

**VIRGINIA:**

*In the Supreme Court of Virginia held at the Supreme Court building in the City of Richmond on Wednesday the 27th day of November, 2019.*

Present: All the Justices

Marilyn Ehrhardt, et al.,

Appellants,

against

Record No. 181003  
Circuit Court No. 2011-00516

SustainedMED, LLC,

Appellee.

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

The parties agree this appeal should be dismissed, but they disagree whether the dismissal should be with prejudice or without prejudice. Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that the appeal should be dismissed without prejudice.

SustainedMED, L.L.C. entered into a stock purchase agreement to purchase a software company, Cyfluent, L.L.C. On January 12, 2011, SustainedMED filed this action in the Circuit Court of Fairfax County, alleging breach of contract and fraudulent inducement, and also seeking a declaratory judgment concerning a portion of the debt incurred in the purchase. The six defendants are Marilyn Ehrhardt, John Ehrhardt, Stephen Mallette, Michael High, Victor Su, and Michael Sutton. The defendants filed a counterclaim. Although the procedural history is somewhat complex, SustainedMED ultimately prevailed in a bench trial on its breach of contract claim. In addition, the trial court rejected the defendants' counterclaim. By order dated August 6, 2013, the court memorialized these rulings, and reserved for a later hearing the resolution of SustainedMED's claims for attorneys' fees, litigation expenses, and costs. Following a hearing, the court awarded attorneys' fees to SustainedMED.

For reasons that are not clear, the court did not enter an order on the attorneys' fees and costs until February 8, 2018, and it entered a judgment order purporting to be a final order on

May 4, 2018. In this order, the trial court awarded SustainedMED damages in the amount of \$2,775,000. The court further awarded attorney's fees and costs of approximately \$1,000,000, granted declaratory relief by cancelling the promissory notes, and denied the counterclaim for enforcement of the notes.

One of the defendants, Michael High, died on July 20, 2016, before entry of the May 4, 2018 order. Counsel for the defendants, unaware of this development, did not inform the circuit court of High's death. The defendants appealed from the May 4, 2018 order, and we awarded them an appeal.

While the case was pending in this Court, counsel for the defendants/appellants informed the Court of High's passing and asked the Court to substitute the executor of his estate as a party. SustainedMED filed a motion to dismiss the appeal, arguing that High was a necessary party and the defendants had failed to perfect their appeal. We ordered additional briefing and argument concerning the impact that High's death may have had on the posture of this case.

Code § 8.01-20 provides as follows:

If at any time after verdict or judgment in the trial court during the pendency of an appeal or before the appeal is granted, the . . . death of a party, or any other fact which might otherwise be relied on in abatement occurs, and such fact is suggested or relied on in abatement in the Court of Appeals or the Supreme Court, the court may, in its discretion, take or retain jurisdiction and enter judgment or decree in the case as if such event had not occurred.

Additionally, Code § 8.01-21 states in relevant part that, "[w]hen a party dies . . . if such fact occurs after verdict, judgment may be entered as if it had not occurred."

Code § 8.01-20 does not apply because High's death did not occur "after verdict" or "during the pendency of an appeal." In addition, Code § 8.01-21 does not apply because his death did not occur "after verdict." A "verdict" is "a jury's finding or decision on the factual issues of the case" or "in a nonjury trial, a judge's resolution of the issues of a case." Black's Law Dictionary 1871-72 (11th ed. 2004). Martin P. Burks, *Pleading and Practice* § 320, at 572 (4th ed. 1952) defines a "general verdict" as "the finding of a jury on one or more questions of fact submitted to its determination. . . . A verdict is what is entered of record." Burks' treatise also states that "[a] general verdict is presumed to be responsive to all the issues in the case affecting the correctness of the verdict." *Id.* at § 521, at 573. Although the trial court found for

the plaintiff on the breach of contract claim and resolved the contract-based attorneys' fees before High's death, none of those findings was memorialized in a final order.

The final order entered judgment against each of the individual defendants jointly and severally, including High. In *Renolds v. Williams*, 147 Va. 196, 198-99 (1927), we observed that

[a]ll suits and actions must be prosecuted . . . against living parties, in either an individual or representative capacity. The dead have passed beyond the jurisdiction of the court, and no decree or judgment of the court could be enforced against them personally. There must be such parties to the record as can be affected by the judgment and from whom obedience can be compelled[.]

*See* Rule 1:1(b) (an order is “final if it disposes of the entire matter before the court, including all claim(s) and all cause(s) of action against all parties, gives all the relief contemplated, and leaves nothing to be done”); *see also* Rule 1:2(d) (“In the absence of the entry of a Partial Final Judgment order . . . any order which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties in the action is not a final judgment.”).

We conclude that the order appealed from was not a final order because it entered judgment against a deceased party. *Renolds*, 147 Va. at 198-99. “[A] writ of error does not lie except where there has been a final order or judgment in the cause,” and without a final order, the Court “is without power to exert its appellate jurisdiction.” *Comcast of Chesterfield Cty., Inc. v. Board of Supervisors*, 277 Va. 293, 300-01 (2009) (citations omitted). We further conclude that the doctrines of waiver and invited error do not apply. Therefore, we dismiss the appeal without prejudice and remand the case for the purpose of entering of a final order substituting as a party the executor of High's estate.

This order shall be certified to the Circuit Court of Fairfax County.

A Copy,

Teste:

Douglas B. Robelen, Clerk

By:

  
Deputy Clerk