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IN THE

Supreme Court of Virginia

RECORD No. 190449

THOMAS BYRNE,

Appellant,

v.

CITY OF ALEXANDRIA,

Appellee.

OPENING BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

1. The Circuit Court for the City of Alexandria wrongly granted the City of Alexandria's Motion Craving Oyer (Error preserved in Opposition to the Motion to the City of Alexandria's Craving Oyer; Hr. Tr. At 5-9; 13; and in the Objection to the Order granting the Motion.) (JA 261-268; 338-342; 329-330).

2. The Circuit Court for the City of Alexandria wrongly granted the City of Alexandria's Demurrer with Prejudice dismissing Thomas Byrne's Petition for Appeal of the Decision of City Council to the Circuit Court (Error preserved in Petitioner's Opposition to the City of Alexandria's Demurrer; the Hr. Tr. At 9-12; 30-48, 54; and in the Objection to the Order granting the Motion.) (JA 269-273; 363-381 & 387; 331-332).

NATURE OF THE CASE AND MATERIAL PROCEEDINGS

This appeal involves the width of a gate along the front fence of real property at 420 S. Lee Street in Alexandria, Virginia ("Property") owned by Appellant, Thomas Byrne ("Appellant" or "Mr. Byrne"). The Property is within the Old and Historic Alexandria District. Mr. Byrne submitted an application for the construction of a replacement fence and gate along the front of the Property as required by the City of Alexandria ("City"). The application submitted by Mr. Byrne was the subject of review by the Old and Historic Alexandria District Board of Architectural Review ("BAR"). The BAR held a public hearing on December 20, 2017 and issued a Certificate of Appropriateness ("Certificate") approving the style, location of the fence, and location of the double gate in front of the curb cut/apron at the front of the Byrne property. The Certificate, however, limited the width of the gate to six feet instead of the eight feet requested by Mr. Byrne, and also required that a second, single gate, be installed.

Mr. Byrne appealed the BAR's decision to the City Council in accordance with legal requirements. The City Council held a public hearing on February 24, 2018 and affirmed the BAR's Certificate. Mr. Byrne timely filed a Petition for Appeal of the Decision of the City Council

to the Circuit Court for the City of Alexandria ("The Court").

In response to the Byrne Petition, the City filed a Motion Craving Oyer for what the City defined as the "entire legislative record the City Council had before it when it affirmed the approval of the Certificate of Appropriateness with conditions and that of the City Council's decision." (Brief in Support of Motion Craving Oyer, JA 27). The City contemporaneously filed a Demurrer based on the "legislative record." Mr. Byrne filed oppositions to both motions. The City filed replies in support of both its motions. Oral Argument on the motions was heard on November 14, 2018.

From the Bench, the Court granted the Motion Craving Oyer and took the Demurrer under advisement authorizing the Parties to file supplemental briefs. The City filed a Supplemental Brief in support of its Demurrer. The Court issued a letter opinion on December 10, 2018 stating the reasons why it would be sustaining the Demurrer with prejudice. The Court issued an Order sustaining the Motion Craving Oyer on December 12, 2018 and an Order sustaining the Demurrer with prejudice and dismissing the case on January 9, 2019. It is from those Orders that Mr. Byrne filed this appeal.

STATEMENT OF FACTS

Mr. Byrne owns an historic home in Old Town District in Alexandria at 420 S. Lee Street. When the home was purchased, it was in disrepair. The home is set back from the sidewalk and has open space on the side of the lot so that it has both front and side yards (JA 46-48). Mr. Byrne obtained all necessary approvals from the BAR for the repair and renovation of the house and its structures except as to the replacement fence. (Byrne Petition for Appeal of Decision of City Council "Petition" (JA 1-3).

The fence that existed at the time of purchase was not original to the house and had been installed by a prior owner sometime after 1960. (JA 116). Prior to that a Victorian wicket and spear fence with a gate into the side yard had been in place per historic photographs (JA 117-119' 152-158). Those photographs show a fence with 2 gates: a single gate in front of a walkway leading directly to the street-facing entrance, and a double gate in front of an historic curb cut into a driveway. The photographs show an automobile parked in the driveway and one of the double gates, demonstrating the width of the double gate as at least eight feet wide.

The BAR agreed with Mr. Byrne that the wicket and spear fence

should be replaced as more historically appropriate. Mr. Byrne then submitted his plans. The BAR, in considering its Certificate, determined that Byrne's proposal of "a metal wicket and spear fence was both historically and architecturally appropriate." (Brief in Support of Demurrer by Respondents City of Alexandria and City Council of the City of Alexandria. (JA 12) It also determined that "a pair of matching gates was also appropriate, provided that the gates were *pedestrian* in scale and consistent with historic examples in the surrounding area." (Emphasis added.) (Brief in Support of Demurrer, JA 12) The BAR, however, restricted the width of the double gate to six (6) feet and required that Mr. Byrne install a second single gate per the photograph of the original. Mr. Byrne's submission was for an eight (8) foot wide double gate which is the historically accurate width of the gate per the photographs. The BAR acknowledged that the use of the gate at the curb cut for access for parking was not within its purview, (JA 46) yet mandated that the gate in front of the curb cut be *pedestrian*.

The BAR staff in conducting its review of the area to determine architectural and historical appropriateness only selected comparators of gates which were "pedestrian in scale" and did not include any gates in front of curb cuts in the area which were used for parking access. It

dismissed the best evidence of historical appropriateness which was the photograph. "While it is true that some eight-foot gates may exist in the Old and Historic District, in most cases they lead directly to driveways or shared alleys..." (City's Supplemental Brief in Support of Demurrer JA 319). The City argued that "staff conducted a thorough review of other *pedestrian gates* in the surrounding neighborhood but could not find any other residences that had eight (8) foot-wide double gates." (City's Reply Brief JA 288). At the hearing on November 14, 2018, the City acknowledged that BAR staff "did not consider as proper comparators gates that opened up to a garage or a wide driveway. Those would not be considered proper comparators in this context." (Hr. Tr. JA 358) "So what the staff did is selected comparators where the gate was facing or related to a pedestrian walkway or a front door, not necessarily a garage or a driveway or something that would also involve a curb cut." (Hr. Tr. JA 372).

Mr. Byrne as required by the City agreed to install a gate in front of the existing walkway leading to the front door; although the application had called for only one gate to be installed in front of the curb cut which would be the singular access point to the property regardless of use. The gate at issue leads directly, now and did at the time of review, to a front driveway in front of an existing curb cut. (Photographic Exhibits to Staff

Report) The City denied the eight-foot width stating the "proposed gate width was out of scale with what it related to, what it faced." (Hr. Tr. JA 358) It was to face a driveway on one side and a curb cut on the other. There are numerous front fence gates throughout the Old and Historic Alexandria District which open up to garages or wide driveways that are at least eight feet in width. (JA 210). The City staff simply chose not to consider them.

STANDARD OF REVIEW

The standard of review for both assignments of error is *de novo*. The ruling of the Court on the Motion Craving Oyer was a pure question of law. Pure questions of law are subject to *de novo* review by the Supreme Court. Alexandria City Council v. Mirant Potomac River, 273 VA 448 (2007).

To the extent this Court agrees that the Motion Craving Oyer should not have been granted, it is unnecessary to reach the decision of the Circuit Court for the City of Alexandria on the Demurrer. That decision if reviewed by the Court is also subject to *de novo* review. Assurance Data, Inc. V. Malyevac, 286 Va. 137, 143 (2013).

AUTHORITIES AND ARGUMENT

I. The Circuit Court for the City of Alexandria wrongly granted the City of Alexandria's Motion Craving Oyer

In Antigone, et al v. Taustin, 98 Va. Cir. 213 (2018) Fairfax Circuit Court Judge David A. Oblon considered the question of whether a defendant may crave oyer for documents other than deeds or letters of probate and administration.[1] The conclusion is that oyer may only be obtained upon the agreement of the parties or to "supplement documents related to deeds or probate already attached to a complaint." (Antigone *2)

From 1895 to 1937 the oyer doctrine was slightly expanded but was still restricted to sealed and unsealed documents, including contracts, that related to deeds or to probate and administration. See Langhorne v. Richmond Ry. Co., 91 Va. 369 (1895); Grubbs v. National Life Maturity Ins. Co., 94 Va. 589 (1897) and Culpeper Nat'l Bank v. Morris, 168 Va. 379 (1937).

Dicta from Culpeper has been cited by trial courts as a basis for expanding the use of oyer in other types of cases, but Culpeper involved

[1] Mr. Byrne liberally cites to that decision obviously not for its precedential value but because of the persuasive thoroughness and clarity of the decision. That opinion provides a detailed review of both the legislative and judicial history of the Oyer Doctrine.

an issue of probate and administration where the moving party attached only a partial prior record of proceedings to the complaint. The holding of the Court did not expand the historical application of the motion. No Supreme Court decisions in the last 83 years have expanded the categories.

Several cases have recognized the use of oyer when the parties consented at the trial court level. Most recently Ward Equip. v. New Holland N. Am, 254 Va. 379 (1997) and EMAC, LLC v. County of Hanover, 291 Va. 13 (2016) established that when the parties agree to append documents to a complaint, they will not be heard if they protest the use of oyer on appeal.

In this case, the Circuit Court did not cite any judicial authority for granting the Motion Craving Oyer. Likewise, there is no statutory authority. Virginia Code § 8-105, recognizing oyer, was not carried over to the revision of Title 8. "The portion of the statute that relates to profert and oyer is taken care of by appropriate Rules of Court and the procedure for discovery; therefore, it is repealed as being unnecessary." Revision of Title 8, Report of the Virginia Code Commission (1977) pp. 142-93. Moreover, this Court has not amended Rule 3:7 of the Rules of the Supreme Court of Virginia "to permit oyer for any instrument upon which a

plaintiff maintains that a cause of action is founded." (Antigone at 2)

Lastly, and persuasively, John L. Costello in his treatise "*Virginia Remedies*, Section 7:09[3] (Matthew Bender & Company, Inc. 3d ed. 2005) argues "that motions craving oyer bypass ordinary discovery and the salutory processes for the administration of evidence..." He notes Virginia's "strong public policy against taking cases away from juries." (Antigone *2)

This case does not involve deeds or letters of probate and administration which is the only time a Motion Craving Oyer is procedurally proper. Mr. Byrne attached no documents to his petition that need supplementation. Mr. Byrne objected to the City's Motion Craving Oyer preserving this issue for appeal to this Court. Mr. Byrne asks this Court to reverse upon *de novo* review the Order granting Oyer.

This Court has repeatedly admonished trial courts to avoid short circuiting litigation and deciding cases without permitting the parties to reach a trial on the merits. See Renner v. Stafford, 245 Va. 351 (Va. 1993); Catercorp, Inc. v. Catering Concepts, Inc., 246 Va. 22 (Va. 1993); Seyfarth Shaw, Fairweather & Geraldson v. Lake Fairfax Seven Limited Partnership, et al, 253 Va. 93 (Va. 1997); Breeding v. Hensley, 285 Va. 207 (Va. 1999); Walsh v. Bennett, 260 Va. 161 (Va. 2000), Fultz v.

Delhaize America, Inc., 278 Va. 84 (Va. 2009); and Assurance Data, Inc. v. Malyevac, 286 Va. 137 (Va. 2013). This Court has continuously stated, "we have often warned of the dangers of short-circuiting litigation because in doing so, a trial court deprives a litigant of his day in court and deprives this court of an opportunity to review a more thoroughly developed record on appeal." Walsh v. Bennett, 260 Va. 161, 163 (Va. 2000).

The admonishment has been equally applied to cases involving Motions for Summary Judgment with this Court noting that "summary judgment is a drastic remedy which is to be rarely applied." Sloane v. General Motors Corp., 249 Va. 520 (Va. 1995) and Smith by Rosen v. Smith, 254 Va. 99 (Va. 1997)

Given that appeals of the granting of demurrers with prejudice, such as in this case, are reviewed *de novo*, any expansion of the use of oyer and demurrer at the first stage of a case is likely to result in an increase in appeals asking this court to consider and review lengthy "instruments" such as this record, interpret, and essentially perform the role of a trial court. Documents are not always clear and are not always complete which may not be known without discovery. The purpose, intent and subtext of documents, particularly "legislative records" is not always apparent.

The jurisprudence developed by this Court is that cases should be tried and not disposed of summarily at early and incomplete stages of the litigation. Contrary to that view, many circuit courts, including the Circuit Court in this case, have expanded the use of Motions Craving Oyer as a tool used in conjunction with Demurrers to prematurely put an end to litigation. The rationale is that by requiring a plaintiff to file a copy of any instrument that the defendant believes is referenced by the complaint or is an underlying basis for the complaint as an exhibit to the complaint and read as part of the complaint leads to efficient and potentially less costly litigation. Questions concerning which documents or instruments which must be produced and read as part of the complaint will, however, vary by case. Increased litigation at the oyer stage is likely. There is trend among the trial court in Virginia to view oyer as an expansive doctrine allowing for any number of instruments to be read as part of the complaint. Will the "medical record" or particular parts of it be subject to oyer in medical negligence cases? This use of the Motion Craving Oyer has been without any instruction from this Court in the last 83 years since the Culpeper case was decided. At this time, there is no Rule of Court authorizing the use of the Motion Craving Oyer. There have been calls for the amendment of Rule 3:7 of the Rules of the Supreme Court of Virginia

but to date such an amendment has not been adopted. Until such an amendment can be the subject of debate and comment, no meaningful guidance will be afforded to trial courts if the use of the Motion for Craving Oyer in this case is sanctioned.

A review of the number of circuit courts who have reported cases since the oyer statutes was repealed in 1977 yields few results. Trial court caseload statistics published in a report of the Supreme Court of Virginia to the General Assembly in 2017 notes that from 2013 through 2017, a period of five years, the Circuit Courts reported filings in general civil litigation cases as approximately 23,000 cases per year. "Virginia Judicial Workload Assessment Final Report – November 2017, House Document No. 15" A brief analysis shows that only in an insignificant number of cases filed on an annual basis has there been a Motion Craving Oyer filed. That number would assuredly substantially increase if Oyer is expanded as would the costs to litigants and the courts. Any resumed cost savings of early adjudication of cases is an illusion. Moreover, the benefit of developing a full factual record and of allowing parties an opportunity to conduct discovery and present appropriate trial issues will be thwarted by such an application.

II. The Circuit Court for the City of Alexandria wrongly granted The City of Alexandria's Demurrer with Prejudice dismissing Byrne's Petition for Appeal of the Decision of City Council to the Circuit Court

If the trial court's order granting the City's Motion Craving Oyer is reversed, the granting of the City's Demurrer must also be reversed. Without the "legislative record" the Demurrer is limited to the four corners of the Byrne Petition for Appeal to the Circuit Court. The Petition alleges that the BAR and the City Council impermissibly exceeded their authority and that the BAR and the City Council decisions were arbitrary, capricious, and contrary to law. These allegations are sufficient to survive a demurrer.

"The purpose of a demurrer is to determine whether a complaint states a cause of action upon which the requested relief may be granted." Assurance Data, Inc. v. Malyevac, 286 Va. 137. 143 (2013). It "does not allow the court to evaluate and decide the merits of a claim." Fun v. Virginia Military Inst. 245 Va. 249, 252 (1993).

If the Court endorses the application of oyer in this case, the demurrer is subject to the *de novo* review of this Court and the Order granting the Demurrer by the Circuit Court still must be reversed. The City's Demurrer sought a ruling on the merits of the case, arguing that as a

matter of law, the BAR and City Council decisions were proper exercises of power and not arbitrary. The "legislative record," however, shows otherwise.

The BAR in conducting its review of the historical and architectural appropriateness of the requested eight-foot gate arbitrarily ignored the existing curb cut leading into the Byrne property in determining the appropriate scale of the fence. It arbitrarily ignored examples of gates leading into driveways or garages at other homes within Old and Historical District as comparators. It arbitrarily ignored the historical photograph. Instead, BAR staff restricted their analysis of gates and front fences as they related to walkways and front entrances of residences. BAR staff acknowledged that they looked only at gates whose purpose was to provide pedestrian access to property. They excluded gates whose purpose was to provide parking access.

The City arbitrarily applied standards which applied only to pedestrian use. As acknowledged by the City throughout the record the BAR was precluded from considering the use to which the gates were going to be put which is the sole province of the Zoning Authority (JA _____). Labeling the gate which was to be placed in front of the curb cut leading into the driveway as "pedestrian," led the BAR staff to wrongly

define the comparative examples. Consequently, the BAR concluded that an eight-foot gate would be out of scale for pedestrian access, thus impermissibly restricting Mr. Byrne's use of the curb cut access for parking on his residential property. The BAR and subsequently the City Council capriciously declared that they could find no historical examples of 8-foot pedestrian gates in the surrounding area, The BAR ignored Mr. Byrne's testimony that "the other photos you will see are double gates of four to five feet in front of the historic curb cuts." (JA _____) and the photographs he supplied which were discussed by City Council but not made part of the record.

Exceeding their authority, the BAR considered the application as one for pedestrian access and use only, meaning no other use, such as for parking access. There can be no doubt that the BAR has restricted the use of the access for parking by restricting the size of the gate but even if that was not their motive, they still considered the use as pedestrian which they had not authority to do. In approving the BAR determination, the City Council, which is bound by the same prohibitions against the consideration of use, exceeded its statutory authority.

In support of its Demurrer, the City argued that the gate was not proper in scale because of its relation to the existing circumstances. The

"legislative record" clearly shows that at the time of review the Property had a driveway and curb cut but no walkway related to the proposed gate.

In reviewing the Demurrer, the Court acknowledged that

> "if there were other comparators that the BAR and its staff didn't consider, I don't think the Petition would be precluded from utilizing those at the appeal to demonstrate that the BAR's decision was that the legislative decision was arbitrary and capricious. They didn't consider things they should have considered." (HR. Tr. at 51)

Having said that, the Court refused to hear any further evidence and ruled as a matter of law on the Demurrer thereby short circuiting and prematurely putting an end to the litigation. "This case is a perfect example in which the trial court incorrectly...short circuited litigation pretrial and... decided the dispute without permitting the parties to reach a trial on the merits. Assurance Data, Inc., 286 Va. at 139 (internal quotations omitted).

CONCLUSION

For the reasons stated, the Byrnes seek *de novo* review of the rulings of the Circuit Court for the City of Alexandria granting the Motion Craving Oyer and Demurrer of the City of Alexandria. The Byrnes seek a reversal of the decision of the Trial Court and a remand to the trial court for a hearing on the merits of the Byrnes' Petition for Appeal of the Decision of City Council and BAR as to the Certificate of Appropriateness of the width of the gate.

Respectfully submitted,

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CERTIFICATE

The undersigned states as follows:

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II. A copy of this Opening Brief was emailed to all counsel of record this 9th day of December 2019, in compliance with Rule 5:26(e).

III. Counsel for Appellant desires to state orally, and in person to this Court the reasons for granting the relief in this appeal; counsel also complied with Rule 5:26(e) this day.

Warner F. Young, III /s/
Warner F. Young, III