VIRGINIA LAWYERS WEEKLY

Court clarifies preservation and endorsement of orders

By: George Somerville June 8, 2009

Most trial and appellate lawyers recognize that the first step in appellate practice occurs at the trial court level, and that is ensuring that reversible errors are preserved for appeal by contemporaneous objections at the trial and other proceedings in that court. The steps required to assure preservation are not always so well recognized, but fortunately the General Assembly has clarified those requirements by enacting Virginia Code § 8.01-384(A), which the Supreme Court earlier this year recognized as leavening some of the rigors of Rule 5:25. See Helms v. Manspile, 277 Va. 1, 6-7, 671 S.E.2d 127, 129-30 (2009).

Property owners objecting to a claim of adverse possession contended that the parties asserting possession had failed to preserve their claim by objecting to the trial court's ruling that adverse possession had not been established. The final order was endorsed by both parties only as "Seen."

In an opinion by Chief Justice Leroy Rountree Hassell Sr., the court noted that the argument for adverse possession had been submitted in a memorandum and concluded that no further objection to the trial court's ruling was necessary.

The contemporaneous objection rule is embodied in Rule 5:25, which states that "Error will not be sustained to any ruling of the trial court ... unless the objection was stated with reasonable certainty at the time of the ruling ...," and in Rule 5A:18, which says the same thing in slightly different words. Each of those Rules is the basis for several pages of annotations in Michie's Virginia Code, many of which report decisions that must have been acutely embarrassing for the appellants' counsel.

In Helms v. Manspile, the Supreme Court held that in cases of apparent conflict it must apply § 8.01-384(A) and not Rule 5:25. ("Code § 8.01-384(A) ... is controlling over Rule 5:25, and we must apply the statutory provision.")

Section 8.01-384(A) provides, in part:

No party, after having made an objection or motion known to the court, shall be required to make such objection or motion again in order to preserve his right to appeal, challenge, or move for reconsideration of, a ruling, order, or action of the court. No party shall be deemed to have agreed to, or acquiesced in, any written order of a trial court so as to forfeit his right to contest such order on appeal except by express written agreement in his endorsement of the order. Arguments made at trial via written pleading, memorandum, recital of objections in a final order, oral argument reduced to transcript, or agreed written statements of facts shall, unless expressly withdrawn or waived, be deemed preserved therein for assertion on appeal.

That portion of the statute was added in 1992, in response to the decision in Lee v. Lee, 12 Va. App. 512, 404 S.E.2d 736 (1991). See Bryson on Virginia Civil Procedure § 12.02 n.14 (4th ed. 2005).

In Helms, the court explained that "[o]nce a litigant informs the circuit court of his or her legal argument, '[i]n order for a waiver to occur within the meaning of Code § 8.01-384(A), the record must affirmatively show that the party who has asserted an objection has abandoned the objection or has demonstrated by his conduct the intent to abandon that objection.'" 277 Va. at 6, 671 S.E.2d at 129, quoting Shelton v. Commonwealth, 274 Va. 121, 127-28, 645 S.E.2d 914, 917 (2007). That is, of course, a dramatic turnaround from Lee v. Lee, which held that "neither the Code nor Rule 5A:18 is complied with merely by objecting generally to an order. Since the rule provides that '[a] mere statement that the judgment or award is contrary to the law and the evidence is not sufficient,' it follows that a statement that an order is 'seen and objected to' must also be insufficient." 12 Va. App. at 515, 404 S.E.2d at 738.

An objection stated only in an endorsement of a final order will not preserve an argument that was not "stated with reasonable certainty at the time of the ruling," as required by Rule 5:25, to be sure. See Nusbaum v. Berlin, 273 Va. 385, 402-06, 641 S.E.2d 494, 503-05 (2007). But once the objection is made, it does not need to be repeated in the

final order -- a practice that may not have originated but certainly achieved far greater currency in the wake of Lee v. Lee.

Endorsement of an order as "Seen," without more, should be sufficient to preserve an argument that was "stated with reasonable certainty at the time of the ruling" (see Kingrey v. Hill, 245 Va. 76, 77 n.2, 425 S.E.2d 798, 799 n.2 (1993)), although the safer practice is to endorse orders "Seen and objected to" or some similar formulation (see Weidman v. Babcock, 241 Va. 40, 43-44, 400 S.E.2d 164, 166-67 (1991)).

A practical benefit of this rule is that counsel thus have more time to evaluate the assignments of error to be presented in a Petition for Appeal, instead of being locked in by objections stated in a final order.

George Somerville is a partner with the Richmond office of Troutman Sanders LLP. His practice focuses on appellate litigation in state and federal courts, and on water use permitting and litigation in state and federal administrative agencies and courts. He can be reached at george.somerville@troutmansanders.com or (804) 697-1291.