NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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Re: *Robert Eisiminger et. al. vs. Perspecta, Inc.,* Case No. CL 2021-0003525

Dear Counsel,

Several Fridays ago, on December 3, 2021, this matter came before the Court upon the Defendant Perspecta, Inc.'s motion to strike the plea-in-bar filed by the Plaintiffs in response to the counterclaim that been filed by Defendant. At the conclusion of the hearing, the court granted the motion to strike and entered a brief order reflecting that decision.

The arguments raised several issues the court did not have time that Friday to fully address. This brief letter opinion explains in greater details why the court granted the motion to strike pursuant to Va. Code § 8.01-274.

Ultimately, the Court found that the plea-in-bar addressed an element of the cause of action and that an otherwise appropriate plea-in-bar does not address the merits of the claims before the court. Issues to be proved by one or the other party in support of their claims or counterclaims should be addressed at trial assuming the claims survive demurer. The essential elements of the respective claims are not subject to pre-trial parsing.

As recognized by the Defendant, an appropriate plea in bar, admits that a wrong has occurred but for reasons other than the merits of the claim, there is a bar that prevents the wrong

from being addressed. As described in *Nelms v. Nelms,* 236 Va. 281, 289 (1988)(quoting E. Meade, Lile's Equity Pleading and Practice, § 199, p. 114 (3d ed. 1952)):

> [f]amiliar illustrations of the use of a plea would be: [t]he statute of limitations; absence of proper parties (where this does not appear from the bill itself); *res judicata;* usuary; a release; an award; infancy; bankruptcy; denial of partnership; *bona fide* purchaser; denial of an essential jurisdictional fact alleged in the bill, etc.

Plaintiffs' reliance on the decisions announced in several cases was misplaced. For example, the plaintiffs relied on *Heard Constr. Inc. v. Waterfront Marine Constr. Co.,* 91 Va. Cir. 4 (Chesapeake 2015)(Wright, J.) for the proposition that an element of a claim – the claim in that case being the tortious interference of a contract – can be the proper subject of a plea-in-bar.

In *Heard,* the court considered the issues of whether the Plaintiff had a valid business expectancy. The issue of a valid business expectancy is an issue in a claim alleging that there had been a tortious interference with that expectation. The trial court cited to *Hawthorne v. VanMarter,* 279 Va. 566, 577 (2010) as authority for it to consider the plea-in-bar. *Hawthorne*, however, addressed the issue of sovereign immunity, once again a doctrinal bar that does not deny the wrongfulness of the claim. The doctrine of sovereign immunity does not challenge the merits of the claim and citation to *Hawthorne* does not support the decision to the address an issue presented under a claim.

The decision does not, however, record that the Plaintiff in *Heard* ever objected to the use of a plea-in-bar. The absence of an objection renders the *Heard* decision inapplicable to this case where the Defendant has objected and moved to strike the plea-in-bar to its counterclaim.

The plaintiffs also relied on the language found in *Campbell v. Johnson,* 203 Va. 43 (1961) in the opposition to the motion to strike but again failed to recognize the unique Virginia procedures that allow discrete factual issues in an equity action to be submitted to a jury for decision.

In *Campbell* the plaintiffs brought an equity action against the defendant for an alleged embezzlement. During that period when Virginia courts were divided into law and chancery, the trial judge allowed the defendant to submit to the jury a plea in chancery. The defendant claimed that she had not wrongfully embezzled the monies challenging that one element of the claim. Pleas in chancery or equity can include what are known as "anomalous pleas" where a party states facts that negates an opponent's facts. *Black's Law Dictionary,* 10th Edition. A "pure plea" in equity is similar to a plea-in-bar as it alleges matters outside the Bill of Complaint that ends the controversy, without addressing its merits. *Black's Law Dictionary,* 10th Edition.

In the *Campbell* decision, the trial court presented the jury with an anomalous plea at the trial of the cause. The Defendant denied that she had wrongfully taken the money. The modern procedure for submitting an issue of fact to be decided by a jury in an equity action is codified under statute. Va. Code § 8.01-336 (D) provides that: "In any action in which a plea has been filed to an equitable claim, and the allegations of such plea are denied by the plaintiff, either party may

have the issue tried by jury". *Campbell* is inapposite to this case despite the language used in the decision. Notably, the rulings in *Campbell* were also rendered at the trial of the action. The Plaintiffs in their plea-in-bar sought a separate pre-trial hearing.

Lastly, in the written opposition to the motion to strike and at the hearing on the motion to strike, the plaintiffs relied heavily on a prior pre-trial decision rendered by another judge of this court. The parties should note that pre-trial decisions within the same case are typically more relevant before the same decisionmaker. If reliance on the prior decision is necessary to the issue then to be decided, the question arises as to whether it is the prior decisionmaker who should consider the pending issue. In most instances, one pre-trial ruling has little effect on a later pre-trial ruling. The issues presented in the motion to strike the plea-in-bar did not require consideration of the prior decision.

In fact, when the trial of this cause starts and a presiding judge is assigned to the case, that judge is not bound by the pre-trial rulings another judge has rendered although many pre-trial decisions are observed for the purposes of consistency. Understandably, some pre-trial rulings are difficult to unwind. Nonetheless, Rule 1:1 of the Rules of the Virginia Supreme Court reminds the final presiding trial judge that all interlocutory orders can be modified, vacated or suspended.

Consequently, a party arguing that a prior pre-trial interlocutory order is dispositive of any issue being then addressed by a different decisionmaker, should be on notice that the prior decision is subject to being revisited. Here, the revisiting of the prior order was unnecessary. The plea-in-bar addressed the merits of the claims to be decided. The court stands by its December 3, 2021 Order and adds this opinion as part of the record of this case.

AND IT IS SO ORDERED.

Sincerely,

[redacted]

John M. Tran
Judge, Fairfax Circuit Court

OPINION LETTER