1/4/08

FIFTH JUDICIAL CIRCUIT OF VIRGINIA

JUDGES
WESTBROOK J. PARKER
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CARL EDWARD EASON, JR.
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CITY OF SUFFOLK
CITY OF FRANKLIN
COUNTY OF ISLE OF WIGHT
COUNTY OF SOUTHAMPTON

RETIRED JUDGES
E. EVERETT BAGNELL
JAMES C. GODWIN
BENJAMIN A. WILLIAMS, JR.

January 2, 2008

Mr. Andrew G. Mauck
Troutman Saunders, LLP
P.O. Box 1122
Richmond, VA 23218-1122

Mr. Jesse J. Johnson
Johnson, Gardy & Associates
3508 Robs Drive
Suffolk, VA 23434

Re: F. Forrest and Janice B. Scott, et al.
v.
Burwell's Bay Improvement Association
CL07-101
Isle of Wight County Circuit Court

Gentlemen:

After the trial in this matter on December 17, 2007, I carefully reviewed the cases cited as well as the evidence presented.

There are two issues presented. First, do the plaintiffs own riparian rights and, if so, what is the extent of those rights?

The answer to the first question is simple. The plaintiffs, pursuant to the case law and the evidence, own riparian rights. Mr. Poole, the plaintiffs' predecessor in interest acquired "the right and privilege" to erect a wharf (which he did) by order of the court dated July 6, 1925 and a wharf, by its

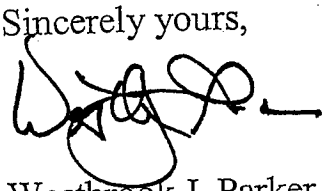
very nature, carries with it riparian rights. The real issue in this case is the extent of those rights.

To answer the second question, the line of navigability becomes extremely important. Both the plaintiffs and the defendant produced hydrographic surveyors (who qualified as experts) and each expert presented the court with a survey. My decision in this case is based in large measure on plaintiffs' exhibit #25 and on the new pier under construction by the defendant. While the defendant's expert testified that the line of navigability is 2 feet, the plaintiffs' evidence shows that the new pier of the defendant extends beyond that depth (and the new pier is not complete). It's obvious that the line of navigability should be 4 feet as set out by Mr. Pruett's (plaintiffs' expert) testimony. Further, the defendant's witnesses testified that the intent is to continue to build the pier in the direction which would impede the riparian rights of the plaintiffs.

Accordingly, the plaintiffs own riparian rights and they extend to the 4 foot line of navigability established on plaintiffs' exhibit #25; further, the construction of the defendant's new pier will interfere with the plaintiffs' riparian rights, and therefore, the said construction of the new pier in its current location is enjoined.

Mr. Mauck is directed to draw the order herein and once it has been signed by Mr. Johnson with proper objections noted, I shall enter it.

Sincerely yours,



Westbrook J. Parker, Judge

Copy to: Sharon N. Jones, Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF ISLE OF WIGHT COUNTY

R. FORREST AND JANICE B. SCOTT, et al.,	)	
Plaintiffs,	)	
	)	No. CL-07101
v.	)	
BURWELL'S BAY IMPROVEMENT ASSOCIATION,	)	
Defendant.	)	

ORDER

On December 17, 2007, a trial was held in this matter upon the Complaint filed by plaintiffs seeking a declaration of their riparian rights and for injunctive relief. Upon consideration thereof, and as set forth in the Court's letter opinion dated January 2, 2008, it is hereby ADJUDGED, ORDERED and DECREED that:

a. Plaintiffs are the owners of riparian rights in the James River at Burwell's Bay in Isle of Wight County, Virginia as described and apportioned as area "B" in the survey of Charles R. Pruett & Associates dated November 30, 2007, which survey is attached hereto and incorporated by reference (Plaintiffs' trial exhibit No. 25);

b. The pier that was recently constructed by defendant and extends into the James River from defendant's property located at Burwell's Bay, said property depicted as the "County Acre" on the Pruett survey, interferes with and impedes plaintiffs' riparian rights and is enjoined in its current location; and

c. Defendant's Motion for Reconsideration is DENIED.

The clerk is directed to send attested copies of this Order to all counsel of record.

ENTER: 1/30/08

Judge

A COPY:
ISLE OF WIGHT CIRCUIT COURT
TESTE: SHARON N. JONES, CLERK
BY _____ **DC**

WE ASK FOR THIS:

Anthony F. Troy, VSB No. 05985
John W. Daniel, II, VSB No. 15504
Andrew G. Mauck, VSB No. 35177
TROUTMAN SANDERS LLP
Post Office Box 1122
Richmond, Virginia 23218-1122
(804) 697-1200
(804) 697-1339 (fax)

Counsel for Plaintiffs

SEEN AND OBJECTED TO:

Jesse J. Johnson, Jr., Esquire
Johnson, Gardy & Associates
3508 Robs Drive
Suffolk, Virginia 23434
(757) 539-0350
(757) 539-1097 (fax)

Counsel for Defendant

1687328

Defendant objects specifically on the grounds that the Court denied Defendant's motion to stike Plaintiff's evidence because Plaintiff produced no evidence with regard to the theory under which Plaintiff may have acquired riparian rights. Thus the court reached an improper conclusion that Plaintiff would have obtained riparian rights.

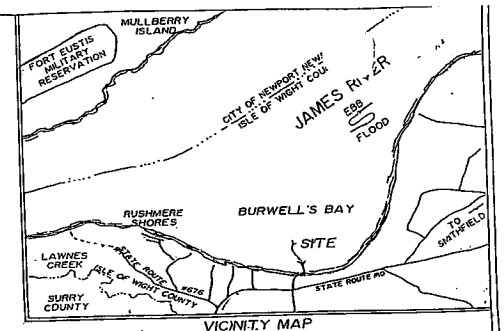
Even if Plaintiff had obtained riparian rights Defendant objects to the Court's ruling as to the manner and extent and the apportionment of riparian rights awarded to the Plaintiff.

Defendant objects to the Court's final ruling after the presentation of all the evidence including rebuttal evidence since neither Plaintiff nor Defendant produced evidence that would establish Plaintiff's riparian rights by prescription, or any other theory of acquisition of sai riparian rights.

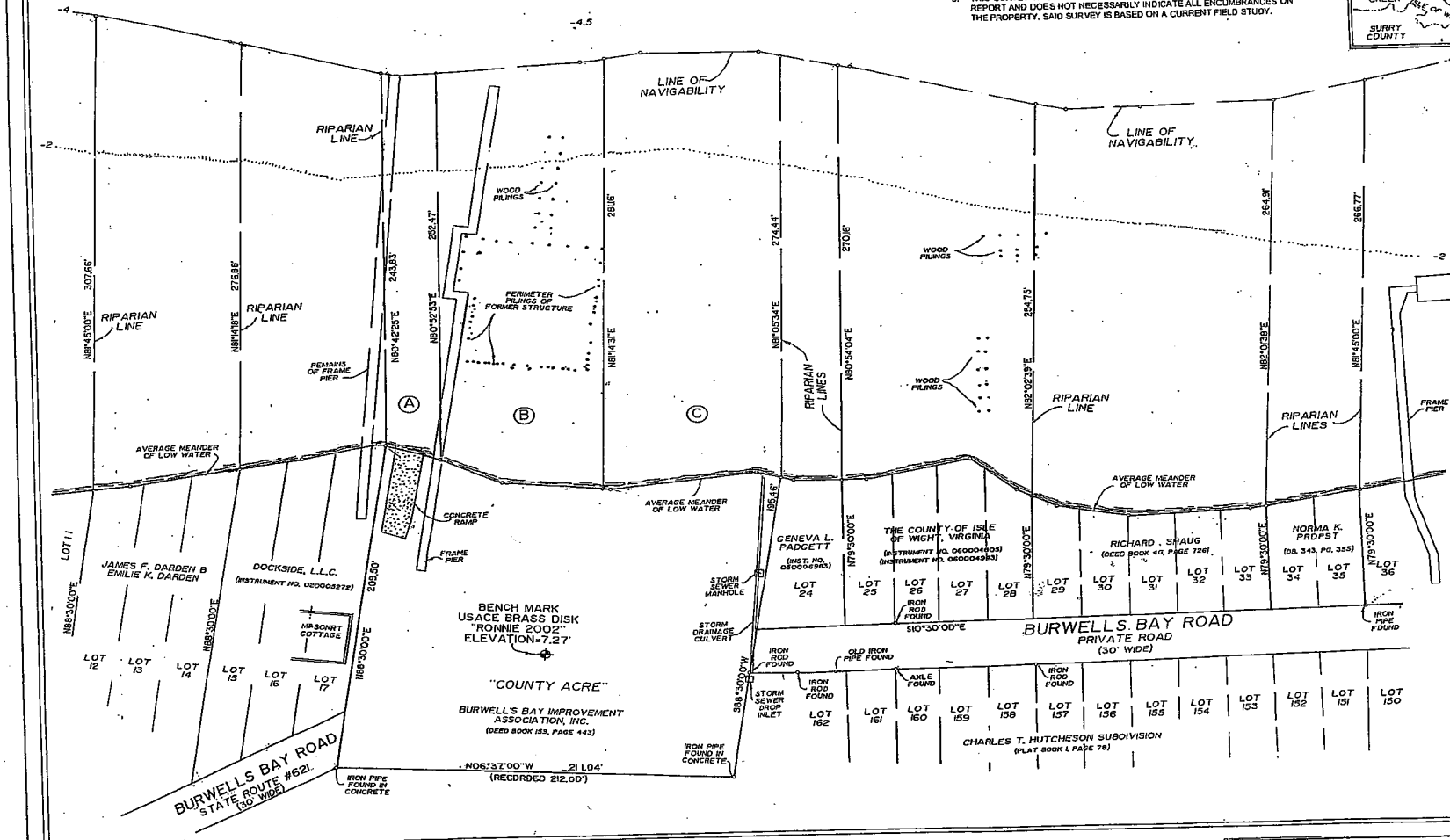
Defendant objects that the Court in its opinion relie upon the Order of Court dated July 6, 1925 to convey riparian rights to Plaintiff's predecessor in title.

NOTES

1. THE BEGINNING (LOTS 11/12) AND ENDING (LOTS 35/36) RIPARIAN LINES WERE CONSTRUCTED PERPENDICULAR TO THE SHORELINE OF THE SURVEYED AREA IN ORDER TO KEEP THE APPORTIONED AREAS IN FRONT OF THE UPLAND PROPERTIES.
2. THE LINE OF NAVIGABILITY IS BASED ON THE AVERAGE CONTOUR (-4 MLW). THIS DEPTH WOULD BE CONSISTENT WITH THE DRAFT OF THE VESSELS USING THIS PORTION OF BURWELL'S BAY (POWER BOAT DEPTH) AND THE LOCATION OF THE EASTERN LIMITS OF THE EXISTING PIERS.
3. DISTANCES WERE APPORTIONED AS PER THE SUPREME COURT OF APPEALS OF VIRGINIA (JUNE 17, 1897) IN CASE OF GRONER et al. VS. FOSTER et al.
4. VERTICAL DATUM & SOUNDINGS WERE BASED ON NGVD (1929 SEA LEVEL DATUM).
5. THIS SURVEY HAS BEEN PREPARED WITHOUT THE BENEFIT OF A TITLE REPORT AND DOES NOT NECESSARILY INDICATE ALL ENCUMBRANCES ON THE PROPERTY. SAID SURVEY IS BASED ON A CURRENT FIELD STUDY.



VICINITY MAP
SCALE 1"=8000'



RIPARIAN APPORTIONMENT

FEE OWNER	SHORE LINE DISTANCE	LINE OF NAVIGABILITY	PERCENTAGE
JAMES F. DARDEN	78.02 FEET	76.75 FEET	11.26%
DOCKSIDE, LLC	78.85 FEET	77.57 FEET	11.38%
*"COUNTY ACRE" ((A))	30.00 FEET	29.51 FEET	4.33%
*"COUNTY ACRE" ((B))	90.37 FEET	88.89 FEET	13.04%
*"COUNTY ACRE" ((C))	95.17 FEET	93.65 FEET	13.74%
GENEVA A. PADGETT	31.12 FEET	30.61 FEET	4.49%
ISLE OF WIGHT CO.	110.32 FEET	108.58 FEET	15.93%
RICHARD C. SHAUG	128.10 FEET	126.03 FEET	18.49%
NORMA K. PROPST	50.83 FEET	50.03 FEET	7.34%
TOTAL	692.78 FEET	681.62 FEET	100.00%

THE "COUNTY ACRE" HAS BEEN APPORTIONED INTO THREE SEPARATE ENTITIES. ((A)) & ((C)) ARE IN FAVOR OF BURWELL'S BAY IMPROVEMENT ASSOCIATION, INC. AND ((B)) IS IN FAVOR OF EARL C. RICHARDSON ET AL. AS DESCRIBED IN DEED BOOK 358 AT PAGE 826 AMONG THE LAND RECORDS OF ISLE OF WIGHT COUNTY, VIRGINIA.

RIPARIAN APPORTIONMENT ON A PORTION OF BURWELL'S BAY ALONG THE SHORE OF THE JAMES RIVER

HARDY MAGISTERIAL DISTRICT
ISLE OF WIGHT COUNTY, VIRGINIA

SCALE: 1" = 40'
NOVEMBER 30, 2007

CHARLES R. PRUETT & ASSOCIATES
LAND SURVEYING * PLANNING * URBAN DESIGN
LANCASTER COURTHOUSE, VIRGINIA
(804) 462-7797

0 20 40 80 120 160
GRAPHIC SCALE

VIRGINIA:

IN THE CIRCUIT COURT OF ISLE OF WIGHT COUNTY

R. FORREST SCOTT and JANICE B. SCOTT, *et al.*,	:	
Plaintiffs,	:	CIVIL CASE NO. CL07-101-1
v.	:	
BURWELL'S BAY IMPROVEMENT ASSOCIATION,	:	
Defendant.	:	

ORDER

NOW COME Plaintiffs and Defendant, by counsel, pursuant to the Virginia Supreme Court's Opinion in this matter dated February 27, 2009, wherein the Supreme Court remanded this matter for "the trial court's consideration of the claims of adverse possession and prescription," and the matter was argued by counsel on September 11, 2009.

Upon a review of the evidence by transcript and a review of all Exhibits, and upon oral argument of counsel for Plaintiffs and counsel for Defendant, this Court has considered all of the evidence presented in this matter.

Upon the consideration of said evidence, it is hereby ADJUDGED, ORDERED and DECREED that Plaintiffs have not proven by clear and convincing evidence their claim of adverse possession, prescription, or adverse use of the riparian rights of Defendant, and said claim is hereby denied, and judgment shall be entered on behalf of the Defendant.

PREPARED BY
JOHNSON GARDY
& TEUMER

ATTORNEYS AND
COUNSELORS AT LAW
3508 ROBS DRIVE
SUFFOLK, VIRGINIA
23434

It is further ADJUDGED, ODERED and DECREED that any and all injunctions ordered by this Court be, and hereby are, dissolved.

ENTERED this 28th day of October, 2009.

Judge

I ASK FOR THIS:

Jesse J. Johnson, Jr., Esquire
JOHNSON, GARDY & TEUMER
3508 Robs Drive
Suffolk, Virginia 23434
Phone: 757-539-0350
Counsel for Defendant

A COPY:
ISLE OF WIGHT CIRCUIT COURT
TESTE: SHARON N. JONES, CLERK
BY: Kathleen S Lorenz DC

SEEN AND OBJECTED TO:

Andrew G. Mauck, Esquire
SETLITT & HOLLAND, P.C.
4940 Dominion Boulevard
Glen Allen, Virginia 23060
Phone: (804) 377-1264
Counsel for Plaintiffs

PREPARED BY
JOHNSON GARDY
& TEUMER

ATTORNEYS AND
COUNSELORS AT LAW
3508 ROBS DRIVE
SUFFOLK, VIRGINIA
23434

ASSIGNMENTS OF ERROR

1. The trial court erred when it held that Appellants did not prove ownership of riparian rights by adverse possession.

2. The trial court erred when it held that Appellants did not prove ownership of riparian rights by prescriptive use.