

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 4th day of May, 2017.

Donald Lee Moore, et al., Appellants,

against Record No. 160585
Circuit Court Nos. CL14-5428 and CL15-609

Douglas W. Fuller, Trustee, et al., Appellees.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Virginia Beach.

This appeal arises from a judgment of the Circuit Court of the City of Virginia Beach that enforced a settlement agreement resolving a family dispute over two inconsistent trusts created by Frances Moore. The order also made express factual findings about representations made by appellants, Donald Lee Moore, Jeffrey T. Talbert, and Robert E. Ruloff, during the mediation that led to the settlement agreement.

I.

Robert and Donald Moore are the two sons of Frances Moore.¹ In 2012, Frances created two trusts for her assets, a September 2012 trust naming Robert as trustee and a December 2012 trust naming Donald, along with licensed Virginia attorneys, Robert Ruloff and Jeffrey Talbert, as co-trustees. Robert later named Douglas Fuller as co-trustee of the September 2012 trust that he controlled. Fuller initially filed in the circuit court a “Bill for Aid and Guidance,” which was subsequently amended with leave of court. This pleading requested “aid and guidance” on whether assets originally placed in the September 2012 trust remained assets of that trust after the creation of the December 2012 trust. J.A. at 5. Donald instituted a separate action by filing a petition seeking the appointment of a guardian and conservator for Frances, which sought to have Robert removed as Frances’s agent under an existing power of attorney and to have Ruloff

¹ For the sake of convenience, we refer to Frances, Robert, and Donald Moore by their first names.

appointed as her guardian and conservator. Both of these actions were consolidated by the circuit court, and after several months of litigation, the parties submitted to mediation to resolve the dispute.

The mediation resulted in a settlement agreement that, among other things, awarded Robert an interest in a piece of property, which is referred to as “the Edinburgh property.” *Id.* at 15. The settlement agreement also required all parties to execute “full and complete releases” of “any and all claims” against the other parties. *Id.* Two weeks after the mediation, appellants filed a complaint in a separate action to enforce the settlement agreement, and shortly thereafter in the existing consolidated case, Fuller filed a motion to enforce the settlement agreement. In Fuller’s brief in support of his motion to enforce the agreement, he asserted a fraud claim, arguing that appellants had misrepresented to Robert the value of the Edinburgh property as \$1.6 million and had provided false financial documentation listing the property as an asset of the December 2012 trust. Fuller did not seek rescission of the settlement agreement, but instead, he affirmed it and requested that the court find that appellants had committed fraud against Robert and order appellants to either convey the Edinburgh property to Robert or pay Robert the \$1.6 million that they had represented as the value of the property. Based upon his fraud allegation, Fuller also sought an award of \$350,000 in punitive damages, \$3,300 in mediation fees, and attorney fees.

The court convened an evidentiary hearing to resolve the issues regarding the enforcement of the settlement agreement a few weeks after Fuller filed his motion to enforce it. After receiving testimony and evidence at the hearing, the court entered a final order on January 20, 2016, ordering the enforcement of the settlement agreement, as both parties had requested. The order also made express factual findings that appellants had “committed actual fraud against Robert” by misrepresenting the value of the Edinburgh property interest, which the court found to be worthless and non-existent. *Id.* at 469. The court also found that Robert had “justifiably relied on the[se] material false representations.” *Id.* at 470.

In February 2016, the court issued a rule to show cause for appellants to demonstrate why they should not be held in contempt for failing to comply with the court’s order to enforce the settlement agreement. At a telephonic hearing, appellants maintained that they would comply with the order only after Fuller and Robert executed full releases of their claims against

appellants as provided in the settlement agreement. Fuller argued that the order should have expressly excluded the fraud claim from the release provision of the settlement agreement. The court then entered an order that amended the final order by excepting from the settlement agreement's release provision any claim that Robert may have against appellants as a result of "(1) the actual fraud they committed in procuring the Settlement Agreement, and (2) their failure to convey title, not a quit claim, to the Edinburgh property." *Id.* at 481. The court entered this order on February 24, 2016 — 35 days after the January 20, 2016 final order. The court stated that this amendment corrected "a scrivener's error" and "that equity require[d] such a correction to the Order." *Id.* at 480-81.²

The appellants filed this appeal challenging various aspects of the circuit court's January 20, 2016 order, which contained the findings of fraud, and its subsequent February 24, 2016 order, which amended the prior order to fix the purported scrivener's error. We find it necessary to address only two of these challenges.³

II.

A. THE FACTUAL FINDINGS OF FRAUD & JUSTIFIABLE RELIANCE IN THE JANUARY 20, 2016 ORDER

We first address appellants' challenge to the circuit court's factual findings of fraud and justifiable reliance, as this challenge is a threshold question for several of appellants' other assignments of error. In its January 20, 2016 order, the circuit court expressly found that appellants had "committed actual fraud against Robert" by making false representations to him about the value of the Edinburgh property interest and that Robert had "justifiably relied on the[se] material false representations." *Id.* at 469-70.

The court made these fraud findings, comprising two paragraphs of the order, in response to Fuller's attempt to plead a fraud claim in his brief filed in support of his motion to enforce the settlement agreement, which the motion merely referenced. The brief also requested certain

² The February 24, 2016 order also included a paragraph that enforced the settlement agreement by directing appellants to pay Robert \$400,000, to convey title to another piece of property, which is referred to as the "Elbow Road" property, and to "execute a mutual release consistent with the terms of this order." J.A. at 481.

³ *See infra* note 8.

relief for appellants' alleged fraud, including specific performance, compensatory damages of \$1.6 million, \$350,000 in punitive damages, \$3,300 in mediation fees, and attorney fees.⁴ Appellants contend that Fuller's fraud claim and requested relief were not properly pleaded, and therefore, the circuit court could not make any findings concerning fraud or grant any of the relief requested. We agree.

Proper pleading "is the *sine qua non* of every judgment or decree. 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 claimed." *Potts v. Mathieson Alkali Works*, 165 Va. 196, 207, 181 S.E. 521, 525 (1935). As we have often said, "[p]leadings are as essential as proof." *Ted Lansing Supply Co. v. Royal Aluminum & Constr. Corp.*, 221 Va. 1139, 1141, 277 S.E.2d 228, 229 (1981) (citation omitted). See generally Kent Sinclair & Leigh B. Middleditch, Jr., Virginia Civil Procedure § 8.1[A], at 695 (6th ed. 2014). Not just any pleading will do; it must be a "valid pleading." *Harrell v. Harrell*, 272 Va. 652, 657-58, 636 S.E.2d 391, 394-95 (2006) (emphasis added). After a pleading has been filed, it may only be amended by leave of court and within any applicable time frame after leave to amend has been granted. See Rule 1:8. "An amendment made without leave of court has no legal efficacy, and the court does not have [active] jurisdiction to adjudicate any causes of action alleged in the amended [pleading]." 1 Charles E. Friend & Kent Sinclair, *Friend's Virginia Pleading and Practice* § 6.07[1], at 6-15 (2d ed. 2007).

At the evidentiary hearing on Fuller's motion to enforce the settlement agreement, the circuit court stated that it had no authority to grant the relief requested by Fuller on the fraud claim. After receiving evidence and oral argument, the circuit court concluded: "[T]his case before me is simply a case in which a court of equity is being asked to give aid and guidance in determining which of these trusts predominates That's all that was prayed for. That's all that was pled by either party." J.A. at 410. The circuit court further observed that "[t]otally different relief [was] being asked" for in Fuller's brief in support of the motion to enforce the settlement agreement and emphasized that courts do not "have the authority to give relief that wasn't prayed for." *Id.* at 411.

⁴ Fuller ultimately waived his request for \$350,000 in punitive damages. J.A. at 420.

On appeal, Fuller concedes that the circuit court’s refusal to *grant relief* on the fraud claim was “in strict accord with the principles found in [*Ted Lansing Supply Co.*],” Appellees’ Br. at 20, but he claims that the court had the authority to *adjudicate* (without granting relief) the fraud claim. We find this distinction illusory in this context.

In the consolidated proceeding, Fuller’s initial affirmative pleading was a Bill for Aid and Guidance, which he properly amended once with leave of court. Fuller never requested leave to amend this pleading *after* the facts allegedly supporting the fraud claim arose as a result of the mediation. Instead, Fuller filed a motion to enforce the settlement agreement, which referenced a brief that attempted to plead the fraud claim for the first time.⁵ A brief, however, is not a pleading. *See* Rule 3:18(a) (defining pleadings as “[a]ll motions in writing, including a motion for a bill of particulars and a motion to dismiss”). And even if the brief could be considered part of the motion to enforce the settlement agreement by reference, Fuller did not seek leave for this motion to serve as an amendment to his initial pleading, the Bill for Aid and Guidance. Just as a court cannot consider an amended complaint filed without leave of court, it cannot consider a lesser pleading, such as the motion filed in this case, as an amendment to the initial affirmative pleading without leave of court. *See Harrell*, 272 Va. at 657, 636 S.E.2d at 394-95 (dismissing an amended bill of complaint for failure to obtain leave to amend pursuant to Rule 1:8).

Even though Fuller never properly pleaded fraud, he contends that the circuit court’s fraud findings are nevertheless justified. This is true, he reasons, because adjudication of the fraud allegation was an “essential” factual predicate to the court’s denial of Fuller’s request for specific performance. Appellees’ Br. at 20. We disagree with this reasoning.

As Fuller recognizes in his brief on appeal, the “trial court reasoned that it did not have the authority to grant this relief” because, he concedes, “it was beyond the scope of what was properly before the court and would require the court to re-write the Settlement Memorandum, something the trial court refused to do.” *Id.* at 19-20. Far from being essential to the court’s ruling, the unpleaded fraud allegation was irrelevant to the court’s stated rationale. The only

⁵ When a party asserts fraud, “the *pleading* must show *specifically* in what the fraud consists, . . . and since fraud must be clearly proved it must be distinctly stated.” *Mortarino v. Consultant Eng’g Servs.*, 251 Va. 289, 295, 467 S.E.2d 778, 782 (1996) (emphases added) (alterations and citation omitted).

essential issue was whether the court could order specific performance — enforcing the agreement by requiring a conveyance of property — against a party that did not own the property. A collateral issue was whether the court could rewrite the settlement agreement to require a party to first purchase the property prior to being ordered to convey it. The court ruled against Fuller on both issues.⁶ It did not matter, for the purpose of answering either question, whether the putative owner misrepresented an ownership interest or the value of the property. For these reasons, the circuit court erred in making factual findings concerning an unpleaded fraud claim.⁷ We thus vacate the two paragraphs containing factual findings of fraud and justifiable reliance in the circuit court’s January 20, 2016 order.⁸

⁶ No objection to these holdings was made at the evidentiary hearing, and no assignment of cross-error was assigned to either holding on appeal. Thus, they are now the law of the case and may not be addressed further. *See Kondaurov v. Kerdasha*, 271 Va. 646, 658, 629 S.E.2d 181, 188 (2006) (“Under the law of the case doctrine, a legal decision made at one stage of the litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time.” (alterations and citation omitted)). Therefore, the remedy of specific performance based on fraud is now unavailable as Fuller has waived any right to challenge the court’s refusal to grant specific performance. As for the monetary relief Fuller requests in support of his fraud claim, neither party raises on appeal the effect, if any, of *res judicata* on a subsequent action brought on a properly pleaded fraud claim. *See generally Funny Guy, LLC v. Lecego, LLC*, ___ Va. ___, ___ n.19, 795 S.E.2d 887, 897 n.19 (2017). We offer no opinion on this issue.

⁷ Because “[a]ll parties stipulated that the Settlement Memorandum was enforceable” and requested that the circuit court enforce it, J.A. at 468, we will not disturb the circuit court’s holding to enforce the settlement agreement in the January 20, 2016 order.

⁸ Relying on *Metrocall of Delaware, Inc. v. Continental Cellular Corp.*, 246 Va. 365, 437 S.E.2d 189 (1993), and *Murayama 1997 Trust v. NISC Holdings, LLC*, 284 Va. 234, 727 S.E.2d 80 (2012), appellants also challenge the circuit court’s finding that Robert justifiably relied on material false representations during the settlement negotiations. Because this order vacates the court’s findings of fraud and, by extension, justifiable reliance, we need not address that portion of Assignment of Error 1. Assignments of Error 2, 3(b), and 4 further challenge the admissibility of statements made during the mediation, the absence of due process in an evidentiary hearing on the fraud claim conducted after only a two-week notice, and Fuller’s standing to assert a fraud claim on Robert’s behalf. These assignments of error are moot because this order vacates the circuit court’s factual findings of fraud and justifiable reliance, and we need not address them.

B. THE FEBRUARY 24, 2016 ORDER'S AMENDMENTS
TO THE JANUARY 20, 2016 ORDER

Appellants also challenge the circuit court's February 24, 2016 order, which purported to correct "a scrivener's error" in the January 20, 2016 final order by adding additional language to the circuit court's holding that the settlement agreement be enforced. J.A. at 480. This additional language excepted from the settlement agreement's release provision any claim that Robert may have against appellants as a result of "(1) the actual fraud they committed in procuring the Settlement Agreement, and (2) their failure to convey title, not a quit claim, to the Edinburgh property" interest awarded to Robert in the settlement agreement. *Id.* at 481. Appellants contend that certain provisions of the February 24, 2016 order violate Rule 1:1 because the court entered that order more than 21 days after the January 20, 2016 final order and because the changes made to the final order were substantive and not mere corrections of clerical mistakes as permitted by Code § 8.01-428(B). We agree.

"All final judgments, orders, and decrees . . . shall remain under the control of the circuit court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer." Rule 1:1. Code § 8.01-428(B) runs parallel with Rule 1:1 and permits a circuit court, at any time, to correct "[c]lerical mistakes in all judgments . . . arising from oversight or from an inadvertent omission." But this "power to amend should not be confounded with the power to create," and amendments made pursuant to Code § 8.01-428(B) "should not be made to supply an error of the court or to show what the court should have done as distinguished from what actually occurred." *Council v. Commonwealth*, 198 Va. 288, 292, 94 S.E.2d 245, 248 (1956). Rather, the court's authority "extends no further than the power to make the record entry speak the truth." *Id.*; *see also Davis v. Mullins*, 251 Va. 141, 149, 466 S.E.2d 90, 94 (1996) (acknowledging that "the statutory power granted by Code § 8.01-428 is to be narrowly construed and applied").

The circuit court erred in entering the February 24, 2016 order. Because the court had no authority to make factual findings of fraud in the January 20, 2016 order, it likewise had no authority in its February 24, 2016 order to rule that those fraud findings survived the waiver provision in the settlement agreement or that the alleged fraud consisted, in part, of appellants' "failure to convey title, not a quit claim, to the Edinburgh property." J.A. at 481. The February

24, 2016 order thus fails for the same reason that the January 20, 2016 order fails: They both adjudicate a fraud claim that was not properly pleaded. The record also confirms that the circuit court entered the February 24, 2016 order outside the court's 21-day window of active jurisdiction even though the amendments did not correct scrivener's errors, technical clerical errors, mere oversights, or inadvertent omissions as Code § 8.01-428(B) contemplates. Rather, the amendments included substantive revisions of the final order and were made more than 21 days after its entry in violation of Rule 1:1. We thus vacate the February 24, 2016 order.

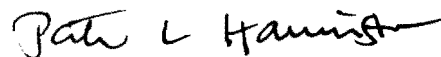
III.

In sum, we vacate the two paragraphs containing factual findings of fraud and justifiable reliance and the dismissal of the cases in the circuit court's January 20, 2016 order. We also vacate in its entirety the February 24, 2016 order and remand this case for further proceedings.⁹

This order shall be certified to the Circuit Court of the City of Virginia Beach.

A Copy,

Teste:



Clerk

⁹ Appellants request that we enter final judgment on appeal, "direct[ing] the parties to carry out the settlement memorandum as it is written, including full releases by all parties of any and all claims they have against each other and delivery of a quitclaim deed to the Edinburgh property, thus bringing this litigation to an end." Appellants' Br. at 27. We decline the invitation to do so, however, because that would require us to offer advisory opinions on matters not ripe for appellate resolution. We will instead rely upon the circuit court to address these residual issues on remand and to determine the most prudent process of bringing this case to closure. The court's authority includes the power to stay entry of its final judgment on remand based on the pendency of collateral litigation, if any, involving the previously unpleaded fraud allegations.