IN THE

SUPREME COURT OF VIRGINIA

RECORD NO.

RICHARD R. CADMUS JR.

APPELLANT

V.

CITY OF WINCHESTER ET AL.

APPELLEE

PETITION FOR APPEAL

RICHARD R. CADMUS JR.
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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF VIRGINIA:

COMES NOW, Richard R. Cadmus Jr.(“Cadmus”), pro se, who is aggrieved by dismissal with prejudice, of his complaint by the Circuit Court of The City of Winchester, which is based on the improper, unlawful and void Judge Designate Order, misapplication of the Virginia statutes, Breach of Duty and the Judge Designate's abuse of his discretion. Cadmus moves this Court to grant him petition for appeal for the reasons stated herein.

Nature of the Case and Material Proceedings Below

Cadmus(pro se) fell victim to the City of Winchester Inc("City") and it's Chief of Police("Sanzenbacher") during a lengthy, unfounded and never ending criminal investigation commenced, by the City and Sanzenbacher for abusive purposes that caused Cadmus to suffer emotional, mental, physical and financial damages. As a result, Cadmus sued the City and Sanzenbacher for a plethora of defamatory comments made by, both, City Officials and Chief Kevin Sanzenbacher.(Complaint 3-32; 12/20/12) Cadmus filed his initial complaint on December 20th, 2012(Complaint 3-32; 12/20/12) in the Circuit Court of the City of Winchester, seeking damages on several theories – mainly defamation. Cadmus , diligently sought private processors on a regular basis in 2013(Affidavit 180-184; 3/14/14) and, finally, procured *Justice Incorporated,* whom Cadmus believed had served process on December 18th, 2013(Affidavit 36-38; 12/18/13). After realizing a technical defect in the initial service of process on January 9th, 2013, Cadmus served process again, that same day, on January 9th, 2014 evidenced by the Proof of Service's.(Proof of SOP 168; 1/13/14), (Proof SOP 169; 1/14/14), (Proof SOP 174; 1/21/14), (Proof SOP 175; 1/24/14).

The City and Sanzenbacher, both, filed Motions to Quash and Motion's to Dismiss with Prejudice(Motions 39-113; 1/8/14, 1/9/14) because the initial

attempt at Service of Process did not contain the “afixed” Summons from the Circuit Court Clerk. The City and Sanzenbacher, both, filed Second Motions to Quash and Motions to Dismiss on the second attempt to procure Service of Process.(Motions 170-173; 1/16/14) and (Motions 176-178; 1/30/14) because the second service of process was not perfected until after the VSC Rule 3:5(e) mandate for serving process within one year had exceeded on the second attempt to cure the defect in the initial attempt.

On January 9th, 2014, The Honorable Judge John E. Wetsel, Jr., after the Court received the City's and Sanzenbacher's motions to Quash and Dismiss, and after one year of the case being filed in the Clerk's office, issued a Recusal Order,(Or. 114; 1/9/14) citing a conflict as being friends and colleague with the former City Sheriff(Lenny Milholland) who is named but un-served in the original complaint.(Recusal 114; 1/9/14)

On February 12th, 2014, a purported scheduling hearing took place without Cadmus' attendance due to a time “mix-up”. The Clerk of the Circuit Court(Clerk) expressly communicated with Cadmus that the hearing would take place in courtroom 3D at 9am(Exhibit A 206, 3/26/14) yet the docket, now, reflects the hearing was for 8:30am. Cadmus showed up on time to his detriment that the hearing had taken place at 8:30am. Cadmus was noticed of a March 14th, 2014 date, by the Clerk, where both the City's and

Sanzenbacher's motions would be heard. At this point, Cadmus was still unaware of who had been designated as the Judge.

The March 14th, 2014 hearing was scheduled to be heard in Courtroom 3D (City of Winchester – Circuit Court) but had been circumvented into Courtroom 3A (Frederick County – Circuit Court). (Exhibit A 206; 3/26/14). No Transfer of the Clerk's File nor any notice was given to Cadmus as he wondered around the Courthouse trying to find his hearing.

Cadmus made an appearance at the March 14th hearing and argued his position in opposition to the City and Sanzenbacher's – Motion's to Quash and Motion to Dismiss with prejudice(Tr. 274-300; 3/14/14)

Cadmus admitted an affidavit into the record(Aff. 180-184; 3/14/14)(Tr. 9-11; 3/14/14) and moved the Court for an Evidentiary Hearing(Tr.16-18; 3/14/14). Cadmus' evidence was removed from the Litigation table at some point during the hearing, by an unknown person. After the hearing was over, the evidence was returned to Cadmus after the judge ruled in favor of the City and Sanzenbacher.(Tr. 258; 3/14/14)(Tr. 328-335; 4/3/14)(Exhibit G 214,215 – 3/26/14).

At the end of the March 14, 2014 hearing, the judge designate, after hearing the evidence, stated: “Your motion is granted,Counsel”. (Tr. 254, L7; 3/14/14) Cadmus believed the judge designate was granting Judkins(City's

attorney) a motion to strike the Affidavit and/or the testimony. Cadmus immediately moved the Court to non-suit his complaint(Tr. 265, L13,14; 3/14/14), however, the judge designate and Julia Judkins agreed, in opposition to Cadmus' objection, that it was too late to take a non-suit as a matter of right. Cadmus emphatically and contemporaneously asserted his non-suit as a matter of right and the Trial Judge noted his exception.(Tr. 265, L25; 3/14/14) Cadmus stated: “I will appeal”.(Tr. 266, L1; 3/14/14)

After the Trial Court dismissed Cadmus' complaint with prejudice, he went to the Clerk's office later that day to inspect the court file and submit a petition for “In Forma Pauparis” (Order. 187; 4/3/14)

Cadmus, for the first time – saw an undated Order “assigning” Benjamin N.A. Kendrick, Retired Circuit Court Judge and subsequently signed by Thomas J. Wilson IV, Chief Judge).(Order. 179; **No Filing Date**) In addition to, not being dated by the Chief Judge, the Order has no date or filing stamp as when it was, in fact, received by the Clerk and subsequently entered into the record in Cadmus v. City of Winchester, Inc. et al.

Cadmus immediately drafted and filed Motions to Set-Aside, Vacate, Recuse or Suspend and subsequent Memorandum of Law and Facts with second amended motions styled under a motion to reconsider and vacate(Mo. 189-242; 3/26/14 & 3/27/14)

The Judge Designate granted a hearing on 4/3/14 in Arlington County Circuit Court. Cadmus traveled to and participated in the hearing where he informed the court of the error and preserved his objections for appeal in the record orally and by written motion.

The Trial Judge denied all of Cadmus' motions and found no merit in any argument or testimony presented to the judge designate.(Or. 243; 4/3/14) The Judge Designate stated that he had heard nothing new.(Tr. 342; 4/3/14)

Assignments of Error

1. As a matter of law, reviewed by the Virginia Supreme Court, de novo, the judge designate erred in his decision dated April 3, 2014 by not vacating, not setting aside and not recusing himself(for good cause shown), surrounding the March 14th 2014 order. No contemporaneous objections are required if the order, appointing the judge designate, is void.

   (a) The designation order is undated and not time-stamped, and subsequently was not entered into the record until after the first hearing had taken place.(Tr. 315; 4/3/14), making the designation order void. Regardless, the error was properly brought to the attention of the judge designate and Cadmus adequately put the court on notice of the void order(Tr. 315; 4/13/14)

   (b) The Clerk failed to comply with the Chief Judge's designation order and mail Cadmus a copy of it and certify, the fact there of, into the record disenfranchising Cadmus' ability to expeditiously discover the process used, contrary to §17.1-105(B) and its memorialized order appointing Benjamin N.A. Kendrick as the judge designate of his proceedings was illegal and, in fact, void. The error was timely brought before the judge designate and properly perserved for appeal(Tr. 323, 324; 4/3/14).

   (c) The Clerk was ordered by the recused sitting Judge, Honorable John E. Wetsel to notify Thomas Wilson IV(26th Circuit

Chief Judge) for the purpose of designating a judge in direct violation of the statutory mandate in §17.1-105(B) and after the Honorable John E. Wetsel had already recused himself from all matters concerning Cadmus' in Case No. CL12-608. To the extent that this order was not void and only voidable, the objection was properly preserved for appeal in the Motion to Vacate on April 3, 2014(Tr. 316, 318, 319; 4/3/14)

(d) The Clerk violated the statutory mandates of §17.1-105(B) by failing to certify, to the Virginia Supreme Court Chief Justice, the sitting Judge's disqualification and Recusal Order dated January 9th, 2014. To the extent that this order was not void and only voidable, the objection was properly preserved for appeal in the motion to vacate on April 3, 2014(Tr. 319; 4/3/14)

(e) The Chief Judge of the 26th Circuit, violated the provisions of the 17.1-105(B) by exceeding the scope of the limited active jurisdiction in judicial designation predicated on recusal and issuing an order to appoint a judge designate, himself. To the extent that this order is not void, the objection was properly preserved for appeal in the motion to vacate on April 3, 2014(Tr. 316; 4/3/14).

(f) The Supreme Court Chief Justice did not, in fact, designate Benjamin N.A. Kendrick, retired Circuit Court Judge, as the lawfully designated retired judge, to hear Cadmus' specific case according to the statutory scope and limited subject matter jurisdiction defined and mandated in §17.1-105(B). Though Cadmus contends this order is void and no contemporaneous objection is necessary, the objection was still made April 3, 2014 – motion to vacate(Tr. 315-319; 4/3/14)

(g) Cadmus has a Constitutional Right under Article VI, Section 7 to have a Judge who resides and serves on the bench in his locality. Chief Judge Wilson's undated order violates Cadmus's substantive rights to have a local Judge hear his case.

2. As a matter of fact and law, reviewed by the Virginia Supreme Court, de novo, and objections partially preserved in the record, to the extent that

the trial judge is deemed lawfully designated by the Supreme Court Chief Justice pursuant to §17.1-105(B) in this matter; concerning the April 3, 2014 decision, the judge designate erred by upholding his May 14, 2014 order when he abused his discretion and refused to rehear, fix or cure the errors committed by the recused sitting trial judge and the Circuit Court Clerk according to Virginia Supreme Court Rule 1:9 including:

> (a) The Clerk of the Court breached his duty to notify Cadmus of the deficiency in copies according to Virginia Supreme Court Rule 3:4(c)(1). This error was not properly preserved in the trial court but should be reviewed, to the ends of justice, because the case is dismissed with prejudice and Cadmus' 5th and 14th Amendment rights to Notice and one full and fair opportunity to have his grievance heard on its merits will be disenfranchised.
>
> (b) The recused and sitting judge breached his duty to notify Cadmus of the "required copies" not being purportedly furnished VSC Rule 3:4(c)(1). This error was not properly preserved for appeal, directly, but should be reviewed, to the ends of justice, because it is not harmless error and would have corrected any defects in the process and circumvented this appellate diversion.
>
> (c) The Clerk breached his specific duty to "issue summons's" and "securely attach one to the front of each copy of the complaint to be served" on December 20th, 2012 when Cadmus filed the initial complaint with (2) copies per VSC Rule 3:5(b). This error was properly preserved for appeal at (Tr. 285, 03/14/14).

3. As a matter of fact, and reviewed in light most favorable to the prevailing party, and to the extent that the judge designate is deemed lawfully designated by the Supreme Court Chief Justice under §17.1-105(B) in this matter – concerning the March 14, 2014 decision; the judge designate erred by dismissing Cadmus' complaint without finding because the ruling does not support the facts that are in the record. Cadmus did exercise due diligence according to Virginia Supreme Court Rule 3:5(e) and Virginia Code §8.01-275.(Tr. 283-285, 290-293; 3/14/14)(Tr. 328-336; 4/3/14) The judge designate erroneously sustained the City's motion to strike witness testimony and disregarded the affidavit that indicated Cadmus did meet the, due diligence, requirement of the applicable rule

and statute. The Judge Designate's ruling of dismissal with prejudice does not not supported in the record on the showing of due diligence. Cadmus preserved this objection at (Tr. 336, 339, 340, 341; 4/3/14).

4. As a matter of law, reviewed de novo,and to the extent that the Trial Judge is deemed lawfully designated by the Supreme Court Chief Justice under §17.1-105(B) in this case – pertaining to the March 14th, 2014 and April 3, 2014 decisions, the Judge Designate erred by misapplication of the standard for taking a non-suit. The Judge Designate erroneously refused to accept Cadmus' motion and simultaneous filing of a Virginia Code §8.01-380 – statutory non-suit as a matter of right; prior to the entry of an order granting a motion to dismiss per Virginia Code §8.01-277(B).(Tr. 295, 296; 3/14/14)(Motion to Reconsider. 231; 4/3/14)

STATEMENT OF FACTS
RE: Assignment of Error #1

On January 9, 2014, the record reflects that Cadmus went to the Winchester City Circuit Court Clerk's office(Clerk's office) and submitted two new complaints with motions for leave to amend.(Motions, 116-167; 01/09/14) The Clerk asked Cadmus to write the addresses down of the places where and to who the service of process was to be served.(Serv. Req. – 115; 1/9/14) The Clerk prepared the summons and had them both served the following day on January 10, 2014(Proof Serv. – 168,169 ,174,175; January 13, 14, 24, 27, 2014) During that exchange,Terry Whittle(Clerk) handed Cadmus a sealed envelope which, after opening, Cadmus discovered that the Honorable John E. Wetsel had recused himself from hearing his matter, effective that same day.(Recusal Order – 114, 1/9/14) Cadmus was notified by the Clerk that the Court would be

in touch as soon as a Judge had been designated(Tr. 212; 4/3/14)

Several weeks later, the Clerk and Cadmus were discussing a different matter in the Clerk's office when the Clerk stated that he believed that Benjamin NA Kendrick, retired Judge Designate may be appointed to Cadmus' case. Cadmus expressed his objection to the Clerk. The Clerk stated that he would be in touch as soon as he knew something.(Tr. 313; 4/3/14) Cadmus received communication from the Clerk that a scheduling hearing was going to be on February 12th ,2014 and that it appeared that Kendrick was the Judge designated. Cadmus checked the file where no designation order was entered into the record.(Tr. 315, L13; 4/3/14) Cadmus appeared for the scheduling hearing which had taken place (30) minutes prior to his arrival, in the courthouse, contrary to the date and time that he was told to appear. Cadmus checked the record again. There was no designation order in the file(Tr. 315; 4/3/14). Cadmus was notified by the Clerk by mail that the hearing to dispose of the Motion to Quash Service of Process and Motion to Dismiss were scheduled for 9:00am on March 14, 2014 in courtroom 3D.(Exhibit A - 206; 3/7/14)

Cadmus revisited the Clerk's office numerous times prior to the March 14, 2014, hearing(Tr. 323; 4/3/14) The last date that Cadmus checked the file was March 11, 2014. No Designation Order was in the file(Tr. - 323, L3-5; 4/3/14) and the Clerk never sent Cadmus a copy of any designation order (Tr. 323-324;

4/3/14) nor had the Clerk certified anything in the record(Tr. 324, L4-6; 4/3/13) that he had sent Cadmus a copy of the designation order. (Desig. Ord. 179; No Date) per the unsigned designation order which appeared in the file, after the fact.(Desig. Ord. – 179, No Date)

On March 14, 2014, after the Judge Designate had dismissed Cadmus' lawsuit with prejudice, Cadmus inspected the file again that same day where he , now, noticed an order “assigning” the Honorable Judge Benjamin NA Kendrick, as the judge designate, assigned in the matter.(Tr. 315, L12-13; 4/3/14)

The order was entered by Thomas Wilson IV, Chief Judge of the 26th Circuit. The order was not dated by the Chief Judge and there is no date or time-stamp as the order ever being entered. (Desig. Ord. – 179, No Date)Cadmus immediately began drafting his Motion to Vacate, Rehear, Disqualify or Recuse because Judge Kendrick, retired Judge, was the sitting Judge in a criminal matter that is directly related and germane to the present civil action which is now dismissed by Judge Kendrick with prejudice.(Tr. 313; 4/3/14). Cadmus filed his motions on March 26, 2014 and it was heard over the defendants persistent objections(Tr. 306; 4/3/14) on April 3, 2014, (3) days prior to the (21) day jurisdictional rule in VSC Rule 1:1. The Honorable John E. Wetsel's recusal order, however, is dated by himself and time-stamped by the Clerk's office as being entered(Recusal Ord. - 114; 1/9/14).

STATEMENT OF FACTS
RE: Assignment of Error #2

On December 20th, 2012, Cadmus filed his lawsuit in the City of Winchester, Circuit Court Clerk's office. He brought (3) copies of his complaint and presented them to Terry Whittle(Court Clerk). Cadmus remitted $359.00 to the Court Clerk for the filing and preparation of service of process. The Clerk received the payment and filed the lawsuit. The Clerk did not take the other two copies sitting on the counter and securely attach any summons' to those copies. Subsequently, Cadmus left the courthouse with the two copies. Cadmus never received any written, verbal or other correspondence, by the Clerk, informing him of any deficiencies in the number of copies prior to the initial service of process on December 18, 2013. There is no certification in the record that the Clerk attempted to obtain any additional copies or attach any summons'. Nothing in the record reflects that the Clerk communicated with the City of Winchester Circuit Court Judge and informed him that there were no additional copies remitted by Cadmus. Subsequently, nothing in the record reflects that the Circuit Court Judge attempted to notice or communicate with Cadmus and order him to provide copies for service of process by a certain date. Nothing in the court record certifies reflects that the Judge was either made aware of the

deficiency or that the Judge, in fact, certified his attempt to order Cadmus to provide the Court Clerk with the appropriate copies for Service of Process.

STATEMENT OF FACTS
RE: Assignment of Error #3

Cadmus(pro se) filed a lawsuit in the City of Winchester Circuit Court, in the instant case, on December 20th, 2012.(Complaint, 3-32; 12/20/14) Cadmus provided three copies of the complaint to Terry Whittle(Clerk). Cadmus placed the copies on the front counter as the Clerk entered the case and received the filing fee of $359.00. Whittle did not create, attach, afix or secure a summons to the other two copies of the complaint sitting on the Clerk's counter(Tr. 340; 4/3/14). Cadmus left the building with the (2) copies of the complaint less any summons properly secured or attached to them.

In 2013, Cadmus was enthralled with several mitigating issues that partially affected the timing of Service of Process. He moved his 7000sft business from Winchester to Frederick County, in an effort to keep his business open which ultimately failed and the business was subsequently closed(Tr. 340; 4/3/14). Cadmus was forced with the task of dissolving and closing down the business affairs of the company. Cadmus's was his “terminally ill” mother's caregiver who had Stage 4 cancer and in and out of the hospital until August, when she died.(Tr. 292; 3/14/14) Cadmus was tasked with burying his mother,

becoming the administrator of that estate and managing all of its affairs.

As an administrative task, Cadmus was having to sue entities in small claims court on behalf of his mother's estate. At one point, in October of 2013, Cadmus was unable to obtain a successful Service of Process through the City Sheriff(Tr. 289; 3/14/14) (Tr. 328-330 ; 4/3/14)(Serv. Return, 214,215) Three continuances, one refiling due to the Sheriff losing the paperwork and five months before the matter was, in fact, before a Court. Additionally, the very agency and individuals who are named or identified in Cadmus' lawsuit are those very people whom the Clerk uses for service of process.

Simultaneously, Cadmus was researching and trying to find private process servers in Northern Virginia. Cadmus was unable to find or procure any local process servers that would serve process on the City and specifically the Chief of Police. Several said they would and never showed up(Tr. 340; 4/3/14) (Affidavit 180-184; 3/14/14). Cadmus asked a female acquaintance purpose to help him serve process. They Both made trips to Harrisonburg and Arlington looking for process servers. (Tr. 292; 3/14/14)

A day or so prior to December 18th, 2014, Cadmus was with his female friend(Marsha Maines) in Northern Virginia when a local process server answered an email through a Process Server Association website, that Cadmus had visited, attempting to find a private process server. Justice Incorporated's

Mark and Cheryl Anderson agreed to serve process on the City of Winchester and the Chief of Police(Sanzenbacher. They agreed to serve process on December 18th, 2013.

Cadmus met Cheryl Anderson at the Winchester Frederick County Joint Judicial Center at 5 N. Kent Street in Winchester VA. He rode with Anderson around the block to City Hall and walked upstairs to the City Attorney's office and watched Anderson serve the City Attorney's office with his complaint. They both left the building and traveled to the Winchester Police Dept. located at 231 E. Piccadilly St in Winchester VA and proceeded to the 3rd floor where Sanzenbacher's office is located. Cadmus witnessed Anderson serve Sanzenbacher. Anderson, subsequently, filed her affidavit of service later that same day in the Circuit Court Clerk's office. After receiving calls from Anderson prior to her filing where she was confused on what she was serving, Cadmus, went to the Clerk's office to verify that she had, in fact, filed the affidavit and then took copies of it for himself. Due to his eye-sight, Cadmus did not notice that Anderson had used white-out on the affidavits and omitted information prior to filing it with the Clerk.(Aff. 36-38; 3/14/14)(Aff. 180-184; 3/14/14).

Cadmus was not aware of the defective process issue or that a summons was even required to be attached and secured to the complaint, by the Clerk, until January 9th, 2014 when he became aware of the City's and Sanzenbacher's

motions to quash and dismiss.

Upset, Cadmus reissued service on the same date, January 9, 2014. He expressed his distaste and objection to the Clerk for not divulging the summons/additional copies issue when the Clerk should have. Cadmus directed the Clerk to serve the City Attorney and the Chief of Police(Sanzenbacher). Service was perfected on January 10th, 2014, personally, by the new City Sheriff – Les Taylor.(Aff. 180-184, #35; 3/14/14)

Both defendants filed second motions to quash and dismiss for being served untimely according to VSC Rule 3:5(e).(Motions, 170-173, 176-178; 1/16/14, 1/30/14)

STATEMENT OF FACTS
RE: Assignment of Error #4

On March 14, 2014 at 9am, Cadmus was scheduled to have a hearing agains the City and Sanzenbacher in 3D(City of Winchester Circuit Court). No court was being held in 3D because the doors were locked and the room was dark. Cadmus wandered down, late, down to courtroom 3A, The Frederick County Circuit Court. The record reflects that he was suppose to be in 3D (Tr. 317; 4/3/14)(Exhibits 206,207; 4/3/14) the City of Winchester Circuit Court. Cadmus, approached the courtroom late. Cadmus saw the sitting Judge but was unaware of his name. Cadmus' case was called approximated (10) minutes

after he entered the courtroom. Cadmus proceeded with the hearing, though he was confused about the venue.

During the hearing, Cadmus proffered to the Court that he did not use the Sheriff's deputies to serve process because of his past experience with them losing his service paperwork in other matters. Cadmus motioned for an evidenciary hearing and it was granted. During argument, Cadmus noticed people rummaging around on the litigation table near the prosecutors filing apparatus.(Tr. 331-334; 4/3/14) As he began to put evidence on that indicated that the Sheriff's office was losing his service paperwork, Cadmus was unable to find the paperwork on the litigation table.(Tr. 328-336; 4/3/14) Cadmus apologized to the court and called his witness to testify to his due diligence to serve process. The City successfully objected and the judge sustained her objections to the evidence. Cadmus was unaware that the judge was getting ready to rule on both motions. The record reflects that Cadmus preserved his right to timely non-suit in his closing statement at line 4 of (Tr. 295-296; 3/14/14) to wit:

> " Cadmus: ….And its in the Affidavit, and I object if its not put into the files and not as a part of the record. That's all I have.
> The Court: Your Motion is granted, Counsel.
> Cadmus: I move –
> The Court: This affidavit –
> Cadmus: I move to nonsuit, Judge.
> Judkins: Your Honor, now that's too late.
> Cadmus: I move to nonsuit, as a matter of right, to nonsuit.

The Court: The motion is denied. You should have made that before the ruling, but the the Court granted the motion.
MCadmus: It's – it's before – no, I can make it, Judge. I disagree. I move to nonsuit.
The Court: Well, your exeption is noted for the record. The motion to nonsuit is denied. The motion to dismiss with prejudice is granted. That motion to dismiss with prejudice was granted before the nonsuit. I note your exception to the ruling.
` Cadmus: I'll appeal."

Cadmus left the hearing and as he was proceeding down the steps, the Commonwealth's Attorney Investigator, yelling his name, approached him and handed the (2) documents back to Cadmus that disappeared from the litigation table prior to the evidentiary hearing. The investigator communicated that the Commonwealth's Attorney found them on the table. Cadmus cleared the table prior to leaving the courtroom. There were no stray documents on the litigation table when Cadmus left the courtroom.(Tr. 331-334; 4/3/14)

Principles of Law and Argument Relating to The First Assignment of Error

Benjamin NA Kendrick, Judge Designate, was sitting in Frederick County Circuit Court, authorized by a "blanket standing order" signed by the Virginia Supreme Court Chief Justice, Cynthia D. Kinser according to 17.1-106. Based on that Order, Rebecca Hogan – the Frederick County Circuit Court Clerk, assigned Judge Kendrick for the purpose of helping to dispose of all the cases

on the entire docket on March 14, 2014.(Exhibit, 208; 4/3/14).(Motion to Vacate – 4/3/14)

The Standing Order, dated December 20, 2013 states:

> "is for the expeditious disposition of the business in the Circuit Courts of the Commonwealth of Virginia" and "....as may be authorized by any additional order or orders of the Supreme Court of Virginia."

Clearly, in this case, 17.1-106 does not control 17.105(B) where it states that:

> "If all the judges of any court of record are so situated in respect to any case, civil or criminal, pending in their court as to render it improper, in their opinion, for them to preside at the trial, unless the cause or proceeding is removed, as provided by law, they shall enter the fact of record and the clerk of the court shall at once certify the same to the Chief Justice of the Supreme Court, who shall designate a judge of some other court of record or a retired judge of any such court to preside at the trial of such case"

Cadmus argues that the sitting Judge recused himself, then ordered the Clerk to notify the Chief Judge of the 26th Circuit to designate another judge. The Clerk entered the recusal order into the record (Gresham v. Ewell, 85 Va. 1, 6 S.E. 700) however, he never certified or communicated to the Chief Justice of the Virginia Supreme Court. The Chief Justice makes it clear in the blanket Standing Order that other orders may arise out of that order:

> "...as may be authorized by any additional order or orders of the Supreme Court of Virginia"

Cadmus argues that 17.1-105(B) slices out and limits the active Subject Matter Jurisdiction of Judges who have the authority or ability to hear cases of a certain nature upon recusal for several reasons(Akers v. Commonwealth, 155 Va. 1046, 1931):

> (1) The State Legislature intended to eliminate all appearances of impropriety of the lower courts by removing or "not granting" authority to designate its own favorite stand-in judge for a specific case or cases.
>
> (2) It would be against good public policy to have the trial courts police and administer its own designation procedure and selection when a disqualification or recusal has been stipulated or ordered by the court and active Circuit Court Judge.

In this case, the Honorable Judge John E. Wetsel is the only sitting Judge in the The City of Winchester Circuit Court. In the alternative, had their been other judges in that court of record, like Fairfax County VA , for example, has numerous sitting Circuit Court Judges – at least one of them could have potentially heard a case such as this. As Winchester only requires (1) active Circuit Court Judge, the imperative mandate in 17.1-105(B) applies to the Clerk:

> "and the clerk of the court shall at once certify the same to the Chief Justice of the Supreme Court"

and looking into the record at the recusal order entered by the Honorable John E. Wetsel juxtaposed with the designation order issued by the Honorable Chief

Judge of the 26th Circuit, forgetting for the sake of argument, that the order in question is undated and not time-stamped as entered into the record, it is clear that the City of Winchester Court Clerk, the active, sitting but recused Judge and the Chief Judge of the 26th Circuit , all, erroneously violated the clear mandates in the provisions of 17.1-105(B):

(1) The Clerk failed to certify the recusal to the Chief Justice of the Supreme Court.

(2) The Chief Judge of the twenty-sixth Circuit issued a designation order that was predicated on a standing blanket order of the Supreme Court, which circumvented the requirements of 17.1-105(B).

(3) The active sitting Judge ordered the Clerk to contact the Chief Judge regarding the designation of a judge – after he recused himself in all matters concerning Cadmus' case which, Cadmus contends, is a conflict.

In the spirit of harmonizing the two subsections in 17.1-105(B) and the blanket standing order issued by the Supreme Court under 17.1-106, the plain and unambiguous meaning of such an order is controlled in 17.106(A)(i) where the legislature clearly state that:

> "either to (i)hear a case or cases pursuant to the provisions of 17.105 such designation to continue in effect for the duration of the case or cases or (ii) perform for a period of time not to exceed ninety days at any one time, such judicial duties in any court of record as the Chief Justice shall deem in the public interest for the expedition disposition of the business of the courts of record."

The case at bar should have been designated per ("i") but clearly it was

assigned according to the provisions of (“ii”) based on the (Recusal Ord. 114; 1/9/14), (Desig. Ord, 179; Undated) and (Exhibit B 208; 4/3/14) and the lack of another order entered by the Chief Justice of the Virginia Supreme Court. Judge Kendrick was in the Frederick County Circuit Court to hear all of the cases on March 14, 2014 according to (“ii”) provision of 17.1-106, not to hear Cadmus' case according to the (“i”) provision.

When analyzing a statute, the courts must assume that the legislature chose, with care, the words it used when it enacted the relevant statute, and the courts are bound by those words as they interpret the statute. A court may not adopt a construction of the statute that would amount to holding that the legislature did not mean what it has actually expressed. Interpretation of the statute by comparison to other, similar statutes supports this result showing that the General Assembly clearly knew how to create such authority when it so desired.

In Layne v. Crist Elec. Contr., Inc., 62 Va. App. 632, 751 S.E.2d 679(2013), the Virginia Court of Appeals concluded that the failure to provide authority to the Virginia Workers Commission to assign or recall or designate a retired commissioner to participate in a review or hearing was on purpose. Likewise, the State Legislature has failed to provide authority to the twenty-sixth Circuit Chief Judge to assign, appoint or designate any Judge Designate upon recusal of the trial judges.

Lastly, In Bennett v. Commonwealth, 29 Va. App. 261, 511 S.E.2d 439 (1999), Bennett argues that the Sixth Circuit erred by sua sponte assigning Judge Baskerville to hear his trial after recusing themselves, without certifying the recusal to the Chief Justice of the Supreme Court for designation as required by 17.1-105(B).

The Court of Appeals concluded in Bennett that:

> "The record contains an order entered by the Chief Justice of the Supreme Court prior to appellant's trial, pursuant to 17.1-105(B), designating Pamela Baskerville of the Eleventh Circuit to provide over the trial. As the record, simply does not support appellants assertion, we will not address the issue farther."

Because the record does not reflect that the Chief Justice of the Supreme Court ordered the designation of Benjamin NA Kendrick, Judge Designate, then any order issued by the same Judge Designate in this case has no legal force and is void ab initio, subsequently to any designation order entered into the record by any Judge, other than the Supreme Court Chief Justice. The Judge Designate, subsequently, committed error by not vacating his own order pursuant to VSC Rule 1:1 and8.01-428(D)

Principles of Law and Argument Relating to The Second Assignment of Error

In filing a lawsuit, its the Clerk's duty to attach summons to the complaint according to VSC Rule 3:5(b) as a part of preparing of the fees for filing and preparing a lawsuit for proper service of process. However, if no copies are provided to the Clerk, it is the Clerk's duty to notify the the plaintiff of such deficiency. If the plaintiff still refuses to respond or comply, the Clerk's imperative duty according to VSC Rule 3:4(c)(1) is to notify the Judge and the Judge shall notify the plaintiff and order him to provide the necessary copies for service by a certain date.

Cadmus argues that prior to the initial service of process on December

18th 2013, Terry Whittle(City of Winchester Circuit Court Clerk) and the Honorable Judge E. Wetsel, whom recused himself in this matter, both committed fatal errors in performing their duty to properly manage the Circuit Court and its processes and procedures:

(1) The Clerk failed to attach summons to the copies of the complaints presented to the Clerk on December 18, 2013.

VSC Rule 3:5(b) states:

> "(b) Affixing summons for service; voluntary appearance. Upon the commencement of a civil action defendants may appear voluntarily and file responsive pleadings and may appear voluntarily and waive process, but in cases of divorce or annulment of marriage only in accordance with the provisions of the controlling statutes. With respect to defendants who do not appear voluntarily or file responsive pleadings or waive service of process, the clerk shall issue summonses and securely attach one to and upon the front of each copy of the complaint to be served. The copies of the complaint, with a summons so attached, shall be delivered by the clerk for service together as the plaintiff may direct.

(2) In arguendo, if the City argues that, Cadmus failed to bring copies to the Clerk's office, the Clerk still failed to notify Cadmus of the deficiencies in copies that prevented the Clerk from performing his

duty to securely attach a summons to the complaints.

> VSC Rule 3:4(c)(1) states in part:
>
> *(C)Additional copies.* A deficiency in the number of copies of the complaint shall not affect the pendency of the action.
>
> (1)"If the plaintiff fails to furnish the required number of copies, the clerk shall request that additional copies be furnished by the plaintiff as needed, and if the plaintiff fails to do so promptly, the clerk shall bring the fact to the attention of the judge..."

(3) If the Clerk notified the recused trial judge, then that Judge committed error by not certifying that he notified Cadmus and Ordered him to produce copies to the court by a determined date.

> VSC Rule 3:4(c)(1) states in part:
>
> " the clerk shall bring the fact to the attention of the judge, who shall notify the plaintiff's counsel, or the plaintiff personally if no counsel has appeared for plaintiff, to furnish them by a specified date. If the required copies are not furnished on or before that date, the court may enter an order dismissing the suit"

Cadmus argues, to the ends of justice, its hardly fair to his substantial rights to bring a suit for damages, for this Court to allow the Clerk and the Judge to breach their own duties to Cadmus by not notifying him of their inability to perform the tasks associated with their role causing Cadmus to suffer a technically and procedurally fatal result predicated on mutually relative VSC Rules.

Cadmus had no responsibility, in the rule, to inform the Clerk or the Judge

to perform, or how to perform their own duties. Based on the reading of the specific rules, its absurd to conclude that Cadmus was responsible when, in fact, its clear by reading the VSC Rule 3:4 and 3:5 in context that the intent was to create checks and procedural balances in VSC Rule 3:4 and 3:5 to keep situations 'exactly' like this from happening.

Had the Clerk attached the summons to the copies on his counter on December 20, 2013, we would not be here right now, in the Supreme Court of Virginia. In arguendo, had the Clerk properly notified Cadmus of the deficiencies in copies or at least notified the Judge, presuming the Judge was never notified, we would not be here right now in the Supreme Court of Virginia. If the Clerk did notify the Judge, again, Cadmus never received any communication ordering him to remit the required copies to further the performance of the Clerk's duties according to VSC Rule 3:4(c)(1) and 3:5(b) which, in no way, imparts any duty on Cadmus other than to comply with their instructions as a matter of procedure and not legal advice.

In conclusion, Cadmus concedes that VSC Rule 3:5(e) and Va Code 8.01-275.1 were violated and service of process was defective at the one year mark. Proper service of process was not achieved until January 10, 2014.

Cadmus argues that his breach was predicated on the Clerk and the Judge's predicately related breachesof the aforementioned rules. The Judge Designate abused his discretion by not considering the totality of the situation in context. A finding of due diligence, in this matter, is just and concluding that Cadmus is at fault for such an error without considering the other officials rule violations would not achieve the ends of justice. The Court should reverse and remand this case back to the trial court for further proceedings.

Principles of Law and Argument Relating

to The Third Assignment of Error

VSC Rule 3:5(e) states:

> *"Service more than one year after commencement of the action.* No order, judgment or decree shall be entered against a defendant who was served with process more than one year after the institution of the action against that defendant unless the court finds as a fact that the plaintiff exercised due diligence to have timely service on that defendant."

Va Code 8.01-275.1 states:

> **When service of process is timely.**
>
> Service of process in an action or suit within twelve months of commencement of the action or suit against a defendant shall be timely as to that defendant. Service of process on a defendant more than twelve months after the suit or action was commenced shall be timely upon a finding by the court that the plaintiff exercised due diligence to have timely service made on the defendant

"Due diligence requires only a good faith, reasonable effort; it does not require that every possibility, no matter how remote, be exhausted." McDonnough v. Commonwealth, 25 Va. App. 120, 129, 486 S.E.2d 570, 573 (1997). In STB Mktg. Corp. v. Zolfaghari, 240 Va. 140, 144-45, 393 S.E.2d 394 (1990), the Supreme Court considered the due diligence standard and requirement in the context of the statute of limitations for fraud actions and stated that:

> "The language by the exercise of due diligence

> reasonably should have been discovered, as used in *Va. Code Ann. § 8.01-249* means such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances. It is not measured by any absolute standard, but depends on the relative facts of the special case. Whether such due diligence has been exercised must be ascertained by an examination of the facts and circumstances unique to each case."

The facts and circumstances of this case are clearly laid out in the Caption of the initial lawsuit. Cadmus is suing the government. Not only that, he is suing some of the very people who work in the Winchester Courthouse. It is not unreasonable that it would be difficult to find people to serve high level officials and the Chief of Police especially when many process servers are law enforcement themselves. Arguably, the private process servers may have committed not only a fatal error, on Cadmus' behalf, they also have a conflict with even working for Cadmus because they, in fact, are previous employees of the Winchester Police Department.

It is not unreasonable for a prudent person, in similar circumstances to be concerned about doing business with the very people that are named in a lawsuit.

Circumstances outside the direct scope of the actual service of process that interfered with the act of serving process itself, should be considered by this Court in determining good cause and its direct relationship as to whether

Cadmus, in fact, exercised due diligence to have both defendants timely served according to VSC Rule 3:5(e) and Va Code 8.01-275.1.

Cadmus was forced to work through collateral situations which affected his ability to serve process. He was convinced that no non-suit was necessary and timely service was, actually, perfected on December 18, 2013. The damages that Cadmus is suing the City and Sanzenbacher for continued to escalate through 2013, which Cadmus had to mitigate and manage on-going damages which were subsequent but related to the case at bar.

For example, Yellow Cab of Winchester finally went out of business as a result of the damages caused by the City and Sanzenbacher. Cadmus' partner and terminally ill mother became a priority as well as all of the collateral damage that ensued as a result of a horrendous attack on Cadmus' character by the City of Winchester and the Chief of Police.

Whether such due diligence has been exercised must be ascertained by an examination of the facts and circumstances unique to each case. See Mears v. Accomac Banking Co., 160 Va. 311, 168 S.E. 740 (1933) (in action for fraud where seller of bonds regularly paid interest to purchaser for almost six years and purchaser had no reason to suspect that bonds were worthless, purchaser's claim was not barred by statute of limitations because of his lack of due diligence to discover seller's fraud).

Likewise, after Cadmus gave the paperwork to the private process server and traveled with them to each place of service, and watched the actual act of serving both defendants, Cadmus had no reason to suspect that the process was improper, defective or subject to dismissal.

Even in that, Cadmus diligently figured out where the error was after the first motion to quash and immediately cured the defect eleven days later.

In Bowman v. Concepcion, 283 Va. 552, 722 S.E.2d 260 (2012), Bowman had similar difficulties where extrinsic circumstances barred her from perfecting the service of process. The Court reasoned that Bowman could have taken a non-suit and preserved her action. Instead she asked the court for an extension for good cause with the showing of no prejudice to the defendants. She never asserted due diligence on the extrinsic circumstance of procuring a medical expert to certify her complaint. The Court reasoned that nothing barred her showing of “good cause” from becoming a never ending extension of time and the absurdity in that situation was not the legislature's intent. The “good cause” standard was improper and did not promote the expeditious disposition of the court's docket.

Distinguishable from Bowman, Cadmus' specific circumstances and inability to serve process on the City and Sanzenbacher is an extension of the Service of Process procedure itself. Cadmus cites reasonable delays during

2013 which hindered his ability to procure competent and qualified private process servers. (1) Local process servers refused to serve the government or the police chief due to conflicts (2) Out of town process server's stated logistical problems (3) On numerous occasions, process servers no-showed or (3) They called at the last minute and canceled. (4) Extrinsic personal circumstances which were directly related to the damages which spawned the case at bar to be filed in the first place.

The actions associated with procuring the private process servers were a part of the act of serving process. Regardless, that the City Attorney and Chief of Police were one block from the Winchester Courthouse. That fact is immaterial to Cadmus diligent efforts for months in: making calls, emailing potential process servers, and coordinating with the process server to ride along and watch the service of process take place as well as immediately following-up with the Clerk's file to verify the process server's affidavit was timely admitted. In Bowman, her act of procuring a medical expert was mutually exclusive but a prerequisite which had no bearing on the act of serving process.

The record reflects that Cadmus, by affidavit and witness testimony, did exercise due diligence to have the defendants timely served with process. The ruling, in this case, is contrary to the facts and law. The Judge Designate's order and the March 14, 2014 and April 3, 2014 transcripts are silent and

subsequently void of any Judicial opinion from the Judge Designate on the issue and finding of due diligence. The Court should find that the Judge Designate's ruling and order do not support the facts and the law in this case and the should be reversed and the second service of process should be deem timely.

Principles of Law and Argument Relating to The Fourth Assignment of Error

Non-suits may be taken as a matter of right according to 8.01-380. Subsection A states:

> A. A party shall not be allowed to suffer a nonsuit as to any cause of action or claim, or any other party to the proceeding, unless he does so before a motion to strike the evidence has been sustained or before the jury retires from the bar or before the action has been submitted to the court for decision. After a nonsuit no new proceeding on the same cause of action or against the same party shall be had in any court other than that in which the nonsuit was taken, unless that court is without jurisdiction, or not a proper venue, or other good cause is shown for proceeding in another court, or when such new proceeding is instituted in a federal court. If after a nonsuit an improper venue is chosen, the court shall not dismiss the matter but shall transfer it to the proper venue upon motion of any party.

On March 14, 2014, Cadmus asserted his right to move and file a non-suit in his lawsuit where the transcripts state in part:

> " Cadmus: ….And its in the Affidavit, and I object if its not put into the files and not as a part of the record. That's all I have.
> The Court: Your Motion is granted, Counsel.
> Cadmus: I move –

The Court: This affidavit –
Cadmus: I move to nonsuit, Judge.
Judkins: Your Honor, now that's too late.
Cadmus: I move to nonsuit, as a matter of right, to nonsuit.
The Court: The motion is denied. You should have made that before the ruling, but the the Court granted the motion.
MCadmus: It's – it's before – no, I can make it, Judge. I disagree. I move to nonsuit.
The Court: Well, your exeption is noted for the record. The motion to nonsuit is denied. The motion to dismiss with prejudice is granted. That motion to dismiss with prejudice was granted before the nonsuit. I note your exception to the ruling.
` Cadmus: I'll appeal."

The Judge Designate erred when he stated:

> "the motion is denied. You should have made that before the ruling, but the the Court granted the motion."

Specifically, 8.01-277(B) states:

> "Nothing herein shall prevent the plaintiff from filing a non-suit under § 8.01-380 before the entry of an order granting a motion to dismiss pursuant to the provisions of this section."

In the transcripts(Tr. 295, 296; 3/14/14), it is unclear what the Judge Designate is actually ruling on when he states your motion is granted. The City filed (2) motions and the court only mentions (1) motion in his ruling from the bench – yet the Judge Designate's order, produced by the City's counsel, refers to two orders.

It is clear, however, in the transcripts that Cadmus was moving the Court and attempting to simultaneously file a written motion for non-suit prior to "the

entry of an order granting a motion to dismiss".

The Judge Designate erroneously applied the "before the ruling standard" when clearly Cadmus was asserting his right to non-suit "before the entry of an order granting a motion to dismiss pursuant to the provisions of this section".

In HGLC Assocs., L.L.L.P v. Commonwealth Transp. Comm'r of Va., 2006 Va. Cir. LEXIS 67 (Va. Cir. Ct. Apr. 10, 2006), the Alexandria Virginia Circuit Court reasoned that rulings and orders are exclusive of one another. Judge Kemler noted in her opinion that:

> "No final order had been entered concerning either the summary judgement ruling or the ruling dismissing the lawsuit."

Likewise, in Davis v. Mullins, 251 Va. 141, 466 S.E.2d 90 (1996), the Supreme Court of Virginia found:

> "Thus, we have held that endorsement of counsel is unnecessary under circumstances where "counsel are present in court when the ruling is made orally and are fully aware of the court's decision; preparation and entry of an order in standard form is all that remains to be done to end the case in the trial court."Smith v. Stanaway, 242 Va. 286, 289, 410 S.E.2d 610, 612 (1991) ."

Cadmus asserts that it is unclear what the Judge Designate had done or ruled on prior to Cadmus' non-suit. The record in the transcript is unclear that there was even a ruling or whether it was in favor of Cadmus or the defendants and in the alternative, If the Judge Designate did rule – it was only on one

motion and both of the motions that were before the Court.

Cadmus argues, again in the alternative, he non-suited his lawsuit after the purported ruling and prior to the entry of an order per 8.01-277(B) and therefore the Judge Designate misapplied the correct standard for refusing to grant the first non-suit as a matter of right in 8.01-380.

In the event that no merit is found in Cadmus' first (3) assignments of error, the Virginia Supreme Court should still reverse the Judge Designate's decision and grant Cadmus his non-suit as a matter of right.

CONCLUSION

For the reasons stated, Cadmus requests the Court grant his petition for appeal to reverse or reverse and remand in order to correct the errors that occurred during the service of process, hearings and in the record.

Respectfully Submitted,
Pro Se

_____

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CERTIFICATE

I, undersigned, certify that:

(1) I have complied with the applicable rules of the Virginia Supreme Court and;

(2) This petition for appeal is 32 pages, exclusive of the cover page, table of contents, table of authorities, and this certificate; and;

(3) Pursuant to Rule 5:17, seven (7) copies of the forgoing Petition for Appeal have been filed with the Clerk of the Supreme Court of Virginia; and

(4) One copy has been mailed, postage prepaid, on this 16th day of June, 2014 to Counsel for the Appellee's:

Julia Judkins, Attorney on behalf of the City of Winchester, Inc.
Bankcroft, McGaviin, Horvath & Judkins, P.C.
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Rosalie Pemberton Fessier on behalf of Kevin Sanzenbacher
Timberlake, Smith, Thomas & Moses, P.C.
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24401-4272

(5) One copy has been retained by Appellant's

Richard Cadmus Jr.
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(6) Appellant is pro se and does not waive oral argument preferably in person.

_____

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