In The

Supreme Court of Virginia

RECORD NO. 090906

KATHRYN SHILLING,

Appellant,

v.

BRIAN C. BAKER, *et al.*,

Appellees.

REPLY BRIEF OF APPELLANT

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APPELLANT'S REPLY BRIEF

Kathryn Shilling hereby respectfully submits this Reply Brief. For the reasons set forth below, the decision of the trial court should be reversed and remanded for further proceedings.

ARGUMENT

I. SHILLING PRESENTS AN ADEQUATE RECORD TO PERMIT REVIEW OF HER APPEAL OF THE TRIAL COURT'S RULINGS.

Appellees Brian C. Baker, Lisa S. Simmons and David R. Kelly rely upon Rule 5:11 in arguing that this Court should affirm the decision of the trial court because no transcript was included as part of the record on appeal with respect to oral argument held before the trial court on December 8, 2008. Rule 5:11 provides, in relevant part, "When the appellant fails to ensure that the record contains transcripts or a written statement of facts necessary to permit the resolution of appellant issues, any assignments of error affected by the omission shall not be considered."

As the text of the Rule 5:11 makes clear, it is facts that are required to be preserved by transcript or written statement to

permit appellate review. Indeed, in each and every case cited by Appellants on this issue, the Court declined to reach the merits of an assignment of error because of a failure to preserve factual evidence necessary to resolving the claimed error. *See*, *e.g.*, *McDonald v. National Enterprises, Inc.*, 262 Va. 184, 195, 547 S.E.2d 204, 211 (2001) (refusing to consider assignment of error pertaining to attorneys' fees because appellant failed to include transcript of post-trial evidentiary hearing during which "detailed time records" were submitted); *Towler v. Commonwealth*, 216 Va. 533, 534, 221 S.E.2d 119, 120 (1976) (dismissing appeal because transcript of "testimony taken at the hearing" was omitted); *Price Seating Corp. v. Rabideau*, 275 Va. 468, 659 S.E.2d 305 (2008) (refusing to consider argument on appeal concerning appellant's proper address for service of process where record lacked transcript of evidentiary hearing held before trial court on factual issue of appellant's correct address).

In the present case, the only evidentiary hearing held before the trial court occurred on April 30, 2008, and the Appellant has provided a complete transcript of that hearing. (App. 46-241.)

The hearing that occurred on December 8, 2008 was for the purpose of considering closing arguments. (App. 359.) Prior to that date, on May 28, 2008, Shilling filed a Post-Trial Memorandum outlining her position on the legal issues presented in the case in detail. (App. 306-327.) The trial court rendered its ruling and its reasoning for such ruling in a letter to counsel dated December 29, 2008, (App. 393-396), which letter was then reduced as part of a written order in all three consolidated cases. (App. 403-407, 409-417, 418-423.) Shilling filed written objections to the trial court's orders to further memorialize and preserve a record of her legal position in all three cases. (App. 424-427, 428-431, 432-435.) Given the foregoing, it is apparent that the record is adequate to consider each of Shilling's claims.

II. THE TRIAL COURT PROPERLY REJECTED THE APPELLEES' DEMURRER.

Appellees Brian C. Baker, Lisa S. Simmons and David R. Kelly argue that the trial court should have dismissed Shilling's appeal of the decision of the Board of Zoning Appeals ("BZA") for allegedly failing to name the BZA as a party to that appeal. This argument should be rejected for at least two reasons. First, the

BZA lacked subject matter jurisdiction to proceed to make any decision in the present case. Second, even if the BZA maintained jurisdiction to render its rulings, Shilling properly appealed its final judgment to the Circuit Court.

A. The BZA lacked subject matter jurisdiction to entertain those issues over which the Circuit Court had already taken jurisdiction.

Section 57-27.1 of the Virginia Code vests circuit courts with subject matter jurisdiction to "enjoin the owner of the property from denying the person reasonable ingress or egress to the cemetery or gravesite." Va. Code Ann. § 57-27.1. The Circuit Court also maintains subject matter jurisdiction in cases involving a landowner who seeks to relocate a cemetery found on his property, by requiring the landowner in such cases to "file a bill in equity in the circuit court of the county or in the circuit or corporation court wherein such land is located for the purpose of having the remains interred in such graveyard removed to some more suitable repository." Va. Code Ann. § 57-38.1. No similar authority is granted to the BZA or its Zoning Administrator.

Shilling invoked the jurisdiction of the Circuit Court on March 11, 2008 with the filing of her Verified Complaint, which sought to enjoin both the cutting off of Shilling's access to the Baker Cemetery, and the threatened removal of remains from the Baker Cemetery. (App. 1-7.) It was only after the initial filing of Shilling's complaint with the Circuit Court that proceedings were initiated with the Zoning Administrator concerning the Baker Cemetery, (App. 35) and subsequently with the BZA. (App. 345.) Without any referral of any aspect of the dispute from the Circuit Court, and without any statutory authority to do so, both the Zoning Administrator and the BZA ordered Shilling to relocate the Baker Cemetery or some portion of it. Clearly then, the BZA lacked subject matter jurisdiction to render any such ruling.

B. Shilling properly appealed the BZA's June 5, 2008 ruling to the Circuit Court.

Section 15.2-2314 of the Virginia Code, which governs appeals of decisions of the board of zoning appeals, contains no requirement that an appellant must name the board as a party in connection with the appeal. Instead, the statute merely requires the "aggrieved party" to file "a petition specifying the grounds on

which aggrieved within 30 days after the final decision of the board." Va. Code Ann. § 15.2-2314. Shilling fulfilled these statutory requirements when, on July 1, 2008, she timely filed her petition seeking review of the June 5, 2008 decision of the Rockingham County Board of Zoning Appeals (the "BZA"). (App. 331-335.)

Appellees Baker, Simmons and Kelly seek to impose on Shilling requirements not set forth in the statute – namely, to specifically name the BZA as a party in the caption of Shilling's Petition filed with the Circuit Court. In support of this claim, the Appellees cite *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County*, 225 Va. 235, 302 S.E.2d 19 (1983), which did not concern a situation where the Board of Zoning Appeals was omitted as a party to the Petition for Appeal. As such, any statements contained in that case to indicate that the Board is a required party to a Petition for Appeal would have been made in *dicta* at best, and need not be followed. *Newman v. Newman*, 42 Va. App. 557, 566, 593 S.E.2d 533, 538 (2004)

(en banc) ("Dicta cannot serve as a source of binding authority in American jurisprudence.").

But even if this Court were to accept the Appellees' claim that the BZA was a necessary party to Shilling's Petition for Appeal, Shilling submits that any such failure is not fatal to her appeal, since she specifically listed "The Rockingham County Board of Zoning Appeals" in the right-side of her caption, referred to the BZA repeatedly in the body of the Petition, and served a copy of the Petition on the Zoning Administrator. (App. 331-334.) A virtually identical situation was recently presented in the case of *Williams Steel Erection Co., Inc. v. Dept. of Labor and Industry*, 42 Va. App. 814, 595 S.E.2d 45 (2004). In that case, the Circuit Court for Prince William County dismissed a Petition for Appeal filed by Williams Steel Erection Co., Inc. ("Williams"), seeking judicial review of a decision by the Virginia Apprenticeship Counsel ("VAC") for Williams' failure to name the VAC as a party in the caption of the Petition. The Virginia Court of Appeals reversed the trial court's dismissal of the administrative appeal, holding that there is no jurisdictional bar

to considering an administrative appeal when "a party submits a timely notice of appeal that names an appellee in the body instead of the caption" of the petition for appeal. *Id.*, 42 Va. App. at 823, 595 S.E.2d at 50. To hold otherwise, reasoned the *Williams* Court, would be to undermine the purpose of the notice of appeal, which is to protect the appellee, and not to penalize the appellant. In the present case, the same logic applies.

Finally, Appellees Baker, Simmons and Kelly also filed a timely Petition seeking reversal of the BZA's decision, which Petition named the BZA as a party in the caption, and which put into issue all aspects of the BZA's June 5, 2008 ruling, including the proper size of the Baker Cemetery. The BZA, by counsel, made a general appearance at the consolidated proceedings concerning both the Appellees' appeal and Shilling's appeal of the BZA's decision, and the record is devoid of any objection by the BZA to the scope of the Circuit Court's review. Shilling herself put the matter of the proper size of the Baker Cemetery into issue with the filing of her Verified Complaint with the Circuit Court. (App. 1-2, ¶ 1, Ex. 1, 266 – defining Baker Cemetery to

be 0.071 area as set forth in survey attached to Shilling's Verified Complaint.) Consequently, the Appellees' claim that this Court is limited in its review to the issue of whether the 10 foot by two foot area encompassed by a chain-link fence constitutes a cemetery, rather than the larger 40 foot by 40 foot area encompassed by the wrought-iron fencing, is without merit.

III. THE CIRCUIT COURT IMPROPERLY CONCLUDED THAT PLACEMENT OF A BODY INTO A HOLE IN THE GROUND WAS A PREREQUISITE TO A VALID CEMETERY IN 1949 WHEN THE BAKER CEMETERY WAS ESTABLISHED.

Appellees ignore Shilling's arguments and this Court's jurisprudence governing the sanctity of one's final resting place, and the judicial standards that apply when one seeks to reinter the remains of the deceased. Instead, Appellees focus solely on the standard of review in BZA appeals, and even then, articulate a legally inaccurate standard of review. This Court recently articulated the correct standard, holding that as a result of a 2006 amendment to Section 15.2-2314 of the Virginia Code governing BZA appeals, "the judgment of a circuit court is no longer presumed to be correct, and its conclusions of law are reviewed de novo." *Hale v. Board of Zoning Appeals for the Town*

of Blacksburg, 277 Va. 250, 268, 673 S.E.2d 170, 179 (2009). The factual findings of the BZA, however, are still entitled to a presumption of correctness. *Id.*

Relying on an incorrect standard of review, the Appellees then rely upon the incorrect law, namely, a definition of "cemetery" contained in Section 17-6 of the Rockingham County Code that uses the phrase "burial of the dead". That provision was not enacted until 1984, well after the time that Shilling claims the Baker Cemetery was established in 1949. A proper analysis must consider the law as it existed in 1949, rather than utilizing the Appellees' *ex post facto* approach. In any event, as pointed out by Rockingham County in its Brief, "burial of the dead" as used in the County Code is susceptible to multiple meanings other than literal burial in the ground. (Rockingham County Brief, pp. 10-11.) This Court should reject the constitutionally suspect meaning that the Appellees' advocate, which would favor one form of burial over another.

IV. THE RECORD CONTAINS AMPLE EVIDENCE TO PROVE THAT THE BAKER CEMETERY WAS INTENDED FOR INTERMENT OF HUMAN REMAINS BY 1949.

Shilling cites *Berryman v. Shiloh Baptist Church*, No. 393-92, 1993 WL 946168 (Va. Cir. Ct. July 19, 1993), for the proposition that burial of a body is not required to establish a cemetery, but instead, all that is required is the setting aside of property intended to be used for interment purposes. Appellees argue that no such evidence exists in the present case. (Appellees' Brief, p. 31.)

To reach such a conclusion is to simply ignore the factual record. First, Mildred Heimer testified that Oliver Baker, her father, always stated since purchasing the at-issue property in 1939 that he desired to have his ashes dispersed in the area on the hilltop that later became known as the Baker Cemetery. (App. 242.) Second, the sonnet, cited by Shilling in her opening brief, and written by her grandmother to her grandfather in 1944, specifically refers to "a hilltop pasture" as the place where "above the noise of man, across the field we'll go," and that on that hilltop "my ashes on the grass you'll fling." (App. 256.) Third,

Shilling testified that her father set aside a portion of this area with fencing, which occurred before Shilling's birth and not long after World War II. (App. 68-69, 71.) Fourth, Shilling testified that it was "common knowledge" that her grandmother desired to be laid to rest with her husband Oliver Baker in the hilltop cemetery upon her death. (App. 70.) Fifth, funeral ceremonies have taken place at the cemetery as early as 1949 for Shilling's grandfather, and as early as 1990 for her father. (App. 73, 191.) Finally, the hilltop area had been known as a cemetery for as long Shilling or any of her siblings could remember. (App. 153-154, 160-161.) Clearly, the requisite intent to establish the Baker Cemetery finds ample support in the record. Moreover, the BZA reached the same factual conclusion, which is entitled to a presumption of correctness.

V. ESTOPPEL AND LACHES PRECLUDE THE DENIAL OF THE EXISTENCE OF THE BAKER CEMETERY.

By permitting a portion of his property to be used as a cemetery since he acquired the property in 1990, Brian Baker should be prevented from denying the existence of that same cemetery, either by estoppel or by the doctrine of laches.

Appellees argue that Shilling cannot use these doctrines to attempt to enlarge the cemetery beyond its use in 1949 because to do so would be to permit Baker to waive the requirements of a zoning ordinance.

Shilling testified, however, that the 40 foot by 40 foot area chosen by her and Ms. Heimer, which was approved by Baker and set aside by the installation of the $5,600 wrought iron fence, was "just enough area around the rock." (App. 82.) The "rock" referred to by Shilling was the specific spot on the hilltop where the relatives of the decedents would stand to disperse the ashes of their loved ones. (App. 73, indicating "We all went to the rock where we dispersed [the ashes]."). As such, Shilling does not seek to expand a pre-existing non-conforming use by estoppel or laches, but simply seeks to prevent Brian Baker from denying that the 40 foot by 40 foot area encompassed by wrought iron fencing constitutes the area of the pre-existing non-conforming cemetery use, or from otherwise removing such fencing. While this might not be directly binding on the BZA or the Zoning Administrator, estoppel or laches applied against Baker should

prevent him from offering factual support of the BZA's conclusion that the protectable portion of the Baker Cemetery only encompasses the 10 foot by two foot area. Absent that support, it is questionable whether the BZA would have reached the same result. But even more importantly, estoppel and laches should have prevented Baker, Simmons and Kelly from denying the existence of the Baker Cemetery in Case No. CL08-262, to which the BZA was not a party. Further, it would prevent Baker, Simmons and Kelly from taking any action to remove the wrought-iron fencing even if this Court were to uphold the BZA's finding that only the 10 foot by two foot area is in compliance with the zoning ordinance as a pre-existing, non-conforming use.

CONCLUSION

The decision of the Circuit Court in all three consolidated cases should be reversed.

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 that fifteen paper copies and one electronic copy on CD of this Reply Brief of Appellant 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, at the below addresses, on October 15, 2009.

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