IN THE

Supreme Court of Virginia

RECORD NO. 180358

VIRGINIA LYNN MERCER,
ADMINISTRATOR of the ESTATE of CLIFTON WOOD,

Appellant,

v.

M. LORI BELLE MACKINNON, *et al*.,

Appellee.

BRIEF OF APPELLEE M. LORI BELLE MACKINNON APPEARING SPECIALLY

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IN THE
SUPREME COURT OF VIRGINIA

AT RICHMOND

VIRGINIA LYNN MERCER, ADMINISTRATOR
of the ESTATE of CLIFTON WOOD,

Appellant,

v. Record No. 18-0358

M. LORI BELLE MACKINNON, *et al.,*

Appellees.

BRIEF OF APPELLEE M. LORI BELLE MACKINNON APPEARING SPECIALLY

TO: THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF VIRGINIA

Appellee, M. Lori Belle MacKinnon (hereinafter referred to as "MacKinnon"), appearing specially, by and through the undersigned counsel, respectfully files this Brief of Appellee pursuant to Rule 5:28 of the Rules of the Supreme Court of Virginia, and represents as follows.

I. STATEMENT OF THE CASE

The appeal granted to Appellant Virginia Lynn Mercer, Administrator of the Estate of Clifton Wood (hereinafter referred to as "Mercer"), limited the appeal to assignments of error Nos. 1 and 4, as set out in the petition for appeal.

Assignment of error No. 4 relates only to the Co-Appellee, Cox and Palmer, who has been dismissed from the appeal by agreement made by Mercer and Cox and Palmer.

Consequently, MacKinnon's brief will address only assignment of error No. 1, as set out in the petition for appeal.

II. QUESTION PRESENTED

Whether the Circuit Court for Loudoun County erred in ruling that MacKinnon did not engage in a "persistent course of conduct" in the forum jurisdiction and was not therefore subject to the trial court's *in personam* jurisdiction.

III. STATEMENT OF FACTS

Appellant, Virginia Lynn Mercer alleges in her Civil Complaint (hereinafter "Complaint")[1] that M. Lori Belle MacKinnon is a Canadian citizen and resident of Canada and was Eleanor Wood's (hereinafter "Eleanor") niece. (App. 2, Compl., ¶6) Mercer and MacKinnon filed competing petitions for guardianship and conservatorship over Eleanor in the Prince William County Circuit Court (hereinafter "Trial Court"). (App. 3, Compl., ¶16) The Trial Court entered an Interim Order granting Mercer control over certain assets and bank accounts and MacKinnon

[1] The only facts before this Court are those allegations pled in the Complaint (appendix, pp. 1-9).

control over certain other assets and bank accounts during the pendency of the proceeding. (App. 3, Compl., ¶17) MacKinnon availed herself of the jurisdiction of the **Prince William County Circuit Court** voluntarily and appeared in that Court regularly, by counsel and in person, on various matters, including a trial on the merits. (App. 3, Compl., ¶18) MacKinnon also initiated proceedings in Prince Edward Island, Canada ("PEI") (App. 3, Compl., ¶21) which was known by Mercer not only through answers to interrogatories in the Trial Court (App. 4, Compl., 27), but also because Mercer filed a cross-petition in the PEI courts seeking the same relief. After a trial on the merits on the issue of Guardianship in the Prince William County Circuit Court, the Trial Court appointed Mercer as Guardian of Eleanor, but bifurcated the issue of Conservatorship as Clifton Wood was a necessary party to the matter to be heard. (App. 3, Compl., ¶19) Eleanor Wood passed this life on July 20, 2016. (App. 1, Compl., ¶3) The Trial Court entered a final Order on August 29, 2016, dismissing the matter as moot and directed the clerk to strike the case from the Court's docket. No appeal was taken from the final Order and no further matter was brought before the Trial Court thereafter.

IV. AUTHORITIES AND ARGUMENT

A. Standard of Review

The determination of whether personal jurisdiction exists over a nonresident defendant is a two-step inquiry. *Bergaust v. Flaherty,* 57 Va. App. 423, 436, 703 S.E.2d 248, 254 (2011). "First, each alleged cause of action must be measured for a

fit against each alleged part of the Long Arm Statute, Va. Code §8.01-328.1. If no fit is found, the inquiry is at an end: there is no personal jurisdiction." *Id.* (original citation and quotations omitted). If any Long Arm Statute provision fits, "the court must then determine whether asserting personal jurisdiction over [the defendant] comports with the Due Process Clause of the Fourteenth Amendment." *Id.*

The court's ruling on MacKinnon's Plea in Bar and Motion to Dismiss involves a matter of law and is subject to a *de novo* review by this Court.

B. The Loudoun County Circuit Court properly granted MacKinnon's Plea in Bar and Motion to Dismiss as Mackinnon was not subject to personal jurisdiction under Virginia's Long Arm Statute

Mercer asserts *in personam* jurisdiction over MacKinnon pursuant to her Affidavit for Service of Process on the Secretary of the Commonwealth under Virginia Code § 8.01-328.1(A) without articulating the provision permitting this Court's exercise of personal jurisdiction over her pursuant to the Non-Residence Grounds Requirement on page 2 of the Affidavit. (Appendix, p.11) Moreover, nowhere in the enumerated paragraphs of the Complaint does Mercer set out the factual basis for the exercise of Long-Arm jurisdiction over MacKinnon pursuant to § 8.01-328.1(A). Consequently, as it was Mercer's burden to establish the factual support for exercise of personal jurisdiction over MacKinnon, her Complaint, its service, and her requested relief in this appeal must fail. *McNutt v.*

General Motors Acceptance Corp., 298 U.S. 178, 80 L. Ed. 1135, 56 S.Ct. 780 (1936).

Admittedly, MacKinnon submitted to the jurisdiction of the Prince William County Circuit Court for the discrete purpose of requesting the guardianship and conservatorship of her aunt, Eleanor. That matter ended with the death of Eleanor in July of 2016 and the entry of a final Order dismissing the matter as moot in August 2016. MacKinnon has made no appearance in Virginia since the entry of that Order and Mercer does not claim that she has done so. Mercer claims in two counts breach of fiduciary duty while acting under the Interim Order of the Trial Court (Appendix, pp. 5-6) and a claim of conversion while acting under the Interim Order of the Trial Court (Appendix, pp. 6-7). Mercer sought that same matter to be heard in the Prince William Trial Court by filing her Motion for Disgorgement on July 14, 2016, a week before Eleanor's death. Mercer decided not to prosecute that motion in the Prince William Trial Court, but rather elected at that time to end the litigation and have her counsel draw and sign the final Order dismissing the Prince William action **as moot** under the prayer denoting "WE ASK FOR THIS." Consequently, the claims asserted in this Complaint are barred by Rule 1:1 of the Rules of the Supreme Court of Virginia; Rule 1:6 of the Rules of the Supreme Court of Virginia and the articulated and accepted principles of *res adjudicata.*

For Long-Arm jurisdiction under § 8.01-328.1 (A) to be asserted against MacKinnon to support her being haled into this Court now to answer this Complaint, Mercer must set forth sufficient facts to satisfy at least one of the provisions of the statute. There is no allegation that MacKinnon (A)(1) transacts any business in the Commonwealth, or (A)(2) contracts to supply services or things in the Commonwealth, or (A)(3) caused tortious injury by an act or omission in this Commonwealth. **At best, Mercer alleges that MacKinnon caused a tortious injury in this Commonwealth by an act or omission outside of this Commonwealth, <u>but fails to allege in any regard nor can she, that MacKinnon "regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this Commonwealth.</u>"** § 8.01-328.1 (A)(4). The other provisions of the statute are not relevant to this inquiry.

Mercer's stale claims, barred by the entry of the final Order in Prince William County Circuit Court and further barred by Rules 1:1 and Rule 1:6 of the Rules of the Supreme Court of Virginia reinvented in the Complaint alleging liability for acts occurring under the Interim Order of the Prince William Trial Court, which were brought on to be heard by pleadings filed in the Trial Court, then dismissed as moot by final Order drawn and executed by Mercer's counsel [which was not appealed and now is final under Rule 1:1 of the Rules of the

Supreme Court of Virginia] cannot form the basis for personal jurisdiction over this Canadian citizen now.

V. CONCLUSION

The Loudoun County Circuit Court carefully considered the memoranda of points and authorities and oral argument by counsel and determined that there was no persistent course of conduct by MacKinnon that would a provide a constitutional basis to exercise *in personam* jurisdiction over her under Va. Code §8.01-328.1(A)(4).

For the reasons stated above and in the record, M. Lori Belle MacKinnon respectfully prays this Court affirm the Order Granting M. Lori Belle MacKinnon's Plea in Bar and Motion to Dismiss for Lack of Personal Jurisdiction entered December 18, 2017, by the Honorable Stephen Sincavage.

Respectfully submitted:

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By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that I have complied with Rule 5:26 and a true copy of the foregoing Brief of Appellee M. Lori Belle Mackinnon Appearing Specially was transmitted via email this 2nd day of August, 2018 to:

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