In The

Supreme Court of Virginia

RECORD NO. 140972

MARBLE TECHNOLOGIES, INC., *et al.*,

Appellants,

v.

STEPHEN M. MALLON, *et al.*,

Appellees.

REPLY BRIEF OF APPELLANTS

James J. Reid (VSB No. 45796)
DAVID, KAMP & FRANK, LLC
739 Thimble Shoals Boulevard, Suite 105
Newport News, Virginia 23606
(757) 595-4500 (Telephone)
(757) 595-6723 (Facsimile)
jjreid@davidkampfrank.com

Counsel for Appellants

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....

ARGUMENT.....1

I. ALL NECESSARY PARTIES HAVE NOT BEEN JOINED IN THE LITIGATION, AND NO EXCEPTION APPLIES TO EXCUSE THE OMISSION.....1

A. Mallon's argument that all of the properties absent from the litigation are now part of other subdivisions is incorrect.....2

B. Joining a subdivision does not extinguish an easement.....3

C. No exception applies to cure the absence of necessary parties in this litigation.....3

II. THE EASEMENT IN QUESTION WAS NEVER ESTABLISHED AS A VARIABLE, SHIFTING EASEMENT.....6

A. The language at issue is not ambiguous.....6

B. Even if it the easement did move, erosion has destroyed it.....7

III. MALLON'S EXPERT WITNESS LACKED PROPER FOUNDATION.....9

CONCLUSION.....10

CERTIFICATE.....12

TABLE OF CONTENTS

Page(s)

CASES

Beach v. Turim,
287 Va. 223, 754 S.E.2d 295 (2014) 8-9

Burdette v. Brush Mt. Estates, LLC,
278 Va. 286, 682 S.E.2d 549 (2009) 8

Mendenhall v. Douglas L. Cooper Inc.,
239 Va. 71, 387 S.E.2d 486 (1990) 3

Nextel WIP Lease Corp. v. Saunders,
276 Va. 509, 666 S.E.2d 317 (2008) 6

Siska Revocable Trust ex rel. Siska v. Milestone Dev.,
282 Va. 169, 715 S.E.2d 21 (2011) 4, 5

STATUTE

Va. Code § 8.01-401.3(B) 9

IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

MARBLE TECHNOLOGIES, INC., ET AL.,

Appellants,

v. **Record No. 140972**

STEPHEN M. MALLON, et al.,

Appellees.

APPELLANTS' REPLY BRIEF

Appellants Marble Technologies, Inc. and Sebastian Plucinski (collectively referred to as "MTI"), by counsel, for their Reply Brief in this action state as follows:

ARGUMENT

I. ALL NECESSARY PARTIES HAVE NOT BEEN JOINED IN THE LITIGATION, AND NO EXCEPTION APPLIES TO EXCUSE THE OMISSION

It is plain error to proceed in litigation without all necessary parties before the court because no recognized exceptions apply to cure the absence of those missing property owners affected by this declaratory judgment action. Appellees Stephen M. Mallon, Helen G. Mallon, Arne Hasselquist, Lauren Hasselquist, and Grandview Islanders, LLC (collectively referred to as "Mallon") contend, on brief, that the recognized exceptions do apply. (Appellee's Brief pp. 8-11.) However, Mallon's

position is premised on a factual error, and it lacks any support from the record or from any legal authority.

A. ***Mallon's argument that all of the properties absent from the litigation are now part of other subdivisions is incorrect.***

Mallon's argument regarding necessary parties contains a basic factual error. Mallon contends that all of the properties absent from the litigation are now part of other subdivisions. (Appellee's Brief p. 9.) According to the parties' own stipulations, that is simply not true. (App. 504-07.) While several of the properties absent from the litigation are now part of other subdivisions, Lots E, F, G, H and I, on which Grandview Beach, LLC operates a restaurant, are not part of any subdivision. (MTI's Petition p. 9, App. 505 at ¶ 4.) So, assuming *arguendo*, that properties absorbed into other subdivisions are not affected by this suit, Mallon has never explained why the owner of Lots E, F, G, H and I is unnecessary. In the proceedings below, Mallon's briefs on the issue just ignored those Lots. (App. 209-11, 240-42.) Now, Mallon relies on a conclusory statement that it was "practically impossible" to join everyone. (Appellee's Brief p. 10.) And yet, Mallon's own expert testified at trial that he had been in touch with the owner. (App. 409, lines 13-14.) At a bare minimum, Grandview Beach, LLC is a necessary party that needs to be included in this litigation.

B. ***Joining a subdivision does not extinguish an easement.***

Mallon's position that the subsequent inclusion of properties in neighboring subdivisions somehow extinguished any interest the owners might have in the easement is flawed. (Appellee's Brief at p. 9.) Mallon has never cited any authority or legal rationale to support his position. Likewise, the lower court apparently accepted the position without reference to any legal authority or rationale. Without supporting authority or reasoning, Mallon's position must fail.

In addition, Mallon's theory about the "migrating" easement is inherently at odds with his stance on necessary parties. Mallon contends that erosion cannot defeat the easement because it burdens all of the properties conveyed in the Liquidation Deed and "did not only burden the land closest to the ocean." (Appellee's Brief at p. 17.) If that were true (which MTI disputes), then all of the Lots shown on the 1936 Plat bear the benefit and the burden of the subject easement. Accordingly, a property owner could not unilaterally extinguish the burden of the easement.

C. ***No exception applies to cure the absence of necessary parties in this litigation.***

The general rule is that a court cannot proceed in litigation without the presence of all necessary parties. *See Mendenhall v. Douglas L. Cooper Inc.*, 239 Va. 71, 74, 387 S.E.2d 486, 470 (1990). While there are two

recognized exceptions to the general rule, neither one applies here. The first exception applies where it is "practically impossible" to join all such parties and the absent parties are represented by others with the same interests. *Siska Revocable Trust ex rel. Siska v. Milestone Dev.*, 282 Va. 169, 176, 715 S.E.2d 21, 25 (2011) (emphasis added). Mallon argues that it is impossible to find the owners of the properties shown on the 1936 Plat, but he offers no explanation as to why that is so. (Appellee's Brief at p. 10). Nothing in the record supports any argument that the other parties were practically impossible to join.[1]

The second prong of the first exception is not satisfied either. Mallon asserts in his brief that the participation of the parties in the case represented the rights of any absent property owners in conclusory fashion. (Appellee's Brief p. 10.) However, Mallon does not cite any portion of the record in support of this conclusion. On the contrary, the record reflects that the only commercial property in the area - the restaurant operated by Grandview Beach, LLC - was not present in the litigation. (App. 409: 13-14, 505.)

[1] The fact that Mallon's own expert spoke with the owner of the restaurant on Lots E, F, G, H and I show that it was not "practically impossible" to join Grandview Beach, LLC. (App. 409:13-14.)

The second exception to the general rule applies where there is a determination that an absent party's interests are separable so that the court may enter an order without prejudice to the rights of the absent party. *Siska Revocable Trust ex rel. Siska v. Milestone Dev.*, 282 Va. 169, 176, 715 S.E.2d 21, 25 (2011). Mallon sought a declaration that he was entitled to an express easement across White Marsh Beach, including that portion owned by MTI. (App. 11-12, 103-04.) The lower court's order does not and cannot separate out the portions of the subject easement that affect absent parties. The order finds that the easement created by the Liquidation Deed and the 1936 Plat moves with the mean high water and that the easement runs the length of Grandview beach, affecting all of the properties shown on the survey prepared by Mallon's expert (App. 501, (App. 566-73.) Because the lower court did not - and could not - parse out the properties that were unrepresented in the litigation, the second exception to the general rule requiring the presence of necessary parties does not apply.

Finally, Mallon contends on brief that MTI's own failure to join all necessary parties somehow cures the fact that necessary parties are missing from the litigation. (Appellee's Brief at pp. 10-11.) Mallon has not cited any authority in support of this position because none exists. The

purpose of joining the necessary parties is to give them the chance to defend or advocate for their interests, and any conduct by parties in the litigation should not in any way affect or extinguish the rights of those absent parties.

II. THE EASEMENT IN QUESTION WAS NEVER ESTABLISHED AS A VARIABLE, SHIFTING EASEMENT.

A. ***<u>The language at issue is not ambiguous.</u>***

On brief, Mallon largely ignores the *de novo* question as to whether the Liquidation Deed and 1936 Plat are ambiguous. A document is ambiguous if it may be understood in more than one way or refers to two or more things at the same time. *Nextel WIP Lease Corp. v. Saunders*, 276 Va. 509, 516, 666 S.E.2d 317, 320 (2008). Mallon argues that the word "present" on the 1936 Plat could be understood two ways: present as it was in 1936 or present as it might be in the future. (App. 260-262, Appellee's Brief at p. 13.) However, the word "present" could not have meant two or more things at the same time from the perspective of a person writing it in 1936. Under the plain meaning rule, it can only mean one thing: the present as it was in 1936.

Other language and information in the Liquidation Deed and 1936 Plat confirm this. The 1936 Deed specifically states that the properties are "subject to an easement on a twenty foot road." (App. 18.) The twenty foot

road is shown on the 1936 Plat as two smooth parallel lines marked with a point and a bearing angle. (App. 494-96.) The unnaturally smooth and uniform depiction of the twenty foot road on the plat does not support the position that it is defined by the mean high water mark. Mallon's expert admitted at trial that a mean high water mark would "typically be a meandering line. Typically waterlines and Mother Nature don't have a good ruler they can draw straight lines." (App. 423:20-25.) The plat also contains reference to a specific intersection with "Bonair Rd.," a specific distance and bearing angle at Lot M1, and a specific angle at Lot A1. (App. 4940496.) The deed and the plat, on their face, establish that the twenty foot road and easement are fixed on the ground.[2] Mallon essentially contends that the word "present" in 1936 also means "future," but the ordinary meaning of the word "present" cannot support this reading, and language is not made ambiguous because parties disagree about its meaning. *Id*.

B. *<u>Even if it the easement did move, erosion has destroyed it.</u>*

Mallon concedes on brief that an easement can be extinguished by an act of God but seeks to avoid this result by arguing that the easement

[2] Mallon's expert's testimony about the renowned accuracy of Mr. Chambers, who drafted the 1936 Plat and included these specific measurements, also weighs in favor of the position that the easement does not move . (App. 386:15-25.)

moved off of the Lots that it was originally located upon. (Appellee's Brief pp. 16-17.) Mallon cites the Liquidation Deed's language that the parties to that deed "take the above mentioned property subject to an easement..." for the proposition that all of the Lots shown on the 1936 Plat are burdened by the easement. (Appellee's Brief p. 17, App. 18.) Mallon's position is faulty, however, because the deed language he relies upon does not place the burden of the easement on all of the Lots.

The Liquidation Deed incorporates the 1936 Plat by reference, and therefore the 1936 Plat is part of the deed "but only for descriptive purposes to establish the metes and bounds of the property being conveyed." *Burdette v. Brush Mt. Estates, LLC*, 278 Va. 286, 298, 682 S.E.2d 549, 555 (2009). Nothing on the 1936 Plat designates that any Lots other than Lots A1-P1 and Lots P-A bear the burden of the easement.

Another problem with Mallon's position is that it would require the migrating easement to somehow jump across the paper street designated on the 1936 Plat as "Pine Drive," which is a 50' wide paper street running approximately parallel to the twenty foot road and separating Lots A1-P1 from Lots A3-P3 and Lots P-A from Lots P2-A2. (App. 494-496.) "Easements must be strictly construed, with any doubt being resolved against the establishment of the easement." *Beach v. Turim*, 287 Va. 223,

230, 754 S.E.2d 295, 298 (2014). MTI does not contend that an easement was never created, but it does contend that no easement was ever created on the Lots other than those expressly shown on the 1936 Plat. Nothing in the Liquidation Deed or the 1936 Plat suggests the possibility that the easement might one day wander across the street and onto other Lots. Even if the easement did move with the high water mark, it was extinguished when, over the years, the easement reached Pine Drive and the erosion of the shoreline destroyed the servient Lots. (App. 497-503.)

III. MALLON'S EXPERT WITNESS LACKED PROPER FOUNDATION.

Mallon's expert surveyor, Donald Davis, lacked a proper foundation to render any opinion on the intent of the drafter of the Liquidation Deed or the 1936 Plat. Mr. Davis admitted at trial that, in looking at the intent of the 1936 Plat, there were no standards for preparation of plats in 1936. (App. 379:2-25.) He also admitted that part of his task was to opine whether the easement moved or remained fixed on the ground. (App. 385: 9-12.) Essentially, Mr. Davis rendered an opinion on the legal conclusion of whether the easement moved or not, which is prohibited by Virginia Code § 8.01-401.3(B). (App. 381:10-20, 384:1-4.) Additionally, the lower court's final order specifically makes reference to the testimony of Mallon's expert and makes no reference at all to MTI's expert. That illustrates that the

admission of Mr. Davis' speculative opinion was anything but harmless. (App. 568, ¶ 7.)

Finally, MTI's use of testimony from its own expert surveyor at trial in no way cures the error made in allowing Mr. Davis' speculative testimony. MTI preserved its objection to Mr. Davis' expert opinion, and it would be incumbent upon Mallon's counsel to object to Mr. Johnson's opinion (which he did) (App. 454:3-6.) So, the admission of opinion evidence from MTI's expert should have no bearing on the admissibility of Mr. Davis' testimony. Once again, Mallon fails to cite any case law, statutes or other authority to support its conclusion that the admission of MTI's expert somehow operated as a waiver of its prior objections to Mr. Davis' opinions.

CONCLUSION

Wherefore, for the foregoing reasons, the Appellants, by counsel, respectfully request that this Court vacate the lower court's final order because necessary parties are missing and/or enter judgment holding that the twenty foot easement at issue has been extinguished by the erosion of the shoreline.

MARBLE TECHNOLOGIES, INC. and SEBASTIAN PLUCINSKI

By:_____

James J. Reid, Esq., VSB 45796
DAVID KAMP & FRANK, L.L.C.
739 Thimble Shoals Blvd., Suite 105
Newport News, VA 23606
(757) 595-4500 (telephone)
(757) 595-6723 (facsimile)
jjreid@davidkampfrank.com
Counsel for Appellants

CERTIFICATE

Pursuant to Rule 5:26(h) of the Supreme Court of Virginia, I hereby certify that on this 22nd day of January, 2015, I hand-filed fifteen copies of the foregoing Reply Brief of Appellants, with one copy on CD, with the Clerk of this Court. I also certify that I served, via UPS Ground Transportation, three copies of the Reply Brief of Appellants, with one copy of the same on CD, upon counsel for Appellees:

Michael B. Ware, Esq.
Adrienne Sakyi, Esq.
Schempf & Ware, PLLC
4000 George Washington Memorial Highway
Yorktown, VA 23692
(757) 369-1199 Telephone
(757) 369-1039 Facsimile
mware@4000law.com
asakyi@4000law.com
Counsel for Steven M. Mallon, Helen G. Mallon, Arne Hasselquist, Lauren Hasselquist and Grandview Islanders, LLC

Bennett L. Stein, Esq.
Stein & Stein, P.C.
724 Thimble Shoals Blvd., Suite 100
Newport News, VA 23606
(757) 873-1221 Telephone
(757) 873-4449 Facsimile
bstein@steinandsteinpc.com
Counsel for Grandview Islanders for the Environment, LLC

One copy of the Reply Brief of Appellants on CD was also served, via U.S. Mail, postage prepaid, upon the following Appellees not represented by counsel:

The City of Hampton
Jeffrey A. Sachs, Esq.
Office of the City Attorney
22 Lincoln Street 8th Floor
Hampton City Hall
Hampton, VA 23669

White Marsh Beach, LLC, as successor in interest to Ella Johnson Kline
James B. Chapman, registered agent
204 Lighthouse Drive
Hampton, VA 23664

Ronald Hogge
Paul Hogge
116 Lighthouse Drive
Hampton, VA 23664

Paul E. Kline, Trustee of the Paul and Ella Kline Revocable Living Trust
80 Beach Rd.
Hampton, VA 23664

Mary Lou Roseau, Trustee of the Paul and Ella Kline Revocable Living Trust
12465 Warwick Blvd.
Newport News, VA 23606

Marilyn Eubank
145 Beach Road
Hampton, VA 23664

Elizabeth A. Johnson, Trustee of the Johnson Living Trust
3023 Country Club Drive
Lynn Haven, FL 32444-5111

Rose Lee Johnson, deceased
103 Beach Rd
Hampton, VA 23664

Betty J. Bland
18575 Martinique Dr.
Dallas, TX 77058

Ern A. Koehler, Jr.
117 Findley Square
Hampton, VA 23666

Thomas A. Diggs, Jr.
25 Myrtle Street
Hampton, VA 23669

Walter B. Johnson, III
140 Sarum Terrace
Midlothian, VA 23113

Kenneth G. Johnson
2 W. Cary Street
Richmond, VA 23220

Jeanne Marie Knaus
Vincent L. Knaus
3912 Regal Court
Virginia Beach, VA 23452

Pam Holloway
3401 Blackhawk Court
Chesapeake, VA 23323

Teresa Buck
2609 Seymour Terrace
Henrico, VA 23233

Robin P. Waller
2324 Springdale Road
Chesapeake, VA 23323

Tammy Ruth Holloway Wallin
465 Hill Street
Boonton, NJ 07005

Frank C. Holloway
909 Poplar Avenue
Chesapeake, VA 23323

Paige Mason
6460 Crescent Way, Apt. 297
Norfolk, VA 23513

Jean Wright Lewis
107 Beach Road
Hampton, VA 23664

Shirley Stevens Kyle
405 Magnolia Drive
Williamsburg, VA 23185

Christopher Kyle
1102 Ridgewood Rd.
Harrisonburg, VA 22801

Larry J. Spencer
8812 Battery Road
Alexandria VA 22308-2803

Route 134 Investing LLC
Bennett L. Stein, Esq.
724 Thimble Shoals Blvd Suite 100
Newport News, VA 23606

Ella J. Kline
80 Beach Road
Hampton, VA 23664

Estate of B.F. Johnson
Thomas Diggs
25 Myrtle Street
Hampton, VA 23669

Robert S. Johnson
3023 Country Club Drive
Lynn Haven, FL 32444-5111

Rex G. Walker
Patricia K. Swan Walker
566 Denbigh Blvd
Newport News, VA 23608

Teddy W. Harris
Barbara M. Harris
712 Queen Elizabeth Drive
Virginia Beach, VA 23452

By:_____
James J. Reid, Esq., VSB 45796