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In The

Supreme Court of Virginia

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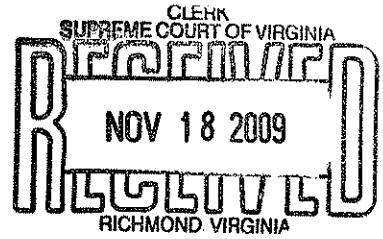

GARR N. JOHNSON, *ET AL.*,

Petitioners – Appellants,

v.

GREGORY WOODARD, *ET AL.*,

Respondents – Appellees.

PETITION FOR APPEAL

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STATEMENT OF THE CASE

This is an appeal from a circuit court's imposition of sanctions against 40 citizens of Gloucester County. When four of the members of the Gloucester Board of Supervisors were indicted by a grand jury, the citizens circulated petitions seeking the removal of those supervisors from office, pursuant to Code §24.2-233.

Having amassed far more than the required number of signatures, the citizens duly tendered the petitions to the Gloucester County Circuit Court. As provided in Code §24.2-235, an order was issued in the name of the Commonwealth, directing the four supervisors to show cause why they should not be removed from office.

This Court appointed a judge designate to preside over the proceedings. The judge promptly disqualified the elected Commonwealth's Attorney from representing the Commonwealth, as provided by Code §24.2-237. The court then appointed a special prosecutor to act in his stead.

In the parallel criminal proceedings, the trial court granted the Commonwealth's motion to dismiss the charges. The special prosecutor in these civil removal proceedings then moved to nonsuit them. The trial court granted this motion over the supervisors' objections, and entered a nonsuit order on November 19, 2008. The nonsuit order purported to retain control of the case to consider the supervisors' requests for (1) an award of costs and attorney's fees from the county under Code §24.2-238, and (2) the imposition of sanctions against the citizens who had circulated the petitions.

After a hearing held more than 21 days later, in which no evidence other than lawyers' bills was adduced by any party, the trial court directed the county (which was not a party to the proceedings) to pay to the supervisors' lawyers $125,000 in legal fees and $4,321.53 in costs. The court then imposed a sanction of $2,000 upon each of the 40 citizens, to be paid directly to the county.

The 40 citizens then made a special appearance, contending that they were not parties to the removal proceeding, and accordingly could not be sanctioned. The trial court ruled that they were already parties, and the citizens then filed a general appearance motion to reconsider, in which they raised a number of substantive challenges to the imposition of sanctions. The court refused their request for a hearing and summarily denied their motion. The court entered an order on September 29, 2009, awarding the supervisors additional fees and costs from the county for their responses to the rehearing motion.

The citizens moved the trial court to vacate the sanctions order in the wake of this Court's decision in *City of Suffolk v. Lummis Gin Co.*, Record No. 082345 (Sept. 18, 2009). The trial court denied this motion.

The citizens appeal.

ASSIGNMENTS OF ERROR

1. The trial court erroneously sanctioned the 40 citizens based on the premise that they were parties to the removal litigation, since the only parties were the Commonwealth and the respondent supervisors.

2. The trial court erroneously sanctioned the citizens for circulating and filing the petitions, because their doing so was a permissible response to the criminal indictments of the supervisors.

3. The trial court erroneously sanctioned the citizens without receiving any evidence other than legal bills, and erroneously ruled that the citizens had the burden to prove that sanctions were not warranted.

4. The imposition of sanctions against the citizens violates the Petition Clause.

5. The supervisors are not entitled to an award of costs and fees under Code §24.2-238, because the nonsuit was not a dismissal in their favor, and because the county was not a party to the proceedings below.

6. The trial court lacked jurisdiction to enter the sanctions order, since it was entered more than 21 days after the nonsuit.

QUESTIONS PRESENTED

1. In removal proceedings brought in the name of the Commonwealth, may a trial court impose sanctions against nonparties? (Assignment 1)

2. Several citizens circulated and submitted removal petitions under Code §24.2-233 after four of their elected officials were indicted for misuse of office. The ensuing removal proceedings were eventually nonsuited. May a trial court sanction the citizens for submitting the petitions, and if so, may it do so without any evidence? (Assignments 2 and 3)

3. May a trial court punish citizens who exercise their rights under the Petition Clause? (Assignment 4)

4. May a court shift fees to a nonparty under Code §24.2-238, and then order partial reimbursement of those

fees by sanctions, based on a nonsuit of the removal proceedings? (Assignment 5)

5. May a trial court shift attorney's fees and impose sanctions more than 21 days after entering a nonsuit order? (Assignment 6)

STATEMENT OF FACTS

Most of the facts relevant to this appeal are procedural, and are set forth in the Statement of the Case. None of the facts material to this appeal are in dispute.

In November 2007, the voters of Gloucester County elected two new members of the County Board of Supervisors. The election had the effect of shifting a controlling number of votes on the Board to a former minority voting bloc, giving the new majority four votes out of seven.

In December, before the new Board took the oath of office, the four members of the new majority met privately to discuss in advance what actions they would take upon

assuming power. Among other things, they agreed to terminate the County Administrator and the County Attorney, and to replace them with their political allies. On January 2, 2008, upon being sworn in, they announced these and other moves during an open meeting. These announcements came as a surprise to the Gloucester residents in the audience, and to the other members of the Board, who had never been consulted on the moves.

The next day, the Commonwealth's Attorney for the county learned of these acts and decided to investigate. The Gloucester Circuit Court eventually convened a grand jury, which returned criminal indictments of the four members of the Board's majority, charging them with, among other things, intentionally violating state open-government laws. Those charges were eventually dismissed at the request of a substitute prosecutor. But in the interim, 40 Gloucester citizens circulated petitions seeking removal of the four supervisors. After collecting over 6,000 signatures, the citizens tendered the petitions to the clerk of the circuit

court, resulting in the issuance of four rules to show cause, the basic initial pleadings in these proceedings.

DISCUSSION

1. Code §8.01-271.1 does not permit the imposition of sanctions against the citizens. (Assignment 1)

The citizens were not parties to the removal proceeding below. The parties were the Commonwealth, as movant, and the four supervisors, as respondents. The attorney for two of the supervisors conceded this during oral argument.[1]

The sanctions statute contains three provisions that are relevant here. In the first paragraph, it provides that "[e]very pleading, written motion, and other paper of *a party* represented by an attorney" must be signed by the attorney, and that an unrepresented *party* must sign it himself. (Emphasis supplied) The second paragraph provides that such a signature constitutes a certificate

[1] See Tr. 12, November 19, 2008.

regarding the factual and legal basis of the paper. And the fourth paragraph states that if a paper is signed in violation of the rule, then appropriate sanctions shall be imposed.[2]

Since the citizens were not *parties* to this litigation, they cannot have signed a pleading or other paper in violation of the obligations in the first paragraph of the statute. The only papers that they signed (along with 6,000 others) are the petitions. The Court thereupon issued a rule to show cause pursuant to Code §24.2-235, but at no point were the citizens parties to this case. Because no document was signed in violation of the statute, sanctions may not be imposed.

2. The record does not demonstrate that the citizens had no factual or legal basis for signing the petitions. (Assignments 2 and 3)

In evaluating whether a particular filing is sanctionable, a court does not investigate the signer's subjective belief. Instead, the Court must apply an "objective standard of

[2] Code §8.01-271.1.

reasonableness" to determine whether the citizens *could* have concluded that the filing was justified under the facts.[3] The Court also resolves any doubts in favor of the sanction respondent, "and eschew[s] the wisdom of hindsight." *Id.* The record must reveal some factual basis to support a finding that sanctions are warranted.[4]

In July 2008, a grand jury indicted the four supervisors, charging them with crimes related to their office. Because of this, the 40 citizens circulated petitions, calling for the removal of the indicted supervisors from office.

Citizens are entitled to do this. The indictments allege, at a minimum, a form of misuse of office that would have a material adverse effect upon the conduct of the office.[5] The returning of these indictments by a grand jury is a plausible basis for citizens to conclude that their elected officials have been compromised in the performance of their duties.

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[3] *Prince William County v. Rau*, 239 Va. 616, 620, 391 S.E.2d 290, 292 (1990).
[4] *McNally v. Rey*, 275 Va. 475, 482, 659 S.E.2d 279, 283 (2008).
[5] Code §24.2-233(1).

The citizens were not required to second-guess or re-investigate the formal indictments; nor were they required to await the results of the criminal proceeding, since the removal statute does not require a criminal conviction or a beyond-a-reasonable-doubt standard. Indeed, even a full acquittal on the merits would not determine the merits of such a civil proceeding, since the burdens of proof differ.[6]

The procedural history of this matter makes the imposition of sanctions all the more troublesome. The trial court never conducted an evidentiary hearing in this case, so the record never developed sufficiently to ascertain any facts upon which sanctions could be based. The only facts that may be gleaned from this record are that the supervisors were indicted, the criminal prosecutions were dismissed, and these removal proceedings were nonsuited. The trial court has conducted no proceedings to determine the

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[6] See *Ellison v. Commonwealth*, 273 Va. 254, 258-59, 639 S.E.2d 209, 212 (2007) (acquittal of criminal charge does not collaterally estop subsequent civil proceeding with lower burden of proof).

reasonableness of any inquiry into the facts, nor whether the citizens could have reasonably concluded that the representations in the petition were well-founded.

In their motion to reconsider, the citizens pointed out to the trial court this lack of any evidence against them. In response, the court acknowledged that "[b]oth the petitioners and the respondents were given the opportunity to present evidence on the issues, but none was presented." The court then purported to allow the citizens "another opportunity to present evidence on the sole issue of who is responsible for the attorneys fees," adding that they would then be subject to cross-examination by the supervisors' lawyers.[7]

This approach is fundamentally at odds with the law applicable to sanctions. The burden is upon the party seeking sanctions to justify their imposition; there is no presumption, based merely upon the filing of a motion, that

[7] Letter opinion, March 23, 2009, at 2.

sanctions are warranted.[8] The trial court proposed to require the citizens to *disprove* their liability for sanctions, when there had been no evidence adduced against them.

This Court must view the citizens' actions prospectively as of the time they submitted the removal petitions. At that point, their elected supervisors had been indicted for offenses that constituted malfeasance in office, and had understandably lost the confidence of the electorate. Under these circumstances, the decision to engage in a fundamental practice of participatory democracy—a petition drive—cannot be viewed as sanctionable.

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[8] See *Rich Art Sign Co. v. Ring*, 122 FRD 472, 474 (E.D. Pa. 1988) and *Phinney v. Paulshock*, 181 FRD 185, 197 (D. N.H. 1998), affd. 199 F.3d 1 (1st Cir. 1999) (burden of proof is on party seeking sanction under Fed.R.Civ.P. 11, upon which §8.01-271.1 is based).

3. The imposition of sanctions in this manner would violate the Petition Clause. (Assignment 4)

The First and Fourteenth Amendments to the Constitution prohibit courts from abridging the right of American citizens to petition the government for redress of grievances. Despite these mandates, the trial court imposed a penalty upon the citizens for their exercise of this fundamental right.

The Supreme Court of the United States has held that "only a compelling state interest in the regulation of the subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms."[9] The trial court's use of the sanctions statute flouts this important principle. The citizens do not contend that the sanctions statute is facially unconstitutional, as it can be enforced in a constitutional way. But as applied to them under the facts

[9] *NAACP v. Button*, 371 U.S. 415, 438, 83 S.Ct. 328, 341 (1963).

of this case, the statute would unquestionably abridge a vital constitutional right by punishing them for exercising it.

4. The supervisors are not entitled to an award under the fee-shifting statute. (Assignment 5)

Code §24.2-238 permits a court, in its discretion, to require the political subdivision (here, the County of Gloucester) to pay a respondent's costs and legal fees if a removal proceeding "is dismissed in favor of the respondent." The trial court elected to employ this statute, though it did so without notifying the county to enable it to defend itself. Indeed, the trial court never acquired active personal jurisdiction over the county, rendering the order void.[10]

Fundamentally, fees cannot be awarded in this case because the proceeding was not "dismissed in favor of" the supervisors. But the trial court prejudged this important legal issue. When one of the supervisors' lawyers began to

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[10] *Finkel Outdoor Prods. v. Bell*, 205 Va. 927, 932-33, 140 S.E.2d 695, 699 (1965).

argue that fees could be awarded after a nonsuit, the trial court interrupted him: ". . . I think on a nonsuit, the Court can award attorney's fees frankly. So I'm not stopping you. I just want you to know that I understand that point, but to rule otherwise is absurd."[11] The court made this decision without receiving any input from the citizens or the county.

Fees may not be shifted unless a proceeding is "dismissed *in favor of* the respondent." If the General Assembly had intended that fees could be awarded upon *any* form of dismissal of the litigation, it would have provided as much by stating that fees could be awarded if the proceeding is *dismissed*, dropping the final clause. Indeed, the statutory construction necessarily employed by the trial court truncates the statute in exactly this way.

[11] Nov. 19, 2008, Tr. 17.

But in construing statutes, courts are obligated to give meaning to every word and phrase.[12] The General Assembly has required more than a mere cessation of proceedings, even more than a dismissal, before fees may be shifted. The proceedings must be dismissed *in favor of* the person whose removal was sought.

This phrase necessarily excludes a neutral termination by nonsuit, which is "in favor of" neither party. This Court has ruled that there is no prevailing party when a proceeding is nonsuited.[13] In that ruling, the Court accepted the definition of *prevailing party* as "A party in whose favor a judgment is rendered . . .," and determined that a nonsuit, by definition, does not favor either litigant.

Since the proceedings below were not dismissed in favor of the supervisors, the trial court was not empowered

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[12] *Red Ash Coal Corp. v. Absher*, 153 Va. 332, 335, 149 S.E. 541, 542 (1929) (treating one phrase of a statute as meaningless "violates a cardinal rule of construction. Every part of an act is presumed to be of some effect and is not to be treated as meaningless unless absolutely necessary.").
[13] *Sheets v. Castle*, 263 Va. 407, 413-14, 559 S.E.2d 616, 620 (2002).

to shift responsibility for their legal fees onto the county. This conclusion makes the sanction order inappropriate as well, since the citizens were directed to pay the sanctions to the county, to offset a portion of the fee award.[14]

5. The trial court lacked jurisdiction to enter the sanction order. (Assignment 6)

The trial court entered the nonsuit order in this case on November 19, 2008. While the order purported to retain control over the case to consider the ancillary matters of attorney's fees and sanctions, that authority extended only for 21 days afterward.[15] This is true even though the court purported to retain the case to adjudicate these ancillary matters.[16]

Thus, when the trial court convened a hearing 28 days later to decide the sanctions motion, it had already lost

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[14] December 17, 2008 Tr. at 65-69; June 2, 2009 sanction order, ¶¶3,6.
[15] *City of Suffolk v. Lummis Gin Co.*, Record No. 082345 (Sept. 18, 2008) (fee-shifting); *Williamsburg Peking Corp. v. Kong*, 270 Va. 350, 355, 619 S.E.2d 100, 102 (2005) (sanctions).
[16] *Lummis Gin*, slip op. at 8.

jurisdiction over the case. The citizens pointed this out in a motion to vacate filed after the announcement of the *Lummis Gin* decision, but the trial court declined to vacate the fee-and-sanction order.[17]

An order that is entered after the trial court loses jurisdiction is void.[18] The trial court therefore erroneously refused to vacate all orders it entered after December 10, 2008, the 21st day after entry of the nonsuit order.

CONCLUSION

The trial court employed the sanctions statute in an improper and even unconstitutional manner, ignoring the protections of the Petition Clause. It acted in the absence of personal jurisdiction, both over the citizens and over the county; imposed sanctions without a factfinding proceeding,

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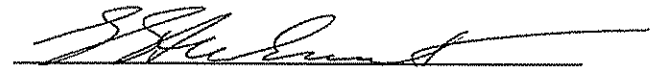
[17] See trial court's letter to counsel dated October 20, 2009.
[18] *Lyle v. Ekleberry*, 209 Va. 349, 350-51, 164 S.E.2d 586, 587 (1968).

long after it had lost jurisdiction to act; and ignored this Court's precedent on what constitutes a prevailing party.

This Court should grant this petition for appeal and thereafter reverse the judgment below and enter final judgment in favor of the 40 citizens.

By: 
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CERTIFICATE

Pursuant to Rule 5:17(e) of the Supreme Court of Virginia, I hereby certify the following:

1. The Appellants are Garr N. Johnson, Robert E. Priseler, Patricia W. Cowan, Carlton B. Cowan, Linda E. Walker, Stephanie L. Ruff, Regina M. Adams, John J. Adams, Sr., Althea A. McCray, Doris T. Baynes, Sherrie S. Hill, Virginia S. Harrell, Yolanda M. R. Fuller, Patrick J. Cooney, Sr., Susan J. Isner, Paul A. Lasseigne, Betty J. White, Susan G. Jenkins, Ronald D. Baron, William W. Tennent, III, Carl R. Snyder, Eva J. Mullins, Joan P. Myles, Leonne Arsenovic, Betty Durrette, Sharon A. Sims, Willie R. Breedon, Jr., Donna F. Wilson, Dianne P. Jordan, Elizabeth F. Haskell, Kevin P. Kiley, Eric Rosenfeld, Lori C. Sindel, Brenda H. Johnson, James R. Stevens, John R. Chirch, Mathew D. Paust, Arnold Nye, Elaine Weber, and Elizabeth H. Ould.

Counsel for the Appellants is L. Steven Emmert, Esquire, Sykes, Bourdon, Ahern & Levy, P.C., 281

Independence Boulevard, Pembroke One, 5th Floor, Virginia Beach, Virginia 23462, (757) 499-8971.

2. The Appellees are Gregory Woodard, Robert A. "Bobby" Crewe, Teresa L. Altemus, and Michelle R. Ressler.

Counsel for Appellees Gregory Woodward and Robert A. "Bobby" Crewe is James R. Corwell, Jr., Esquire, Sands Anderson Marks & Miller, P.C., 250 South Main Street, Suite 226, Blacksburg, Virginia 24060, (540) 443-9815. Counsel for Appellees Teresa L. Altemus and Michelle R. Ressler is Anthony F. Troy, Esquire, Troutman Sanders LLP, 1001 Haxall Point, Richmond, Virginia 23219, (804) 697-1318.

3. The Commonwealth of Virginia was a party to the proceedings below, but is not involved in this appeal.

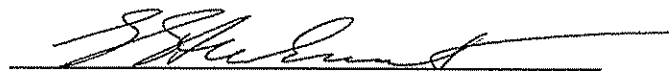
Counsel for the Commonwealth of Virginia is Jack T. Randall, Esquire, Stallings & Bischoff, P.C., 429 North Main Street, Suffolk, Virginia 23434, (757) 935-9065.

2. A copy of the Petition for Appeal has been served, via hand delivery, upon counsel for Appellees Teresa L. Altemus and Michelle R. Ressler, Anthony F. Troy, Esquire,

Troutman Sanders LLP, 1001 Haxall Point, Richmond, Virginia 23219 and via facsimile and U.S. Mail, postage prepaid, upon counsel for the Appellees Gregory Woodward and Robert A. "Bobby" Crewe, James R. Corwell, Jr., Esquire, Sands Anderson Marks & Miller, P.C., 250 South Main Street, Suite 226, Blacksburg, Virginia 24060, facsimile: (540) 443-9802, this 18th day of November, 2009.

3. Seven (7) copies of the foregoing Petition for Appeal were hand-filed with the Clerk of the Supreme Court of Virginia on this 18th day of November, 2009.

4. Counsel for the Appellants desires to state orally and in person to a panel of this court the reasons why this petition should be granted.



L. Steven Emmert