
In the
Court of Appeals of Virginia
At Richmond

1860-23-3

WOODROCK RIVER WALK LLC,

Appellant,

– v. –

LLOYD RICE and CHRISTINE ANDRADE,

Appellees.

PETITION FOR REHEARING *EN BANC*

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INTRODUCTION

Appellees Lloyd Rice and Christina Andrade (“Tenants”) petition this Court for *en banc* review of the panel’s decision rendered in this matter, a case of first impression that affects tens of thousands of tenants living in properties that receive support from the federal government and are subject to the 30-day notice provision of the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), codified at 15 U.S.C. § 9058(c).¹ The panel ruled said notice provision “is violated only when an officer executes a writ during the 30 days after a landlord has served a notice to vacate.” *Woodrock River Walk LLC v. Rice*, No. 1860-23-3, 2024 WL 4439083, at *5 (Va. Ct. App. Oct. 8, 2024) (“*Decision*”). But that decision violates

¹ A property subject to the notice provision is classified as a “covered property” under 15 U.S.C. § 9058(a) of the CARES Act if the property participates in one of numerous types of federal housing programs, including properties with loans owned by Fannie Mae or Freddie Mac, such as the property at issue here. Other covered properties include properties with loans insured by the Federal Housing Administration, Veterans Administration, and U.S. Department of Agriculture; public housing; the Section 8 Housing Choice Voucher program; Section 8 project-based housing; Section 202 housing for the elderly; Section 811 housing for people with disabilities; Section 236 multifamily rental housing; Section 221(d)(3) Below Market Interest Rate (BMIR) housing; HOME programming; Housing Opportunities for Persons with AIDS (HOPWA); McKinney-Vento Act homelessness programs; Section 515 Rural Rental Housing; Sections 514 and 516 Farm Labor Housing; Section 533 Housing Preservation Grants; Section 538 multifamily rental housing; and the Low-Income Housing Tax Credit (LIHTC) program.

established Virginia law, misapplies the statute, and deprives Virginians of the very protections Congress granted.

Since Congress enacted the CARES Act in March 2020, tens of thousands of tenants living in CARES Act covered properties in Virginia have been afforded 30 days to catch up on rent before finding themselves threatened with an eviction action. For families who are living paycheck to paycheck and struggling with rising rents, the CARES Act 30-day notice provision has provided an immeasurably consequential lifeline, preventing tenants in covered properties from falling into homelessness and keeping countless families in their homes.

In Virginia, where tenants struggling with rent are generally afforded a mere five days to “pay or quit,” the CARES Act 30-day notice requirement has given covered tenants an extra 25 days to pay rent before an eviction action is commenced. With 25 extra days, working families receive one or two more paychecks. With an extra 25 days, many tenants are able to obtain new housing and move. For tenants across Virginia, having these extra 25 days during a time of crisis has prevented the cascade of devastating effects that ripple from an eviction.

The panel’s ruling not only threatens the housing security of Virginia tenants living in CARES Act covered properties but is wrong for three reasons.

First, the panel’s ruling—that a landlord may initiate an unlawful detainer action before the 30-day notice to vacate expires—conflicts with Va. Code § 8.01-

126(B) and ignores our Supreme Court’s ruling in *Parrish v. Federal National Mortgage Association*, 292 Va. 44 (2016) (“*Parrish*”). The statute requires as a precondition for initiating a summons for unlawful detainer that “possession of any house, land or tenement is unlawfully detained by the person in possession” *Parrish* holds that an unlawful detainer action cannot be maintained against a tenant who lawfully came into possession of the premises until the tenant’s right of possession has expired, such that the tenant’s continued possession of the premises is unlawful—“ [i]t is brought by a plaintiff lawfully entitled to possession at the time of suit” *Parrish*, 292 Va. at 50. As a result of the panel’s opinion, tenants will find themselves in the untenable position of being lawfully in possession of the premises while simultaneously the subject of a court action pointedly accusing them of “unlawfully detain[ing]” the premises.

Second, the panel’s interpretation of 15 U.S.C. § 9058(c) is inconsistent with the plain language of the CARES Act and undermines the CARES Act’s purpose of giving tenants more time to lawfully remain in possession before an unlawful detainer for nonpayment of rent can be filed. The language at issue in relevant part states: “[t]he lessor of a covered dwelling unit . . . [] may not require the tenant to vacate the covered dwelling unit before the date that is 30 days after the date on which the lessor provides the tenant with a notice to vacate” 15 U.S.C. § 9058(c). The statute only references an action taken by a landlord, “providing the

tenant with a notice to vacate,” and makes no reference to the actions of “officers,” or “execut[ing] a writ.” Further, the panel interpreted the phrase “require the tenant to vacate,” as meaning the actual removal of the unlawfully detaining tenant from the premises. That interpretation is flawed since under Virginia law, a notice to vacate sent by a landlord cannot, by itself, empower the landlord to remove the tenant.

The phrase “require the tenant to vacate” means the termination of the tenancy by the landlord. A notice to vacate is a “termination notice” as defined in Va. Code § 8.01-126(A), and once the tenancy is terminated, “the tenant shall promptly vacate the premises” Va. Code § 55.1-1233. The CARES Act and Virginia law operate together, where the CARES Act specifies the tenancy terminates 30 days after the date the landlord provides notice, and upon termination, Virginia law requires the tenant to “promptly vacate the premises.” When the tenant fails to “promptly vacate” 30 days after landlord provides notice, only **then** does the tenant’s possession becomes unlawful and the tenant unlawfully detains the premises.

Finally, the panel erred in concluding that a landlord could not comply with both the CARES Act and Virginia law, creating a conflict that necessitated striking the words “shall promptly vacate the premises” in Va. Code §55.1-1233 on grounds of federal preemption. No such conflict exists. The CARES Act and Virginia law

operate together—and a landlord complies with both by serving the tenant with a notice to vacate, which itself, “requires the tenant to vacate,” and provides the tenant 30 days’ notice before the tenant’s tenancy is terminated. The only conflict between the CARES Act and Virginia law is the number of days after notice the tenancy terminates. The CARES Act prescribes 30 days whereas Virginia law prescribes 5 days “if the rent is not paid within the five-day period” Va. Code § 1245(F). The CARES Act preempts Virginia’s five-day notice period, giving the tenant 30 days as opposed to 5 days to lawfully remain in possession after notice is given, thus, delaying the time that a landlord can commence an action for possession.

For these reasons, this Court should grant Tenants’ petition for *en banc* review and thereafter affirm the circuit court’s judgment dismissing this unlawful detainer action without prejudice.

STATEMENT OF FACTS & PROCEDURAL POSTURE

Tenants Lloyd Rice and Christina Andrade resided at a property owned by Appellant Woodrock River Walk, LLC (“Landlord”) under a lease agreement and the parties agree the property is governed by the CARES Act. R. 402. On December 7, 2022, Landlord issued a pay or quit notice advising Tenants that they had five days to pay the unpaid rent, or Landlord would terminate the lease. R. 7. The pay or quit notice also advised Tenants that they were not required to vacate

the property following the 30 days after the date of notice. *Id.* However, on January 5, 2023, twenty-nine days after the date of the notice and one day prior to the expiration of the 30-day period following Landlord's issuance of the pay or quit notice, Landlord filed an unlawful detainer action in the Salem City General District Court against Tenants for nonpayment of rent, seeking both possession and damages for unpaid rent. R. 1. Following continuances and a hearing, the General District Court dismissed the unlawful detainer without prejudice on June 16, 2023. *Id.* On June 23, 2023, Landlord appealed the General District Court's decision to the Circuit Court. R. 2.

Once the case was in Circuit Court, Tenants filed a Motion to Dismiss on Special Plea, R. 365-68, and Landlord filed a Demurrer and Memorandum in Opposition. R. 369-401. On September 1, 2023, the trial court heard oral arguments on the Motion to Dismiss and the Demurrer and Memorandum in Opposition. The parties agreed that the CARES Act applied to the property at issue in the unlawful detainer and that Landlord filed the unlawful detainer less than 30 days after the issuance of a pay or quit notice to Tenants. R. 402. The Circuit Court found Landlord failed to comply with the CARES Act by not waiting to file its unlawful detainer until 30 days after the issuance of the pay or quit notice. On September 27, 2023, the trial court issued a final order consistent with its ruling

from the bench and dismissed the case without prejudice. R. 402-03. Landlord appealed the Circuit Court’s decision on November 2, 2023. R. 404-05.

A panel of this Court heard oral arguments on July 9, 2024. On October 8, 2024, the panel ruled in favor of Landlord on its assignment of error that the Circuit Court erred in its interpretation of the CARES Act. *Decision*, at *5, n.5. The panel ruled that “Congress did not intend 15 U.S.C. § 9058(c) to prevent landlords from filing a summons during the 30 days after a landlord provides notice,” *Id.*, at *2, and that the summons does not require a tenant to vacate the premises. *Id.*, at *3. According to the panel, the CARES Act only prevents *execution* of the writ of eviction during the 30 days following the issuance of the notice to pay or quit. *Id.*, at *5. Furthermore, the panel ruled that due to a purported conflict between the CARES Act and Va. Code § 55.1-1233, the CARES Act preempts the language in Va. Code § 55.1-1233 that the tenant “promptly vacate the premises” upon termination of the lease, because “under the CARES Act, the landlord may not mandate that the tenant leave the premises for 30 days after the tenant receives notice of failure to pay.” *Decision*, at *4.

ARGUMENT

I. **The panel erred by authorizing a landlord to file an unlawful detainer while the tenant was still in lawful possession, contrary to Virginia Code and Virginia Supreme Court precedent.**

The panel's holding permitting a covered landlord to initiate an unlawful detainer action seeking both possession and damages for unpaid rent during the 30-day period after issuing the notice to vacate — while the tenant's possession is still lawful — conflicts with Va. Code § 8.01-126(B) and our Supreme Court's ruling in *Parrish v. Federal National Mortgage Association*, 292 Va. 44, 50, (2016), both of which require that a tenant be unlawfully detaining at the time a landlord initiates an unlawful detainer action.

Va. Code § 8.01-126(B) provides the statutory basis for unlawful detainer actions:

In any case when possession of any house, land or tenement is unlawfully detained by the person in possession thereof, the landlord, his agent, attorney, or other person, entitled to the possession may present to a magistrate or a clerk or judge of a general district court a statement under oath of the facts which authorize the removal of the tenant or other person in possession, describing such premises; and thereupon such magistrate, clerk or judge shall issue his summons against the person or persons named in such affidavit.

Va. Code § 8.01-126(B) (Emphasis added).

The plain language of Va. Code § 8.01-126(B) requires that a landlord seeking a summons must, when the summons is sought, state facts authorizing the removal

of a tenant. Under Va. Code § 8.01-126(B), a landlord cannot properly file an unlawful detainer action anticipating that there could come a day in the future where the landlord would have a statutory right to remove the tenant. Rather, the subsection's usage of the present tense ("facts which authorize the removal of the tenant"), rather than the future tense ("facts which will authorize the removal of the tenant"), makes plain that a tenant must no longer have lawful possession of the premises when the summons is sought, such that "possession . . . is unlawfully detained by the person in possession thereof . . ." Va. Code § 8.01-126(B).

The principle that an unlawful detainer action cannot be maintained until the date the tenant's possession becomes unlawfully withheld was affirmed by our Supreme Court in *Parrish v. Federal National Mortgage Association*, which holds:

Unlawful detainer is an action against a defendant who lawfully entered into possession of real property but **whose right to lawful possession has since expired**. It is brought by a **plaintiff lawfully entitled to possession at the time of suit**, which the **defendant is then unlawfully withholding**.

Parrish v. Federal National Mortgage Association, 292 Va. 44, 50, (2016) citing *Allen v. Gibson*, 25 Va. 468, 473 (1826) (emphasis added).

Plainly stated, a tenant's right to lawful possession must have expired before an unlawful detainer suit can be properly filed. If a landlord is not yet lawfully entitled to possession, an unlawful detainer action is not ripe. This ripeness requirement applies irrespective of the type of breach and irrespective of the

various requirements for terminating a tenancy. For example, if a landlord believes a tenant has committed a noncriminal, nonremedial lease violation and issues a 30-day notice to the tenant under Va. Code § 55.1-1245(C), the landlord must wait until after the 30-day notice period has concluded to file the unlawful detainer action. Thus, the landlord may not obtain a judgment under Va. Code § 8.01-126 if suit is filed during the 30-day notice period, because the tenant's possession is still lawful. This is true even if the landlord waited until day 29 to file the action. This is true even if the landlord waits the full 30 days to file the action.

Here, as a covered property under the CARES Act, Landlord was not entitled to seek possession of the premises and damages for unpaid rent by obtaining a summons until after the 30-day period lapsed, because until the 30 days lapses, Tenants remained in lawful possession of the premises. The CARES Act unambiguously provides that tenants remain in lawful possession for 30 days following a landlord's notice to vacate.² The CARES Act requires that the lessor of a covered dwelling unit "may not require the tenant to vacate the covered dwelling unit before the date that is 30 days after the date on which the lessor

² The part of the termination notice Landlord sent to Tenants that explicitly referenced the CARES Act states: "You are not required to vacate during the 30-day period immediately following the date of this Notice." R. 7. Assuming, *arguendo*, that the termination notice is otherwise valid, the quoted language means that the tenant's right of possession did not expire until the 30-day period ended.

provides the tenant with a notice to vacate.” 15 U.S.C. § 9058(c)(1). Here, on Day 29, Tenants were still in lawful possession of the premises because their tenancy had not yet terminated. Thus, on Day 29, Landlord lacked the facts that would authorize the removal of the tenants.

The panel erred by failing to properly apply Va. Code § 8.01-126(B) and *Parrish*. As a result of the panel’s opinion, tenants will find themselves in the untenable position of being lawfully in possession of the premises while simultaneously the subject of a court action pointedly accusing them of “unlawfully detain[ing]” the premises. This untenable position must be corrected through *en banc* review.

II. The panel’s application of 15 U.S.C. § 9058(c) is inconsistent with the plain language of the CARES Act and undermines the CARES Act’s purpose of giving tenants more time to lawfully remain in possession before an unlawful detainer for nonpayment of rent can be filed than Virginia law provides.

This matter is a case of first impression as to how the CARES Act is to be applied to unlawful detainers in Virginia. When interpreting the language of an unambiguous statute, a reviewing court is “bound by the plain meaning of that language.” *City of Hampton v. Williamson*, 302 Va. 325, 333 (2023) (citing *Blake v. Commonwealth*, 288 Va. 375, 381 (2014)). Moreover, “[a]lthough our focus is generally on the plain meaning of unambiguous statutory language, [a reviewing court] must also consider that language in the context in which it is used.” *Id.*

(citing *Potter v. BFK, Inc.*, 300 Va. 177, 182 (2021)). The panel’s interpretation that 15 U.S.C. § 9058(c) only prevents the execution of the writ 30 days after the landlord provides the tenant with a notice to vacate contradicts the plain language of the statute, especially considering that statute’s context relative to 15 U.S.C. § 9058(b).

The relevant portions of the CARES Act at issue here, 15 U.S.C. § 9058, read as follows:

(b) Moratorium

During the 120-day period beginning on March 27, 2020, the lessor of a covered dwelling may not-

- (1) make, or cause to be made, any filing with the court of jurisdiction to initiate a legal action to recover possession of the covered dwelling from the tenant for nonpayment of rent or other fees or charges; or
- (2) charge fees, penalties, or other charges to the tenant related to such nonpayment of rent.

(c) Notice

The lessor of a covered dwelling unit-

- (1) may not require the tenant to vacate the covered dwelling unit before the date that is 30 days after the date on which the lessor provides the tenant with a notice to vacate; and
- (2) may not issue a notice to vacate under paragraph (1) until after the expiration of the period described in subsection (b).

The panel never found that these two provisions of the CARES act were ambiguous, such that the plain meaning of the statute is what must govern the interpretation of these provisions.

The panel’s ruling that the 30-day notice requirement set forth in 15 U.S.C. § 9058(c) “is violated only when an officer executes a writ during the 30 days after a landlord has served a notice to vacate,” *Decision*, at *5 finds no support in the plain language of that provision. The statute only references an action taken by a landlord, “providing the tenant with a notice to vacate,” and makes no reference to the actions of “officers,” or “execut[ing] a writ.” Effectively, the panel rewrote 15 U.S.C. § 9058(c) to govern the issuance of writs of eviction, which is completely improper as this Court recently observed:

Courts are not permitted to rewrite statutes. This is a legislative function. The manifest intention of the legislature, clearly disclosed by its language, must be applied.

Artis v. Commonwealth, 76 Va. App. 393, 400, (2023) (citing *Anderson v. Commonwealth*, 182 Va. 560, 566 (1944)).

Further, the panel’s ruling is grounded in a flawed interpretation of the phrase “require the tenant to vacate.” The panel interpreted the phrase “require the tenant to vacate,” as meaning the actual removal of the unlawfully detaining tenant from the premises. The panel found that a summons itself does not require the tenant to vacate because “a summons is simply a step in the enforcement of an eviction action; the landlord does not yet have the legal right to remove the tenant.” *Decision*, at *3. Then, the panel correctly noted that “it is only when an officer executes the writ that a landlord has the legal power to remove the tenant from the premises.” *Id.* The phrase “require the tenant to vacate” cannot possibly mean the

removal of the tenant from the premises, as under Virginia law, a notice to vacate sent by a landlord, the only action that paragraph (c) is directed to, does not empower the landlord to remove the tenant. As the panel correctly observed, “it is only when an officer executes the writ that a landlord has the legal power to remove the tenant from the premises.” *Decision*, at *3.

The proper meaning of the phrase, “require the tenant to vacate” is the termination of the tenancy and the tenant’s right to continued possession. Under Virginia Law, a “termination notice” is the written instrument that terminates a tenancy whereby the tenant’s right of possession expires. The notice to vacate required by the CARES act is a “termination notice,” defined as “a notice given under § 55.1-1245 or other notice of termination of tenancy given by the landlord to the tenant of a dwelling unit” Va. Code § 8.01-126(A).

Virginia Code § 55.1-1245 provides different periods of time from the date of the “termination notice” a landlord must give before terminating a tenancy. For example, for nonpayment of rent the landlord must give the tenant five days from the date of the notice before terminating the tenancy, Va. Code § 55.1-1245(F)³; for breaches of the rental agreement the landlord must give the tenant 30 days, Va.

³ The panel correctly found that the notice the landlord sent the tenants was “a notice to vacate under the CARES Act because it terminated Rice's lease after five days for failure to pay, **and the termination of the lease mandated Rice vacate.**” *Decision*, at *4 (emphasis added.)

Code § 55.1-1245(A); to terminate a month-to-month periodic tenancy the landlord must give notice 30 days prior to the next rent due date, Va. Code § 55.1-1253(A); and so on. Then, “[a]t the termination of the term of tenancy, whether by expiration of the rental agreement or by reason of default by the tenant, **the tenant shall promptly vacate the premises . . . [and i]f the tenant fails to vacate,** the landlord may bring an action for possession and damages, including reasonable attorney fees.” Va. Code § 55.1-1233 (emphasis added).

Thus, the CARES Act and Virginia law operate together, where the CARES Act specifies the tenancy terminates 30 days after the date the landlord provides notice, instead of 5 days as set forth in Va. Code § 55.1-1245(F), and upon termination, Virginia law requires the tenant to “promptly vacate the premises.” Va. Code § 55.1-1233. When the tenant fails to “promptly vacate” 30 days after landlord provides notice, only **then** does the tenant’s possession become unlawful and the tenant unlawfully detains the premises.

The panel attempts to buttress its ruling by comparing the language contained in 15 U.S.C. § 9058(c) with the language in 15 U.S.C. § 9058(b), noting that nowhere in paragraph (c) does the word “filing” appear, whereas under paragraph (b), a landlord could not file an unlawful detainer action during the 120-day eviction moratorium established by paragraph (b). *Decision*, at *2 (“[i]n contrast, subsection (c) does not mention filings, including a summons.”) This

analysis, too, is flawed. There is no need for the word “filing” to appear in paragraph (c). A notice to vacate is directed to the tenant and is not a “filing with the court of jurisdiction to initiate a legal action to recover possession” 15 U.S.C. § 9058(b). Rather, a notice to vacate terminates the tenancy, a necessary precondition for filing an unlawful detainer. Discussion, *supra*, at 14-15. Significantly, Congress chose not to make the notice provision in paragraph (c) effective until the 120-day eviction moratorium period expired. 15 U.S.C. § 9058(c)(2). When these two provisions are properly viewed together, it becomes abundantly clear that once the 120-day moratorium expired, Congress intended to delay the filing of new unlawful detainer actions for nonpayment of rent by requiring landlord to provide 30 days’ notice to terminate a tenancy for nonpayment of rent, instead of shorter notice periods such as the five days’ notice allowed under Virginia law.

The panel’s failure to recognize that under Virginia law, a “notice to vacate” or termination notice, itself, requires a tenant to vacate, caused the panel to render a flawed analysis of 15 U.S.C. § 9058(c), and is an error that must be corrected by *en banc* review.

III. The panel correctly found the CARES Act pre-empted Virginia law but identified the wrong provision of Virginia Law that conflicts with the CARES Act.

The panel’s decision correctly recognized that when provisions of state law directly conflict with provisions of federal law, that state law must yield to federal law and the conflicting provisions of state law are pre-empted by federal law.

Decision, at *4 (“There is a clear conflict between [state law] and the CARES Act . . . [and t]hus, the state law here is preempted by the federal CARES Act.”).

However, the panel identified the wrong provision of state law that directly conflicts with the CARES Act.

The panel decision found that the CARES Act’s language providing that a landlord may “not to require the tenant to move out during the 30-day timeframe” directly conflicts with the language in Va. Code § 55.1-1233 that “the tenant shall promptly vacate the premises” “[a]t the termination of the term of tenancy” *Decision*, at *4. The panel reasoned, “[t]here is a clear conflict between this [Va. Code § 55.1-1233] and the CARES Act, as it is impossible for a landlord to both require the tenant to move out promptly and not to require the tenant to move out during the 30-day timeframe.” *Id.*

The panel’s determination that a landlord cannot comply with both the CARES Act and Va. Code § 55.1-1233 is based on its flawed analysis of the phrase “require the tenant to vacate.” Discussion, *supra*, at 14-15. The CARES

Act and Virginia law operate together, where the CARES Act specifies the tenancy terminates 30 days after the date the landlord provides notice, instead of 5 days as set forth in Va. Code § 55.1-1245(F), and upon termination, Virginia law requires the tenant to “promptly vacate the premises.” Va. Code § 55.1-1233. What makes it impossible for a landlord to comply with both the CARES Act and state law is the different amount of time a tenant may lawfully remain in possession following the date the landlord issues the tenant a notice to vacate or termination notice. Under the CARES Act, the tenant may remain in possession for 30 days following the issuance of notice by the landlord even where the tenant fails to pay rent, whereas under Va. Code § 55.1-1245(F) the tenant may remain in possession only 5 days after notice “if the rent is not paid within the five-day period” Va. Code § 55.1-1245(F).

A landlord can comply with both the CARES Act and Va. Code § 55.1-1233 by providing the tenant 30 days’ notice before the tenancy is terminated, and once the tenancy is terminated, the tenant shall promptly vacate the premises” Va. Code § 55.1-1233. Since the only conflict between the CARES Act and Virginia law is the time period a tenant may lawfully remain in possession following issuance of a termination notice or notice to vacate, the shorter 5 day period provided by Va. Code § 55.1-1245(F) must yield to the 30-day period provided by

the CARES Act, and the five day period provided by Va. Code § 55.1-1245(F) is preempted.

The panel's failure to identify the correct provision of state law that directly conflicts with the CARES Act is the third error to be corrected by *en banc* review.

CONCLUSION

The panel's opinion contains three clear errors that an *en banc* panel should correct. For the reasons stated above, this Court should grant Tenants' Petition seeking *en banc* review by the full Court of Appeals and thereafter, the full Court of Appeals should affirm the Circuit Court's ruling and dismiss the instant action without prejudice.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I do hereby certify that the foregoing Petition for Rehearing *En Banc* complies with Va. Sup. Ct. R. 5A:34 and contains 4,649 words. I further certify that on October 22, 2024, I electronically filed the foregoing Petition with the Court of Appeals of Virginia by using the VACES system, and an electronic copy has been emailed to counsel listed below:

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