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IN THE

Supreme Court of Virginia

RECORD NO. 141577

WETLANDS AMERICA TRUST, INC.,

Appellant,

v.

WHITE CLOUD NINE VENTURES, L.P.,

Appellee.

REPLY BRIEF OF APPELLANT

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Appellant Wetlands America Trust, Inc. ("WAT") states as follows for its Reply Brief:

I. The trial court's rejection of White Cloud's estoppel and laches defenses was well supported by the evidence.

The trial court held as a matter of fact that White Cloud failed to prove its defenses of estoppel and laches. On appeal, these holdings must be affirmed unless they are "plainly wrong or without evidence to support [them]." *Carter v. Carter*, 223 Va. 508, 509 (1982). The record is examined in the light most favorable to the prevailing party. *Id*.

Estoppel is "applied rarely and only from necessity." *Princess Anne Hills Civic League v. Susan Constant Real Estate Trust*, 243 Va. 53, 59 (1992). The elements must be proven by clear and convincing evidence:

> (1) There must have been a false representation or concealment of material facts; (2) the representation must have been made with knowledge of the facts; (3) the party to whom it was made must have been ignorant of the truth of the matter; (4) it must have been made with the intention that the other party should act upon it; and (5) the other party must have been induced to act upon it.

Trayer v. Bristol Parking, Inc., 198 Va. 595, 604-605 (1956). The party claiming estoppel must not only be "ignorant of the true state of facts" but have had "no convenient and available means of acquiring such information, and where the facts are known to both parties, and both have the same means of ascertaining the truth, there can be no estoppel."

Chesapeake & O.R. Co. v. Walker, 100 Va. 69, 92-93 (1902). A party cannot claim estoppel unless he has been misled to his prejudice. "This means that the reliance must occur prior to loss." *Gallimore, Inc. v. Home Indem. Co.*, 432 F. Supp. 434, 438 (W.D. Va. 1977) (citing *State Farm Mutual Automobile Insurance Co. v. Pederson*, 185 Va. 941 (1947)); *see also American Nat'l Bank v. Ames*, 169 Va. 711, 739 (1938) (rejecting estoppel claim when the American National Bank "followed the course pursued by them because they thought the contract gave them the right to do so, and not because of anything The First National Bank or its stockholders did or failed to do.").

Before buying the Property, White Cloud had a copy of the Easement and engaged counsel to review it. Appendix ("App.") 754.[1] White Cloud

[1] White Cloud misstates the evidence when it writes that the Easement was drafted by WAT. White Cloud Brf. at 1. The only testimony regarding the drafting of the Easement came from the Grantor, Mr. Sedgwick. He never testified that WAT drafted the document. Instead, he said that the Easement went through numerous drafts to take into account comments and edits from himself, his counsel Georgia Herbert, WAT and its counsel Laurel Florio, and others. April 30 Tr. at 59, App. 60 ("there were several more correspondence between your counsel and Laurel Florio regarding changes and modifications to the conservation easement"), App. 878 ("this is a letter from Laurel Florio to my attorney Georgia Herbert"), App. 884 (describing the "latest draft" of the easement, and Sedgwick stating "we went through a lot of different drafts"), App. 888-889 (there were "numerous drafts and modifications").

owner Jennifer McCloud communicated with the Easement Grantor, Mr. Sedgwick, and he warned: "I suspect a restaurant with attendant parking and other significant retail operations might be a problem, but a roadside stand would probably be fine." App. 1300. Sedgwick then put McCloud in touch with Mr. Marrone, associate counsel for WAT. On October 12, 2007, Marrone wrote:

> the permitted agriculture language, even read generously, would <u>not allow</u> stores, inns or restaurants . . . WAT's position is that the way the easement is written, a store, winery, restaurant, etc. is <u>not allowed</u> on the property.

App. 1298 (emphasis added).[2] His email was conveyed to McCloud. App. 704-705. McCloud fully understood that Marrone was saying "no" to her plans because she asked Sedgwick to lobby WAT on her behalf to change its position. But Sedgwick refused to do so. *See* App. 1298 ("I can't 'lobby' them to change their position"). So McCloud sent Marrone a lengthy email trying to persuade him to change his mind and describing her interpretation of the Easement. App. 1304-09. By email dated November 16, 2007,

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[2] White Cloud misreads Marrone's October 12 email statement that "we could characterize the winery/vineyard building as a farm building." It is obvious that Marrone was arguing hypothetically that "even if" the winery could be characterized as a farm building, restrictions would still apply. This hypothetical does not undermine his unequivocal and unambiguous statement at the conclusion of his email where he writes: "a store, winery, restaurant, etc. is not allowed on the property."

Marrone unequivocally rejected her arguments. App. 1274. With nothing further in writing from WAT, McCloud (through White Cloud) nonetheless bought the Property at her own risk.

Nothing happened on the Property for the first few years after White Cloud bought it. App. 1059-1061. This inactivity undermines White Cloud's laches claim. Furthermore, WAT monitors the Property each year and issues a written report that contains a statement similar to this:

> This Monitoring Inspection Form does not waive Grantee's rights under the conservation Easement, cannot be relied on by Grantor to estop enforcement of the Conservation Easement, used as an estoppel certificate, or to support a defense of laches or limitation, and in no way modifies or amends the Conservation Easement.

See, *e.g.*, App. 1380.

WAT did not learn significant details about White Cloud's possible commercial and retail operation until November 8, 2010 when it received a copy of Chrysalis Vineyards' November 2010 newsletter. App. 1329. Jennifer Christman, manager of conservation programs for WAT, testified about her response to viewing the newsletter:

Q. Okay. What did you do subsequent to the review of this correspondence?

A. Called Jenni [McCloud] and asked for additional details, plans, designs, show us what the footprint is of these places you are talking about.

Q. Okay. Did you take issue, though, with the fact that she was intending to build a tasting room, creamery or bakery on the property?

A. Yes.

* * *

A. I called Jenni and asked for more information so we could better understand what's going on?

Q. Okay. And what was her response?

A. Very similar to the easement monitoring report, that she doesn't need our permission, she doesn't need our review and approval, that we played no part in reviewing said designs, so she's not providing us with anything.

* * *

Q. But did you tell her that she could not build a tasting room, creamery or bakery on the property at this time?

A. She knew that we didn't believe she could build a big commercial general public-type place on the property.

Q. How did she know that?

A. Because we talked about it.

App. 805-813. Moreover, by November 2010 White Cloud had done very little on its land except build a road from Route 50 partly into its property but not across the Little River. Therefore, despite concerns by the neighbors and others, WAT concluded that White Cloud's activities at that time were not violative of the Easement. App. 1343, 1060. WAT continued to request that McCloud provide more information about her purported

plans, but she consistently refused to do so.[3] *See* App. 1304 ("I must add, as well, that I am not writing this letter as a request for permission (it's clear none is needed, as our intended activities are specifically permitted by the agreement)."). *See, e.g.*, Christman testimony above and at App. 847-852. WAT inspector Chris Vaughan asked McCloud for written plans on April 12, 2012. She again refused stating: "As I had explained in my response to the 2009 annual audit, there is no requirement to advise Ducks Unlimited of any activities we undertake on the property that fall within the permitted uses of the easement." App. 1428. Instead, she falsely assured him that her plans conformed to the Easement. *Id*.

Because the parties disagreed over many issues, including McCloud's purported building intentions, in 2011 they worked on a possible settlement by considering an amendment to the Easement. *See,* App. 1345, 767. But no amendment or settlement was ever finalized, signed or agreed upon. App. 767-768, 846. This failed settlement process demonstrates that WAT did not approve White Cloud's plans and that

[3] The party to be estopped must have "had knowledge of *all* of the facts" unless "his ignorance was a result of gross negligence or otherwise involved gross culpability." *Gallimore, Inc. v. Home Indem. Co.*, 432 F. Supp. 434 (W.D. Va. 1977) (emphasis in original). Estoppel is not "founded on expectation; ordinarily it rests upon past or present considerations, not on possible future events based upon opinion as to the supposed intention of another." *Brooks v. Clintsman*, 124 Va. 736, 740 (1919).

significant disagreements existed between them. Jamie Brown, a WAT employee involved in the failed settlement process, testified unequivocally that he "never, ever" said that McCloud was allowed to build what is currently on the Property. App. 675.[4]

Without notice to WAT, in the Fall of 2012, White Cloud filed a building/zoning permit application (App. 1430, dated August 28, 2012), bulldozed a large hill on the property and constructed an enormous parking lot. When WAT learned this, it quickly sent White Cloud a cease and desist letter on October 31, 2012. App. 1049. When White Cloud refused to comply, WAT quickly filed suit. There was no delay. Instead of halting construction, McCloud urged her builder to "plow ahead and get this building built before the trial date", essentially daring the trial court to make her remove the facilities if it held they violated the Easement. App. 1069.

Simply put, McCloud made up her own mind before she bought it regarding what she thought could be done on the Property under the Easement. She never relied on WAT. She never changed her mind. She bulldozed ahead (literally) with her commercial and retail plans despite the Easement's multiple restrictions, Sedgwick's and Marrone's written

[4] Brown testified that he simply took the comments of all parties and put them into a draft amendment document for discussion purposes only. App. 642, 678. Any draft document would have to be presented to the WAT Board of Directors for approval and "it wasn't up to me [Brown]." App. 678.

warnings, the language of the monitoring reports, Christman's objections, a failed amendment process, ongoing disagreements, a cease and desist notice and this lawsuit. She has no one to blame but herself, and the trial court correctly rejected the defenses.

II. The defenses of laches and estoppel do not apply as a matter of law to a non-profit, charitable entity that is the holder of a conservation easement.[5]

In enacting the Virginia Conservation Easement Act, Va. Code §§ 10.1-1009 *et seq.*, the General Assembly recognized the public interest in conserving in perpetuity land and water in its natural, scenic and open condition. The public pays for and acquires the benefits and rights of a conservation easement when the landowner is provided significant and ongoing tax benefits and credits. This public interest cannot be lost by the acts or omissions of the mere holder of a conservation easement.[6]

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[5] WAT presented this argument to the trial court in a Motion for Summary Judgment, and the trial court erred when it failed to grant the Motion.

[6] Notably, "laches or estoppel is not available as a defense against a municipality acting in its governmental capacity." *Portsmouth v. Chesapeake*, 232 Va. 158, 164-65 (1986). It is "well settled that the doctrine of estoppel does not apply to the rights of a State when acting in its sovereign or governmental capacity. This is so because the legislature alone has the authority to dispose of or dispense with such rights." *Main v. Department of Highways*, 206 Va. 143, 150 (1965). *See Ellis v. Commissioner of Dep't of Mental Hygiene & Hospitals*, 206 Va. 194, 201 (1965) ("A State acting in its sovereign or governmental capacity cannot be bound by the unauthorized acts or representations of its employees and

The well-established principal that public rights are not subject to these defenses is particularly applicable here because the Act expressly authorizes certain charitable entities to be the "holder" of a conservation easement. *Id*. § 10.1-1009. The holder and numerous others, including the Virginia Attorney General, can enforce the easement and protect the public interest. *Id*. § 10.1-10.13. Clearly, the Commonwealth would not be subject to estoppel or laches defenses based on the alleged acts or omissions of a charitable entity holder. It would make no sense, therefore, to apply such defenses to WAT when the Commonwealth could simply step in and enforce the easement and not be subject to such defenses.

The case of *Weston Forest & Trail Ass'n v*. *Fishman*, 849 N.E.2d 916 (App. Ct. Mass. 2006) is directly on point. The Massachusetts Appeals Court held that enforcement of a conservation restriction "serves a public

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agents."); *Telephone Company v. Bles*, 218 Va. 1010, (1978) (statutory requirement that public utilities adhere to rate schedules precludes customer from claiming estoppel because the statute was clearly enacted for the protection of a public interest); *Bar v. S.W. Rodgers Co*., 34 Va. App. 50, 58 (2000) ("it is longstanding public policy that state actors cannot waive the right to enforce public health and safety laws."); *Sink v. Commonwealth*, 13 Va. App. 544 (1992) (laches and estoppel cannot bar state from exercising its governmental functions and an agent of the Commonwealth may not waive the right of the Commonwealth to enforce the Habitual Offender Act); *Fort Ellsworth Condo. Apts. Council of Co-Owners v. de Maynadier*, 8 Va. Cir. 4 (Alexandria 1980)("It is generally recognized that estoppel cannot be the means of successfully avoiding the requirements of legislation enacted for the protection of a public interest. It does not operate to defeat positive law or public policy.").

benefit, and therefore, laches and estoppel do not apply to the entity holding the easement. The "public or private nature of an entity is not dispositive of whether that entity is enforcing 'public rights.'" *Id*.

> Thus, we conclude that a nonprofit entity like the WFTA, created for the purpose of protecting and conserving land and water, should be immune from a laches defense where, as here, it seeks to ensure that a landowner acts in accordance with the public interest.

Id. at 920-21. *See id*. at 921-22 ("[e]stoppel is not applied to government acts where to do so would frustrate a policy intended to protect the public interest."). *See Weston Forest & Trail Ass'n v. Fishman*, 853 N.E.2d 1060 (2006) (appeal denied). WAT is a non-profit, charitable entity and is the mere holder of the conservation easement at issue. Its alleged acts or omissions cannot result in the public losing the benefits and interests it acquired, at considerable expense, to preserve the Property in perpetuity.

III. There is no basis for White Cloud's claim that the entire Easement should be voided.

White Cloud asserts that the entire Easement should have been voided by the trial court because it is "fraught with doubtful terms." White Cloud cites no applicable cases to support its novel request. Meanwhile, it ignores Virginia law that when a term is of doubtful meaning it is not voided but instead parol evidence is allowed to establish the agreement of the parties. *Prospect Dev. Co. v. Bershader,* 258 Va. 75, 84 (1999). It also

ignores Easement Section 4.8 (Severability) whereby the easement remains "valid and binding" if any provision is found void or unenforceable.[7] Voiding the easement would destroy the benefits the public acquired at considerable expense and give White Cloud an undeserved windfall.

IV. White Cloud's arguments demonstrate the compelling need for a conservation easement to be interpreted in a straightforward manner to give effect to the intention of the parties and to carry out its purpose.

As conservation easements age in Virginia, it is inevitable that the lands they are intended to preserve and protect will become owned by persons interested in development and not conservation. As development occurs around the protected properties, the importance of preserving them increases. Development minded owners will inevitably claim that that the easement language allows development. This places enormous pressure and expense on charitable holders of conservation easements such as WAT, who can lose their charitable status if they do not properly enforce the conservation easements they hold.

This case makes clear that the future is now. White Cloud is developing what was rural and pastoral land at the time the Easement was created into a significant commercial, retail and entertainment facility open

[7] In footnote 7 to its Brief, White Cloud lists 13 sections of the Easement that it believes are "patently or latently ambiguous." White Cloud, however, fails to identify or discuss the exact language that is allegedly ambiguous.

to the public 362 days a year and serving tens of thousands of people. To do so, it makes multiple arguments that torture the language of the Easement and distort its unequivocal goal of preservation. For example, White Cloud argues that a "farm building" is any building on a farm. This means a gas station (App. 939) or nuclear reactor built on a farm would be a farm building. White Cloud argues that a building becomes a "farm building" if a farm product is merely imported to the protected property and into the building. Therefore, cotton could be imported from China, manufactured into T-shirts, and sold in a retail store in the purported "farm building." *See* App. 288. [8]

White Cloud argues that a bridge across the Little River is not a "structure" but part of the road. The trial court responded by asking White Cloud's counsel: "do you really seriously contend that I find a bridge is not a structure?" App. 942-41.

White Cloud claims that the prohibition against constructing a building on a "highly erodible area" as defined by the Department of Agriculture is

[8] Easement Section 3.3(A) allows for a small set of residential buildings to be built on the entire 400 acre parcel, including two free-standing secondary dwellings and two secondary dwellings "which are incorporated within permitted farm buildings." This simply means that if a building qualifies as a "farm building" it can then also be used as a secondary dwelling. It does not in any way change or alter the definition of "farm building" as incorrectly argued by White Cloud. White Cloud Brf. at 30-31.

meaningless because the Department's definition under 7 CFR 1221 is for "highly erodible land." White Cloud argues that the terms do not mean the same thing. But the Easement is recorded against land. A building is built on land. Land can be "highly erodible." Not air. Not water. White Cloud's position reads the "highly erodible" prohibition out of the Easement, contrary to Virginia law.[9]

White Cloud further argues that the prohibition against constructing a building on a highly erodible area can be voided by simply bulldozing the area before construction. This void by bulldozer argument also reads this prohibition out of the Easement. White Cloud further argues that Mr. Sledjeski's expert opinion, that the building site was a highly erodible area pre-construction, lacked adequate factual basis because he did not sample the soils or visit the site. But White Cloud bulldozed the soils without notice to WAT, so he had no soils to test and no reason to visit the site. Thus, he relied on what experts in his field regularly rely on – pre-construction contour maps of the landowner's contractors, App. 374, a soil map overlay, *id*., the Loudon County soil survey interpretive guide and the Soil

[9] White Cloud's reference to the universal soils loss equation is misleading. White Cloud Brf. at 35. While the equation may be used in certain contexts to determine erodible soils, it is not applicable to determinations of "highly erodible" soils. App. 389. A "highly erodible" determination is based on 7 CFR 1221 ("Identification of highly erodible land criteria").

Conservation Service manual, App. 379-80, and the location of the building.

The Easement's stated "Purpose" is that the protected property shall be "retained in perpetuity predominantly in its natural, scenic and open condition as evidence by the [Baseline Documentation] Report." Easement § 1.1 ("BDR"). White Cloud simply ignores the term "retained" and instead argues that this language and the BDR are not restrictions on the property's use. It does so even though the Easement states that the BDR is an "objective" measuring tool and any breaching activity must remedied by returning to the condition the land was in per the BDR (as required under Federal law, *see* WAT Opening Brf. at 22).

And White Cloud argues that changing the use of the protected property from rural and pastoral land to a significant commercial, entertainment and retail operation open 362 days a year to tens of thousands of people does not significantly impair the Easement simply because its facilities encompass about 5% of the property. But impairment is not measured by a percentage of land coverage, but instead by the <u>impact of the activities</u> on the property and its environment. The totality of the physical impacts, stretching 1/3 of the way into the property, combined

with the impacts caused by the facilities' extensive, commercial and public use, unquestionably and significantly impair the Easement's purpose.[10]

These arguments would be troublesome in any context, but especially so when applied to a conservation easement whose stated purpose is to protect and preserve the land in perpetuity for the benefit of Virginia citizens. They compel a ruling by this Court that a conservation easement should be interpreted in a straightforward manner to give effect to the intention of the parties and to carry out its purpose. *See Restatement (Third) of Property: Servitudes § 4.1* (2000).

The Assignments of Cross-Error should be denied and WAT should be granted the relief sought in this Appeal.

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[10] Regarding WAT's Assignment of Error VII and the bridge across the Little River, White Cloud states that under Virginia law "a party must actually amend the pleadings in order to take advantage of the new evidence." White Cloud Brf. at 42. This is incorrect and none of the cases cited by White Cloud say that.

CERTIFICATE

I hereby certify that Rule 5:26(e) of the Supreme Court has been complied with and pursuant to this Rule on July 6, 2015, the correct number of copies of this Reply Brief of Appellant, and one electronic copy (via email or CD), have been filed with the Clerk of the Supreme Court of Virginia and the correct number of copies, and one electronic copy, have been mailed postage prepaid or emailed to:

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