Supreme Court of Virginia Oral Argument April 8th
Nordgren v Wilsons Ventures

Attorney Jay O'Keefe, Arlington Citizens
If it may please the court, Jay O'Keeffe on behalf of petitioners, the group of Arlington County homeowners. This zoning appeal calls on the court to answer two questions. First, can a third-party developer intervene in a facial challenge to local legislation after a five-day trial and ruling on the merits, when, as a matter of law, the developer cannot assert a claim or defense germane to the action that wasn't adequately represented by the county. And second, does changing the stay conditions on a stay pending appeal under Rule 1:1b reset the appeal clock for appealing the underlying merits judgment. The Court of Appeals got the answer to each question wrong. And I'll start with jurisdiction one, because it's very straightforward. The point here is simple. Wilsons Ventures filed its notice of appeal 49 days after the final order in the case. So, the court of appeals lacked jurisdiction over its appeal. The timeline relevant to this is that on October 25, 2024 the trial court both denied the motion to intervene and entered its final order.

Justice 1
With either of the stay orders, the magic words from rule 1:1 as recognized by "super fresh" don't appear anywhere. So, your position is basically like a state doesn't change – it may affect immediate enforceability of the judgment – but the appellate issues of the judgment are the same regardless.

Attorney Jay O'Keefe, Arlington Citizens
That's exactly right. And one of the many ways we know that, is that the county, represented by some of the best lawyers in the Commonwealth, showed up and filed their notice of appeals in 30 days upon order. They weren't confused about the space pending appeal. There is no independent statutory basis for jurisdiction for an appeal from one of those orders they've entered under the trial court's concurrent jurisdiction. And Wilsons Ventures cannot resuscitate its forfeited appeal by trying to move to intervene into the county's timely appeal, because the law of the case doctrine presents that it prevents that. It hasn't timely appealed its intervention issue from the trial court. So that's all we think, completely straightforward as a matter of the timeline, and it's fatal to this appeal. If the court does reach the merits issue about intervention, that's equally straightforward. Rule 314 lets the party intervene with the trial in the trial court's discretion as a plaintiff or defendant to assert a claim or defense germane to the subject matter of the proceeding. The subject matter of this proceeding was a facial challenge to the county zoning ordinance on the basis that the county didn't comply with the statutory requirements in adopting it. The defenses relevant to that claim are exactly the defenses that the county asserted and pushed during a fiveday trial.

Justice 1
But you'll concede that Wilson Ventures – and I don't want to use the phrase "interested party" because that has a very specific meaning when we're talking about appeals and naming parties and so but they – they are a party, and they certainly had an interest in the outcomes, because prior to the trial court's determination in this case, they had a right to do something. If, the trial court is ultimately correct and what it decided, they don't have a right to do something. So, they're interested in that sense, are they not?

Attorney Jay O'Keefe, Arlington Citizens
They absolutely are, your honor, and there's a body of case law that protects that interest. It's the vested rights doctrine, and particularly the vested rights statute. The county pointed that out actually at the trial, when we're having the whole brouhaha over intervention, and they're correct to the extent that Wilsons Ventures asserts those property interests, that's how they're protected in a separate proceeding to establish the declaratory judgment that they have vested rights in that use of their property. And in fact, they pursued that separate proceeding and got that declaration in a separate case in Arlington County. That is distinct from the question of whether the county itself has complied with the mandatory statutory requirements for amending the zoning ordinance, and that was the subject matter of this lawsuit. There was no developer specific defense to that.

JUSTICE 1
If you were right on assignment of error one, no one ever has to talk about two or three correct.

Attorney Jay O'Keefe, Arlington Citizens
That's correct. But I was here, so I figured I'd talk about it anyway.

Justice 1
Let me ask you this 1:1b – the concept is escaping me now it was like four years ago – I remember, we the court working on that. We clearly said that stays are not affecting the finality of the earlier judgment, and we pointed out what had been implicit in the law this concurrent jurisdiction for that. So, what do we do about a stay that, according to the Court of Appeals order here, seems to – the second the amendment stay – seems to go further. Do we try to correlate the remedial aspects of the stay to the power of staying, or do we go back and translate the whole event as simply an amendment of the prior order? Because that seems to be what the Court of Appeals is trying to say, although it's…I'm not sure.

Attorney Jay O'Keefe, Arlington Citizens
I think it has to be the first one. I think, to translate the whole event as amendment of the underlying merits order, you're going to have to use some of the magic words from rule 1:1 where you're modifying or vacating that order, because otherwise parties are just not going to know what to do with that. And some parties are going to miss appeal deadlines, because, like Wilsons Ventures, they're looking to the stay. Other parties are going to do – what I've seen very experienced is health lawyers do in other cases, and just file a multiplicity of notices of appeal. Notice of Appeal after the final order, notice of appeal after the stay order. Because sometimes you'll see judges continue to issue orders in cases they'll have a final order, and then they'll issue a later order that's not final, that they'll have to label final order. And so, what we need to do, I think, is adopt a bright line rule that rule 1:1b means exactly what it says, unless the Court invokes a different power within 21 days to modify or vacate the underlying merit.

Justice 1
Almost all of stay of the judgment pending appeal does is preclude the winning party from enforcing the judgment while the appeal is pending, correct?

Attorney Jay O'Keefe, Arlington Citizens
Exactly right.

Justice 1
And so in that way, it's no different than when a court enters an order with a suspending bond that doesn't change. It doesn't matter when the suspending bond is posted. It doesn't matter if the amount of the suspending bond has changed at a later date. The final order is still the judgment order.

Attorney Jay O'Keefe, Arlington Citizens
That's exactly right, Your Honor.

Justice 2
I'm sorry to interrupt again. How do we deal with the Court of Appeals point that the partial stay was expanded and that has an implicit effect, or indirect effect, on changing the scope of the judgment? That's sort of the argument that's being made that's not totally unfair, is it?

Attorney Jay O'Keefe, Arlington Citizens
It's not totally unfair, but I don't think it's correct either for two reasons. First of all, if you look at the transcript of the hearing for that amendment of this day, it's very clear that the amendment language that we're talking about the judge had originally intended the stay to function the way the amended stay did. He makes it clear that he thought the original stay was going to apply to projects like Wilsons Ventures project. When it brought his attention that it wouldn't, he corrected what was essentially got…

Justice 1
he let out word town homes.

Attorney Jay O'Keefe, Arlington Citizens
Yes, he says that we put in it applies to all these projects, including town homes and semi-detached. So that's what he thought he was doing all along. So, he didn't really modify the state that he thought he was putting in place. And second, none of this is amending the underlying merits judgment. We're talking again – to Justice Russell's point – about suspension of the effect of that judgment during appeal.

Justice 1
So the expansion argument is really *quasi non pro tunc* the original order.

Attorney Jay O'Keefe, Arlington Citizens
I think that's right, and I think that's what the trial judge thought he was doing. The Court of Appeals does make another point. Well, this gets us back to rule 314 but they point out that the plaintiffs in this case did spend part of their complaint talking about developers, right? There are 10 developer related allegations in the complaint, and so the court of appeals argued that that makes developers germane to the appeal, because they can respond to those allegations. I think the correct analysis there is that at most that would make some developers fact witnesses at trial, but it wouldn't make them parties to the appeal, because nobody is asserting a claim against them. Nobody is seeking relief against them,

Speaker 2 08:26
Or – not asking you to see this – potentially, somebody who could have intervened at trial, or may have been if improperly denied to intervene at trial, been allowed to vindicate that right on appeal, if timeline.

Attorney Jay O'Keefe, Arlington Citizens
The timeliness is an independent basis for the judge's ruling, and the finding about undue delay is an independent basis the Court of Appeals doesn't get into. I think that's right. We may have to differ about whether the developer could ever assert anything that would be relevant to this case.

Justice 2
Last question for me. Suppose I'm on the bench and I issue an injunction, and I make a mistake. I leave something out. And I later discovered in a stay hearing –and it's brought to my attention "dang," – so it's not a *non pro tunc*. I made a mistake. I didn't say it. I should have said it earlier in my original order. And if I owned up to it, would that cause the stay additional language to upset the finality of the original injunction under 1:1b or would that be too bad, so sad?

Attorney Jay O'Keefe, Arlington Citizens
I think if you are going about amending the underlying original injunction order – whatever order you're doing it in – I think that that would reset the clock.

Justice 2
The Court of Appeals is implying…um…

Attorney Jay O'Keefe, Arlington Citizens
But I don't think that's what the trial judge did, or thought he was doing…

Justice 2
It's the difference between a stay order and an injunction order.

Attorney Jay O'Keefe, Arlington Citizens
Exactly right, Justice.

Justice 2
Got it.

Attorney Jay O'Keefe, Arlington Citizens
So, unless the court has any further questions.

Justice 2
Thank you for your argument.