IN THE

Supreme Court of Virginia

RECORD NO. 140972

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

Appellants,

v.

STEPHEN M. MALLON, *et al.*,

Appellees.

BRIEF OF APPELLEES STEPHEN M. MALLON, HELEN G. MALLON, ARNE HASSELQUIST, LAUREN HASSELQUIST, AND GRANDVIEW ISLANDERS, LLC

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NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

This litigation concerns property in the White Marsh area near Grandview Island in Hampton, Virginia. The property was originally owned by Grandview Development Corporation ("the Corporation"), which was incorporated in 1923. The Corporation recorded a plat depicting subdivision of the property ("the Grandview Plat") and a deed distributing the subdivided lots unto its shareholders in 1936 ("the Grandview Deed"). According to the recorded deed, these lots were taken "subject to an easement on a twenty foot road as designated on the map recorded with this deed, which easement is to run with the land from the parties hereto to their assigns and heirs but it is expressly stated that the said twenty foot road shall not become a public road, but merely an easement for the parties their heirs or assigns to this deed." App. 16. The Grandview Plat recorded with the Grandview Deed depicts a right-of-way running across the subdivided lots just above the area marked as the "Low Tide Line" of the Chesapeake Bay, bearing the description "Twenty Foot Road Along Present Mean High Water Line." App. 13.

Appellees filed a Complaint for Declaratory Judgment and Injunctive Relief in August 2011 based upon existence of an express easement. Appellants filed an Answer and Counterclaim, Cross-Claim, and Third-Party

Complaint in October 2011. Appellees amended their Complaint in November 2012 to seek declaratory judgment as to the existence of an express easement or, alternatively, an easement by necessity or an implied easement from preexisting use. Appellants amended their Counterclaim, Cross-Claim, and Third-Party Complaint in March 2013.

At a hearing on April 3, 2013, Appellants moved the court for a continuance based upon an alleged lack of necessary parties and failure to produce information relied upon by Appellees' expert until the date of the expert's deposition. See App. 199-202. Over Appellees' objection, the continuance was granted and the trial court verbally stated from the bench that the continuance was granted to add additional parties, if any. No written order was produced from the hearing and the matter was scheduled for trial on October 29-30, 2013. No parties were added by Appellants or Appellees. On October 7, 2013, Appellants again filed a motion for a continuance based upon alleged lack of necessary parties that was heard by the trial court. App. 236-238. Such motion was opposed by Appellees. App. 239-243. The motion was granted as to moving the trial court one day due to unrelated reasons, but the motion for a continuance was denied as to the necessary parties issue. App. 280-282.

The case was tried without a jury on October 30, 2013 and Appellants non-suited their Counterclaims, Cross-Claims, and Third Party Claims on oral motion by counsel on the date of trial. At trial, the court heard testimony from members of the community as to their access of the property and the changing water lines. App. 328:13 – 331:4. Evidence was also introduced by Appellees' expert witness, Donald Davis, as to his opinion as to the location of the mean high water line and his opinion as a surveyor as to the purpose and location of the easement depicted on the Grandview Deed and Grandview Plat. App. 371 – 406. Appellant presented evidence from his expert, Wayne Johnson, as to his opinion that the easement in dispute was set at a fixed location. App. 462:20-24.

The trial court Judge issued his ruling from the bench to be effective as of the date of trial. The parties were unable to agree as to the content of the court's ruling and the parties each filed opposing motions for the trial court to enter their proposed order. On March 21, 2014, the trial court entered a final written order in the matter that ruled that: i) the Grandview Deed and Grandview Plat were ambiguous and required the Court to ascertain the intent of the parties; ii) Appellees have an express easement of twenty feet to cross the Appellants' property that moves with the mean high water line for the purpose of ingress and egress to their parcels; and

iii) Appellees do not have an easement by necessity or an implied easement from preexisting use because they have an express easement. App. 566-573.

STATEMENT OF FACTS

The property involved in this litigation was originally owned by Grandview Development Corporation ("the Corporation"), which was incorporated in 1923. The Corporation recorded a plat depicting subdivision of the property ("the Grandview Plat") and a deed distributing the subdivided lots unto its shareholders in 1936 ("the Grandview Deed"). According to the recorded deed, these lots were taken "subject to an easement on a twenty foot road as designated on the map recorded with this deed, which easement is to run with the land from the parties hereto to their assigns and heirs but it is expressly stated that the said twenty foot road shall not become a public road, but merely an easement for the parties their heirs or assigns to this deed." The Grandview Plat recorded with the Grandview Deed depicts a right-of-way running across the subdivided lots just above the area marked as the "Low Tide Line" of the Chesapeake Bay, bearing the description "Twenty Foot Road Along Present Mean High Water Line."

Property owners, as well as members of the public, accessed the White Marsh Beach properties along the water line for many years. See e.g. App. 301. Over the years, the water line has moved significantly. App. 325. The parties in this case began having disputes as to access to the properties and Appellees brought their action in the trial court to secure access to their parcels through the easement created in the Grandview Deed and Grandview Plat in 2011. See App. 88-116 and App. 360-363.

I. THE TRIAL COURT DID NOT ERR BY DENYING APPELLANTS' MOTION TO CONTINUE TO ALLOW FOR THE ADDITION OF PARTIES.

The trial court did not make a reversible error by refusing to grant Appellants' motion to continue to allow for the addition of parties. The Appellants' argument that the judgment should be reversed for failure to add necessary parties should be rejected because the subject properties were re-subdivided and are no longer relevant parties to this litigation, lack of necessary parties does not render the judgment void, and Appellants had numerous opportunities to join the parties they now claim are necessary, yet failed to act. Trial courts have discretion to determine whether a matter should proceed without parties that are purportedly necessary. *Siska Revocable Trust ex rel. Siska v. Milestone Development, LLC, et al*, 282 Va. 169, 715 S.E.2d 21 (2011).

First, the subject properties that Appellants reference in their Petition have been re-subdivided. Lots A through D on the original plat of Grandview Development Corporation Property have since become a part of a different subdivision, Fox Hill Shores, when the property was acquired and re-subdivided. In addition, Lots A2 – Lots I2 and Lots A4 – Lots I4 are no longer part of the Grandview Development Corporation Property as such were purchased and re-subdivided as part of the Riley's Way Subdivision. Accordingly, the owners of these properties are no longer relevant parties to this litigation. During his deposition, Appellants' expert, Wayne Johnson, opined to this fact in his deposition. App. 239-243.

The second reason that the Appellants' argument that the judgment should be reversed for failure to add necessary parties should be rejected is that a lack of necessary parties does not render a judgment void or deprive the court of subject matter jurisdiction. This Court ruled in 2011 in the case of *Siska Revocable Trust ex rel. Siska v. Milestone Development, LLC*, et al, 282 Va. 169, 715 S.E.2d 21 (2011), and prior to that in *McDougle v. McDougle,* 214 Va. 636, 203 S.E.2d 131 (1974), that there is an exception to the rule that a court cannot render a judgment without necessary parties where it is 'practically impossible' to join all parties in interest, and the absent parties are represented by others having the same

interests, or where an absent party's interests are separable from those of the parties before the court so that the court may enter a decree without prejudice to the rights of the absent party. In this case, there were over 35 parties to the litigation and identification of the current owners of parcels on a 1936 plat makes addition of all possible parties with interest practicably impossible. Further, in this case, there were parties who rigorously argued for and against the existence of the subject easement. As one justice inquired at the argument of this matter's Petition for Appeal, after all of this information that was presented and developed over years, what could possibly have been added to the evidence before the court? If this Court were to find merit in Appellants' argument that the parties who were not added to this litigation were necessary, the parties were clearly represented by others having the same interests.

Finally, the trial court had previously granted a motion to continue in April 2013 to allow the parties the opportunity to add necessary parties. The Appellants, who at that time had Counterclaims, Cross-Claims, and Third Party Claims, did not take any action to add any additional parties to the litigation over the six month continuance and instead moved for an additional continuance in September 2013. This was one of the trial court's concerns when he rendered his ruling on Appellants' second motion for a

continuance. App. 249:9-13. Appellants' concern regarding necessary parties is insincere in light of this fact.

For the above stated reasons, this Court should reject the Appellants' argument that the trial court erred by allowing the trial to proceed without necessary parties.

II. THE LOWER COURT DID NOT ERR IN HOLDING THAT THE TWENTY FOOT EASEMENT ESTABLISHED IN 1936 MOVES WITH THE MEAN HIGH WATER LINE AND WAS NOT EXTINGUISHED BY EROSION.

In light of the existing Virginia law and the circumstances surrounding the grant of the easement, the trial court did not make a reversible error in holding that the subject twenty foot easement established in 1936 was not extinguished by erosion and moves with the mean high water line.

The Appellants have not appealed the trial court's ruling that the Grandview Deed and the Grandview Plat created an easement. Appellants only argue that the trial court erred in ruling that the easement moved with the mean high water line or, alternatively, that the easement was extinguished by erosion.

Determination of whether a written instrument is ambiguous is reviewed *de novo* upon appeal. *Doswell Ptnr v. Va. Elec. & Power Co.*, 251 Va. 215 (1996). However, the trial court's determination as to the intent of

the drafters of a writing is a factual determination for the trier of fact that should not be overturned unless plainly wrong. *C.G. Blake Co. v. Smith*, 147 Va. 960, 133 S.E. 685 (1926); *Online Res. Corp. v. Lawlor*, 285 Va. 40, 55, 736 S.E.2d 886,895 (2013).

A. The trial court did not err in ruling that the easement moved with the mean high water line

The trial court properly determined that the subject easement moves with the mean high water line in light of the language in the creation of the easement, subject Virginia law, the intent of the parties, and the circumstances surrounding creation of the easement.

The language in the creation of the easement was ambiguous and allowed the court to set the location. Courts have the power to set the location of an easement where the granting instrument is ambiguous as to the location. An ambiguity exists when language admits of being understood in more than one way or refers to two or more things at the same time. *Doswell Ltd. Partnership v. Virginia Elec. and Power Co.*, 468 S.E.2d 84, 251 Va. 215 (1996). In *Hamlin v. Pandapas*, 197 Va. 659, 90 S.E.2d 829 (1956), the Virginia Supreme Court affirmed a trial court's decree, which had located and fixed the width and extent of a passway and right of way. The Court found that the deed, which granted a five foot

passway "along the southeastern side of the said house" and a right of way "to the rear end of the lot" were ambiguous as to the location of the easement. *Id.* The Court stated, "Where an easement has been granted or reserved by deed, the ordinary rule which governs in the construction of other writings prevails, namely, that the rights of the parties must be ascertained from the words of the deed, and the extent of the easement cannot be determined from any other source. But where its language is ambiguous, the court in order to ascertain the intention of the parties looks to the language employed in the light of the circumstances surrounding the parties and the land at the time the deed was executed." *Hamlin v. Pandapas*, 197 Va. 659, 663, 90 S.E.2d 829, 833 (1956).

In this case, the express easement is ambiguous. The word "present" in "present mean high water line" is not sufficiently defined and is open to multiple interpretations. Accordingly, the court must look to the intention of the parties. The intention of the parties in using the phrase "present mean high water line" was to create an easement along the mean high water line – whatever that level is on the date of an easement holders' access. Under Virginia law, the ambiguity in the phrase "present mean high water line" allowed the trial court to look outside of the document to ascertain the intention of the parties from the language in the deed, the circumstances

surrounding the parties, and the circumstances surrounding the land at the time the deed was executed.

In this case, evidence was presented at trial that all of the lots in this litigation previously belonged to a group of persons acting together as the Grandview Development Corporation. App. 373:21-23, App. 459:7-12. Given the use of the property at that time as a recreational location, the prior relationship between the lot owners, and the inability to access the lots through any other reasonable means at the time of the drafting of the deed, the trial court was correct in its determination that the intention of the parties in creating the easement was for ingress and egress to each piece of property.

Virginia law also allowed the trial court to consider the circumstances surrounding the land at the time the deed was executed. Evidence was presented during trial that in 1933, which was shortly before the subdivision of the Grandview property, the Chesapeake-Potomac Hurricane of 1933 caused significant changes to the beaches in the White Marsh area. See App. 257-268 and App. 461:20 – 462:1. Additionally, it is an elementary tenet of natural science that water levels rise and fall over time, which is why the location of the mean high water line used in surveying is determined by averaging the location of the high water over a period of

time called an epoch, which is approximately 18 years. App. 376:7-9. Finally, the Virginia Supreme Court has long held that the low-water mark for boundaries shift with shifting sands due to gradual accretion or recession. *Steelman v. Field*, 128 S.E. 558, 142 Va. 383 (1925). Accordingly, the trial court properly considered the circumstances of the changing water line at the time of the creation of the Grandview Deed and the existing law on accretion and erosion and held that the easement must move with the mean high water line to be effective.

Because the location of the express easement is ambiguous due to the phrase "Present Mean High Water Line," the trial court properly considered *all* the language within the Grandview Deed and Grandview Plat. Said easement creation expressly called for said easement "to run with the [l]and [sic] from the parties hereto to their assigns and heirs." Clearly, running with the land requires the easement to remain appurtenant to the land. Thus, as the land recedes due to erosion, as in the present case, in order to remain appurtenant to the land and "run with the [l]and from the parties hereto," as established in the 1936 Deed, Plat, and Easement, the easement must move with the beach high water mark. To hold otherwise, as is argued by Appellants, would sever the easement from the property and defeat or nullify the language contained within the

Grandview Deed, Grandview Plat, and easement. Appellants' argument would set the location of the easement out in the Chesapeake Bay, which would accordingly be owned by the Commonwealth and no longer "run with the land" as drafted. In evaluating the language that created the easement as a whole, the trial court did not err when it ruled that the easement moves with the mean high water line.

Due to the ambiguity of the phrase "Present Mean High Water Line," the trial court properly looked to the language in the rest of the creation of the easement, the circumstances surrounding the parties to the Grandview Deed, and the circumstances surrounding the land in interpreting the instruments' language, as well as the testimony of expert Donald Davis, to find that the express easement moves with the mean high water line.

B. The trial court did not err in ruling that the easement was not extinguished by erosion

The trial court did not err in ruling that the easement was not extinguished by erosion. Because the court ruled the easement moves, this argument is moot; however, it will be briefly addressed.

Although it is true that an easement can be extinguished by an act of God or through expiration of the purpose of the easement, such is not the case here. *Hudson v. American Oil Co.*, 152 F. Supp. 757 (1957); *Pyramid*

Dev. V. D&J Assocs., 262 Va. 750, 553 S.E.2d 725 (2001). The trial court properly ruled that the subject easement moves with the mean high water line as discussed above. Accordingly, it is not attached to the land that has eroded.

Further, Appellants' analysis that the servient tracts have been destroyed ignores the language of the deed, which states that all of the parties to the deed take their property subject to the easement. Accordingly, each parcel owner had the right to cross each other's land at mean high water line and the easement did not only burden the land closest to the ocean.

Finally, the purpose of the easement – to allow ingress and egress for the parcel owners - has not been extinguished. Property owners testified at the trial that the easement is the primary method for accessing their property and other modes of access are not practicably available. See, e.g., App. 301-307. Because the need for and use of the easement has not ceased, the easement has not been extinguished by abandonment of purpose of the easement. *Hudson v. American Oil Co.*, 152 F. Supp. 757 (1957); *Pyramid Dev. V. D&J Assocs.,* 262 Va. 750, 553 S.E.2d 725 (2001).

In sum, Appellants' argument as to erosion of the easement is without merit because the easement moves with the mean high water line and accordingly has not been extinguished by erosion.

III. THE TRIAL COURT DID NOT MAKE A REVERSIBLE ERROR WHEN IT ALLOWED IN PAROL EVIDENCE FROM APPELLEE'S EXPERT WITNESS

The court did not make a reversible error when it allowed in parol evidence from Appellee's expert witness. Notably, upon review, a trial court's evidentiary rulings are reviewed applying an abuse of discretion standard. *Hinkley v. Koehler*, 269 Va. 82, 91, 606 S.E.2d 803, 808 (2005).

In this case, the trial court expressly ruled that the Grandview Deed and the Grandview Plat that created this easement are ambiguous. See Final Order of the Court at App. 567. Accordingly, parol evidence was appropriate for admission. *Ott v. L&J Holdings, LLC*, 275 Va. 182, 187 (2009).

Appellant argues that Mr. Davis' testimony was without a foundation and should have been excluded. Mr. Davis testified that he based his opinion on looking at the plat and the deed, as well as subsequent deeds throughout the years when making his opinions. App. 384:11-387:15, App. 389:7-14. Mr. Davis did state that he knew the drafter of the plat and praised his accuracy, but Mr. Davis did not say that this information was the

basis of his opinion. App. 386:15-20. Mr. Davis also discussed that there were "very little standards" for sureveying in the 1930s, however, this was followed by Mr. Davis' discussion of the technical aspects of the plat, the significance of the addition of the words "along the present high waterline" rather than just a drawing of the road, and the importance of waterways as "natural monuments or landmarks" in fixing property lines. App. 387:2-6; App. 391:12-20. Mr. Davis' opinion clearly had a proper foundation and was properly admitted by the court.

Any error, if this Court were to find one occurred, is harmless and Appellants fail to contend that this alleged error is not harmless. The trial court stated in its ruling that it based its decision not only on Mr. Donald Davis' testimony, but also all materials submitted by the parties, the parties' stipulations and stipulated documents, pretrial briefs, submitted case law, and oral arguments. App. 566. The trial lasted several hours with testimony from approximately six witnesses. Further, the trial court Judge's statements from the bench indicate that he relied most heavily on the deed, the plat, and his power to set the location of an easement when such instrument is ambiguous. App. 489: 9 – 490:23. There is no evidence that Mr. Davis' testimony was the sole basis for the trial court's opinion that the drafters' intent supports the interpretation that the easement moves. The

Appellants fail to show that admission of this parol evidence was not a harmless error.

Finally, Appellants' own witness Wayne Johnson also testified as to his personal knowledge of the drafters of the documents (App. 455:17-456:24), speculated as to the purpose of the easement when it was created (App. 459:7-16), and opined as to the intent of the drafters of the document (App. 460:6-9). Such evidence was appropriate for admission as it was appropriate for admission from Appellees' expert Mr. Davis.

Accordingly, the trial court did not abuse its discretion in admitting Mr. Davis' testimony and, alternatively, any error that may have occurred was harmless and does not constitute grounds for reversal.

CONCLUSION

Because the trial court did not commit any reversible errors in this matter and for the foregoing reasons, the Appellees, by counsel, respectfully request that this Court affirm the trial court's ruling.

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In compliance with Rule 5:26, I hereby certify that on January 8, 2015, the correct number of true and accurate copies of the Brief of Appellees were hand-filed with the Supreme Court of Virginia and an electronic copy filed by CD in PDF format, and the correct number of copies along with the electronic copy by CD in PDF format were served upon counsel for the appellee by first class mail:

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