ of fieri facias becomes a lien on intangible property, to construe § 8.01-507 without reliance on § 8.01-501 would not give the latter its full effect as required, *City of Virginia Beach*, 253 Va. at 253, and would violate this Court’s long-held *in pari materia* rule, *Lillard*, 208 Va. at 13.

Because a transfer order under § 8.01-507 stands or falls on whether a lien under § 8.01-501 exists and because Shifflett's and Deane's contingent interests in uncertain tax refunds were not subject to any *fi. fa.* lien under § 8.01-501, as discussed above in part I, the transfer orders were void. Section 8.01-507 by itself did not supply the general district court with the power needed to enter its transfer orders.

b. <u>Allowing a trial court to proceed under § 8.01-507 without a lien would circumvent statutory requirements for judgment enforcement.</u>

If exercise of authority under Virginia Code § 8.01-507 to transfer personal estate did not first require the existence of power established by a lien under § 8.01-501, one would expect that no writ of fieri facias is needed before a trial court resorts to § 8.01-507. But since exercise of power under § 8.01-507 stems only from the discovery of property at a hearing upon interrogatories brought under § 8.01-506, and since § 8.01-506 relies on the issuance of a summons and writ of *fieri facias*, VA. CODE ANN. §§ 8.01-506, 16.1-103, any order under § 8.01-507 necessarily implies the issuance of a writ of *fieri facias*.

Moreover, without looking to whether a lien arose under § 8.01-501, a trial court would improperly ignore various statutory limits as to the lien's reach. VA. CODE ANN. §§ 8.01-481 (territorial limits); 8.01-501 (temporal

limit); 8.01-502 (protection of third party without notice of lien).[6] When the general district court ordered transfer of uncertain refunds under § 8.01-507 without concern for lien existence, it improperly evaded consideration of those limits. The court also thereby evaded consideration of Virginia exemptions for tax credits under Virginia Code § 34-26(9) that Shifflett and Deane might have wanted to assert (were any return filed and refund issued) but which were not discernible at the time. Instead, the court's premature orders made those exemptions meaningless. *Physical Distributions Sys., Inc.*, 1991 WL 834968 at *1 (Fairfax County).

III. The circuit court lacked the authority to exercise power under Virginia Code § 8.01-507 when Shifflett and Deane lacked contemporaneous possession or control of any tax refund.

Standard of Review

A circuit court's application of law to undisputed facts to grant or deny summary judgment is subject to *de novo* review on appeal. *St. Joe Co. v. Norfolk Redevelopment & Hous. Auth.*, 283 Va. 403, 407 (2012).

Law

Seizure of property to enforce judgments is not authorized by the common law, but by statutory provisions, which must be strictly satisfied.

[6] Although not raised below, the interests Shifflett and Deane had in federal tax overpayment after the tax year ended and before they had filed returns were not likely intangibles within the bounds of Virginia—making them not subject to a fieri facias lien. VA. CODE ANN. § 8.01-481.

Network Sols., Inc. v. Umbro Int'l, Inc., 259 Va. 759, 767 (2000). In Virginia, when a judgment creditor seeks satisfaction of its judgment by issuance of a writ of *fieri facias* and summons to answer interrogatories under Virginia Code § 8.01-506, the court may order transfer or delivery of disclosed property so long as there exists contemporaneous possession or control:

> [A]ny money, bank notes, securities, evidences of debt, or other personal estate, tangible or intangible, which it may appear by such [interrogatory] answers *are in possession of or under the control* of the debtor or his debtor or bailee, shall be delivered by him or them, as far as practicable, to such officer, or to some other, or in such manner as may be ordered by the commissioner or court.

VA. CODE ANN. § 8.01-507 (emphasis added); *Amin v. Adams*, Va. Ct. App. No. 0282-94-2, 1995 WL 293043, at *2 (May 16, 1995).

To control requires the "[p]ower or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee" or "[t]he ability to exercise a restraining or directing influence over something." BLACK'S LAW DICTIONARY 329 (6th ed. 1990).

Before the filing of a return, a taxpayer lacks control over any potential refund. The taxpayer cannot claim a right to a federal refund by a lawsuit until the taxpayer files a return. *United States v. Clintwood Elkhorn Min. Co.*, 553 U.S. 1, 7 (2008) (unanimous). Likewise, in Virginia she does not have a property interest in withheld income tax payments until either

the state discovers an overpayment or the taxpayer applies for a refund. *George v. Com.*, 276 Va. 767, 772 (2008) (state and federal statutes impose trust on paid income taxes for income tax liability); 23 VA. ADMIN. CODE § 10-110-320(D). Even after a return is filed, the government may apply a setoff. 26 U.S.C.A. § 6402; VA. CODE ANN. §§ 58.1-524, 58.1-528.

Although the writ of *fieri facias* is a powerful creditor's tool, sometimes a creditor's attempts necessarily must fail "because rights of others, which the law regards as superior to his, stand in his way." *Evans v. Greenhow*, 56 Va. 153, 161–62 (1859). It is well settled that if an execution on a judgment is irregular and issued without authority of law, quashing it is the proper remedy. *Broyhill v. Dawson*, 168 Va. 321, 324 (1937).

Analysis

a. Shifflett and Deane lacked the necessary contemporaneous possession or control of any tax refunds because they had not filed any tax returns.

Before the general district court could order Shifflett or Deane to deliver tax refunds, Virginia Code § 8.01-507 required them (or their respective debtors or bailees[7]) to possess or control such refunds. *Amin*,

[7] The circuit court did not rule that any third party was Shifflett's or Deane's debtor or bailee, (Appx.37), but doing so would have been error. Neither government was either debtor's debtor because the existence of a tax refund obligation depended on the filing of returns (plus no government setoff) that had not occurred. *Boisseau*, 40 S.E. at 649; see also part I.a.ii.,

1995 WL 293043, at *2. Shifflett and Deane did not possess any 2015 tax refunds when the general district court entered its order on January 5, 2016. (Appx. 8-9, 13-15, 26-27, 31, 33.) The creditors never disputed that fact. (Appx. 75 at lines 11-13; 82 at lines 6-8, 20-24.)

Shifflett and Deane did not have control over any refunds at the time either. They had no power to manage, direct, or administer any refunds, BLACK'S LAW DICTIONARY 329, for the simple reason that no refunds then existed. Once Shifflett's and Deane's 2015 income taxes were collected, state and federal authorities held them in trust for the government to cover tax liabilities, *George*, 276 Va. at 772, and held any actual tax overpayment in abeyance, subject to the government's exercise of its setoff power for tax and non-tax liabilities, 26 U.S.C.A. § 6402; VA. CODE ANN. §§ 58.1-524, 58.1-528.

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above. In addition, neither government was either debtor's bailee. Creation of a bailment requires lawful possession of property and the duty to account for the thing as the property of another. *K-B Corp. v. Gallagher*, 218 Va. 381, 384 (1977); 2C MICHIE'S JURISPRUDENCE, Bailments §§ 2-3 (1992). No refunds or tax overpayment were then Shifflett's or Deane's property because they had not filed returns. *Clintwood Elkhorn Min. Co.*, 553 U.S. at 7; *George*, 276 Va. at 772. Moreover, a bailee has no title or ownership, 2C M.J., Bailments § 4, but both governments held legal title to the paid income taxes—even to the extent of any overpayment—as trustees for the benefit of the government to cover income tax liability, *George v. Com.*, 276 Va. at 772 (citing 26 U.S.C.A. § 7501; VA. CODE ANN. § 58.1-474); *see* BLACK'S LAW DICTIONARY 1514 ("trustee") (6th ed. 1990).

For tax refunds to have existed, Shifflett and Deane needed to have filed returns, *Clintwood Elkhorn Min. Co.*, 553 U.S. at 7; *George*, 276 Va. at 772; 23 Va. Admin. Code § 10-110-320(D), which they had not done (Appx. 12-13, 30-31). They might not even have needed to file.[8] Had returns existed, the court's orders would not have equivocated as to entitlement to refunds ("It appearing to the Court from such answers that Defendant(s) is/are or may be entitled to state and/or federal income tax refunds") or as to their future existence ("should Defendant(s) determine that he or she will receive no refund(s)"). (Appx. 6, 19.) In addition, had refunds existed, they would have had something to give to a sheriff (or creditor's attorney) to relinquish the purported control, something like a security or an evidence of debt. VA. CODE ANN. § 8.01-507.

On January 5, it was not possible for Shifflett and Deane to deliver or control tax refunds when at that time no refunds existed and it was uncertain whether they would ever exist. Without the required possession or control by Shifflett and Deane, the general district court lacked authority to require surrender of their contingent interests in tax refunds. Instead of perpetuating the error, the circuit court should have granted their motion for

[8] Some lower-earning taxpayers are not required to file a federal return. *See* IRS 1040 Instructions (2015) at 7-8, https://www.irs.gov/pub/irs-pdf/i1040gi.pdf.

summary judgment. To allow a trial court to demand delivery of tax refunds not in existence would not only be manifestly unjust, it would also fly in the face of strict compliance with what § 8.01-507 requires before a transfer order is authorized. *Network Sols., Inc.*, 259 Va. at 767.

b. <u>Shifflett's and Deane's ability to file tax returns did not amount to contemporaneous control over potential refunds.</u>

That Shifflett and Deane had the ability to file their returns did not imbue them with the necessary control over hoped-for refunds. Section 8.01-507 requires actual possession or control of the intangible at issue; the mere ability to take steps to remove a condition for obtaining actual control does not meet the statute's requirements, which must be strictly followed. *Network Sols., Inc.*, 259 Va. at 767. Plus, control must exist at the time of the return date, VA. CODE ANN. § 8.01-507 ("*are* in possession of or under the control"), but Shifflett and Deane had none on January 5.

c. <u>Shifflett and Deane face real harm.</u>

The *ultra vires* orders entered against Shifflett and Deane subject them to the very real risk of contempt. They could be summonsed to court under threat of imprisonment upon a show-cause proceeding. Repeatedly facing the same threat year upon year for the same type of void order

aggravates the harm.[9] The involuntary transfer of any of Shifflett's or Deane's property under Virginia Code § 8.01-507 must be done in full compliance of the law. *Evans*, 56 Va. at 161–62. The entry of such void transfer orders is an irregular practice that must cease. *Broyhill*, 168 Va. at 324.

CONCLUSION

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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[9] Both debtors faced show-cause proceedings for similar orders from the same creditors in 2015.

CERTIFICATE OF SERVICE

In compliance with Rule 5:26, I hereby certify that on June 8, 2017, the correct number of true and accurate copies of this Opening 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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