

No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

OSCAR O. OZFIDAN,
Petitioner,

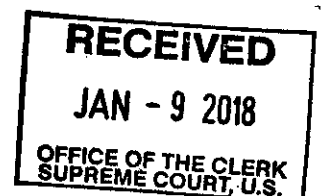
v.

PAMELA L. OZFIDAN,
Respondent.

**On Petition for Writ of Certiorari
to the Supreme Court of Virginia**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

There is no statutory authority in Virginia to empower the trial court to award Ms. Ozfidan spousal support, an *in personam* judgment, based on my motion. Also, there is no rule of civil procedure or a precedent that could lead to such conclusion. On the contrary, Virginia's statutes, pleading rules as well as multiple binding precedents make it clear that it is and has always been the recipient spouse who must have a valid pleading before the court. Thus, the question presented is:

Did granting of the spousal support award to Ms. Ozfidan based on my Motion to Decree Spousal Support violate the due process and equal protection clauses of the constitution?

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¹ Full audio recording of the oral argument is available online at
http://www.courts.state.va.us/courts/cav/oral_arguments/2015/richmond_chesapeake/mar/1265_14_2.MP3

² Also available online at
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OPINIONS BELOW

None of the opinions below are reported. The opinion of the Court of Appeals of Virginia on the first appeal is *Ozfidan v. Ozfidan*, Record No. 1265-14-2, (VA 05/05/2015) (Va. 2015). (*Ozfidan I*). The Opinion Letter of the trial court can be found in App. at XVI. The Final Order of the Circuit Court on remand can be found in App. at XX. The opinion on the second appeal is *Ozfidan v. Ozfidan*, Record No. 0806-16-2, (VA 01/10/2017) (Va. 2017) which can be found in App. at XXXV. (*Ozfidan II*). Dismissal of the Petition for Appeal can be found in App. at LXIII. The Denial of Petition for Rehearing can be found in App. at LXIV.

JURISDICTION

The Circuit Court for the Henrico County of Virginia, "trial court," entered the Final Decree of Divorce on June 9, 2014 declining to address spousal support between the parties. On appeal, the Court of Appeals of Virginia remanded the case instructing the trial court to consider the issue of spousal support. On remand, the trial court entered the Final Order dated April 25, 2016 awarding Ms. Ozfidan permanent spousal support which was also appealed. The Court of Appeals of Virginia affirmed the award in its opinion dated January 10, 2017. I filed my Petition for Appeal to the Supreme Court of Virginia which was dismissed on May 16, 2017. I filed my Petition for Rehearing which was denied on October 6, 2017. I timely filed the petition for Writ of Certiorari. This Court has jurisdiction under 28 U.S.C. §1257(a).

Because this petition draws into question the constitutionality of Virginia Code §§20-79(b) & 20-107.1(A) and the Rules of the Supreme Court of Virginia 1:4(d) & 3:2(c)(i), 28 U.S.C. §2403(b) may apply.

The fact that the constitutionality of Virginia Code §§20-79(b) & 20-107.1(A) and the Rules of the Supreme Court of Virginia 1:4(d) & 3:2(c)(i) are drawn into question has not been certified to the Virginia Attorney General.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Section 1 of the Fourteenth Amendment of the United States Constitution provides:

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Virginia Code §20-79(b) titled “Effect of divorce proceedings.” provides:

“In any suit for divorce, the court in which the suit is instituted or pending, when either party to the proceedings so requests, shall provide in its decree for the maintenance, support, care or custody of the child or children in accordance with Chapter 6.1 (§ 20-124.1 et seq.), support and maintenance for the spouse, if the same be sought, and counsel fees and other costs, if in the judgment of the court any or all of the foregoing should be so decreed.”

Virginia Code §20-107.1(A) titled “Court may decree as to maintenance and support of spouses.” provides:

“Pursuant to any proceeding arising under subsection L of § 16.1-241 or upon the entry of a decree providing (i) for the dissolution of a marriage, (ii) for a divorce, whether from the bond of matrimony or from bed and board, (iii) that neither party is entitled to a divorce, or (iv) for separate maintenance, the court may make such further decree as it shall deem expedient concerning the maintenance and support of the spouses, *notwithstanding a party's failure to prove his grounds for divorce, provided that a claim for support has been properly pled by the party seeking support.* However, the court shall have no authority to decree maintenance and support payable by the estate of a deceased spouse.”

It is noted that the General Assembly added the italicized phrase above in §20-107.1(A) effective July 1, 2016.

Rule 1:4(d) of the Supreme Court of Virginia titled “General Provisions as to Pleadings.” states:

“Every pleading shall state the facts on which the party relies in numbered paragraphs, and it shall be sufficient if it clearly informs the opposite party of the true nature of the claim or defense.”

Rule 3:2(c)(i) of the Supreme Court of Virginia titled “Commencement of Civil Actions.” “Form and Content of the Complaint.” states:

“It shall be sufficient for the complaint to ask for the specific relief sought. Without more it will be understood that all defendants mentioned in the caption are made parties defendant and required to answer the

complaint; that proper process against them is requested; that answers under oath are waived, except when required by law, and that all relief authorized by law and demanded in the complaint may be granted. No formal conclusion is necessary."

STATEMENT OF THE CASE

This case has been a sustained effort by the courts of Virginia to save a defective spousal support decree at my expense. The trial court initially declined to hear anything about the support issue despite my Motion to Decree Spousal Support leading to the first appeal and on remand exceeded its jurisdiction by granting support to Ms. Ozfidan based on the motion, leading to the second appeal. In both instances, the trial court avoided denying support to Ms. Ozfidan.

Ms. Ozfidan and I were separated on March 4, 2012. Retroactive back to April 1, 2012 she was granted *pendente lite* support. On April 30, 2012, she filed her Complaint for Divorce where she made no request nor offered any facts or grounds for an award of permanent spousal support. During the trial, the court *sua sponte* and I raised the support matter. The trial court set a hearing for March 10, 2014 to consider the issue of spousal support to be included in the final decree. On March 10, 2014, the trial court, however, declined to hear the matter of permanent spousal support on the grounds that neither party had filed a pleading in the divorce action requesting a determination of spousal support.

In Virginia, a *pendente lite* spousal support order continues to be in full force and effect if the divorce decree is silent as to support. *Werner v. Com.*, 212 Va. 623, 186 S.E.2d 76 (1972). Thus, on March 19, 2014, I

filed my own Motion to Decree Spousal Support. The motion stated:

“COMES NOW the defendant, Oscar O. Ozfidan, by counsel, pursuant to Section 20-107.1 of the Code of Virginia (1950), as amended, and moves this Court to decree the maintenance and support of the spouses and, if any such decree be made, order that said support and maintenance be made in periodic payments for a defined duration.” (App. at I).

I requested the court to decree the “maintenance and support of the spouses” mirroring the title of Virginia Code §20-107.1. The purpose of the duration clause in my motion was to inform the court that in the event Ms. Ozfidan amended her complaint later to request spousal support and if the court decided to order support to her that it be for a defined duration. The motion did not request that the court order that I pay spousal support. My motion simply invoked the court’s jurisdiction to address the support issue as required by Virginia Code §20-79(b) and *Werner* in order to extinguish the *pendente lite* order. (App. at XLVII). In response to my motion, Ms. Ozfidan filed with the trial court her “Memorandum in Response to Motion to Decree Spousal Support and Motion to Enter Final Decree”. (App. at III-VI). In her memorandum, she argued that it is one’s personal right to receive spousal support and that she could not be awarded spousal support based on my request. Furthermore, she asked that my motion be denied.

Ms. Ozfidan argued in paragraph 11 of her memorandum “[a]t no point has the Plaintiff filed any pleadings requesting that this Court award her spousal support”. (App. at IV). In paragraph 15, she argued that “[a] party is required to file their own

separate petition for support if sought, and cannot rely upon a petition for support filed by the other party on their own behalf.” (App. at V). She further argued in paragraph 16 that “[t]he right to request spousal support is a personal one – if a party does not request it for himself or herself, the Court cannot grant them something for which they have not asked.” (App. at VI). All of these arguments were in an effort to prevent the trial court from obtaining jurisdiction to enter a decree provision addressing support so that the favorable *pendente lite* support continued indefinitely. (App. at XLVII).

The trial court denied my request to address the support issue. I appealed. On appeal, it was clear to the Court of Appeals that I was seeking a denial. (App. at IX). The Court of Appeals of Virginia reversed the decision and remanded the case back to the Circuit Court to be heard. *Ozfidan I*.

On November 16, 2015, a hearing was conducted on the remanded issues. At the beginning of the hearing and before the court made any rulings, I expressly limited my Motion to Decree Spousal Support to a denial of support for the wife. (App. at X). This was to clarify my motion before the trial court. After presenting evidence as to my inability to pay support, I submitted a memorandum of law and moved the court to enter an order denying any award of spousal support based on the fact that Ms. Ozfidan did not have a valid pleading before the court requesting support. (App. at XI-XII). The court ordered Ms. Ozfidan's counsel to respond to my memorandum and suspended the hearing.

On February 8, 2016, Judge Marshall denied my request for summary judgement and held:

“The Court takes the position that Mr. Ozfidan’s pleading on its face put the issue before the Court

between the spouses, not solely for Mr. Ozfidan, and one could also logically argue by his statement that a contemplation was made in the pleading that he would be, in fact, ordered to pay support based on the requests that it be for a defined duration.” (App. at XIII).

Furthermore, Judge Marshall concluded that he had to address the support issue between the spouses “as per the edict of the Court of Appeals.” (App. at XIV). Then Judge Marshall began receiving Ms. Ozfidan's evidence as to her need for support despite my objections.

On February 11, 2016, the trial court rendered its decision on the issue of permanent spousal support by an opinion letter. (App. at XVI-XIX).

On March 25, 2016, the Governor signed the Acts of Assembly, Chapter 478, adding the phrase “[n]otwithstanding a party's failure to prove his grounds for divorce, ***provided that a claim for support has been properly pled by the party seeking support***” to the Virginia Code §20-107.1(A). The amendment was sponsored by Virginia Family Law Coalition in response to a court decision. (App. XXXIV).

On April 25, 2016 Judge Marshall ordered that I pay \$1200 a month in spousal support for an undefined duration. I appealed that ruling and challenged its compliance with the state laws and fundamental rules of pleadings.³

³ Following holding in *Potts v. Mathieson Alkali Works*, 165 Va. 196, 181 S.E. 521 (1935) is referred to as “fundamental rules of pleading” in Virginia:

“No court can base its decree upon facts not alleged, nor render its judgment upon a right, however meritorious, which has not been pleaded and

On November 22, 2016, after I submitted my briefs, the Court of Appeals decided *Ruane v. Ruane*, Record No. 1285-15-2, (VA 11/22/2016) (Va. 2016). This unpublished case relied on a phrase cited in *Werner* and a similar phrase in *Reid v. Reid*, 24 Va. App. 146, 151, 480 S.E.2d 771, 773 (1997) and even cited *Ozfidan I* to conclude that the courts could order support to one party based on a pleading from another party.

On January 10, 2017, the Court of Appeals of Virginia issued its opinion affirming the trial court order. *Ozfidan II*. (App. at XXXV). The ruling completely ignored the landmark precedents and relied solely on misguided *Ruane*. (App. at L-LI).

On February 9, 2017, I filed my Petition for Appeal to the Supreme Court of Virginia. On May 16, 2017, the Supreme Court of Virginia dismissed the Petition for Appeal for lack of jurisdiction. (App. at LXIII).

On May 30, 2017, I filed my Petition for Rehearing to the Supreme Court of Virginia. On October 6, 2017, the Supreme Court of Virginia refused the Petition for Rehearing which exhausted all of the state remedies available to me in this case. (App. LXIV).

Virginia courts' unwillingness to reverse and vacate the illegal spousal support award made in this case has the effect of violating my constitutional due process and equal protection rights. Thus, I timely filed this Petition for Writ of Certiorari before this Court.

A petitioner who fails to raise his constitutional claim below would be barred raising it before this

claimed ... Pleadings are as essential as proof, the one being unavailing without the other. A decree can not be entered in the absence of pleadings upon which to found the same, and if so entered it is void."

Court absent showing of cause for and actual prejudice from the default. *Wainwright v. Sykes*, 433 U.S. 72, 87, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

This Court, however, has the inherent authority to consider any issues *sua sponte* especially “[i]f the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.” *United States v. Atkinson*, 297 U.S. 157, 160, 56 S. Ct. 391, 392, 80 L. Ed. 555 (1936). This is such a case.

SUMMARY OF THE ARGUMENT

There is no authority in Virginia statutes, rules of civil procedure, or precedents to grant an award to Ms. Ozfidan based on my motion. It is quite the opposite. The order in this case flies in the face of the rule of law in the Commonwealth and violates my due process and equal protection rights under the constitution.

I had a right to have the court make a decree provision addressing spousal support and Ms. Ozfidan had the burden of requesting support if she wanted an award. Exercise of my right to a decree provision neither absolved Ms. Ozfidan from her responsibility to assert her own claim for support nor took away my right to notification of a support claim against me.

Generally, failing to raise the constitutional questions below precludes review by this Court unless there is a cause for and actual prejudice from the default.

I could not have anticipated that the Court of Appeals of Virginia would dispose my case based on an unpublished ruling decided after I submitted my briefs. The ruling the Court of Appeals relied on was the first case ever where a Virginia court held that a trial court can grant a personal right to a party based on a pleading from the other party raising the issue.

Thereafter, I could not raise the constitutional issues inherent in such a ruling because appellate rules do not allow review of any assignments of error not properly preserved below.

This Court however could consider the constitutional question raised in this petition if the errors are obvious, or if they affect fairness, integrity or public reputation of judicial proceedings.

ARGUMENT

When the trial court entered the order, I properly reserved following assignments of error among others.

1. The court erred in making a spousal support award to Ms. Ozfidan when she did not have a valid pleading before the court requesting support for herself. (#1 in App. at XXV).

This error was based on the fact that Virginia jurisprudence has always required a valid pleading from the recipient party to grant relief to that party.

2. The court erred in holding that Mr. Ozfidan's Motion to Decree Spousal Support is a basis for awarding spousal support to Ms. Ozfidan. (#4 in App. at XXV).

This error was based on the fact that there was no rule, statute, or case law that authorized granting of relief to a party without a pleading from that party requesting it.

A petitioner who fails to raise his constitutional claim below would be barred raising it before this Court absent showing of cause for and actual prejudice from the default. *Wainwright v. Sykes*, 433 U.S. 72, 87, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

This Court, however, has the inherent authority to consider any issues *sua sponte* especially "[i]f the

errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.” *United States v. Atkinson*, 297 U.S. 157, 160, 56 S. Ct. 391, 392, 80 L. Ed. 555 (1936). This is such a case as explained below.

A. Novelty of the Ruling.

I did not raise the constitutional claims below because I had a reasonable expectation that the two assignments of error stated above would be disposed according to the Virginia rules of civil procedure, statutes, and case law. Thus, I had no reason to assign errors to the constitutional dimensions of these two errors (i.e. the due process and equal protection clauses of the Fourteenth Amendment would not permit an arbitrary support award in contradiction of existing law; and an award without a legal basis would be unconstitutional because there could be no due process of law without the law, respectively). In the end, the assignments of errors I properly preserved were not decided according to the Virginia rules and laws.

The Court of Appeals heavily relied on the unpublished *Ruane* case. (App. at L-LI). The *Werner* and *Reid* cases the *Ruane* case in turn relied on were never construed the way they were construed in *Ruane*. *Ruane* was the first ever such interpretation of the spousal support statutory framework in the entire history of Virginia jurisprudence. Moreover, *Ruane* was decided after I submitted my briefs to the Court of Appeals. As a result, I could not have been reasonably expected to anticipate a disposition based on *Ruane*’s application when the trial court judge, Judge Marshall, entered the award. Similarly, I could not have been reasonably expected to raise the constitutional questions inherent in the *Ruane*

decision and its interpretation of *Werner* and *Reid* cases before it was decided.⁴

Therefore, the cause of my failure to raise the constitutional challenges below is contextually similar to that in *Reed v. Ross*, 468 U.S. 1, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984) which held “*where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant had cause for his failure to raise the claim.*” The disposition in *Ruane* is such a novelty which could not have been reasonably expected.

B. Binding Precedents.

In addition to the constitutional issues inherent in the *Ruane* decision, there is a track record of precedents that clearly establish that granting of spousal support requires a valid pleading from the recipient spouse. See *Boyd v. Boyd*, 2 Va. App. 16, 340 S.E.2d 578 (1986); *Harrell v. Harrell*, 272 Va. 652, 654, 636 S.E.2d 391, 395 (2006); and *Wroblewski v. Russell*, 63 Va. App. 468, 759 SE 2d 1 (2014) among others. That is because, as discussed in *Boyd*, a suit seeking an award of support is an *in personam* proceeding. Based on these cases, I had every reason to believe that the Court of Appeals of Virginia would overturn the award.⁵

⁴ Also, the facts of *Ruane* were completely different from the facts in my case. Unlike *Ruane*, I limited the request in my motion to a denial to Ms. Ozfidan before the court made any decisions on remand and moved the court for summary judgement. (App. at X-XII).

⁵ Ironically, prior to the remand hearings, Ms. Ozfidan thought the same way. She maintained that spousal support was a personal right and the courts could not grant support to her unless she requested it. (App. at III-VI, VII-IX). She strategically took that position in

Stare decisis ensures that “the law will not merely change erratically” and “permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals.” *Vasquez v. Hillery*, 474 U. S. 254, 265 (1986). While the doctrine “is not an inexorable command” it carries such persuasive force that requires “a departure from precedent to be supported by some ‘special justification.’” *Dickerson v. United States*, 530 U.S. 428, 443, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000). Yet, there was no such special justification in my case. Thus, I could not have foreseen a departure from binding precedents in my case and could not have been expected to raise in advance the constitutional issues that would be inherent in such a ruling.

C. Error is Obvious.

The legal error in this case is a fundamental error and is plain as day. In our adversarial system of jurisprudence, a party must himself affirmatively seek a personal relief in his favor through a pleading filed in the pending suit. *Moore v. Moore*, 218 Va. 790, 795, 240 S.E.2d 535, 538 (1978). Once he seeks an affirmative relief, the court then could either grant the relief to him or deny it. The court however cannot grant the relief sought by him to the other party just because one of the parties raised the issue. *Smith v. Sink*, 247 Va. 423, 442 S.E.2d 646 (1994). Besides jurisdiction of the person of the defendant and of the general subject matter of the action, it is necessary to the validity of a judgment that the court should have

order to make the *pendente lite* support permanent. (App. at XLVII). She prevailed in the trial court which was reversed in *Ozfidan I*. On remand she completely reversed her position. She prevailed again in the trial court, but was not reversed in *Ozfidan II*.

had jurisdiction of the precise question which its judgment assumes to decide, or of the particular remedy or relief which it assumes to grant. *Drewry v. Doyle*, 179 Va. 715, 720, 20 S.E.2d 548, 551 (1942).

The Rules of the Supreme Court of Virginia make it clear that a pleading must state the facts, make a demand for a specific relief, and inform the opposite party of the true nature of the claim. Rule 1:4(d) and 3:2(c)(i). Granting of relief to one party based on another's motion does not squarely fit in the framework of these rules. My motion did not state facts or grounds establishing Ms. Ozfidan's entitlement to support neither did her complaint demand support.

The courts are not empowered to grant a personal relief such as property, money damages, attorney fees, or a fault based divorce to the defendant when only the plaintiff is affirmatively seeking that relief. Such a practice defies the function of pleadings such as the Answer and the Counterclaim to give notice to the other party.

A reasonable person could not foresee that a state appellate court would commit such a plain and fundamental error and preserve assignments of error involving constitutional violations in anticipation of such a failure of a court of that caliber.

D. Appellate Rules.

The Supreme Court of Virginia does not consider assignments of error not properly preserved below. Rule 5:17(c)(1)(i) of Supreme Court of Virginia. When the Court of Appeals of Virginia ruled essentially that Judge Marshall's order complied with state rules and statutes I could not raise any constitutional claims regarding his application of Virginia rules and statutes before the Supreme Court of Virginia. Thus, I could

not raise the constitutional claim at the time and in the manner required by the state law as noted in *Adams v. Robertson*, 520 U.S. 83, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997). Instead, I asserted that the ruling involved a matter of significant precedential value pursuant to Rule 5:17(c)(1)(ii) of the Supreme Court of Virginia.

My assertion was based on the fact that there has never been a case in Virginia where a party was granted a personal judicial relief without a valid pleading from that party requesting it. However, the Supreme Court of Virginia apparently disagreed that the ruling involved a matter of significant precedential value and dismissed my Petition for Appeal and Petition for Rehearing. (App. at LXIII-LXIV).

E. Prejudice.

The unconstitutional ruling of Judge Marshall and subsequent affirmation by Virginia Court of Appeals were also prejudicial in several respects.

i. Right to Notice & Burden of Pleading and Proof.

A litigant has a right to notice at a meaningful time in a meaningful manner. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). The truth-seeking function of our adversarial system of justice is disserved when the boundaries of a suit remain ill-defined and litigants are exposed to the vicissitudes of trial by ambush. At a bare minimum, even in this age of notice pleading, a defendant must be afforded both adequate notice of any claims asserted against him and a meaningful opportunity to mount a defense. A defendant has an inalienable right to know in advance the nature of the cause of action being asserted against him. *Rodriguez*

v. Doral Mortgage Corp., 57 F.3d 1168, 1171 (1st Cir.1995).

A relief granted to a plaintiff without a proper pleading violates the defendant's right to due process of law. *Jenkins v. Bay House Assocs.*, 266 Va. 39, 45, 581 S.E.2d 510, 513 (2003). In addition, the burdens of pleading and proof usually fall upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005).

When Judge Marshall overruled my Motion for Summary Judgement and Motion to Strike Ms. Ozfidan's case, he immediately proceeded to receive her evidence and testimony despite my objections. At that point in time, I had no knowledge of alleged facts and grounds against me for an award of spousal support to Ms. Ozfidan. Had I been afforded the benefit of a pleading seeking spousal support from me, Ms. Ozfidan would have had the burden of proving her case against whatever defenses I might have interposed given the knowledge of claims and grounds against me. *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965). Additionally, a litigant is not entitled to submit evidence without a proper pleading. The test of the relief to be granted is not the case proved, but the case stated in the bill upon which the issue is made up. *Drewry v. Doyle*. The complaint must be sufficient to adjudicate the matter on the merits. Thus, not only was I deprived of my right to notice, Ms. Ozfidan was also relieved of her burden of pleading and proof.

Under the facts of this case, I did not receive notice at a meaningful time in a meaningful manner. Given Ms. Ozfidan's memorandum in response and her motion to deny my motion, only notice I received was that she was not seeking support. (App. at III-VI). Notwithstanding her memorandum and motion, that

is the legal reality of her complaint. Thus, Judge Marshall's handling of the case was prejudicial to me.

ii. Lack of Clarity in the Rulings.

The rulings are clear that the support award was granted based on my motion. However, it is not clear what rule or statute authorized my motion to be the basis. Judge Marshall admitted himself that he "[c]ould not find any cases dealing directly with the issue." (App. at XIII). When he made that observation, he should have refrained from going forward.

In Virginia, the authority to award spousal support cannot be acquired by the court inferentially or through indirection. *Johnson v. Johnson*, 224 Va. 641, 645, 299 S.E.2d 351, 353-54 (1983). It can only be accomplished by using the clear, detailed language set out by the General Assembly in its enacted statutes. The courts do not have broad common law power in cases of a divorce *vinculo matrimonii*. *Gloth v. Gloth*, 154 Va. 511, 153 S.E. 879 (1930). In those cases, the trial court enjoys no power whatever except that expressly conferred upon it by statute. *Dyndul v. Dyndul*, 541 F.2d 132, 134, 13 V.I. 376, 381 (3d Cir.1976).

However, Judge Marshall continued to make references to *Werner*, and the opinion on the first appeal as the basis of his ruling, but there was and still is no clarity as to how he reached that conclusion. The Final Order does not provide any specifics as to which statute or rule was the basis for construing my motion in such a way. (App. at XX-XXIV). The opinion on the second appeal also makes references to *Werner*, §20-79(b), and §20-107.1 but does not provide a detailed explanation of how that conclusion was reached. (App. at XXXV-LXII).

As a result, I am fairly certain that the legal basis authorizing my motion to be the basis of an award is either *Werner*, or §20-79(b), or §20-107.1, but I am not exactly sure which one it is and why. The lack of clarity put me in the disadvantageous situation of attacking some possible bases unnecessarily and of trying to hit a moving target.

Also, because there was no such authority, the lack of clarity of the rulings placed on me the undue burden of having to prove non-existence of a non-existing statutory authority which was also prejudicial. The burden was on Ms. Ozfidan to establish that Judge Marshall had jurisdiction to make an award based on my motion.

iii. Disingenuous Distinguishing.

The Court of Appeals of Virginia distinguished every binding precedent on some frivolous ground and withheld its application to my case.

The Court of Appeals of Virginia distinguished my case from *Boyd* because in that case “neither husband nor wife raised the issue in their pleadings.” (App. at L). There is no ambiguity in *Boyd* that it is the recipient spouse’s pleadings that matter. See *Boyd* holding that the trial court erred in awarding spousal support “[t]o a party whose pleadings requested no such relief.” Whether there was a pleading from the non-recipient party is not controlling and does not render *Boyd* inapposite. That is because, as discussed in *Boyd*, a suit seeking an award of support is an *in personam* proceeding. Ms. Ozfidan’s bill of complaint failed to state a claim and grounds for support and the court lacked jurisdiction in so far as to grant support, an *in personam* judgement, against me. *Walt Robbins, Inc. v. Damon Corporation*, 232 Va. 43, 348 S.E.2d 223 (1986).

The Court of Appeals' holding distinguished also *Harrell* from this case because my motion asked that the trial court decree maintenance and support of the spouses not that only I be awarded support as in *Harrell*. (App. at L). *Harrell* speaks for itself. It is the recipient party's pleading that matter. See *Harrell v. Harrell*, Record No. 0395-05-2 (VA 11/22/2005)(Va. 2005) acknowledging "[w]e have tied the trial judge's authority to grant this relief to the existence of a pleading in which the recipient spouse has made a request for spousal support." The recipient party must request support in Virginia to be granted that relief.

Pertinent to the question in this case, the Supreme Court of Virginia had an opportunity to justify the award in *Harrell* based on the husband's pleading, but it declined to do so. The husband in that case requested that he be awarded support. Ms. Harrell specifically argued in her brief that Mr. Harrell himself made a request for spousal support in his Cross-Bill and pleaded the issue, thus putting the issue of spousal support before the trial court for an award to herself pursuant to §20-79(b) of the Code of Virginia. (App. at XXVII). In an apparent response to that argument, the Supreme Court of Virginia concluded in *Harrell* that "***Pursuant to Code § 20-79(b), a party must request spousal support in order to be granted that relief.***"

In reversing the award of spousal support to Ms. Harrell, the Supreme Court of Virginia implicitly rejected any notion that an award of spousal support could be based on Mr. Harrell's request. I raised this fact in *Ozfidan II* and provided the part of Ms. Harrell's brief on this issue during the oral arguments, but the Court of Appeals completely swiped it under the rug in its disposition.

The Court of Appeals distinguished *Wroblewski* from this case too because in that case “husband did not raise the issue of spousal support.” (App. at L). That statement in *Ozfidan II* is plainly false. The husband had requested a decree and determination in his counterclaim - paragraph 15 of the husband’s Counterclaim for Divorce specifically requested that spousal support be decreed and determined pursuant to Virginia Code §§20-107.1 and 20-108.1 just like I requested a decree for the maintenance and support of the spouses in my motion. (App. at XXIX). As a result, *Wroblewski* is indistinguishable from my case despite the contention of the Court of Appeals to the contrary.

I raised this fact in *Ozfidan II* as well and provided the husband’s Counterclaim to the Court of Appeals during the oral arguments to no avail.

Also, the justification offered by Judge Marshall in his ruling was noting that my motion requested a decree for maintenance and support of the spouses as opposed to for a spouse.⁶ (App. at XIII). However, a decree granting or denying support is a decree between the spouses and consequently for the maintenance and support of the spouses. Thus, simply noting the plural nature of the request is hardly a justification especially given the §20-107.1 has always been titled in plural terms but has always been interpreted to require a pleading from the recipient spouse.

Furthermore, the Court of Appeals noted the plural nature of my motion in footnote 4 in *Ozfidan II* and stated that it finds no ambiguity in my motion that it placed the issue of support before the spouses

⁶ This is despite the fact that I limited my motion to denial at the beginning of the first hearing on remand. (App. at X).

which includes support from husband to wife. (App. at XLVIII). However, the same court characterized the same motion during the oral arguments on the first appeal as follows:

“They’re not requesting it for the other party though. As Judge Ha[i]ley noted, they’re making a decision that we want this Court to deal with it now, and to perhaps deny it, as opposed to grant it...Either party can ask for either provision of spousal support or denial of it to the other spouse.” (App. at IX).

In *Ozfidan II*, the Court of Appeals has conveniently reversed its understanding of what my motion requested sharply and contradicted itself in a significant way.

In addition, Judge Marshall also mentioned that my motion contemplated being ordered support. (App. at XIII). Despite the contemplation of being ordered support, the motion cannot form the basis of an award to Ms. Ozfidan. The duration request was made in anticipation of Ms. Ozfidan amending her complaint to request support for herself which she declined to do. Thus, the duration clause has never become relevant in this case.

In federal cases, an anticipatory defensive pleading in response to a probable future cause of action by the other party does not avail as a basis of jurisdiction. *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913). Allowing an anticipatory pleading to avail as a basis of jurisdiction would be to give the litigants the key to any forum they would like to bring their suit in and any issue they would like to try in that forum.

These actions of the Court of Appeals and Judge Marshall were prejudicial.

iv. Pleading Rule Misapplied.

Scrambling to find a rational basis to adjudicate my case to reach a desired conclusion, the Court of Appeals also ruled *sua sponte* that ambiguous pleadings are construed against their proponent which is an argument not even raised by Ms. Ozfidan. (Footnote 4 in App. at XLVIII-XLIX).

The Court of Appeals cited *United States v. Linn*, 42 U.S. (1 How.) 104, 110-11 (1843) which quoted *Precedents of Pleading* (1808) by Joseph Chitty in support of its position to interpret my motion against me.

However, the Court of Appeals failed to realize that it is one thing to deny relief to the proponent of an ambiguous pleading, but it is quite another to grant an affirmative relief to the opponent on that pleading.⁷ A denied motion for an affirmative relief to one party cannot be the basis of another affirmative relief to another party. Even the source relied on admits the burden of proof is with the party "[w]ho holds the affirmative" of an issue. *United States v. Linn*.⁸ A defendant's averment on an issue related to the cause of action cannot cure the plaintiff's defective complaint. In *Harrison v. Nixon*, 9 Pet. 483, 34 U.S. 483, 9 L.Ed. 201 (1835), a plaintiff-appellee with a

⁷ My pleading was not ambiguous because I clarified what I precisely requested in my motion at the beginning on remand before the court took any action.

⁸ Interestingly enough, that case also notes "*The demurrer admits whatever is well pleaded. But it does not admit any more, and certainly does not admit what is not pleaded at all.*" When I moved the trial court for summary judgement, I essentially had nothing to admit because no support was pleaded in Ms. Ozfidan's complaint.

favorable judgement below argued that if his bill was defective for want of an averment on the issue of the testator's domicile, it is cured by the answer of the defendant-appellant. However, this Court disagreed and held that:

"The bill contains no averment of the actual domicile of the testator ... Nor does the answer contain any averments of domicile, which supply these defects in the bill, even if it could so do; as we are of opinion, in point of law, it could not. Every bill must contain in itself sufficient matters of fact, per se, to maintain the case of the plaintiff; so that the same may be put in issue by the answer, and established by the proofs."

That is because the responsibility for asserting a right or remedy belongs to the party seeking that relief. *Smith v. Sink*. The Courts cannot match requests from one party with proofs from another party to grant relief.

Also, the maxim of construing pleadings against their proponent is not without limitation. It was recognized by the same author:

"The maxim must be received with this qualification, that the language of the pleading is to have a reasonable intendment and construction; and where an expression is capable of different meanings, that shall be taken which will support the declaration, & not the other, which would defeat it." A Treatise on Pleading and Parties to Actions (1855), by Joseph Chitty, et. al., pp. 237.

If pleadings were to be construed against their proponent, then Ms. Ozfidan could not have been granted support either based on my motion because she moved the court to deny my motion. Thus, she

should have been also denied any relief that could arise from my motion.

These actions of the Court of Appeals were prejudicial.

v. Recent Amendment to Virginia Code §20-107.1.

The Court of Appeals also blatantly declared that the recent amendment to §20-107.1 did not apply to this case.

Effective July 1, 2016 Virginia Code §20-107.1(A) now requires as a prerequisite to an award of spousal support that “[n]otwithstanding a party's failure to prove his grounds for divorce, **a claim for support has been properly pled by the party seeking support.**” Even though that amendment does not retroactively apply to this case, the amendment does not represent a substantive change in the applicable law because the binding precedents discussed above establish unequivocally a party must have always claimed and must still claim permanent support in order to be granted that relief under the fundamental rules of pleadings.

The amendment reversed the part of *Wroblewski* allowing a grant of an award when a party fails to prove his or her grounds, but also confirmed the part that a proper pleading by the party seeking support is a prerequisite to any award of support as Ms. Wroblewski properly requested in her complaint. Clearly, the second clause of the amendment is not a new law but rather is a codification of existing fundamental rules of pleadings into the spousal support statute as an affirmation of case law in the precedents particularly in *Wroblewski*.

The Virginia Family Law Coalition initiated the amendment in response specifically to *Wroblewski*.

Virginia Bar Association Journal, (Spring 2016), pp. 11. (App. XXXIV). However, the Court of Appeals maintained in footnote 3 in *Ozfidan II* that “The 2016 amendment is not applicable to this suit” as if it was new law rather than codification of existing case law. (App. at XLV). This erroneous ruling had the effect of singling me out from the previous cases and taking away my right to rely on those binding precedents violating my right to equal protection of laws.⁹

Judge Marshall and the Court of Appeals have left their traces all over this case while trying to prejudicially reach an outcome they desired.

Therefore, I respectfully request that this Court consider my constitutional challenges, or move this case to a federal District Court for adjudication of my Constitutional claims, or otherwise allow Virginia courts to address the constitutional issues by remanding the case.¹⁰

⁹ It is noted that prior to the statutory amendment Virginia appellate courts had a vested interest to make sure the case law was consistent in that no support award could be made without a valid pleading from the recipient spouse. Going forward the amendment will be the primary basis for such decisions and the appellate courts could afford to affirm an award in this case by pretending the amendment was new law and the previous case law allowed awarding support based on the payer spouses pleading.

¹⁰ Presently, I am, independently from this case, seeking relief for violations of my constitutional rights by Judge Marshall and Ms. Ozfidan under a 42 U.S.C. §1983 action filed in the U.S. District Court for the Eastern District of Virginia. See Civil Action Number: 3:17-cv-00726.

REASONS FOR GRANTING THE PETITION

The trial court has shown a total disregard for the rule of law and logic; ignored the binding precedents and objective application of law; imposed its subjective beliefs and reached a desired outcome without any legal basis. Virginia appellate courts joined in the decision by either affirming or refusing to hear it.

In these proceedings my constitutional rights were blatantly violated. Even though I failed to raise the constitutional questions below I have valid causes for my failure. The constitutional violations could not have been reasonably anticipated to be caused during the progress of the case, were obvious, prejudicial, and affected the fairness, integrity and public reputation of judicial proceedings. If this case was a litmus test for integrity, Virginia judiciary has failed it.

This case also presents an excellent opportunity for this Court to provide guidance on how constitutional violations committed during the progress of the cause by judicial officers should be addressed. I properly assigned errors for violations of state rules and law, but my errors were not resolved in accordance with the law which in itself offended my constitutional rights. Authority is desperately needed finding that such violations are independent from the state court decision on the merits.

In *Exxon-Mobil v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005) and subsequently in *Skinner v. Switzer*, 131 S. Ct. 1289, 1293 (2011), this Court reigned in on the contours of *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-416 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983) cases. This Court can use this case to provide additional guidance on the applicability of the *Rooker-Feldman* doctrine.

Beyond the question of independence, having constitutional rights offended once in the state courts, recidivism is a real concern with remanding the case back to the state courts. Allowing federal District Court review for such decisions also involves other valid concerns. Guidance is needed on where the proper venue is to adjudicate such claims.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted.


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