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IN THE

Supreme Court of Virginia

RECORD NO. 161640

THE ROBERT AND BERTHA ROBINSON FAMILY, LLC,

Appellant,

v.

DOUGLAS O. ALLEN, *et al*.,

Appellees.

REPLY BRIEF OF APPELLANT

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I. THE ALLENS' MISSTATEMENTS OF FACTS

Throughout their brief, Douglas and Deborah Allen (the "Allens") misstate numerous facts which are either not supported by the record or directly contradicted by the record. The Robert and Bertha Robinson Family, LLC (the "LLC") believe a correction of these misstatements is relevant and necessary for a proper determination by this Court of the matters before it. While the LLC does not address every misstatement made therein, it does believe a failure to address some of the material misstatements may have a prejudicial effect on the outcome of this appeal. As such, the LLC highlights two misstatements which it argues are key facts for the correct determination of this appeal.

First, the LLC points to the Allens' factual claim that the Allens and the LLC agreed to a withdrawal of the LLC's *claim* and agreed that the Allens' counterclaim should be given consideration by the Court. (Brief of Appellees, p. 1, ¶ 1, p.2 ¶ 1, p. 6, ¶ 2, p.7 ¶ 1, p. 8 ¶ 1). This contention is not supported by the record on appeal. In fact, the record clearly states that the Allens and the LLC agreed to the withdrawal of the LLC's *appeal* not its *claim*. (JA 269 – 270). The record further shows the Allens and the LLC only agreed that the Allens should be heard on the issue of discovery sanctions not their counterclaim or motion for sanctions for the LLC's bring

of a claim for alleged lack of good faith. *Id*. This fact as proven by the record is further supported by the Allens' objections to the LLC's Written Statement of Facts In Lieu Of Transcripts. Therein, the Allens list numerous objections to the LLC's factual and procedural recitation but never object to the LLC's statement encapsulating the agreement between the Allens and the LLC regarding the withdrawal of the appeal. (JA 278 – 282).

While the misstatement may seem trivial in nature, the LLC argues that the difference between agreeing to the withdrawal of the LLC's appeal and the withdrawal of the LLC's claim is profoundly different and would require different analyses by this Court. If the Allens and the LLC's agreement had been only for the withdrawal of the LLC's claims, the Allens, procedurally, are in a much better position to argue that their counterclaim was still before the trial court after the withdrawal of the LLC's claim, assuming the trial court had jurisdiction over the counterclaim. However, the agreement was for the withdrawal of the appeal as evidenced by the record. This procedural difference clearly changes the analysis which must be undertaken because if this Court follows the Allens' argument that the general district court claim and counterclaim became one case pursuant to Va Code § 16.1-88.01, then it must also follow that the withdrawal of the

appeal i.e. the whole case, both claim and counterclaim, precludes the Allens from moving for judgment on their counterclaim. Of course, realizing this paradox in logic, the Allens attempt to distort the record by claiming that only the LLC's claim was withdrawn not the whole case. This is not a correct recitation of the facts or procedure of the case and is an important point that this Court should not overlook when rendering a decision on this case. The fact is the appeal, the whole case, both claim and counterclaim, was withdrawn not just the LLC's claims.

The Allens' second misstatement of fact presents their theory of the case as undisputed fact when in fact it is nothing more than their proffer of what happened between the LLC and the Allens. The Allens state that the parties reached an oral agreement at the conclusion of the Allens' occupancy of the premises whereby the LLC waived its rights under the lease agreement (Brief of Appellees, p. 7, ¶ 2). However, as admitted by the Allens, the trial court took no evidence or testimony from the parties whereby their claim that the parties entered into an oral agreement was found to be fact by the trial court. (*See*. JA 279 at ¶ 4, where the Allens admit "No testimony or evidence was received by this Court at either the June 8, 2016 hearing or the July 21, 2016 hearing"). The Allens' statement that an oral agreement existed is and was contested by the LLC who

argued that the lease agreement precluded such oral agreements as a matter of law. (JA 274).

Rather than admitting this is the Allens' theory of the case, the Allens have consistently attempted to argue that this theory is a hard fact even though the trial court made no finding that an oral agreement existed precluding enforcement of the lease agreement. The LLC argues that the reason the Allens have consistently attempted to forward this idea of an oral agreement as a foregone conclusion of undisputed fact is because if they admit it is just their factual theory of the case, yet to be proven through the proceedings in the trial court, they, by extension, admit that the LLC's claims were made in good faith.

The LLC beseeches this Court to not accept the Allens' factual theory of the case as an indisputable fact. The LLC denies this theory is fact and based its dispute of this fact on its good faith understanding of the lease agreement language and its own theory of the facts. The LLC argues that a failure by this Court to differentiate between the Allens' theory of the case and proven facts developed through the trial exhibits and testimony of witnesses, which the Allens admit the trial court never took or heard, would lead to a miscarriage of justice.

II. THE ALLENS' MISAPPLICATION OF LAW

A. Misapplication as to Assignment of Error No. 1

The Allens argue that the noting and perfection of an appeal by one party to a general district court case invokes the appellate jurisdiction for all claims brought in the general district court including counterclaims. The Allens' argument does not point to specific statutory language stating that a counterclaim is appealed upon a plaintiff noting and perfecting its appeal. Instead, the Allens cite numerous non-authoritative and non-precedential Virginia Circuit Court decisions as support for their argument.

The LLC urges this Court to not adopt the holdings and legal grounds recited in the cases the Allens cite because they do not properly follow the rules of statutory construction and interpretation when an abrogation of the common law may be the result. The rule is clear that an appeal does not exist at common law. *Covington Virginia v. Woods*, 182 Va. 538, 543, 29 S.E.2d 406, 409 (1994). Furthermore, when a right created by statute is in derogation of the common law, the statute must be strictly construed. *Chesapeake & O. Ry. Co. v. Kinzer*, 206 Va. 175, 181, 142 S.E.2d 514, 518 (1965). These two rules of law must be followed when interpreting statutes granting the right of a party to invoke a court's appellate jurisdiction. A court's failure to abide by these principles is self-evident

proof that the decisions and opinions made are not correct and should not be followed by courts of higher review. With these two rules and the principle they promulgate in mind, a close look at the cases the Allens cite shows that this Court should not give deference to those courts' opinions and shows the correctness of the LLC's argument that this Court should not adopt the holdings as stated in those cases.

The Allens rely heavily upon the Virginia Circuit Court arguments that an appeal by a plaintiff also appeals a defendant's counterclaim. In particular, the Allens rely almost exclusively on the decision *Boyce v. Athey*, 4 Va. Cir. 19 (Frederick County 1980) for their argument that a counterclaim is appealed upon a plaintiff noting and perfecting its appeal of its claims. However, the *Boyce* court in finding that a counterclaim is "piggybacked" on appeal failed to follow the rules stated in *Covington Virginia* and *Chesapeake & O. Ry. Co.* In reaching its decision, the *Boyce* court does exactly what this Court has stated it should not do in interpreting statutes that abrogate the common law.

In *Boyce*, the Frederick County Circuit Court did not cite specific statutory language stating that the legislature allows a counterclaim to piggyback on the appeal of another party's appeal. Instead, the *Boyce* court determined that such a right existed by reciting several statutes and

interpreting the statutory scheme it believed the legislature intended pass. *Boyce*, 4 Va. Cir. at * 20 (holding that the interplay between Va. Code §§ 16.1-106, 16.1-88.01, and 16.1-112 make the legislative intent clear that a counterclaim should piggyback on another party's appeal). The *Boyce* court's use of the statutory scheme to divine the intent of the legislature is in direct conflict of the rules on statutory interpretation and construction in dealing with issue that abrogate the common law.

The rules as stated in *Covington Virginia* and *Chesapeake & O. Ry. Co.* explicitly forbid this type of interpretation because it requires the court to speculate as to what the intent of the legislature was when creating the statute rather than relying upon the text of the statute passed by the legislature. A court should not delve into speculation or "soothsaying" of what the legislature intended when interpreting statutes that may abrogate the common law. *Chesapeake & O. Ry. Co.*, 206 Va. at 181. Such interpretation methods put the speculative opinions of the courts above the textual language of the legislature which must be the first and, in the case of abrogation of the common law, the only source of interpretation.

The LLC requests this Court not follow the same mistake in interpretation that the *Boyce* court made. If the legislature wanted a counterclaim to piggyback upon the appeal of another party's claims it

would have done so specifically through the statutory language. However, the legislature in this case has not adopted specific language allowing such finding by the courts and the LLC argues that this Court should not substitute its own belief on what the legislature may have intended to do in place of what the legislature specifically stated in the text of the laws it passed. To do so would make courts super-legislatures which rewrite the laws based upon what the court believes the legislature meant or intended rather than an interpretive body.

B. Misapplication as to Assignment of Error No. 2

Like assignment of error number 1, the Allens also misapply the law to the facts of this assignment of error. The rule once again is clear and states that a pleading, motion, or other filing executed by a party or attorney for that party must be well grounded in fact or law. Va. Code § 8.01-271.1. However, the Allens' request is not that this Court uphold the sanctions because no facts exist to support the LLC's claim but rather ask this Court to uphold sanctions because the LLC at the time of filing its appeal did not possess all evidence necessary to prevail on its good faith claim. The LLC argues that such an interpretation of the sanctions statute would change the standard from one of good faith to one where a party can be sanctioned for a good faith claim that they just cannot prove. A well-

known example of this issue is shown through the analogy of the tree that falls in the woods without a witness to verify it makes a sound when it falls. According to the Allens' argument and interpretation of the sanctions statute, a person who claimed that the tree does in fact make a sound when it falls would be subject to sanctions because at the time they state the tree made a sound, a statement they would be making in good faith, they have no proof that the tree did in fact make a sound. Obviously, without a witness to testify to the fact the tree did in fact make a sound, a person could never prove that the tree did in fact make a sound. However, just because a person who claims that a tree makes a sound when it falls and nobody is around to hear it cannot prove it does not mean that their belief that the tree makes a sound is made in bad faith because a tree does in fact make a sound regardless if a witness is present to observe it or not.

Similarly, in this case, the LLC had a good faith belief that the Allens breached the lease agreement by failing to return the premises to the pre-lease conditions. The LLC knew of evidence showing the damage sustained to the property at the time of filing and had a good faith belief that it would collate and produce those documents on appeal of the case. However, do to health concerns of the managing member of the LLC, the evidence admittedly was not produced in a timely manner. Nevertheless,

the LLC's failure to produce the documentation does not mean it did not exist and that the claim upon which the evidence was based was not made with good faith. If the rule becomes one of proof verses good faith belief then every unsuccessful plaintiff would be subject to sanctions because every unsuccessful plaintiff would fail to obtain evidence necessary to prove its claim which according to the Allens' argument and the trial court's ruling is sanctionable. The LLC argues that this Court should not adopt such a rule.

Instead, the LLC urges this Court to identify the dichotomy between claims brought in bad faith i.e. claims brought to harass, annoy, or vex a litigant verses claims brought in good faith which due to evidentiary limitations cannot be proven. The LLC requests the Court to explain this dichotomy and adopt the LLC's argument about this dichotomy so that the rule may be plainly understood by all. In so doing, the LLC requests the Court overturn the trial court's ruling that a failure to have all evidence at the time of filing a case is tantamount to a *per se* bad faith claim. After all, if this were the rule, there would be no need for discovery or rules regulating the discovery process because a party would need to have all evidence before filing a case in order to avoid sanctions thus making discovery of evidence unnecessary. This contradictory result which would

come about if such a rule were adopted shows the error in discretion by the trial court in making such a ruling.

C. Misapplication as to Assignment of Error No. 3

The Allens' final misapplication of law stems from its argument about how Va. Code § 16.1-106.1 should be interpreted. In their argument, the Allens claim that Va. Code § 16.1-106.1(E) allows a trial court to enter any orders it deems appropriate, including granting judgment to the non-withdrawing party without trial and without hearing any testimony or accepting any evidence, upon the withdrawal of an appeal. However, the Allens' argument requests this Court to ignore subsection (C) of the statute which clearly states that subsection (E) is only applicable to the extent it does not contradict subsection (C)'s requirement that the general district court's judgment be reinstated. Va. Code § 16.1-106.1. Unfortunately for the Allens, this Court has held that such an interpretation of statute is plainly wrong. *Manu v. GEICO Cas. Co.*, ____ Va. _____, 798 S.E.2d 598, 607 (2017) (citing *Oraee v. Breeding*, 270 Va. 488, 498, 621 S.E.2d 48, 52 (2005)).

The Allens' argument in essence is that this Court should ignore subsection (C) and allow a court to enter any order it deems fit to end the litigation even if that order does not reinstate the general district court's

judgment. Such an interpretation is against the clear and plain text of the statute. The statute clearly states that a party may withdraw its appeal at any time. Va. Code § 16.1-106.1(A). Upon moving for a withdrawal of the appeal, the non-moving may object and request the court not allow the appeal. Va. Code § 16.1-106.1(C). Upon receiving the objection, the trial court may decline to allow the withdrawal. *Id*. However, if the court allows the withdrawal, the court shall enter an order disposing of the case in accordance with the lower court's ruling subject to subsections (E) and (F). *Id*.[1] The Allens' argument requests the Court ignore this legislative mandate, deem subsection (C) as superfluous, and ignore even the plain text of subsection (E) which states that a court can only award damage that have ***accrued*** since the noting of the appeal, and instead allow the trial court's award of $2,600, which accrued before the general district court case and was the subject of the general district court case, to stand. Such a request and argument are plainly contrary to the text of the statute and

[1] The Allens argue that subsection (C) only applies if no objection is filed to the withdrawal. However, this argument makes no sense because it could also then be argued that subsection (E), upon which the Allens rely, could not be invoked as the statute states that such subsections are only applicable if no objection is filed. Clearly, the Allens cannot have it both ways.

any fair interpretation of the law on this subject. The LLC request this Court not agree with such an argument or interpretation.

III. PRAYER FOR RELIEF

WHEREFORE, The Robert and Bertha Robinson Family, LLC humbly requests this Court overturn the judgment of the Trial Court as contrary to law, specifically Va. Code § 16.1-106.1(C), in the alternative, dismiss Douglas and Deborah Allens' counterclaim appeal for lack of subject matter jurisdiction, overturn the Trial Court's granting of sanctions, and finalize the case or remand the case to the Trial Court for further proceedings based upon this Court's ruling, and/or grant such other relief this Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that Rule 5:26(e) of the Supreme Court of Virginia has been complied with and pursuant to the Rule, a PDF version of this brief has been filed through VACES and three paper copies delivered to the Clerk's Office. An electronic version has also been delivered to opposing counsel via email. I further state and certify that I sent the forgoing Opening Brief for Appellant, consisting of 13 pages, via U.S. Mail, Pre-paid Postage, this 10th day of July, 2017 to:

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