In the

Supreme Court of Virginia

At Richmond

Record No. 082387

MARY VILLON DE BENVENISTE,

Appellant,

– v. –

AARON CHRISTENSEN FAMILY, LP, POHLMAN FAMILY LLC, JOHN W. CHRISTENSEN, CAROL J. BARTHOLOMEW, ED BARTHOLOMEW, JOHN W. CHRISTENSEN, LLC, NATALIE CAPRANO, SHERRIE CHRISTENSEN, AARON CHRISTENSEN, and STEPHEN CHRISTENSEN,

Appellees.

BRIEF OF APPELLEES

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I. CORRECTED NATURE OF THE CASE

This was an action in the Loudoun County Circuit Court ("Trial Court") for allotment, sale in lieu of partition of certain real property, or – in the alternative – partition of the property known as Mountain Gap Farm in Loudoun County, Virginia (the "Farm") together with an allocation of the costs of improvements, payment of back taxes and other expenses incurred by the cotenants-in-common who are the Plaintiffs. The parties before the Court include the ten Plaintiffs/Appellees (the "Plaintiffs"), representing ownership of seventy-five percent of the Farm, and one Appellant, Defendant Mary Villon De Benveniste ("Defendant"), who has resided permanently in Paris, France since at least the 1980s. The Defendant failed to pay her share of taxes and operating expenses for the Farm, and she refused to contribute to any of the $650,000 in subdivision, engineering and development expenses which the Trial Court found added $4.1 million to, and accounted for 45 percent of, the value of the Farm.

At the conclusion of the bench trial, in an hour long bench ruling, the Honorable Burke F. McCahill carefully explained his ruling and the basis for each of his very specific findings of fact. This resulted in a

number of orders, including those granting Plaintiffs' request for allotment or sale in lieu of partition, denying the Defendant's cross-claim seeking partition, and entering judgment against Defendant in the amount of $147,277.72. In its bench ruling dated June 4, 2008, the Trial Court expressly rejected Defendant's motion to reconsider on virtually the same grounds asserted in this appeal.

Plaintiffs dispute Defendant's assertion that she "has always wanted to have her one quarter interest in the family farm conveyed to her in kind," as well as disputing her assertion that Plaintiffs improved the Farm over Defendant's "strong objection." (Appellant's Br. at 1). To the contrary, as discussed in more detail at pages five through seven below, Defendant vacillated and sent mixed signals about her desires. Sometimes she expressed appreciation and happiness about the progress of the development. Sometimes she tried to sell the entire Farm. At other times, she tried to sell her quarter of the Farm. And at still other times she stated that she wanted her quarter of the Farm in kind and was opposed to any development. The Trial Court thus correctly found that Plaintiffs believed that Defendant was equivocal and gave mixed signals about her desires for the Farm. (J.A. at 954, 989, 1023-24, 106-08).

The only consistent thing about Defendant's position was that she wanted to "have her cake and eat it too." That is, she refused to pay or commit to paying her share of the development expenses while, at the same time, she never sought at or before the time of trial to invalidate the preliminary subdivision plan about which she now complains so vociferously. (J.A. at 298-99).

II. CORRECTED STATEMENT OF FACTS

Plaintiffs invested approximately $650,000 in engineering, survey and development expenses and to obtain approval of a preliminary subdivision plan to preserve and enhance the value of the Farm and to avoid a threatened down-zoning and devaluation of the property. (J.A. at 949; J.A. at 91; J.A. at 615-16, 617, 618-33, 734-896). The Farm was worth only $4.8 million as one lot undeveloped without the approved preliminary subdivision plan, but its value was increased to $8.995 million developed with the preliminary subdivision plan in place. (J.A. at 978, 983, 991-92; J.A. at 427-538, 539-607). Thus, the preliminary subdivision plan accounted for approximately 45 percent of the Farm's value. Plaintiffs were awarded less than one-sixth of the $1,000,000 value added to Defendant's portion of the Farm, which was Defendant's $147,000 share of actual

engineering, survey, development and subdivision costs incurred by the time trial exhibits were finalized.

By September and October of 2008, the Farm had been sold, and there is no evidence of record that the preliminary plan had been invalidated due to alleged inability to take the Farm to record plat and obtain final subdivision approval by the December 2008 deadline, which was still two or three months away at time of sale. (Appellant's Pet. at 18; Appellant's Br. at 17; J.A. at 950). This December 2008 deadline for filing the application for final or record plat was the only deadline about which any evidence was offered at trial or admitted at any time. In fact, the Trial Court consistently and expressly rejected both sides' post-trial efforts to introduce into the record evidence or contentions about the preliminary plat's viability or lack of viability as time passed, ruling that "these are new facts that attorneys are trying to interject to the Court that really are not of record." (*See* Hr'g Tr. at 44, Sept. 5, 2008) (Attached as Addendum A).

Nevertheless, even in what the parties agree was a steadily declining real estate market (Appellant's Br. at 3, 12), the Farm sold in September 2008 (contract of sale) and October 2008 (closing) for $6 million, resulting in an available distribution to Defendant of $1.5 million less the $147,000 in

subdivision costs that have been put in escrow.[1] This $6 million sale price after six to seven months of steady, continued deterioration in the relevant real estate market was $1.2 million more than what the Trial Court had determined in March 2008 was the value of the Farm without Plaintiffs' improvements. (J.A. at 978, 983, 991-92; J.A. at 427-538, 539-607). Defendant thus benefitted in the amount of at least $300,000 (one quarter of the $1.2 million difference between $6 million and $4.8 million) from sale of the Farm after Plaintiffs' improvements. Thus, the preliminary subdivision plan was sufficiently permanent and valuable to the parties before the Court that Defendant derived benefit from it by more than twice the amount of the $147,277.72 that the Trial Court assessed against Defendant as her one-quarter share of subdivision expense improvements. Plaintiffs' improvements were sufficiently "permanent" to put an additional $300,000 in Defendant's pocket even though she admittedly was a "free rider" who refused to contribute to helping fund the development process that created this benefit. (Appellant's Br. at 1, 6, 7, 10).

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[1] (Hr'g Tr. at 5, 6, August 28, 2008, (Attached as Addendum B); J.A. at 1035-39).

Defendant seeks to interject into this appeal a contention that she repeatedly and expressly waived at trial; namely, that the preliminary subdivision plan is invalid or void. (*E.g.*, Appellant's Br. at fn. 2 and p. 21). However, the Trial Court repeatedly clarified on the record – with the express assent of Defendant through her counsel – that there was no challenge in this action by Defendant or anyone else to the validity of the preliminary subdivision plan or process, either in the pleadings or otherwise. (*E.g.*, J.A. at 951, 974, 982-83, 993-94) ("neither side is asking this Court for a declaration that the subdivision process is somehow void or voidable"). (*See also* J.A. at 1023-24) ("I was not being called upon to address this issue about the partnership using the subdivision process.").

There was no finding and no evidence that Plaintiffs acted fraudulently or in bad faith toward Defendant in the subdivision process or otherwise. Rather, the Trial Court found that Plaintiffs believed that Defendant was equivocal and sent mixed signals about her desires for the Farm, the subdivision process, and her periodic insistence that the Farm with eleven owners be partitioned in kind into four lots (despite the now uncontested infeasibility of partition in kind). (J.A. at 954, 989). Supporting Plaintiffs' reasonable belief that Defendant sent mixed signals about her

desires to partition the Farm in kind was the fact that Defendant tried to sell the Farm herself on some occasions, and on other occasions she tried to sell her share of it. (J.A. at 91-92, 109). Plaintiffs therefore took the initial risk of investing in the subdivision plan and were attempting to get Defendant to commit to and cooperate in their plan, rather than indulging Defendant's singular insistence an on infeasible partition in kind among eleven owners. (J.A. at 954; 107-08).

Defendant would equivocate as to her desires, so – as the Trial Court found – there were missed or mixed signals regarding her alleged opposition to the development plan. (J.A. at 954, 989,1023-24). This was supported by, among much other evidence, testimony from Plaintiff John Christensen that Defendant was very happy to learn that there were 71 drain fields on the Farm, she was very happy when she learned that the county had approved the subdivision plan, and she was kept fully informed about the status of Plaintiffs' efforts to obtain the plan. (J.A. at 75-77, 134, 146, 163).

In addition, Defendant frequently was undecided and vacillated about whether she wanted to be bought out, as to whether she wanted a portion of the Farm in kind, and as to which portion of the Farm she might want in

kind. (J.A. at 107-11, 141). Indeed, even at the trial, Defendant was undecided and equivocal about which portion of the Farm she supposedly wanted in kind or whether she believed her own proposed one-fourth lots to be equally satisfactory. (J.A. at 963, 989; J.A. at 304-19, 325, 332-33).[2]

In response to Plaintiffs' hope that Defendant would eventually commit to the development effort and stop being a free rider, the partnership's attorney advised the Plaintiffs "to go ahead with the partnership," (J.A. at 119-20), although there would be a risk that the subdivision may not be successful if Defendant did not eventually agree. There is absolutely no evidence that the attorney advised anyone that continuing with the partnership or trying to obtain the plan would be tortious or improper, but only that it might be unsuccessful.

With respect to the partnership signing the subdivision application paperwork, the uncontradicted testimony was that Plaintiffs' civil engineer simply signed the application in the same ownership name that appeared on the Farm's county tax records – *i.e.*, in the name of the partnership.

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[2] Defendant's trial testimony is excerpted at length in the Joint Appendix (J.A. at 295-333) and is highly commended to the Court's reading. It leaves absolutely no doubt that Defendant was full of uncertainty and had a great deal of difficulty committing to any position, preference or course of action, even by the time she testified at trial.

(J.A. at 210, 238). There was no evidence and no finding in the Trial Court of any intent to deceive the Defendant or the county, nor of any Plaintiff knowing that the application submitted in the name of the partnership – which was the majority owner of the Farm – supposedly was invalid. Likewise, there was no evidence and no finding of any harm to the Defendant based on any signature issues with the subdivision application. Finally, there was no evidence that the Plaintiffs or their independent contractor civil engineer who prepared the subdivision application – for whose actions Plaintiffs would not be responsible – knew at the time of any requirement that each of the several co-tenants separately must sign it. In fact, the uncontradicted evidence was that Plaintiffs did not know about any requirement that all owners had to sign the paperwork and that their civil engineer filled out the paperwork. (J.A. at 148, 153).[3]

In any event, Defendant certainly was not deceived, misled or tricked by any of Plaintiff's actions. Rather, as she admits (Appellant's Br. at 10), Defendant was kept fully informed of Plaintiffs' efforts to obtain the

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[3] Even if the Plaintiffs' civil engineer knew or should have known this, he was an independent contractor and there is no basis for holding Plaintiffs responsible for his alleged errors with respect to the application process.

preliminary subdivision plan, in the hope that Defendant eventually would recognize the need for it and commit to cooperating and paying for her fair share. (*See, e.g.*, J.A. at 395-98, 405-06, 407, 408; J.A. at 608-11; J.A. at 141; J.A. at 955, 960).

Despite having been updated on the ongoing subdivision process, neither Defendant nor any of her string of lawyers ever told the county zoning office of her alleged opposition to the preliminary plan before trial. (J.A. at 298-99). After trial, Defendant even objected to the commissioner of sale providing potential purchasers with disclaimers regarding possible challenges to the preliminary plan's validity caused by Defendant's failure to sign onto the subdivision applications. (Hr'g Tr. at 11, August 28, 2008, Attached as Addendum B). Defendant's acquiescence in the preliminary plan *vis-à-vis* the county zoning office and potential purchasers further demonstrates that Plaintiffs held a reasonable and correct belief that Defendant was not really opposed to the subdivision process itself but rather was an opportunistic "free rider" who was only opposed to paying for it.

Despite Defendant's incorrect statement (Appellant's Br. at 10), there simply was never any agreement to divide the Farm into four lots. While

lawyers and engineers were hired to investigate options including a four-lot subdivision, there was never any agreement to begin or complete a four-lot subdivision. (J.A. at 123-24) ("We were certainly looking at a four lot subdivision, not agreed to it. No we had not. . . . We had not agreed to it. We were talking to him and getting information."). Defendant never contended in the court below that there was any final or binding agreement to create a four-lot subdivision. Indeed, no such agreement could have been made when – even by the time of trial – Defendant still had not made up her mind about which lot or portion thereof (if any) she would accept as her share. (J.A. at 963, 989; J.A. at 304-19, 325, 332-33).[4]

III. CORRECTED STATEMENT OF QUESTIONS PRESENTED

(A) Did the Trial Court act within the proper bounds of its discretion in permitting the Plaintiffs to recover $147,000 in survey, engineering, development, and subdivision improvement costs

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[4] In addition, as the Trial Court found in a ruling that Defendant no longer contests, there was overwhelming evidence that partition in kind simply was not convenient, practicable or feasible. That ruling and the evidence supporting it are summarized on pages 6 through 9 of Plaintiff's September 25, 2008 Brief in Opposition to Petitioner's Petition for Appeal dated September 4, 2008.

from Defendant when Plaintiffs financed acquisition of the preliminary subdivision plan and related surveys and engineering which increased the value of the Farm by $4.1 million and accounted for forty-five percent of its total value?

(B) Did the Trial Court act within the proper bounds of its discretion in finding that the Plaintiffs' claim for compensation for improvements is not barred by unclean hands when: (1) there was no evidence and no finding of any willful wrongdoing; (2) the Plaintiffs kept Defendant informed about the development and subdivision process and she never complained about it to the zoning office; (3) Plaintiffs were hoping that Defendant would cooperate with them in the subdivision process to avoid the threat of devaluation from a down-zoning; and, (4) instead of injuring the Defendant, the preliminary subdivision plan and other development efforts by Plaintiffs increased the value of Defendant's share of the Farm by over $1 million at the time of trial and over $300,000 at the time of sale?

IV. ARGUMENT AND DISCUSSION OF AUTHORITIES

(A) The Trial Court Properly Exercised Its Discretion To Compensate Plaintiffs For The Improvements and Enhanced Value Resulting From Their Development, Subdivision and Engineering Expenditures Which Were Intended To Preserve The Value of The Farm Against a Threatened Down-zoning.

Improvements to jointly owned property, like the engineering, survey, development and subdivision costs awarded (but not yet paid) to the Plaintiffs, need not permanently change the physical characteristics of the property for Plaintiffs to recoup their costs or value from their co-tenant. *Black's Law Dictionar*y defines an "improvement" as "[a]n addition to real property, **whether physical or not**; esp. one that increases its value or utility or that enhances its appearance." *Black's Law Dictionary,* 761 (7th ed. 1999) (first definition of "improvement") (emphasis supplied).

Under Virginia law, "the term 'improvement' is not a word of art having a fixed and definite meaning, but it must be interpreted and given the meaning indicated by its setting." 21A M.J., Words and Phrases, "Improvement" (2000 & 2005 supp.).

The reason for permitting compensation for improvements in the context of partition suits is "to prevent one cotenant from becoming enriched at the expense of another." *Shotwell v. Shotwell*, 202 Va. 613,

618, 199 S.E.2d 251, 255 (1961). Here, as the Trial Court found, permitting Defendant to "free ride" by having the value of her share of the Farm preserved and greatly increased without contributing anything to the engineering, survey, development and subdivision expenses which doubled its value would violate the letter and spirit of the improvements doctrine by permitting her to be enriched at the expense of the Plaintiffs. (J.A. at 992).

In *Quillen v. Tull*, 226 Va. 498, 502, 312 S.E.2d 278, 280 (1984), this Court affirmed compensation being given to a party in a partition suit who had acquired easements benefitting certain parcels which he was allotted. These clearly were not improvements that permanently changed the physical characteristics of the property. (*Cf*. Appellant's Br. at 19). Rather, they were legal rights and benefits just like the subdivision plan obtained by the Plaintiffs in this case, which the Trial Court found had added forty five percent and $4.1 million to the value of the Farm at the time of trial.

Defendant still cites not a single case in which this or any other Court has denied compensation for improvements by co-tenants on the basis that the improvement was not sufficiently "permanent." To be sure, this Court has generally used the term "permanent" improvement in *dicta* when recognizing the doctrine of compensation among co-tenants. (Appellant's

Brief at 16). Yet, this Court has never held that compensation cannot or should not be granted for improvements that, while costly, conferring substantial value on a co-tenant, and reasonably incurred to preserve the value of the property, are not as physical or long-lasting as a building.

Not only is Defendant's purported permanency requirement absent from the actual holdings of this Court, it also is absent from hornbook and treatise discussion of the doctrine of compensation among co-tenants. In fact, in the leading black-letter secondary sources, the purported permanency requirement is noticeably absent from statements of when a claim for contribution among co-tenants will lie.

> The view in Virginia is that a joint tenant or tenant in common who improves the common property at his own expense is entitled in a partition suit to compensation for improvements, whether the cotenant assented thereto or not.

5A M.J., Cotenancy § 27 at 89 (2002 & 2007 supp.).

> If a cotenant improves realty held in common, the court will take this into consideration on partition and compensate that cotenant for such improvements.

59A Am. Jur. 2d, Partition § 109 (2nd ed. 2008).

> Courts, when they decree a partition of property, make a suitable allowance for improvements to the property made by one of the cotenants, especially if the improvements were needed to preserve the property. Compensation to the cotenant who made the improvement is based on the theory

> that the other cotenants should not have the benefits of improvements that enhance the value of the common estate, to which they have not contributed.

(Id. at § 159).

Thus, permanency of the improvement has not been and should not be held to be an element of a cotenant's claim for compensation for improvements. Defendant's proposed narrow a focus on the temporal duration or permanency of the improvement would undermine the doctrine's goal of preventing a cotenant from benefiting from the estate's increased value without contributing to the improvements which created it. Rather, consistent with the purposes of the doctrine, Plaintiffs should be entitled to compensation for the expenditures they made which almost doubled the value of the property, and which they made to preserve the value of the property in the face of a threatened down-zoning.

Thus, the Trial Court in this case properly permitted Plaintiffs to recover from Defendant her one-quarter share of unpaid taxes, development, engineering and subdivision expenses that Plaintiffs had made to preserve and enhance the value of the Farm and to avoid a threatened down-zoning and devaluation of the Property. This enhanced the value of the Farm over $4,100,000 for the benefit of all of its owners,

including $1,000,000 for the Defendant's share at the time of trial, and she should not be permitted to take a "free ride" on the Plaintiffs' efforts.

Even in what the parties agree was a steadily declining real estate market (Appellant's Br. at 3, 12), the Farm sold in September 2008 (contract of sale) and October 2008 (closing) for $6 million.[5] The contract of sale was approved three months before the December 2008 deadline for filing the final "record plat" subdivision application, which was the only procedural deadline about which any evidence was admitted by the Trial Court. (Pet. at 18; J.A. at 950). This $6 million sale price after six to seven months of steady, continued deterioration in the relevant real estate market still was $1.2 million more than what the Trial Court had determined in March 2008 was the value of the Farm without a preliminary subdivision plan and related improvements. (J.A. at 978, 983, 991-92; J.A. at 427-538, 539-607). Defendant thus benefitted in the amount of at least $300,000 (one quarter of the $1.2 million between $6 million and $4.8 million) from the sale of the Farm under the preliminary plan with Plaintiffs' improvements. Thus, the preliminary subdivision plan and related surveys

[5] (Hr'g Tr. at 5, 6, August 28, 2008, Attached as Addendum B; J.A. at 1035-39).

and engineering were sufficiently permanent and useful to the parties before the Court that Defendant derived benefit from them by more than twice the amount of the $147,277.72 that the Trial Court assessed against Defendant as her one-quarter share of subdivision expense improvements. This increase in value was sufficiently permanent that Defendant benefited from it and would be unjustly enriched if she were not required to pay her share of the expenses that were advanced by her siblings and co-tenants in the hope that one day Defendant might cooperate in and help fund the development effort that they correctly expected to benefit all parties and to preserve the value of the Farm in the face of a threatened down-zoning.

By September and October of 2008, the Farm had been sold, and there is no evidence of record that the preliminary plan had been invalidated due to alleged inability to take the Farm to record plat and obtain final subdivision approval by the December 5, 2008 deadline, which still was three months away at time of sale. (Pet. at 18; Hr'g Tr. at 6, April 16, 2008). This was the only record evidence offered at trial or admitted into evidence at any time of regarding the timing of additional procedural steps necessary to preserve the subdivision plan. In fact, the Trial Court consistently and expressly rejected both sides' efforts to introduce into the

record evidence about the preliminary plat's viability or lack of viability as time passed, specifically ruling after the contract of sale had been approved that "these are new facts that attorneys are trying to interject to the Court that really are not of record." (*See* Hr'g Tr. at 44, Sept. 5, 2008, Attached as Addendum A).

Similarly, Defendant cannot belatedly interject into this appeal the contention which she repeatedly and expressly waived at trial that the preliminary subdivision plan is invalid or void *ab initio*. Not only did Defendant expressly stipulate that the validity of the preliminary subdivision plan was not at issue before the Trial Court, she also failed to join Loudoun County as a necessary party to any action challenging the validity of the subdivision plan which it had approved. *Cf. Friends of Clark Mountain Foundation, Inc. v. Bd. of Supervisors of Orange County*, 242 Va. 16, 21, 406 S.E.2d 19, 21-22 (1991) (board of zoning appeals in a necessary party to action contesting a zoning decision). Defendant sought, and still seeks, inequitably to reap the benefits of the preliminary plan and related development efforts without paying her fair share of the expenses.

The primary reason that Defendant claims the subdivision plan may have become invalid is that, through the time of sale, the Defendant

insisted on trying to waste the Plaintiffs' investment in the subdivision process by refusing to acknowledge or sign any past or future subdivision application papers. Thus, it is as if the Defendant has burned down a house built by her family members on the Farm and then refused to compensate them for any part of its value because the house was not "permanent." Plaintiffs' subdivision and development expenditures benefitted all the owners both at the time of trial and at the time of sale. Even if – contrary to fact – the Trial Court had admitted into evidence any post-trial contentions about the risks to the viability of the preliminary plat resulting from additional procedural deadlines, any such risk was created and perpetuated primarily by Defendant's own sabotage and failure to cooperate.

It has long been recognized under Virginia law that an owner making improvements to jointly held property may obtain compensation from the other co-tenants, "**even if the costs are incurred against the wishes of a**

co-tenant." (Appellant's Br. at pp. 15-16).[6] Therefore, Defendant's lack of express consent to the improvements made and paid for by the Plaintiffs provides no basis for reversing the Trial Court's decision to require Defendant to pay her quarter of the taxes, engineering, development and subdivision costs, which are roughly one-sixth of the added value she received from Plaintiffs' expenditures.

Compensable improvements are not limited to buildings. In addition to the easement recognized by this Court as a compensable improvement in *Quillen v. Tull*, courts have recognized less durable, less physical, less expensive improvements as "permanent" to the extent permanence is required, in conformity with the policies and purposes behind real estate law improvements doctrines. In *Pranger v. Pranger*, 164 N.W. 607, 608,

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[6] In fact, had Plaintiffs failed to take reasonable actions to protect against the severe devaluation which they were informed was likely to result from the threatened down-zoning, they may have been liable to the Defendant for committing waste on the property. *See* Code of Va. § 55-212 (1950); 19 Va. Cir. 430, 432 (Stafford Cir. 1990) ("Indeed, had the three co-tenants not acted, they could have been liable to the fourth co-tenant for permitting waste."). Attempting to prevent a predicted severe devaluation from the threatened down-zoning is also the equivalent of performing a necessary repair on the property, for which a co-tenant is entitled to immediate compensation. 5A MJ, Cotenancy § 27, n. 10 (2002) ("Under the general modern rule, the right to claim contribution [from co-tenants] extends to all necessary repairs.").

611 (Iowa 1918), the court found that any applicable “permanent improvements” requirement was satisfied by the tenant’s ordinary cultivation and fertilization of the soil, grubbing out stumps and trees, cutting wood and rebuilding and maintaining fences. Thus, the tenant had satisfied any applicable “permanent improvement” exception to the statute of frauds and showed that he was the owner of the subject land pursuant to a parol gift. (Id.)

Consistent with *Pranger*, any “permanent” improvement requirement applicable to this case should be deemed satisfied due to Defendant’s receipt of an extra $300,000 over the adjudicated value of her quarter of the land without the preliminary plan. This is consistent with the purpose of the improvements doctrine regarding contribution among co-tenants in that it would preclude Defendant from being unjustly enriched by opportunistically free riding on Plaintiffs’ development expenditures.

The Trial Court properly exercised its discretion in making Defendant contribute her $147,000 pro-rata share of the subdivision, engineering and development costs incurred by Plaintiffs in adding $1,000,000 in value to Defendant’s share of the Farm as of the time of trial and at least $300,000 in value to her share as of the date of sale.

(B) The Trial Court Did Not Abuse Its Discretion in Finding That Plaintiffs' Claim Was Not Barred By Unclean Hands.

A trial court's decision as to whether to grant or deny compensation to a co-tenant for improvements made to real property is reviewable only for an abuse of discretion. *Butler v. Hayes*, 254 Va. 38, 44, 487 S.E.2d 229, 232 (1997). The defense of unclean hands "requires unconscionable, bad faith, or inequitable conduct by the plaintiff in connection with the matter in controversy." 27A Am. Jur. 2d, Equity § 104 n. 1 (2008). It also requires "willful wrongdoing" in relation to the controversy before the court on the part of the plaintiff. *Harrods Limited v. Sixty Internet Domain Names*, 157 F. Supp. 2d 658, 679-80 (E.D. Va. 2001), *rev'd in part on other grounds*, 302 F.3d 214 (4th Cir. 2004). Relief to which the plaintiff is otherwise entitled "will not be denied because of the [plaintiff's] wrongdoing in the course of a transaction with a third person, or because of a wrong practiced by both parties on a third person." 27A Am. Jur. 2d, Equity § 104 nn. 9-10.

Here, the Defendant expressly waived any challenge to the partnership or signature processes that resulted in the preliminary plan. (*E.g.*, J.A. at 951, 974, 982-83, 993-94) ("neither side is asking this Court for a declaration that the subdivision process is somehow void or

voidable”). *See also* (J.A. at 1023-24) (“I was not being called upon to address this issue about the partnership using the subdivision process.”) Defendant’s waiver of defects in the subdivision process and the preliminary plan which resulted from it precludes Defendant from arguing her unclean hands defense based on those same alleged defects.

Defendant’s refusal to challenge the preliminary plan or the subdivision application process which led to it at or before trial also shows that Defendant acquiesced in Plaintiffs’ allegedly defective subdivision application. Defendant’s acquiescence is further demonstrated by the fact that she admittedly never informed the county zoning office about the alleged defect before trial (J.A. at 298-99), even though she had been informed that Plaintiffs were pursuing the subdivision application without her participation or written approval. (Appellee’s Br. at 10). In fact, Defendant actually opposed the commissioner of sale providing potential purchasers with disclaimers regarding possible challenges to the subdivision plan’s continuing viability resulting from by Defendant’s own refusal to sign onto the subdivision applications. (Addendum B). Thus, Defendant both acquiesced in and waived any challenge to the preliminary plan and Plaintiff’s application for it in the hope, which she did realize, of

obtaining financial benefit from Plaintiff's development expenditures without (so far) helping to defray the related expenses.

"[T]he doctrine of unclean hands is applicable only where the party seeking to invoke it was injured, damaged or prejudiced by the alleged wrongful conduct." 27A Am. Jur. 2d, Equity § 105 n. 1 (2008). *See also Harrods*, 157 F. Supp. 2d at 679-80; *Seniors Coalition, Inc. v. Seniors Foundation, Inc.*, 39 Va. Cir. 344 (Fairfax Cir. Ct. 1996). Thus, "where [as here] the defendant has profited by the wrongful conduct, the defendant may not invoke the maxim." 27A Am. Jur. 2d, Equity § 105 n. 4.

Thus, *Butler v. Hayes*, 254 Va. 38, 487 S.E.2d 229, the case relied upon by Defendant for her unclean hands argument, is inapposite and distinguishable. In *Butler*, the trial court's prior decision **not** to award compensation for improvements was held not to be an abuse of discretion where a co-tenant who had purported to obtain the entire piece of property through a forged deed improved the land while directly harming his co-tenants by denying them use of their land, even after the purchaser had been informed that the deed had been forged and that seven out of the eight prior co-tenants had not consented to the sale. *Butler*, 254 Va. at 44-45, 487 S.E.2d at 232-33. The purchaser's conduct had not only prevented

the vast majority of co-tenants from enjoying the land in its unimproved state, but also had wrongfully excluded the seven other co-tenants from any use of the land for six years, directly injuring them. *Id*. Thus, the vast majority of co-tenants themselves were directly injured by the *ersatz* purchaser's misconduct.

Even so, this Court did not hold that an award of improvement costs was or would have been an abuse of discretion. Rather, it merely found that the trial court had not abused its discretion in deciding not to require the seven co-tenants who had been wrongfully deprived of their land for six years to reimburse the improvement expenses paid by a purchaser who knew of the problems with his title at the time the improvements were made. *Butler*, 254 Va. at 44, 487 S.E.2d at 232. This was consistent with a long line of cases holding that, under the governing statutes, "a person with notice, actual or constructive, of infirmity in the title cannot recover compensation for permanent improvements made on the premises." *Butler*, 254 Va. at 44, 487 S.E. 2d at 232 (collecting several cases).

In short, *Butler* provides no authority for reversing a trial court's decision to award compensation for improvements where, as here, the vast majority of co-tenants fund improvements with the intention of protecting

against a threatened down-zoning and proportionally benefitting both themselves and the free-riding co-tenant who refused to contribute toward the cost of the improvements.

There is absolutely no finding and no evidence of willful wrongdoing on the part of the Plaintiffs. The Defendant was equivocal and indecisive about her desires and intentions regarding the Farm, and the Plaintiffs proceeded with the development efforts and kept Defendant informed of them in the hope that she eventually would agree to cooperate in and benefit from them. The subdivision application was prepared by Plaintiffs' civil engineer, who signed the application in the name of the family partnership (the majority owner of the Farm) pursuant to and consistent with his usual practice of signing those applications in the name of the owner listed on the county tax records for the property. (J.A. at 210, 238). There was no evidence that the Plaintiffs or their independent contractor civil engineer who prepared the subdivision application – for whose actions Plaintiffs would not be responsible – knew at the time the application was submitted that there was any requirement that each of the several co-tenants must separately sign the application. In fact, the uncontradicted evidence was that Plaintiffs did not know about any requirement that all

owners had to separately sign the paperwork and that their civil engineer filled out the paperwork. (J.A. at 148, 153). Even if, contrary to fact, Plaintiffs' civil engineer knew or should have known about the alleged all owners signature requirement, he was an independent contractor and there is no basis for holding Plaintiffs liable for his alleged errors with respect to the application.[7]

Where the Defendant benefited to the tune of at least $300 thousand to $1 million from the Plaintiffs' alleged misconduct, where Defendant acquiesced in the allegedly defective application *vis-à-vis* both the county and prospective purchasers, and where there is no evidence or finding that Plaintiffs engaged in willful deception toward Defendant or anyone else, there is no basis for disturbing the Trial Court's rejection of Defendant's unclean hands defense, and certainly not for holding that it was an abuse of the Trial Court's discretion.

---

[7] Note that even the statute referred to in footnote 2 of Appellant's Brief, Va. Code §15.2-2264, does not expressly state that all owners of any level of interest must sign. It merely requires a certificate that the platting is done "in accordance with the desires of the undersigned owners."

V. CONCLUSION

The Trial Court carefully set forth its findings and conclusions in its detailed, well-reasoned, hour-long, fifty-page bench ruling dated April 16, 2008, which was delivered almost a month after the trial was held. Through its bench ruling dated June 4, 2008, the Trial Court confirmed those findings and rulings and rejected Defendants' motion to reconsider on virtually the same grounds she asserts in this appeal.

There was no finding and no evidence of any willful bad faith deception or other willful misconduct toward Defendant on the part of the Plaintiffs. Rather, the Trial Court correctly found that Plaintiffs were confused by what they considered to be Defendant's indecisiveness and mixed signals, and that they were hopeful that their free-riding sister would eventually cooperate in the development and subdivision process that was intended to protect against a threatened down-zoning and which (according to the evidence actually admitted at trial and credited by the Trial Court) benefitted Defendant's own share of the Farm in the amount of at least $1 million. Because there was no willful misconduct, and because Defendant acquiesced in and was not injured by the Plaintiffs' alleged wrongdoing, the Trial Court correctly rejected Defendant's unclean hands defense.

The Trial Court also correctly found and held that Defendant would be unjustly enriched if she were permitted to share in the $4.1 million in increased value of the Farm resulting from the subdivision efforts and development expenses without reimbursing the Plaintiffs for any of their expenditures. Upholding the Trial Court's decision would serve the established purpose of preventing Defendant from being unjustly enriched by free-riding on the valuable improvements made by her co-tenants at their expense. The beneficial effects of Plaintiffs' development efforts were sufficiently durable that the Farm sold for $1.2 million more than what the Trial Court found was its unimproved value. Therefore, the improvements funded by the Plaintiffs were sufficiently permanent or durable to benefit the Defendant and to entitle the Plaintiffs to compensation.

For all of these reasons, the Trial Court's challenged Orders dated June 4, 2008, September 5, 2008, and November 7, 2008, all should be affirmed.

Respectfully Submitted,

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Counsel for Respondents

Addendum A

1 V I R G I N I A:

2 IN THE CIRCUIT COURT FOR LOUDOUN COUNTY

3

4 AARON W. CHRISTENSEN FAMILY, LP,)

5 et al.,)

6 Plaintiffs,)

7 vs.) Case No. 44520

8 MARY DE BENVENISTE,)

9 Defendant.)

10 * * * * *

11 COPY

12

13 The above-entitled matter came on for

14 hearing on Friday, September 5, 2008, commencing

15 at 3:27 p.m., at the Loudoun County Circuit Court,

16 18 East Market Street, Leesburg, Virginia, before

17 Jamie L. Portela, Notary Public.

18

19 BEFORE:

20 THE HONORABLE BURKE F. McCAHILL

21

22 * * * * *

1 A P P E A R A N C E S

2

3 ON BEHALF OF THE PLAINTIFF:

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5 Dunlap, Grubb & Weaver, PLLC

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12 ON BEHALF OF THE DEFENDANT:

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22 (Appearances continued on the next page.)

1 APPEARANCES (continued):

2

3 COMMISSIONER OF SALE:

4 WILLIAM H. ATWILL, JR., ESQUIRE

5 Atwill, Troxell & Leigh, P.C.

6 The John Carr House

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1 as they were in this case, to the Court. And
2 suggesting that somehow a deadline -- I remember
3 there was a motion about that, about a deadline in
4 July.
5 Again, there was no evidence of that at
6 the trial. It was something after the fact that
7 motions started coming in, and now a suggestion
8 that somehow that deadline was missed and that I
9 should somehow conclude that the whole preliminary
10 plat subdivision is out.
11 I'm just going to decline to do that.
12 There has to be finality in these cases. The
13 curtain has to come down, and that applies across
14 the board because these are new facts that
15 attorneys are trying to interject to the Court
16 that really are not of record.
17 They're just completely in memoranda that
18 are filed. I have to reopen all the evidence in
19 the case and I really think that is inappropriate.
20 I realize that I reserved jurisdiction,
21 but it was not with the idea of allowing the case
22 to be a moving target. It was with the idea that

Addendum B

COPY

1 VIRGINIA:

2 IN THE CIRCUIT COURT FOR LOUDOUN COUNTY

3 - - - - - - - - - - - - - - - - x

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

5 :

Plaintiffs, :

6 :

vs. : Case No. 44520

7 :

MARY VILLON DE BENVENISTE, :

8 :

Defendant. :

9 :

- - - - - - - - - - - - - - - - x

10

11 Leesburg, Virginia

12 Thursday, August 28, 2008

13 The proceedings commenced at 8:53 a.m.

14 BEFORE:

15 THE HONORABLE BURKE F. MCCAHILL.

16

17

18

19

20

21

22

1 APPEARANCES:

2 MICHAEL C. WHITTICAR, ESQ., Dunlap Grubb &
Weaver, PC, 199 Liberty Street, S.W.,
3 Leesburg, Virginia 20175, counsel for
the plaintiffs. (Via telephone)
4

JOHN A.C. KEITH, ESQ., Blankingship &
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Suite 300, Fairfax, Virginia 22030,
6 counsel for the defendant. (Via
telephone)
7

WILLIAM H. ATWILL, JR., ESQ., Atwill,
8 Troxell & Leigh, P.C., 101 North King
Street, Leesburg, Virginia 20176,
9 special commissioner of sale.

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1 opportunity to file a report itself and enter a
2 report, but I do recommend the contract that has
3 been proposed to the Court.
4 The material terms are for a $6 million
5 purchase price, a $100,000 deposit made with Union
6 Title, a 15-day study period, it's an all cash -- an
7 all cash deal. The proposed settlement date in the
8 contract I believe said September 27th. Due to the
9 timing now of getting before the Court, I would be
10 recommending confirmation subject to the
11 purchaser -- contract purchaser extending the
12 settlement date by a few more days so as to allow a
13 full 30-day period for either of the underlying
14 parties to file a notice.
15 By way of background, as I indicated in my
16 cover letter, we have had two higher offers on the
17 property, one for six and a half million dollars.
18 It was from a third party. But it had a lengthy
19 study period associated with it that when I first
20 received the contract offer and that lengthy study
21 period, it appeared to me that it was going to
22 basically take the property out of circulation for

1 too long, so I did not think that was an appropriate
2 contract.
3 I did receive an offer from the
4 Christensen family or one of their entities in the
5 earlier part of August for slightly above the
6 listing price, but it had a settlement period -- it
7 had a settlement, if memory serves, of about August
8 the 13th. It was well within the 30-day shot clock
9 for notice of -- either party being able to file
10 notice of appeal.
11 Suffice to say that we -- I responded to
12 that offer with a fairly significant addendum. I
13 think we were close on the terms, but ultimately
14 that contract did not go through.
15 The Christensen family entities submitted
16 a revised contract that dropped the purchase price
17 to five and a half million dollars, and so
18 confronted with basically the five and a half
19 million dollar offer and now receiving the
20 $6 million all cash, it appeared to me that this was
21 an appropriate contract for the property. So I
22 recommend its approval, confirmation.

1 bidder, but it appears that the plaintiffs have had
2 a lot more access to information. And I'm not
3 faulting Mr. Atwill in any way here. In fact, the
4 only information we have received about the bidding
5 process has come from Mr. Atwill.
6 The first indication to me that the
7 plaintiffs were injecting themselves into the court
8 sale process was when I received a copy of an e-mail
9 from Mr. Whitticar dated July 21 in which he
10 discussed my client's objection to the preliminary
11 subdivision plat process and the potential
12 invalidity of the plan.
13 The plaintiffs demanded that everybody who
14 came to an open house at the property sign a waiver
15 form which they drafted. And Mr. Atwill agreed to
16 that and I didn't object at the time, but in
17 retrospect it was an advocacy piece and it appears
18 to have been an attempt to chill the market. You'll
19 see that the contract that has been submitted today
20 has that waiver form on it and signed.
21 Next, on July 25th we received another
22 e-mail from Mr. Whitticar in which he was

CERTIFICATE

The undersigned hereby certifies that:

On this the 8th day of May, 2009, three copies of the foregoing Brief of Appellees were mailed or delivered to counsel for the appellant:

John A. C. Keith
William B. Porter
Blankingship & Keith, P.C.
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Suite 300
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703-691-1235

This same date, fifteen copies of the foregoing were hand delivered to the clerk's office and a copy was filed electronically via email at scvbriefs@courts.state.va.us.

/s/ Michael C. Whitticar
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Michael C. Whitticar, VSB #32968
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