In The

Supreme Court of Virginia

RECORD NO. 180678

RADIANCE CAPITAL RECEIVABLES FOURTEEN, LLC,
as Assignee of New South Federal Savings Bank,

***Appellant*,**

v.

ROBERT D. FOSTER and JAMES M. WILSON,

Appellees.

BRIEF OF APPELLANT

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STATEMENT OF THE NATURE OF CASE AND MATERIAL PROCEEDINGS IN THE TRIAL COURT

This case concerns the application of Virginia Code § 8.01-232(A), concerning promises not to plead the statute of limitations, to a contractual waiver of the benefit of the statute of limitations that was entered into by individual guarantors, for valuable consideration, in a guaranty of a commercial note. The case raises the issue of whether a contractual waiver of the benefit of the statute of limitations in a commercial transaction is valid in the Commonwealth of Virginia.

This case, which appears to be a case of first impression, raises significant issues pertaining to whether contractual waivers of the statute of limitations are completed performances or promises for future performance, and are valid and enforceable absent a showing by clear and convincing evidence that the waiver was made with fraudulent intent.

The facts are not in dispute.

On February 21, 2006, Foster & Wilson Building, LLC, a Virginia limited liability company (the "Company"), acting through its members, Robert Foster ("Foster") and James Wilson ("Wilson"), executed a Promissory Note (the "Note") in favor of New South Federal Savings Bank (the "Bank"). App. pp.165-166.

On March 2, 2006, Foster and Wilson executed a Continuing Guaranty (the "Guaranty") by which they guaranteed and promised to pay to the Bank, or order, all of the Company's indebtedness. App. pp.167-169.

On December 16, 2008, the Company, again acting through its members, Foster and Wilson, executed an Amended and Restated Promissory Note (the "Restated Note") in favor of the Bank, to correct a misnomer in prior Note as to the correct legal name of the Company. App. pp.170-172. The Guaranty was given by Foster and Wilson for valuable consideration, and as set forth in paragraph 6 of the Guaranty, Foster and Wilson expressly and contemporaneously waived numerous legal rights and benefits including, but not limited to, the waiver of the benefit of any statute of limitations.

Radiance Capital Receivables Fourteen, LLC ("Radiance") is the ultimate assignee and holder of the Note, Restated Note, and Guaranty. App. pp.104-106, 109-110.

Radiance, as the true, lawful, and absolute owner of the Note, Restated Note and Guarantee, filed suit against Foster and Wilson on November 23, 2015. App. pp. 1-4. Foster & Wilson Building, LLC had defaulted in its obligations under the Restated Note, and its authority to operate as a limited liability company in the Commonwealth of Virginia was terminated by the State Corporation Commission on May 31, 2013.

At the trial on February 8, 2018 Radiance presented, without objection by Foster and Wilson, the admitted and uncontroverted facts as admitted by Foster and Wilson in their individual answers to the Complaint and in their individual responses to Plaintiff's Requests for Admissions. App. pp.106-110. After

reviewing the uncontroverted and admitted facts in the case, the Trial Court found that in the absence of a statute of limitations defense, Defendants Foster and Wilson were liable to the Radiance, in the amount of $247,621.45 plus judgment interest at the rate of six percent (6%) from February 8, 2018 and any attorney's fees incurred by Radiance in the prosecution of its claim. App. pp.131-133, 173.

At the conclusion of the trial the Trial Court requested briefs on issue as to whether Radiance's claim was barred by the applicable statute of limitations, the effect of the waiver of the benefit of any statute of limitations signed by Foster and Wilson in the Guaranty, and whether Virginia Code § 8.01–232(A) was applicable to the waiver, and if so, was Radiance's claim against Foster & Wilson barred by the statute of limitations.

After receipt and review of post-trial briefs, the Trial Court ruled that Virginia Code § 8.01–232(A) was applicable to the Foster's and Wilson's contractual waiver of the statute of limitations in the Guaranty and the waiver of the benefit of the statute of limitations was therefore invalid and unenforceable. App. p.82. The Trial Court found that Radiance's claim was barred by the statute of limitations and entered a judgment Order in favor of the defendants, Robert Foster and James Wilson. Radiance objected to the application of Virginia Code § 801-232(A) noted its objection on the Order. App. pp.83-84.

This Court granted an appeal on October 1, 2018.

STATEMENT OF FACTS

This matter involves the legal effect of a contractual waiver of the benefit of the statute of limitations that was entered into by the individual guarantors, for valuable consideration, in a guaranty of a commercial note.

On February 21, 2006, Foster & Wilson Building, LLC, (the "Company') acting through its members, defendants Robert D. Foster ("Foster") and James M. Wilson ("Wilson") executed a secured Promissory Note (the "Note") in favor of New South Federal Savings Bank (the "Bank"). App. pp.165-166. On March 2, 2006, Foster and Wilson, for valuable consideration, executed a Continuing Guaranty by which they guaranteed and promised to pay to the Bank, or order, all of the Company's indebtedness. App. pp.167-169. In the Guaranty, Foster and Wilson expressly and contemporaneously waived numerous legal rights and benefits including, but not limited to, a waiver of the benefit of any statute of limitations. App. p.167 (Par. 6).

December 16, 2008, Foster & Wilson Building, LLC, acting through its members, defendants Robert D. Foster ("Foster") and James M. Wilson ("Wilson") executed an Amended and Restated Promissory Note (the "Restated Note") in favor of the Bank. App. pp.170-172. The Restated Note was executed to cure a misnomer concerning the correct legal name of the Company and was delivered to the Bank as a replacement of, and in substitution for, the prior Note.

Foster & Wilson Building, LLC defaulted in its obligations under the Restated Note and its authority to operate as a limited liability company in the Commonwealth of Virginia was terminated by the State Corporation Commission on May 31, 2013. On August 27, 2010 a Notice of Default and Demand for Payment was mailed to Foster and Wilson by LPP Mortgage Limited as successor to, and assignee of, the Bank. App. p.116.

Radiance Capital Receivables Fourteen, LLC ("Radiance") is the ultimate assignee and holder of the Note, Restated Note, and the Continuing Guaranty. App. pp.104-106, 109-110.

Foster and Wilson, admitted that a principal balance $220,648.23 was due and owing by the Company as of April 1, 2011. App. pp. 106-108, 173.

After providing a credit for the full foreclosure sale price of the last remaining property sold by the Bank's assignee at foreclosure without any deductions for the costs of sale, and with the accrual of interest at seven percent (7%), the debt owed by Foster and Wilson to Radiance was found by the Trial Court to be in the amount of $247,621.45 as of the trial date of February 8, 2018. App. pp.123-126, 128, 131. The Trial Court further found that if the waiver of the statute of limitations in the Guaranty was valid and enforceable, then judgment would be entered in the amount of $247,621.45 plus interest at 8% per annum from the judgment date and attorney's fees to be determined. App. p.131.

ASSIGNMENTS OF ERROR

I. The Trial Court erred in finding that a contractual waiver of the benefits of any statute of limitations in the Guaranty signed by the Defendants as consideration for a Commercial Loan is not valid and enforceable according to the terms of Virginia Code Annotated § 8.01–232(A). (Order, February 27, 2018)

II. The Trial Court in finding that the Defendants' waiver of the benefit of any statute of limitations was not a completed performance at the time it was signed, but was instead a promise of a future performance. (Order, February 27, 2018)

III. The Trial court erred in finding that the Plaintiff must prove by clear and convincing evidence that the Defendants signed a Commercial Guaranty waiving the benefits of any statute of limitations with the fraudulent intent to refuse to be bound by the signed waiver as a requirement for the waiver to be enforceable under the provisions of Virginia Code § 8.01-232(A). (Order, February 27, 2018)

PRINCIPLES OF LAW, ARGUMENT AND AUTHORITIES

A. THE ASSIGNMENTS OF ERROR ADDRESS THE TRIAL COURT'S INTERPRETATION AND APPLICATION OF VIRGINIA CODE § 8.01-232(A) AND ARE SUBJECT TO A DE NOVO STANDARD OF REVIEW.

As set forth in the Assignments of Error, the Trial Court erred in its interpretation of Virginia Code § 8.01-232(A), and its application to the clear, concise, and undisputed language of the waiver of the benefits of any statute of limitations that is set forth in the Guaranty signed by the defendants.

A potentially erroneous legal conclusion based on the interpretation of a statute presents a pure question of law which is subject to a de novo review. *Conyers v. Martial Arts World of Richmond*, *Inc.*, 273 Va. 96, 104, 639 S.E.2d 174, 178 (2007): *Commonwealth v. Williams*, 295 Va. 90, 95, 809 S.E.2d 672, 675 (2018). The Assignments of Error present pure questions of law and are subject to a de novo standard of review.

B. THE TRIAL COURT ERRED IN FINDING THAT A CONTRACTUAL WAIVER OF THE BENEFITS OF ANY STATUTE OF LIMITATION IN THE GUARANTY SIGNED BY THE DEFENDANTS AS CONSIDERATION FOR A COMMERCIAL LOAN IS NOT VALID AND ENFORCEABLE ACCORDING TO THE TERMS OF VIRGINIA CODE ANNOTATED § 8.01-232(A). (ASSIGNMENT OF ERROR I)

The Virginia Supreme Court has described "waiver" as "the intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it." *May v. Martin*, 205 Va. 397, 404, 137 S.E.2d 860, 865 (1964); *Hensel Phelps Constr. Co. v. Thompson Masonry Contr.*, *Inc.*, 292 Va. 695, 702, 791 S.E.2d 734, 737 (2016).

In the present case, Defendants Robert Foster and James Wilson clearly expressed an intentional relinquishment of a known right as set forth in paragraph 6 of the Guaranty: "Each of the Guarantors waives the benefit of any statute of limitations…" App. pp.167-169.

It has long been recognized in Virginia that "An agreement to waive and an actual waiver are essentially different." *Richmond Leather Mfg. Co. v. Fawcett*,

130 Va. 484, 506, 107 S.E.2d 800, 808 (1921). In *Richmond Leather* the Supreme Court recognized the main distinction is that "An actual waiver is a completed performance". *Id.* at 505, 107 S.E.2d at 808.

In *Hensel Phelps*, *supra*, the Virginia Supreme Court recognized the contractual right of a party to expressly waive the statute of limitations period. In *Hensel Phelps*, the general contractor for a Virginia Tech construction project argued that its subcontractor waived the 5-year statute of limitations in their written subcontract. Virginia Tech, as a Commonwealth agency, was, by statute, not bound by a limitations period (*Va. Code § 8.01-231*). The general contractor argued that its contract with Virginia Tech was incorporated into its contract with its subcontractor, including the statutory waiver of the limitation period. The Court examined the subcontract to determine if the general incorporation language was sufficient to find that the subcontractor expressly waived its right to a limitations period. The Court found that the provisions of the contract failed to expressly indicate "knowledge of" and "intent to relinquish" the subcontractors' right to a limitations period. *Id.* at 703, 791 S.E.2d 734, 737.

The Trial Court in this matter requested briefs concerning whether Virginia Code § 8.01–232(A) would invalidate the express waiver of the statute of limitations made by Robert Foster and James Wilson. The Trial Court acknowledged that the case would turn on whether or not a contractual provision to waive the statute of limitations is permissible in the Commonwealth. App. p.131.

After a review of the post-trial briefs, the Trial Court found that the waiver of the benefit of statute of limitations as set forth in the Guaranty was not valid and enforceable according to the terms of Virginia Code annotated § 8.01–232(A). The statute provides, as follows:

> Whenever the failure to enforce a promise, written or unwritten, not to plead the statute of limitations would operate as a fraud on the promisee, the promisor shall be estopped to plead the statute. In all other cases, an unwritten promise not to plead the statute shall be void, and a written promise not to plead such statute shall be valid when (i) it is made to avoid or defer litigation pending settlement of any case, (ii) it is not made contemporaneously with any other contract and (iii) it is made for an additional term not longer than the applicable limitations period."

Va. Code Ann. § 8.01–232(A)

As set forth in *Richmond Leather Mfg. Co.*, *supra*, there is an essential difference between an agreement to waive and an actual waiver. Virginia Code § 8.01–232(A) is limited to a specific act of a promise of future performance ("an agreement to waive the statute of limitations") and by its terms, is not applicable to a waiver of the benefit of the statute of limitations ("an actual waiver is a completed performance"). *Richmond Leather*, 130 Va. at 505, 107 S.E.2d at 808.

Virginia Code § 8.01–232(A) and the handful of cases concerning the statute are limited to executory promises for future performance – agreements to waive and not actual waivers. In *Soble v. Herman*, 175 Va. 489, 9 S.E.2d 459 (1940) the executrix of an estate made an oral promise that she "would never plead the statute of limitations against a note". Likewise in *Tucker v. Owen*, 94 F.2d 49 (1938),

there was a "unwritten promise, with nothing more, not to plead the statute of limitations to a debt", and in *Slaey v. Harrington*, 539 B.R. 500 (E.D. Va. 2015), *aff'd on opinion below*, 671 F. App'x 126 (4th Cir. 2016), there was a written agreement that "…the undersigned agrees that she will not raise the defense of the statute of limitations in any legal proceeding that relates to the funds borrowed."

There are no reported cases concerning the application of Virginia Code § 8.01–232(A) to a past waiver of the statute of limitations ("a completed performance").

In *Hensel Phelps*, *supra*, the Virginia Supreme Court carefully examined the specific contract documents between the general contractor and the subcontractor to determine whether the subcontractor expressly waived its right to a limitations period. As a necessary predicate to its ruling, the Court in *Hensel Phelps* inferred that had there been an express waiver by the subcontractor of the limitations period, the subcontractor would be bound by the express waiver of the statute of limitations. Under the Trial Court's ruling concerning the application of Virginia Code § 8.01–232(A) to a completed waiver, the examination by this Court of the *Hensel Phelps* subcontract document would not have been necessary because all waivers that are made contemporaneously with any other contract are invalid and *void ab initio* unless it is proven by clear and convincing evidence the waiver was made with a fraudulent intention not to honor the waiver.

If the Trial Court's ruling is upheld, all general contractors that contract with agencies of the Commonwealth would find themselves in the untenable position whereby they would be subject to no limitation periods in proceedings filed by agencies of the Commonwealth, but would be unable to provide for similar waivers of limitations in their contacts with their subcontractors.

C. THE TRIAL COURT ERRED IN FINDING THAT THE DEFENDANTS' CONTRACTUAL WAIVER OF THE BENEFITS OF ANY STATUTE OF LIMITATION WAS NOT A COMPLETED PERFORMANCE AT THE TIME IT WAS SIGNED, BUT WAS INSTEAD A PROMISE FOR FUTURE PERFORMANCE. (ASSIGNMENT OF ERROR II)

The Trial Court erroneously found that an unconditional waiver of a legal right is not a completed performance whereby the party relinquishes the right and is estopped from exercising the right, but is instead the promise of future performance.

Robert Foster and James Wilson acknowledged and agreed in paragraph 11 of the Guaranty that the "Bank may without notice assign this Guaranty in whole or in part in each reference herein to Bank shall be deemed too include its successors and assigns". App. p.168. Therefore, any subsequent assignees would be relying upon the waivers contained in the Guaranty, including the waiver of the benefit of the statute of limitations.

Foster and Wilson, in exchange for the valuable consideration of a bank loan, agreed in their Guaranty to waive numerous legal rights, including the rights

of subrogation, reimbursement, contribution, indemnity, recourse, the right to participate in a security held by the Bank, the rights of presentment, the rights for demand of performance, notices of non-performance, notice of acceleration, and the benefits of Virginia Code §§ 49-25 and 49-26. App. pp.167-169 (Par. 6)

Foster and Wilson, also explicitly and unconditionally waived the benefit of any statute of limitations. App. pp.167-169 (Par. 6).

The Virginia Supreme Court has consistently defined "waiver" as the voluntary and intentional abandonment of a known legal right, advantage or privilege. *See*, *May v. Martin*, 205 Va. 397, 404, 137 S.E.2d 60 and 65 (1964)*; Fox v. Deese*, 234 Va. 412, 425, 362 S.E.2d 699, 707 (1987); *Hensel Phelps Constr. Co. v. Thompson Masonry Contr.*, *Inc.*, 292 Va. 695, 702, 791 S.E.2d 734, 737, 262 (2016).

The Virginia Supreme Court has long recognized that a party may enter into an agreement which waives a significant legal right. *See e.g.; Blue Cross of Southwestern VA. v. McDevitt & Street Co*., 234 Va. 191, 196-197, 360 S.E.2d 825, 828 (1987) (waiver of right to claim damages); *Flintkote Co. v. W.W. Wilkinson*, *Inc.*, 220 Va. 564, 570, 260 S.E.2d 229, 232 (1979) (waiver of right to a jury trial on amount of attorney's fees); *VNB Mortgage Corp. v. Lone Star Indus.*, *Inc.*, 215 Va. 366, 369, 209 S.E.2d 909, 912 (1974) (waiver of right to file a mechanic's lien).

If the party being charged with relinquishment of right acknowledged the right and intended to waive it, the waiver will be enforced. *Roenke v. Virginia Farm Bureau Mut. Ins. Co.*, 209 Va. 128,135, 161 S.E.2d 704, 709 (1968); *Woodman of the World Life Ins. Soc. v. Grant*, 18 Va. 288, 299, 38 S.E.2d 450, 454 (1946).

An actual waiver is a completed performance, *Richmond Leather Mfg. Co. v. Fawcett*, 130 Va. 484, 505, 107 S.E.2d 800, 808 (1921), and the effect of a waiver is to "estop" one from the exercise of a waived right. *Sink v. Commonwealth*, 13 Va. App. 544, 547, 413 S.E.2d 658, 660 (1992); *Roenke v. Farm Bureau Mut. Ins. Co.*, 209 Va. 128, 135, 161 S.E.2d 704, 709 (1968).

The waivers in the Guaranty were completed performances. Foster and Wilson relinquished the waived legal rights and should therefore be estopped from exercising any of the waived legal rights, including the waiver of the benefit of the statute of limitations.

The court erred in concluding that a waiver is not an immediate extinguishment of right estopping one from exercising the waived right, but instead is a promise to not to assert the legal right in the future.

D. THE COURT ERRED IN FINDING THAT THE PLAINTIFF MUST PROVE BY CLEAR AND CONVINCING EVIDENCE THAT THE DEFENDANTS SIGNED THE CONTINUING GUARANTY WAIVING THE BENEFITS OF ANY STATUTE OF LIMITATIONS WITH THE FRAUDULENT INTENT TO REFUSE TO BE BOUND BY THE SIGNED WAIVER. (ASSIGNMENT OF ERROR III)

It cannot be determined by the Trial Court's cursory ruling whether the Court relied upon the two cases cited by Defendants in their post-trial briefs, *Slaey v. Harrington* (*In Re: Slaey*), 539 B.R. 500 (E.D. Va. 2015) and *Soble v. Herman*, 175 Va. 489, 9 S.E.2d 459 (1940).

The opinions in *Soble v. Herman* and *Slaey v. Harrington* result in a nonsensical legal paradox. Specifically, the opinions result in paradoxical situation where a written waiver of a statute of limitation, made contemporaneously with a contract, by an honest person with the intent of being bound by the waiver is invalid and unenforceable. However, if the identical promise is made by a dishonest person with no intention of performing a promise, then the promise is valid and enforceable.

In *Slaey*, District Judge Ellis concluded that a written promise not to plead the statute of limitations was valid and enforceable only if three (3) specific requirements are met. The promise must be made to avoid or defer litigation pending a settlement of a case, must not be made contemporaneously with any other contract, and must be made for an additional term not longer than the applicable limitations. Judge Ellis also noted that the statute provided a limited

exception to this general rule, specifically that if any written promise is made to not plead the statute of limitations, and the failure to enforce the promise would operate as a fraud on the promise by the promisee, then the promisor shall be estopped to plead the statute. *Slaey v. Harrington* (*In Re. Slaey*), 539 B.R. 500 (E.D. Va. 2015).

In *Slaey*, the court reviewed the opinion of the Supreme Court of Virginia in *Soble v. Herman*, *supra*, where the court relied on the principle that "[f]raud must relate to a present pre-existing fact, and cannot ordinarily be predicated on unfulfilled promises or statements as to future events" *Soble*, 175 Va. at 499, 9 S.E.2d at 464. In *Slaey*, the court concluded that the fraud exception of Virginia Code § 8.01-232(A) cannot be based upon the breach of the agreement to perform, but must be found in the fraudulent intent present in the promisor's mind at the time that the promise is made. Furthermore, the fraudulent intent must be established by clear and convincing evidence. *Slaey*, 539 B.R. at 509.

Thus a nonsensical legal paradox has been created whereby if a promise not to plead a statute of limitation is made contemporaneously with another contract by an honest person with the honest intention to perform the promise and be bound by it, the promise is invalid and unenforceable and cannot be relied upon by the promisee. However, if the identical promise made by a dishonest person, without the intent to perform, as proven by clear and convincing evidence, the identical promise is then a valid and enforceable promise.

Furthermore this Court is not bound by the decisions of the federal courts in *Slaey v. Harington.* *See*, *e.g. Toghill v. Commonwealth*, 289 Va. 220, 227, 786 S.E.2d 674, 677 (2015) ("While this Court considers Fourth Circuit decisions as persuasive authority, such decisions are not binding precedent for decisions of this Court."); *Owsley v. Peyton*, 352 F.2d 804, 805 (4th Cir. 1965) ("[t]hough state courts may for policy reasons follow the decisions of the Court of Appeals whose circuit includes their state…they are not obligated to do so"); *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1076 (7th Cir. 1970) ("[B]ecause lower federal courts exercise no appellate jurisdiction over state tribunals, decisions of lower federal courts are not conclusive on state courts.").

In the present case the waiver of the benefit of the statute of limitations was effective and enforceable at the time the waiver was made. Subsequent assignees of the Commercial Note and Continuing Guaranty must be able to rely on the waiver as made by the guarantors in the Guaranty and not be forced to determine, by clear and convincing evidence, whether the guarantors signed the guaranty with fraudulent intent, in order to determine whether the waiver was valid and enforceable.

CONCLUSION

For the foregoing reasons, this court should reverse the trial court's ruling that the waiver of the statute of limitations as set forth in the Guaranty is not valid and enforceable, and remand for entry of judgment for the Plaintiff, Radiance Capital Receivables Fourteen, LLC, in the amount of $247,621.45 plus interest Eight Percent (8%) per annum from February 8, 2018, and further for a determination as to the amount of attorney's fees that should be assessed against the Defendants, Robert D. Foster and James M. Wilson.

Respectfully submitted,

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CERTIFICATE

I hereby certify that on this 7th day of November, 2018, pursuant to Rules 5:26 and 5:32(a)(3)(i), three paper copies of the Brief of Appellant and three paper copies of the Appendix have hand-filed with the Clerk of the Supreme Court of Virginia and electronic copies of the Brief and Appendix were filed, via VACES. On this same day, electronic copies of the Brief of Appellant and Appendix were served, via email, upon:

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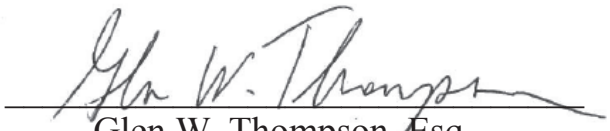

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