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IN THE

SUPREME COURT OF VIRGINIA

Record No. 181238

JAMES DAVID EVERETT, II,

Appellant,

v.

KATHRYN JEAN TAWES

Appellee.

BRIEF OF APPELLEE

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NATURE OF THE CASE AND MATERIAL PROCEEDINGS

For purposes of this Brief of Appellee, Appellee shall adopt Appellant's designation of the parties as "Everett" (referring to Appellant) and "Tawes" (referring to Appellee). Reference to pages in the Joint Appendix will be referred to as "JA ____". The Williamsburg and James City County Circuit Court will be referred to as the "trial court." The Opening Brief of Appellant is referred to as "Everett's Brief."

Tawes agrees with Everett's Statement of the Case and Material Proceedings as stated by Everett except as specifically corrected herein. Further, Everett has left out many material proceedings and dates. Therefore, Tawes adopts Everett's Statement of the Case and Material Proceedings with the following additional statements, clarifications and corrections.

Tawes filed a motion for temporary spousal support pursuant to the 9th Circuit guidelines on April 26, 2016 but was not heard on this motion until October 13, 2016. (JA pp. 5, 6, 8). After consideration of the evidence of Everett's income, each party's needs, and crediting Everett for direct payments towards marital expenses since suit was filed, on December 12, 2016, the presiding trial judge, the Honorable Walter J. Ford, temporarily ordered Everett to continue paying various *marital* expenses directly in addition to paying Tawes spousal support of $7,831 per month retroactive to May 1, 2016. Since Everett had not given Tawes any

spousal support directly to meet her needs since she filed her petition on April 26, 2016, the court determined that Everett owed an arrearage of $46,986 as of the date of that hearing. No interest was added. (JA 8-9, 138-139). Upon entry of the *pendente lite* Order, Everett did not object to the arrearage amount, he only objected to the determination of his income for purposes of calculating the presumptive amount of spousal support. (JA 10).

Contrary to the assertions in Everett's Brief, his total monthly *pendente lite* spousal support obligation was unclear from the record since part of Everett's support obligation required him to pay various marital expenses directly and the evidence differed on what those amounts were. (JA 136-138; 142-144; 146-152; 160-162; 189-191; 207; 549-550; 557; 568). Also contrary to Everett's assertions, there were no findings that *pendente lite* support exceeded Tawes' need. In fact, the trial court specifically ruled at the temporary support hearing that even with Everett paying the mortgage, the car payment, and other family debt, a cash payment to Tawes of $7,831 per month means "she is not going to get enough money to live on." (JA 207).

All subsequent hearings in the case, including the final four day trial, were heard by a different judge, The Honorable Charles Maxfield. (JA 216; 378; 403; 433; 530).

At the final hearing, after considering all of the evidence and arguments of counsel over a period of four days, the trial court ruled that Everett owed a total *pendente lite* arrearage of $66,437.68, the amount due as of the date of the Show Cause hearing which was the same month Everett filed his Motion for Reconsideration. (JA 11; 570). Tawes' counsel stipulated that the trial court could modify the temporary spousal support due after March, 2017, when Everett filed his Motion for Reconsideration because Virginia Code § 20-109 specifically allows for it, not because he was "absorbing the trial court's comments about the injustice of the award". (JA 388, Everett's Brief p. 5).

Tawes conceded that a trial court can retroactively modify spousal support orders from the date a modification is requested, not to a date prior to that. *See Brief in Opposition p. 7* .

STATEMENT OF FACTS

Tawes incorporates Everett's Statement of Facts except as specifically noted herein. There are also some important facts that Everett omitted.

Pendente Lite Hearing

In October, 2016 the trial court was presented with extensive evidence from both parties regarding Everett's ability to pay and Tawes' need. (JA 122-215; 542-569). At the conclusion of the evidence, Judge Ford found:

> "The spousal support that was presented to me by the defendant [Everett] shows a monthly gross income of $32,922. Based on the information that was presented, it seems to be a fairly accurate amount…I assume [Tawes] doesn't have any income at all and that has been the evidence and supported by the evidence and I can understand that. The Court considers the previous existence prior to their divorce and had a good life [sic]…And for the record, if all [Everett] makes is $12,200 a month and he is paying out more than that, where does he get the money to pay that with [sic] unless he has other funds available that he can divert some of the money he's getting." (JA 207-208).

Show Cause Hearing

In March, 2017, as stipulated by Everett, Judge Maxwell heard virtually the same evidence as Judge Ford heard in October, 2016, regarding Everett's cash flow (JA 236-377; 571-594) and found:

> "[T]here is absolutely no evidence of a lavish lifestyle or anything else and to come in and to point to certain areas in a tax return and say, see, you know, there is a lot more money here than meets the eye, when there is no, absolutely no external evidence of that being true…It is my case now…I don't think, as I told you, legally that an arrearage *pendente lite* makes any sense at all." (JA 373-374).

Hearing on Motion to Increase Support and Motion for Reconsideration

In June, 2017, at the hearing on Everett's Motion for Reconsideration of temporary spousal support, Judge Maxfield held, "[a]bsent a change in circumstances here from a hearing last fall, I am not going to entertain the hearing on the PL [sic]. I am just going to take a look at what I think correct spousal support is next month, I am going to take a look at what Judge Ford did." (JA 397).

And, in his final ruling on all matters stated, "I am going to set [support] at $4,800 a month. The arrearage of $66,437 remains. I am not going to change the *pendente lite* order. I would note that this is far less than the pendente lite order." (JA 541).

Appeals

In its opinion, the Court of Appeals stated as fact that "[t]he [trial] court concluded that established case law did not permit retroactive modification." (JA 97). However, there is no dispute that is not a fact of this case. Just as stated in Everett's Brief, when the trial court refused to modify Everett's arrearage under the *pendente lite* order, it specifically did not conclude whether it could or could not do so stating, "[w]hether or not I have the authority to vacate [the *pendente lite* order] is just ground I don't want to cover." (JA 529A).

Material Facts

In Everett's Brief he improperly states as fact that Tawe's monthly expenses were only $11,720.33 per month at the temporary support hearing. *See Everett's Brief p. 9*. However, the evidence was that in addition to that amount, Tawes had $58,658.17 in credit card debt for which she was solely responsible for paying the minimum each month. (JA 150-151; 550). She also had to borrow $20,000 from her mother to make ends meet and Judge Ford declined to advance any funds for her to carry on this suit relying on the payment of the support arrearage to help her do so. (JA 143-144; 208). Everett also implies that the direct payments he was

ordered to make were solely for Tawes' benefit. *See Everett's Brief p. 9*. However, those payments were for marital debt, insurance and upkeep on marital property, and therefore, benefitted both parties.

In Everett's Brief he also states that it was a fact that he only had $2,200 remaining from his 2015 and 2016 distributions after payment of taxes and that Judge Ford did not rely "on cash *actually* available to meet living expenses." *See Everett's Brief p. 8* [emphasis added]. Properly stated, Everett's testimony was his version of the story, it was not a fact of the case at the temporary support hearing. The facts are that the at the temporary support hearing, Judge Ford found, "if all [Everett] makes is $12,200 per month and he's paying out more than that, where does he get money to pay that with [sic] unless he has other funds available that he can divert some of the money he's getting [sic]." (JA 207). Further, when asked by Everett's counsel how Everett would meet the monthly temporary support obligation and pay down the arrearage, Judge Ford stated, "[b]ased on the information I have, he should be able to do it." (JA 211).

STANDARDS OF REVIEW AND ARGUMENT

I. THE COURT OF APPEALS *DID NOT* ERR AND IT DID NOT DECLARE THAT A *PENDENTE LITE* SPOUSAL SUPPORT ORDER IS A FINAL JUDGMENT, EFFECTIVELY RESULTING IN DENIAL TO EVERETT A RIGHT TO APPEAL.

Standard of Review

Tawes incorporates Everett's standard of review on this argument.

Argument

While the Court of Appeals held that "[t]he law is well settled that support payments vest as they accrue and many not be modified retroactively," it did not hold that *pendente lite* orders are final judgments that may not be appealed. (JA 98). The Court of Appeals was merely referring to the trial court's authority to retroactively modify the support to a date prior to Everett's Motion for Reconsideration. The Court of Appeals then went on to hold that "trial court did not err in denying [Everett's] request to modify the *pendente lite* order retroactively." (JA 99).

Tawes maintains her position that the trial court never ruled that it did not have the authority to retroactively modify the *pendente lite* support and thereby rid Everett of his accrued arrearages. When referring to his authority to retroactively modify the *pendente lite* support at the June 6, 2017 hearing on Everett's Motion for Reconsideration, Judge Maxfield stated "…I am chickening out because I am

not willing to cite this issue." (JA 400). However, it is presumed that this Court has granted this appeal for the purpose of addressing whether a trial court may retroactively modify *pendente lite* spousal support to a date prior to the filing of a petition to modify, so it will be addressed in this Argument.

In determining the court's authority to retroactively modify *pendente lite* spousal support to a date prior to the filing of a petition to modify, one must first look at the relevant authority granted to the courts by statute. In Virginia, the statutory requirements for modifying any existing spousal support order are found in Virginia Code § 20-109 and § 20-112. Under Virginia Code § 20-109 "[u]pon petition of either party the court may increase, decrease or terminate the amount or duration of *any spousal support and maintenance* that may *thereafter* accrue, whether previously or hereafter awarded as the circumstances may make proper." (emphasis added). Virginia Code § 20-112 provides, "*no support order may be retroactively modified*, but may be modified with respect to any period during which there is a pending petition for modification in any court, but only from the date that notice of such petition has been given to the responding party." (emphasis added).

To determine the meaning of these statutes, we must turn to settled principles of statutory construction for guidance.

> "We give the words of a statute their common, ordinary and accepted meaning, absent an indication by the legislature to the contrary. We are also required to view the entire body of legislation and the statutory scheme to determine the true intention interpreting a statute, the Code of Virginia constitutes a single body of law, and other sections can be looked to where the same phraseology is. Under a similar principle, statutes which are not inconsistent with one another, and which relate to the same subject matter, are *in pari materia,* and should be construed together; and effect should be given to them all, although they contain no reference to one another, and were passed at different times." *Ipsen v. Moxley*, 49 Va. App. 555, 561, 642, S.E.2d 798, 800 (2007)(citations and internal quotation marks omitted).
>
> "Ultimately the proper course in all statutory construction cases is to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objectives of the legislature. In doing so, we must, as far as possible, place ourselves in the light that the legislature enjoyed, looking at things as they appeared to it, and discover its purpose from the language used in connection with attending circumstances." *Id*. (citations and internal quotation marks omitted).

The language in Virginia Code § 20-109 and § 20-112 are clear. Pursuant to Virginia Code § 20-109 a trial court can only modify spousal support that may "thereafter" accrue, referring to the date of the petition. Black's Law Dictionary defines "thereafter" to mean "afterward; later." Virginia Code § 20-112, consistent with Virginia Code §20-109, specifically states that no support orders may be retroactively modified except "with respect to any period during which there is a pending petition for modification in any court, but only from the date that notice of

such petition has been given to the responding party." Neither of these statutes state that they do not apply to support orders made pursuant to Virginia Code § 20-103.

Admittedly, Virginia Code § 20-103 is silent on the court's authority to retroactively modify past due support payments. Yet, Everett argues that the court's silence necessarily means this authority is implied since Virginia Code § 20-107.1(H)(6) specifically says "the support obligation as it becomes due and unpaid creates a judgment by operation of law," as does Virginia Code § 20-60.3. This reasoning is flawed because the trial court's authority to enter spousal support orders of any kind and its powers to modify them is purely statutory, not implied. *See Weizenbaum v. Weizenbaum,* 12 Va.App 899, 904, 407 S.E.2d 37, 40 (1991); *see also Reid v. Reid*, 245 Va. 409, 415, 429 S.E.2d 208, 211 (1993).

When construing a statute, the "Court…presumes that the legislature chose, with care, the words used when it enacted the relevant statute." *Fox v. Fox*, 61 Va. App. 185, 196, 734 S.E.2d 662, 667 (2012). To suggest that Virginia Code § 20-103 is an exception to Virginia Code § 20-109 and § 20-112 because it does not state that support orders when due create judgments by operation of law as Virginia Code §20-60.3 and § 20-107.1 do is absurd. "The plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow or

strained construction; a statute should never be construed so that it leads to absurd results." *Sargent v Sargent*, 20 Va. App. 694, 706, 460 S.E.2d 596, 602 (1995).

Virginia case law has consistently held that courts cannot modify accrued arrearages without statutory authority. "To hold arrearages can be taken away violates due process of the 14th Amendment." *Smith v. Smith*, 4 Va. App 148, 152, 354 S.E.2d 816, 818-819 (1987). See also *Richardson v. Moore*, 217 Va. 422, 229 S.E.2d 864 (1976); and *Weidlein v Weidlein,* 65 Va. App. 260, 77 S.E.2d 222 (2015). When the case of *Cofer v. Cofer,* 205 Va. 834, 140 S.E.2d 663, (1965) was decided, Virginia Code § 20-112 was not yet enacted. The policies and objectives of the legislature clearly was to protect any obligee's accrued support by making no distinction between temporary or permanent support in both Virginia Code § 20-109 and § 20-112, as amended.

Everett argues that because he could not immediately appeal the arrearage to the Court of Appeals because it was an interlocutory order, he should have been permitted to appeal to Judge Maxfield to reverse Judge Ford. He had his day in court and wanted another bite at the apple while admittedly presenting the same evidence although with expert testimony. This is not how Virginia courts work. Only appellate courts can reverse a trial court's ruling, the trial court judges cannot reverse each other. Just as the Court of Appeals is required to determine whether there a been an abuse of discretion on properly perfected appeals of permanent

spousal support orders, it must also do so for temporary spousal support orders if the appellant alleges the final judgment was adversely affected by the *pendente lite* order. See *Pinkard v. Pinkard*, 12 Va. App. 848, 853, 407 S.E.2d 339, 342 (1991). See also *Robinson v. Robinson***,** 50 Va. App 199, 648 S.E.2d 314 (2007) where the Court of Appeals did not deny Husband right to appeal a trial court's failure to retroactively modify a temporary spousal support which in effect overruled a prior agreement between the parties. Here, the Court of Appeals did not make a ruling inconsistent with that well-settled principle. Judge Maxfield exercised his discretion to modify *pendente lite* support in accordance with Virginia Code § 20-112 when he retroactively modified Everett's *pendente lite* spousal support obligation only to the date he filed his Motion for Reconsideration.[1] Accordingly, the Court of Appeals affirmed the trial court's decision.

The trial court did not conclude that it could not retroactively modify temporary support as a matter of law. The trial court simply chose not to retroactively modify temporary support under the broad discretion invested in it under Virginia Code § 20-103 (discussed *infra*) stating, "[w]hether or not I have the authority to vacate [the *pendente lite* order] is just ground I don't want to cover." (JA 529A).

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[1] The arrearage was actually higher because several additional support payments became due under the December 12, 2016, Order, but that issue is not before the court.

II. THE TRIAL COURT DID NOT ERR BY REFUSING TO MODIFY THE PENDENTE LITE SPOUSAL SUPPORT AWARD RETROACTIVELY, BY DECLARING THAT AN ARREARAGE EXISTED, OR BY ENTERING JUDGMENT ON THE ARREARAGE.

Standards of Review

"Whether to grant *pendente lite* support lies within the sound discretion of the trial judge." *Weizenbaum,* Va. App. at 905, S.E.2d at 40 (1991). A trial court has "broad discretion in setting spousal support and its determination 'will not be disturbed except for a clear abuse of discretion'." *Fadness v. Fadness*, 52 Va. App. 833, 845–46, 667 S.E.2d 857, 863 (2008), quoting *Brooks v. Brooks*, 27 Va. App. 314, 317, 498 S.E.2d 461, 463 (1998). "This standard, if nothing else, means that the trial judge's ruling will not be reversed simply because an appellate court disagrees' [internal citation omitted]. Only when reasonable jurists could not differ can we say an abuse of discretion has occurred." *Brandau v. Brandau*, 52 Va. App. 632, 666 S.E.2d 532 (2008)(citation omitted).

"When reviewing a trial court's decision on appeal, we view the evidence in the light most favorable to the prevailing party, granting it the benefit of any reasonable inferences." *Congdon v. Congdon,* 40 Va.App. 255, 258, 578 S.E.2d 833, 835 (2003) (citations omitted). "That principle requires us to 'discard the evidence' of the appellant which conflicts ... with the evidence presented by the

[prevailing party] at trial." *Id.* (quoting *Wactor v. Commonwealth,* 38 Va.App. 375, 380, 564 S.E.2d 160, 162 (2002)). Thus, a trial court's judgment will not be disturbed on appeal unless plainly wrong or without evidence to support it. *Jennings v. Jennings,* 12 Va.App. 1187, 1189, 409 S.E.2d 8, 10 (1991).

Argument

Judge Maxfield did not abuse his discretion by refusing to modify the temporary spousal support. Virginia law is well settled that a trial court has broad discretion in awarding spousal support. See *Fadness; see also Sargent v. Sargent,* 20 Va.App. 694, 703, 460 S.E.2d 596, 600 (1995) (quoting *Calvert v. Calvert,* 18 Va.App. 781, 784, 447 S.E.2d 875, 876 (1994)).

At the temporary support hearing the trial court was presented with extensive evidence from both parties regarding Everett's ability to pay and Tawes' need. (JA 122-215, 542-569). At the conclusion of the evidence, Judge Ford ruled:

> "Based on the information that was presented, it seems to be a fairly accurate amount...that particular worksheet provides for the husband to make the mortgage payment and the car payments and other family debt of $2,082. And then the bottom line figure was $7,831…I know that he cannot afford to pay as much as she wants. I know that as far as the bills are concerned she is not going to get enough money to live. The Court considers the previous existence prior to their divorce and had a good life [sic]… And also for the record, I might say, if all he makes is $12,200 per month and he's paying out more than that, where does he get money to pay that with [sic] unless he has other funds available that he can divert some of the money he's getting

> [sic]… I do think that that support of $7,831 seems to be correct, so that's what I'm ordering." (JA 206-207).

"Unless it appears from the record that the trial court misapplied one of the statutory mandates or evidence fails to support the findings of fact underlying its resolution of the conflict, the trial court's award will not be reversed on appeal." *Fadness*, Va. App at 846, S.E.2d at 864. Virginia Code § 20-103 specifically gives the trial court full discretionary authority to award spousal support pending the suit:

> "In suits for divorce, annulment and separate maintenance...the court having jurisdiction of the matter may, at any time pending a suit pursuant to this chapter, in the discretion of such court, make any order that may be proper (i) to compel a spouse to pay any sums necessary for the maintenance and support of the petitioning spouse." Va. Code § 20-103(A) (2015)(emphasis added).

The only requirement Virginia Code § 20-103 places on the trial court in this determination is that such sums are "necessary." It does not require the trial court to consider any other factors such as the factors in Virginia Code § 20-107.1 *Weizenbaum*, Va. App at 905, S.E.2d at 40. Here, Tawes provided detailed evidence of her need and Everett's ability to pay through her testimony and various exhibits. This was sufficient to prove her prima facie need for support and Judge Ford found it *necessary* to give her most of what she requested. (JA 141-176, 558-569) See *Fadness*, Va. App. at 846, S.E.2d at 864. Everett argues that Judge Ford

should have taken his evidence at face value and not Tawes'. But, Judge Ford specifically noted he did not believe Everett's cash flow evidence by stating he appeared to be diverting funds from another source given their lifestyle. "Arguing the trail court should have weighed the evidence differently is not proper appellate argument." *Id*.

Later, at the show cause hearing in March 2017, Judge Maxfield heard virtually the same evidence as Judge Ford heard in October, 2016, regarding Everett's cash flow (JA 236-377; 571-594) and found:

> "[T]here is no absolutely no evidence of a lavish lifestyle or anything else and to come in and to point to certain areas in a tax return and say, see, you know, there is a lot more money here than meets the eye, when there is no, absolutely no external evidence of that being true…It is my case now…I don't think, as I told you, legally that an arrearage *pendente lite* makes any sense at all." (JA 373-374).

Here, there were two differing reasonable jurists. The first, Judge Ford, found Tawes evidence regarding the parties' lifestyle and real cash flow to be more persuasive than Everett's at the *pendente lite* hearing. The second, Judge Maxfield, found Everett's evidence to be more persuasive at the show cause hearing and stated he did not think the *pendente lite* award was appropriate. However, after consideration of the memoranda and arguments of counsel on Everett's Motion for Reconsideration of *pendente lite* support and the arrearage, Judge Maxfield still properly held, "[a]bsent a change in circumstances here from a

hearing last fall, I am not going to entertain the hearing on the PL [sic]." (JA 397). Thereafter, in his final ruling, after reviewing the evidence of the arrearage total, Judge Maxfield held, "[t]he arrearage of $66,437 remains. I am not going to change the *pendente lite* order." (JA 541). Consistent with his earlier statements that he thought the support was too high, he then ordered a much lower final support amount effective as of August 1, 2017.

While Judge Maxfield did openly state he disagreed with Judge Ford, and even asked counsel to file briefs on his authority to modify the arrearage, he ultimately never ruled at any hearing on whether he could change it or not. By stipulation of counsel, the trial judge did, however, modify the *pendente lite* support effective as of the date Everett filed his Motion for Reconsideration[2] in accordance with Virginia Code § 20-112 which does permit modification retroactive "with respect to any period during which there is a pending petition for modification…from the date that notice of such petition has been given to the responding party." Therefore, the trial court did not abuse its broad discretion by

[2] Everett's Motion for Reconsideration only requested the court to reconsider the original award. He did not plead for a modification of the award going forward, but the court treated it as such by setting the arrearage at $66,437, the total as of the March, 2017 hearing, even though Everett only paid Tawes $8,145.48 from March, 2017 through the trial in July 2017. The *pendente lite* order was not modified until August 1, 2017, resulting in an additional arrearage of $23,178.52 through July 31, 2017. Even if the court determined the new final support amount of $4,800 per month was retroactive to April, 2017, the first payment due after Everett's Motion was filed, Everett still would have been in arrears an additional $6,254.52. (JA 12, 19, 55 89, 91, 596-600). This issue, however, is not before the court.

refusing to retroactively modify the arrearage, or by finding that Everett owed Tawes an arrearage of $66,437 because its ruling was not plainly wrong and there was evidence to support it.

Tawes' Request for an Award of Attorney's Fees on Appeal

Everett's assignments of error are not supported by the law or the evidence (see *Gottlieb v. Gottlieb*, 19 Va. App. 77, 95, 448 S.E.2d 666, 677 (1994)) and is "not fairly debatable under any reasonable construction of the record or the governing legal principles" (see *Brandau v. Brandau*, 52 Va. App. 632, 642, 666 S.E.2d 532, 538 (2008)). See also *Miller v. Cox*, 44 Va. App. 674, 688, 607 S.E.2d 126, 133 (2005) (remanded for an award of attorney's fees when the appeal lacked merit).

> "The rationale for the appellate court being the proper forum to determine the propriety of an award of attorney's fees for efforts expended on appeal is clear. The appellate court has the opportunity to view the record in its entirety and determine whether the appeal is frivolous or whether other reasons exist for requiring additional payment." *O'Loughlin v. O'Loughlin,* 23 Va. App. 690, 695, 479 S.E.2d 98, 100 (1996).

Everett's numerous hearings and filings over this one issue at both the trial court level and the appellate level has cost Tawes almost as much as the award itself, without any award of attorney's fees to her to date. Further, the arrearage has not yet been paid to her almost two and a half years after it was awarded to her. The governing law and record support a ruling in her favor yet at a very high cost

to her. Therefore, if she prevails, this court should award her attorney's fees for efforts expended in this appeal.

RELIEF SOUGHT

For the reasons set forth above, Tawes requests: 1) that this court affirm the trial court's rulings on *pendente lite* support and the arrearages 2) that this Court award her all of her fees and costs incurred in this matter under the Rule 5:35(2) of the Rules of the Supreme Court of Virginia; and, 3) remand the matter to the trial court for a determination of fees and costs award to her.

Respectfully submitted,

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CERTIFICATE

In accordance with Rules 5:26 and 5:28 of the Rules of the Court of Appeals of Virginia, I hereby certify that on this 6th day of May, 2019, the requisite copies of the foregoing Brief of Appellee were hand filed in the Clerk's Office of the Supreme Court of Virginia. This same date I served one (1) copy of said Brief by e-mail to:

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The Appellee wishes to appear for oral argument.

By: *Player B. Michelsen /s/*_____
Player B. Michelsen