VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 12th day of February, 2016.

Sequel Investors Limited Partnership, et al., Appellants,

against Record No. 150388
Circuit Court No. CL13000199-00

Albemarle Place EAAP, LLC, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of Albemarle County.

On March 25, 2013, Sequel Investors Limited Partnership and Pepsi-Cola Bottling Company of Central Virginia, Inc. (collectively, the "Appellants") filed a complaint in the Circuit Court of Albemarle County seeking declaratory and injunctive relief against Albemarle Place EAAP, LLC ("Albemarle Place"). The complaint alleged that Albemarle Place had constructed a stormwater system on its property, which was designed to collect stormwater and discharge it into a drainage basin on the Appellants' parcels. The complaint further alleged that the new stormwater system expanded the watershed draining to the basin, and thereby increased the quantity and rate of stormwater flowing into the basin. According to the complaint, the additional stormwater flows will flood developable property on the Appellants' parcels during certain storm events, thereby constituting a trespass.

After a bench trial, the circuit court granted judgment in favor of Albemarle Place and entered a final order dismissing the Appellants' claims. On March 9, 2015, the Appellants filed a petition for appeal in this Court. Throughout the proceedings, the Appellants were represented by Brian Glasser ("Glasser") and Joseph Lovett ("Lovett"), foreign counsel admitted pro hac vice, in association with Isak Howell ("Howell"), a member of the Virginia State Bar. Although the petition for appeal listed each of the attorneys as counsel for the Appellants, only an image of Glasser's signature was affixed to the petition.

This Court granted the Appellants' petition for appeal on September 18, 2015, and the parties submitted briefs on the merits of their arguments. On December 16, 2015, Albemarle Place filed a motion to dismiss the appeal based on Rule 1A:4 and this Court's ruling in Wellmore Coal Corp. v. Harman Mining Corp., 264 Va. 279, 568 S.E.2d 671 (2002). Albemarle Place contends that the petition was invalid because it was not signed by local counsel, as required by Rule 1A:4(2). Albemarle Place maintains that the Appellants have failed to file a valid petition for appeal within the three-month time period allowed by Code § 8.01-671(A) and Rule 5:17(a)(1). Consequently, this Court would not have jurisdiction to hear the appeal on its merits.

Upon learning of the signature defect, the Appellants filed a motion for leave to amend the petition and an amended petition for appeal bearing Howell's signature. The Appellants argue that the original petition was timely filed and that the omission of Howell's signature was a clerical error, which may be cured pursuant to Code §§ 8.01-271.1 and 8.01-428(B), among other authorities. The Appellants contend the record shows that Howell has participated at every stage of the action, has taken responsibility for every pleading filed in the action, and has promptly remedied the defect. Accordingly, the Appellants maintain that the Court has the power to convert the defective petition into a legally compliant document. We disagree.

Code § 8.01-671(A) provides that "no petition shall be presented for an appeal to the Supreme Court from any final judgment . . . which shall have been rendered more than three months before the petition is presented." Likewise, Rule 5:17(a)(1) states that "a petition for appeal must be filed with the clerk of this Court within . . . three months after entry of the order appealed from." In the present case, the final order was entered on December 10, 2014, and the Appellants filed a petition for appeal on March 9, 2015 — within the three-month period set forth in Code § 8.01-671(A) and Rule 5:17(a)(1).

However, Rule 1A:4(2) provides that "[a]ny pleading or other paper required to be served (whether relating to discovery or otherwise) shall be invalid unless it is signed by local counsel." There is no dispute that Rule 1A:4(2) applies to petitions for appeal, and there is no dispute that the original petition for appeal in this case was not signed by local counsel.

In Wellmore Coal Corp. v. Harman Mining Corp., 264 Va. 279, 282-83, 568 S.E.2d 671, 672-73 (2002) this Court considered the legal effect of a notice of appeal signed only by foreign

counsel, and whether such notice could be amended to comply with the requirements of Rule 1A:4. In that case, foreign counsel signed and filed a notice of appeal within the 30-day deadline contained in Rule 5:9(a). Twenty-three days later, and outside the 30-day deadline, the appellant filed an amended notice of appeal signed by an attorney licensed in Virginia. Id. at 281-82, 568 S.E.2d at 672.

First, we observed that the original notice of appeal was "invalid" pursuant to Rule 1A:4. Accordingly, the notice of appeal was "not legally binding [and] therefore, it had no legal effect." Id. at 283, 568 S.E.2d at 673. Then, we concluded that the purported "amendment" was ineffective because "an amendment presupposes a valid instrument as its object." Id. As no valid instrument existed, there was nothing to amend, and because the "amended" notice of appeal was filed beyond the 30-day deadline, we granted the appellees' motion to dismiss. Id. at 284, 568 S.E.2d at 673.

In the present case, the original petition for appeal bears only the image of Glasser's signature. Because Glasser is not licensed to practice in Virginia, the petition is invalid pursuant to Rule 1A:4(2), and it had no legal effect. See Wellmore, 264 Va. at 283, 568 S.E.2d at 673. Accordingly, the Appellants' motion to amend lacks an "object" on which to operate. See id. Moreover, because the original petition had no legal effect, the Appellants have failed to file a petition within the mandatory deadline set forth in Code § 8.01-671(A) and Rule 5:17(a)(1). See also Rule 5:5(a).[1] As this Court has previously held that the deadline for filing a petition for appeal is jurisdictional, the motion to dismiss must be granted. Upshur v. Haynes Furniture Co., 228 Va. 595, 597, 324 S.E.2d 653, 654 (1985).

Nonetheless, the Appellants contend that the signature defect was an oversight — a "[c]lerical mistake," which this Court may correct pursuant to Code § 8.01-428(B). However, the defect at issue is not a "[c]lerical mistake" as contemplated by that section. We have explained that "[s]uch errors cause the court's record to fail to 'speak the truth.'" Wellmore, 264 Va. at 283, 568 S.E.2d at 673.

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[1] "The times prescribed for filing . . . a petition for appeal (Rules 5:17(a) and 5:21(g)) . . . are mandatory. A single extension not to exceed thirty days may be granted if at least two Justices of the Supreme Court of Virginia concur in a finding that an extension for papers to be filed is warranted by a showing of good cause sufficient to excuse the delay." Rule 5:5(a) (emphasis added).

Here, the Appellants never filed a petition for appeal signed by local counsel. Accordingly, the correction sought by the Appellants would not make the record "speak the truth," but actually "create" a valid petition for appeal. See Davis v. Mullins, 251 Va. 141, 149, 466 S.E.2d 90, 94 (1996) (stating that "the power to amend should not be confounded with the power to create" and noting that a court's inherent power to enter an order nunc pro tunc, like the statutory power granted by Code § 8.01-428, should be narrowly construed). As such, the correction falls outside the scope of Code § 8.01-428(B).

Next, the Appellants contend that Code § 8.01-271.1 permits a litigant to cure any signature defect in a pleading.[2] However, their argument overlooks the fact that the mandatory deadline for filing a petition for appeal has passed. Any amendment to the petition for appeal would thus have to "relate back" to the original filing. See Shipe v. Hunter, 280 Va. 480, 485, 699 S.E.2d 519, 521 (2010); Whitt v. Commonwealth, 61 Va. App. 637, 654 n.4, 739 S.E.2d 254, 262 n.4 (2013). But as the signature defect rendered the original petition invalid, there is no valid instrument pending before the Court to which the amendment can "relate back." Shipe, 280 Va. at 485, 699 S.E.2d at 522; Wellmore, 264 Va. at 283, 568 S.E.2d at 673.

Finally, the Appellants contend that the Court has the discretion to "fashion a remedy other than dismissal." For this proposition, they cite Rules 1:9 and 5:1A, as well as a number of cases from the Court of Appeals.[3] As explained above, the Court's discretion to extend the mandatory deadline for filing a valid petition for appeal is explicitly constrained by Code § 8.01-671(A) and Rule 5:5(a). Moreover, none of the cases cited by the Appellants for this proposition

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[2] Code § 8.01-271.1 provides:

> [E]very pleading, written motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name . . . .
>
> If a pleading, written motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.

[3] Rule 1:9 provides that "[t]he time allowed for filing pleadings may be extended by the court in its discretion and such extension may be granted although the time fixed already has expired." Meanwhile, Rule 5:1A(a) authorizes the Court to issue a show cause order "prescribing a time in which to cure [a] defect" before dismissing an appeal.

involved a purported amendment to an invalid, jurisdictional instrument after a mandatory deadline had passed. Rather, those cases illustrate that litigants may amend timely-filed, valid petitions for appeal under certain circumstances. See generally Whitt, 61 Va. App. at 656, 739 S.E.2d at 263 (concluding "that an appellate court may entertain a motion to amend an assignment of error once a timely notice of appeal and petition for appeal have been filed"); Riner v. Commonwealth, 40 Va. App. 440, 454-55, 579 S.E.2d 671, 678-79 (2003) (permitting a petitioner to enlarge his petition for appeal after the court had acquired jurisdiction "via timely filing of the original petition for appeal"). Our precedent dictates that there is nothing to amend in the present case because the original petition for appeal had no legal effect.

Based upon the failure of the petition for appeal to comply with Rule 1A:4, and as the amended petition for appeal was filed outside the three-month requirement of Code § 8.01-671(A) and Rule 5:17(a)(1), we will grant Albemarle Place's motion to dismiss the appeal.

This order shall be certified to the said circuit court.

A Copy,

Teste:

Patricia L Harrington

Clerk