SCV: Submitted on 01-16-2020 15:51:24 EST for filing on 01-16-2020

IN THE

Supreme Court of Virginia

RECORD No. 190449

THOMAS BYRNE,

Appellant,

v.

CITY OF ALEXANDRIA,

Appellee.

REPLY BRIEF OF APPELLANT

Warner F. Young, III (VSB 24259)
ALLRED, BACON, HALFHILL & YOUNG, PC
11350 Random Hills Road
Suite 700
Fairfax, Virginia 22030
(703) 352-1300
(703) 352-1301 (Facsimile)
wyoung@abhylaw.com

Counsel for Appellant

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477

TABLE OF CONTENTS

Table of Authorities ii

Introduction 1

Argument 2

I. It was error for the Circuit Court for the City of Alexandria to grant the specific Motion Granting Oyer in this case 2

II. The Circuit Court Erred In Granting the Demurrer With Prejudice. 10

Conclusion 13

Certificate 15

TABLE OF AUTHORITIES

CASES

Aetna Co. v. Earle-Lansdell Co.,
142 Va. 435 (1925) 6
Allen v. Commonwealth,
122 Va. 834 (1918) 5
Antigony, et al. v. Taustin,
98 Va. Cir. 213 (2018) 7
Bennett's Executor v. Giles,
33 Va. (6 Leigh) 316 (1835) 3
Commonwealth v. Springer,
138 Va. 719 (1924) 6
Commonwealth v. Stockley,
37 Va. (10 Leigh) 678 (1840) 6
Culpeper National Bank v. Morris,
168 Va. 379 (1937) 6
EMAC, LLC v. County of Hanover,
291 Va. 13 (2016) 6
Fun v. Virginia Military Institute,
245 Va. 249 (1993) 10
Grubbs v. National Life Maturity Insurance Co.,
94 Va. 589 (1897) 5
Hensel Phelps Construction Co. v. Thompson Masonry Contractor, Inc., 292 Va. 695 (2016) 6
Interstate R. Co. v. Roberts,
127 Va., 688 (1920) 4
Jared and Donna Murayama 1997 Trust v. NISC Holdings, LLC.,
284 Va. 234 (2012) 6
Langhorne v. Richmond Railway Co.,
91 Va. 369 (1899) 3, 4, 5, 6
Marios v. Va. Elec. Elec & Power Co.,
219 Va. Cir. LEXIS 453 (2019) 7
Resk v. Roanoke City,
73 Va. Cir. 272 (Roanoke Cir. Ct. 2007) 7
Riverside Healthcare Association, Inc. v. Forbes,
281 Va. 522 (2011) 6
Smith v. Wolsiefer,
119 Va. 247 (1916) 5

Terrell v. Page's Administrator,
13 Va. (3 Hen. & M.) 118 (1808) 5
Titan America v. Riverton Investment Corp.,
264 Va. 292 (2002) 10
Walker v. Welch,
154 Va. 652 (1930) 6

STATUTES AND RULES

F.R.C.P. 12(d) 10

Va. Code Ann. § 8-105 3
Va. Code Ann. § 8.01-2 11

Va. Cr. Rule 3:18(d) 3
Va. Sup. Ct. R. 1:4(d) 3

Alexandria Zoning Ordinance, Section 10-107 11

TREATISES

IV. Blackstone's Commentary (Tucker Ed. 1803) 2
Minor's Institutes (3d Ed. 1893) 2

INTRODUCTION

The issues on this appeal have broader implications than the precise issue between the parties. The appropriateness and utility of the Motion Craving Oyer given its power as a predicate for a Demurrer with Prejudice is an open debate. Thus, the Virginia Association of Defense Attorneys ("VADA") has filed an Amicus Curiae Brief in the matter. Oyer is a tool that defendants understandably would like to use in as many ways and as often as possible.

The issue to the parties to this appeal is more limited. The dispute is about a 24-inch difference in the size of a fence gate and the documents which the City craved oyer are its own self defined "legislative record."

The historic development of the Motion Craving Oyer and its appropriate application under modern rules of notice pleading mandate a restrained and limited application of the doctrine. The extent of the appropriate limits may be an issue for another day, but the benefits of Oyer/Demurrer are not as real as supposed and the costs of its greater application are.

The ultimate decision of the trial court which aggrieves Mr. Bryne is the Circuit Court's grant of the Demurrer with Prejudice. That Order

extinguished property rights and decided Byrne's assertions of arbitrariness and capriciousness by the City of Alexandria's Board of Architectural Review ("BAR") and City Council ("Council") on a "record" without allowing sufficient factual investigation.

ARGUMENT

I. It was error for the Circuit Court for the City of Alexandria to grant the specific Motion Granting Oyer in this case.

A. The Motion Craving Oyer is an ancient common law procedure.

John B. Minor's Institutes of Common and Statue Law, 732-33 (3d Ed. 1893), concluded that early use of Oyer was rigorously enforced and applied only to "specialities" defined as contracts under seal, and letters of probate and administration. Likewise, Blackstone stated that the Oyer Doctrine could be invoked regarding writs, bonds or other specialities including deeds under seal or contracts under seal. At early common law, sealing a document had particular significance such that any variation between the sealed or other specific category document and the initial pleading was demurrable. See IV. Blackstone's Commentary, 299 (Tucker Ed. 1803). Several of the cases cited by the VADA indicate that bonds were later included in the definition of "specialities," but the early decisions regarding oyer were limited to certain types of documents.

All of the cases decided before Langhorne v. Richmond Ry. Co., 91 Va. 369 (1899) through all cases in the Commonwealth decided prior to 1950 were before the modern pleadings standards were codified. Until 1950 common law pleadings were highly technical with rules and remedies which are no longer applicable. In 1950, the specificity required of a Motion for Judgment was codified in Va. Cr. Rule 3:18(d) which provided that "[e]very pleading shall state the facts on which the party relies…and it shall be sufficient if it clearly informs the opposite party of the true nature of the claim or defense." In 1972 the rule was amended and renumbered creating the current standard that a pleading state the "essential facts" and that the pleading "clearly inform the opposite party of the true nature of the claim or defense." Va. Sup. Ct. R. 1:4(d). Moreover, Virginia Code § 8-105 which recognized oyer was repealed in 1977.

Issues which were at the forefront of many of the early decisions related to the variance between pleadings and proof to the extent that in Bennett's Ex'r v. Giles, 33 Va. (6 Leigh) 316 (1835); a suit was dismissed when the defendant craved oyer of a bond and it was found that the date of the bond differed from the date which was pled by 8 days which was a defect fatal to the case on demurrer. This would not be so under modern

pleading. In short, the early decisions regarding oyer are interesting but have little practical or precedential application to modern pleading.

In 1895, the Virginia Supreme Court decided Langhorne. In that case the Defendant craved oyer of deeds of trust, petitions and ordinances of the Common Council of the City of Richmond and various deeds. The specific holding of the Court was that the Motion Craving Oyer was improper given that the Plaintiff did not claim under any of the documents and these matters could not be considered upon demurrer. The Court could have limited its decision accordingly but it chose instead to state a general rule which restricting the right to crave oyer to "deeds and letters of probate and administration not to other writings, and only applies to a deed when the party pleading relies upon the direct and intrinsic operation of the deed." Id. at 372. Interstate R. Co. v. Roberts, 127 Va., 688, 692 (1920) defined a deed as more than a formal instrument for the conveyance of land; but also, a writing that is "signed, *sealed* and delivered." VADA suggests that the oyer requirement of "sealing" of deeds should now be ignored and removed from the understanding of "specialities" and oyer should apply to any written instrument. This application is unsupported by any of the cases cited in support.

The Langhorne decision was a correct summary of the common law understanding of what documents were subject to oyer at that time. In Smith v. Wolsiefer, 119 Va. 247 (1916) and Grubbs v. Nat'l Life Maturity Ins. Co., 94 Va. 589 (1897) the Supreme Court reaffirmed the general rule announced in Langhorne. Grubbs addressed the issue of whether the life insurance policies of which the defendants sought oyer were "sealed instruments" which would be a question of fact for trial. Absent a seal, it was improper to crave oyer of those documents. In Smith v. Wolsiefer the Court expressed disapproval of the use of the Motion of Craving Oyer but found the Plaintiff had waived the objection.

Terrell v. Page's Adm'r, 13 Va. (3 Hen. & M.) 118 (1808) predates Langhorne by 87 years and makes only passing reference that the Defendant's had taken oyer of the agreement. Likewise, the cases cited by VADA which came after Langhorne, Grubbs and Smith do not add to the understanding of the use of oyer. In Allen v. Commonwealth, 122 Va. 834 (1918) the Court again simply noted that oyer had been craved of a check. Finding that the check and the indictment variances were immaterial, the Court sustained the trial court's denial of the Motion to Quash the indictment. The process of oyer was not questioned at the trial

court. Commonwealth v. Springer, 138 Va. 719 (1924); Aetna Co. v. Earle-Lansdell Co., 142 Va. 435 (1925); Walker v. Welch 154 Va. 652 (1930); Jared and Donna Murayama 1997 Trust v. NISC Holdings, LLC., 284 Va. 234 (2012), Hensel Phelps Construction Co. v. Thompson Masonry Contractor, Inc., 292 Va. 695 (2016); and EMAC, LLC v. County of Hanover, 291 Va. 13 (2016) note no objection to oyer at the trial court. In Riverside Healthcare Ass'n, Inc. v. Forbes, 281 Va. 522 (2011) there was no motion craving oyer to be ruled upon. The case asserted to sum up the post Langhorne oyer practice, Commonwealth v. Stockley, 37 Va. (10 Leigh) 678 was decided in 1840.

Culpeper National Bank, 168 Va. 37(1937) is a case regarding probate which is consistent with Langhorne as the oyered documents were within the general rule.

There are no cases which have directly expanded the use of oyer since the Langhorne decision in 1895. Moreover, citation to Section 2.07[9] of the Virginia Civil Bench Book for Judges and Lawyers (2018-2019 Ed.) is not to a recognized "rule." There is no Rule of the Supreme Court of Virginia adopting oyer and the Bench Book is not an authority.

B. The Expansion of the Doctrine. The Circuit Court cases relied

upon by the City of Alexandria have expanded the use of oyer to bid forms, operating agreements, franchise agreements, sales contracts, employment contracts and in this case the City's self-defined "legislative record." The same court that decided Antigony, et al. v. Taustin, 98 Va. Cir. 213 (2018) in Marios v. Va. Elec. Elec & Power Co., 219 Va. Cir. Lexis 453 (2019) decided that motions craving oyer should be applied regardless of the type of action to any document which forms the basis of an action. The City of Alexandria has cited Virginia circuit court cases as establishing the standard of review for this court for motions craving oyer. One such case, Resk v. Roanoke City, 73 Va. Cir. 272 (Roanoke Cir. Ct. 2007) has gone so far as to say that all documents which are material parts of a record should be subject to oyer.

In this case, the "legislative record" is contained as Exhibit B to the Motion Craving Oyer filed by the City of Alexandria. (JA 39 through 260 and Consent Motion Ex. A and B). Contrary to the historic use of oyer, the City of Alexandria did not crave oyer of documents in Byrne's possession for the purpose of allowing them to present a proper defense, it attached documents that it prepared and assembled as a record. It defined and chose the extent of the document to be incorporated into the Byrne

petition. The City attached its own internal reports over which Byrne had no control and critically failed to incorporate photographs "of locations in Old Towne where there are double gates of four to five feet in front of the historic curb cuts." (Consent Motion Ex. A).

Unlike a contract or any other document which might be in the possession of the Plaintiff, this motion craved oyer by the City of Alexandria of its own documents. The danger of such an application is readily apparent.

The City of Alexandria suggests a standard that oyer should apply to all material parts of a record that the court would find it needed to review on Demurrer. Importantly and contrary to the assertion of the City, Mr. Byrne did not ask that the trial court make a ruling on the "legislative record." There was no such record in his possession at the time of filing his Petition to the Circuit Court. There is no definition of what constitutes a legislative record in the Alexandria Code. By craving oyer of its own document, the City denied Mr. Byrne an opportunity to contest whether the documents constituted a full and accurate record for the court to review.

The utility of the Motion Craving Oyer in modern practice is limited. This case involves an incomplete document as it does not include

photographs submitted by Byrne. In other cases, questions of which documents are subject to oyer, whether the documents are complete, whether plaintiffs have relied upon the documents; and are there other documents necessary to provide context or completeness will be litigated on the particular document of each separate case.

The issue is not whether these documents ultimately get produced in litigation and are reviewed by the court who is then empowered to make appropriate decisions but when they are produced. When documents are oyered, it is always a predicate for a demurrer. At the start of litigation, before any discovery, there may be no certainty, context, or full understanding of the documents. Not all parties have the same copy of contracts; plaintiffs frequently do not have full and complete insurance policies; what constitutes a "legislative record" and how would a plaintiff know what might be inaccurate; and, are there limits to the type of document are issues and questions which will of necessity need to be litigated if oyer is expanded. To be sure, if attorneys are given a new application for an old tool, they will use it. A reasonable alternative is to allow discovery and then hear summary judgment arguments based on full records allowing for appellate review.

In the federal system, a Motion to Dismiss a Complaint when supplemented by documents is converted to a Motion for Summary Judgment FRCP 12(d). The Courts of the Commonwealth should require no less. This court has consistently limited the use of summary judgment. It should not expand the oyer/demurrer procedure so as to allow for the summary disposition of cases at the earliest stages of litigation.

Byrne does not argue that demurrers should always be rejected but the recognition of the power of the combination of a motion craving oyer with a demurrer as noted by this court in Fun v. Virginia Military Institute, 245 Va. 249 (1993) (a court may ignore the allegations in the complaint when compared to documents that have been oyered) strongly suggests that oyer remain a practice that applies only to limited categories of documents in limited types of cases.

II. The Circuit Court Erred In Granting the Demurrer With Prejudice.

Judicial Notice

A. In Titan Am. v. Riverton Inv. Corp., 264 Va. 292 (2002) the trial court took judicial notice of prior judicial proceedings which it had conducted. The Byrne case does not involve previous litigation; it involves

an application to the BAR, BAR reports, and hearings which were not judicial in any respect. They were proceedings before political bodies, the BAR and the City Council. It is not an action defined in Va. Code § 8.01-2 as including "all civil proceedings whether upon claims at law, or equity… and whether in circuit court or district courts." Actions do not include non-judicial proceedings. Accordingly, if this court does not affirm the Circuit Court's granting of the Motion Craving Oyer for the "legislative record" it is not necessary to reach the issue of the Demurrer as the Petition for Appeal to the Circuit Court on its face clearly met the pleading standards required to survive a Demurrer.

B. If That the Motion Craving Oyer is granted, the Demurrer Still Must Fail. The Circuit Court recognized that it was bound by the Alexandria Zoning Ordinances to accept administrative "finding of fact" in appeal of BAR and Council decisions. Section 10-107 of the Zoning Ordinance does not provide that the court is restricted in its evaluation of whether the decision was arbitrary and capricious and constituted an abuse of discretion to any defined "legislative record."

The record accepted by the Court upon oyer was not conclusive that as a matter of law the BAR and Council decisions were not arbitrary.

Indeed, the record shows the City Council arbitrarily ignored evidence which was contrary to the BAR's conclusions.

The Plaintiff's Petition for appeal to the Circuit Court is clearly not a model pleading, but contrary to the assertion of the City, the petition is not founded solely on the issue of parking. The Petitioner made allegations that the "decision of the BAR and approval of that decision by City Council were arbitrary, capricious contrary to law and constituted abuses of discretion" and pled that "any claim that the Council decision was based solely on the proper standards of architectural review is meritless." (JA 1-2) At the hearing on the Demurrer, Petitioner clearly articulated to the court the principle defect in the BAR and City Council's decisions was that the gate would only be used as a pedestrian gate. (JA 363-370) In fact, the City mandated that the Byrne's install a second single gate that would be directly aligned with the front door condition Byrne accepted. Having accepted the second gate, the double set of gates in front of the curb cut was not intended for pedestrian access. Moreover, it was impermissible for the BAR and Council to have considered the use of the fence.

It simply was not true that Byrne represented in the application that the double gate would be for pedestrian use and clearly was not true after

he accepted the condition of approval. Contrary to the Opposition Brief, this was acknowledged by the City at the hearing. "We do recognize that Mr. Byrne did not say that this walk or gate was for pedestrian use." (JA 371) Moreover, the City argues that Council had no means of assessing the width of the historic gate of the historic wicket and spear fence. (JA Ex. B) is Mr. Byrne's testimony regarding how the width of the gate was easily determined. This evidence was capriciously ignored.

The record shows that a 24-inch difference in the width of the gate was denied because the City arbitrarily classified the gates as pedestrian and arbitrarily refused to acknowledge what had historically been there. The record does not support the grant of a demurrer, yet alone one with prejudice.

CONCLUSION

This case highlights the risk of any expansion of the Langhorne general rule regarding the use of oyer as a predicate for demurrer. It is particularly inappropriate in this case and Byrne prays that the decision of the trial court on both assignments of error be reversed and remanded for further proceedings.

Respectfully submitted,

THOMAS BYRNE

By Counsel

*Warner F. Young III, Esq. /s/*_____
Warner F. Young III, Esq., VSB 24259
Allred, Bacon, Halfhill And Young, P.C.
11350 Random Hills Road, Suite 700
Fairfax, VA 22030
T: 703-352-1300
F: 703-352-1301
wyoung@abhylaw.com

CERTIFICATE

The undersigned states as follows:

I. Appellants are Thomas and Amanda Byrne, whose counsel is Warner F. Young, III, Virginia State Bar Number 24259, Allred, Bacon, Halfhill & Young, P.C., 11350 Random Hills Road, Suite 700, Fairfax, Virginia 22030, Telephone Number (703) 352-1300; Facsimile Number (703) 352-1301; email address: wyoung@abhylaw.com.

Appellee is City of Alexandria, whose counsel is Amy Miller, Virginia State Bar Number 70698 and Martin J. Amundson, Virginia State Bar Number 86735, Buchanan Ingersoll & Rooney, P.C., 1737 King Street, Suite 500, Alexandria, Virginia 22314, Telephone Number (202) 452-7977; email address: martin.amundson@bipc.com.

II. A copy of this Reply Brief was emailed to all counsel of record this 16th day of January, 2020, 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.

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