In The

Supreme Court of Virginia

RECORD NO. 090906

KATHRYN SHILLING,

Appellant,

v.

BRIAN C. BAKER, *et al.*,

Appellees.

BRIEF OF APPELLANT

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Appellant, Kathryn Shilling, on this appeal seeks reversal of three final Orders of the Rockingham County Circuit Court, each of which were entered on February 5, 2009, in case numbers CL08000262-00, CL08000596-00, and CL08000607-00, which cases were consolidated for trial in the lower court.

STATEMENT OF NATURE OF THE CASE AND MATERIAL PROCEEDINGS

Kathryn Shilling ("Shilling" or "Petitioner") filed suit against Brian C. Baker ("Baker"), Lisa S. Simmons ("Simmons") and David R. Kelly ("Kelly") (collectively the "Defendants") on March 11, 2008, which action was assigned Case No. CL08000262-00. (the "Original Action"). (A. 1.) The Original Action concerned claims by Shilling that a cemetery (the "Baker Cemetery") exists on certain real estate (the "Property"), which Baker Cemetery is the final resting place of the remains of Shilling's parents and grandparents. (A. 2, ¶¶ 2-5.)

The Baker Cemetery is located on Property owned by Baker, who had contracted to sell it to Kelly as of the time of the filing of the Original Action. (A. 4, ¶ 9; A. 257-265.) Access to the Baker Cemetery requires utilizing a private road that extends across other real estate adjacent to the Property that is jointly owned by Baker and Simmons. (A. 21, 266, 291.) Shilling brought her claims against Baker, Kelly and Simmons seeking to protect the Baker Cemetery and her continued access to it. (A. 1-9.)

On March 19, 2008, the Defendants filed an Answer to the Complaint in the Original Action, as well as a Counterclaim against Shilling. (A. 23-38.) In their Answer, the Defendants claimed that the Baker Cemetery was legally invalid, asserting that the cemetery had been formed in 1989 by Shilling when she allegedly buried the ashes of her Mother in an urn in the Baker Cemetery without first obtaining a required permit from the Rockingham County Zoning Board (the "Zoning Board"). (Id.) In their Counterclaim, the Defendants sought a declaratory judgment that the Baker Cemetery was not a valid cemetery, and therefore, that they could dispose of the Property in any

manner they deemed appropriate, and could deny Shilling access to the Property. (Id.) In support of this claim, the Defendants relied upon a March 18, 2008 letter ruling, issued by Rockingham County Zoning Administrator Diana Colb Stultz (the "Zoning Administrator") in response to a complaint filed with her by the Defendants, finding that Shilling had violated applicable zoning law by burying an urn in the Baker Cemetery in 1989, which urn contained the ashes of Shilling's mother, without first obtaining a permit to establish a private family cemetery. (A. 35.)

Shilling filed her Answer and Affirmative Defenses to the Defendants' Counterclaim on April 1, 2008, denying that any zoning law was violated by the burial of her mother's ashes in 1989, given that the Baker Cemetery was established in 1949, prior to the enactment of the Rockingham County Zoning Ordinances (the "Ordinance"). (A. 39-44.) Shilling further asserted that the Defendants were estopped from denying the existence and legal validity of the Baker Cemetery, given that Defendant Baker had permitted Shilling to expend substantial sums of money on improvements to the Baker Cemetery, and given that the

Defendants had at all times recognized the Baker Cemetery as a proper place for the disposal of human remains up until the filing of the Original Action. (A. 42, ¶ 4.)

By letter dated March 31, 2008, Shilling filed an appeal of the decision of the Zoning Administrator to the Rockingham County Board of Zoning Appeals (the "BZA"), claiming, *inter alia*, that the Baker Cemetery was established in 1949, prior to the enactment of the Ordinance, and that therefore, the burial of the ashes of Shilling's mother in 1989 within the Baker Cemetery was a legal non-conforming use. (A. 250-251.) On April 7, 2008, the Zoning Administrator issued a letter to Shilling stating that the County was reversing its position that there was a violation by Shilling of the Ordinance. (A. 249.)

By letter dated April 18, 2008, the Defendants appealed the reversed findings of the Zoning Administrator to the BZA. (A. 252-254.) Specifically, the Defendants argued that burial of human remains is a required condition under Virginia law before an area of land can be recognized as a cemetery. (Id.) Because the first burial of human remains within the Baker Cemetery did not occur until 1999, the

Defendants argued that no legally valid use of the Property as a cemetery pre-existed the enactment of the Ordinance requiring a special use permit before using A-2 zoned property as a cemetery. (Id.)

By letter dated June 5, 2008 the BZA affirmed in part and reversed in part the decision of the Zoning Administrator. (A. 345.) Specifically, the BZA found that an area approximating 10 feet by 2 feet encompassed by a chain and four metal posts had been established as a cemetery in 1949, and therefore, was a pre-existing non-conforming use. (Id.) The BZA also found, however, that the larger area of approximately 40 feet by 40 feet encompassed by a wrought-iron fence, and within which the smaller 10 feet by 2 feet area is located, did not constitute a valid cemetery that pre-existed the enactment of the applicable zoning regulation. (Id.) Therefore, the BZA ordered that any memorial plaques placed outside the 10 feet by 2 feet area, or any items buried outside that area, would be in violation of the applicable zoning law, and that they must be removed. (Id.) Further, the Board found that no additional markers or graves may be placed on the

property without first obtaining a special use permit from the Board. (Id.)

On July 1, 2008, both the Defendants and Shilling appealed the BZA's June 5, 2008 ruling to the Rockingham County Circuit Court, which appeals were assigned Case Nos. CL08000596-00 and CL08000607-00 respectively. (A. 331-335; A. 339-346.) Having previously taken evidence in the Original Action that related to each of these two appeals, the trial court consolidated all three cases for final argument, which occurred on December 8, 2008. (A. 354-360.)

On February 5, 2009, the trial court entered a final order in all three cases, essentially resolving all matters adverse to the Plaintiff, finding that no legally cognizable cemetery ever existed on the Property. (A. 403-423.) In reaching this conclusion, the trial court reasoned that Virginia law requires the actual "burial" of human remains in order to create a valid cemetery. (A. 393-396.) Because no such "burial" occurred prior to the enactment of the zoning regulation requiring a special use permit before land zoned A-2 can be used for a cemetery, the trial court held that the Baker Cemetery violated

applicable zoning law, and that, therefore, it was not entitled to the statutory protections otherwise applicable to other cemeteries established in this Commonwealth. (A. 395.) On February 18, 2009, Shilling filed written objections to the rulings in each of the three cases. (A. 424-435.) On February 25, 2009, Shilling timely filed her Notice of Appeal in all three cases, seeking review of the trial court's rulings. (A. 436-441.)

ASSIGNMENTS OF ERROR

1. The circuit court erred as a matter of law in concluding that "burial" of human remains is a required pre-requisite to establish a valid cemetery under Virginia law.

2. The circuit court erred as a matter of law in failing to hold that the defendants' claims are barred under the doctrines of laches or estoppel.

QUESTIONS PRESENTED

1. Whether the trial court utilized the proper standard of review in determining whether the Baker Cemetery was legally valid under Virginia law. (Assignment No. 1).

2. Whether an actual “burial” of human remains in a hole dug into the ground is a required prerequisite to form a valid cemetery in Virginia. (Assignment No. 1).

3. Whether one should be barred by the doctrine of laches or otherwise estopped from denying the existence of a cemetery after permitting his property to be used as a cemetery for a period of seventeen years, and after permitting extensive work and expenditure to occur on his property to preserve such cemetery. (Assignment No. 2).

STATEMENT OF FACTS

The facts of this case are not materially in dispute. Oliver Edwin Baker and Alice Crew Baker (the “Grandparents”) are the deceased grandparents of Petitioner Kathyrn Shilling. (A. 2, Cmplt. ¶¶ 2-3.) In 1939, Shilling's Grandparents purchased certain real estate that included beautiful hilltop views of the City of Harrisonburg and Rockingham County (the “Baker Property”). (A. 66-67, 242, Transcript pp. 21-22, 197.) After the acquisition, sometime in the 1940s, Ms. Shilling’s Grandparents decided to set apart a portion of the Baker Property, located at the pinnacle of the hilltop, for the purpose of establishing a family cemetery (the “Baker Cemetery”). (Id.) In April

1944, Shilling's grandmother, Alice Crew Baker would write a poem, alluding to these intentions, and the importance of the hilltop where the Baker Cemetery is now located, which poem reads as follows:

SONNET
To My Husband
(Who loves a hill-top pasture in the Shenandoah Valley)

When I am gone from friends and neighbors kind,
I'll walk upon that pasture that you love,
The one that lies the little wood above

To lime and potash and the other salts
With which you try experiments and see
How high the Ph of the soil may be
And how the grass again greens o'er those vaults

Of lime-stone Valley caves that lie below
And we will walk out in the rain, who love
The rain as others love the sun.
Above the noise of man, across the field we'll go

And if my ashes on the grass you'll fling,
I'll be a part of that first flower of Spring!

(A. 132-133, Transcript pp. 87-88; A. 256.)

The sister of Shilling's grandfather, who was alive at the time of the 1939 acquisition of the property, affirmed this expressed intention of Shilling's grandparents' desire to be laid to rest on the hilltop, stating, "[A]s long as I can remember – they bought it in '39 – they always said, I want my ashes there to enrich

the soil in this worst part of the farm." (A. 242, Transcript p. 197.)

Oliver Edwin Baker, Shilling's grandfather, died in 1949, and at that time, pursuant to his wishes, his body was cremated and his ashes[1] were scattered on the hilltop at the location that he and his wife had chosen for the Baker Cemetery. (A. 2, Complaint ¶ 3; see also A. 66-69, 236, Transcript pp. 22-24, 191.) A memorial plaque was chosen to mark the place of the interment of Oliver Edwin Baker’s remains, which area was also cordoned off by fencing. (Id.; see also A. 13, Pictures of Oliver Baker Plaque.) The plaque was lodged into the rock located on Hilltop in center of Baker Cemetery, which plaque was donated by Oliver Baker's colleagues from the Department of Agriculture where

[1] These “ashes” are not like those found in one’s fireplace that just disburse in the mind, but are little pieces of bone. In the present case, the family of those persons whose “ashes” were placed in the Baker Cemetery would stand on a particular rock that is in the center of the Baker Cemetery and would disburse the “ashes” on the ground surrounding that rock. As described by Shilling, “[E]ventually, mother nature and rain and wind will absorb them [the small pieces of bone referred to as “ashes”] into the ground, and so basically, they are buried. It’s just, they are buried by mother nature. “ (A. 69, 104, Transcript, pp. 24, 59.)

he had worked for many years. (A. 71-72, Transcript pp. 26-27.)

Alice Crew Baker, Shilling’s grandmother, died in 1986. (A. 70, Transcript p. 25.) Her remains were cremated and kept in an urn until 1990. (A. 70, Transcript p. 25.) Shilling's father, Edwin C. Baker, died in 1990 in a farming accident. (Id.) His remains, along with the remains of Shilling's grandmother, were dispersed in the Baker Cemetery in 1990. The family gathered at the Baker Cemetery upon Edwin C. Baker's death in 1990, and conducted a private funeral ceremony, and disbursed both Edwin C. Baker's remains, as well as the remains of Alice Crew Baker, on the hilltop within the Baker Cemetery as a part of that ceremony. (A. 72-73, Transcript pp. 27-28.) Also in 1990, memorial plaques were then erected in honor of both Shilling's father and grandmother within the Baker Cemetery to mark each of their respective final resting places. (A. 2, Complaint ¶¶ 3-4.)

Thereafter, Shilling's mother, Nancy Whitmore Baker, died, and her remains were cremated, placed in an urn, and in 1999, the urn containing her remains was buried in the Baker Cemetery, and the spot of her burial was marked with

a memorial plaque. (A. 2, Complaint ¶ 5.) A funeral service was held on the hilltop at the Baker Cemetery for Nancy Whitmore Baker at the time she was buried, all with the knowledge and consent of Defendant Brian C. Baker, her step-son, who had acquired the land on which the Baker Cemetery was located in 1991, after persuading Nancy Whitmore Baker, his step-mother, to sell it to him for the sum of $1.00. (A. 75, 92, 152, 223-224, Transcript pp. 30, 47, 103, 107, 178-179; A. 14, Complaint Ex. 3.) The remains of Shilling's uncle Glenn Matthias Heimer are also deposited within the Baker Cemetery. (A. 113, Transcript p. 68.)

Brian Baker testified that he grew up on the Baker Property since he was a child, and from his earliest memory, he knew that the hilltop on that land was the final resting place of his relative’s remains, and that the family commonly referred to this area as the “Baker Cemetery.” (A. 223-224, Transcript p. 177-178.) Defendant Baker further admitted that he knew of the Baker Cemetery at the time he acquired the at-issue property from his step-mother in 1991, and that he knew that his siblings were regularly visiting the Baker Cemetery over the years since his acquisition of the Baker Property.(Id.) Mr. Baker did

nothing to stop them from doing so. (Id.) When each of Mr. Baker's siblings were asked whether they had obtained permission from Brian Baker before visiting the Baker Cemetery, they each testified that "we didn't need permission," since it was always understood that this portion of the Baker Property belonged to the family, and not to Brian Baker. (A. 154-155, 162, 223, Transcript pp. 109-111, 117, 178.)

Defendant Baker also admitted that he permitted the burial of his step-mother at the Baker Cemetery, and acknowledged that funeral services were held on the hilltop for Nancy Whitmore Baker's burial without objection from him. (A. 223-224, Transcript pp. 178-179.) Defendant Baker further admitted that Plaintiff Shilling, with his knowledge, would regularly come onto the property to do maintenance for the Baker Cemetery, including cutting of the grass, again without any objection from him, which Plaintiff Shilling has done on a regular basis for the past seventeen years. (A. 75-78, 223, Transcript pp. 30-33, 178.) Brian Baker also admitted that he was aware of and permitted Petitioner Shilling and her aunt, whose husband's remains are also deposited within the Baker Cemetery, to expend more than $5,600.00 to construct a black 40'x40'

wrought-iron fence around the Baker Cemetery to preserve that land, with signs on that fence indicating that it was the "Baker Cemetery." (A. 75-78, 82-83, 118, 231-232, Transcript at pp. 30-33, 37-38, 73, 186-187; see also A. 10-13, Pictures of Baker Cemetery.)

Brian Baker specifically approved of the area to be cordoned off by the 40'x40' fence, during a pre-installation meeting with Shilling and the fencing contractor. (A. 82, Transcript p. 37.) This 40'x40' area was chosen because it encompassed all of the rocks located on the hilltop where the family had stood to disburse the remains of their deceased loved ones during the ceremonies that had occurred in connection with laying those relatives to rest. (A. 82, 104-105, 112-113, Transcript pp. 37, 59-60, 67-68.)

On December 10, 2007, Brian Baker sold the Baker Property to David Kelly for $500,000.00, the majority of which purchase price Mr. Baker owner-financed. The contract contained a contingency that required Baker to move the cemetery to an alternative site, and provided that if the cemetery could not be moved, Kelly would be refunded all monies that he had paid toward the purchase price. (A. 224-225, Transcript pp. 179-180.) When Petitioner Shilling

refused to give her written consent to Baker to move the cemetery, the Defendants sought to restrict Shilling's access to the Baker Cemetery, and threatened to proceed with moving the cemetery without Shilling's consent, or the written consent of the relatives of those deceased persons whose remains were laid to rest at the Baker Cemetery. (A. 5, Complaint ¶¶ 13-15.)

ARGUMENT

I. The trial court erred in failing to utilize the proper standard of review in determining whether the Baker Cemetery was legally valid under Virginia law.

This Court has instructed that given "a long-standing societal belief in the sanctity of giving effect to a decedent's wishes, that the expressed wish of one, as to his final resting place, shall, so far as it is possible, be carried out." *Grisso v. Nolen*, 262 Va. 688, 694, 554 S.E.2d 91, 95 (2001). An equally well-grounded principle of Virginia law is that "[i]nterments once made should not be disturbed except for good cause." *Goldman v. Mullen*, 168 Va. 345, 355, 191 S.E. 627, 631 (1937).

In the present case, it is clear that it was the expressed desire of decedents Oliver Edwin Baker, Alice Crew Baker, Edwin Crew Baker, and Nancy Whitmore Baker to have their remains deposited within the Baker Cemetery as

their final resting place. In accordance with those expressed wishes, the remains of those decedents were, in fact, laid to rest within the Baker Cemetery. As such, in analyzing the facts of this case, the trial court should have been guided by the principle that, if possible, effect must be given to the wishes of those persons buried on the hilltop of the Baker Property that their final resting place be and remain the Baker Cemetery. The trial court failed, however, to give any consideration to this standard in its analysis of whether the Baker Cemetery was legally cognizable under Virginia law.

The trial court should have also been guided by the principle that, since those decedent’s remains have, in fact, been laid to rest within the Baker Cemetery, that such interment should not be disturbed except for good cause. The Petitioner submits, then, that it was the Defendants' burden to overcome these long-standing legal principles, since they are the ones who propose to re-interment the remains of the Petitioner's decedents, or to otherwise take action that would harm the Baker Cemetery. Rather than first addressing this legal standard, the trial court erroneously proceeded to impose the burden on the Petitioner to prove the existence of a "legal" cemetery

that had been established pursuant to the proper permitting requirements under applicable zoning law, which approach and the resulting ruling should be overturned.

II. Actual "burial" of human remains is not a required prerequisite to form a valid cemetery under Virginia law.

The primary thrust of the trial court's ruling against the Petitioner in all three consolidated cases was that the actual burial of a human body is a necessary prerequisite to establishing a valid cemetery under Virginia law. Indeed, in ruling against Shilling, the trial court specifically reasoned, "A cemetery cannot be established, then, without the burial of a dead body." (A. 395, Trial Court Ltr Ruling.) Such a finding is directly contrary to the common law governing formation of cemeteries, is contrary to the Virginia statutory text protecting "interments" of the deceased, and is contrary to the only other Virginia circuit court case to have addressed the issue.

First, at common-law, "burial" of remains was never a required element to form a cemetery. In *Heiligman v. Chambers*, 338 P.2d 144 (Okla. 1959), for example, the

Oklahoma Supreme Court set forth the majority view that appropriation by the owner of land for use as a family cemetery, the making of internments therein of members of the family, the building of a stone wall around the area to set it off from the remaining land, and the erection of proper markers of those persons whose remains were interred on such property, fulfill the common-law requirements of establishing a family burial blot.

This common-law understanding expressed by the *Heiligman* Court regarding the elements necessary to establish a cemetery are also evidenced in Virginia when one examines the definitions used in the Virginia Code for the word "cemetery." In Section 54.1-2310 of the Virginia Code, for example, the Virginia legislature provided:

> 'Cemetery' means any land or structure used or intended to be used for the interment of human remains. The sprinkling of ashes or their burial in a biodegradable container on church grounds or their placement in a columbarium on church property shall not constitute the creation of a cemetery.

Va. Code Ann. § 54.1-2310.

That same statute defines “interment” to mean “all forms of final disposal of human remains.” *Id.* The word “grave,” by contrast, is defined to mean “a below-ground right of interment.” *Id.* In the present case, it is undisputed that since the early 1940s, that the hilltop portion of the Baker Property was designated by the then-landowners, Oliver Edwin Baker and Alice Crew Baker, for interment - that is, for the final disposal of human remains. It is further undisputed that such interment did, in fact, occur in 1949 when the remains of Oliver Edwin Baker were deposited on that ground. That land on which such remains were deposited has been set apart since that time by fencing, and all persons interred at the Baker Cemetery have had markers placed at the site of the interment. Ceremonies have been held at the site in connection with such interment, and the plot has been commonly referred to as the “Baker Cemetery” as long as any witness in this case could remember. This clear intention and setting aside of such land for internment purposes is all that is required under the common law, and

under subsequent statutory enactments in Virginia, to constitute a cemetery.

Indeed, the only other Virginia case to have addressed the issue has held that "burial" of human remains is not a prerequisite to establish a valid cemetery under Virginia law. *See Berryman v. Shiloh Baptist Church*, Ch. No. 393-92 1993 WL 946168 (Va. Cir. Ct. July 19, 1993). (A. 322-326.) In that case, Ms. Berryman brought a lawsuit against the Shiloh Baptist Church seeking to enjoin them from utilizing a one-acre parcel of real estate adjacent to the church as a cemetery. The church had acquired the one-acre parcel in 1956 as a replacement for another similar-sized tract of land on which the church had formerly been utilizing as a cemetery, but which had been taken by the Federal Government under its powers of eminent domain. Despite this 1956 acquisition, no human remains were buried or otherwise deposited on the new one-acre tract of land until the church attempted its first burial in 1991. At the time of the first burial in 1991, a zoning law was in effect which prohibited the establishment of a cemetery within 250 yards of any residence, absent consent of the owner of the residence. Ms. Berryman, who owned a residence within

250 yards of the at-issue parcel, brought suit to enjoin the trustees of the Shiloh Baptist Church from continuing to use such property as a cemetery. Specifically, Ms. Berryman argued, as did the Defendants in the present case, that the cemetery claimed by church was illegal, because to be a valid cemetery, Ms. Berryman claimed that Virginia law required the remains of a decedent to be buried on such land, and because no such burial occurred until 1991, the cemetery was not legally established, since the church had never obtained Ms. Berryman's written consent as required by applicable law.

In an opinion written by Judge James W. Haley, Jr., who now sits on the Virginia Court of Appeals, the Court rejected Ms. Berryman's argument and denied her request for injunctive relief. In doing so, Judge Haley explained, "An interment is not a condition precedent to the establishment of a cemetery." Instead, Judge Haley found that the deposit or burial of human remains on a tract of land is not a necessary element at all in order for a cemetery to be deemed to have been "established." Citing the case of *Temple v. City of Petersburg*, 182 Va. 418, 29 S.E.2d 357 (1944), as an example, Judge Haley stated, "[S]ince there had been no burials on the 1.01 acre parcel

at the time of the court's decision [in the Temple case], by inference a burial was not required to establish a cemetery, for if such were the case, the primary issue before that court would have been moot." *Id.* at *3. Judge Haley went on to further prove his point in utilizing, by analogy, the language contained in Section 57-35.11 of the Virginia Code, wherein the word "cemetery" is defined to mean "any land used or intended to be used for the interment of human remains," a definition virtually identical to that found in Section 54.1-2310 of the current Virginia Code, which was quoted previously herein. The phrase "intended to be used as a cemetery," according to Judge Haley, envisioned that to be a valid cemetery, the actual depositing of human remains is unnecessary, but instead, all that is required is evidence showing that such land was intended to be used for the interment of human remains. As such, the *Berryman* Court concluded that the Shiloh Baptist Church had "established" a cemetery on the one-acre tract at the time that the church acquired that property in 1956 for the purpose of future interments.

Like in *Berryman*, the facts of the present case make clear that a valid and legal cemetery was established under Virginia law, at the latest, by 1949 when Oliver Edwin Baker

and Alice Crew Baker had dedicated a portion of the Baker Property, purchased by them in 1939, for the use of future interment. That is all that is required in Virginia to "establish" a legal cemetery. Indeed, the Petitioner's Grandparents and her Parents went well beyond this basic requirement by fencing the area, referring to that area as the "Baker Cemetery" such that use of that name became common as far back in time as Defendant Baker can remember; and by actually making interments within the area designated as the cemetery, and marking such interments with memorial plaques. Not only is this sufficient to "establish" a cemetery under current statutory definitions found in Section 54.1-2310 of the Virginia Code, and under the test espoused in *Berryman*, but it is also sufficient under the common law of the vast majority of states in this Country. The Defendants' contrary position that an actual grave must be dug and a burial of human remains must occur within that grave in order to establish a cemetery is simply not supportable by applicable law.

In the present case, the trial court deviated from these legal principles, and instead, imposed a requirement never before seen in Virginia to create a valid cemetery – the burial of a body. Such an erroneous legal conclusion

raises serious constitutional questions, such as separation of church and state, given the trial court's willingness to give preferential treatment to one form of interment of human remains over another. It also creates serious practical problems by restricting landowners, churches or other organizations from being able to preserve or set aside real estate as a cemetery without first burying a body in the ground. For these reasons, this case carries a legal and practical importance that extends well-beyond the facts presented here.

III. The doctrine of laches and estoppel should bar the Defendants from denying the existence of the Baker Cemetery.

Under Virginia law, one who sits on one’s rights for an unreasonable period of time, to the prejudice of another, will be prevented in equity under the doctrine of laches from belatedly attempting to assert such rights. In the present case, the trial court should have applied the doctrine of laches to bar Defendant Baker from denying the existence of the Baker Cemetery, since he was aware of the existence of such cemetery his entire life, he took the conveyance of the Baker Property in 1991 without consideration and with full knowledge of the existence of

the Baker Cemetery, and his siblings' expectations that they had rights in and to such land, and their desire to have the Baker Cemetery as their final resting place, and yet knowing all of this, Defendant Baker delayed more than seventeen years before filing his counterclaim in this case to seek to end those rights that he permitted to accrue for all of those years. The doctrine of laches prohibits litigants like Defendant Baker from pursuing such an inequitable position, and the trial court's failure to address that issue constitutes reversible error.

But even if the doctrine of laches were inapplicable, the trial court should have nevertheless barred the Defendants from denying the existence of the Baker Cemetery under estoppel principles. Similar to the doctrine of laches, the doctrine of equitable estoppel under Virginia law prevents one from taking a position contrary to a prior position taken by that party, when another party has reasonably relied on the previous position to her detriment. In the present case, the doctrine of estoppel should have been applied to bar Defendant Baker from attempting to deny the existence of the Baker Cemetery, since he has, at all times since he acquired the Baker Property in 1991, treated the hilltop on such property as a cemetery, all to the

detriment of Plaintiff Shilling and the other heirs. Defendant Baker himself admits that he permitted (or took no action to prevent) the heirs from accessing the Baker Property over the last seventeen years to visit their deceased relatives; he admits permitting Shilling to perform regular upkeep and maintenance to the cemetery; he admits allowing his mother to be buried at the Baker Cemetery and for funeral services for her to be conducted there; and he admits to permitting Ms. Shilling and her aunt to incur $5,600.00 in expense to building a fence to protect the Baker Cemetery for years to come. Given these facts, the trial court should have equitably estopped the Defendants from denying the legal existence of the Baker Cemetery.

Indeed, for these same reasons, *in Berryman v. Shiloh Baptist Church*, Ch. No. 393-92 1993 WL 946168 (Va. Cir. Ct. July 19, 1993), Judge Haley also applied these same doctrines to bar Ms. Berryman from denying the existence of the cemetery at-issue in that case. Specifically, Judge Haley found that Ms. Berryman, who was an officer of the Shiloh Baptist Church, should have known at the latest by 1958 of the intention of the church to form a cemetery on the one-acre parcel, and yet Ms. Berryman did not bring

any legal action to assert her rights within a reasonable time, which barred her claim under the doctrine of laches. Judge Haley further explained that Ms. Berryman would be held to have implied accepted the existence of the cemetery under the doctrine of estoppel, since she had actual knowledge of the use to which such land was to be put as a cemetery, and permitted it to be dedicated as such, and only thereafter sought to enjoin such use. The *Berryman* Court, therefore, properly refused to permit such an inequitable result. The trial court should have done the same in the present case, and its failure to do so should be reversed.

CONCLUSION

For all of the foregoing reasons, Shilling prays that this Court reverse the trial court's final order in case numbers CL08000262-00, CL08000596-00, and CL08000607-00, and in so doing, hold that the Baker Cemetery, encompassed by the 40'x40' rod-iron fencing, enjoys all those statutory protections available to other properly established cemeteries in this Commonwealth.

Respectfully submitted,

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CERTIFICATE PURSUANT TO RULE 5:26(d)

In accordance with Rule 5:26(d) of the Rules of the Supreme Court of Virginia, I certify the following:

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Appellees also include the Rockingham County Board of Zoning Appeals;

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(2) Fifteen paper copies and one electronic copy on CD of this Brief of Appellant and Appendix were hand-filed with the Clerk of the Supreme Court of Virginia, and three paper copies of the same were sent via U.S. Mail, postage prepaid to each counsel for the Appellees on September 8, 2009.

Michael J. Melkersen