In The

Supreme Court of Virginia

RECORD NO. 121728

COREY NEJATI and ROBABEH NEJATI,

Appellants,

v.

STEPHEN P. STAGEBERG, *et al.*,

Appellees.

CORRECTED BRIEF OF APPELLANTS

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ASSIGNMENTS OF ERROR

I. **The Fredericksburg City Circuit Court erred when it held that Stageberg's purchase of the Hanover Street parcel resulted in a tenancy in common with the Nejatis.** (J.A.[1], pp. 1, 37, 60, 66, and 79).

II. **The Circuit Court erred when it held that Stageberg obtained a percentage ownership interest in the physical building and improvements on the Nejatis' parcel, as Stageberg bought and paid for only undeveloped dirt when he purchased from Properties By Us.** (J.A., pp. 1, 37, 60, 66, and 79).

III. **The Circuit Court also erred when it held that Virginia Code § 15.2-2254, prohibiting the sale of unapproved subdivided parcels, constitutes a restraint on the alienation of real property.** (J.A., pp. 1, 37, 60, 66, and 79).

IV. **The Circuit Court erred in ruling that the words of severance in the deed descriptions and Long Survey failed to give "such definite designation so that the boundary can be located," and the trial court was incorrect to hold that the deeds "require some further action for said boundary line to become definite, that being the necessary and required approval of the City."** (J.A., pp. 1, 37, 60, 66, and 79).

[1] Joint Appendix ("J.A.") is being filed herewith.

STATEMENT OF THE CASE

Corey and Robabeh Nejati were two of several defendants in the underlying Circuit Court action and are the Appellants herein. (J.A., p. 1 and 167). They are hereinafter collectively referred to as the "Nejatis." Stephen P. Stageberg ("Stageberg") filed his Complaint in the Circuit Court for Fredericksburg City, Virginia, seeking to quiet title regarding two parcels of real property. (J.A., p. 1). The crux of the case is threefold: (1) whether the two parcels (hereinafter referred to as the "Hanover Property" and the "Littlepage Property") are owned separately by the Nejatis (who bought the Littlepage Property) and Stageberg (who bought the Hanover Property); or (2) whether the Hanover and Littlepage Properties are an indivisible single "whole property" owned as tenants in common by the Nejatis and Stageberg together; and (3) whether the ownership interests of the Nejatis and Stageberg are defined by the physical boundary lines in the recorded plat annexed with the deeds, or whether the interests are merely "percentage interests" of a "whole property."

The background of this case begins in January 2005, when Kristopher K. Angstadt purchased a parcel of real property located at the intersection of Littlepage and Hanover Streets in the City of

Fredericksburg, Virginia. (J.A., p. 87). Three years later, in April 2008, Angstadt hired a surveying company, Long Survey, to prepare and record a survey of the property, which survey drew a boundary line down the property, dividing it into two parcels. (J.A., p. 91). One parcel was given the address 901 Hanover Street (the "Hanover Property") and contained 2,185.97 square feet of property, and the other parcel was given the address 802, 804 Littlepage Street (the "Littlepage Property") and contained 1,725.24 square feet of property. (J.A., p. 91).

Angstadt thereafter transferred each individual parcel by separate deed to his real estate development company, Properties By Us on April 15, 2008. (J.A., p. 93 and 95). Angstadt's company then built a two-story apartment building on the Littlepage Property, but left the Hanover Property undeveloped.

The Nejatis bought the 1,725.24 square foot Littlepage Property, with the building thereon, in June 2008, and Stageberg bought the 2,185.97 square feet of undeveloped land that was the Hanover Property in August 2008. (J.A., p. 97 and 130). The legal description of the Littlepage Property contained within the deed was:

> ALL THAT certain lot or parcel of land with all rights and privileges appurtenant thereto, situate, lying and being in

> the City of Fredericksburg, Virginia, and known as #802, #804 Littlepage Street, containing 1,725.24 square feet as shown on a plat survey dated April 2, 2008, by Long Surveying, L.L.C., Land Surveyors, which plat is recorded in the Clerk's Office of the Circuit Court of the City of Fredericksburg, Virginia as Instrument No. 080000914; and commonly known as 802 and 804 Littlepage Street.

(J.A., p. 97). Further, the legal description of the Hanover Property contained within the deed was:

> ALL THAT certain lot or parcel of land with all rights and privileges appurtenant thereto, situate, lying and being at the northwest corner formed by the intersection of Hanover and Littlepage Streets, in the City of Fredericksburg, Virginia, and containing 2,185.97 square feet as shown on a plat of survey dated April 2, 2008, by Long Surveying, L.L.C., Land Surveyors, which plat is recorded in the Clerk's Office of the Circuit Court of the City of Fredericksburg, Virginia, as Instrument No. 080000914; and commonly known as #901 Hanover Street.

(J.A., p. 130).

Stageberg had planned to build a home on the Hanover Property, but when Properties By Us submitted an application for a variance, they discovered that the Hanover Property was unbuildable because the subdivision plat had not been approved and did not qualify as a legal nonconforming lot under Fredericksburg City zoning standards. (J.A., pp. 120, 125, and 133). Stageberg exhausted his

administrative remedies through the Zoning Administrator's office but did not prevail. (J.A., pp. 133, 135, 136).

Stageberg filed his action to quiet title against Properties By Us, Angstadt, Long Surveying, the Nejatis, and the Nejatis' lender, Sterling Mortgage, as well as Bradford Hustead, in his capacity as the individual trustee on the Nejatis' deed of trust, and MERS, as beneficiary, in August 2010. (J.A., p. 1). Long Surveying was later removed from the case as a result of a demurrer granted by the Fredericksburg City Circuit Court on January 14, 2011, and Stageberg thereafter amended his Complaint in July 5, 2011 to add Gordon B. Gay, Trustee, for the benefit of Properties by Us, a second mortgagee for the Nejatis, as a new party. (J.A., p. 37).

Prior to the hearing at trial on April 30, 2012, Stageberg nonsuited Counts I, II, III and IV of his Amended Complaint against Properties By Us and Angstadt Properties, leaving as the sole remaining issue Count V, which was the quiet title action. (J.A., pp. 1, 14, 60 and 66). Following presentation of evidence, the parties filed post-trial briefs in lieu of closing arguments. (J.A., pp. 14, 37, and 51). The Court issued its letter opinion on June 7, 2012, and entered the Final Order on July 13, 2012. (J.A., pp. 60 and 66). The Nejatis noted

their objections on the Order and filed their appeal on August 13, 2012. (J.A., p. 66).

STATEMENT OF FACTS

I. OWNERSHIP BY ANGSTADT AND THE LONG SURVEY.

In January 2005, Kristopher K. Angstadt ("Angstadt") purchased a parcel of real property located at the intersection of Littlepage and Hanover Streets in the City of Fredericksburg, Virginia. (J.A., p. 87). Three years later, in April 2008, Angstadt hired a surveying company, Long Survey, to prepare and record a survey of the property, which survey drew a boundary line down the center of the property, dividing it into two distinct parcels clearly defined by the survey. (J.A., p. 91). One parcel was given the address 901 Hanover Street (the "Hanover Property"), and the other parcel was given the address 802, 804 Littlepage Street (the "Littlepage Property"). (J.A., p. 91).

The Long Survey was a plat **showing by rod, degree, and distance the specific dimensions** of each of the two new properties. (J.A., p. 91). The Hanover Property was depicted as 2,185.97 square feet within an area clearly depicted by rod, degree and distance. (J.A., p. 91). The Littlepage Property was depicted as

1,725.24 square feet within an area clearly depicted by rod, degree and distance. (J.A., p. 91).

There is no doubt and no dispute as to the location and area of these two properties.

II. OWNERSHIP BY PROPERTIES BY US AND THE NEJATIS' PURCHASE.

Angstadt thereafter transferred each individual parcel by separate deed to his real estate development company, Properties By Us on April 15, 2008. (J.A., pp. 93 and 95).

In June 2008, Corey Nejati, with Robabeh Nejati, his grandmother, were shopping for a property they could use both as an income property and for Corey to live in while he went to school at Mary Washington University. The Nejatis found the Littlepage Property to be to their liking: it contained a two-story building, where Corey could live, and it also had potential as an income property down the road. They purchased the Littlepage Property, including the potential rental units within the building, from Properties by Us for approximately $300,000 on June 11, 2008. (J.A., p. 97).

Properties By Us recorded a deed transferring the Littlepage Property to the Nejatis on June 16, 2008. (J.A., p. 97). The deed described the Littlepage Property as follows:

> ALL THAT certain lot or parcel of land with all rights and privileges appurtenant thereto, situate, lying and being in the City of Fredericksburg, Virginia, and known as #802, #804 Littlepage Street, containing 1,725.24 square feet as shown on a plat survey dated April 2, 2008, by Long Surveying, L.L.C., Land Surveyors, which plat is recorded in the Clerk's Office of the Circuit Court of the City of Fredericksburg, Virginia as Instrument No. 080000914; and commonly known as 802 and 804 Littlepage Street.

(J.A., p. 97).

The Nejatis thereafter executed a Deed of Trust in favor of Sterling Mortgage Corporation ("Sterling Mortgage") to secure the Nejatis' promissory note for their mortgage on the Littlepage Property. (J.A., p. 100). The Nejatis also executed a Deed of Trust in favor of Properties By Us to secure a second mortgage on the Littlepage Property, with Gordon B. Gay as Trustee for the Second Deed of Trust. (J.A., p. 118).

The Littlepage Property contains a two-story duplex, which building is also shown on the plat survey done by Long Surveying, which plat survey was recorded and referenced in the deed's metes-and-bounds description of the Littlepage Property. (J.A., p. 91).

III. STAGEBERG'S PURCHASE AND APPLICATION FOR ZONING VARIANCE.

Two months after the Nejatis' purchase, on August 27, 2008, Stephen P. Stageberg ("Stageberg"), as buyer, purchased the Hanover Property from Properties By Us. (J.A., p. 130). The deed described the Hanover Property as follows:

> ALL THAT certain lot or parcel of land with all rights and privileges appurtenant thereto, situate, lying and being at the northwest corner formed by the intersection of Hanover and Littlepage Streets, in the City of Fredericksburg, Virginia, and containing 2,185.97 square feet as shown on a plat of survey dated April 2, 2008, by Long Surveying, L.L.C., Land Surveyors, which plat is recorded in the Clerk's Office of the Circuit Court of the City of Fredericksburg, Virginia, as Instrument No. 080000914; and commonly known as #901 Hanover Street.

(J.A., p. 130). Stageberg purchased the Hanover Street property as raw land and paid only $120,000 for such raw land, and Stageberg contracted with Properties By Us to build a house on the raw land. (J.A., pp. 120 and 125).

However, when Properties By Us applied to the City of Fredericksburg to obtain a zoning variance to build the house, the Zoning Administrator for the City of Fredericksburg opined that the Hanover Property was unbuildable because the subdivision plat had not been submitted or approved pursuant to the City's zoning

requirements at the time when the boundary line in the Long Survey was drawn. (J.A., pp. 133, 135, and 136).

Stageberg appealed the Zoning Administrator's decision and exhausted his administrative remedies; however, he did not prevail. As a result, Stageberg could not build a house on his Hanover Street property. (J.A., pp. 133, 135, and 136).

IV. STAGEBERG'S LAWSUIT.

After exhausting his administrative remedies through the Board of Zoning Appeals, Stageberg then filed an action to "quiet title", for breach of covenant of title and rescission against Properties By Us, Angstadt, Long Surveying, the Nejatis, and the Nejatis' lender, Sterling Mortgage, as well as Bradford Hustead, in his capacity as the individual trustee on the Nejatis' deed of trust, and MERS, as beneficiary, in August 2010. (J.A., p. 1).

Long Surveying was later dismissed from the case as a result of a demurrer granted by the Fredericksburg City Circuit Court in January 14 2011, and Stageberg decided not to amend to re-plead against Long Surveying. Instead, Stageberg thereafter amended his Complaint on July 5, 2011 to add Gordon B. Gay, Trustee, for the

benefit of Properties by Us, a second mortgagee for the Nejatis, as a new party. (J.A., p. 1).

Prior to the hearing at trial on April 30, 2012, Stageberg nonsuited Counts I, II, III and IV of his Amended Complaint against Properties By Us and Angstadt Properties, leaving as the sole remaining issue Count V, which was the quiet title action. (J.A., pp. 14. 37, 60 and 66). Following presentation of evidence, the parties filed post-trial briefs in lieu of closing arguments. (J.A., pp. 14, 37, and 51). The Court issued its letter opinion on June 7, 2012. (J.A., p. 60). The Court entered a Final Order on July 13, 2012. (J.A., p. 66). The Nejatis noted their objections on the Order and filed their appeal on August 13, 2012. (J.A., p. 66).

ARGUMENT

I. STANDARD OF REVIEW.

The standard of review to be used in this case is a *de novo* standard of review. In Virginia, questions of law appealed to the Supreme Court of Virginia are reviewed *de novo.* Syed v. ZH Techs., Inc., 280 Va. 58, 68, 694 S.E.2d 625, 631 (2010). Mixed questions of law and fact are also reviewed *de novo.* Westgate at Williamsburg Condo. Ass'n v. Philip Richardson Co., 270 Va. 566, 574 (2005). The

Supreme Court reviews the trial court's "application of the law de novo, while giving deference to [its] factual findings." See Barter Found., Inc. v. Widener, 267 Va. 80, 90, 592 S.E.2d 56, 61 (2004). A mixed question of law and fact requires the application of legal principles to historical or physical facts and a determination whether the rules arising from those legal principles are satisfied under the facts. MicroStrategy Inc. v. Li, 268 Va. 249, 264 (2004) (citations omitted).

The Court also "consider[s] the evidence and all reasonable inferences fairly deducible from it in the light most favorable to the prevailing party below." Syed v. ZH Techs., Inc., 280 Va. 58, 68, 694 S.E.2d 625, 631 (2010).

The Supreme Court of Virginia has held that "[s]tatutory interpretation is a question of law which we review de novo, and we determine the legislative intent from the words used in the statute, applying the plain meaning of the words unless they are ambiguous or would lead to an absurd result." Syed v. Zh Techs., Inc., 280 Va. 58, 68-69 (2010) (citations omitted).

Since nearly all of the facts in this case were stipulated by the parties and the Circuit Court at trial was applying legal standards to

undisputed facts, the standard of review to be applied by this Court is a *de novo* review of the trial judge's application of the law to the facts presented and interpretation of the statutes raised by the parties in light of the stipulated facts. Syed v. Zh Techs., Inc., 280 Va. 58, 68-69 (2010), citations omitted. However, the trial court also reviewed mixed questions of law and fact; specifically with regard to making its judgments on the "percentage interests" issue in light of the testimony presented by Chris Kaila. The standard of review for the mixed questions of law and fact would also be a *de novo* review in this matter.

II. ZONING LAWS WERE NEVER INTENDED TO CREATE A RESTRAINT ON ALIENATION; THEY ARE ONLY A RESTRAINT ON DEVELOPMENT OF THE PROPERTY. (Assignment of Error 3).

The purpose and legislative intent of Virginia's zoning laws is laid out in Virginia Code § 15.2-2200 as follows:

> This chapter is intended to encourage localities to improve the public health, safety, convenience and welfare of its citizens and to plan for the future development of communities to the end that transportation systems be carefully planned; that new community centers be developed with adequate highway, utility, health, educational, and recreational facilities; that the need for mineral resources and the needs of agriculture, industry and business be recognized in future growth; that residential areas be provided with healthy surroundings for family life; that agricultural and forestal land be preserved;

> and that the growth of the community be consonant with the efficient and economical use of public funds.

Va. Code Ann. § 15.2-2200.

The zoning laws in Virginia were not created for the purpose of restraining alienation of property rights; rather, they were created to restrain the <u>use</u> of such property. "Such purpose is in general two-fold: (1) To preserve the existing character of an area by excluding prejudicial uses and (2) to provide for the development of the several areas in a manner consistent with the uses for which they are suited." 21 M.J. ZONING AND PLANNING § 5.

While buyers of property do acquire title "subject to the lawful regulatory powers of the city, one of which is zoning," zoning law cannot prohibit the transfer of title or the recordation of deeds. 21 M.J. ZONING AND PLANNING § 5. In fact, Virginia Code § 15.2-2254(3) specifically states as follows:

> 3. No person shall sell or transfer any land of a subdivision, before a plat has been duly approved and recorded as provided herein, unless the subdivision was lawfully created prior to the adoption of a subdivision ordinance applicable thereto. ***However, nothing herein contained shall be construed as preventing the recordation of the instrument by which such land is transferred or the passage of title as between the parties to the instrument.***

Va. Code Ann. § 15.2-2254 (Emphasis added).

"The zoning of land is an exercise of the police power." Vienna Council v. Kohler, 218 Va. 966, 976 (Va. 1978). However, that police power, may not, under the guise of regulating or restricting the use of property, deprive the owner of all use thereof. County of Fairfax v. Parker, 186 Va. 675, 44 S.E.2d 9 (1947). The police power, by statute, cannot prevent passage of title as between the parties to the instrument.

The trial court in this case incorrectly held that the deed from Properties By Us to the Nejatis "requires some further action . . . that being the necessary and required approval of the City" before full title to the Littlepage parcel would transfer to the Nejatis. This decision is contrary to the language specifically stated in the statute.

Furthermore, the court's power to order the division of land is unaffected by a subdivision ordinance; therefore, the trial court had the authority to hold that the Nejatis and Stageberg each owned separate, fee simple title to their individual parcels as described in their deeds. Crestar Bank v. Martin, 238 Va. 232, 383 S.E.2d 714 (1989). Obviously, the parties would not thereafter be immune to the valid laws regulating how such land was to be used, and this would necessarily result in Stageberg not being able to build what he

desired to build upon his land. However, the finding by the trial court that the land could not be transferred in fee simple to the Nejatis is simply contrary to law.

While the practical effect of dividing the parcels into fee simple ownership may be that potential buyers may in the future be less willing to buy the Nejatis' property or Stageberg's property, given that the properties can only be used for certain purposes, that does not mean that some lesser title, i.e. tenancy in common, automatically results from the conveyance. The Code is clear that title can transfer, regardless of the zoning restriction cited by the trial court.

"Courts of equity in Virginia are cautious in depriving a landowner of his freehold and converting it into money over his objection. . . Even evidence that the property would be less valuable if divided was held "insufficient to deprive a co-owner of his 'sacred right' to property." Crestar, 232 Va. at 258, 349 S.E.2d at 146.

The Nejatis' interest in their parcel is a sacred right to property, which the Nejatis purchased from Properties By Us in fee simple and without limitation. The trial court was incorrect to hold that a lack of approval from a city zoning board is enough to deprive the Nejatis of

their sacred right to property and subject them against their will to joint ownership with Stageberg.

III. THE LANGUAGE OF THE NEJATIS' DEED CONTAINED NO WORDS OF LIMITATION; THEREFORE, PROPERTIES BY US CONVEYED TO THE NEJATIS THE GREATEST ESTATE THAT PROPERTIES BY US HAD, THAT IS, A FEE SIMPLE ESTATE. (Assignments of Error 1-4).

Under Virginia law, "the language in a deed will be construed to pass to the grantee the greatest estate which the language employed is capable of conveying." Goodson v. Capehart, 232 Va. 232, 349 S.E.2d 130 (1986). The modern rule for deed descriptions is that, where the intent of the parties is "clearly and unequivocally expressed within the four corners of the instrument," that intent will be given effect. 2 F. Ribble, Minor on Real Property § 1032, p. 1336-1337 (2d ed. 1928).

In the instant case, the language in the deeds conveying property to the Nejatis and Stageberg contained no words of limitation; nothing on the face of those deeds showed any intent by Properties By Us to transfer anything less than a fee simple estate in the parcels described on the face of the deeds and according to the boundary lines drawn on the Long Survey incorporated into the deeds to the Nejatis and to Stageberg.

Of note, a tenancy in common is necessarily a lesser estate than a fee simple estate. It is encumbered ownership; a tenancy in common, especially as it is described in the trial court's letter opinion, lacks the freedom of alienation--the ability to freely dispose of your property at any time that you so choose. In fact, the trial court's opinion is that this property cannot be sold without the agreement of both parties; the trial court even appears to opine that the property could not even be partitioned by a court.

The Supreme Court of Virginia has held that "the legislative intent, expressed in Code § 55-11, that when land is granted without words of limitation, the grant shall be construed to convey the fee simple, or whole estate the grantor has power to convey, unless a contrary intention appears in the deed. Our decisions have long been to similar effect: the language in a deed will be construed to pass to the grantee the greatest estate which the language employed is capable of conveying." Goodson v. Capehart, 232 Va. 232, 237 (Va. 1986) (citations omitted).

The parties' intent in the case *sub judice* was clearly to transfer a fee simple estate from Properties By Us to the Nejatis, including the duplex building thereon. There were no words or other expressions

of limitation in the deed. The trial court was incorrect to rule that Properties By Us did not have the power to transfer the full estate, as shall be further explained below in the argument heading regarding zoning law. The language in the deed from Properties By Us transferred to the Nejatis the described property in fee simple. Properties By Us' intention was to transfer a fee simple estate, and the Nejatis' intention was to purchase a fee simple estate. Since the Court had held that the Long Survey was not effective to sever the two parcels, then Properties By Us should have been held to transfer the entire "Whole Property" to the Nejatis.

The trial court was incorrect in its ruling that the conveyance made to the Nejatis was anything less than a fee simple estate; the question is solely whether the Nejatis own a fee simple estate only in the Littlepage parcel as such boundary lines are drawn on the Long Survey, or whether the Nejatis own both the Littlepage and Hanover parcels as a single whole property transferred by Properties By Us, and Stageberg owns nothing, because Properties By Us transferred all that it had to the Nejatis.

Interestingly, the trial court incorrectly held that Properties By Us was able to limit its conveyance to the Nejatis, without any words

of limitation. Instead, the trial court upholds the intent of the Nejatis and Properties by Us to convey something less than the entire property because of the language in the deed transferring a distinct and defined portion of the entire property. In other words, the trial court had to find that there was some effect in the language of the survey. However, rather than utilize the language of that limitation, i.e. the survey, the trial court created its own words of limitation--words that were never intended by any of the parties to these transactions as noted by the plain language of their contracts and deeds. The “new” deed created by the trial court is a fabrication without any basis in the language of any conveyance.

The trial court’s decision states that Properties By Us could not transfer a portion of the entire parcel to the Nejatis and to Stageberg, yet, the trial court does just that by “creating” its own formula for ownership. The trial court found that the conveyances by Properties By Us were defective, yet, the trial court uses a methodology that no one discussed to create “equitable” interests in the parcels. This was clear error on the part of the trial court.

IV. THE PROPERTY DESCRIPTION IN THE NEJATIS' DEED WAS SUFFICIENTLY DEFINITE TO CONVEY THE PORTIONS OF THE PARCEL AS DESCRIBED IN THE SURVEY. (Assignments of Error 1-4).

The trial court was incorrect in its holding that the deed description was not sufficiently definite to convey a fee simple estate to the Nejatis.

a. Incorporation of the Survey.

"When a lot is described as on a map or plat, to which reference is made, such map or plat becomes, for the purpose of description, a part of the deed, and has the same effect as though it were incorporated into the instrument. The boundaries, monuments, courses and distances laid down on a map referred to are as much to be regarded the true descriptions of the land as if they were expressly recited in the deed." 5C M.J. DEEDS § 76

In this case, the Long Survey was referenced in the deed description in both the Nejatis' deed and Stageberg's deed. (See Joint Exhibits E and J). Because the Long Survey was referenced in the deed, it has the same effect as though it were incorporated into the instrument and the boundaries drawn on the survey are regarded under Virginia law as the true descriptions of the land as if they were expressly recited in the deed. "Where a clause describing property in

a deed incorporated a certain plat by reference, that plat must be considered part of the instrument itself." Faison v. Union Camp Corp., 224 Va. 54, 294 S.E.2d 821 (1982).

b. Boundary Language.

It is clear, then, that the descriptions in the deeds are as definite as they can be -- they reference a map of the property with clearly drawn boundary lines between the parcels. Not one centimeter of any portion of either parcel overlaps the other on the Long Survey; they are both drawn to be separate neighboring parcels, with separate street addresses. A plat incorporated by reference is part of the incorporating instrument. Irby v. Roberts, 256 Va. 324, 504 S.E.2d 841 (1998). Here, the Long Survey has become part of the title to the properties, it is incorporated into both of the deeds by reference and clearly and definitely describes the particular parcels in question.

"The rule in Virginia is that a grantor is bound by the description of property contained in a plat which has been incorporated by reference into a deed." Nature Conservancy v. Machipongo Club, Inc., 419 F. Supp. 390, 399 (E.D. Va. 1976), citing Bossieux v. Shapiro, 154 Va. 255, 153 S.E. 667, 668 (1930). Properties By Us

was bound by the description of the property contained in the Long survey plat, and Properties By Us therefore transferred the definite property described in the Long survey to the Nejatis in fee simple. “If a conveyance purports to be of land conveyed by a prior deed to which reference is made, the grantee cannot contend that more passed than was included in the recited deed.” 5C M.J. DEEDS § 76.

Neither the Nejatis nor Stageberg are entitled to MORE than what was conveyed by deed to each of them. The boundaries are clearly drawn and described in the survey. Stageberg NEVER intended, by word or deed, to purchase an interest in the Littlepage parcel. Stageberg NEVER offered to purchase an interest in the duplex on the Littlepage parcel. The trial court erred in extending the property boundaries beyond the clearly expressed intent of Stageberg.

Therefore, the Nejatis are not asking the Court to hold that they own the entire parcel, although it seems a reasonable result; but rather, the Nejatis are asking that the Court find that the Nejatis own the Littlepage property delineated within the boundary lines clearly and definitely drawn on the Long Survey, recorded and referenced in the Nejatis’ deed, in fee simple ownership. Further, they asking this

Court to hold that Stageberg owns no more than his own Hanover parcel, clearly and definitely described in his own deed. These deeds give precise square footage in precise locations, and to give either the Nejatis or Stageberg more than the benefit of their bargain is contrary to law.

c. Parol Evidence.

"A description of land as a numbered lot or block on a certain plat is sufficiently definite, although the plat on its face furnishes no data for locating the lot or block, if with the aid of parol evidence the land can be identified." 5C M.J. DEEDS § 76. Here, no parol evidence is even necessary, as the Long Survey plat, on its face, is a sufficiently definite description of the land. A deed description is sufficient "if it is possible, by any reasonable rules of construction, to ascertain from the description, aided by extrinsic evidence, what property it is intended to convey." Midkiff v. Glass, 139 Va. 218, 225, 123 S.E. 329, 331 (1924). "The purpose of a deed description is not to identify the land, but to furnish the means of identification." Id.

> Where several particulars are given in the description, all of which are necessary to identify the land intended to be conveyed, nothing but what will correspond with all the particulars will pass by the deed; but where the deed contains two descriptions of the land equally explicit, but repugnant to each other, that

> description which the whole deed shows best expresses the intention of the parties must prevail. The court will look into the surrounding facts, and will adopt that description, if certain and definite, which, in the light of the circumstances under which it was made, will most effectually carry out the intention of the parties.
>
> It is one of the maxims of the law that a false description does not render a deed or other writing inoperative, if, after rejecting so much of the description as is false, there remains a sufficient description to ascertain with legal certainty the subject matter to which the instrument applies. This rule of construction is said to be derived from the civil law. Falsa demonstratio non nocet cum de corpore constat. 2 Minor's Inst. 1063 (4th Ed.); 1 Greenleaf on Ev., sec. 301; 2 Taylor on Ev., sec. 1218, &c.; Wootton v. Redd, 12 Gratt. 196, 209; Preston & Massie v. Heiskell, 32 Gratt. 48, 59 and 60; Broom's Legal Maxims, 629, &c. (7th Ed.)

State Sav. Bank v. Stewart, 93 Va. 447, 451-452 (Va. 1896).

The Supreme Court of Virginia has held that where "the deeds contained a correct reference to the land conveyed by lot, block and section number, [such a] reference, aided by available extrinsic evidence, such as the field office plat, furnished a ready means of identification of the property sold." Matney v. Cedar Land Farms, Inc., 216 Va. 932, 936 (1976). The Court, in the Matney case, held that even where the deeds referenced lot numbers that did not exist on an uncertified recorded plat, which plat was incorporated by reference into the deeds, such a description "did not prevent passage

of title to the plaintiffs." The trial court's decision that the deed descriptions in this case were insufficient is incorrect and contrary to Virginia law.

V. THE DETERMINATION BY THE TRIAL COURT TO ASSIGN "PERCENTAGE INTERESTS" TO THE NEJATIS AND TO STAGEBERG IS ARBITRARY, CAPRICIOUS, AND RESULTS IN A FUNDAMENTALLY UNFAIR WINDFALL TO PLAINTIFF. (Assignments of Error 1-3).

The trial court in this case held that, "[w]eighing the equities between the parties, the Court adopts the position of Stageberg that [the parties'] separate ownership interest in the Whole Property is based upon their respective percentage of the total purchase price of the Whole Property". The trial court then, incorrectly, found that because the Nejatis paid $300,000, they should have a 71.43% interest in the whole property, and since Stageberg paid $120,000, he should have a 28.57% interest in the whole property.

The trial court's opinion regarding percentage interests is internally inconsistent: The trial court first holds that the transfer from Properties By Us to the Nejatis was a transfer of some undeterminable "undivided share" of the Whole Property, but then holds that upon Properties By Us conveying to Stageberg, suddenly the Nejatis and Stageberg are held to own percentage interests of the

"Whole Property" based upon their purchase price. This determination by the trial court is plainly wrong and without evidence to support it.

If Properties By Us had never sold to Stageberg but had simply kept the Hanover raw land for itself, the trial court's determination of percentage interests would not hold up, as the Nejatis would have then paid $300,000 for the Littlepage Property and Properties By Us would have paid nothing when it obtained the Hanover Property from Angstadt. Presumably, under the trial court's theory of "percentage interests, the Nejatis would own a 100% interest and Properties By Us would own nothing because it paid nothing for the Hanover Property.

The trial court's determination of the "separate ownership interests" of the Nejatis and Stageberg is arbitrary and capricious and results in a windfall to Stageberg. The trial court states in its opinion that it reached this determination after "balancing the equities" in this case; however, there is nothing equitable about requiring the Nejatis to give up the value they purchased to allow Stageberg to gain from his own failure to do his research and homework before buying a

parcel that was not properly approved for the development he had planned.

In effect, the trial court has done exactly what it determined could not be done -- it created separate distinct interests in the property. The trial court's determination is not noted anywhere on the deeds. There are no words of limitation of interest in either of the deeds to the properties.

In essence, the trial court held that the separate Littlepage and Hanover parcels could not be transferred, yet, it does just that. The trial court imposed a transfer of property onto the Nejatis and Stageberg. The trial court ignored the intent of the Nejatis and Stageberg, as expressed in their deeds. The trial court created its own transfer of property that resembled nothing that was intended by the parties.

The true "value" of the property, both the Littlepage parcel and the Hanover parcel, resides in the building located on the Littlepage parcel, and Stageberg is not and cannot be entitled to any interest whatsoever in the building. This is evident from the deeds and the purchase prices paid by the Nejatis and Stageberg. At most, Stageberg is entitled to the value of his raw land and no more.

CONCLUSION

The trial court in this matter made the following errors of law, which this Court reviews under a *de novo* standard of review: (1) The trial court erred in ruling that a zoning law can prevent the alienation of title, and the trial court's decision is directly contrary to the language of § 15.2-2254(3), stating that "nothing contained [in the statute] shall be construed as preventing the recordation of the instrument by which such land is transferred or the passage of title as between the parties to the instrument." Zoning law serves to prevent certain types of use of and on the land, but does not and cannot prevent transfer of title.

(2) The trial court erred in holding that Properties By Us conveyed only a "partial interest in the Whole Property to the Nejatis," and that the deed language served to convey something less than a fee simple estate. Properties By Us conveyed all that it had, which was a fee simple estate, without words of limitation.

(3) The trial court erred in ruling that the words of severance in the deed descriptions and Long Survey failed to give "such definite designation so that the boundary can be located." The boundary between the Hanover and Littlepage Properties was designated on

the recorded plat survey and also described in each of the deeds to the Nejatis and Stageberg, and the trial court was incorrect to hold that the deeds "require some further action for said boundary line to become definite, that being the necessary and required approval of the City." The deed description in the Long Survey is definite – it is a map with clear boundary lines drawn thereon, and the parties take pursuant to this clear and definite description of their separate properties.

(4) The trial court incorrectly ruled that each party has only an equitable percentage interest in the Whole Property. The trial court's decision to determine the ownership interests to the Nejatis and Stageberg as "percentages" of ownership of the "Whole Property" based upon each party's purchase price is arbitrary, capricious, an incorrect application of the law, and is not supported by the evidence. This holding results in a windfall to Stageberg, as the value of the Littlepage Property includes the two-story apartment building thereon and is therefore much higher than the value of the Hanover Property. At most, Stageberg owns the raw land he purchased, described by the boundary lines in the Long Survey, and no more. He cannot ever

own any portion of the Nejatis' apartment building, as he paid no consideration whatsoever for that building.

RELIEF REQUESTED

WHEREFORE, the Nejatis respectfully request that this Court:

1. Determine that the transfer from Properties By Us conveyed a fee simple interest in the described property to the Nejatis; and

2. Determine that a zoning decision cannot prevent "the recordation of the instrument by which such land is transferred or the passage of title as between the parties to the instrument"; specifically, determine that the zoning decision does not affect the transfer of fee simple title from Properties By Us to the Nejatis; and

3. Determine that the deed descriptions in the Nejatis' deed and in the Long Survey plat are sufficiently definite for an individual to transfer title to a property; and

4. Determine that the Nejatis own their physical boundaries as described in the Long Survey plat, including the apartment building, and Stageberg owns only his raw land, and that the percentage interest designation made by the trial court is incorrect and contrary to law; and

5. Remand the Nejatis' cause for further proceedings consistent with the direction of this Court.

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CERTIFICATE

Pursuant to Rule 5:26(h), Rules of the Supreme Court of Virginia, this is to certify that Counsel for Appellant has been privately retained and, on the 11th day of April, 2013, fifteen bound copies of the Corrected Opening Brief of the Appellant with ten electronic copies on CD of the Corrected Opening Brief of Appellant and Appendix, were hand-filed with the Clerk of this Court and three copies of the Corrected Opening Brief of Appellant with one electronic copy on CD of Corrected Opening Brief of Appellant and Appendix, were served, via U.S. Mail, postage prepaid to:

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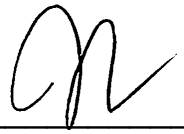
2) Counsel for Appellant respectfully requests oral argument.



Jason E. Hickman, Esquire