IN THE SUPREME COURT OF VIRGINIA

Record No. 100149

R. FORREST AND JANICE B. SCOTT, et al.,

Appellants,

v.

BURWELL'S BAY IMPROVEMENT ASSOCIATION

Appellees.

OPENING BRIEF OF APPELLANTS

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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.

STATEMENT OF THE CASE

This case involves the apportionment of riparian rights between two owners on the James River in Isle of Wight County, Virginia. The Burwell's Bay Improvement Association ("Association") owns one acre of land at Burwell's Bay, which it bought in 1960. A group of family members, referred to herein as the "Bracey Family, own a pier and structure, known as the "Pavilion," which extends from the Association's property. The Family bought the Pavilion in 1989 as a private family retreat.

The genesis of this dispute is the Association's decision to build a pier from its land that will extend directly in front of and interfere with the Pavilion. The Bracey Family has no objection to the Association building a pier, simply not in front of its house.

In March, 2007, the Bracey Family filed a Complaint in the Circuit Court of Isle of Wight County to establish their riparian rights under three separate theories. First, the Family alleged that they were successors-in-interest to the rights acquired by Edwin Poole by order dated July 6, 1925 of the Circuit Court of Isle of Wight County ("1925 Order"), granting him the right to erect a wharf, which related riparian rights, from the land now owned by the Association. Appendix ("App.") at 1, ¶ ¶ 7, 9. The Family also alleged that it had acquired the rights by adverse possession and prescriptive use. *Id.* ¶ ¶ 11-12.

Trial was held on December 17, 2007. At the close of the Bracey Family's case-in-chief, the court denied the Association's motion to strike all of the claims. Trial concluded, and by letter opinion dated January 2, 2008, the court held that the Bracey Family owned riparian rights because "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 court apportioned the riparian rights according to the survey of plaintiffs' expert, Charles R. Pruett, whereby the riparian rights of the Association are established

in Areas "A" and "C" and the rights of the Bracey Family in Area "B". App. 150. Under this apportionment, both parties have sufficient access to the James River. The court did not address the Bracey Family's claims of adverse possession or prescriptive rights.

The Association appealed on the grounds that Mr. Poole's rights under the 1925 Order were personal to him and not transferable. In *Burwell's Bay v. Scott*, 277 Va. 325, 329, 672 S.E.2d 847 (2009), the Court reaffirmed that riparian rights may be severed from the land and held that Mr. Poole obtained riparian rights under the 1925 Order. The Court, however, held that the 1925 Order was personal to Mr. Poole, could not be transferred, and expired when he died. The case was remanded for the trial's court consideration of the claims of adverse possession and prescription.

Counsel presented oral argument at a hearing was on September 11, 2009, after which the trial court held without explanation that the Bracey Family's claims were denied. There were no findings of fact. The final order stated only that the Bracey Family has "not proven by clear and convincing evidence their claim of adverse possession, prescription, or adverse use of the riparian rights of the" Association. App. 11.

QUESTIONS PRESENTED

1. As to Assignment of Error Number One, did Appellants prove all elements of adverse possession to establish their ownership of riparian rights?

2. As to Assignment of Error Number Two, did Appellants prove all elements of prescriptive use to establish their ownership of riparian rights?

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 Circuit Court dated July 26, 1925 (the "1925 Order"), it was granted "unto said Edwin T. Poole the right and privilege of erecting a wharf as shown by the plan attached to said petition, on a portion of said County landing at Burwells Bay." App. 71.

Mr. Poole built and operated the Pavilion from the County land for many years. App. 64. An old photograph of the area shows the Pavilion as it existed from at least the 1930's until it was mostly destroyed in 2003. App. 134. The parties stipulated that the Pavilion was present by at least 1937. App. 36. Former Isle of Wight County

Board of Supervisors member O. A. Spadey testified that he recalled the Pavilion from his childhood in the 1940's, as shown in the old photograph, and confirmed its continued existence throughout his lifetime. App. 53-54.

The Pavilion has been bought and sold several times. *See, e.g.*, App. 75, 81-84. James and Emille Darden conveyed the Pavilion to Pier A Rama Corporation in 1963. App. 81-84. When Spadey came back from the military service in the 1960s, the "Pavilion wasn't open to the public like it had been all of those other years." App. 55. It had been bought by Dr. Darden. "When he purchased it, I don't know, but it was not open to the public at that time." *Id.* "Basically it was privately owned." App. 59. Spadey testified that he had never heard anyone from the Association state that they gave the Bracey Family permission to use their cottage. App. 58.

LeBay, Inc. purchased the Pavilion in 1986, and its owner, John Read, used the Pavilion for his construction business and built a bedroom in it where he slept. App. 23, 60-61. The owners have historically used it for a variety of purposes including a fishing pier, game room, snack bar, pool hall, and dance hall. App. 54-56. The

facilities included bathhouses, electricity and running water. App. 22-23, 54.

The Pavilion was purchased by the Bracey Family from Le Bay, Inc. on January 6, 1989. App. 81-84. The Bracey Family continuously used it as a family retreat until it was destroyed by Hurricane Isabel in 2003. App. 25. *See* also App. 136 (newspaper article chronicling the history of the Pavilion and its renovation and use by the Bracey Family); App. 140-141 (photograph taken after Hurricane Isabel). Multiple poles remain at the site delineating the footprint of the Pavilion. App. 31-32, 71, 140-141. The Bracey Family intends to rebuild the Pavilion once its riparian rights are resolved. App. 18.

Forest Scott testified that his family members never asked for permission to park on the Association Property or cross the Property to get to the pier to the Pavilion. App. 29. No one has ever told him that the Pavilion can be used only as a public wharf. App. 30. And no one from the Association ever told him "that you were lucky to be there and that they could take away your permission to use the structure for a home at any time." *Id.*

The County sold the land to the Association on July 7, 1960. App. 73-74. In 2006, the Association decided to construct a pier from its property that would cross directly in front of the Bracey Family home and block their access to the James River. App. 33. The offensive pier is partly depicted in Mr. Pruett's survey. The pier is to have an additional L-shaped end which will further extend the pier directly in front of the Bracey Family's house. App. 36; 111-116 (Association's permit application to the Virginia Marine Resources Commission with diagram of the pier).

The Bracey Family does not oppose the Association building a pier. Instead, it simply asked that the pier not be built in front of their home. App. 33-34. The Association could build it on the other side of the Pavilion but refused to change the location. App. 34. Thus, the Bracey Family was forced to bring this suit to establish its riparian rights and to enjoin construction of the Association pier.

ARGUMENT

The facts of this case are largely undisputed. "In determining the proper application of the law of adverse possession to the facts of this case, we review the trial court's decision *de novo*." *Quatannens v. Tyrrell*, 268 Va. 360, 365, 601 S.E.2d 616, 618 (2004).

I. The Bracey Family Established Their Riparian Rights by Adverse Possession.

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).

> Use and occupation of property, which may be evidenced by fencing property, constitutes proof of *actual* possession. One is in *hostile* possession if his possession is under a claim of right and adverse to the right of the true owner. Possession is *exclusive* when it is not in common with others. Possession is *visible* when it is so obvious that the true owner may be presumed to know about it. Finally, possession is *continuous* if it exists without interruption for the statutory period.

Grappo v. Blanks, 241 Va. 58, 61-62, 400 S.E.2d 168, 171 (1991) (citations omitted; original emphasis).

A. <u>The Pavilion is an open and actual use that has been continuously present since at least the 1930's</u>.

The usual mode of actual possession is by occupancy, use or enjoyment, residence, cultivation, enclosure and improvement of the premises. *La Due v. Currell*, 201 Va. 200, 207, 110 S.E.2d 217, 222 (1959). Thus, it is sufficient if the possession is marked or held by enclosure by fence, by cultivation, residence, clearing or any other plainly visible and notorious manifestation of sole, exclusive

possession, according to the nature of the case. *Id.* As the Court noted in *Brock v. Bear*, 100 Va. 562, 566, 42 S.E. 307, 308 (1902):

> while the intention to claim title must be manifest, it need not be expressed. The intention to hold and claim title is often best shown by the acts of the parties, and their manner of occupancy. It would be difficult to conceive a more unequivocal determination to take and hold title to land up to a given line than to erect costly buildings upon the land up to that line, and use and occupy the same for years in the face of all persons who could question the right. In such a case the intention is explicit, and the acts open and notorious.

The Pavilion, by its very nature, is an open, notorious and actual use. It is undisputed that it has continually existed since at least the 1930's and that the Bracey Family bought it in 1989.

The only argument made by the Association on this issue was that the Pavilion was destroyed by Hurricane Isabel in 2003. This argument is meritless for two reasons. First and foremost, dozens of poles remain that outline the footprint of the structure and block riparian access by the Association. *See* App. 140-141. Second, adverse possession had occurred more than 15 years before 2003 (*see* below regarding tacking of possessor periods).

B. The Bracey Family Has Been in Exclusive Possession of the Pavilion Since 1989.

Possession is exclusive when it is not in common with others and occupancy is marked by acts clearly indicating a claim of ownership of the property. *See Grappo*, 241 Va. at 62, 400 S.E.2d at 171. It is undisputed that the Pavilion was operated as a private facility for the exclusive use by its owners since the 1930's. More importantly, the Bracey Family bought the Pavilion in 1989 and continuously used and maintained it as their private and exclusive family retreat. The mere presence of the Pavilion excluded the Association from the river bottom under the structure and prevented the Association from accessing navigable waters in that area. There was no evidence presented by the Association on this issue.

C. The Bracey Family's Possession of the Pavilion Was Hostile and Under a Claim of Right.

Possession is considered "hostile" when it is under a claim of right and adverse to the right of the true owner. *Grappo*, 241 Va. at 62, 400 S.E.2d at 171. "When used in the context of adverse possession, the terms *claim of right, claim of title*, and *claim of ownership* are synonymous. They mean a possessor's intention to appropriate and use the land as his own to the exclusion of all

others." *Id.* (original emphasis). "That intention need not be expressed but may be implied by a claimant's conduct. Actual occupation, use, and improvement of the property by the claimant, as if he were in fact the owner, is conduct that can prove a claim of right." *Id.*

There is no question that the Bracey Family claimed and continues to claim ownership of the Pavilion and related rights. They spent a substantial amount of money improving and refurbishing the structure and adding a significant pier extension. *See* App. 135-137.

This Court's ruling that the 1925 Order has expired does not undermine the Bracey Family's claim for adverse possession.

> It is immaterial that the title paper relied on as color is defective or even void as passing title. Indeed, . . . it is inherent in color of title that the claim thereunder is invalid -- is in fact no title -- and the writing may indeed be absolutely void. This is necessarily true because color of title is only important in cases of claim under adverse possession, and the occasion to invoke adverse possession never arises where the party in possession has the superior paper title.

Blacksburg Mining and Manufacturing Company v. Bell, 125 Va. 565, 580, 100 S.E. 806, 811 (1919) (citations omitted).

II. The Bracey Family Established Their Riparian Rights by Prescriptive Use.

"In order to establish prescriptive use of . . . riparian bottom, the claimant must show such use has been open, notorious, actual, continuous, exclusive and hostile accompanied by a claim of right for 20 years." *Sanders Yacht Yard v. Crockett's Landing*, 65 Va. Cir. 514, 519 (2001). For all of the reasons stated above, the Bracey Family proved each element. The Bracey Family may tack on the adverse periods of its predecessors in title. *Hollingsworth v. Sherman*, 81 Va. 668, 674 (1885) (several possessions can be tacked so as to make a continuity of possession where there is privity of estate). The Bracey Family bought the Pavilion from Le Bay, Inc. in 1989, LeBay bought the Pavilion in 1986 from Pier A Rama Corporation, App. 81-84, and Pier A Rama bought the Pavilion in 1963. App. 75.

As discussed herein, the Association failed to introduce any evidence to contradict these facts. Therefore, all of the evidence clearly established that the Bracey Family acquired riparian rights by prescriptive use.

III. The Association failed to establish its defense of permissive use.

The primary argument of the Association is that the Bracey Family's use of the Pavilion was permissive.[1] "Permission is properly viewed as a defense to a claim of adverse possession. As such, the defendant to the claim has the burden of proof." *Quatannens*, 268 Va. at 373, 601 S.E. 2d at 623. The trial court did not address this issue.

A. The Association Failed to Present Any Evidence Regarding Adverse Possession.

The Association called only two fact witnesses, Kenneth Nye and Charles Butler, and their testimony was *extremely* limited.[2] It introduced no documents (except the survey of Mr. Kennedy). This minimal evidence was due in part because the Association in its

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[1] After the Bracey Family concluded its case-in-chief, the Association moved to strike all of the Bracey Family's claims. The trial court denied the motion and held "I think that they've met their burden." Tr. 84. Therefore, the Bracey Family should prevail in this case unless the Association presented evidence to refute the evidence presented by the Bracey Family. As discussed herein, the Association clearly failed to do so

[2] R.M. Kennedy, a marine surveyor, testified on behalf of the Association regarding the apportionment of riparian rights. His testimony has no relevancy to the adverse possession and prescriptive rights claims.

answers to plaintiffs' interrogatories admitted that it knew next to nothing about the history and use of the Pavilion:

> 3. Describe and identify all uses made of the Facilities, in whole or in part, by any person or entity at any time, and for each such use described, describe the nature of the use and identify the approximate dates of the use, the identity of the user and whether the use was a private or public use (meaning available to the general public).
>
> ANSWER:
>
> Defendant has insufficient knowledge of Plaintiff's use of the facility other than to state that it *was used a private recreation facility.*

Ex. 23 (emphasis added).

The sum total of Nye's testimony was that he was 68 years old, had been going to the Public Acre since he was six years old, and had no recollection of talking to Forest Scott about the Public Acre. His testimony added nothing to the case.

Butler testified that he was a member of the Association and an Association officer in "approximately '94 or '95." App. at 64. He confirmed that the Bracey Family "came in '89" and admitted that "[t]hey owned it at that time." *Id.* Butler testified about a conversation he allegedly had with Forest Scott in 1995:

> He [Scott] showed us a picture – and I don't have these pictures here – I think it was the oldest picture they had of the existing pier of how it used to look. He said he'd like to put the pier back like it used to be back in the old days. And we told him that at that time, we said, we would like for you not to put that left-hand side in because eventually we're going to build a pier at Burwell's Bay. We don't know when exactly, but we are going to build a pier. He said, No problem. He said, I'll move the pier starting from the middle or back about here and we'll go straight out. That's what the agreement was.

App. 65-66.

Assuming this conversation occurred,[3] it establishes nothing. The Bracey Family simply and courteously agreed to locate their pier extension out from the middle of the Pavilion instead of from the left-hand side so that there would be room for the Association to build a pier in the future near the left hand side.[4] There is no evidence of any permission asked for or granted by anyone. *See Martin v. Moore*, 263 Va. 640, 646, 561 S.E.2d 672, 676 (2002) ("there must be a positive showing that an agreement existed").

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[3] Scott denied this conversation occurred. App. 40-41.

[4] Unfortunately, the actual pier built by the Association runs through the footprint of the Pavilion and is proposed to include an L-shaped end that will extend directly in front of the Pavilion and through the location of the Bracey Family's pier extension. *See* App. 115.

Moreover, the conversation had nothing to do with the Pavilion itself but instead a mere pier extension off the front of it, and it allegedly took place in 1995, long *after* the riparian rights had been adversely possessed. The Association bought its property in 1960, which means that by 1995 the Pavilion had been an open and obvious obstruction which blocked the Association's access to navigable water *for thirty five years*.

Simply put, the Association failed to present evidence to refute the claims of the Bracey Family or establish that the use was permissive.

D. The 1925 Order has no Affect on the Bracey Family's Claim of Adverse Possession.

The Association contends that because the Mr. Poole's original entry on the property was permissive under the 1925 Order, no one could subsequently adversely possess the landowner's rights. Such an argument fails for several reasons. First and foremost, under the 1925 Order, Mr. Poole was granted the right to build a *public* wharf in a specific location and of a certain size. Mr. Poole's Petition clearly states that he "desires to erect said wharf for public use." App. 1. As noted by the Court, Mr. Poole's petition was granted "subject to the right of the public to use the wharf in exchange for payment of certain

fees." *Burwell's Bay*, 277 Va. at 328, 672 S.E.2d at 848; App. 71. The plat attached to his Petition shows a structure "40 ft.sq." that is "400 ft. more or less from shore" with an entryway on the left side and not extending beyond the structure. App. 69.

Contrary to his Petition and the 1925 Order, Mr. Poole built a larger structure in a different location and he and subsequent owners operated it as a *private* facility. *Compare* Mr. Poole's plat, App. 69, to Mr. Pruett's survey depicting the Pavilion, App. 150. In its closing argument, the Association recognized this fact:

> Mr. Poole, obviously, just went out there and did whatever he wanted to and maybe he thought he was within his area. I don't know. . . Mr. Poole violated the provisions in the court order when he did so.

Tr. 117. All subsequent owners of the Pavilion, including the Bracey Family, have used it as a private facility. In fact, the Association admitted in its response to Interrogatory No. 3 that the Pavilion "was used a *private recreation* facility" by the Bracey Family. Ex. 23 (emphasis added).

In other words, there was no permission granted by anyone to anyone for the actual Pavilion as built and used. Knowing that their use of the Pavilion was for private purposes, the Bracey Family was careful to allege that they had acquired "private facilities at the

Property and accessed those facilities over and through the Property and via the James River without complaint from the Association or the County." *See* App 3, ¶ 11.

Second, the only person that received any permission for a public wharf was Mr. Poole from the Isle of Wight Circuit Court. This Court has now held that his permission under the 1925 Order was limited only to him and could not be transferred and expired when he died. Thus, any use of the Pavilion by any person after he transferred it or after his death was non-permissive.

Finally, the Bracey Family's ownership began in 1989, and there is no proof that *their possession* was permissive when it began. Thus, any argument by the Association that adverse possession is impossible in light of the 1925 Order must be rejected.

CONCLUSION

As set forth above, the Bracey Family respectfully requests that the Court: (1) reverse the decision of the trial court; (2) hold that the Bracey Family acquired riparian rights by adverse possession and prescriptive use; and (3) apportion riparian rights to them consistent with the riparian area set forth in the trial court's Letter Opinion of January 2, 2008, which adopted area "B" on Mr. Pruett's survey.

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CERTIFICATE OF SERVICE

I hereby certify that on May 20th, 2010, Rule 5:26(d) of the Supreme Court of Virginia has been complied with and pursuant to the Rule, fifteen (15) copies of this Brief of Appellants have been filed with the Clerk of the Supreme Court of Virginia and three (3) copies have been mailed postage prepaid to Jesse J. Johnson, JOHNSON, GARDY & ASSOCIATES, 3508 Robs Drive, Suffolk, Virginia 23434, counsel for Appellees.

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