

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

QUESTION PRESENTED

STATEMENT OF FACTS ARGUMENT

I. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION BY DENYING
MANDAMUS RELIEF

II. CIRCUIT COURT'S DENIAL OF MANDAMUS DID NOT TREAT
CARTWRIGHT UNFAIRLY CONCLUSION

CERTIFICATE [NOT INCLUDED IN ONLINE VERSION]

=====

TABLE OF AUTHORITIES

Cases

Carbaugh v. Solem, 225 Va. 310, 302 SE2d 33 (1983)

Gannon v. State Corporation Commission, 243 Va. 480, 416 SE2d 446 (1992)

Hall v. Stuart, 198 Va. 315, 94 SE2d 284 (1956)

Hawkes v. Internal Revenue Service, 467 F.2d 787 (6th Cir. 1972)

Hertz v. Times-World Corporation, 259Va. 599, 528 SE2d 458 (2000)

In Re: Hopeman Brothers, Inc., 264 Va. 424, 569 SE2d 409 (2002) cert. den., 537 U.S.
1083, 154 L.Ed. 582, 123 S.Ct. 663 (2002)

Lawrence v. Jenkins, 258 Va. 598, 521 SE2d 523 (1999)

Marsh v. Richmond Newspapers, Inc., 223 Va. 245, 288 SE2d 415 (1982)

Nix v. U.S., 572 F.2d 998 (4th Cir. 1978)

Ticonderoga Farms, Inc. v. County of Loudon [sic], 242 Va. 170,409 SE2d 446 (1991)

Virginia Beach S.P.C.A., Inc. v. South Hampton Roads Veterinary Association, 229 Va. 349, 329 SE2d 10 (1985)

WTAR Radio-TV Corporation v. City Council of the City of Virginia Beach, 216 Va. 892, 223 S.E.2d

Other Authorities

Rule 5:18 of the Rules of the Virginia Supreme Court

=====

IN THE SUPREME COURT OF VIRGINIA

Record No. 042240

**RAYMOND D. CARTWRIGHT,
Petitioner-Appellant,**

v.

**COMMONWEALTH TRANSPORTATION COMMISSIONER OF VIRGINIA,
Respondent-Appellee.**

BRIEF IN OPPOSITION

The Commonwealth Transportation Commissioner of Virginia, by counsel, pursuant to Rule 5:18 of the Rules of the Virginia Supreme Court files this Brief in Opposition.

STATEMENT OF THE CASE

As part of a project to reconstruct a portion of Route 17 in the City of Chesapeake, the Commonwealth Transportation Commissioner ("VDOT") filed a condemnation certificate to acquire a portion of Raymond D. Cartwright's ("Cartwright") property. In the course of the litigation to condemn Cartwright's property, Cartwright filed a discovery request for VDOT to produce the sales brochure it had prepared for the Route 17 project. VDOT objected to the request for production on the ground that the sales brochure was protected from disclosure by the work product doctrine.

During the pending condemnation litigation, in lieu of filing a motion to compel production of the sales brochure, Cartwright filed a request for the sales brochure under the Virginia Freedom of Information Act ("FOIA"). VDOT responded to Cartwright's FOIA request by advising him that the sales brochure was exempt from disclosure under FOIA because, among other things, it was work product compiled for use in litigation. Upon receiving this response, Cartwright filed a Petition for a Writ of Mandamus with the Chesapeake Circuit Court seeking to compel VDOT to produce the sales brochure.

VDOT filed a Demurrer to the Petition for a Writ of Mandamus asserting that mandamus relief should be denied because the sales brochure was exempt from disclosure because it was work product compiled for use in litigation and because Cartwright had an adequate remedy at law to have applicability of the work product doctrine determined in the condemnation litigation that also was pending in Chesapeake Circuit Court. Arguments on the Demurrer were held before the Chesapeake Circuit Court on March 3, 2004 and by telephone on March 17, 2004. The circuit court took the Demurrer under advisement and, on July 9, 2004, entered an Order denying the Petition for a Writ of Mandamus. The Order withheld ruling on whether the sales brochure qualified as work product exempt from disclosure under FOIA, but denied mandamus relief because Cartwright had an adequate remedy at law to seek access to the sales brochure through the discovery process in the pending condemnation case. Cartwright appeals from this Order.

QUESTION PRESENTED

1. Did the circuit judge abuse his discretion in denying Cartwright's Petition for a Writ of Mandamus because Cartwright had an adequate remedy at law in the pending condemnation litigation to pursue his claim that the sales brochure was not protected from disclosure by the work product doctrine? (Assignments of Error 1 and 2)

STATEMENT OF FACTS

VDOT is reconstructing Route 17 in Chesapeake. (Transcript dated 3/3/04, referred to as "Tr.", 34) To make the statutorily required *bona fide* offers to landowners whose properties will be acquired for the Route 17 project, VDOT prepared a "sales brochure" of comparable properties to evaluate when appraising the properties being acquired. Tr. 43.

Thomas M. Savage, a person who has appraised properties for 36 years, prepared the sales brochure for the Route 17 project. Tr. 32&33. While preparing the sales brochure, Mr. Savage compiled sales data for properties comparable to the properties VDOT anticipated acquiring for the highway project. Tr. 35&36. Mr. Savage sifted through information derived from a variety of sources and selected properties that in his judgment best represented the land characteristics of the types of properties VDOT would acquire for the project. Tr. 36&37. Mr. Savage used his subjective judgment as a licensed real estate appraiser to determine which properties should be included in the sales brochure because they had land characteristics similar to properties that would be acquired by VDOT for the project. Tr. 48. Mr. Savage's inclusion of each property in the sales brochure represented his professional opinion that the property was comparable to at least one of the properties that VDOT intended to acquire for the project. Tr.42.

Preparation of the sales brochure began after the decision was made to construct the Route 17 project and remained an ongoing process throughout the project as new comparable sales occurred and the highest and best uses of comparable properties changed. Tr.37&44. After Mr. Savage prepared the initial version of the sales brochure,

VDOT's appraisers reviewed the properties contained in the sales brochure and selected the most applicable properties to use in appraising the individual properties to be acquired. Tr. 43. These appraisals were then used to make the statutorily required purchase offers which, if refused, permitted VDOT to initiate condemnation litigation to acquire the properties. Tr. 43. In the condemnation litigation, the appraisals form the basis for appraiser's expert opinion at trial. Tr. 43. Accordingly, the sales brochure is prepared in anticipation of litigation. Tr. 42.

Condemnation litigation did result to acquire a portion of Cartwright's property for the Route 17 project. Tr. 19. In the course of that litigation, Cartwright filed a discovery request for VDOT to produce the sales brochure. Tr. 19, Exhibit 3 to the Demurrer. VDOT objected to the request for production because the sales brochure was protected by the work product privilege. Cartwright did not file a motion to compel to resolve this discovery dispute, choosing instead to file a FOIA request for the sales brochure. Tr. 9, Exhibit 2 to the Demurrer. VDOT denied the FOIA request, asserting that the sales brochure was exempt from disclosure because it was covered by the work product and appraisal data exemptions to FOIA. Exhibit 4 to the Demurrer.

Cartwright filed a Petition for a Writ of Mandamus to compel disclosure of the Route 17 sales brochure. An evidentiary hearing was held on March 3, 2004, and the circuit court heard additional arguments by telephone on March 17, 2004. The circuit court took the matter under advisement and, on July 9, 2004, entered an Order that withheld from ruling whether the sales brochure was work product but ruled that mandamus did not lie because Cartwright had an adequate remedy at law. Specifically, the court ruled that Cartwright had an adequate remedy at law because he could seek access to the sales brochure by a motion to compel production in the condemnation case that also was pending in Chesapeake Circuit Court. Cartwright appeals the court's Order of July 9, 2004.

ARGUMENT

I. The Circuit Court Did Not Abuse its Discretion by Denying Mandamus Relief

The following facts existed at the time the circuit court denied Cartwright I mandamus relief because he had an adequate remedy at law to pursue his claim that he was entitled to a copy of the sales brochure for the Route 17 project. As part of the condemnation litigation to acquire Cartwright's property for Route 17, Cartwright filed a discovery request for production of the project's sales brochure. VDOT objected to the request for production because the sales brochure was protected by the work product doctrine. Rather than seeking a determination on the applicability of the work product doctrine by filing a motion to compel production of the sales brochure in that litigation, Cartwright filed a FOIA request for the sales brochure and sought extraordinary relief through a petition for a writ of mandamus when VDOT asserted that the sales brochure was exempt from disclosure under FOIA.

This Court consistently has stated the principles that govern the issuance of a writ of mandamus:

A writ of mandamus is an extraordinary remedial process, which is not awarded as a matter of right but in the exercise of sound judicial discretion. Due to the drastic character of the writ, the law has placed safeguards around it. Consideration should be had for the urgency which prompts an exercise of the discretion, the interests of the public and third persons, the results which would follow upon the refusal of the writ, as well as the promotion of substantial justice. In doubtful cases the writ will be denied, but where the right involved and the duty sought to be enforced are clear and certain and *where there is no other available specific and adequate remedy* the writ will issue.

Gannon v. State Corporation Commission, 243 Va. 480, 482, 416 SE2d 446,447 (1992).

Gannon had filed a FOIA request seeking certain records from the State Corporation Commission ("the Commission"). A senior counsel for the Commission advised Gannon that the Commission had "long maintained" that it was not subject to FOIA and that a particular code section prohibited disclosure of the requested records. Id. 481, 447. In a subsequent letter, he advised that if Gannon were dissatisfied with his response, Gannon could pursue remedies available under the Commission's Rules of Practice and Procedure. Id. 481, 447. Instead, Gannon filed a petition for a writ of mandamus with this Court seeking disclosure of the records because his FOIA rights had been denied. Id. 481, 447. The Court dismissed the petition for a writ of mandamus because Gannon had an adequate remedy at law. Id. 482, 447. The Court held that the Commission's Rules permitted Gannon to challenge counsel's interpretation that the Commission was not subject to FOIA but that Gannon had "failed to avail himself of this legal remedy." Id. 483, 448. Accordingly, the Court ruled that mandamus did not lie because Gannon had an adequate remedy at law to pursue his claim that the records should have been disclosed because the Commission was subject to FOIA. Id. 483, 448.

Cartwright asserts that *Gannon* is inapplicable to this case because it was not a FOIA case and does not stand for the proposition that mandamus relief will be denied to a FOIA applicant if he or she has an adequate remedy at law. Cartwright disingenuously asserts that Gannon was not a FOIA case because the Court withheld ruling whether the Commission was subject to the provisions of FOIA because Gannon had an adequate remedy to pursue his entitlement to FOIA relief under the Commission's Rules. Cartwright's argument in this regard ignores that Gannon filed his petition for mandamus relief because the Commission allegedly *had not complied with FOIA* and the Court denied Gannon mandamus relief because he had an adequate remedy at law to pursue his claim that he was entitled to the documents under FOIA. Moreover, while discussing Gannon in *Hertz v. Times-World Corporation*, 259 Va. 599, 608-609, 528 S.E.2d 458, 463 (2000), the Court made clear that *Gannon* held that a petition for a writ of mandamus to enforce the provisions of FOIA would be denied if the petitioner had an adequate remedy at law to pursue his claims. The Court noted that Gannon had invoked the Court's

original jurisdiction and sought a writ of mandamus to require the Commission to produce certain records Gannon had requested pursuant to FOIA. *Id.* The Court stated that it had applied the "elemental principle" that "mandamus never lies where the party aggrieved has another adequate remedy at law" in *Gannon*. *Id.* Further, the Court explained its ruling by stating that Gannon had sought mandamus relief "to require the State Corporation Commission to produce certain documents that Gannon had requested pursuant to the Virginia Freedom of Information Act" and noting that it held Gannon had "a specific and adequate legal remedy" because the Rules of the Commission permitted him to pursue his claim that he was entitled "to obtain the documents that he had requested." *Id.*

Like Gannon, Cartwright had another avenue available and did not have to resort to the extraordinary remedy of mandamus relief to assert his claim that the sales brochure was not protected by the work product doctrine. He had filed a request for production of the brochure in the pending condemnation case and consciously chose to file for mandamus relief rather than to have applicability of the work product doctrine determined by a motion to compel in the condemnation case. Tr. 9. Much of Cartwright's argument concerning why he did not have an adequate remedy at law because his other remedy was not as convenient as seeking mandamus relief in a FOIA proceeding ignores the Court's holding in *Gannon* that it was of no consequence that Gannon may have believed that the Commission would deny his request. *Gannon v. State Corporation Commission*, supra 483, 448. Because Cartwright could obtain a ruling on the applicability of the work product doctrine by filing a motion to compel discovery in the pending condemnation case, the circuit court found that Cartwright had an adequate legal remedy and exercised its substantial discretion to deny relief in the mandamus case. Like in *Gannon*, Cartwright's view of his chances of prevailing in that venue is of no consequence. What matters is that the circuit court exercised its discretion to find that he could have the dispositive issue resolved in the condemnation case and that the availability of that legal remedy warranted denying extraordinary relief in the mandamus proceeding. The circuit court's ruling in this regard is in accord with this Court's consistent admonitions that mandamus relief should be denied in doubtful cases. *In Re: Hopeman Brothers, Inc.*, 264 Va. 424, 569 S.E.2d 409 (2002), cert. den., 537 U.S. 1083, 154 L.Ed. 582, 123 S.Ct. 663 (2002); *Gannon v. State Corporation Commission*, supra 482, 447; *Hertz v. Times-World Corporation*, supra 608, 463; *Hall v. Stuart*, 198 Va. 315, 323, 94 S.E.2d 284, 290 (1956).

Cartwright has cited several of this Court's cases as support for his argument that where a statute like FOIA provides mandamus as a possible remedy to enforce its provisions, the circuit court should not deny relief if he has an adequate remedy at law. Those cases do not support his position, however. *WTAR Radio-TV Corporation v. City Council of the City of Virginia Beach*, 216 Va. 892, 894, 223 S.E.2d 895, 897 (1976), considered whether a plaintiff's allegations of previously consummated violations of FOIA were sufficient to support issuance of an *injunction* restraining future FOIA violations. This was not a mandamus case and while the Court ruled that the filing of a verified petition alleging a denial of a protected FOIA right vests a chancellor with jurisdiction to hear the cause, the Court held that FOIA "does not, however, expressly provide what other

allegations are necessary or *what restraints may be imposed to enforce the right denied.*" (emphasis added) *Id.* Further, the Court ruled that the City's demurrers were properly sustained because the verified petitions failed to allege facts sufficient to show good cause for the *injunctive relief* requested. *Virginia Beach S.P.C.A., Inc. v. South Hampton Roads Veterinary Association*, 229 Va. 349, 329 S.E.2d 10 (1985) was not a mandamus or a FOIA case. The Court merely held that because a code section granted the circuit court discretionary power to enjoin the unlawful practice of veterinary medicine, the availability of administrative remedies before the Virginia Board of Veterinary Medicine was not a bar to *injunctive relief*. *Id.* 353-354, 12-13. Similarly, *Ticonderoga Farms, Inc. v. County of Loudon*, [sic] 242 Va. 170, 409 S.E.2d 446 (1991), was not a mandamus or a FOIA case. Like *Virginia Beach S.P.C.A.*, the Court held Loudon [sic] County officials could seek *injunctive relief* to prevent violation of a county ordinance without proving irreparable injury resulting from the violation. *Id.* 176, 459-460. Finally, *Carbaugh v. Solem*, 225 Va. 310, 315, 302 S.E.2d 33, 35 (1983), held that state agricultural officials were entitled to *injunctive relief* for regulatory violations when a statute *expressly* provided that they did not have "to allege or prove that an adequate remedy at law does not exist." Only *WTAR Radio-TV Corporation* was a FOIA case and that case involved a request for *injunctive relief* rather than a petition for mandamus relief. Accordingly, these cases do not support Cartwright's position that an adequate remedy at law is irrelevant when a petitioner seeks a writ of mandamus to enforce FOIA rights.

Cartwright cites *Marsh v. Richmond Newspapers, Inc.*, 223 Va. 245, 288 S.E.2d 415 (1982), to support his contention that the General Assembly has provided that even "[a] single instance of denial of the rights and privileges conferred by [the Act] shall be sufficient to invoke the remedies [which include a petition for mandamus] granted [in the Act]." Contrary to what Cartwright has inserted into the above-quoted language, *Marsh* was not a mandamus case. Rather, *Marsh* held that even though the legislature had amended FOIA to authorize a court to *exercise its discretion to grant injunctive relief* when there had been a single violation of FOIA, the granting of such *injunctive relief* was predicated on a finding by the court that future violations would occur. *Id.* 258, 422. *Marsh* not only makes it clear, therefore, that the judge retains discretion whether to grant relief for alleged FOIA violations, it also is inapposite to whether mandamus relief must be granted for an alleged FOIA violation irrespective of whether the petitioner has an adequate remedy at law.

Finally, Cartwright cites *Lawrence v. Jenkins*, 258 Va. 598, 521 S.E.2d 523 (1999), as support for his position that "a writ of mandamus [is] appropriate... if [a citizen] was denied clearly established rights and privileges under FOIA". In *Lawrence*, however, the Court held that "[a] writ of mandamus is an extraordinary remedial process, which is not awarded as a matter of right but in the exercise of a sound judicial discretion", and reversed a grant of mandamus relief because the petitioner did not have a clear right to the relief being sought, one of the elements necessary before a writ of mandamus can issue. *Id.* 602-603, 525. Like much of Cartwright's petition for appeal, this argument assumes that a FOIA applicant has a clear right to obtain a copy of the sales brochure. This assumption was disputed, however, and the circuit court withheld ruling on its validity because Cartwright had an adequate remedy available in the pending

condemnation case to obtain a ruling on whether the sales brochure was protected from disclosure by the work product doctrine. The circuit judge properly exercised his discretion when he made that ruling.

Cartwright is unable to cite a single case where this Court has held that alleged FOIA violations can be enforced by a petition for a writ of mandamus irrespective of whether the petitioner has another adequate remedy at law. Indeed, in *Gannon* and *Lawrence*, the only two cases he cites that involved requests for mandamus relief for alleged FOIA violations, this Court held that mandamus relief should not be granted for the alleged FOIA violations. *Gannon* and *Lawrence* clearly hold that a writ of mandamus is an extraordinary remedial process, which is not awarded as a matter of right but in the exercise of a sound judicial discretion. *Gannon v. State Corporation Commission*, supra 482, 447; *Lawrence v. Jenkins*, id. 602, 525. Due to the drastic character of the writ, consideration should be had for the urgency which prompts an exercise of the discretion, the interests of the public and third persons, the results which would follow from a refusal of the writ, as well as the promotion of substantial justice. *Gannon v. State Corporation Commission*, supra 482, 447. Using these well-recognized standards, the circuit judge exercised his discretion to deny the writ because Cartwright had an adequate remedy at law to have applicability of the work product doctrine determined in the pending condemnation case. Given the facts that were present in this case, there was no urgency for issuance of the writ, the interests of the public were not harmed by denial of the writ, and substantial justice was done because petitioner had another avenue available to pursue his claim that the sales brochure was not exempt from disclosure because it was protected by the work product doctrine. Clearly, therefore, the circuit judge did not err in exercising his considerable discretion to deny mandamus relief because Cartwright had another adequate remedy at law.

II. Circuit Court's Denial of Mandamus Did Not Treat Cartwright Unfairly

Relying on *Nix v. U.S.*, 572 F.2d 998 (4th Cir. 1978) and *Hawkes v. Internal Revenue Service*, 467 F.2d 787 (6th Cir. 1972) Cartwright asserts the circuit court erred in denying him mandamus relief because other courts have held that a person's ability to obtain a document under FOIA should not be enhanced or diminished because of his or her status as a litigant in a separate proceeding. The federal statute under which these cases were decided, however, did not authorize a court to grant mandamus relief; it only authorized a court to grant injunctive relief for a FOIA violation. *Nix v. U.S.*, id. 1001 footnote 2; *Hawkes v. Internal Revenue Service*, id. 791-792. Moreover, the Fourth Circuit noted that FOIA's purpose is to inform the public about action of government agencies rather than to supplement the rules of civil discovery and that a court retains discretion to balance the public and private interests involved in determining whether FOIA exemptions apply. *Nix v. U.S.*, id. 1002-1003. *Hawkes* likewise is inapplicable because *Hawkes* had pled guilty and no longer had a proceeding in which to gain discovery of the requested documents and because the Sixth Circuit expressly retrained from ruling that Congress did not intend to require exhaustion of the criminal discovery

process as a prerequisite to disclosure by a grant of injunctive relief to a FOIA applicant. *Hawkes v. Internal Revenue Service*, supra 793.

Cartwright argues that *Nix* and *Hawkes* show that the circuit court treated him unfairly and differently from other FOIA applicants seeking the sales brochure because the judge considered his status as a litigant in another case. In making this argument, Cartwright compares himself to hypothetical FOIA applicants and attempts to obfuscate the circumstances that actually constituted the basis for the circuit judge's exercise of discretion to deny mandamus relief. Further, Cartwright's argument incorrectly assumes that other FOIA applicants would have been furnished the sales brochure and that he was denied the brochure only because he was the subject of a condemnation suit. The record not only does not support that assumption, but counsel for VDOT took issue with that assumption and advised the circuit court that to his knowledge VDOT routinely objects to disclosure of the sales brochure on the basis of the work product doctrine. Tr. 23-24. Cartwright's argument also ignores the underlying facts that actually existed when the circuit judge exercised his discretion to refuse the requested extraordinary mandamus relief. Cartwright had filed a request for production of the sales brochure in the pending condemnation case. When VDOT objected to production because the sales brochure was protected by the work product doctrine, Cartwright consciously chose not to try to obtain a ruling on the work product doctrine's applicability in the condemnation case. Instead, he chose to file a FOIA request and contest the applicability of the work product doctrine through a petition for a writ of mandamus. Because this issue could be resolved in the pending condemnation case, the circuit judge found that Cartwright had an adequate remedy at law and denied mandamus relief. This ruling was not an abuse of the judge's substantial discretion and did not treat Cartwright unfairly as compared to other FOIA applicants. The judge's ruling did not have the effect of causing Cartwright to forfeit his FOIA rights when the condemnation certificate was filed to take part of his property, it merely reflected the facts that existed in this particular case at the time Cartwright sought extraordinary relief by filing a petition for a writ of mandamus. As noted in the previous argument, the judge's ruling was in accord with the principles consistently enunciated by this Court for the issuance of mandamus relief and his exercise of discretion should not be reversed.

CONCLUSION

VDOT respectfully submits that the Petition for Appeal should be denied because the circuit court did not abuse its discretion in ruling that Cartwright should be denied mandamus relief because he had an adequate remedy at law to pursue his claim that the sales brochure for the Route 17 project was not protected from disclosure by the work product doctrine.

COMMONWEALTH TRANSPORTATION COMMISSIONER OF VIRGINIA
s/ by Todd E. LePage, counsel

Jerry W. Kilgore

Attorney General

Richard L. Walton Jr.
Todd E. LePage VSB #16329
Senior Assistant Attorneys General

Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-7774 (phone)
(804) 786-9136 (facsimile)

Matthey D. Pethybridge, Esquire

Carr & Porter LLC
355 Crawford Parkway, Suite 520
Portsmouth, Virginia 23704
(757) 393-6018 (phone)
(757) 393-0854 (facsimile)

Counsel for Commonwealth Transportation Commissioner of Virginia