In The

Supreme Court of Virginia

RECORD NO. 171067

CATJEN, LLC,

Appellant,

v.

HUNTER MILL WEST, L.C.,

Appellee.

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

In its Appellant's Brief ("Brief"), Catjen LLC ("Creditor") seeks reversal of the trial court's decision to set aside Creditor's post-foreclosure deficiency judgment of $2.42 million on a confessed judgment note (the "Confessed Note") in the original amount of $1.0 million made by debtor Hunter Mill West LLC ("Debtor").

Upon Debtor's intervention, the trial court reduced the deficiency judgment to "only" $1,101,171.75— which represents Creditor's relief in addition to (i) foreclosing on Debtor's 5-Acre property for a credit bid of $1.3 million and (ii) receiving nearly $500,000 in interest payments under the Note prior to 2011. Joint Appendix ("JA") 316-318. Notably, the Court's reduction was made after both sides admitted that the total amount due under the Confessed Note was a "pure legal issue" with no disputed facts. JA 47. Indeed, it was and it still is.

Now Creditor seeks to reverse and reopen the case – by requesting a "trial" on the Confessed Note (without identifying a single contested fact, as opposed to a contested result) – so that it can inflict additional millions of dollars in compound interest, attorney fees, and other costs. Neither Virginia law or logic permit such a result.

STATEMENT OF FACTS

Terms of Confessed Note

On November 19, 2008, the Debtor, a family-owned partnership, executed the Confessed Note, as well as the Deed of Trust ("Deed of Trust") encumbering its five-acre parcel in Fairfax County. JA 2-20. The Confessed Note had a principal value of $1.0 million and a non-default interest rate of 14%. JA 2. The Note anticipated monthly interest payments until maturity (one year from execution) and authorized compound interest for every "monthly payment" not made. JA 4.

> Borrower hereby expressly acknowledges and agrees that this Note provides for payment of compound interest and that the principal balance of this loan shall increase whenever, and every time, that a **monthly payment** due here under [sic] is not received by Lender, that month's late fee, as well as interest due and payable **for that month**, shall be added to the total principal balance of the Loan. The principal balance shall thus increase, and failure to make any subsequent **monthly payment(s)** shall also have the effect of increasing the principal balance of the debt due hereunder.

JA 4 (emphasis added).

Pre-maturity, the Note utilized a 14% interest rate based upon a year of 360 days, which equals an effective rate of **14.194%.1** JA 3.. Upon declaring "an event of default," the Confessed Note vested Creditor with two additional remedies, namely (i) a post-default interest rate of 24.194% (on a per annum basis) and (ii) and a one-time "late charge" equaling 10%

of the outstanding principal. JA 4-5. These latter sanctions were specifically designated as "**post-default**," as opposed to "compounding interest" which specifically (and only) applied to "monthly payments" under the Confessed Note. *See id*.

Confessed Note Goes into Default

A year later (November 19, 2009), the Confessed Note came due. The Debtor did not pay it off, although it had made all monthly interest payments to that date. For the next three years, Debtor made continued monthly interest payments which Creditor accepted. JA 214-219. During this time, the Creditor did not take judgment on the Confessed Note although it was continually in default. JA 251-54.

On November 9, 2012, after an ongoing dispute with Creditor over the payoff amount, Debtor filed a bankruptcy petition to determine the amount due under the Confessed Note. JA 66-70.

On October 15, 2013, the Bankruptcy Court ruled *inter alia* on the amount due under the Confessed Note. In precise verbiage, it sustained the Debtor's objection to Creditor's inflated interest claims and specifically stated that the claim on the Note "is **reduced and fixed** at $1,504,998.05 as of the [Debtor] Petition Date," i.e. November 9, 2012. JA 66-70

(emphasis added). The reduced figured **included** a 10% penalty on the entire principal balance, as well as the default rate of 24.194%. JA 257.

The Bankruptcy Court in its Order did not delineate whether its determined amount ($1,504, 998.05) was principal or interest – nor was that fact even relevant to its ruling. *Id*. Nor did the Court rule on the issue of simple vs. compound interest. *Id*.

Contrary to the assertions in Creditor's Brief, Debtor never acknowledged that the $1.504 million amount due "compounded after the date of default." Brief at 2. In fact, the Bankruptcy Court made no reference to monthly late fees on the Note in its ruling. *See* JA 257-75.

Foreclosure

On July 21, 2016, the Creditor foreclosed on the Confessed Note and the Deed of Trust. The Debtor's 5-acre parcel was sold at auction, per Virginia law, where the Creditor obtained title through a "credit bid" of $1.3 million. JA 24. At that point, the $1.0 million principal was extinguished.

After the Foreclosure, the sole remaining issue was the balance due on the Note, i.e. the unpaid interest from 2012 going forward. In that respect, there was no "factual dispute" as the Debtor had made no payments since the debt was fixed as of November 9, 2012 and the agreed

default rate (until foreclosure) was 24.194%. Therefore, the undisputed parameters of the interest owed were as follows:

- The original principal debt of $1.0 million;
- The amount of $1,504,998 due as of November 9, 2012;
- The $1.3 million credit from the foreclosure on July 21, 2016.

On August 11, 2016, following the foreclosure sale, the Creditor appeared in Fairfax County Circuit Court and confessed judgment ("the Confessed Judgment") against the Debtor in the additional amount of **$2,402,838.20** with interest continuing to accrue at 24.194%. JA 1-26. In its Confessed Judgment, the Creditor attached a schedule of payments ("the Schedule") which confirmed that the principal due as of "November 2009" (the maturity date) was "$1.0 million." JA 22.

The Creditor's Schedule erroneously charged the one-time penalty (10%) as well an inflated post-default interest rate (24.333%, rather than 24.194%) for every payment beginning on December 1, 2009. JA 22-24. The Schedule then "compounded" the amounts allegedly due, by adding these new penalties to the underlying principal for every single payment period – even though no monthly payments were due after November 2009. *Id*. As a result, the amount due exploded from **$1.504** million in

November 2012[1] to **$3.618** million in July 2016 – an increase of 241% in forty-four (44) months. JA 24.

Debtor Files Timely Motion to Set Aside

On September 9, 2016, upon notice of the Confessed Judgment, the Debtor by counsel filed a "Motion to Set Aside." JA 27-29. Per Virginia Code Section 8.01-433, the Circuit Court set the matter for a "trial" on November 8, 2016. Prior to the trial, Catjen filed a "Trial Memorandum" which attached relevant exhibits and articulated all its positions. JA 30-34.

At the "trial" on November 8, 2016, neither side put on any witnesses, as there were no relevant factual disputes; the only argument was how the post-default interest rate applied. (In response to a question from the bench on November 8th regarding the amounts due, Creditor's counsel replied: "I believe it's a pure legal issue. There is no challenge of the actual calculation of the principal and interest"). JA 47.

At the conclusion of the trial, the Court denied Debtor's motion to set aside the Confessed Judgment and confirmed the initial judgment. JA 54; JA 57. That would have been the end of this case, except for one fact.

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[1] In a concession to its own dishonest tactics, the Creditor on its Schedule (without any explanation) reduces the amount due from "$1.782 million" to "$1.504 million" for November 2012 following the Bankruptcy Court ruling—while continuing to utilize the same methodology that produced the original inflated figure. JA 23.

Ironically, the Creditor asked that the case be held open for "sanctions" against Debtor for challenging its calculations. JA 57. Accordingly, no final order was entered; rather, the Court set the matter for a hearing on December 16, 2016 on "Plaintiff's Request for Sanctions." JA 55.

Debtor Challenges Use of Compounding

Prior to the sanctions hearing, new counsel entered an appearance for Debtor. On November 29, 2016, the new counsel filed a "Motion to Reconsider" (the "Motion") the Court's November 8th ruling which specifically challenged the use of "compounding" after the Note's maturity in November 2009. JA 58-70. That Motion to Reconsider and the motion for sanctions was then jointly heard by the Court on December 16th, 2016,[2] which took the entire matter under advisement. JA 98.

Four months later, the Court set a hearing on **April 21, 2017** in order to issue its ruling on the Motion to Reconsider, as well as sanctions. After further argument on that date, the Court reversed its earlier position and granted Debtor's motion to reconsider the November 8th trial decision, i.e. finding that the Creditor had wrongfully applied the interest rate. JA 123-125. At that hearing (the third hearing on the specific terms of the Note),

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[2] All the trial court hearings were held before the Honorable Robert Smith, except the nonsuit motion of May 5th heard by Judge Azcarate.

the Court requested Debtor's new counsel to provide the non-compounding calculations for purposes of entering a final judgment.[3] JA 125.

Court Determines Amounts Due

Having ruled on the compounding issue, Court then set a follow-up hearing for **May 19, 2017** for a final calculation of amounts due on the Confessed Note. JA 126. Specifically, the April 21, 2017 order continued the matter to May 19, 2017 only for "entry of order regarding interest." JA 141. No other matter was still at issue.

Prior to the May 19th hearing and recognizing that it had lost on its key legal issue, Creditor attempted to nonsuit its Confessed Judgment case. JA 142-146. On May 5, 2017, the Court (J. Azcarate presiding) heard and denied the Creditor's attempted nonsuit as the matter had "already been submitted to the court and adjudicated." JA 161, 163, and 165.

Prior to the May 19th hearing, Creditor filed a bevy of motions and briefs with the Court:

- Motion to Supplement or, in the Alternative, for Leave to Amend its Confession of Judgment;
- Motion to Reconsider the April 21st order;

[3] At no time did Creditor proffer a damages figure except the compounded figure of $2.42 million.

- Submission of Amounts Due Under the Note.

JA 166-280. Each Creditor motion was extensively briefed and contained multiple exhibits which sought to (i) justify the original calculation under the Confessed Judgment, (ii) amend the Confessed Judgment so as to add additional costs, fees and interest, or (iii) nonsuit the underlying case so that it could be "refiled" and "tried" before a different judge. *Id*.

At the hearing on May 19th, 2017, Debtor's counsel presented the Court with a spread sheet which determined the post-default simple interest *per diem* ($662.95),[4] then multiplied that by the days from the Bankruptcy Court determination (November 9, 2012) until the foreclosure (July 22, 2016). JA 318. That interest figure of $896,173.20 was then added to the $1,504,998.55 due on November 9, 2012 to reach a total debt of **$2,401,171.75**[5] due at foreclosure. Minus the credit bid of $1.3 million, the balance was **$1,101,171.75**. That amount was then proffered by Debtor as the deficiency judgment amount. *Id*.

Without any competing proffer from Creditor, the Court entered a final judgment in that amount. JA 316-17. The interest rate on the Confessed

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[4] The Confessed Note principal amount of $1.0 million at the effective interest rate of 24.144%.

[5] This amount should not be confused with the $2,402,838.20 submitted as the confessed judgment.

amount, which solely represents unpaid interest (already accrued at 24.144%), was set at the judgment rate. *Id*.

On June 8, 2017, Creditor noticed this appealed. JA 326-27.

AUTHORITIES AND ARGUMENT

Creditor asserts there are three errors with the final judgment of the trial court. First, that the trial court "short-circuited" litigation contravening statutory requirements. Second, that the trial court misapplied certain principles of *res judicata* with respect to the amounts awarded. Finally, that the trial court improperly denied a non-suit. All three of these contentions are inaccurate both factually and as a matter of law.

First, the trial court did proceed as required under § 8.01-433 to set aside the confessed judgment and require "future proceedings . . . as to the court may seem just." Second, Creditor incorrectly applies the legal standards of *res judicata* to the basic underlying facts. Finally, there is no absolute right to a non-suit after a matter has been submitted for judicial consideration and ruled upon.

STANDARD OF REVIEW

Debtor agrees that statutory interpretation is a pure question of law which is reviewed *de novo*. *See Fitzgerald v. Loudoun County Sheriff's Office*, 289 Va. 499, 504, 771 S.E.2d 858, 860 (2015). However, Creditor

challenges the discretionary choices of the trial court judge, as proscribed by Virginia Code § 8.01-433, and therefore Assignment of Error 1 should be reviewed for an abuse of discretion. *See Grattan v. Commonwealth*, 278 Va. 602, 620, 685 S.E.2d 634, 644 (2009) (Appellant asserted that "the circuit court abused the discretion afforded to it under this statute . . . ."). When reviewing "whether a trial court abused its discretion" this Court does "'not substitute our judgment for that of the trial court. Rather, we consider only whether the record fairly supports the trial court's action.'" *Id*. (quoting *Beck v. Commonwealth*, 253 Va. 373, 385, 484 S.E.2d 898, 906 (1997)). In contrast to the de novo standard of review:

> the abuse of discretion standard requires a reviewing court to show enough deference to a primary decisionmaker's judgment that the court does not reverse merely because it would have come to a different result in the first instance.

Lawlor v. Commonwealth, 285 Va. 187 *(*citing *Evans v. Eaton Corp. Long Term Disability Plan*, 514 F.3d 315, 322 (4th Cir. 2008)).

Debtor agrees that the standard of review is *de novo* for assignments of error 2 and 3.

DISCUSSION OF THE ISSUES

1. The trial court properly followed the statutory procedures for modifying a confessed judgment.

Confessed judgments are creatures of statute. *See Westlake Legal Grp. v. Flynn*, 293 Va. 344, 350, 798 S.E.2d 187, 190 (2017). Virginia Code § 8.01-432 permits a debtor's attorney-in-fact to confess judgment on behalf of the creditor and treats said confessed judgment as a final, binding judgment. However, "[o]btaining a judgment by confession pursuant to Code § 8.01-432 is an extraordinary remedy." *Safrin v. Travaini Pumps USA, Inc.*, 269 Va. 412, 419, 611 S.E.2d 352, 356 (2005).

Thus, under Virginia Code § 8.01-433, a confessed judgment may be set aside where a defendant can raise "any ground which would have been an adequate defense or set off in an action at law instituted upon the creditor's note, . . . upon which such judgment was confessed." Va. Code § 8.01-433. The merits of those adequate defenses are irrelevant for the purposes of Virginia Code § 8.01-433; indeed what matters is whether or not the debtor timely raised defenses. *See Pate v. Southern Bank & Trust Co.*, 214 Va. 596, 203 S.E.2d 126 (1974) (overturning trial court's denial to set aside confessed judgment where fraud was alleged). *See also NationsBank v. Sarelson*, 31 Va. Cir. 544, 544 (1992) ("The decisive issue is whether defendants have raised an "adequate defense" to the

enforcement of the underlying debts.”). “Whenever any such judgment is set aside or modified,” Virginia Code § 8.01-433 states that “the case shall be placed on the trial docket of the court” and “[a]fter such case is so docketed the court shall make such order as to the pleadings, future proceedings and costs **as to the court may seem just**.” Va. Code § 8.01-433 (emphasis added).

Creditor correctly asserts that Virginia Code § 8.01-432 initially requires the court enter a confessed judgment in an amount the creditor would deem acceptable. Creditor is likewise correct in asserting that Virginia Code § 8.01-433 states that “the case shall be placed on the trial docket of the court.” Indeed, that is exactly what happened.

When Debtor filed a motion to set aside the confessed judgment, the Court set a “trial” date (November 8, 2016); prior to which, Creditor filed a “Trial Memorandum.” There was a “trial” on November 8, 2016 at which each side appeared and agreed that no facts were disputed. Subsequently, that ruling was challenged by the Motion to Reconsider the interest awarded, which the trial court took under advisement. All proceedings after the November 8, 2016 hearing were therefore “post-trial” motions not subject to § 8.01-433. The trial court then granted Debtor’s Motion to Reconsider at the April 21, 2017 hearing. That is to say, the trial court

made a post-trial finding on April 21, 2017 that the November 8th judgment should be modified as a matter of law and placed a further hearing on its docket, i.e. on May 19, 2017, to set the interest. JA 123-126.

"A decree that enters judgment for a party is not final if it 'expressly provides that the court retains jurisdiction to reconsider the judgment or to address other matters still pending in the action before it.'" *Kellogg v. Green*, 2018 Va. LEXIS 4, *8 (2018) (quoting *Super Fresh Food Mkts. v. Ruffin*, 263 Va. 555, 561, 561 S.E.2d 734, 737 (2002)). *See also Johnson v. Woodard*, 281 Va. 403, 409-10, 707 S.E.2d 325, 328 (2011) ("[A] circuit court may avoid the application of the 21-day time period in Rule 1:1 by including specific language stating that the court is retaining jurisdiction to address matters still pending before the court."). Indeed, this is what occurred. *See* JA 57. *See also* JA 98. After the November 29, 2016 motion to reconsider, the case <u>remained</u> on the "trial docket" and the trial court made "order as to the pleadings, future proceedings and costs." On May 19, 2017, the trial court issued the final order in the matter, when it made a ruling as to the interest owed.

Creditor errs in assuming that § 8.01-433 "requires the case to then proceed as if the creditor had filed an action on the debt." Brief at 14. In reality, all that is required is that the case be placed on the "trial docket"

with such "pleadings, future proceedings and costs as to the court may seem just." Va. Code § 8.01-433. The term "trial docket" has no definition in the Rules of the Supreme Court nor in case law. Rather, it appears to be used by trial courts as an analogy for 'active proceeding.' *See First American Bank v. MacDonald*, 30 Va. Cir. 299, 300, 1993 Va. Cir. LEXIS 12, *3 (1993) ("I find that the issue of attorneys' fees is properly before the court since, by statute, **when a confessed judgment is set aside** or modified, the **matter must be set on the trial docket of the court** and heard as if an action at law had been instituted upon the note. Here, that portion of the confession of judgment relating to attorneys' fees and costs was **specifically set aside and the matter set down for <u>hearing</u>**.") (emphasis added) (internal citations and quotations omitted).

The plain language of Virginia Code § 8.01-433 cuts against the arguments of Creditor in other ways. After the case is docketed for further proceedings, it specifically allows judicial discretion for the remainder of the matter. Specifically providing that, "[a]fter such case is so docketed the court shall make such order as to the pleadings, future proceedings and costs **as to the court may seem just**." Va. Code § 8.01-433 (emphasis added). That is to say, there is no explicit requirement—as Creditor asserts—that the matter be set for a trial on the merits, go through

discovery, and proceed to a final trial. In the present matter, the trial court followed the requirements of Virginia Code § 8.02-433.

Creditor analogizes the procedural history to a situation where the litigation was impermissibly "short-circuited" because there was a "disputed and incomplete factual record." Brief at 17. However, counsel for Creditor acknowledged that only a "pure legal issue" existed at the November 2016 trial when it had the opportunity to raise evidence. JA 47. Likewise, at the hearing on Debtor's Motion to Reconsider counsel for Creditor did not raise any disputed factual issues. JA 104-141. There were none.

Creditor relies upon *AAA Disposal Servs., Inc. v. Eckert*, 267 Va. 442, 593 S.E.2d 260 (2004) for the proposition that a case need "proceed[] as if an action at laws had been instituted on the debt" where a confessed judgment is set aside. Brief at 16. However, the present matter is distinguishable from *Eckert*. In *Eckert*, the Debtor filed a confessed judgment pursuant to Virginia Code § 8.01-431 for the full amount of the *ad dandum* clause in an underlying lawsuit. In upholding the trial court's decision to grant a non-suit, the Virginia Supreme Court noted that there had been no entry of judgment and that the plain language of § 8.01-431 required that a Creditor be willing to accept the amount of the confession. There was no challenge under Virginia Code § 8.01-433 nor were there any

hearings vis-à-vis the validity of the underlying amounts. The only issue before the Court was whether or not that confession was a final judgment such that a non-suit would be untimely.

In the present case, Creditor successfully confessed judgment in the amount it so desired. JA 1. Following the presentation of "adequate defenses" vis-à-vis a Virginia Code § 8.01-433 challenge, the trial court (with the approval of both counsel) decided that the amounts due on the Note was a purely legal matter. JA 47 and 141. In so deciding, the trial court exercised its judicial discretion under Virginia Code § 8.01-433 that only a hearing as to the legal arguments on the applicable interest was necessary. JA 141. At such an adequately noticed hearing, the Court reached its decision regarding the amounts due. JA 316.

The trial court did not treat the "disputed debt in a summary fashion." Brief at 17. The Creditor had four separate opportunities, from November 2016 to May 2017, to be heard, during which it submitted countless pleadings and exhibits and gave hours of oral argument to the trial court. Ironically, appellant asserts that "factual disputes are not to be resolved on a summary basis and that courts should not short-circuit the litigation process." Brief at 17-18. Although appellant correctly cites *Fultz v. Delhaize Am. Inc.,* 278 Va. 84, 677 S.E.2d 272 (2009) for that proposition, Creditor

must recognize is own inconsistent positions. *See* JA 47. It cannot have it both ways, especially after admitting before the trial court that the issue is a "pure legal issue." This Court has held that:

> [a] litigant is not allowed to approbate and reprobate. This Court has stated that a party may not "in the course of the same litigation occupy inconsistent positions." It is improper for a litigant to invite error and take advantage of the situation created by her own wrong.
>
> The prohibition against approbation and reprobation forces a litigant to elect a particular position, and confines a litigant to the position that she first adopted.

Matthews v. Matthews, 277 Va. 522, 528 (2009) (internal citations omitted).

In short, only after suffering legal defeats does Creditor now come before this Court pleading *disputed facts*. In reality, the trial court only needed a copy of the Note, an understanding of mathematics, and the ability to apply the correct legal standards. The trial court below had all of the above and correctly followed the procedures of Virginia Code § 8.01-433 in arriving at the correct legal conclusion.

2. The prior judicial determinations were irrelevant to the ultimate, relevant issue.

A. The principal of the Note and the manner to calculate interest had not been judicially determined.

Creditor asserts that *res judicata* principles required the trial court to calculate compounding interest on a principal of $1,504,998.55. Creditor is

correct that a valid order was entered by a court of competent jurisdiction (the "Claims Order"). However, it is telling that Creditor purports to describe the effect of the Claim Order without actually quoting from it. Specifically, the Bankruptcy Court held that: "Claim 5 filed by [Creditor] is reduced and fixed at $1,504,998.55 as of the [November 9, 2012.]" JA 67. Nothing in the order describes that amount as "principal." JA 66-70. Nor can any inference be drawn in that respect.

"It is the firmly established law of this Commonwealth that a trial court speaks only through its written orders." *Davis v. Mullins*, 251 Va. 141, 148, 466 S.E.2d 90, 94 (1996). "[I]t is fundamental that 'a court of record speaks only through its written orders.'" *Va. Fuel Corp. v. Lambert Coal Co*., 291 Va. 89, 107 (2016) (quoting *Upper Occoquan Sewage Auth. v. Blake Constr. Co.*, 266 Va. 582, 588, 587 S.E.2d 721, 724 (2003). Any conflict between the contents of an order and a transcript of a trial proceeding must be resolved in favor of the court order. *Stamper v. Commonwealth*, 220 Va. 260, 257 S.E.2d 808 (1979); *Kern v. Commonwealth*, 2 Va. App. 84, 341 S.E.2d 397 (1986).

Nowhere in the Claim Order from the Bankruptcy Court does it identify the <u>principal</u> or how it relates to the amount fixed at $1,504,998.55. Neither does it state that compounding interest was used to derive that

figure and that same concept must apply to that balance going forward. Rather, all that it states is that as of November 9, 2012, Debtor owed a sum certain. Indeed, the trial court relied on that figure in reaching its calculation. *See* JA 281-85 and316. Therefore, *res judicata* cannot apply to the Claims Order as Creditor hopes.

B. The Final Order was properly calculated.

As discussed *supra*, the terms of the Confessed Note are clear on compounding interest. JA 4. Namely, that it applied "whenever, and every time, that a **monthly payment** due here under is not received by the Lender." JA 4 (emphasis added). Therefore, under the plain terms of the Confessed Note, compounded interest only applies when a <u>pre-maturity</u> payment is not made timely ("due and payable monthly commencing on the first (1st) day of the first (1st) calendar month following the date hereof, and continuing … each and every calendar month thereafter **until** maturity"). JA 2 (emphasis added). After maturity, there were no more monthly payments due, only the actual pay-off itself.

Accordingly, the provisions of the Confessed Note providing for the compounding of interest when "a monthly payment . . . is not received" are inapplicable to post-maturity computations. Imposing monthly compounding interest post-default would ignore the language in the Note and unfairly

"stack" additional penalties on top the post-judgment remedies of 24.194% interest and 10% penalty charge. Nothing in the Confessed Note allows that. "Where the language of [the] deed clearly and unambiguously expresses the intention of the parties, no rules of construction should be used to defeat that intention." *Swords Creek Land P'ship v. Belcher*, 288 Va. 206, 212, 762 S.E.2d 570, 572 (2014) (citations omitted).

Plaintiff's reliance on *Cecil & Perry v. Hicks*, 70 Va. 1 (1877) is misplaced. In that case, the debtor sought to have the interest rate on a note reduced post-maturity (but pre-judgment) to the judgment rate. *Id*., 70 Va. at 3. The basis for this request was that the contract was silent as to the interest rate after maturity. *Id*., 70 Va. at 4. In denying that relief, this Court held "[i]nterest, then, being an incident of a debt due by contract in the absence of a stipulation in the contract to the contrary, is as much a part of the debt as the principal itself." *Id*., 70 Va. at 6-7 (1877).

This case is altogether different. Debtor does not deny that it was bound to continue paying the contractual rate of interest post-maturity—indeed, their calculations use the post-default rate of 24.194%. JA 283. What Debtor sought—and was awarded—was the protection of the temporal contractual terms regarding compounding interest as discussed *supra*. The Court simply followed those terms.

C. The Final Order Properly Applied Virginia Law

Creditor asserts that the Final Order contradicted two fundamental provisions of the Confessed Note; in doing so, it again contradicts itself by arguing that unpaid interest both must be transmuted to principal while, simultaneously, remaining separate so that it can be paid "first." Brief at 27. In reality, the Confessed Note only speaks to "monthly payments" and is silent as to the present circumstance.

First, as stated *infra*, unpaid interest only becomes the principal in the specific situation where "a monthly payment **due here under** is not received by Lender." JA 4 (emphasis added). For the same reasons, post-maturity unpaid interest does not convert into principal—as it is undisputed that Debtor did not miss any "monthly payment[s] due hereunder." JA 4.

Likewise, it is true that "payments **<u>made on account here under</u>**" are credited to interests and costs before principal under the Note. JA 3 (emphasis added). *See* Brief at 27. That is because the Confessed Note only describes how to apply the agreed upon (i.e. monthly) payments—it does not address post-maturity payoffs from the sale of security. JA 2-4. Generally, where the contract is silent (as it is here), upon the application of proceeds from a foreclosure sale, a credit bid reduces the principal first, excluding interest. *See In re Tucker*, No. 5:09-bk-914, 2010 Bankr. LEXIS

3971, *22 at n. 8, 2010 WL 4823917 (Bankrtcy. N.D. W.Va. 2010); *In re Broomall Printing Corp*., 131 B.R. 32, 36 (Bankr. D. Md. 1991) (concluding that when an unsecured creditor of a Chapter 11 debtor received proceeds from the sale of a portion of its collateral during a bankruptcy case, "the payments should be credited to reduce its principal indebtedness."). This construction, to apply the foreclosure proceeds first to the principal debt (after the expenses of executing the trust), is consistent with Virginia Code § 55-59(6) which in relevant part states:

> **[A]ll the interest on the principal secured by the deed of trust shall be on an equal priority with the principal debt secured by the deed of trust**, <u>in the event of sale to be paid next after the expenses of executing the trust</u>.

Va Code § 55-59(6) (emphasis added).

Furthermore, it is well settled under Virginia law that absent specific contractual language stating otherwise, payments on a debt, i.e. from the sale of a security, are "applied in discharge of the items antecedently due, in the order of time in which they stand in the account." *Chapman v. Commonwealth*, 66 Va. 721, 746 (1875); *Upper Occoquan Sewage Auth. v. Blake Constr. Co.*, 275 Va. 41, 71 (2008) (holding that "in the absence of an effective allocation by either debtor or creditor, the courts will apply the payment to the debts in order of age, starting with the oldest."). *See also Northern Virginia Savings & Loan Ass'n. v. J. B. Kendall Co.*, 205 Va. 136,

145, 135 S.E.2d 178, 185 (1964); *Pope v. Transparent Ice Co.*, 91 Va. 79, 85, 20 S.E. 940, 942 (1895). In the present case, the principal has been due and owing since November 19, 2009 whereas the interest and fees have come due post-maturity. Therefore, once the security has been foreclosed, the principal (the older debt) should be extinguished.

Creditor asserts that any judgment made on the Note must bear interest at the 24.194% default rate described in the Note. Brief at 28; JA 5. This argument rehashes all the same arguments relating to the Confessed Note. Following the credit bid of Creditor at foreclosure, the principal of the Note was extinguished—leaving only unpaid interest. JA 317. Reading the Note as Creditor suggests—i.e. to permit post-judgment interest at 24.194% on the deficiency—would render the compounding interest protections as meaningless, as the Creditor would now be charging "interest on [unpaid] interest" at the maximum rate. *See S'holder Representative Servs., LLC v. Airbus Ams., Inc*., No. 151640 (October 27, 2016) (contractual provisions limiting liability must be interpreted to give meaning). Nothing in the Confessed Note authorizes that. *See* JA 2-20. To the extent that the Confessed Note is silent as to the interest rate accruing <u>after</u> the principal is paid (and only interest remains), that silence itself has meaning —as it is well settled that any ambiguities must be

construed against the drafter. R. 5; *Colony Council Bd. of Directors v. Hightower Enterprises*, 228 Va. 197, 200, 319 S.E.2d 772, 773 (1984).

D. This Court Should Affirm the Judgment of the Trial Court.

Notably, Creditor seeks that this Court enter a final judgment based on the current record—which runs counter to its entire Assignment of Error No. 1. Brief at 12-18. First, Catjen seeks a "new trial" because there are "disputed facts." Then it argues that this Court has sufficient record to enter a judgment. Brief at 29-30. Irrespective of Creditor's contradictory position, this Court does have a sufficient record before it – to protect the Debtor from Creditor's attempt to endlessly compound interest. Accordingly, this Court should affirm the judgment of the trial court.

3. The Trial Court Properly Denied Creditor's Nonsuit.

The record in the instant matter is clear. At the April 21, 2017 hearing on the Motion to Reconsider (six months after the October 8th trial), the Court granted the motion and only left open the issue of the exact figure to be entered. JA 125-26. Counsel for both parties had "yielded the issues to the court for consideration and decision." *Moore v. Moore*, 218 Va. 790, 795, 240 S.E.2d 535, 538 (1978). Indeed, at the final hearing, after a lengthy argument from Creditor's counsel, the trial court succinctly stated: "I am prepared to do what I originally prepared to do, and that is sign the

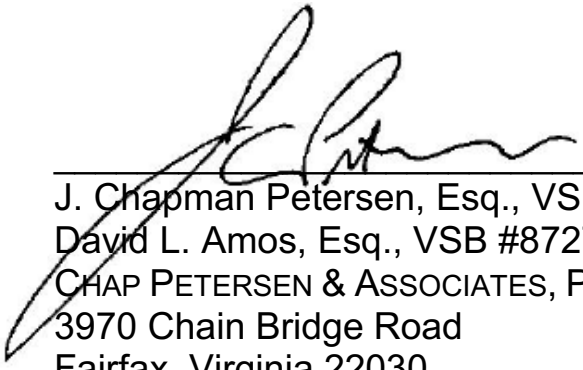
order that Mr. Petersen had." JA 311. Only after that clearly harmful decision did Creditor move for nonsuit. *Cf.* JA 141 *with* JA 142.

CONCLUSION

The above considered, this Court should deny the appeal and sustain the decision of the trial court.

Respectfully Submitted,

Date: April 9, 2018



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CERTIFICATE

The undersigned hereby certifies that the foregoing Brief of Appellee complies with Rule 5:26 and further certifies as follows:

On this 9th day of April, 2018, three copies of the foregoing Brief of Appellee were hand delivered to the Clerk's Office of the Supreme Court of Virginia for filing, and an electronic copy was filed, via VACES. On this same day, one electronic copy of the foregoing Brief of Appellee was sent, via email, to counsel for Appellants, below. This Brief consists of [5,668] words.

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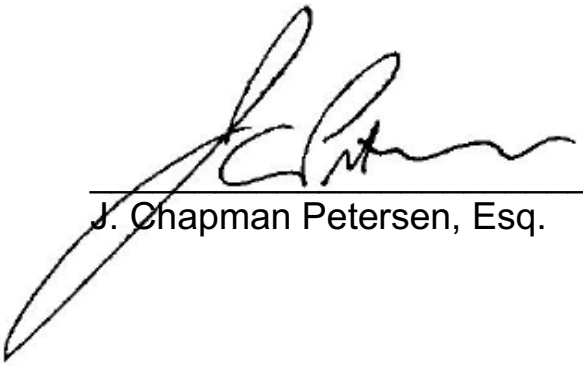

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