In The

Supreme Court of Virginia

RECORD NO: 100149

R. FORREST SCOTT and JANICE B. SCOTT, *et al.*,

Appellants,

v.

BURWELL'S BAY IMPROVEMENT ASSOCIATION,

Appellee.

BRIEF OF APPELLEE

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IN THE SUPREME COURT OF VIRGINIA

At Richmond

Record No. 100149

R. FORREST SCOTT
and JANICE B. SCOTT, *et al.*,

Appellants,

v.

BURWELL'S BAY IMPROVEMENT ASSOCIATION,

Appellee.

BRIEF OF APPELLEE

STATEMENT OF THE CASE

This case involves whether Appellants have acquired any rights of the riparian rights rightfully owned by Appellee by virtue of Appellee's ownership of a one-acre parcel of land in the Burwell's Bay section of the Isle of Wight County, which was purchased from Isle of Wight County in 1960. Appellants, who are made up of family members, referred to herein as the Bracey Family, purportedly purchased a pier at Burwell's Bay by Deed dated

January 6, 1989, said pier and associated structure extending from the property owned by the Association into the James River.

In March 2007, the Braceys filed a Complaint in the Circuit Court of Isle of Wight County to establish riparian rights. A bench trial was held on December 17, 2007. The trial court concluded by letter opinion dated January 2, 2008, that the Bracey Family owned riparian rights because they were the predecessor of a Mr. Poole, who was granted the right and privilege to erect a wharf by Court Order dated July 6, 1925. The Court further apportioned riparian rights.

The Association appealed on the grounds that Mr. Poole's rights under the 1925 Court Order were personal to him and not transferable. In *Burwell's Bay v. Scott*, 277 Va. 325, 329, 672 S.E.2d 47 (2009), the Court ruled that the 1925 Order was personal to Mr. Poole, could not be transferred, and expired when he died. The case was remanded to the trial court for consideration on the Bracey Family's claim of adverse possession and prescription.

Counsel presented oral argument on September 11, 2009, and by Order of the Isle of Wight County Circuit Court dated October 28, 2009 (App. 11), the Honorable Westbrook J. Parker ruled for the Association. The Order stated that the Court had reviewed the transcript of evidence from the prior hearing, had reviewed all Exhibits, and considered oral argument, and further considered all of the evidence presented in the matter before the Court. Judge Parker ordered that the plaintiffs, the Scott Family, had not proven by clear and convincing evidence their claim of adverse possession, prescription or adverse use an entered up judgment on behalf of the defendant Association.

Appellants appealed and received a Writ on the issue of possible adverse claim so far as it may vest title of the riparian rights to Appellants.

STATEMENT OF FACTS

In 1876, the County of Isle of Wight acquired an acre of land at Burwell's Bay on the James River. By Order of the Isle of Wight County Circuit Court dated July 26, 1925, Edwin T. Poole was granted the right and privilege of erecting a wharf as shown by a

plan attached to said petition on a portion of said County Landing at Burwells Bay (App. 71). Mr. Poole built his pier and structures, and it is unclear from the record as to when he completed construction, but it appears that at some point in time in the early 1930's, his work was destroyed, and it was rebuilt. The pier and appurtenant structures were later destroyed by Hurricane Isabel in 2003. Appellee would agree that the pier and appurtenant structures appeared to have changed hands on several occasions, and Mr. Forrest Scott indicated that before he purchased the pier, he went to the Clerk's Office and obtained a copy of the old Court Order, and that he knew that the Circuit Court had granted Mr. Poole the privilege to erect a pier. (App. 38) Mr. Scott further acknowledged that his family had obtained permission and gained an easement from Appellee to access the septic tank to make repairs and do other things so far as the septic tank was concerned. (App. 39 and App. 77)

Mr. Bracey further testified that the property was not used very much by the family members but was used by various civic groups, including Ruritan Club, Rotary Club, and other organizations, and

that he had a $1 million liability insurance policy on the pier because he let other people use it, even though when Mr. Bracey obtained his zoning permit, it was permitted for a two bedroom intermittent use structure. (App. 43-44) Mr. Bracey also stated that he was a member of Appellee's Association from 1989 until 2003. (App. 45)

ARGUMENT

I. THE CIRCUIT COURT JUDGE'S RULING SHOULD NOT BE DISTURBED

While Appellants believe the facts of this case may be undisputed Appellee believes the facts to be in dispute. Therefore, a *de novo* review as set forth in *Quatannens v. Tyrell*, 268 Va. 360, 365, 601 S.E.2d 616, 618 (2004), is misplaced, since the Judge of the Circuit Court of Isle of Wight County decided both issues of fact and made conclusions of law. In this particular case, there is no review *de novo*, and this Court, in order to reverse the Circuit Court's Judge's decision, would have to find that the Judge's decision was plainly wrong or without evidence to support it. *Martin v. Moore v. Martin*, 263 Va. 640, 679, 561 S.E.2d 672 (2002) Further, in this case, the trier of fact was the Judge, and the trier of fact would determine whether the elements of adverse possession

and/or prescription have been proven, and only when reasonable minds could not differ would the issue become one of law for the court. *Grappo v. Blanks*, 241 Va. 58, 62, 400 S.E.2d 168 (1991)

Further, pursuant to §8.01-680 of the Code of Virginia of 1950, as amended, there was no objection in the record that the Court's decision of September 11, 2009, was contrary to the evidence in the case, and, thus, the judgment of the trial court would not be set aside unless it appeared from the evidence that such judgment was plainly wrong or without evidence to support it.

Thus, Appellee can find no reason why the case, in light of the factual findings of the Court, should be reviewed further.

Notwithstanding Appellee's position that the Judge's decision as trier of fact could not be disturbed unless plainly wrong or without evidence to support said decision, Appellee states that the Bracey Family has no right to riparian rights by adverse possession.

II. APPELLANTS DID NOT ACQUIRE TITLE TO THE RIPARIAN RIGHT BY ADVERSE POSSESSION

While Appellants state the proposition that adverse possession must be actual, exclusive hostile, open and notorious and under a claim of right for fifteen years, *Calhoun v. Woods*, 246 Va. 41, 43,

431 S.E.2d 285, 286 (1993), the proposition that adverse possession is the proper remedy is erroneous. Of all the cases cited by Appellants for the proposition that adverse possession is appropriate in this matter, it should be noted that none of these cases deal with riparian rights—they all deal with either the possession of a piece of land or, as in the case of *Blacksburg Mining & Mfg. Co. v. Bell*, 125 Va. 565, 100 S.E. 806 (1919), deal with mineral rights and the right to sever said minerals from the land. As defined in *Groner v. Foster*, 94 Va. 650, 27 S.E. 493 (1897), riparian rights are rights that exist between the mean low water mark of tidal waters and the edge of navigation on and over the lands of the Commonwealth of Virginia. Thus, to rule that a person may acquire the land by adverse possession would be a ruling that, in effect, Appellants could adversely possess land as against the Commonwealth of Virginia. Obviously, this is plainly wrong and is not the position recognized by any case law applicable to riparian rights. Also, the pier was totally destroyed by Hurricane Isabel in 2003, and Appellants were compensated. (App. 39)

III. APPELLANTS DID NOT ACQUIRE RIPARIAN RIGHTS BY PRESCRIPTION

The Bracey Family failed to establish the right to riparian rights by prescriptive use. Appellee would agree that *Sanders Yacht Yard v. Crockett's Landing*, 65 Va. Cir. 514, 519 (2001) fairly states that in order to establish a prescriptive use, the claim must show that such use has been open, notorious, actual, continuous, exclusive, and hostile, accompanied by the claim of right for twenty years.

As is evident in the Exhibits in the Appendix, the Bracey Family acquired whatever right, title, and interest it has to the Pavilion in 1989. Thus, an adverse claim by prescriptive use was at the time of their filing an action premature.

IV. PRINCIPLES OF TACKING, MISTAKE, AND PERMISSIVE USE ARE RELEVANT IN THE DETERMINATION OF AN ADVERSE CLAIM OF RIGHT

Appellants' claim that they may tack any prior adverse periods of their predecessors in title. However, in the case before this Court, there was no evidence on behalf of predecessor in title by Appellants that the predecessor had attempted to acquire the riparian rights of Appellee. In order for Appellants to avail themselves of tacking, the evidence must be clear and convincing

evidence. The only evidence was that the Pavilion was there, and that it was there by virtue of a 1925 Court Order, which was fully addressed in *Burwell's Bay v. Scott, supra*, where this Court stated that there could be no claim of right by virtue of that Court Order. In *Grappo v. Blanks, supra,* said case reaffirmed this Court's position that a plaintiff must recover solely on the strength of his own title and not on the weakness of the defendants' title.

Further, in *Grappo*, p. 63, this Court also stated that the tacking remedy was not available to Appellants, since Appellee's heirs and successors in title were not parties to the action. In the case before the Court now, Appellants produced no evidence other than the fact that other people or entities had claimed the Pavilion, but in no case was testimony given by any of them, nor were any of them parties in this case.

Therefore, it is Appellee's position that tacking cannot be used to establish adverse rights.

Appellants erroneously claim that the 1925 Court Order, which was the subject of *Burwell's Bay v. Scott, supra,* has no effect on the Bracey Family's claim of adverse possession. Appellee would

state that the 1925 Court Order is and was a very significant part of the claim, since until *Burwell's Bay* was reported, neither the parties to this action nor any predecessors in title of the parties knew the legal import of that 1925 Court Order. *Quatannens, supra*, delves into the subject of adverse possession and inferentially adverse use by mistake, and it appears that the cases cited in *Quatannens* were well researched and analyzed, and Appellee would argue that the assumption on all the parties' part as to the import of the 1925 Court Order could be characterized as the ultimate mutual mistake of fact. Appellants, the Bracey Family, had every opportunity to determine the legal import of the 1925 Court Order, and Mr. Bracey admitted that he had viewed the Court Order in the Clerk's Office (App. 39), and the logical conclusion is that he presumed that he was being granted the Pavilion. *Quatannens, supra*, also sets forth the law that any adverse taking be viewed in a fact-specific case-by-case basis as to mistake, and their case should not be treated differently.

Further, there is evidence in the record that the use of the Pavilion and any right acquired to the riparian rights was by

permission. The record reflects (App. 77) permission to maintain a septic system on property owned by Appellee. An easement was also granted by Appellee to Appellants' predecessor in title to maintain a septic tank drain field. Further, Mr. Bracey acknowledged that he was a member of the Burwell's Bay Improvement Association from 1989 until 2003 (App. 46), the very organization from which he now seeks redress. Further, Mr. Bracey's testimony establishes that this property was not used as a two bedroom single-family weekend retreat and, in fact, was used by Ruritan Clubs, Rotary Clubs, and various other organizations, and that Mr. Bracey had insured the property for $1 million because they were letting people use it. (App. 43 & 44).

Further, according to the testimony of Charles W. Butler, Jr. (App. 65, 66), the Association had its annual meeting on the pier at least once, and that Mr. Butler discussed and came to an agreement as to the placement of a possible future pier.

Appellee would also draw the Court's attention to *Mary Moody Northern, Inc. v. Bailey*, 244 Va. 118, 418 S.E.2d 882 (1992), which dealt with the issue of permissive use versus adverse use. Based

upon the whole of this matter, Appellee and Appellants coexisted permissively, and there was no intent implicit or explicit on the part of Appellants to adversely obtain any rights to the riparian rights of Appellee.

CONCLUSION

As set forth hereinabove, Appellee respectfully requests that this Court affirm the decision of the trial court.

Respectfully submitted,

BURWELL'S BAY IMPROVEMENT ASSOCIATION

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CERTIFICATE OF SERVICE

Pursuant to Rule 5:26(d), I hereby certify that fifteen copies of the foregoing Appellee's Brief were filed in the Office of the Clerk of the Supreme Court of Virginia via hand delivery, and that three copies of said Brief were mailed to Andrew G. Mauck, Esquire, TROUTMAN SANDERS LLP, P. O. Box 1122, Richmond, Virginia 23218-1122, counsel for Appellants, on this 9th day of June, 2010. On this same date, a copy of the foregoing was filed electronically via e-mail at scvbriefs@courts.state.va.us.

/s/ Jesse J. Johnson, Jr.
Jesse J. Johnson, Jr., Esquire