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*.,

Appellees.

OPENING BRIEF OF APPELLANT

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SCV: Submitted on 07-10-2018 15:11:44 EDT for filing on 07-10-2018

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VIRGINIA:

IN THE VIRGINIA SUPREME COURT

MERCER, Virginia Lynn,
Administrator of the Estate of Clifton Wood

Petitioner/Appellant,

v. Record No. 180358

MacKINNON, M. Lori-Belle,

Appellee,

and

COX & PALMER,

Appellee.

APPELLANT'S OPENING BRIEF

COMES NOW the appellant, by and through the undersigned counsel, and issues this Opening Brief pursuant to Rule 5:27 of the Rules of the Supreme Court, and for her opening brief, states as follows:

I. STATEMENT OF THE CASE

THIS CASE comes on appeal from two orders of the Circuit Court for Loudoun County dismissing this suit against each of two defendants for lack of in-personam jurisdiction against each defendant. Appellant filed a Complaint in the Circuit Court for Loudoun County on June 7, 2018, naming an individual (Appellee MacKinnon) and her Canadian law firm (Appellee Cox & Palmer).

Each of the named defendants filed a motion to dismiss the case against them for lack of in personam jurisdiction. The matter was referred to a long briefing schedule and a hearing was held on December 18, 2018 (Appendix, P. 391). No evidence was introduced at the hearing and no witnesses were called. At the conclusion of the hearing, the trial court issued two separate Final Orders, one dismissing each defendant (Appendix, Pp. 379, 381). The trial court then gave the Appellant/plaintiff time to file written objections to the Orders, which objections were filed on January 3, 2018 (Appendix, Pp. 384, 387). Appellant filed her notice of appeal on January 11, 2018.

II. STATEMENT OF FACTS

A hearing on a motion to dismiss for lack of in personam jurisdiction is an evidentiary hearing on that issue, however, the hearing on the appellees' motions was limited to argument as neither appellee introduced any exhibits or called any witnesses. Therefore, the only facts before this Court are those pled in the Complaint (Appendix, P. 1), which facts should be taken as true. The facts relating specifically to the issue of jurisdiction over the two appellees are as follows:

A. Background Facts:

Appellee Virginia Lynn Mercer is a resident of the Commonwealth of Virginia now residing in Loudoun County (Appendix, P. 1). Eleanor Grace Wood, deceased, was a citizen of both the United States and Canada who, at the time of

her demise, owned real property situated in Loudoun County, Virginia (Appendix, P. 1). Eleanor Wood died intestate on July 20, 2016 (Appendix, P. 1). Clifton Wood (hereinafter "Clifton"), was a resident of the Commonwealth of Virginia, now deceased and last residing in Loudoun County, and was the spouse of Eleanor Wood, and the father of the Appellant. He is Eleanor Wood's sole heir as a matter of intestate succession (Appendix, Pp. 1-2). Appellant is the administrator of the estates of both Eleanor and Clifton Wood, and both estates are being probated in the Loudoun County Circuit Court (Appendix, P. 2).

Appellant MacKinnon is a Canadian citizen and resident, and was Eleanor Wood's niece (Appendix, P. 2). Cox & Palmer is a law firm whose solicitors are licensed to practice law in Prince Edward Island, Canada (Appendix, P. 2).

B. Facts relating to jurisdiction over Appellee MacKinnon:

As of December 2014, Appellant was the primary care-giver to Clifton and Eleanor Wood (her father and step-mother, respectively), and held Power of Attorney for both (Appendix, P. 2). Sometime in December 2014, Appellee MacKinnon, who had not visited Eleanor Wood in Virginia for more than fifteen years, came to Virginia and thereafter removed Eleanor Wood to Canada while Appellant was busy getting Clifton Wood settled into a nursing home facility (Appendix, P. 2). Appellee MacKinnon had a new power of attorney drawn up for Eleanor Wood naming Appellee MacKinnon as the attorney-in-fact for Eleanor

Wood, and used the power of attorney to remove Clifton Wood's name from one or more bank accounts that had been jointly held by Eleanor and Clifton Wood, and to take control of Eleanor Wood's retirement accounts (Appendix, P. 2). Upon information and belief, Appellant MacKinnon used the power of attorney to have herself named as the death beneficiary on at least one of the couple's bank accounts (Appendix, P. 3).

Thereafter, both Mercer and MacKinnon filed competing petitions with the Prince William County Circuit Court, each seeking to be appointed as the guardian and conservator for Eleanor Wood. The cases were joined and set to be tried as one (Appendix, P. 3). While the Prince William County case was pending, an Interim Order was entered by that Court granting Appellant control over certain assets and bank accounts and granting Appellee MacKinnon control over certain assets and bank accounts, with each being required to provide regular accountings to a guardian *ad litem* appointed by the Court (Appendix, P. 3). 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 (Appendix, P. 3). Appellee MacKinnon appealed the Final Order appointing Appellant as the guardian, and refused to accept Appellant's authority with respect to bringing Eleanor Wood back to the United States so that she could be reunited with her husband and

American family. The appeal was denied by the Virginia Supreme Court, and Appellant remained the legal guardian of Eleanor Wood (Appendix, P. 3).

C. Facts relating to jurisdiction over Appellee Cox & Palmer

The facts pertaining to the question of in personam jurisdiction over Appellee Cox & Palmer, as alleged in the Complaint, are as follows: While the Virginia case was proceeding, Appellee MacKinnon also initiated legal proceedings in Prince Edward Island, Canada to be appointed as the guardian and fiduciary there, in an effort to prevent the Virginia Order from being granted comity by the Canadian court. (Appendix, Pp. 3-4). Appellee MacKinnon retained the services of Appellee Cox & Palmer, and placed a substantial portion of Eleanor Wood's funds that had been entrusted to her through the Virginia proceeding on deposit with Appellee Cox & Palmer for payment of her legal fees in Canada. (Appendix, P. 4). Appellee MacKinnon used her access to the bank accounts under an Interim Order entered by the Prince William County Circuit Court to spend Clifton and Eleanor Wood's joint money to fund the litigation in Canada as well as the Prince William County case, even though she had no authority to do so (Appendix, P. 4). Appellee Cox & Palmer's attorneys representing Appellee MacKinnon in Canada were aware that the funds MacKinnon placed on deposit were taken from Clifton and Eleanor Wood's bank accounts (Appendix, P. 4). Appellee MacKinnon never obtained permission from

the Court in Prince Edward Island to use Eleanor and Clifton's funds to pay her Canadian legal fees (Appendix, P. 4).

III. ASSIGNMENTS OF ERROR:

This Court has granted the appellant's appeal on the following errors by the Circuit Court for Loudoun County:

> **Assignment of Error 1**: That 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.

This error is preserved in the record at Page 60-61 of the transcript of the December 18, 2018 hearing (Appendix, P. 449-450), in the trial court's Final Order (Appendix P. 381), and in the appellant's objections to the said Final Order (Appendix, P. 387).

> **Assignment of Error 4:** The Circuit Court for Loudoun County erred by failing to find that Cox and Palmer availed itself of the law of the Commonwealth when it engaged in a common scheme with the co-appellee to take fees from the decedent's estate.

This error is preserved in the record at Page 59-60 of the transcript of the December 18, 2018 hearing (Appendix P. 448-449), in the trial court's Final Order (Appendix P. 379), and in the appellant's objections to the said Final Order

(Appendix, P. 384).

IV. ARGUMENT

The Circuit court's errors in this case fall into two categories: clear error in the dismissal of Appellee MacKinnon for lack of in personam jurisdiction on the grounds that she did not engage in a persistent course of business in the Commonwealth of Virginia; and errors of interpretation in the dismissal of Appellee Cox and Palmer by failing to consider how the case law applied to Appellee Cox & Palmer availing themselves of the of the law of Virginia by participating in a common scheme.

A. Standard of Review.

Questions regarding whether a decision is contradictory to law, including the meaning of any underlying statutes, are reviewed de novo. Osburn v. Virginia Department of Alcoholic Beverage Control, 295 Va. 10810 S.E.2d 262 (2018), *Citing*; REVI, LLC v. Chicago Title Ins. Co., 290 Va. 203, 208, 776 S.E.2d 808, 810 (2015). That statute in question in this case is the Virginia Long-Arm statute, Section 8.01-328.1 Code of Virginia 1950.

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

The trial court's ruling on the issue of whether or not it could assert jurisdiction over Ms. MacKinnon is set forth in Pages 60-61 of the Transcript of

the December 18, 2017 hearing. (Appendix, Pp. 440-441) What is clear from the trial court's analysis is that the trial court had limited its decision to a narrow, verbatim reading of the Commonwealth's "long arm" statute, Section § 8.01-328.1(A)(4) of the Code of Virginia, without consideration of the jurisprudence interpreting that statute. In particular, the trial court was focused on the words "persistent course of conduct" and determined that the clause referred to "…something along the lines of ongoing interactions with the forum state…" (Appendix, P. 441).

The trial court's ruling runs directly counter to this Court's previous holdings in John G. Kolbe, Inc. v. Chromodern Chair Co., 211 Va. 736, 740, 180 S.E.2d 664, 667 (1971) and Glumina Bank v. D.C. Diamond Corp., 259 Va. 312, 317 S.E.2d 775 (2000), that Virginia's long arm statute is a "single act" statute, meaning that even a single transaction within the Commonwealth of Virginia would subject the party to jurisdiction in the Virginia Courts. Kolbe v. Chomodern, *Id*. at 740,667. This is the prevailing law of the Commonwealth that the Virginia Circuits have taken to heart. See, Noah Nathan v. Takeda Pharmaceuticals America Inc., et al. 83 Va. Cir. 216 (2011). There, the Fairfax Circuit Court noted, "The Virginia Supreme Court has stated that the "manifest purpose" of section (A)(1) of the Virginia long-arm statute is 'to assert jurisdiction over non-residents who engage in some purposeful activity in [Virginia] to the

extent possible under the due process clause.'"

This jurisprudence could not be more contrary in its interpretation of the statute to the Loudoun County Circuit Court's reading of the same language and finding that it may only assert jurisdiction if it finds "…something along the lines of ongoing interactions with the forum state…" Appendix, P. 441.

It should be noted that Appellant has not attempted to hang her hat on a single act. Rather, Appellant has alleged a laundry list of acts committed by MacKinnon within the Commonwealth of Virginia any one of which would form the basis for in personam jurisdiction. The allegations in the Complaint, which, that this point, must be taken as alleged in the light most favorable to the Appellant, are that: Appellee MacKinnon engaged in a variety of banking and legal transactions in Virginia; that she had herself appointed as attorney-in-fact for a Virginia resident under a power of attorney that was to be controlled by Virginia Law by its own terms[1]; that she filed a petition in a Virginia court to be appointed guardian and conservator for Elanor Wood; that she accepted legal responsibility over some of Eleanor Wood's funds and property pursuant to a Virginia court order; and that she then appealed the ultimate decision of that Court.

Even by the standards of the Loudoun County Circuit Court, Appellee

[1] The power of attorney was entered into evidence in the Prince William County case and was referenced in the Complaint (Appendix, P. 2). A copy of the power of attorney was included as an exhibit to the appellant's brief in opposition to the motion to dismiss (Appendix, P. 58).

engaged in a "persistent course of conduct" in the Commonwealth of Virginia. The fact that Appellee MacKinnon has since ceased that course of conduct does not relieve her of the Virginia court's jurisdiction over her relating to all of the actions she undertook here in the Commonwealth.

Moreover, the trial court's ruling has far-reaching implications. There are a variety of situations in which a party outside the Commonwealth can be appointed by a Virginia court to be in control of money or property that originated in Virginia. In the conservator context, a trial court is required to set a bond specifically for the protection of the incapacitated adult, but only in the final order. *See*: Section 64.2-2011 (A)(2) Code of Virginia 1950. The code does not provide for a temporary bond in the type of contested matter involved in this case. Therefore, when the Prince William County Circuit Court entered its Interim Order temporarily placing custody and control over approximately half of Eleanor Wood's funds and property in the hands of Appellee MacKinnon, it did so without the requirement for posting bond.

In other words, all that the Prince William County Circuit Court had to rely onto ensure that Appellee MacKinnon would not convert or otherwise misuse or misappropriate the funds was the fact that Appellee MacKinnon had herself filed the petition in the Court, thereby accepting the jurisdiction of the Virginia court. It is a logical and reasonable conclusion that, if a person accepts personal jurisdiction

in order to gain control over funds and property, that the jurisdiction would continue to apply thereafter for all matters related to those funds and property. A person should not be able to pick and choose when they want to be subject to jurisdiction.

This Court's prior decisions on that matter strongly support that conclusion. In E.C. v. Virginia Dept. of Juvenile Justice, 283 Va. 522, 527; 722 S.E.2d 827, 829 (2012), this Court held, "Our jurisprudence has long held that a court's jurisdiction is determined at the time the litigation is filed and, once established, remains until the termination of the litigation. As we stated in Laing v. Commonwealth, 205 Va. 511, 514, 137 S.E.2d 896, 899 (1964):

> [I]t is axiomatic that when a court acquires jurisdiction of the subject matter and the person, it retains jurisdiction until the matter before it has been fully adjudicated."

This case is somewhat convoluted in that MacKinnon's possession and control over Eleanor Wood's property commenced pursuant to litigation filed in the Prince William County Circuit Court. However, the respondent in that case, Eleanor Wood, passed away before the final conclusion, and her estate was thereafter probated in Loudoun County Circuit Court. The cross petitions in Prince William Circuit Court were dismissed as moot, because there was no longer a respondent to be appointed guardian and conservator over. Once that case ended,

Appellee MacKinnon no longer had any authority to retain Eleanor Wood's funds and property, yet she continues to hold it to this day, including exercising control over bank accounts in U.S. banks.

It is the position of the Appellant that the issue of MacKinnon's possession and control over Eleanor Wood's funds and property has never been fully litigated and that the probate case is a natural extension of the initial litigation. It is a matter that has yet to be fully adjudicated. Thus, even though the facts are unique, the logic of the decision in E.C. v. Virginia Dept. of Juvenile Justice, Id. applies. Because MacKinnon applied to a Virginia court to gain possession and control over the funds and property, she must thereafter accept jurisdiction in Virginia with regard to the disposition of those funds and property.

C. The Circuit Court for Loudoun County erred by failing to find that Cox and Palmer availed itself of the law of the Commonwealth when it engaged in a common scheme with the co-appellee to take fees from the decedent's estate.

The specific facts alleged here, that a person who was subject to jurisdiction in Virginia removed funds and property from the Commonwealth and placed a large portion of those funds into the hands of another who was not otherwise subject to Virginia jurisdiction appear on first blush to be unique. However, if one disregards the fact that the receiving party is a law firm, the facts become far more mundane. Appellant MacKinnon could have given the funds to anyone; a brother, a bank, or a perfect stranger, and the legal analysis would be the same: If the

Virginia Courts can exercise jurisdiction over the person who removed the funds from the Commonwealth, can the courts also exercise jurisdiction over the person outside of Virginia knowingly receives those funds.

This appears to be a case of first impression for the Virginia Supreme Court, but the issue was discussed in depth in the circuit court case, Noah Nathan v. Takeda Pharmaceuticals America Inc., et al. 83 Va. Cir. 216 (2011). There, the Fairfax Circuit Court reiterated the Virginia general policy with regard to jurisdiction, stating, "The Virginia Supreme Court has stated that the "manifest purpose" of section (A)(1) of the Virginia long-arm statute is 'to assert jurisdiction over non-residents who engage in some purposeful activity in [Virginia] to the extent possible under the due process clause.'" The Fairfax Court ruled that, where a party acts in concert with, or in a common scheme with, someone engaging in transactions in Virginia, the foreign party will be found to have purposefully availed itself of the law of Virginia. In considering the relevant case law, the Fairfax Court stated:

> "Courts acknowledging the conspiracy theory of jurisdiction seem to recognize that a defendant who joins a conspiracy knowing that acts in furtherance of the conspiracy have taken or will take place in the forum state is subject to personal jurisdiction in that forum because the defendant has purposefully availed himself of the privileges of that state and should reasonably expect to be haled into court there."
> Id., citing: Noble Sec., Inc. v. MIZ Eng'g, Ltd., 611 F.Supp.2d 513, 538–40 (E.D.Va.2009).

The first question then is whether or not there was a common scheme. Much emphasis has been placed on the fact that Appellee Cox & Palmer was nothing more than a Canadian Law Firm hired to perform legal work exclusively in Canada. Appellee Cox & Palmer certainly made that argument in its brief to the trial court, but presented no evidence to support that claim despite the fact that the hearing was an evidentiary hearing on that very subject. That claim is simply not supported by the facts before this Court.

Taking as true those facts pled in the Complaint; namely, that the Canadian litigation was initiated solely to prevent the Virginia Order from being granted comity by the Canadian court. (Appendix, Pp. 3-4); that Appellee MacKinnon used her access to the bank accounts under an Interim Order entered by the Prince William County Circuit Court to spend Clifton and Eleanor Wood's joint money to fund the litigation in Canada as well as the Prince William County case, even though she had no authority to do so (Appendix, P. 4); and that Appellee Cox & Palmer's attorneys representing Appellee MacKinnon in Canada were aware that the funds MacKinnon placed on deposit were taken from Clifton and Eleanor Wood's bank accounts (Appendix, P. 4); it becomes clear that Appellee Cox & Palmer did not simply engage in legal work in Canada. Rather, the firm was actively helping MacKinnon avoid the consequences of losing her case in Virginia, using funds that that Appellee MacKinnon wasn't entitled to use for herself and

that Appellee Cox & Palmer weren't entitled to accept but for a misinterpretation of a Virginia court order. They were, in other words, assisting in her conversion of the estate funds.

Much has also been made of the fact that Appellee MacKinnon was the principal and Appellee Cox & Palmer was her agent and therefore Appellee Cox & Palmer could not have directed its client to engage in actions in Virginia on its behalf. This argument is irrelevant to the analysis because it does not matter which of the parties initiated the acts in Virginia so long as both were participants and both benefited from the Virginia actions.

A careful review of the documents in Exhibit C to the Appellant's brief in opposition to the motions to dismiss (Appendix, P. 77) reveal that the Appellees initially filed their pleadings with the Canadian court on July 10, 2015, just days before the trial in the Prince William County Circuit Court, seeking the appointment of Eleanor Wood's Canadian brother and sister as joint guardians and committees. Appellee MacKinnon lost at trial, but the Final Order was not entered by the Prince William county Circuit Court until late August. Immediately afterwards, the Appellees changed tactics and filed amended pleadings in the Canadian court, this time seeking to have Appellee MacKinnon, herself, appointed as guardian and committee for Eleanor Wood.

What is notable in the amended pleadings filed with the Prince Edward

Island Court is Paragraph 11 of the section entitled "The Grounds for This Application," which states: "It is the Applicants' position that any order arising from the Virginia petitions should not be recognized by the Prince Edward Island Court, in whole or in part…" (Appendix, P.101). This pleading was clearly filed as a part of a concerted effort to prevent the execution of an Order of a Virginia court in a proceeding that had been initiated by Appellee Cox & Palmer's own client, Appellee MacKinnon. In other words, Appellee Cox & Palmer was actively engaged in a common scheme to defeat the effects of the Virginia Order.

Appellee MacKinnon, who had filed an appeal to the Virginia Supreme Court, was deliberately attempting to hedge her bets by shopping her case to a (hopefully) friendlier forum and was using Appellee Cox & Palmer to carry out that purpose. Had she been successful, Appellee MacKinnon would have not only gained final and exclusive control over Eleanor Wood's assets, which necessarily included the assets of Clifton Wood, but would have avoided scrutiny over her actions as a fiduciary under the appointment contained in the Virginia Court's Interim Order. Appellant points out that this type of forum shopping has been labeled "pernicious" by the Virginia Courts in Clark v. Clark, 11 Va. App. 286, 398 S.E.2d 82 (Va. Ct. App. 1990). The Virginia Court of Appeals later reiterated its policy against forum shopping in the case: Williams v. Williams, 61 Va. App. 170, 734 S.E.2d 186 (Va. Ct. App. 2012).

Pernicious or not, what is simply not credible, given the facts in this case that this Court must accept as true for the purposes of this appeal, is that Appellant Cox & Palmer acted completely independent of and with total ignorance of what was happening in the Virginia litigation, or that its fees were limited solely to filing what amounts to initial pleadings in a run-of-the-mill adult guardianship case in Prince Edward Island.

What is logical and reasonable given this Court's oft stated policy to assert jurisdiction over non-residents who engage in some purposeful activity in Virginia to the extent possible under the due process clause, is to find that jurisdiction does extend to those who, although not physically present in Virginia, aid in the removal of funds from Virginia residents and assist in putting those funds out of reach of the rightful owner.

CONCLUSION

The trial court's decision in this case to dismiss Appellee MacKinnon is simply erroneous. The trial court's reasoning, as explained when issuing its ruling (Appendix, Pp. 440-441) shows that the trial court looked only to the statute and made up its own interpretation of it, disregarding all of this Court's jurisprudence on the issue of in personam jurisdiction. Appellee MacKinnon's continued possession and control over the funds and property of the estate of Eleanor and Clifton Wood should fall squarely under the jurisdiction of the Virginia courts.

Appellee MacKinnon has undertaken a range of actions in Virginia related to this matter, including actively pursuing litigation in the Virginia courts to gain possession of the funds she now refuses to return. According to this Court's long line of cases on the subject, it need only find that a single one of those acts occurred in Virginia or even that the litigation Appellee MacKinnon herself initiated began in Virginia to conclude that the Virginia courts may exercise in personam jurisdiction over Appellee MacKinnon in this case.

Appellant concedes that the issue of in personam jurisdiction over Appellee Cox & Palmer is one of first impression for this Court. Appellant maintains, however, that it was error nonetheless for the trial court to fail to consider the case law regarding jurisdiction over co-conspirators and participants in a common scheme. Appellant points out that this Court has consistently ruled that the very purpose of the long-arm statute was to assert jurisdiction over non-residents who engage in some purposeful activity in Virginia to the extent possible. Applying that principal to the analysis would have and should have led to a finding that the trial court could exercise jurisdiction over Appellee Cox & Palmer. The opportunity to do so now rests with this Court.

WHEREFORE the Appellant prays that this Court grant her appeal and remand this case back to the Loudoun County Circuit Court for trial on the merits.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I, James P. Magner, Esq., counsel for Appellant Virginia Lynn Mercer, does hereby certify that, on the 10th day of July, 2018 I served a true and accurate copy of the foregoing on the following persons in accordance with Rule 5:26 of the Rules of the Supreme Court of Virginia, via email to:

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I also ask for oral argument before this Court in person.

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