In the

Supreme Court of Virginia

At Richmond

Record No. 082387

MARY VILLON DE BENVENISTE,

Appellant,

– v. –

AARON W. CHRISTENSEN FAMILY, LP, et al.,

Appellees.

OPENING BRIEF OF APPELLANT

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I. NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

A. Nature of the Case

This appeal arises from a partition action in the Circuit Court for the County of Loudoun ("Trial Court"). The parties before the Court are four siblings (and their children) who, sadly, were unable to agree upon what to do with Mountain Gap Farm, a 350-acre family farm in Loudoun County they inherited from their parents. Appellant Mary Villon de Benveniste ("Mary") always wanted to have her one-quarter interest in the family farm conveyed to her in kind. The Appellees are Mary's three siblings and their children (collectively, "the Christensens"). The Christensens wanted to develop the entire family farm into a 68-lot subdivision.

After a 3 day trial, the Honorable Burke F. McCahill entered orders, inter alia, (1) denying Mary's request for partition of the family farm on the grounds that the 350-acre family farm could not be conveniently partitioned in-kind, (2) granting the Christensens' request that the family farm be sold at a judicial sale, and (3) entering judgment against Mary in the amount of $147,277.72. The $147,277.72 represents Mary's "share" of the costs incurred by her siblings in obtaining a preliminary subdivision plan, which was done without Mary's consent and over her strong objection.

B. Material Proceedings Below

Mary and her three siblings – Carol Bartholomew ("Carol"), Judith Pohlman ("Judith"),[1] and John Christensen ("John") – are the four children of Dr. Aaron W. Christensen and his wife, Gertrude M. Christensen.

On March 5, 2007, the Christensens filed a two count Complaint against Mary. Count I was titled "Request that The Court Issue an Order that the Shares be Laid Off Pursuant to § 8.01-81 or be Allotted Pursuant to § 8.01-83," and "Alternative Count I" for partition. (R. at 5, 7) On March 30, 2007, Mary answered the Complaint and asserted a Counterclaim for partition. (R. at 24-33)

On March 10, 2008, the Christensens filed a First Amended Complaint that included five counts: Count I "Partnership Affirmation Through Declaratory Judgment," Count II "Winding Up of the Partnership if it Dissolved or was Terminated," Count III "Request that The Court Issue an Order that the Shares be Laid Off Pursuant to § 8.01-81 or be Allotted Pursuant to § 8.01-83," Count IV "Request that the Court Issue an Order that the Property be Sold," and Count V "Partition." (Joint Appendix ("J.A.") at 1-16)

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[1] Judith is not a named plaintiff in this action because she previously transferred her interest in the family farm to a limited liability company, Appellee Pohlman Family, LLC.

On March 11, 2008, Mary answered the First Amended Complaint and asserted a three count Amended Counterclaim seeking a judicial dissolution of the family partnership and a winding up of its affairs, partition, and an accounting under Code of Virginia section 8.01-31. (J.A. at 51-66)

Beginning on March 18, 2008, the Trial Court heard evidence from the parties over the course of three days. The parties presented closing arguments to the Trial Court on April 2, 2008, and the Trial Court issued an oral ruling from the bench on April 16, 2008, inter alia, denying Mary's request for partition, granting the Christensens' request that the family farm be allotted to them or, alternatively, judicially sold, and awarding the Christensens a judgment in the amount of $147,277.72, which represents Mary's "share" of the costs incurred by the Christensens to "improve" the family farm by obtaining a preliminary subdivision plan for the land. (J.A. at 945-51, 1026)

On May 6, 2008, the Christensens filed a "Praecipe and Notice of Election" with the Trial Court in which they rejected the Trial Court's award of allotment "due to continued deterioration in the relevant real estate market." (J.A. at 996-97) The next day, the Christensens asked the Trial Court to order Mary to sign a construction plan and profile, or "CPAP," which the Christensens contended was an essential document required to

advance the preliminary subdivision plan to record plat. Specifically, the Christensens stated, "in light of the Court's order that the property is valuable as a result of the development, coupled with the undisputed fact that the development will fail if the CPAP is not signed by July of 2008, the court should order the Defendant to sign the CPAP to allow Plaintiffs to continue the subdivision process pending sale of the property to preserve the value of the property and the application for all parties." (J.A. at 998)

On May 23, 2008, Mary filed a motion to reconsider. (J.A. 1020.1-1020.16) In this motion Mary asked, inter alia, that the Trial Court reconsider its ruling that Mary should have to pay her "share" of the development costs because, the Christensens revelation about the July 2008 deadline to execute the CPAP combined with Mary's longstanding and consistent position that she would not consent to the filing of any paperwork necessary to advance the preliminary subdivision plan to record plat, confirmed that the Christensens' "improvements" were not permanent. (J.A. at 1020.6)

On June 4, 2008, the Trial Court denied Mary's motion to reconsider and entered an interlocutory order reflecting the Trial Court's rulings at the completion of trial. (J.A. at 1025-31) The action remained before the Trial Court for the purpose of completing a judicial sale of the family farm.

On September 5, 2008, the Court entered a second order with respect to the June 4, 2008 monetary award against Mary, recasting it specifically as a judgment. (J.A. at 1032-34)

Thereafter, the family farm was sold through a court-approved sale. The proceeds of the sale were distributed as directed by the Trial Court. On November 7, 2008, the Honorable Burke F. McCahill entered a final order in the case. (J.A. at 1035-39) That same day, Mary filed her Notice of Appeal.

On December 5, 2008, Mary filed a Petition for Appeal. On March 3, 2009, this Court awarded Mary an appeal from the judgment of the Circuit Court of Loudoun County. The two Assignments of Error, as detailed below, relate to the Trial Court's rulings that (1) Mary was responsible for her "share" of the costs for the non-permanent improvements to the property and (2) that the Christensen's claim for Mary's "share" of the costs was not barred by the equitable doctrine of unclean hands.

II. STATEMENT OF FACTS

During their lives, Dr. and Mrs. Aaron W. Christensen maintained a 350-acre farm, called "Mountain Gap Farm," in Loudoun County ("the Property").

After the death of their father in 2003, a fundamental disagreement arose between Mary and her siblings over what to do with the Property. Mary, who has resided in Paris for most of her adult life, always wanted to divide the Property into four lots and to have one for herself. The other siblings initially considered a four lot division, but changed their minds, over Mary's strong objection, and decided to apply for subdivision approval. Carol, Judith, and John were motivated, at least in part, by the impending Loudoun County downzoning that was in the works in 2005 and 2006. In furtherance of their own desires, the Christensens applied for and pursued a preliminary subdivision plan, fully aware of Mary's dissent and, incredibly, without her permission or consent.

Title to the Property

While Dr. and Mrs. Christensen were both alive, they divided the ownership of the Property for estate planning reasons. Dr. Christensen had a 51.12017% undivided interest, and Mrs. Christensen had a 48.87983% undivided interest. Mrs. Christensen died in 1995, leaving her interest to a trust she had set up. Dr. Christensen transferred his interest to the Aaron W. Christensen Family Limited Partnership ("the Partnership") in 2000. Dr. Christensen was the sole general partner of the Partnership.

At the time of Dr. Christensen's death on September 19, 2003, the Property was titled 51.12017% in the Partnership and 48.87983% in the Gertrude M. Christensen Family Trust. The Gertrude M. Christensen Family Trust conveyed the Property to the Christensen's four children by deed dated January 28, 2005. Pursuant to that conveyance, Judith, Carol, John, and Mary each individually owned an undivided 12.2199575% interest in the Property (from their mother). (J.A. at 386-87) This ownership interest was in addition to the four children's ownership interests as limited partners in the Partnership (from their father). (Id.)

Administration of Dr. Christensen's Estate

The administration of Dr. Christensen's estate took place during the last quarter of 2003 and 2004. As the estate administration progressed, the family began to discuss how best to go about dividing the Property between the siblings. In November 2004, Mary expressed her preference for dividing the farm into four (4) pieces and her opposition to getting involved in real estate development. Mary expressed her view numerous times over the next few years, so that there was absolutely no doubt about her position on the subject. (J.A. at 375-85, 401-404, 412-13)

The Partnership

The Partnership was established by Dr. Christensen for estate planning purposes. (J.A. at 277-78) The Partnership held title to Dr. Christensen's portion of the Property during Dr. Christensen's life, and he made annual gifts of limited partnership interests to his children and grandchildren for the purpose of transferring his ownership to his descendants and avoiding estate taxes on the value of the Property. Dr. Christensen was the sole general partner of the Partnership. (J.A. at 5, 359)

The Partnership Agreement provides that the Partnership is dissolved upon the death of the general partner unless, within 6 months, the remaining limited partners vote to continue the Partnership and elect a general partner. (J.A. at 280-81, 355-73)

In late 2004, approximately a year after Dr. Christensen's death on September 19, 2003, Mary's siblings sought the advice of Daniel D. Smith, Esq., who had been their father's lawyer. (J.A. at 278-79) Mr. Smith organized a mail ballot that was sent to all the limited partners in February 2005, and that asked their vote in favor of, inter alia, waiving the six month deadline to continue the Partnership set forth in the Partnership Agreement, continuing the Partnership, and electing John W. Christensen

L.L.C. as general partner. (J.A. at 280-82, 389-94) The vote was not unanimous; Mary (and her children, who, at that time, were limited partners) did not vote to agree to revive the Partnership or to elect a new general partner. (J.A. at 287-89, 399) Therefore, the Partnership had no general partner, was dissolved, and was required to be wound up. (J.A. at 284, 291-92)

The Subdivision

In early 2005, Mary's siblings hired Randall J. Minchew, Esq. to advise them on how best to pursue a four lot division of the Property. (J.A. at 72-73, 123-25, 395-98) Around the same time, Mary's siblings hired Kevin Murray, an engineer, to prepare the four lot division. (J.A. at 125, 127-28) By April 19, 2005, all of the siblings were in agreement that the Property should be divided into four lots. (J.A. at 130) As the year went on, however, John discovered that additional drain fields were on the Property and a difference of opinion began to emerge. (J.A. at 131) Mary's siblings became convinced that, in light of the anticipated downzoning, they should try to get a preliminary subdivision plan in place to vest their right to develop the Property under the existing zoning before it was changed. (Id.) Mary steadfastly remained opposed to the idea of subdivision and the concomitant costs entailed in the process. (J.A. at 134-

40) While Mr. Murray had developed a preliminary sketch of a four lot division, the Christensens had him abandon that effort and focus on a 68-lot subdivision proposal. (J.A. at 165, 234-35)

Over Mary's protests, the Christensens forged ahead and began to spend a prodigious amount of money on engineering and other related services, all aimed toward planning a large subdivision on Mountain Gap Farm. (J.A. at 91) Both Mr. Minchew and John told Mary that they were aware of her opposition to the manner in which her siblings were proceeding, but that they were going ahead nevertheless. (J.A. at 140, 405-07) Both indicated that after the plan was vested, they would address Mary's concerns somehow or other. (Id.)

As the application for preliminary subdivision approval progressed, every document that identified the Property owner stated, inaccurately, that the sole owner was the "A.W. Christensen Family LP." (J.A. at 148, 152-55, 409-11) This misleading failure to identify the individual owners, especially Mary, who objected and did not join in the application, was more than an oversight. (J.A. at 155-56) So, the dissolved Partnership, which only owned just over 50% of the Property, applied for approval of a preliminary subdivision plan without revealing that it owned only part of the Property and, nonetheless, certifying that the ownership information was

accurate. (J.A. at 152-55, 410-11) This is in addition to the fact that the land development application was signed only by John, who called himself "managing partner" even though, based on the results of the Partnership vote, the Christensens knew that the Partnership (1) was dissolved and had no business doing anything other than winding up its affairs, and (2) had no validly elected general partner.

Trial

There were numerous issues presented to the Trial Court, including whether the Partnership had been dissolved and if it was convenient to partition the Property. The facts relevant to this appeal, however, are those that relate to the development costs expended by the Christensens to obtain the preliminary subdivision plan and the corresponding holdings of the Trial Court.

The Christensens took the position at trial that Mary should pay her "share" of the development expenses incurred by her siblings in advancing the preliminary subdivision plan. These development expenses were made up of the costs to obtain the preliminary plat, including the costs of engineering, soil surveys, hydrogeology surveys, wetlands surveys, attorneys' fees, and the cost of obtaining the preliminary subdivision approval. (J.A. at 7, 91, 226-27)

At the end of the trial, among other findings, Judge McCahill held that the Property could not be partitioned in kind, awarded the Christensens their requested remedy of allotment, ordered that the Property otherwise be sold at a judicial sale, and awarded the Christensens a judgment against Mary in the amount of $147,277.72, which sum represented Mary's "share" of the development expenses incurred against her will by the Christensens. (J.A. at 1025-31)

Within weeks of obtaining the precise relief they had sought – and before an order could be entered that reflected the Trial Court's ruling – the Christensens advised the Court that they did not wish to pursue allotment. Specifically, the Christensens stated that, "due to continued deterioration in the relevant real estate market [they] have elected not to purchase [Mary's] interest in the subject property or partnership through the allotment price and process established by the Court." (J.A. at 996-97) Despite – and, perhaps more accurately, because of – the "continued deterioration in the relevant real estate market," the Christensens then sought to purchase the Property at a distress sale through public auction, with the expectation that the first almost $650,000 would go to them as a credit to recoup the costs expended to "improve" the Property. (J.A. at 996-97, 1004)

The Christensens' bid was not successful, and the Property was sold to a third-party. (R. at 651-67) A final order approving the sale and directing the distribution of the proceeds was entered on November 7, 2008. (J.A. at 1035-39)

As of the date the final order was entered, the Christensens never introduced any evidence demonstrating that the preliminary subdivision plan had become permanent, the failure of which rendered all of their "improvements" for naught. Throughout trial the Christensens advised the Trial Court that, if Mary did not agree to the continued pursuit of the final subdivision plan, the record plat would not be obtained. (J.A. at 70, 80, 223, 227, 969) They specifically represented that if the required paperwork to complete the zoning modification was not completed by December 5, 2008, the preliminary plan would expire and never become permanent. (Id.)

On May 7, 2008, just after trial but before the interlocutory order had been entered reflecting the Trial Court's rulings, the Christensens asked the Trial Court to order Mary to sign a construction plan and profile, or "CPAP," which the Christensens contended was an essential document required to advance the preliminary subdivision plan to record plat. (J.A. at 998) Specifically, the Christensens stated that "the development will fail if

the CPAP is not signed by July of 2008." (Id.) In response, Mary maintained her longstanding and consistent position that she would not consent to the filing of any paperwork necessary to advance the preliminary subdivision plan to record plat. (J.A. at 1020.6) Therefore, from the last day of trial to today, the Property retains its original character as an undivided 350-acre tract of land know as Mountain Gap Farm, which is still zoned AR-1. (J.A. at 963)

III. ASSIGNMENTS OF ERROR

1. The Trial Court erred in charging a portion of the cost of the subdivision process for the Property to Mary because the "improvements" are not permanent. (AE 1)

2. The Trial Court erred in requiring Mary to pay a pro rata share of the subdivision costs because the Appellees do not have clean hands. (AE 2)

IV. QUESTIONS PRESENTED

1. In a partition action, should a co-owner be charged with a share of the costs incurred by other co-owners for improvements that do not permanently change the characteristics of the property? (Assignment of Error 1)

2. In a partition action, should a co-owner be charged with a share of the cost of improvements incurred by other co-owners who expended these costs with prior knowledge that another co-owner was opposed to them and when the improvements were obtained based on knowingly false statements? (Assignment of Error 2)

V. ARGUMENT

A. The Cost of the Subdivision Process Should Not be Charged to Mary

The Trial Court held that Mary, as a co-tenant of the Property and not as a partner in the Partnership, was required to pay her proportionate share of the costs incurred by the Christensens in obtaining a preliminary subdivision plan for the Property. (J.A. at 991-92) This ruling was in error because the "improvements" claimed by the Christensens are not permanent and it is inequitable to require Mary to pay for "improvements" that she did not authorize, that she actively opposed, and that were obtained by an inaccurate land use application.

1. Standard for Imposing Costs on a Co-Tenant

In a long line of cases, the Supreme Court of Virginia has discussed the reasons for assigning costs of improving property among co-tenants, even if the costs are incurred against the wishes of a co-tenant. See Butler v. Hayes, 254 Va. 38, 487 S.E.2d 229 (1997); Jones v. Jones, 214 Va. 452,

201 S.E.2d 603 (1974); Shotwell v. Shotwell, 202 Va. 613, 119 S.E.2d 251 (1961); Dalgarno v. Baum, 182 Va. 806, 30 S.E.2d 559 (1944); Roark v. Shelton, 169 Va. 542, 194 S.E. 681 (1938); Ballou v. Ballou, 94 Va. 350, 26 S.E. 840 (1897). In these cases, the Court has formulated the following rule:

> Generally, a joint tenant who at his own expense has constructed permanent improvements on property owned in common is entitled in a partition suit to compensation for the improvements, even in the absence of a showing that his cotenant assented thereto. The rule is founded on the desire of the court to do justice and to prevent unjust enrichment of one cotenant at the expense of the other.

Jones, 214 Va. at 454-55, 201 S.E.2d at 605 (emphasis added) (citing Shotwell, 202 Va. at 618, 119 S.E.2d at 255; Dalgarno, 182 Va. at 808, 30 S.E.2d at 560; Ballou, 94 Va. at 352, 26 S.E. at 840).

For the reasons outlined below, this Court should reverse the Trial Court's decision awarding the Christensens a judgment equal to Mary's share of the costs incurred in the subdivision process.

2. The Christensens' "Improvements" are not Permanent

As stated in the rule quoted above, the first requirement for a co-tenant to recover for improvements made to property is that the improvements be permanent. In this case, while the Christensens have incurred expenses totaling approximately $650,000 in the course of

obtaining a preliminary subdivision plan, there is no dispute that the Christensens have not improved the Property in any permanent way. To the contrary, the "improvements" made by the Christensens amount to such things as engineering drawings, boundary surveys, an archeological survey, a hydrogeology survey, and a wetlands survey. (J.A. at 91) Indeed, there was ample testimony at trial about the steps that still need to be accomplished to convert the preliminary subdivision plan to a permanent subdivision plat. (J.A. at 79-80, 226-27, 246-47) The Christensens estimated that the additional work would cost an additional $250,000 to $270,000 and that, if this work was not completed by December 1, 2008, the preliminary plan would expire and could not become permanent. (J.A. at 70, 80, 223, 227, 969)

In its ruling, the Trial Court repeatedly recognized the preliminary, non-permanent status of the Property. (J.A. at 949 (the Christensens "hired counsel, an engineering firm and expended significant sums of money to obtain a 'preliminary plat' as a part of the subdivision process."); 950 (the Christensens "have to finalize [the preliminary plat] by filing what is known as a Record Plat. Again, counsel is familiar with the two step process in terms of obtaining a preliminary plat which has been obtained, and the Record Plat. And that must be submitted by approximately

December 5, 2008 in order to accomplish the Record Plat."); 982 ("All of the testimony and a lot of the decisions the Court made is based upon the existence of this preliminary plat, because that is indeed the legal status of this property right now.") (Emphasis added))

The temporary and tenuous nature of the "improvements" is highlighted by the Christensens' revelation – which was made after the trial and for the first time – that "the development will fail if the [construction plan and profile ("CPAP")] is not signed by July of 2008." (J.A. at 998) Mary consistently maintained the position that she would not consent to the filing of any paperwork necessary to advance the preliminary subdivision plan to record plat, and she refused to execute the CPAP. (J.A. at 1020.6) Without her endorsement as a fee simple owner of an undivided interest in the Property, the preliminary plat could never have become final. By its very nature, a preliminary subdivision plat cannot be considered permanent.

The logic of a rule requiring compensable improvements to be permanent is sound. As outlined in Jones, the rule is an equitable one. Its purpose is to assure that a co-tenant is not unjustly enriched by permanent improvements that add value to property. The converse of this, however, must also be true: it would be inequitable to charge a co-tenant for

temporary, possible, or prospective improvements that may or may not have an impact on the value of property. Such is the case here. Because there is no evidence in the record that the subdivision advanced by the Christensens was taken to record plat, there is no evidence that the Property was ever changed in a permanent way. As noted by the Trial Court, to this day the Property retains its character as an undivided 350-acre tract of land know as Mountain Gap Farm, which is zoned AR-1. (J.A. at 963 ("Currently, the property's eligible for AR-1 zoning which allows one lot per five acres.”))

Indeed, this Court's opinions that discuss assigning the costs of improvements in the context of a partition action involve permanent, physical structural improvements. For example, the improvements in Butler, Jones, Dalgarno, and Roark were houses. Butler, 254 Va. at 44, 487 S.E.2d at 232; Jones, 214 Va. at 453, 201 S.E.2d at 604; Dalgarno, 182 Va. at 807, 30 S.E.2d at 559; Roark, 169 Va. at 544, 194 S.E. at 682. The improvements in Shotwell were repairs to a house. Shotwell, 202 Va. at 615, 119 S.E.2d at 253. The improvements in Ballou are unspecified, except to say that the co-owners "occupied" them. Ballou, 94 Va. at 351, 26 S.E. 840. In this action, the Christensens' efforts are not only temporary, they did nothing to physically change the Property. Instead,

their “improvements” were limited to engineering drawings, boundary surveys, an archeological survey, a hydrogeology survey, and a wetlands survey. (J.A. at 91)

The Christensens instituted this action and they chose when to file it. If recovering the costs of the “improvements” were important to them, they should have waited until the preliminary subdivision plan advanced by them had become permanent. Of course, the Christensens could not wait for the “improvements” to become permanent because – while they had obtained the preliminary subdivision plan without the consent of Mary and by somewhat dubious means[2] – they had no reason to believe that Mary would ever agree to execute the final application required for the Property to go to record plat as a 68-lot subdivision. So, by filing a partition suit, the Christensens apparently hoped to divest Mary of her interest in the Property before the deadline to file for record plat. Having elected to

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[2] Pursuant to Va. Code § 15.2-2264, before recordation, subdivision plats require a certificate that states that “[t]he platting or dedication of the following described land . . . is with the free consent and in accordance with the desire of the undersigned owners, ...” Because the preliminary subdivision plat was approved by Loudoun County based on misrepresentations and without the consent and desire of all of the owners, the plat is, likely, void ab initio. See Segaloff v. City of Newport News, 209 Va. 259, 262, 163 S.E.2d 135, 137 (1968) (holding that an application for a building permit approved by the City violated the zoning ordinance and therefore was invalid).

proceed along that course, the Christensens failed at trial to establish that the "improvements" they had made to the Property were permanent. Because the Christensens' efforts to subdivide the Property failed to result in a "permanent improvement" to the Property, the Trial Court erred by awarding the Christensens an amount equal to Mary's proportionate share of the cost of her siblings' fruitless efforts.

B. The Christensens Are Not Entitled to the Equitable Remedy of an Allocation of Costs Because They Do Not Have Clean Hands

As noted in Jones, assessing a co-tenant a share of the value of improvements to real property is an equitable remedy to prevent unjust enrichment and to promote fairness. 214 Va. at 454-55, 201 S.E.2d at 605. In this case, it is unfair and inequitable to assess Mary any part of the cost of the preliminary subdivision plan when the Christensens obtained the plan by filing a misleading, inaccurate, and probably invalid application with Loudoun County. But, further, since an allocation of the cost of improvements is an equitable remedy, the Trial Court should not have allocated the costs of improvements to the Christensens because they do not have clean hands.

The Supreme Court of Virginia recently addressed this same concept in a case with facts remarkably similar to those in the case before this

Court, Butler v. Hayes, 254 Va. 38, 487 S.E.2d 229 (1997). The issue before the Court in Butler was whether or not, as part of a partition suit, co-tenants could recover an allowance for permanent improvements made to land when the permanent improvements were added with prior knowledge that the extent of their ownership claim was in question. The facts of the case follow.

Brown inherited a 1/8 interest in a piece of property through his family. However, he persuaded a notary to execute and notarize a false instrument of title purporting to grant Brown a larger interest in the property and then he sold his fraudulently increased interest in the property to the Butlers. When the other owners of the property found out about the sale, they informed the Butlers that Brown did not have the authority to transfer any interest in the property greater than his 1/8 interest. With knowledge of the dispute, the Butlers improved the property by erecting a modular home, more than tripling the value of the property. The other owners instituted a partition action, during the course of which the Butlers sought a credit for improving the property by building the modular home.

The trial court rejected the Butlers' request for a credit because they "had actual notice of an infirmity in their title, and they did not place the improvements on the property in good faith." Id. at 42, 487 S.E.2d at 231.

The Supreme Court affirmed the trial court's ruling relying on long standing equitable principles. Specifically, the Supreme Court held as follows:

> The allowance ordinarily given a cotenant for permanent improvements upon real estate that is ultimately partitioned is not a legal right. Rather, compensation of this kind is allowable to enable a court of equity to do justice and to prevent one tenant from becoming enriched at the expense of another. But, according to a settled maxim, a litigant who seeks to invoke an equitable remedy must have clean hands. The Butlers fall short of fulfilling this requirement.

Id., at 43, 487 S.E.2d at 232 (internal citations omitted) (emphasis added). This Court held that the Butlers did not come into court with clean hands because they ignored information relating to the scope of their title and because they improved land that had otherwise been left to the rest of the family to enjoy in its unimproved state. Id., at 44, 487 S.E.2d at 232.

As in Butler, the Court should reverse the equitable remedy awarded to the Christensens for the temporary "improvements" they made to the Property because the Christensens are not before the Court with clean hands. The Christensens acted with the knowledge that Mary was opposed to the subdivision plan. (J.A. at 134-40) They knew that approximately half of the Property was owned by the Partnership and half of the Property was owned by the four siblings. (J.A. at 115) They knew that all property owners did not endorse and join in the application for preliminary subdivision, only the dissolved partnership. (J.A. at 148, 152-

55) As the Trial Court noted in its ruling, before the application for the preliminary subdivision plan had been submitted, and long before expenses began to accrue for the subdivision process, the lawyer for the Partnership "specifically, advised John Christensen that he would be at substantial risk" if he acted in the name of the Partnership without unanimous consent. (J.A. at 293, 958, 961) The Trial Court also noted that the Christensens continued to proceed with the preliminary subdivision process even though "[t]here is no question . . . that [Mary] made known her opposition to the subdivision process." (J.A. at 961)

VI. CONCLUSION

Mary should not be taxed with the costs incurred by her siblings to pursue a subdivision that will never be built. The preliminary subdivision plat did not permanently change the Property, was opposed by Mary, and was obtained by knowingly false statements. Mary should not be charged with the cost of non-permanent improvements and the Christensen's claim for Mary's "share" of the costs should be barred by the equitable doctrine of unclean hands.

For the foregoing reasons, Mary Villon de Benveniste respectfully requests that this Court reverse the Trial Court's order requiring Mary to

pay $147,277.72 for improvements to the Property and grant any further and other relief the Court deems just and proper.

Respectfully submitted,

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By Counsel

Date: April 13, 2009

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CERTIFICATE OF COMPLIANCE WITH RULE 5:26(D)

I, John A. C. Keith, Counsel of Record for Appellant, hereby certify that on this 13th day of April 2009, fifteen (15) copies of this Opening Brief and Appendix have been hand delivered to the Office of the Clerk of the Supreme Court of Virginia and an electronic copy of this Opening Brief and Appendix have been filed electronically on CD. This same date, three copies of this Opening Brief and of the Joint Appendix have been mailed to counsel for the Appellees:

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