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.

REPLY BRIEF OF APPELLANT

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PRINCIPLES OF LAW, ARGUMENT AND AUTHORITIES

A. THE COURT FAILED TO RECOGNIZE THAT A WAIVER IS A COMPLETED PERFORMANCE AND NOT A PROMISE FOR FUTURE PERFORMANCE.

Foster and Wilson argue that a waiver of a known legal right and a personal promise not to assert a right in the future are legally equivalent acts. In support of their argument, Foster and Wilson rely solely on Judge Ellis's labelling of a promise as a "waiver" in a federal court appeal of a bankruptcy court decision. *Slaey v. Harrington (In re Slaey)*, 539 B.R. 500 (E.D. Va. 2015), *aff'd* 671 F. App'x 126 (4th Cir. 2016).

In *Slaey*, Judge Ellis reviewed Mary Slaey's executory promise for future performance "…that she will not raise the defense of the statute of limitations in any legal proceeding that relates to funds borrowed." 539 B.R. 502. Judge Ellis labelled the written agreement as a "waiver" without any review as to what constitutes a waiver under Virginia law and opinions of this court. "This written agreement – hereinafter referred to as the 2008 SOL Waiver". 539 B.R. 502.

Judge Ellis's opinion concerned the application of Virginia Code § 8.01-232(A), which specifically addresses promises not to plead the statute of limitations, to the executory promise made by Mary Slaey not to raise the defense of the statute of limitations. Notwithstanding Judge Ellis's labelling of the executory promise as a "waiver", Judge Ellis did not address whether the executory

promise was a waiver, as defined by Virginia law, and the issue was not before the court because the agreement in *Slaey* was clearly an executory promise for future performance and not a waiver as defined by Virginia law.

A waiver of a right is not a promise not to assert a right, but is a relinquishment of a right effective at the time when the waiver is made. "A waiver takes place when a known right is intentionally relinquished". *Coleman v. Nationwide Life Ins. Co.*, 211 Va. 579, 583, 179 S.E. 466, 469 (1971). An actual waiver of a legal right is a completed performance, and is essentially different from an agreement to waive a legal right in the future. *Richmond Leather Mfg. Co. v. Fawcett*, 130 Va. 484, 505-506, 107 S.E. 800, 808 (1921).

Virginia Code § 8.01-232(A) is limited to executory promises to not plead the statute of limitations in the future, which is essentially different from the completed performance of a waiver. Likewise, Judge Ellis's opinion in *Saley, supra*, does not address the completed performance of a waiver but is limited to the executory promise made by Mary Slaey. The labelling of the executory promise as a "waiver" is not supported by the facts of the case or an analysis of Virginia law as to what constitutes a waiver.

Furthermore, this Court is not bound by a federal court judge's characterization of an executory promise as a waiver. *See, e.g., Toghill v. Commonwealth*, 289 Va. 220, 227, 786 S.E.2d 674, 677 (2015) (While this Court

considers Fourth Circuit Court decisions as persuasive authority, such decision are not binding precedent for the decisions of this Court"); *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1076 (7th Cir. 1970) ("Because lower federal courts exercise no appellate jurisdiction over state tribunals, decisions of lower federal courts are not conclusive on state courts.").

B. A PARTY TO A CONTRACT MAY WAIVE ANY RIGHT CONFERRED BY LAW OR CONTRACT AND BEING FOR HIS OWN BENEFIT, THE RELINQUISHMENT OF A RIGHT IS SOLELY HIS CONCERN.

Foster and Wilson, having agreed that they knowingly waived numerous rights in their contract, including the right to the benefit of any statute of limitations, now argue that they should be relieved of this contractual obligation because such a waiver violates public policy. Foster and Wilson raised no allegations at trial and presented no evidence that it entered into the Guaranty contract under duress, or as a result of fraud or mistake, or under any circumstances that might serve as a basis for declaring the Guaranty and its waiver provisions as unenforceable.

It is well-settled that a term of the parties' contract becomes the law of the case unless such term is repugnant to public policy or to some rule of law. *Rash v. Hilb, Regal, & Hamilton Co. of Richmond*, 251 Va. 281, 285, 467 S.E.2d 791, 794 (1996). It is also well recognized that generally a party may waive by contract any

right conferred by law or contract. *Gordonsville Energy, L.P. v Virginia Elec. & Power Co.*, 257 Va. 344, 356, 512 S.E.2d 818 (1999). No one is concerned with the waiver of a legal right by a party to a contract because the right is solely for the party's benefit. *Roenke v. Farm Bureau Mut. Ins. Co.*, 209 Va. 128, 135, 161 S.E.2d 704, 709 (1968); *Richmond Leather, supra*, 130 Va. at 505, 107 S.E. at 808.

This court has upheld the waivers of significant legal rights because if a party had knowledge of the right and intended to waive it, the waiver will be enforced. *Roenke*, 209 Va. at 135, 161 S.E.2d at 709; *Gordonsville*, 275 Va. at 356, 512 S.E.2d at 818.

Foster and Wilson argue that a waiver of the statute of limitations "would constitute a significant assault on the purposes of statues limitations in general" and should be found to violate public policy. In support of their position, they argue that to allow waivers of statutes of limitations, even if knowingly made, stale claims could be extended in perpetuity resulting in unworkable and unacceptable situations.

Foster and Wilson fail to acknowledge that the General Assembly has allowed this supposedly horrendous result to exist for any claims made by any agency of the Commonwealth. No statute of limitations can bar any proceeding by or on behalf of the Commonwealth. *Virginia Code § 8.01-231.* If contractual waivers of the statute of the limitations are barred as a matter of public policy, or

by the application of Virginia Code § 8.01-232(A), then all parties that contract with the Commonwealth will be subject to no time limits on claims made by the Commonwealth, but will be unable to seek compensation from their subcontractors in cases where the Commonwealth's claim may result from the subcontractor's contractual duty. This Court recognized ability of a general contractor to protect itself from this situation by having its subcontractor waive the statute of limitations. *Hensel Phelps Constr. Co. v. Thompson Masonry Contr., Inc.*, 292 Va. 695, 791 S.E.2d 734 (2016). In *Hensel Phelps*, the general contractor was subject to a claim by Virginia Tech that was beyond the statute of limitation and based upon the performance of a subcontractor. The subcontract documents were reviewed to determine if there was a waiver of the statute of limitations by the subcontractor. However the subcontract was found to lack the clear and explicit language to support a knowing waiver of the statute of limitations.

In the present case the waiver by Foster and Wilson was clear, explicit, knowingly made with no evidence presented of fraud, duress, mistake or undue influence.

C. THE CIRCUIT COURT'S HOLDING THAT VIRGINIA CODE § 8.01-232(A) APPLIES TO CONTRACTUAL WAIVERS OF THE BENEFITS OF A STATUTE OF LIMITATION CREATES A LEGAL IMPOSSIBILITY BECAUSE THERE ARE NO SITUATIONS WHERE THE FAILURE TO ENFORCE THE WAIVER WOULD OPERATE AS A FRAUD.

1. There can be no fraud absent the defrauded party's right to reasonably rely upon the fraudulent misrepresentation.

Foster and Wilson argue that that Virginia Code § 8.01-232(A) applies to all contractual waivers of the statute of limitations and therefore the waiver as set forth in the Guaranty is void as a matter of law. They further argue that to satisfy the fraud exception of Code § 8.01-232(A) "… the waiver of the statute-of-limitations defense would be enforceable under Virginia law only if Radiance had shown, by clear and convincing evidence, that the Guarantors fraudulently signed the Guaranty without any present intention not to plead the statute of limitations as a defense when the time came." (Appellee's Br. 13.)

While Foster and Wilson dispute that their argument creates a "nonsensical legal paradox", they have failed to provide any argument in support of their position. There can be no claim for fraud when the defrauded party relies on a representation that is void and unenforceable as a matter of law.

The tort of fraudulent misrepresentation is defined as fraudulently making a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or refrain from action in reliance upon it. The following elements

must be proven by a plaintiff: (1) a fraudulent misrepresentation, (2) that induces another to act or refrain from acting, (3) causing harm to the plaintiff, and (4) the plaintiff's justifiable reliance on the misrepresentation. (*8B M.J., Fraud and Deceit, §2*, p. 3). To establish fraud, it is essential that the defrauded party demonstrates the right to reasonably rely upon the misrepresentation. *Anthony v. Verizon Va., Inc.*, 288 Va. 20, 34, 758 S.E.2d 527, 534 (2014).

If, as a matter of law, there is no right to reasonably rely upon a misrepresentation, then there is no justifiable reliance and therefore no fraud. *Metrocall of Delaware v. Continental Cellular Corp.*, 246 Va. 365, 374, 437 S.E.2d 189, 194 (1993). Therefore, if a contractual waiver of the statute of limitations is void as a matter of law, there can be no justifiable reliance on the waiver. There can be no fraud and the fraudulent intent of the party making the waiver is irrelevant.

2. If the fraud language of Virginia Code § 8.01-232(A) is limited to the fraudulent intention of the party making a contractual waiver at the time the waiver is made, then the fraud language in the statute is nonsensical and of no effect because there can be no justifiable reliance on a contractual waiver of the statute of limitation if all contractual waivers are invalid and unenforceable.

If a contractual waiver of, or a promise not to plead, the statute of limitation is subject to Virginia Code § 8.01-232(A) and void as a matter of law, there are no situations where pleading the statute of limitations would "operate as a fraud"

because there can be no justification for reliance on a waiver or promise not to plead the statute of limitations.

Foster and Wilson argue that the "fraud" language of the statute provides a narrow exception to the statute of limitations by granting a limited circumstance in which statutes of limitations can be voluntarily waived. "By contrast, enforcing a dishonest person's promise to not to plead the statute of limitations, which is identical to the honest person's promise but made without the present intention to perform, gives effect to the different policy goal of preventing a fraud on the promise." (Appellee's Br. P.14) The argument completely ignores the fundamental element of justifiable reliance by the promisee to establish fraud. There can be no justifiable reliance on a promise that is void as a matter of law, and therefore the honesty or the intentions of the promisor are irrelevant. See, e.g. *Metrocall of Delaware, supra* (No fraudulent inducement when negotiating a compromise of an existing controversy over fraud, dishonesty, and self-dealing because it is unreasonable to rely on the representations of the allegedly dishonest party). *Petinelli v. Danzig*, 722 F.2d 706 (11th Cir. 1984) (fraudulent inducement in entering into a release not established because plaintiffs had no legal right to rely on representations made by allegedly dishonest parties).

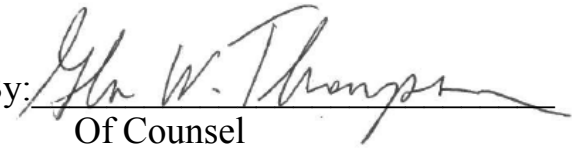
In the present case this Court does not need to address this "nonsensical legal absurdity" because the waiver was not a future promise subject to Virginia

Code § 8.01-232(A). The waiver of the statute of limitations was a completed act when Foster and Wilson signed the Guaranty. When Foster and Wilson signed the Guaranty, they relinquished their right to the benefit of the statute of limitations. The waiver was complete and there were no promises for future performance. Radiance's reliance on the waiver was justifiable when it purchased the underlying Note, Guaranty and account.

CONCLUSION

For the reasons stated above, and also for the reasons set forth in the Opening Brief, this Court should reverse the trial court's ruling that the waiver of the statute of limitations 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 at 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,

By: 
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CERTIFICATE

I hereby certify the on this 12th day of December, 2018, pursuant to eh Rules of the Supreme Court, three copies of the Appellant's Reply Brief have been hand-filed with the Clerk of the Supreme Court of Virginia and an electronic copy of the Reply Brief was filed, via VACES. On the same day, an electronic copy of the Appellant's Reply Brief was served, via email, upon:

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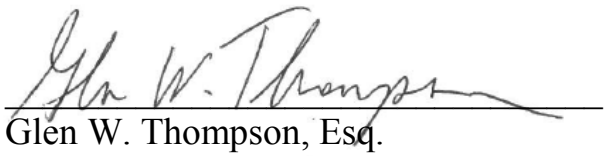

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