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.

REPLY BRIEF OF APPELLANT

JOHN A. C. KEITH, VSB #14116
WILLIAM B. PORTER, VSB #41798
PATRICIA C. AMBERLY, VSB #74627
BLANKINGSHIP & KEITH, P.C.
4020 University Drive, Suite 300
Fairfax, Virginia 22030
P: (703) 691-1235
F: (703) 691-3913
jkeith@bklawva.com
wporter@bklawva.com
tamberly@bklawva.com

Counsel for Appellant

COUNSEL PRESS • VA – (800) 275-0668

TABLE OF CONTENTS

Argument 1

I. The Christensens' Description Of The Case And The Facts Is Inaccurate 1

A. Mary Has Paid Her Share of All Taxes and Operating Expenses for the Property 2

B. The Christensens' Suggestion that Mary "Sent Mixed Signals" About the Preliminary Subdivision Plan is Not Supported by the Record and is Inaccurate 2

C. The Record Does Not Support the Christensens' Assertions About the Real Estate Market Post Trial 4

II. The Preliminary Subdivision Plan Was Not a Permanent Improvement..... 5

A. The Christensens Confuse "Improvement" With the Requirement That the Improvements be "Permanent." 5

B. The Christensens Analysis of the Law of Improvements is Inaccurate..... 7

C. The Christensens' Improperly Attempt to Shift the Burden to Mary to Prove that the Preliminary Plan Never Became Permanent 9

D. Mary Had No Obligation to "Invalidate the Subdivision Plan." 11

III. The Christensens' Unclean Hands Bars Their Recovery of the Cost of the Preliminary Subdivision Process..... 12

Certificate

TABLE OF AUTHORITIES

Cases

Ballou v. Ballou,
94 Va. 350, 26 S.E. 840 (1897) 8

Butler v. Hayes,
254 Va. 38, 487 S.E.2d 229 (1997) 7, 15

Cline v. Berg,
273 Va. 142, 639 S.E.2d 231 (2007) 13

Dalgarno v. Baum,
182 Va. 806, 30 S.E.2d 559 (1944) 8

Jones v. Jones,
214 Va. 452, 201 S.E.2d 603 (1974) 7, 8, 13

Norfolk-Southern Ry. v. Tomlinson,
116 Va. 153, 81 S.E. 89 (1914) 9

Quillen v. Tull,
226 Va. 498, 312 S.E.2d 278 (1984) 8

Roark v. Shelton,
169 Va. 542, 194 S.E. 681 (1938) 8

Shotwell v. Shotwell,
202 Va. 613, 119 S.E.2d 251 (1961) 7

White v. Pleasants,
227 Va. 508, 317 S.E.2d 489 (1984) 8

Rules, Statutes and Other Authorities

Rule 5:29 1

5A Michie's Jurisprudence, Cotenancy § 27 8

Pursuant to Rule 5:29, Mary Villon de Benveniste ("Mary") submits this Reply Brief in response to the Brief of Appellees (the "Christensens").

ARGUMENT

The Christensens' Brief betrays their disdain for Mary. On no fewer than seven occasions, Mary's siblings refer to her as a "free rider" and contend that her "refus[al]" to go along with the preliminary subdivision plan amounted to "sabotage" and a "failure to cooperate." (Br. of Appellees 20.) While the Christensens concede that they advanced a preliminary subdivision plan without Mary's participation or approval (Id. 24), they insist that they should not have had to "indulge[] [Mary's] singular insistence" on partitioning her portion of the Property to her (Id. 7).

The record makes clear that the Christensens attempted to wear Mary down so that she would accede to their demands. The Christensens' "hope" was that Mary "would eventually commit to the development effort and stop being a free rider." (Id. 8.) However, Mary was not on a free ride; she was a hostage to her siblings on a ride she never wished to take and for which they seek to charge her.

I. The Christensens' Description of the Case and the Facts is Inaccurate.

In their Brief, the Christensens discuss many facts and arguments that are irrelevant to the narrow issue before the Court. The only issue

before the Court is whether the Loudoun County Circuit Court ("Trial Court") properly held that Mary should be charged with a share of the costs incurred by her siblings to obtain a preliminary subdivision plan for a 350-acre farm, called "Mountain Gap Farm" (the "Property"). Resolution of this issue does not depend on the superfluous facts and argument injected by the Christensens, but Mary is compelled to address certain factual issues raised by the Christensens in order to set the record straight.

A. Mary Has Paid Her Share of All Taxes and Operating Expenses for the Property.

The Christensens assert that Mary failed to pay her share of taxes and operating expenses for the Farm. (Br. of Appellees 1, 16.) While this issue was disputed at trial, it was resolved after trial. (10/3/08 Order ¶ 7.) Mary does not owe any taxes or operating expenses for the Property (id.), no error or cross-error was assigned to any ruling with respect to this issue, and there is no reason for including this point in this appeal. (Id.)

B. The Christensens' Suggestion that Mary "Sent Mixed Signals" About the Preliminary Subdivision Plan is Not Supported by the Record and is Inaccurate.

The Christensens also assert that Mary "vacillated and sent mixed signals about her desires" with respect to the preliminary subdivision plan. (Br. of Appellees 2, 6-8, 29.) These statements are not supported by the record. Indeed, the Christensens' purported support for Mary's alleged

vacillation is based almost entirely on John Christensens' self-serving account of his impression of Mary's attitude, not on anything Mary said. (Br. of Appellees 2 (citing John Christensen's testimony at J.A. 954, 989, 106-08), 7 (citing John Christensen's testimony at J.A. 91-92, 109).)

There is no evidence in the record supporting the position that Mary ever agreed to go along with, participate in, or pay for the efforts to develop a preliminary subdivision plan. On this score, the record and the Trial Court's findings could not have been clearer. The record contains no less than eight letters from Mary or her counsel in which the Christensens were informed in writing about Mary's unequivocal desire to be given her portion of the Property in-kind as well as her opposition to the subdivision process proposed by her siblings. (J.A. at 375-78, 380-85, 401-04.)

In response to Mary's letters, and before any significant expenses had been incurred for the preliminary subdivision plan, the Christensens (by counsel) acknowledged that they were "fully aware of [Mary's] desire to have her part of the Mountain Gap Farm subdivided off." (J.A. at 405.) Because Mary's request was inconsistent with the 68-lot subdivision the Christensens had planned for the entire Property, they told Mary they were forging ahead anyway. (J.A. at 405-06.) In its final ruling, the Trial Court

stated, "[t]here is no question, in my mind, that [Mary] made known her opposition to the subdivision process." (J.A. at 961.)

The only equivocation by Mary was with respect to which lot she might accept if the Trial Court decided to partition the Property. (J.A. at 963.) The Trial Court rightly chalked up such equivocation to Mary's "emotional attachment to the entire property" and otherwise dismissed such equivocation as a "diversion" and "not really the issue." (J.A. at 989.) Mary's desires with respect to a preliminary subdivision plan were well known and were recognized by the Trial Court.

C. The Record Does Not Support the Christensens' Assertions About the Real Estate Market Post Trial.

The Christensens contend that the preliminary subdivision plan must have added value because, after trial, the Property was purchased for an amount higher than the value the Trial Court had placed on the Property without the preliminary subdivision plan. (Br. of Appellees 5, 17-18, 22, 28, 30.) This "fact," however, is irrelevant to the status of the improvements as "permanent," and the evidentiary record between trial and the sale of the Property was unchanged: the Property retained its character as an undivided 350-acre farm and the numerous steps required to convert the preliminary subdivision plan to a permanent subdivision plat had not been completed. (J.A. at 963, 950, 79-80, 226-27, 246-47.)

Further, the Christensens' argument erroneously suggests that the purchaser paid a premium for the Property because it wanted the "benefit" of the preliminary subdivision plan. There is absolutely no evidence of what the purchaser wanted. To the contrary, the sale price is completely consistent with the expert testimony offered by Mary: that the preliminary subdivision plan did not add any value to the Property and that the Property was worth the same with or without it. (Trial Tr. 79, Mar. 19, 2008.)

II. The Preliminary Subdivision Plan Was Not a Permanent Improvement.

A. The Christensens Confuse "Improvement" With the Requirement That the Improvements be "Permanent."

Without citing any supporting authority, the Christensens assert that "[i]mprovements to jointly owned property . . . need not permanently change the physical characteristics of the property for [the Christensens] to recoup their costs or value from their co-tenant." (Br. of Appellees 13.) In an attempt to bolster this point, the Christensens rely on the definition of "improvement." (Id.) This argument, however, ignores completely Virginia's well-established jurisprudence detailing when the costs of improving property may be divided among co-tenants.

The issue for the Court is not the meaning of the word "improvement." The only issue is whether the improvements are permanent. As discussed

in the Opening Brief, this Court's requirement that improvements be permanent assures that a non-participating tenant is not enriched unjustly by temporary, non-permanent improvements to property. (Opening Br. 18-19.) Such a rule also assures that non-participating tenants are not forced to pay for expenses that do not add permanent value to property.

There is no dispute that the preliminary plan was not a permanent plan. This point was recognized explicitly by the Trial Court in its ruling, which repeatedly recognized the preliminary, non-permanent status of the plan. (Opening Br. 17-18 (citing J.A. at 949, 950, 982).) Further, the record does not contain evidence demonstrating that the preliminary plan ever became permanent. To the contrary, the Christensens own post-trial statements to the Trial Court concede that the preliminary plan would never become permanent. (Opening Br. 18 (citing J.A. at 998, 1020.6).)

Instead of addressing this Court's requirement that improvements be permanent, the Christensens argue that the improvements need not be "physical." In doing so, the Christensens misconstrue Mary's point. While she observes in her Opening Brief that this Court's opinions discussing the assignment of improvement costs in the context of a partition action involve permanent, physical structural improvements (Opening Br. 19), Mary's position is not premised on such a requirement. Instead, relying on this

Court's long-standing jurisprudence, Mary's point is, simply, that the improvements have to be permanent.

For example, had the Christensens been able to convert the preliminary subdivision plan into a permanent plat before the partition action over Mary's objection, they may have had an argument that the Property had been changed in a non-physical, yet permanent way. But those facts are not present in this case and it is not necessary for this Court to reach that issue. Throughout trial – and to this day – the Property has maintained its character as an undivided 350-acre farm.

B. The Christensens Analysis of the Law of Improvements is Inaccurate.

Perhaps conceding that the preliminary subdivision plan was not a permanent improvement, the Christensens make the bold statement that Mary's "purported permanency requirement [is] absent from the actual holdings of this Court." (Br. of Appellees 15.) This statement is inaccurate. As discussed by Mary in her Opening Brief, in a long line of cases, this Court's rule for compensation among co-tenants in a partition action requires permanent improvements to the property. (Opening Br. 15-16 (citing Butler v. Hayes, 254 Va. 38, 487 S.E.2d 229 (1997); Jones v. Jones, 214 Va. 452, 454-55, 201 S.E.2d 603, 605 (1974); Shotwell v. Shotwell, 202 Va. 613, 618, 119 S.E.2d 251, 255 (1961); Dalgarno v. Baum, 182 Va.

806, 808, 30 S.E.2d 559, 560 (1944); Roark v. Shelton, 169 Va. 542, 194 S.E. 681 (1938); Ballou v. Ballou, 94 Va. 350, 352, 26 S.E. 840, 840 (1897)).) See also White v. Pleasants, 227 Va. 508, 514, 317 S.E.2d 489, 492 (1984); Quillen v. Tull, 226 Va. 498, 502, 312 S.E.2d 278, 280 (1984).

The Christensens cite no case from this Court that contradicts this long standing rule. Instead, in an effort to avoid these precedents, the Christensens cite Michie's Jurisprudence and American Jurisprudence as the only support for their hollow assertion that "the purported permanency requirement is [also] noticeably absent" from "hornbook and treatise discussion of the doctrine of compensation among co-tenants." (Br. of Appellees 15.) While the specific subsection of Michie's Jurisprudence cited by the Christensens omits the term "permanent" in the body of the text when discussing improvements, the treatise cites – as authority for the stated position – the identical cases relied upon by Mary, which undeniably hold that the rule in Virginia requires the improvements to be permanent. See 5A Michie's Jurisprudence, Cotenancy § 27, p. 89-90 n.14 (citing Ballou, 94 Va. 350, 26 S.E. 840; Dalgarno, 182 Va. 806, 30 S.E.2d 559; Jones, 214 Va. 452, 201 S.E.2d 603). Indeed, the footnotes contained in the section of Michie's Jurisprudence relied upon by the Christensens state explicitly that the improvements must be permanent. Id.

C. The Christensens' Improperly Attempt to Shift the Burden to Mary to Prove that the Preliminary Plan Never Became Permanent.

In her Opening Brief, Mary argued that the Christensens failed to prove at trial that the preliminary subdivision plan had been taken to record plat, thereby permanently improving the Property. (Opening Br. 19-21.) In response, the Christensens purport to shift the burden to Mary to prove that the preliminary subdivision plan never became permanent. (Br. of Appellees 4 (at the time the Property was sold "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"), 18 (same).) The Christensens cite no authority for the novel concept that claimants for reimbursement do not have the burden of proving their claim but, instead, may shift the burden to the opposing party to disprove. Indeed, such a concept does not exist and would stand the elements of proof on its head. See, e.g., Norfolk-Southern Ry. v. Tomlinson, 116 Va. 153, 162, 81 S.E. 89, 92 (1914) ("[T]he burden is always upon the party who alleges the fact to establish it by proof. The onus probandi is upon him throughout."). The facts remain, there is no evidence that the preliminary subdivision plan became permanent and

there is evidence that it could not become permanent without Mary's assent. (J.A. at 246-47, 998, 1020.6; Trial Tr. 15-17, Mar. 20, 2008.)

The Christensens' argument also is incorrect, in that it suggests that Mary's position – i.e., that, at the time of trial, the Christensens failed to prove the improvements were permanent – is merely technical. Instead, the Christensens are well aware that the preliminary subdivision plan never became permanent and the purchaser never took any steps to advance the preliminary subdivision plan by the December 2008 deadline.

The Christensens also attempt to draw the improper inference that the purchaser of the Property must have ascribed value to the preliminary subdivision plan – thereby benefiting all of the parties – because the Property was purchased for an amount greater than their appraiser's valuation of the Property without the preliminary subdivision plan. (Br. of Appellee 17-18.) However, as is more fully discussed in section I, A, 3, supra, there simply is no evidence in the record linking the purchase price for the Property to the preliminary subdivision plans or even suggesting that the purchaser took the preliminary subdivision plan to record plat by the December 2008 deadline.

The only relevant point – which also is dispositive – is that, by the close of trial, the Christensens failed to introduce any evidence that the

preliminary subdivision plan had become a permanent improvement. Instead, as recognized by the Trial Court, there was clear testimony at trial about the multiple steps that had yet to be completed before the preliminary subdivision plan could be converted into a permanent subdivision plat. (J.A. at 79-80, 223, 226-27, 246-47, 969.) The Christensens did not – and could not – submit any evidence that these steps had been completed. Thus, they failed to meet their burden of proving that they had permanently improved the Property.

D. Mary Had No Obligation to "Invalidate the Subdivision Plan."

As a final attempt to burden Mary with the cost of their ill-advised preliminary subdivision plan, the Christensens fall back on the argument that their acts somehow are insulated from criticism because Mary did not try to invalidate the preliminary subdivision plan. (Br. of Appellees 3, 19.) However, this is not a burden that ever fell to Mary, and it had nothing to do with the issues before the Trial Court in a partition case.

The Trial Court did clarify that it was not being called upon to decide the validity of the preliminary subdivision plan. (J.A. at 1023-24.) Perhaps this was because of the Trial Court's disclosure that it was "concerned" by the "conduct of the [Christensens] in applying for subdivision." (J.A. at 1023.) However, the existence of the preliminary subdivision plan was

irrelevant to the issue of partition. Instead, the Trial Court evaluated only the characteristics of the Property without respect to the preliminary subdivision plan. (J.A. at 983-83 ("And I want to make it clear that this decision [to deny partition] was not based on a notion that there would be some waste of money regarding money spent for the development of this property if the preliminary plat was void because I understand the circumstances of how that came about. . . [instead] it really is based primarily, if not exclusively, on analysis of the testimony that this land has substantial idiosyncrasies.").) At best, the Trial Court's valuation of the Property related only to the Christensens' request for allotment, which they promptly rejected once it was awarded by the Trial Court. (J.A. at 996.)

Finally, Mary did not need to have the preliminary subdivision plan invalidated because it could not proceed to record plat without her signature as an owner of the Property, a point conceded by the Christensens' expert. (J.A. at 246-47.) Indeed, the Christensens recognized the demise of the preliminary subdivision plan in post-trial filings with the Trial Court. (J.A. at 998, 1020.6.)

III. The Christensens' Unclean Hands Bars Their Recovery of the Cost of the Preliminary Subdivision Process.

As this Court has recognized, the right of a tenant to recover compensation from a co-tenant for permanent improvements is an

equitable one founded on the desire to do justice. See Jones, 214 Va. at 454-55. However, "'[h]e who comes into equity must come with clean hands,' . . . [and] must not himself have been guilty of any inequitable or wrongful conduct with respect to the transaction or subject matter sued on . . . .'" Cline v. Berg, 273 Va. 142, 147-48, 639 S.E.2d 231, 233-34 (2007) (citations omitted). The application of the doctrine turns upon the facts of each particular case. Id., 273 Va. at 148, 639 S.E.2d at 234.

At trial, Mary introduced ample evidence of the Christensens' unclean hands. This included evidence that the Christensens acted with knowledge that Mary was opposed to the subdivision plan (J.A. at 134-40, 377-85, 401-07), that John Christensen signed a preliminary subdivision application that failed to recognize Mary as an owner of the Property (J.A. at 148, 152-55, 410-11), and that, before the application for preliminary subdivision plan had been submitted and long before expenses began to accrue for the subdivision process, the Partnership's lawyer 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).

In response to this evidence, the Christensens attempt to push the blame to Mary by asserting that she either "waived" her unclean hands argument or "acquiesced" to the Christensens' conduct by not challenging

the viability of the to the preliminary subdivision plan at trial. (Br. of Appellee 23-24.) As discussed in section I, B, 4, supra, Mary had no obligation to challenge the legitimacy of the preliminary subdivision plan at trial, and no logical basis exists for the Christensens' position.

The Christensens also attach a partial transcript from a post-trial hearing before the Trial Court and assert the remarkable position that Mary's opposition to "the commissioner of sale providing potential purchasers with disclaimers regarding possible challenges to the subdivision plan's continuing viability" amounts to her "acquiescence" to what the Christensens acknowledge was a "defective subdivision application." (Br. of Appellees 24.) This representation is inaccurate.

An examination of the complete transcript from the post-trial hearing reflects that Mary expressed concern that the "disclaimer" was, in fact, an advocacy piece drafted by the Christensens and handed out to potential purchasers in an attempt to chill the market so that the Christensens could purchase the Property themselves at the lowest price. (Trial Tr. 11, Aug. 28, 2008.) The other concern expressed by Mary at this hearing was the report she received from the commissioner of sale that members of the Christensen family had been contacting potential purchasers directly to discourage them from bidding on the Property. (Id. 12-13.) Believing this

conduct to be improper, Mary immediately brought the issue to the Trial Court's attention. These actions can hardly be viewed as "waiving" a position or "acquiescing" to improper conduct.

The Christensens' attempt to distance themselves from this Court's holding in Butler v. Hayes is similarly unpersuasive. Just like the co-tenant in Butler, who was aware of the infirmity in his title before he improved the property, the Christensens knew that the Partnership had no authority to act and knew that it was acting without Mary's consent. Nonetheless, the Christensens filed a preliminary subdivision application that they knew was inaccurate and then went about incurring hundreds of thousands of dollars in costs. (J.A. at 152-55, 410-11.)

Indeed, just before filing the preliminary subdivision application, the Christensens' lawyer wrote Mary's lawyer, acknowledged that Mary wanted no part in the subdivision, and informed her they were going forward anyway, but that they would address Mary's request for her portion of the Property after they had secured the record plat for the 68-lot subdivision. (J.A. at 405-06.) The offer to Mary, of course, was a meaningless gesture. As John Christensen testified at trial, they never had any intent to give Mary a portion of the Property that was unencumbered by the 68-lot subdivision plan. (J.A. at 141-44.)

Respectfully submitted,

MARY VILLON DE BENVENISTE
By Counsel

Date: May 22, 2009

BLANKINGSHIP & KEITH, P. C.
4020 University Drive, Suite 300
Fairfax, Virginia 22030
(703) 691-1235 (telephone)
(703) 691-3913 (facsimile)

By: _____
John A. C. Keith, VSB No.14116
JKeith@bklawva.com
William B. Porter, VSB No. 41798
WPorter@bklawva.com
Patricia C. Amberly, VSB No. 74627
TAmberly@bklawva.com
Counsel for Petitioner
Mary Villon de Benveniste

CERTIFICATE OF COMPLIANCE WITH RULE 5:26(D)

I, John A. C. Keith, Counsel of Record for Appellant, hereby certify that on this 22nd day of May 2009, fifteen (15) copies of this Reply Brief have been filed in the Office of the Clerk of the Supreme Court of Virginia, three copies of this Reply Brief have been mailed to counsel for the Appellees, and an electronic copy of this Reply Brief has been sent by e-mail to scvbriefs@courts.state.va.us.

John A. C. Keith