In The

Supreme Court of Virginia

RECORD NO. 140972

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

Appellants,

v.

STEPHEN M. MALLON, *et al.*,

Appellees.

BRIEF OF APPELLANTS

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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' OPENING BRIEF

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

STATEMENT OF THE CASE

On October 30, 2013, the parties to this appeal participated in a bench trial in Hampton Circuit Court that culminated in the court's entry of a final order on March 21, 2014 holding that an express twenty-foot easement established in 1936 along Grandview beach[1] in Hampton, Virginia was a variable easement that has moved with the mean high water line as the shoreline had eroded over time. (App. 283-503, 566-73.) MTI

[1] Grandview beach is also frequently referred to in the record as "White Marsh Beach."

filed its Notice of Appeal on November 27, 2013, and this Court awarded MTI this appeal on November 4, 2014. (App. 534.)

This litigation began when Appellees Stephen M. Mallon, Helen G. Mallon, Arne Hasselquist, Lauren Hasselquist, and Grandview Islanders, LLC (collectively referred to as "Mallon"), owners of certain real properties along Grandview beach, sought a declaration that a twenty-foot easement established along the beach in 1936 had moved with the shifting mean high water mark as the beach shoreline has eroded. (App. 12-23, 85-119.) MTI, which also owns properties along the beach, has contended that the twenty-foot easement created in 1936 was located at a fixed point and, with the erosion of the shoreline, is now located on the bottom of the Chesapeake Bay below the mean low water mark. (App. 46-61,130-38.) Once the parties were at issue, Mallon obtained a preliminary injunction preventing MTI from placing any objects on MTI's properties that might prohibit pedestrian or vehicular access across its parcels of Grandview beach. (App. 29-32, 67-69.)

As this litigation progressed, MTI objected that some of the property owners that are necessary parties to the action were not before the court, but those objections were overruled. (App. 66-69, 199-202 at ¶ 9, 236-38, 244-56, 280-82.) Over MTI's repeated objection that all necessary parties

were not before the court, the matter was tried on October 30, 2013, and the lower court ruled from the bench that the easement in question moves with the mean high water mark for the purpose of allowing property owners ingress and egress to their properties. (App. 557-58.) The lower court entered its final order on March 21, 2014. (App. 566-73.)

STATEMENT OF FACTS

In 1936, the Grandview Development Corporation dissolved and distributed most of a large tract of real estate in the White Marsh Beach area to its shareholders. (App. 494-96, 501 at ¶¶ 1 and 9.) Grandview Development Corporation conveyed out parcels of its real estate by a May 4, 1936 deed recorded in Deed Book 99 at page 569 (the "Liquidation Deed"). (App. 16-20, 501 at ¶ 1.)

The Liquidation Deed divided the corporate property into multiple parcels and paper streets by incorporating by reference that certain "Plat of Grandview Development Corporation Property" prepared by Girard Chambers & Son, Civil Engrs. and Survs. and dated December 1, 1936, which is recorded in the Clerk's Office of this Court in Deed Book 99 at pages 373-75 (the "1936 Plat"). (App. 494-96, 501 at ¶ 2.)

The 1936 Plat lays out the following lots: Lots A through P; Lots A1 through P1; Lots A2 through P2; Lots A3 through P3; Lots A4 through N4;

and Lots G5 through O5, all of which are depicted on the 1936 Plat (collectively, the "Lots"). At all relevant times, Mallon has owned Lots G1, G3, G5,C1, and C3, and MTI has owned Lots N, N1, N2, N3, N4, N5, L, L1, L2, L3, L4 and L5. (App. 96 at ¶¶ 5-7 and 17, 299:3-4, 350:20-25, 130-31 at ¶¶ 5-7 and 17.)

The 1936 Plat also depicts three paper streets: Outten Street, Bloxom Street, and Pine Avenue. (App. 494-96, 504 at ¶¶ 1and 2.) The three paper streets in the 1936 Plat act in conjunction to reach every Lot on the 1936 Plat. However, because the Liquidation Deed did not convey out title to the paper streets to anyone, a subdivision developer filed suit in the early 1990s to acquire portions of the paper streets desired for its subdivision development plans. On January 22, 1993, the Hampton Circuit Court entered an order that conveyed portions of the paper streets to the City of Hampton and to the subdivision developer. (App. 501 at ¶ 11, 519-22.) However, the majority of the paper streets, as they are sited on A1 through P1, Lots A3 through P3, and Lots F3 through P3, were not affected by this order.

The Liquidation Deed states that the Lots conveyed to the grantees are subject to an easement on a twenty foot road. In pertinent part, the Liquidation Deed states:

> *The parties to this deed take the above mentioned and described property 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 and 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. 501, ¶ 1.)

The 1936 Plat shows the referenced "Twenty Foot Road," which is also labeled "Along Present Mean High Water." The "Twenty Foot Road" crosses Lots A1 through P1 and Lots A through P, which were the Lots that fronted on the Chesapeake Bay. (App. 494-96, 501 at ¶¶ 1 and 2.)

Since 1936, the sand and water levels at Grandview beach have shifted due to erosion. (App. 501 at ¶ 10.) If the twenty foot road shown on the 1936 Plat has never moved, then it is now located within the Chesapeake Bay. (App. 404:22-405:5.) At trial, Mallon's expert witness took a current survey of the parcels shown in the 1936 Plat, and he overlaid it onto aerial photographs of the beach from 1937, 1960, 1981 and 2013 to demonstrate how the erosion of the shoreline has affected the parcels. (App. 497-503.) In fact, almost all of Lots A, B1 through P1, and Lots J through P (the "Servient Lots") are now below the mean low water line of the Chesapeake Bay, and what little portion of Lot A that remains above

the mean high water line is insufficient to accommodate placement of a twenty foot road. (App. 404:22-405:5; 416:21-420:16; 503.)

Not all of the successors in title to the properties conveyed in the Liquidation Deed have been made parties to this action. (App. 504 at ¶¶ 4-7.) Specifically, Grandview Beach, LLC, which has never been a party to this litigation, is the record owner of Lots E, F, G, H and I, and those Lots are the site of a restaurant. (App. 408:23- 409:14.) In addition, most, if not all, of the record owners of Lots E2 through I2 and Lots E4 through I4 (which have become part of a nearby subdivision) have not been made parties to this litigation either. (App. 504 at ¶ 5.) Most, if not all, of the current record owners of Portions of Lots A through D and Lots A2 through D2 (which have become part of another nearby subdivision) have not been made parties to this litigation. (App. 504 at ¶ 6.) Finally, portions of Lots A2 through D2 and A4 through D4 are owned by persons who also have not been made parties to this litigation. (App. 504 at ¶ 7.)

ASSIGNMENTS OF ERROR

1. The lower court erred in holding a trial and entering a final order without first joining as necessary parties all the landowners that would be affected by any declaratory judgment rendered. (App. 280-81, 481:18-82:7, 566-71.)

2. The lower court erred in holding that the twenty foot easement on the road established in 1936 was not extinguished by the subsequent erosion of the shoreline. (App. 482:17-83:7, 566-71.)

3. The lower court erred in finding the relevant deed and plat ambiguous and in allowing Plaintiffs' expert to offer parole evidence regarding the intent of the drafters of those documents. (App. 105:16-23, 380:6-12; 380:22-25; 381:10-20, 382:18-384:2, 387:16-388:7, 482:8-16, 566-71.)

ARGUMENT

I. THE LOWER COURT ERRED IN HOLDING A TRIAL AND ENTERING A FINAL ORDER WITHOUT FIRST JOINING AS NECESSARY PARTIES ALL OF THE LANDOWNERS THAT WOULD BE AFFECTED BY ANY JUDGMENT RENDERED.

The lower court made a plain error of law in allowing this litigation to proceed to final judgment without first having all necessary parties brought into the litigation. The issue of whether all necessary parties are before the Court is a pure question of law and is therefore reviewed *de novo*. *Kocher v. Campbell*, 282 Va. 113, 116, 712 S.E.2d 477, 479 (2011). A necessary party is one "who is in actual enjoyment of the subject matter, or has an interest in it, either in possession or expectancy, which is likely either to be diminished or defeated by the plaintiff's claim." *Mendenhall v. Douglas L. Cooper Inc.*, 239 Va. 71, 75, 387 S.E.2d 486, 470 (1990). In that situation, that person "has an immediate interest in resisting the demand, and all persons who have such immediate interests are necessary parties to the suit. " *Id*.

Here, the several property owners absent from this litigation have property interests that are affected by a declaratory judgment because their

parcels are either dominant or servient estates for the purported twenty foot road. No matter which way the lower court may have ruled on the declaratory judgment action, all of the owners of the dominant and servient estates stood to be affected by the court's ruling. The most dramatic example is Grandview Beach, LLC, the owner of Lots E, F, G, H and I, on which a restaurant sits. Mallon's expert testified at trial that his survey of the present-day shoreline shows that the twenty-foot road, if it moves, runs through Lots E, F, G, H and I. (App. 408:17-409:14.)

Virginia law is settled that:

> [a] court is powerless to proceed with a suit unless all necessary parties are properly before the court. We have said that [a necessary party's] interests in the subject matter of the suit, and in the relief sought, are so bound up with that of the other parties, that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed. In such cases the court refuses to entertain the suit, when these parties cannot be subjected to its jurisdiction.

Mendenhall v. Douglas L. Cooper Inc., 239 Va. 71, 74, 387 S.E.2d 486, 470 (1990). Consequently, the lower court erred in proceeding to trial and entering a final order without bringing all necessary parties before the court so that they are afforded the opportunity to protect their property interests from an encroaching easement.

II. THE LOWER COURT ERRED IN HOLDING THAT THE TWENTY FOOT EASEMENT ON THE ROAD ESTABLISHED IN 1936 WAS NOT EXTINGUISHED BY THE SUBSEQUENT EROSION OF THE SHORELINE.

The trial court erred in holding that the easement on the twenty foot road had moved with the mean high water line because: i) nothing in the Liquidation Deed and 1936 Plat provides that the easement on the twenty foot road moves at all; and ii) the servient estate had been overtaken by erosion. The easement on the twenty foot road at issue is described and shown in the Liquidation Deed and the 1936 Plat.

A. *The plain language of the Liquidation Deed and 1936 Plat fixes an easement over a twenty foot road in a specific place that is now part of the Chesapeake Bay bottomland.*

The Liquidation Deed and 1936 Plat establish the easement in a fixed locale that is now underwater. The construction of written documents is a question of law for the court. *Saunders v. Ocean Park Corp.*, 140 Va. 759, 762, 125 S.E. 685, 686 (1924); *Fulton v. W.R. Grace & Co.*, 143 Va. 12, 22, 129 S.E. 374, 377 (1925). On appeal, a circuit court's interpretation of covenants, deeds, options, and other related documents is reviewed *de novo*. *Beeren & Barry Invs., LLC v. AHC, Inc.*, 277 Va. 32, 37, 671 S.E.2d 147, 150 (2009).

Where a deed is unambiguous, a court called upon to construe such a deed should look no further than the four corners of the

instrument under review. *Langman v. Alumni Ass'n of the Univ. of Va.*, 247 Va. 491, 498-99, 442 S.E.2d 669, 674 (1994). In doing so, a court should interpret the deed according to its plain meaning. *Beeren & Barry Invs., LLC v. AHC, Inc.*, 277 Va. 32, 37, 671 S.E.2d 147, 150 (2009).

The Liquidation Deed, in conjunction with the 1936 Plat, unambiguously fixes the location of the twenty foot road at a specific place shown on the 1936 Plat. The Liquidation Deed conveys the Lots "subject to an easement on a twenty foot road as designated on the map recorded with this deed." The 1936 Plat shows two smooth, parallel lines labeled "twenty foot road" and "along present mean high water." The 1936 Plat also shows a stake at the intersection of the twenty foot road and another road, with a specific point on the east side of the twenty foot road labeled "980.0' S 29 55 W." At the southern terminus of the twenty foot road is a note "S 20-00 W."

In addition to those notations on the 1936 Plat, the plat itself describes the twenty foot road as "along present mean high water." The plain meaning of the word "present" means "now existing, at hand; relating to the present time." *Black's* at 1183 (6th ed. 1990). It does not mean "at some future time" and it does not have any prospective meaning. If it were otherwise, then the use of the word "present" could have calamitous

unintended consequences. For example, if the word "present" meant at the present time when a document is read (as opposed to when a document is written or signed), then every settlement agreement that releases all claims "presently existing" would really act as a release of all prospective claims. One cannot ignore that the word "present" was written on the 1936 Plat in 1936, a time when 2013 was in the future.[2] A plat drawn in 1936 that shows a road placed along the "present mean high water" leads inescapably to the conclusion that the road was fixed in a specific place along the mean high water as it existed in 1936.[3]

No other language in the Liquidation Deed or the 1936 Plat states that the twenty foot road will move. In fact, the Plaintiffs' own expert agreed that nothing in the documentation provides that the twenty foot road moves. (App. 436:7-13.) It logically follows that if the easement is over the twenty foot road and the twenty foot road does not move, then the easement does not move either. If the grantors had intended for an easement on a twenty foot road to move with the shifting shoreline, then they certainly could have expressly provided for that. In examining deeds,

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[2] It is reminiscent of the famous Yogi Berra answer to the question, "What time is it?" Berra answered, "You mean now?"

[3] It is also worth noting that a mean high water line is determined using an 18.6 year period of time, so identifying the present mean high water in 1936 indicates a specific period of time. (App. 376:4-9.)

the true inquiry is not what the grantor meant to express but rather what the words do express. *Browning v. Blue Grass Hardware Co.*, 153 Va. 20, 26, 149 S.E. 497, 498-99 (1929). Here, the language used by the grantors fixed the twenty foot road in a place that is now underwater.

B. ***The erosion of the Servient Lots has extinguished any easement on the twenty foot road because the Servient Lots are now State-owned bottomland.***

Even if the easement on the twenty foot road had been designed to move with the mean high water line, all of the Servient Lots have been almost entirely destroyed by erosion, except for a small portion of Lot A, and what little portion of Lot A remains is incapable of providing a twenty foot road. (App. 404:22-405:5; 416:21 - 420:16; 503.) While a reviewing court affords deference to a trial court's factual findings, it reviews the application of the law to the facts *de novo*. *Ferguson v. Stokes*, 287 Va. 446, 450, 756 S.E.2d 455, 457.

It is undisputed that the erosion of the shoreline over the years since 1936, have all but consumed the Servient Lots. (App. 416:1-420:7, 503.) The application of law to those undisputed facts leads to a conclusion that the easement in question has been destroyed. The establishment of an easement involves two estates, the dominant estate and the servient estate. The dominant estate receives the benefit of the easement, and the

servient estate bears the burden of the easement. *French v. Williams*, 82 Va. 462, 470, 4 S.E. 591, 594 (1886). As the Servient Lots were overtaken by the mean low water mark of the Chesapeake Bay, they became the property of the Commonwealth of Virginia by operation of law. *See* Va. Code § 28.2-1202(A).

Consequently, even if the easement on the twenty foot road was designed to move, the destruction of the Servient Lots extinguishes the easement. The twenty foot road is now part of the Chesapeake Bay and can no longer exist as a road, and the Servient Lots are eroded to the point that they cannot serve to provide a twenty foot road. "If the particular purpose for which [an] easement is granted is fulfilled or otherwise ceases to exist, the easement . . . falls to the ground." *Pyramid Dev. v. D&J Assocs.*, 262 Va. 750, 755, 553 S.E.2d 725, 728 (2001); see also *Hudson v. American Oil Co.*, 152 F. Supp. 757, 765 (D. Va. 1957) ("It is elementary that an easement is one of the rights which may be extinguished or destroyed by act of God, operation of law, or act of the party.")

Furthermore, nothing in the Liquidation Deed or the 1936 Plat provides that the easement could somehow "jump" from the Servient Lots over the paper street "Pine Drive" shown on the 1936 Plat, onto other parcels, thereby turning dominant estates into servient estates. When the

Servient Lots were destroyed by erosion, the easement on the twenty road was likewise destroyed, and it was plain error for the lower court to hold otherwise.

III. THE LOWER COURT ERRED IN ALLOWING PLAINTIFF'S EXPERT TO OFFER PAROLE EVIDENCE REGARDING THE DOCUMENTS THAT CREATED THE EASEMENT ON THE TWENTY FOOT ROAD IN 1936.

As noted in the preceding section, the Liquidation Deed and 1936 Plat are not ambiguous. Accordingly, the lower court erred in admitting parole evidence to ascertain the intent of the drafter of those documents. Specifically, the lower court erred in allowing Plaintiffs' expert surveyor, Donald Davis, to testify as to the intent of the surveyor of the 1936 Plat. Although the Plaintiffs contend that the documents are ambiguous, they are not rendered so merely because the parties disagree as to the meaning of the language. *See Wilson v. Holyfield*, 227 Va. 184, 187, 313 S.E.2d 396, 398 (1984). The question whether an agreement is ambiguous is not one of fact but one of law. *Doswell Ptnr v. Va. Elec. & Power Co.*, 251 Va. 215, 222, 468 S.E.2d 84, 88 (1996). As a pure question of law, this issue should be considered *de novo* on appeal. *Kocher v. Campbell*, 282 Va. 113, 116, 712 S.E.2d 477, 479 (2011). For those reasons cited in the preceding section, the lower court erred in holding that the Liquidation Deed and 1936 Plat were ambiguous.

Even if those documents were ambiguous, the lower court erred in allowing the unfounded and speculative opinion of Plaintiff's expert surveyor, Donald Davis, to guess as to the intent of the drafter of the 1936 Plat. On appeal, a lower court's evidentiary rulings are generally reviewed under an abuse of discretion standard. "However, a trial court has no discretion to admit clearly inadmissible evidence because admissibility of evidence depends not upon the discretion of the court but upon sound legal principles." *Boyce v. Commonwealth***,** 279 Va. 644, 649, 691 S.E.2d 782, 784-85 (2010).

Here, Plaintiffs' expert, Donald Davis, was recognized by the lower Court as an expert in engineering and surveying, and Mr. Davis testified that he surveyed the beach in 2012. (App. 370:20-371:2; 372:16- 377:23.) Mr. Davis explained that he wanted to ascertain the intent of the drafter of the 1936 Plat, but he admitted that "at that particular time in 1936 there were basically no standards for preparation of plats, not the same type certainly of the standards that we have today...." (App. 379:11-20.) Counsel for MTI objected to Mr. Davis opining as to the plat drafter's intent because the documents were not ambiguous and parole evidence should not be admitted. The lower court overruled the objection. (App. 380:6-18.)

When Mr. Davis began offering testimony regarding the intent of the surveyor who drafted the 1936 Plat, counsel objected to Mr. Davis' opinion as speculative and without adequate foundation. (App. 380:19-99:9; 383:2-3; 387:16-24.) Over that objection, Mr. Davis then testified that he had looked at the 1936 Plat and some of the deeds, and he knew Mr. Chambers, the drafter of the 1936 Plat, to have unparalleled knowledge and accuracy. (App. 386:15-25.) Counsel renewed the objection to Mr. Davis' opinions as speculative and lacking foundation, and the lower court ruled that, "whether its speculative or not, it is the basis of his opinion. I'm going to allow him to testify to this, Mr. Reid. Note your exception." (App. 388:3-6.)

Mr. Davis then proceeded to opine that when Mr. Chambers drew the 1936 Plat, he tied the twenty foot road to mean high water for the "enjoyment of the property owners who had a privilege to be able to use that." (App. 388:12-21.) There is no foundation at all for Mr. Davis' opinion as to the purpose of the twenty foot road - it is pure speculation. In fact, Mr. Davis reveals in his own testimony that he did not know Mr. Chambers' mind-set: "Now, possibly Mr. Chambers didn't think about going into 70, 80 years in the future and that the waterline might move by a couple hundred feet." (App. 389:15-20.) Mr. Davis was purely speculating as to what Mr.

Chambers' intent was in drafting the 1936 Plat, and the lower court should not have permitted that testimony or opinion.

Then, after acknowledging that there were no standards of surveying in 1936, Mr. Davis proceeded to render an opinion of the meaning of notations on the 1936 Plat based on his application of current surveying standards. (App. 391:11-392:21.) Yet, he still acknowledged the possibility that the twenty foot road ran along mean high water as it existed in 1936, rather than floating with the tide line. (App. 423:16-19.) He also acknowledged that a mean high water line would typically not be shown as a straight smooth line. (App. 423:20-25, 425:2-6.) He finally acknowledged that he does not really know what happened when Mr. Chambers drew the 1936 Plat, but his opinion was based upon "thousands of these plats." (App. 424:22-425:1.)

Mr. Davis lacked any foundation to render an opinion on what the drafter of the 1936 Plat meant when he drafted that plat. Mr. Davis became a licensed land surveyor in approximately 1981, decades after the 1936 Plat was created, and he acknowledged that there were no standards of practice for surveying in 1936. Accordingly, he retroactively applied modern standards of practice to the terms and notations on the 1936 Plat to somehow render an opinion as to the intent of the 1936 Plat. Even then,

Mr. Davis admitted that the 1936 Plat is not very accurate and that he had to make some "jumps" to try and figure out what Mr. Chambers intended. (App. 435:12-20.)[4] Mr. Davis' opinions as to the intent of the 1936 Plat and the Liquidation Deed were wholly speculative, lacked foundation, and should have been excluded from trial.

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.

[4] Wayne Johnson, MTI's engineering and surveying expert, testified: "I've never seen anywhere where an easement moved with high tide." (App. 452:20-453:20; 460:6-11; 462:17-19; 462:23-25.)

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CERTIFICATE

Pursuant to Rule 5:26(h) of the Supreme Court of Virginia, I hereby certify that on this 15th day of December, 2014, I hand-filed fifteen copies of the foregoing Brief of Appellants and ten copies of Appendix, with ten copies on CDs with the Clerk of this Court. I also certify that I served, via UPS Ground Transportation, three copies of the Brief of Appellant and one copy of the Appendix with one copy of the same on CD upon counsel for Appellees:

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

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