

In the
THE SUPREME COURT of VIRGINIA
APPEAL FROM THE STATE CORPORATION COMMISSION

Record No. 091703

DOUGLAS ROBERT JOHNSON,
Appellant,

v.

VIRGINIA STATE CORPORATION COMMISSION and
FLUVANNA COUNTY BOARD OF SUPERVISORS and
LOUISA COUNTY BOARD OF SUPERVISORS and
JAMES RIVER WATER AUTHORITY,
Appellees

PETITION FOR REHEARING ON DISMISSAL ORDER

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ASSIGNMENT OF ERRORS

The Court specifically erred in not recognizing that Johnson's Assignment of Errors was filed and filed within the specified time requirement.

STATEMENT OF NATURE OF CASE AND MATERIAL PROCEEDINGS IN THE DISMISSAL

Here we are on December 15th in Richmond physically in view of where the Bill of Rights were ratified some 200 plus years ago¹.

That Bill of Rights, ratified in our US Constitution is mirrored also in our Virginia Constitution.

This cause refers to two specific Rights of the people that are being trampled on by Government right here in the birthplace of the protection of those Rights.

It is noted here that man is not the author of these rights but, as our Declaration of Independence clearly states, God has given these Rights to all men².

Government then is granted certain of these Rights

¹December 15, 1791.

²"...they are endowed by their Creator with certain unalienable Rights...."

and are responsible to the people. While this is fully acknowledged, it must also be acknowledged that our Creator holds those in authority to a higher standard to do justice.

That all means that the oaths of office we³ all take here in Virginia is not empty words but a commitment between God, government, and man (we the people) to uphold the basic rights outlined in our Constitutions, both State and Federal, especially when those rights are enumerated in both.

The first is the Right to Petition government⁴⁵. This Right predates our Constitution as it was one of the specific grievances described in our Declaration of Independence which justified the violence of our War for

³Johnson has just been elected to the Fluvanna County School Board and is taking his oath of office on December 16, 2009.

⁴"Congress shall make no law ... abridging ... the right of the people ... to petition the Government for a redress of grievances." [First Amendment to US Constitution]

⁵"the General Assembly shall not pass any law abridging the ... right of the people ... to petition the government for the redress of grievances." [Va Constitution, ARTICLE I, Section 12]

Independence⁶.

This case started when the Fluvanna Board of Supervisors, by a 4 to 2 vote on April 15, 2009, refused to honor two separate and distinct Citizen Petitions which were clearly authorized by the laws of the Commonwealth of Virginia⁷.

The Right to Petition has two meanings, a Citizen Petition where a certain number of people sign a singular document and also where the citizen has the right to sue government by the way of a Petition. While it has been held that only one of these definitions may be the meaning in our Constitutions, both definitions have been trampled on by Government.

The Petition for review of the actions of the Fluvanna Board of Supervisors was timely filed in the Fluvanna Circuit Court on or before April 20, 2009 in two

⁶"Our repeated Petitions have been answered only by repeated injury." [Declaration of Independence]

⁷§ 15.2-5105. Hearing; referendum. "... If ten percent of the qualified voters in a locality file a petition with the governing body at the hearing calling for a referendum, such governing body shall petition the circuit court to order a referendum in that locality as provided in this section."

distinct cases.

In an attempt to flee the jurisdiction of the Court, the Fluvanna Board of Supervisors, with the assistance of the Louisa Board of Supervisors, caused the State Corporation Commission to "conclusively deem the actions in the Court moot". This procedure was a violation of the even more basic right, the right of Due Process.

The Assignment of Errors is a simple explanation of how Due Process was not followed. That was given as numbered paragraph nine in the Motion to Increase the Record that was timely filed on October 23, 2009 with the Clerk of the Virginia Supreme Court.

It is apparent from a simple reading of the Order of Dismissal dated November 16, 2009 in that: (1) Johnson's Objection to Motion to Dismiss was conspicuously missing from the list of documents which included every other document and (2) the only reason stated was "failure to submit Assignment of Errors".

The basic error in granting the Motion of Dismissal is in not treating Johnson's paragraph 9 of his Motion to Increase the Record filed October 23, 2009 as an

Assignment of Errors when, in fact, it met the letter of the law. Johnson's Objection to Motion to Dismiss, filed November 9, 2009, clearly emphasizes that the Assignment of Errors was filed and that filing was timely.

QUESTIONS PRESENTED

Johnson concurs with all opponents that an Assignment of Errors would be needed to be submitted by the date specified to overcome the Motion to Dismiss on the grounds specified. Hence the two simple questions:

1. Was an Assignment of Errors ever Submitted?

and

2. If so, was the submission done in a timely basis?

There would be a third question, if the reason was more broadly stated in the Motion to Dismiss and or in the Order of Dismissal:

3. If so, as to the above, was the Assignment of Errors sufficient?

Johnson will grant that sufficiency is a valid requirement but does not grant that it would have the same fatal consequences. Certainly "sufficiency" was not

brought up by any of the Appellees and not even mentioned in the Order of Dismissal.

FACTUAL BACKGROUND

The text of Johnson's Objection to Motion to Dismiss filed November 9, 2009, had only two numbered paragraphs. The first one dealt with the Bond and is no longer disputed. The second numbered paragraph simply stated the fact that Johnson's Assignment of Errors was given in Johnson's Motion to Increase the Record as numbered paragraph 9, namely:

"The basic logic is that the Articles need to conform to law, specifically the law the filing is done under, namely the Virginia Water Authority Act. That law says that for the Articles to conform to law they need to be acted on by the Fluvanna BOS and the Louisa BOS. The error this appeal is based on started at the Fluvanna BOS when they failed to act on a citizen petition calling for a referendum. While that action is disputed, it is still the main error. That error was brought forward by concealing the dispute from the Commission and by using the filing as a attempt to flee the jurisdiction of the court."

Certainly that Assignment of Errors could have been submitted as a separate document but such a requirement is not explicitly specified in the rules and none of the Appellees brought up that point.

Certainly that Assignment of Errors could have been identified with a bold heading going before the actual paragraph. But again, such a requirement is not explicitly specified in the rules and none of the Appellees brought up that point.

The second question then comes into play as to whether the document was submitted timely. The answer is an unquestioned yes as demonstrated by the date stamp on the document.

ARGUMENT

The specific case law brought up all indicates the fatal nature of a totally missing Assignment of Errors and the fatal nature of the timeliness of the submission of same. The specifics are from the November 10, 2009 filing of the Commission:

"The time for filing prescribed by the Supreme Court is jurisdictional and mandatory, and failure to comply is fatal to an appeal. Thrasher v. Burlage, 219 Va. 1007, 1010, 254 S.E.2d 64 (1979) and Vaughan v. Miller, 215 Va. 323, 324, 210 S.E.2d 139 (1974). This Court has previously held under circumstances similar to those in the instant case that an appeal must be dismissed when assignments of error are filed outside the prescribed ten (10) day deadline. Chincoteague Bay Trails End Assn, Inc. v. Trail's End Utility Co., Inc. and State Corporation Commission,

Record No. 831856 (Va. 1984), S.C.C. Case No. PUE820065, and Langdon v. State Corporation Commission and Chesapeake and Potomac Telephone Company of Virginia, Record No. 770834 (Va. 1979), S.C.C. Case No. 19696. In those cases, the assignments of error were filed, but were not filed within the time frame prescribed by Rule; yet even that failure necessitated dismissal of the appeal. In this case, the assignments of error were due on October 23, 2009. As of today's date, assignments of error have not yet been filed."

Apparently, the Commission had not yet received Johnson's filing of November 9, 2009 which documents Johnson's Assignment of Errors.

Johnson fully acknowledges that, had he not filed his Assignment of Errors, that failure would have been fatal. Fortunately, he did.

In the November 10, 2009 filing, the Commission quotes Harlow v. Commonwealth, 195 Va. 269, 271 (1953), 77 S.E.2d 851, where the Court states that:

"The purpose of assignments of error is to point out the errors with reasonable certainty in order to direct this court and opposing counsel to the points on which appellant intends to ask a reversal of the judgment, and to limit discussion to these points. Without such assignment, appellee would be unable to prepare an effective brief in opposition to the granting of an appeal, to determine the material portions of the record to designate for printing, to assure himself of the correctness of the record while it is in the clerk's office, or to file ...

assignments of cross-error."

The Commission then states:

"It is for precisely this reason that the Appellees have been unable to respond to Appellant's Motion to Expand the Record and List of Exhibits. Without assignments of error, none of the Appellees can appropriately respond to this motion or prepare arguments on the merits of the appeal."

Here the Commission states that it did review Johnson's Motion to Increase the Record but apparently did not review it closely enough to see numbered paragraph 9 which defines the whole Due Process failure.

On November 12, 2009, Johnson took into account the opposition to vastness of his Motion to Increase the Record and reduced it to only those items that should have been considered by the Commission at the time of the April 21, 2009 Order. This was accomplished by Johnson with a filing of an Amended Motion to Increase the Record and an Amended List of Exhibits.

The original List of Exhibits were intended to demonstrate the validity of the original error of the Fluvanna Board of Supervisors. The Amended List of Exhibits simply demonstrates that the error of Fluvanna

Board of Supervisors was already being challenged in Court before the April 21, 2009 Order was issued.

Were the Appellees to have objected that Johnson's Assignment of Errors was defective in some way, Johnson would have the right to correct any deficiency.

Even if deficiencies in Johnson's Assignment of Errors actually exist, they would not be fatal to the appeal. As long as the gist of the matter is perceptible, then the cause must go forward. This is specified in actual code language in:

§ 8.01-275. When action or suit not to abate for want of form; what defects not to be regarded.

No action or suit shall abate for want of form where the motion for judgment or bill of complaint sets forth sufficient matter of substance for the court to proceed upon the merits of the cause. The court shall not regard any defect or imperfection in the pleading, whether it has been heretofore deemed misleading or insufficient pleading or not, unless there be omitted something so essential to the action or defense that judgment, according to law and the very right of the cause, cannot be given.

We know that actual Code supersedes Rules whether at the Circuit Court level or the Supreme Court level.

"The time for filing prescribed by the Supreme Court is jurisdictional and mandatory". This statement is taken

directly from the Commission's Response to Motion to Dismiss. The principle of law that is being quoted here is so basic that it is assumed without any thought. Yes this is a Rule of the Court. But it is not an arbitrary Rule.

Sometimes Rules are Arbitrary and established just to keep everything uniform. An example would be the size of paper used in court papers. Other Rules go to more basic Principles of Law, and have a Common Law root.

That Basic Principle is called "DUE PROCESS". It is a most basic of all Principles. It is the reason we do not execute murders the same day they are convicted. Due Process specifies a particular time and method of appealing the Conviction.

The Assignment of Error in this cause is description of a violation of Due Process. The phrase "Due Process" was not explicitly stated but was not required because of the basic nature of the Principle.

To say "Due Process was not followed" would be too general a statement to be itself following "Due Process". We refer, instead, to specific Rules of the Court to

specify what part of Due Process was not followed.

It could be argued that the Due Process errors were all on the part of the Fluvanna Board. But the assignment of that Board's error must also pass to the Louisa Board as it had full knowledge of the events, although "after the fact".

The assignment of these errors to the Commission then hinges on what did the Commission know, when did the Commission know it, and what should the Commission have had known.

Thus the Assignment of Error to the Commission can be described as either the simple two word phrase "Due Process" or a multi page dissertation of the entire procedure. The practical compromise is the brief description given in Johnson's Assignment of Error.

This case is unique in that any further error the Commission makes in conjunction with what transpired on April 21, 2009 is not evident according to the procedure explained to Johnson by a representative of the Commission on about from April 16, 2009 through April 24, 2009. That explanation is summarized:

When articles are submitted for filing, the first step is to simply issue the Certificate without any hearing whatsoever. If there is no timely objection, the Certificate and Order authorizing it stands as written. If a timely objection is raised, then a hearing is held and a finding is made.

If that is an accurate representation of the standard procedure of the Commission, then no error occurred in the issuance of the April 21, 2009 Order.

The error would only be on the Commission's part should, subsequently to April 21, 2009, the Commission refuse to address timely objection(s).

In this case, Johnson made a timely objection on April 24, 2009 and was assigned Commission Case number CLK-2009-00012. That Case has dragged on to this date without any clear decision whether or not the Commission is actually considering the objection.

When the Commission finally makes a decision on that case, an error could be stated as to how they handled said objection.

This Case is before the Supreme Court now because the statute of limitations was about to expire on the Order of April 21, 2009 with no further decisions made by the

Commission. Johnson saw no alternative but to file prior to the last day to preserve his right to file at all.

Johnson fully expects the Supreme Court to remand the case back to the Commission to complete its due process.

The Supreme Court does now, however, have the opportunity to rule now on the egregious actions of the Fluvanna Board of Supervisors who clearly sought to flee the Jurisdiction of the Circuit Court by filing with the Commission.

This is egregious because the Board clearly knew that the Circuit Court had clear Jurisdiction in deciding on the validity of the Citizen Petitions.

It is accepted by all that if either of the two separate Citizen Petitions were legally valid, then the Ordinance/Resolution would be invalid and thus making the Articles of Incorporation unlawful.

The "Race to Richmond" was a clear attempt to shorten the time specified in the Statute of Limitations by the "middle of the night" filing with the Commission.

This is a clear case where the Court needs to affirm the Principal of Due Process with respect to

circumventing the Statutes of Limitation.

CONCLUSION

The Order Granting Dismissal should be reversed and the cause should be restored to the docket.

As an alternative, the case should be directly remanded back to the Commission to complete action on Case CLK-2009-00012.



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CERTIFICATE

I hereby certify that, pursuant to Rule 5:39A, the word count of 3,000 words is complied with.

I hereby certify that a true copy of this document was mailed the 15th day of December, 2009, to:

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