In The

Supreme Court of Virginia

RECORD NO. 130062

OLD DOMINION BOAT CLUB,

Appellant,

v.

THE ALEXANDRIA CITY COUNCIL, and THE CITY OF ALEXANDRIA, VIRGINIA, and 106 UNION DUBLIN, LLC, and 106 UNION IRELAND, LLC,

Appellees.

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

1. The Circuit Court erred in dismissing Count 2 of the Amended Complaint and failing to recognize ODBC's vested easement in Wales Alley.

   (Error present in October 9, 2012 Opinion and Order, App at 133. Error preserved in Plaintiff's Motion for Reconsideration, App at 135-139.)[1]

2. The Circuit Court erred in dismissing Count 4 of the Amended Complaint and failing to enjoin the Union Parties from erecting any structures in Wales Alley or otherwise obstructing ODBC's free use of Wales Alley for ingress and egress.

   (Error present in October 9, 2012 Opinion and Order, App at 133. Error preserved in Plaintiff's Motion for Reconsideration, App at 135-139.)

3. The Circuit Court erred in dismissing Count 5 of the Amended Complaint and failing to enjoin the City Parties from changing the nature of Wales Alley, limiting the direction of travel, or making or authorizing others to make obstructions in Wales Alley.

   (Error present in October 9, 2012 Opinion and Order, App at 133. Error preserved in Plaintiff's Motion for Reconsideration, App at 135-139.)

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[1]The Opinion and Order was drafted by Hon. John J. McGrath, Jr., Judge Designate, and transmitted to Judges Chambers of the Alexandria Circuit Court, at which time it was forwarded to parties' counsel via USPS. No hearing for entry was convened at which Plaintiff could object or take exception. Under such circumstances, Plaintiff believes its Motion for Reconsideration is sufficient, but not necessary, for preservation of error.

STATEMENT OF THE CASE

Plaintiff-Appellant Old Dominion Boat Club ("ODBC") filed suit against Defendants-Appellees City of Alexandria and Alexandria City Council ("City Parties") and 106 Union Dublin, LLC and 106 Union Ireland, LLC ("Union Parties") seeking to ensure unimpeded ingress and egress from its property across the adjacent Wales Alley.

A one-day bench trial was held on February 7, 2011. Having heard evidence, and following post-trial briefing by all parties, the Circuit Court granted two of ODBC's five counts, ruling that ODBC enjoyed a 30-foot vested easement in Wales Alley which could not be obstructed and granting a permanent injunction against any such obstruction by the Union Parties. The Circuit Court did not reach the issue of obstruction of Wales Alley by the City parties.

The City Parties and Union Parties appealed, arguing that the grant of injunctive relief against the Union Parties was improperly grounded on *res judicata*. The Supreme Court of Virginia reversed on those grounds alone and remanded.

On remand, the Circuit Court heard argument and received briefing by all parties, but took no new evidence, and subsequently dismissed all of ODBC's counts, a reversal of its prior decision

recognizing ODBC's 30-foot vested easement in Wales Alley and the enjoinment of its obstruction.

This appeal followed.

STATEMENT OF FACTS

More than two centuries ago, John Fitzgerald and Valentine Peers jointly owned much of the land adjacent to the south side of King Street in the blocks near the Potomac River in the City of Alexandria, Virginia. Wanting to divide up the property between them, Fitzgerald and Peers executed a deed of partition in 1789. ODBC Exhibit 1, Appendix at 57-62. In order to secure permanent access between the various parcels and the public city streets, the recorded deed included mutual easements to "covenant assure and [c]onfirm . . . each to the other the free use and passage" of the areas laid off as streets and alleys in the deed. Id. One such easement area was and remains appurtenant to a parcel now owned by the Old Dominion Boat Club.

Neither ODBC nor any previous owner of the parcel at issue has ever withheld the right to the easement, or dedicated it to the public. Transcript at 52-53; Opinion and Order (April 22, 2011), App

at 120. Further, the City Parties have never taken any interest in the alley by eminent domain.

Since at least 1971, ODBC members have used Wales Alley continuously to bring boats into the ODBC parking lot parcel. Tr at 79; Opinion and Order, App at 113. Additionally, ODBC members have frequently maintained or improved Wales Alley, so as to facilitate easier passage through and across it, to include filling potholes, plowing snow, removing trash, and removing obstructing trees. Tr at 82-83, 89-90, 120-121, 123-125; Opinion and Order (April 22, 2011), App at 113.

The single instance in which ODBC's use of the alley was interfered with by any individual or entity was in 1972, when Dockside Sales (predecessor-in-title to the Union Parties) obstructed ODBC's passage by erecting fences. ODBC Ex 9, App at 65-66. ODBC responded then as it has now, by taking affirmative legal action to enforce its rights. The Corporation Court of the City of Alexandria ruled that indeed, ODBC had a "vested easement of way" in Wales Alley, and that thus Wales Alley could not be obstructed. ODBC Ex 8, App at 63-64.

In May 2010, the Union Parties applied for and were granted by the City Parties a Special Use Permit to operate a restaurant in the building adjacent to Wales Alley. ODBC Ex 15, App at 70-98. The City Parties subsequently granted the Union Parties a license to build a raised concrete patio upon the surface of Wales Alley, which would obstruct a large portion thereof, and the City Parties further declared the alley to be open only to one-way vehicular traffic. ODBC Ex 15, App at 70-73; Union Ex 18, App at 99-106. This litigation followed.

AUTHORITIES AND ARGUMENT

ASSIGNMENT #1. The Circuit Court erred in dismissing Count 2 of the Amended Complaint and failing to recognize ODBC's vested easement in Wales Alley.

(Error present in October 9, 2012 Opinion and Order, App at 133. Error preserved in Plaintiff's Motion for Reconsideration, App at 135-139.)[2]

Standard of Review: De novo

[2] The Opinion and Order was drafted by Hon. John J. McGrath, Jr., Judge Designate, and transmitted to Judges Chambers of the Alexandria Circuit Court, at which time it was forwarded to parties' counsel via USPS. No hearing for entry was convened at which Plaintiff-Appellant ODBC could object or take exception. Under such circumstances, Plaintiff believes its Motion for Reconsideration is sufficient, but not necessary, for preservation of error.

A. The Settled Factual Findings Made by the Trial Court in its April 2011 Opinion, and the Evidence and Testimony Presented at Trial, are Contrary to the October 2012 Ruling

In its Opinion and Order of April 22, 2011 ("2011 Opinion"), the Circuit Court found that ODBC enjoys a 30-foot vested easement through and across Wales Alley. This finding did not turn on the application of *res judicata* arising from earlier litigation, and thus the Supreme Court of Virginia's opinion of May 25, 2012 did not direct or compel reconsideration of this finding.

The Circuit Court's affirmation of ODBC's easement in the 2011 Opinion was properly grounded in the testimony and exhibits presented by ODBC at trial. On remand, however, following the presentation of no new testimony or other evidence, the Circuit Court reversed itself and dismissed ODBC's easement claim, giving as its only basis therefor "the reasons stated" in the 2011 Opinion. This represents clear error.

On April 22, 2011, following a full-day trial, argument, and post-trial briefing, the Circuit Court issued a thorough and reasoned 19-page opinion in which it made findings of fact and conclusions of law that ODBC has a private easement in Wales Alley. Opinion and Order (April 22, 2011), App at 119 ("Plaintiff's easement"), 120 ("[ODBC's]

right to a thirty foot right of way"). See also, id. at 122 ("ODBC's 'vested easement of way'"), 123, 125 ("Plaintiff has a vested easement in a 30 foot right of way over Wales Alley").

The basis for these findings and the provenance of ODBC's easement was more than adequately proven at trial. The creation of Wales Alley, and the easement within it, dates back to a 1789 deed between Valentine Peers and John Fitzgerald, which provided that "the said parties do covenant assure and Confirm by these presents each to the other the free use and passage of the several Streets and Alleys in common now left by them from their grounds for the more easy communication with the public main Streets and the river." Tr at 50, 210. ODBC Ex 1, App at 59; Opinion and Order (April 22, 2011) at 109. ODBC is successor in title to a parcel described in that deed, adjacent to Wales Alley, now known as 2 King Street. Tr at 42; Opinion and Order (April 22, 2011), App at 110, and has continuously made use of its easement to pass through and across Wales Alley, including bringing a successful private-party lawsuit to enforce its private rights when they were interfered with. Tr at 79, 120. ODBC Ex 8, App at 63-64.

B. City of Alexandria Charter § 2.03(a) Does Not Apply

Given the existence of ODBC's easement in Wales Alley, as confirmed by the Circuit Court's clear 2011 findings, *supra*, the only argument to permit its obstruction would be that the City of Alexandria's Charter Section 2.03 had operated — as interpreted by City of Staunton v. The Augusta Corp., 169 Va. 424, 193 S.E. 695 (1937), and Keppler v. City of Richmond, 124 Va. 592, 98 S.E. 747 (1919) — to convert the private easement right to public control, contingent upon an "implied dedication" by ODBC. The Circuit Court in fact found that ODBC had never "taken or permitted any action or entered into any contract which would indicate that they had 'dedicated' their right to a thirty foot right of way over Wales Alley." Opinion and Order (April 22, 2011), App at 120.

The Circuit Court spent considerable time exploring the City Parties' theory, appropriately and correctly reciting the controlling standard in Virginia for an implied dedication of an individual's private rights: "[I]n order to constitute proof of dedication, [use] must have been by the public, and adverse to and exclusive of the use and enjoyment of the property by the proprietors." Opinion and Order (April 22, 2011), App at 119, citing City of Staunton v. The Augusta

Corp., 169 Va. 424, 433, 193 S.E. 695, 698 (1937). The Court found that "regular 'public use' of Wales Alley is not inconsistent with [ODBC's] easement or in any way hostile or adverse to [ODBC] having an easement for ingress and egress across Wales Alley." Opinion and Order (April 22, 2011), App at 119.

At trial, the City Parties offered witness testimony that City employees had paved the surface of Wales Alley, prohibited parking in Wales Alley, and maintained the surface of the alley and an adjacent sidewalk. Id., App at 113. However, the City Parties have never attempted to prevent, restrict, or otherwise control access through Wales Alley by ODBC. On this basis, the Court made an unchallenged finding that there had been "no evidence that any actions by public users, the City of Alexandria, or abutting land owners interfered with ODBC's use of the 30 foot easement over Wales Alley. Id., App at 119.

As to whether an action taken by ODBC could be construed as constituting dedication, the Circuit Court found that "[t]he mere fact that ODBC has not protested the public use of Wales Alley for a pedestrian and vehicular passage between Union Street and The Strand is not an abandonment of their vested easement or an

indication that their ‘easement’ was being ‘dedicated to the public.’” Opinion and Order (April 22, 2011), App at 120.

Importantly, ODBC does not claim, and the Circuit Court found that ODBC does not have, fee-simple interest in Wales Alley. Opinion and Order (April 22, 2011), App at 118. Rather, ODBC has only an easement for unobstructed passage through and across the area. The scope of rights enjoyed by an easement owner are defined by the terms of the easement, and the owner of the servient estate may “may make any use of [the] land that does not unreasonably interfere” with those rights, including allowing others to make additional non-interfering uses. Preshlock v. Brenner, 234 Va. 407, 410-411, 362 S.E.2d 696, 698 (1987). Conversely, the easement owner has no legal right to object to any actions taken or uses made of the servient estate which do not interfere with its easement rights.

The distinction between fee-simple and easement rights in an implied dedication context is illustrated by this Court’s recent decision in 3232 Page Ave. Ass’n v. City of Va. Beach, 284 Va. 639, 735 S.E.2d 672 (2012), in which a condominium association gained fee title to a section of beach, from which the local government later sought to condemn a public access easement. During the trial, it was

shown that over some years the government had "patrolled and maintained the property" during which time "the Condo Association never objected to the City's exercise of dominion and control." Id. at 649, 677. On this evidence, this Court ruled that the condominium association had impliedly dedicated the easement to the City by the "acquiescence in the exercise of dominion and control over the property." Id.

In contrast, ODBC enjoys not title to Wales Alley, but merely an easement for "the free use and passage" across it. That was and is the full extent of ODBC's property interest, and thus it has only ever had the authority to object to actions which prevented that limited use. As the Circuit Court ruled, evidence presented by the City of Alexandria of its actions in maintaining the surface of the alley and prohibiting parking in the alley, and evidence of the public's pedestrian and vehicular transit through the alley, were not "in any way hostile or adverse" to, and did not represent interference with, ODBC's "free use and passage" easement. Opinion and Order (April 22, 2011), App at 119. Neither do they constitute the assertion of legal "dominion and control" over an easement interest the way they

may have over the condominium association's fee-simple interest, following the Supreme Court's reasoning in 3232 Page Ave Ass'n.

Virginia Beach was claiming a public access easement -- a mere slice of property right -- from a fee-owner by showing long public access and maintenance of the area. Alexandria is here claiming the total extinguishment of ODBC's ingress-egress easement by showing long public ingress and egress and other actions not at all inconsistent with ODBC's own ingress and egress. These are very different propositions. One was recently declared the law in Virginia; the other should not be.

As the Circuit Court found in its 2011 Opinion and Order, ODBC's actions in allowing others to traverse Wales Alley while never allowing itself to be excluded from it clearly did not show any intention to relinquish its own rights in the easement. Since under Keppler and Staunton, the Alexandria Charter Section 2.03 conversion cited by the City Parties requires a threshold finding of implied dedication through adversity, hostility, or exclusivity of use, the Charter section simply never takes effect, and ODBC's rights in the easement are unabridged.

None of the Circuit Court's 2011 findings about ODBC's easement were at issue in the appeal by the City Parties and Union Parties of the 2011 Opinion and Order, so the existence of the easement is settled as the law of the case and is not subject to reconsideration. Additionally, on remand from the Supreme Court of Virginia, the Circuit Court heard no additional evidence, giving it no basis for making new findings of fact or conclusions of law inconsistent with those in its 2011 Opinion.

In summary, the Circuit Court's 2011 holding that "Plaintiff [ODBC] *has* a vested easement" in Wales Alley, Opinion and Order (April 22, 2011), App at 125 (emphasis added), established that the easement exists and continues undisturbed. This finding was supported by the evidence presented at trial, was not reversed during the first appeal of this matter, and stands contrary to the Circuit Court's October 9, 2012 opinion which cites only "the reasons stated" in the earlier opinion for its basis. Opinion and Order (October 9, 2012), App at 133. The Circuit Court erred in failing to decree ODBC's easement rights and denying Count 2 of the Amended Complaint.

ASSIGNMENT #2. The Circuit Court erred in dismissing Count 4 of the Amended Complaint and failing to enjoin the Union Parties from erecting any structures in Wales Alley or otherwise obstructing ODBC's free use of Wales Alley for ingress and egress.

(Error present in October 9, 2012 Opinion and Order, App at 133. Error preserved in Plaintiff's Motion for Reconsideration, App at 135-139.)

Standard of Review: De novo

ASSIGNMENT #3. The Circuit Court erred in dismissing Count 5 of the Amended Complaint and failing to enjoin the City Parties from changing the nature of Wales Alley, limiting the direction of travel, or making or authorizing others to make obstructions in Wales Alley.

(Error present in October 9, 2012 Opinion and Order, App at 133. Error preserved in Plaintiff's Motion for Reconsideration, App at 135-139.)

Standard of Review: De novo

As discussed, *supra*, the trial court found in its 2011 Opinion that ODBC has a "vested easement" in Wales Alley, arising from the 1789 deed of partition between John Fitzgerald and Valentine Peers. Opinion and Order (April 22, 2011), App at 119; see also, id., App at 120, 122, 123, 125.

It then reversed itself in its 2012 Opinion, holding that "ODBC's interest in Wales Alley was dedicated to the City," based on "the reasons stated" in the earlier opinion. Opinion and Order (October 9, 2012), App at 133. In fact, in the 2011 Opinion, the Circuit Court made no findings whatsoever that ODBC had dedicated its interest in Wales Alley.

To the contrary, among the explicit findings in the 2011 Opinion was that neither ODBC nor its predecessors in title have ever "taken or permitted any action or entered into any contract which would indicate that they had 'dedicated' their right to a thirty foot right of way over Wales Alley." Opinion and Order (April 22, 2011), App at 115.

Additionally, the Circuit Court found that no actions by "the public users, the City of Alexandria or abutting land owners interfered with ODBC's use of the 30 foot easement" or were otherwise "inconsistent with [ODBC's] easement or in any way hostile to or adverse to" the easement. Opinion and Order (April 22, 2011), App at 119.

Neither the City Parties nor the Union Parties assigned error to any of the above holdings during the appeal on the *res judicata* issue,

and they are thus the law of the case. See State of Maine v. Adams, 277 Va. 230, 672 S.E.2d 862 (2009).

Notwithstanding ODBC's easement, the City Parties and the Union Parties have conspired in planning to "erect an elevated outdoor dining pavilion . . . which will encroach approximately 11.5 feet into the Alley for a length of approximately 74 feet." Opinion and Order, App at 115. Additionally, the City Parties have deemed that the alley now allows only one-way traffic. Tr at 162-63; ODBC Ex 15, App at 70-73.

Both separately and together, these two conditions result in a circumstance in which a significant portion of ODBC's easement would be impermissibly rendered unusable for ingress and egress. Pizzarelle v. Dempsey, 259 Va. 521, 526 S.E.2d 260 (2000); see also, Snead v. C&S Properties Holding Co., 279 Va. 607, 692 S.E.2d 212 (2010). Snead and Pizzarelle are both cases in which encroachments placed within a deeded easement of a width certain were ruled unlawful, even without proof they actually hindered or obstructed the easement owner's activities.

As noted above, in this case the change of the alley to one-way prevents ODBC from fully using its easement for both ingress and

egress. Further, the construction of a raised patio represents an obstruction of the easement and thus a material infringement of ODBC's rights.

Nevertheless, the Circuit Court has dismissed ODBC's requests for permanent injunctions against the defendants prohibiting them from obstructing or in any way interfering with ODBC's use of its ingress-egress easement. Amended Complaint, App at 11; Opinion and Order (October 9, 2012), App at 133. This "denial of injunctive relief would permit a taking of a portion of the [e]asement" by the defendants, thereby rewarding them for their interference with ODBC's "deeded property rights." See Snead v. C&S Properties Holding Co., 279 Va. 607, 613, 692 S.E.2d 212 (2010). Such denial by the trial court was plainly wrong and should be reversed.

CONCLUSION

The irony of this case is that, for all the discussion of "implied dedication to the public," it is the ODBC who is trying to keep Wales Alley entirely open for continued use by the public and itself, while the City and an adjacent owner are trying to close off a significant portion as private restaurant space, and limit the use of the rest of it.

The “public” is trying to make it private, while a private owner is trying to keep it fully public.

As the Circuit Court held in its 2011 Opinion and Order, ODBC enjoys a 30-foot easement in Wales Alley for ingress and egress to its property arising from a 1789 deed in its chain of title, maintained through continuous use, and never interfered with. Based on these findings, which were unappealed and are the settled law of this case, the Circuit Court should have recognized ODBC’s “vested easement” by granting Count 2 of ODBC’s Amended Complaint.

Separate and apart from the settled status of 2011 Opinion and Order, the underlying findings of fact and conclusions of law found therein are supported by the testimony, exhibits, and other evidence presented at trial, and should now be endorsed by this Court.

Given that ODBC enjoys a 30-foot easement in Wales Alley, as decreed in the Circuit Court’s 2011 Opinion and Order and independently supported by the facts and law presented at trial, the Circuit Court should have enjoined the City Parties and the Union Parties from any interference therewith, by granting Counts 4 and 5 of ODBC’s Amended Complaint. This court should do so now.

Respectfully Submitted,

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CERTIFICATE

Pursuant to Rule 5:26(h), I hereby certify that on this 28th day of May, 2013, I caused the required number of bound copies, with ten electronic copies on CDs, of this Brief of Appellant and Joint Appendix, to be hand filed with the Clerk of this Court, and that on the same day, the required number of bound copies, with one electronic copy on CD, of the same to be served, via UPS Ground Transportation, to Counsel for the Appellees:

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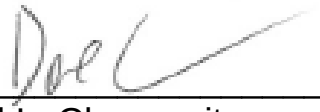

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