In The

Supreme Court of Virginia

RECORD NO.: 141277

WILLIAM D. EVANS, in his capacity as Trustee of the Wanda S. Evans Trust,

Appellant,

v.

WAYNE L. EVANS, Individually and as the Personal Representative of Douglas E. Evans, Deceased; LLOYD D. EVANS; LISA M. EVANS; JASON L. EVANS,

Appellees.

BRIEF OF APPELLEES

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IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

RECORD NO. 141277

WILLIAM D. EVANS, in his capacity
As Trustee of The Wanda S. Evans Trust

Appellant

v.

WAYNE L. EVANS, Individually and as the
Personal Representative of Douglas E. Evans,
Deceased

LLOYD D. EVANS
LISA M. EVANS
JASON L. EVANS

Appellees

BRIEF OF APPELLEES

To the Honorable Justices of this Court:

Wayne L. Evans, Lloyd D. Evans, Lisa M. Evans, and Jason L. Evans (collectively the "Evans Defendants") file their brief in support of the Trial Court's grant of summary judgment for the Evans Defendants and denial of summary judgment for William D. Evans (the "Trustee"), as follows:

COUNTERSTATEMENT OF THE CASE

The Evans Defendants dispute that this case is one of first impression in the real estate law of the Commonwealth. It is well-settled

Virginia law that both tenants by the entireties must join as grantors to convey TBE property.

The Trustee filed an initial complaint on or about November 16, 2012, seeking declaratory relief regarding the validity of the 1976 deed from Douglas E. Evans to Wanda Evans (the "1976 Deed"), the application of Virginia Code § 55-52 to the 1976 Deed, and the legal effect of the general warranty contained within the 1976 Deed (App. 1).

The Trustee then moved for leave to amend the initial complaint and filed an amended complaint on or about February 22, 2013 (App. 30). The amended complaint requested attorney fees in the event that the Trial Court found a breach of general warranty, but, otherwise, was identical to the initial complaint.

After the Trial Court granted summary judgment to the Evans Defendants, the Trustee once again moved for leave to amend the complaint. The Evans Defendants objected to his second motion for leave to amend (App. 194), and the Trial Court sustained the objection in its final order (App. 214).

At no point, whether with leave or because of a denial of leave, did the Trustee amend his complaint to allege, as reflected in Assignment of Error No. 3, that the Settlement Agreement dated November 30, 1995 (the

"1995 Agreement") constituted a bar to the claims of the Evans Defendants in the action before the Trial Court. And, in his appeal, the Trustee does not assign as error the Trial Court's denial of his motion for leave to amend his complaint for a second time to include a cause of action relating to the 1995 Agreement.

COUNTERSTATEMENT OF FACTS

Douglas Evans continued to live in the property designated as Lot No. 5, Section A, located in Tazewell County, Virginia (the "Property"), after the death of his wife Wanda Evans on April 18, 1994, until his death on March 12, 2012, but as the surviving tenant by the entireties, not as a life tenant under The Wanda S. Evans Trust (the "Trust").

The list of heirs that Wayne Evans filed in the Clerk's office for Tazewell County Circuit Court may have stated "LIFE ESTATE ONLY!!!," but there was no evidence before the Trial Court that Wayne Evans typed these words. More important, they are irrelevant to a determination as to the validity of the 1976 Deed. Furthermore, what the Trustee omits is that the list of heirs includes, in handwriting, the words "Decedent's Ownership of marital residence – subject to title search and title opinion," followed by the signature of Wayne Evans (App. 20).

The Evans Defendants dispute that the validity of the 1976 Deed was finally settled by the 1995 Agreement. The language that the Trustee quotes refers only to any "claims against the Estate, whether under the Trust, the will, his elective share or otherwise." (App. 134). Douglas Evans made no claims against the Estate and asserted no right to the Property except through operation of law as the surviving tenant by the entireties.

STANDARD OF REVIEW

Since only issues of law are before the Court, the standard of review is *de novo*.

ARGUMENT AND AUTHORITIES

1. The Trial Court properly held that the 1976 Deed from Douglas Evans to Wanda Evans was void and did not convey property to Wanda under the law of "tenancies by the entireties"

Contrary to the assertion by the Trustee, this Court has long held that a conveyance from one spouse to the other spouse of property titled under a tenancy by the entireties requires that both spouses join as grantors in a deed conveying the property to himself or herself.

In Vasilion v. Vasilion, 192 Va. 735, 66 S.E.2d 599 (1951), Lionel Woodard conveyed property to George Vasilion and his wife Anne as tenants by the entireties. Several years later, George and Anne Vasilion joined as grantors to a deed conveying the same property to Anne Vasilion.

The issue before this Court was whether the property that the Vasilions jointly conveyed to Anne Vasilion was free from individual liens or claims of creditors of George or Anne Vasilion under the doctrine of tenants by the entireties. In resolving this issue, this Court observed:

> When an estate by the entireties is once set up, neither spouse can sever it by his or her sole act. Neither spouse can convey or dispose of any part of it so as to effect such a severance. *They may, of course, terminate the estate by a joint conveyance of the property*. (internal citations omitted and emphasis added)

192 Va. at 741.

The rationale for requiring a "joint conveyance of the property" to sever a tenancy by the entireties is "[b]ased on the fiction of the unity of husband and wife" under which "neither [spouse] has an interest which can be conveyed" without the joinder of the other spouse. *See* id. at 742.

This Court further observed that since "[t]he husband and wife unquestionably can join in a deed conveying the entirety to a third party," Code § 55-9 "permits a husband and wife to join in a deed conveying land to himself or herself." *See* id. at 740.

Accordingly, this Court concluded in Vasilion that "if the property can be conveyed by the husband and wife jointly, free from liens or claims of creditors, to a third party, there is no reason why it cannot be so conveyed by the husband and wife to himself or herself." *See* id. at 743.

Moreover, in response to the suggestion that the doctrine of tenancy by the entireties had been statutorily abolished, this Court declared that this doctrine has become "a rule of property in this Commonwealth, and the suggested changes should be addressed to the Legislature and not to us." *See* id. at 744.

Douglas and Wanda Evans should have done exactly what the Vasilions did in conveying TBE property from one spouse to the other spouse: a joint conveyance from Douglas and Wanda to Wanda. To paraphrase this Court's decision in Vasilion, there is no reason that Douglas and Wanda Evans could not and should not have joined in the conveyance of the Property to Wanda. Not having done so, Douglas Evans, in attempting to convey the Property to Wanda, executed a deed that was without legal effect.

Since Vasilion, this Court has repeatedly and unequivocally affirmed the principle that neither a husband nor a wife can individually sever a tenancy by the entireties as Douglas Evans, intentionally or unintentionally, attempted by executing the 1976 Deed without his wife Wanda joining as a grantor.

For example, in Waskey v. Thomas, 218 Va. 109, 235 S.E.2d 346 (1977), this Court found, citing Vasilion, that the husband, as one of two

tenants by the entireties, "has no capacity to convey title to the estate, in whole or in part, to a third party." *See* id. at 113. This Court also observed, citing Virginia Code § 55-9, that the husband "might have been able to acquire full title by right of survivorship or *by deed executed by himself and his wife*." *See* id. (emphasis added).

In other words, this Court contemplated the very action that Mr. and Mrs. Evans dismissed as unnecessary: the direct joinder by the husband and wife through their joint execution of the deed of conveyance.

In Rockingham Mutual Insur. Co. v. Hummel, 219 Va. 803, 250 S.E.2d 774 (1979), this Court, citing Vasilion, stated that "[t]he property was owned in tenancy by the entirety, and, in Virginia, once such an estate is established, neither spouse can sever it by his or her sole act." *See* id. at 806. As this Court had observed in Waskey only two years earlier, the proper method for conveyance of TBE property is for both spouses to execute the deed as grantors.

In Hausman v. Hausman, 233 Va. 1, 353 S.E.2d 710 (1987), this Court, citing Vasilion, confirmed again that "[w]hen spouses hold title to property in fee simple as tenants by the entirety, neither spouse can convey any part of the property by his or her sole act. Both spouses may dispose of the property by a joint conveyance." *See* id. at 5.

In Rogers v. Rogers, 257 Va. 323, 326, 512 S.E.2d 821, 822 (1999), this Court, quoting from Jones v. Conwell, 227 Va. 176, 181, 414 S.E.2d 61, 64 (1984), reaffirmed the legal fiction essential to the doctrine of tenancies by the entireties that the husband and wife are one, and declared, therefore, that "[n]either spouse can by separate act make an absolute disposition of property they hold as tenants by the entirety . . . ."). *Accord*, Pitts v. United States of America, 242 Va. 254, 258-59, 408 S.E.2d 901,903 (1991) ("a husband and wife 'were considered a juristic person separate and distinct from the spouses themselves' . . . each owned the entire, undivided estate as tenants by the entireties, and neither could sever the tenancy by alienating its interest during coverture.")

By these decisions, this Court dismissed without question the erroneous assertion by the Trustee that the unity of husband and wife under the doctrine of tenancy by the entireties was no longer the law of the Commonwealth of Virginia. (Brief of Appellant at 14). The Trustee conveniently misapplied a doctrine that applies only under tenancies by the entireties to condemn the ruling of the Trial Court as if it had applied the fictional unity of a husband and a wife holding property as tenants by the entireties to all aspects of the marital relationship.

The Trustee also attempts to dilute the holding under Vasilion and its progeny by creating his own law as to the requirement of joinder by both spouses to convey TBE property, whether to one spouse, the other spouse, or to a third party. The fact that Mrs. Evans was a grantee of the 1976 Deed is not the same as her signing the deed as a grantor. It is further irrelevant whether Mr. Evans or Mrs. Evans recorded the 1976 Deed. Likewise, her attempted conveyance of the marital residence to the Trust was ineffective and demonstrates only that she lacked an understanding of the requirements of the doctrine of tenants by the entireties. Moreover, her execution of a deed attempting to convey the Property to the Trust appears to have been an afterthought, given that her February 2, 1993 deed was not recorded until May 2, 1994 (App. at 44), several months after her execution of it and several weeks after her death. In other words, this deed was not of record in the Clerk's office for the Circuit Court of Tazewell County at the time of her death. Finally, her reservation in the Trust of a life estate to her husband demonstrates again only her faulty belief in contravention of the law of the Commonwealth of Virginia that her husband had divested himself from ownership of the Property as a tenant by the entireties by his sole execution as grantor of the 1976 Deed.

The Trustee further attempts to confuse this Court by his reference to the citation in Vasilion of the Pennsylvania decision of Runco v. Ostroski, 361 Pa. 593, 65 A.2d 399 (1940) "to show that even a conveyance from the husband alone would have been a valid conveyance." (Brief of Appellant at 16).

The Trustee is correct that this Court cited this Pennsylvania case, but it did so only as an example of a holding in another state that supports generally the transferability of real property from one spouse to the other spouse, consistent with Virginia Code § 55-9.

Runco holds that a tenant by entirety may convey his or her interest to the other tenant by entirety by his or her *sole* act rather than requiring a *joint* act, and that the formal joinder of the two spouses is "wholly unnecessary." *See* Vasilion at 743. If the "formal joinder" of both spouses to the deed is "wholly unnecessary," as the Supreme Court of Pennsylvania held, then a joint conveyance by both spouses is not required under Pennsylvania law. This statement may be the law of the Commonwealth of Pennsylvania, and some other states, but it is not the law of the Commonwealth of Virginia, as this Court explained in Vasilion and in cases citing it with approval over the last half-century.

The Supreme Court of Mississippi examined the same issue in In re Estate of Childress, 1991 Miss. LEXIS 668, 588 So. 2d 192 (1991). The majority adopted the position of the Supreme Court of Pennsylvania in Runco, but in the context of a divorce, to hold that "the stringent requirements of common law in this instance should give way to a practical application of a plan by two spouses to dispose of marital property incident to a divorce" and that "'[our] cases have shown that the rigidity of the common law concept of tenancy by the entireties has yielded to the demands of modern life.'" *See* id. at 196.

The concurring justice opined that the husband and wife had no power to destroy their tenancy by entireties except by joint execution until *after* their divorce, at which time the requirement for joint execution of a single instrument to sever an estate by entirety no longer existed. *See* id. at 202. This position is consistent with Vasilion by requiring a joint conveyance as long as a tenancy by entirety remained in effect.

The dissenting justice took a position most akin to the law in Virginia: "No factual situation has been litigated and affirmed by this Court severing an entirety estate by contract or agreement in this jurisdiction, except by a joint deed of the tenants." *See* Estate of Childress at 200. The dissent concluded, as follows:

> Mississippi law has always held that a severance or transfer of an entirety estate must be by a joint deed. Our case law is clear and unequivocal; the procedure has been set forth over a century. The majority is abandoning well-established procedure in favor of the presumed intent of these deceased grantors.

Id.

Runco did not require a conveyance "by the husband and wife to himself or herself," as required under Vasilion, but, rather, allowed a conveyance of tenancy by entireties property by one spouse to the other spouse. Runco looked to the intent of the parties, while Vasilion and its progeny abide by long-established principles that require a joint conveyance, even between a husband and a wife, regardless of intent.

The Trustee urges this Court to ignore over fifty years of precedent by ignoring the holdings in Vasilion and its progeny. No argument made by the Trustee, however, should cause this Court to excuse Wanda Evans from her failure to perform an essential and indispensable act under the doctrine of tenancies by the entireties under the law of the Commonwealth of Virginia: to join her husband as a grantor to the deed for the purpose of severing a tenancy by entireties.

The Trial Court was correct in holding that the1976 Deed did not sever the tenancy by entireties held by Douglas and Wanda Evans, and did not convey any new interest or title in the Property to Wanda Evans. As a

result, her later attempted conveyance to the Trust was ineffective for the same reason that the1976 Deed was ineffective: one tenant cannot sever a tenancy by entireties by his or her sole act and without the joint execution by the other tenant as grantor to the deed of conveyance.

2. The Trial Court properly held that the Evans Defendants were not estopped under the doctrine of "estoppel by deed" from claiming title against the Trustee and that the "estoppel by deed" doctrine, under the facts of the case on appeal, did not apply to tenancy by the entireties property

Neither the common law doctrine nor the statutory codification of estoppel by deed applies to this appeal because, at all relevant times, Mr. Evans acknowledged his title to and was an owner of the Property as a tenant by the entirety. While, under Vasilion, Mr. Evans could not convey the whole of the entireties property without the joinder of his wife as grantor on the deed, he was, along with his wife, an owner of the whole at the time of his execution of the 1976 Deed.

Because of the nature of ownership by tenancy by the entireties, this Court made clear in Vasilion that at the death of one spouse, title to the tenant by entireties property *remains* with the other spouse. As this Court observed:

> Upon the death of either spouse the whole of the estate by the entireties remains in the survivor. This is so not because he or she is vested with any new interest therein, but because in the

> first instance he or she took the entirety, which, under the common law, was to remain in the survivor.

192 Va. at 740, *citing* Lang v. Commissioner of Internal Revenue, 289 U.S. 109, 53 S. Ct. 534 (1933). *Accord*, Hausman v. Hausman, 233 Va. 1, 353 S.E.2d 710 (1987) ("Upon the death of either spouse, the entire property remains in the survivor."). *See also* In re Ballard, 65 F.3d 367, 371 (4th Cir. 1995) ("We recognize that the unique character of entireties property is such that the death of one spouse does not vest the other with interests he or she did not already hold.")

The Trustee's assertion that Mr. Evans became vested with a new title or a new interest after his wife's death is simply wrong. (Brief of Appellant at 22).

Virginia Code § 55-22, the codification of the common law doctrine of estoppel by deed, states, in part, as follows:

> When a deed purports to convey property, real or personal, describing it with reasonable certainty, *which the grantor does not own at the time of execution of the deed but subsequently acquires*, such deed shall, as between the parties thereto, have the same effect as if the title which the grantor subsequently acquires were vested in him at the time of the execution of such deed and thereby conveyed. (Italics added)

As this Court held in Vasilion and Hausman, at the death of one of the two spouses, the entirety remains in the survivor. The survivor does not acquire any *new* interest or title in the property.

For Code § 55-22 to apply, the grantor must acquire title to property that he or she did not already own at the time of execution of the deed. Douglas Evans already owned the Property at the time of execution of the 1976 Deed, and, therefore, there was no new interest or title in the Property for him to acquire at the death of his wife. Accordingly, Code § 55-22 does not apply to the facts of this appeal, as the Trial Court recognized and held.

Hausman does not suggest or require a different result. This Court held in Hausman that Code § 55-52 applies only "as between the parties thereto" and not to the benefit of a third party individual creditor. *See* 233 Va. at 4. This Court never decided or had a reason to decide in Hausman that Code § 55-22 validates conveyances between tenants by the entireties who fail to join as grantors to a deed from one spouse to the other spouse. Rather, this Court reaffirmed the principle set forth in Vasilion that "[w]hen spouses hold title to property in fee simple as tenants by the entirety. neither spouse can convey any part of the property by his or her sole act . . . ." *See* id. at 3.

Moreover, Hausman involved a divorce by owners of former tenancy by the entireties property, not the death of a former tenant by the entireties. After the Hausmans divorced, each of them acquired a new interest in the property as a tenant in common in accordance with Virginia Code § 20-111.

The tenancy by entireties interest that both of the Hausmans had held prior to their divorce did not remain with either of them. Rather, they each acquired a new interest in property that neither had owned at the time of the execution of the deed, which distinguishes this case from the facts of the case on appeal.

The Trustee's recitation of Virginia cases involving covenants of general warranty of title and estoppel by deed is likewise inapplicable to this appeal. As this Court will observe, none of the cited cases involved ownership by tenancy by the entireties. And, as tenants by the entirety, neither Mr. Evans had the ability to transfer any title or new interest to his wife without her joinder as a grantor to the 1976 Deed nor could Mrs. Evans have received any more than she already had owned. Accordingly, Mr. Evans was loyal to his covenant of general warranty.

This Court explained the doctrine of estoppel by deed in Virginia Electric and Power Co. v. Buchwalter, 228 Va. 684, 325 S.E.2d 95 (1985), as follows:

> It is well established that a party who purports to convey an estate is estopped as against his grantee from asserting anything in derogation thereof. That is to say, *a grantor cannot deny his title to the prejudice of his grantee.*

Id. at 688(emphasis added).

Douglas Evans never denied his title to the subject property as a tenant by entireties. Rather, the attempted conveyance by Douglas Evans to Wanda Evans of the whole of the entireties was not effective or valid because Wanda Evans, the other tenant by the entireties, did not join her husband as a grantor to the 1976 Deed. Moreover, since Wanda Evans was already a tenant by the entireties at the time of execution of the 1976 Deed, she remained a tenant by the entireties after execution of the deed, and, along with Douglas Evans, an owner of the whole of the entireties.

The cases that the Trustee cites do no more than to confirm that the Evans Defendants are estopped from denying that Douglas Evans and Wanda Evans remained tenants by the entireties after execution of the 1976 Deed. After Wanda's death, her husband received no more than what he had already owned as a tenant by the entireties. To put it another way, since both tenants by the entireties owned the whole of the entireties, Douglas Evans acquired no new title or interest at the death of his wife, making the doctrine of estoppel by deed inapplicable to the facts of this appeal.

Likewise, the covenant of general warranty under the 1976 Deed does not apply to the facts of this appeal because Wanda Evans already owned the whole of the entireties, and a deed from Douglas Evans alone

gave her no more than she already had owned as a tenant by the entireties.

Furthermore, if the doctrine of estoppel by deed, whether with or without a general warranty of title, renders impotent the principle established by Vasilion and its progeny that the joinder of both spouses is necessary to convey the whole of the tenancy by the entireties, then Virginia law as it applies to the doctrine of tenancies by the entireties no longer has any meaning or purpose. The Evans Defendants doubt that this Court intends such an incomprehensible result.

3. The Settlement Agreement of November 30, 1995, does not bar the claims of the Evans Defendants

The Trustee did not plead in his original complaint or in his amended complaint a cause of action for breach of contract or equitable estoppel based on the 1995 Agreement. In fact, the Trustee makes no mention whatsoever of the 1995 Agreement in the original complaint or the amended complaint. Accordingly, it was proper for the Trial Court to exclude consideration of the 1995 Agreement in adjudicating the cross motions for summary judgment. And, even if the Court had considered them, its grant of summary judgment to the Evans Defendants was still proper for the reasons set forth below.

First, the Trustee did not plead as a cause of action in his complaint or amended complaint a contractual or equitable bar to the claim of the Evans Defendants by virtue of the 1995 Agreement.

Moreover, after the grant of summary judgment to the Evans Defendants, the Trustee moved for a second time for leave to amend the first amended complaint, to which motion the Evans Defendants objected (App. 194). By its Order entered on May 27, 2014, the Trial Court denied the Trustee's motion (App. 214), and the Trustee did not assign error to the Trial Court's exercise of discretion under Rule 1:8 in denying the Trustee's motion for leave to amend for a second time. Accordingly, under Rule 5:25, this Court cannot consider the Trial Court's adverse ruling on appeal. *See* Wash v. Holland, 166 Va. 45, 183 S.E. 236 (1936) (Court can consider only such errors as are presented to it by appropriate assignments in error).

It is firmly established that "no court can base its judgment or decree upon facts not alleged or upon a right which has not been pleaded and claimed." *See* Ted Lansing Supply Company, Inc. v. Royal Aluminum And Construction Corp. 221, Va. 1139, 1141, 277 S.E.2d 228, 230 (1981). As this Court ruled in Lansing, "pleadings are as essential as proof, and no relief should be granted that does not substantially accord with the case as made in the pleading". *See* id. *Accord,* Dabney v. Augusta Mutual Insur.

Co., 282 Va. 78, 710 S.E.2d 726 (2011) ("The law in Virginia is well established that a court cannot enter judgment based on facts that are not alleged in the parties' pleadings."). Id. at 86.

In Dabney, the amended complaint did not allege additional notice of a personal injury action, and, therefore, this Court found that "[t]he circuit court's decision properly limited Dabney to relief based on the allegations in her amended complaint." *See* id. at 86-87.

In Fein v. Payandeh, 284 Va. 599, 734 S.E.2d 655 (2012), Fein filed a motion for summary judgment relating to a zoning ordinance. Fein then filed an amended complaint and an amended motion for summary judgment that amplified the arguments in the first motion. The issue before this Court was whether the amended motion for summary judgment presented a new or different claim than that set forth in the amended complaint. If it had, then this Court could not have considered the arguments in the amended motion for summary judgment without contradicting the holding of this Court in Lansing and Dabney.

This Court in Fein found the argument set forth in the amended motion for summary judgment consistent with the allegations in Paragraph 11 of the amended complaint. The dissent disagreed and found that the claim set forth in the amended motion for summary judgment "was not the

claim presented to the circuit court [in the amended complaint] and we should not consider it for the first time on appeal . . . because this claim was fundamentally different from Fein's claim in her amended complaint . . . ." *See* id. at 17-18.

The critical point is not whether the claim was or was not set forth properly in the amended motion for summary judgment, but the consensus by the majority and the dissenting justices of this Court that the claim in the amended complaint and the amended motion for summary judgment had to be the same for this Court to consider it on appeal.

The Trustee raised the 1995 Agreement repeatedly in his motion for summary judgment and motion for reconsideration. This Court, however, cannot on appeal consider this cause of action because the Trustee never raised it in his initial complaint or his amended complaint, and did not assign as error the failure of the Trial Court to grant his motion for leave to file a second amended complaint.

Second, even if the Trial Court should have considered the Trustee's argument relating to the 1995 Agreement, notwithstanding his failure to plead this cause of action in his complaint or amended complaint, or to assign as error the Trial Court's failure to grant leave to amend for a second time, the issue before this Court is not whether settlement

agreements are enforceable or favored in Virginia. Rather, the issue is whether Douglas Evans contractually waived his tenancy by entireties interest in the Property by his execution of the 1995 Agreement.

As the Evans Defendants explained in the preceding sections, the record title to the Property remained in Douglas Evans after the death of Wanda Evans as the surviving tenant by entirety. Douglas Evans remained an owner of the Property by operation of law under the doctrine of tenancy by the entireties. Wanda Evans' execution of a deed dated February 2, 1993, to Wanda S. Evans, Trustee of the Wanda S. Evans Trust, was of no legal effect because she had never acquired any interest from the 1976 Deed that she could later transfer to the Trust.

Accordingly, the language in Paragraph 2 of the Settlement Agreement reciting consideration for "full satisfaction of [Douglas Evans'] claims against the Estate [of Wanda S. Evans], whether under the Trust, the will, his elective share or otherwise," may have resolved multiple claims asserted by the Plaintiffs against the Estate or the Trust arising out of the 1995 litigation, but not with regard to the Property. Rather, the ownership of the Property rests solely on the validity or invalidity of the 1976 Deed, and not on the validity or invalidity of any claim by Douglas Evans against the Estate or the Trust. Since Douglas Evans did not assert ownership of

the Property through the Estate or the Trust, his purported waiver of any claim to the Property through the Estate or the Trust did not cause him to relinquish his ownership interest in the Property as the surviving tenant by the entireties.

Likewise, the language in Paragraph 2 of the Settlement Agreement that Douglas Evans "waives any right he *may have* to Lot 5, Section A of Ply Developing Corporation except for his life estate" refers only to any right he may claim through the Estate or the Trust, and *not* by operation of law under the doctrine of tenancies by the entireties.

Accordingly, Douglas Evans' purported waiver of any right to the Property was only a waiver of such right under the Estate, whether under Trust, the will, his elective share or otherwise, and did not operate as a waiver of his right of ownership in the Property as a matter of law as the surviving tenant by the entirety.

Third, the waiver language in the 1995 Agreement was not effective to convey title to the Property from Douglas Evans because such conveyance can be accomplished under Virginia law only by a deed. *See* Code § 55-2 (no freehold shall be conveyed unless by deed or will); Code § 55-48 (form of a deed specified); Lim v. Choi, 256 Va. 167, 171, 501 S.E.2d

141, 144 (1998) (document purporting to convey title must contain operative words manifesting an intent to transfer the property).

Contrary to the assertion of the Trustee, the Evans Defendants should not be faulted for taking no action since 1995 to convey title to Mr. Evans because he had already acquired title as the surviving tenant by the entirety, and was the title owner of record prior to his death.

What is missing from the 1995 Agreement is any conveyance or transfer of title from Douglas Evans, the surviving tenant by the entirety, to the Trustee. Neither the 1993 deed from Wanda Evans to the Trust nor the 1995 Settlement Agreement was effective to change title from Douglas Evans to the Trust.

Accordingly, title remained in Douglas Evans after his wife's death, and, at his death, title was devised to Wayne and Lloyd Evans and to Wayne's two children under Douglas Evans's will.

CONCLUSION

For the reasons set forth above, this Court should affirm the circuit court's grant of summary judgment for the Evans Defendants and its denial of summary judgment for the Trustee.

Respectfully submitted,

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By:/s/ Mark A. Black

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CERTIFICATE REQUIRED BY RULE 5:26(h)

I hereby certify that:

A. The names of all appellants and appellees; the name, Virginia State Bar numbers, mailing address, facsimile number; and email address of counsel for each party, and the mailing address, facsimile number, and email address of any party not represented by counsel, are, as follows:

Appellant:	William D. Evans, in his Capacity as Trustee of the Wanda S. Evans, Trust
Counsel for Appellant:	John E. Kieffer (VSB #14599) Attorney at Law 1934 Euclid Avenue P.O. Box 2125 Bristol, VA 24203-2125 Telephone: 276-466-5522 Facsimile: 276-466-2124 Email: jekpc@bvu.net
Appellees:	Wayne L. Evans, Individually and as the Personal Representative of Douglas E. Evans, deceased, Lloyd D. Evans, Lisa M. Evans and Jason L. Evans

Counsel for
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B. On February 13, 2015, I electronically filed the foregoing Brief of Appellees with the Clerk of the Court via e-mail (scvbriefs@courts.state.va.us) and filed via hand delivery fifteen printed copies of the said Brief with the Clerk of this Court. On the same day, three printed copies of the Brief were sent via e-mail and first class mail to Counsel for Appellant.

C. All parties are represented by counsel.

Respectfully submitted this 13th day of February, 2015.

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