

**SELLER BEWARE: THE IMPACT OF
PROSPECT DEVELOPMENT COMPANY v. BERSHADER
ON THE SALE OF REAL ESTATE IN VIRGINIA**

By R. Peyton Mahaffey and Daniel P. Lyon¹

The Supreme Court of Virginia broke new ground in the recent decision, *Prospect Development Co. v. Bershader*, 258 Va. 75, 515 S.E.2d 191 (1999) (“*Bershader*”), when it granted new home purchasers a negative restrictive easement by estoppel in an undeveloped lot (“Outlot B”) adjacent to their home. It is the first time that the Virginia Supreme Court has upheld a negative restrictive easement by estoppel, which prohibits a landowner from developing its own property, and marked the revival of an equitable doctrine that had been dormant for over fifty (50) years. *Bershader* created an interest in real estate based upon oral misrepresentations and promises that did not expressly grant an easement, and were not included in the sales contract or deed. The Virginia Supreme Court also recognized for the first time a fraud exception to the American Rule, giving a Chancellor authority in equity to award attorney’s fees even where the misconduct may not be sufficient to support an award of punitive damages.

The unprecedented rulings in *Bershader* in the areas of negative easement by estoppel and attorney's fees, as well as the thoughtful analysis of the fraud and contract issues, are instructive to attorneys advising sellers and purchasers alike. The potential impact of *Bershader*

¹R. Peyton Mahaffey is a principal and Daniel P. Lyon is a senior litigation associate with the law firm of McCandlish & Lillard, a Professional Corporation, in Fairfax, Virginia. Their practices emphasize litigation in the business, corporate and commercial areas, as well as the areas of residential and commercial real estate.

on future Virginia real estate transactions (and related litigation) is more fully understood by examining the distinct factual and legal foundations which support the opinion.

I. Misrepresentations of Pre-Existing Fact.

The *Bershader* defendants misrepresented that the adjacent Outlot B: (1) was previously tested and did not percolate; (2) was tested by Prospect and did not percolate; (3) cannot be built upon; (4) can never be built upon; (5) cannot be developed; (6) can never be developed; (7) will give you the view and privacy you want; and (8) was “Preserved Land”.

Generally, “[w]hat is susceptible of exact knowledge when the statement is made is usually considered as a matter of fact.” *Poe v. Voss*, 196 Va. 821, 825, 86 S.E.2d 47, 49 (1955). However, “fraud must relate to a present or a pre-existing fact, and cannot ordinarily be predicated on unfulfilled promises or statements as to future events.” *Bershader*, 258 Va. at 86 (citations omitted).ⁱ Determining whether a statement is one of pre-existing fact or an opinion as to future events requires consideration of the facts of each case, including the relative knowledge of the parties, their intentions, the language used as applied to the subject matter and as interpreted by the surrounding circumstances. *Mortarino v. Consultant Eng'g Services, Inc.*, 251 Va. 289, 293-94, 467 S.E.2d 778, 781 (1996).

In *Bergmueller v. Minnick*, 238 Va. 332, 334-35, 383 S.E.2d 722-23 (1989), the Supreme Court of Virginia rescinded the purchase of certain land based upon misrepresentations by the seller's agent that a percolation test had been performed on the property and that the property "perked", when no percolation test was ever performed. The Supreme Court found that these statements were material misrepresentations of fact constituting clear and convincing evidence of constructive fraud. *Id.* at 337.

In *Mortarino*, 251 Va. at 291, a potential purchaser of property conditioned his purchase “upon the feasibility of development of the [p]roperty, unimpeded by governmental wetlands regulations”. The defendant seller then hired a consultant to perform a wetlands and drainage feasibility study to ensure that the property could be developed. *Id.* The consultant reported that on the vast majority of the property, he found “nothing to indicate that wetlands are present” and “the only location that is remotely possible for a contrary determination to be made is a small area on the southern boundary of the property and the chances of this are only slight”. *Id.* at 292. The defendant seller provided the report to the plaintiff purchaser. Relying upon these representations, the plaintiff purchased the property. Subsequently, a different consultant and the U.S. Army Corps of Engineers determined that most of the property was wetlands and could not be developed. *Id.* The Virginia Supreme Court specifically found that the consultant’s statement regarding the condition of the land and its suitability for development were representations of fact, and not expressions of opinion, because they addressed the present quality or character of the property:

We hold that the alleged misrepresentations contained in CES’s report to Morrow are statements of fact. . . . *These statements are unambiguous representations of the present quality or character of the property and, thus, are representations of fact, and not mere expressions of opinion.*

Id. at 294 (emphasis supplied).

The misrepresentations in *Bershader* also concerned the suitability of property for development and were strikingly similar to those in *Bergmueller* and *Mortarino*. The defendants in *Bershader* misrepresented that water percolation tests had been performed, when none had. There is no meaningful distinction between misrepresentations that land “did” percolate (as in *Bergmueller*) or “did not” percolate (as in *Bershader*). The only material difference between the

two cases is that the *Bershader* defendants committed actual fraud because they knew the statements were false at the time they made them and intended to mislead the Bershadars.ⁱⁱ

The defendants' statements regarding testing, failure and inability to perk or be developed, and their verbal and written misrepresentations of Outlot B as "Preserved Land" (ostensibly owned by Fairfax County or some charitable organization) are susceptible of exact knowledge and represent the present quality or character of the land related to its ability to drain and be developed. The nature of these statements is substantially similar to those in *Mortarino* where the consultant and seller represented that there were no wetlands to impede the development of the property. Hence, the defendants' statements are representations of present, pre-existing facts that may be actionable as fraud. *Bershader*, 258 Va. at 86.

Sellers should not make representations regarding the suitability of land for development. These are risky declarations even if they are founded upon scientific studies or tests since even experts routinely disagree on such issues. If the studies or tests prove inaccurate or the results could vary depending upon the techniques employed, the representations may support an action for constructive fraud allowing rescission of the sales contract.

Representations regarding the ability of property to percolate water are particularly troublesome because so many different factors can effect the rate of percolation. The weather conditions at the time of the test, the variation of soil types from one area of the property to another, the ability to reconfigure the property, and the available technology for reducing water flow over the property can all effect the rate of percolation. Property that does not perk one day may be retested and found to perk on another day. It is simply more prudent to avoid any representations regarding the ability of property to percolate.

II. Fraudulent Concealment and Nondisclosure.

The defendants' fraud in *Bershader* also included deliberate concealment and nondisclosure of facts known to the defendants. The proven facts showed conclusively that the scheme was "designed to mislead the Bershadars, . . . induce them to enter a contract, . . . and preclude them from examining [Health Department] records . . ." May 8, 1998 Opinion Letter of Judge David T. Stitt ("OL"), p. 8. "For purposes of an action for fraud, concealment, whether accomplished by word or conduct, may be the equivalent of a false representation, because the concealment always involves deliberate nondisclosure designed to prevent another from learning the truth. A contracting party's willful nondisclosure of a material fact that he knows is unknown to the other party may evince an intent to practice actual fraud." *Van Deusen v. Snead*, 247 Va. 324, 328-29, 441 S.E.2d 207, 209 (1994) (citations omitted).

III. Proving the Fraud.

No percolation tests were ever conducted on Outlot B despite the defendants' numerous representations to the contrary. The Chancellor found that the defendants' own witnesses conceded that prior to 1996, Outlot B had never been perk tested by the defendants, or anyone else for that matter, much less failed a percolation water test, and further, that it was inaccurate to state that Outlot B did not percolate until a percolation water test had been performed. OL 5. The Fairfax County Health Department ("FCHD") records and the testimony of the witnesses showed that the defendants falsely represented to the Bershadars that the outlot had been perk tested and did not perk. Moreover, the defendants were in *possession* of the Final Subdivision Plans showing a proposed drainfield site located on Outlot B and which stated that Outlot B could be developed if an approvable drainfield was located or public sewer was brought to the property.

At trial, the defendants also defined the term “Preserved Land” as land that is not to be touched, and admitted that there was something wrong with using that term when marketing property to potential purchasers. (OL 5). Outlot B was never “Preserved” as the defendants represented and no action was ever taken to make it preserved. Instead, the defendants perpetrated a continuing pattern of fraud against all the purchasers in the subdivision by making the same or substantially identical misstatements to three (3) other new home purchasers and anybody else who inquired. OL 5-6.

The circumstances showed that the defendants always intended to develop Outlot B. From the date the subdivision was first acquired in 1992 through 1997, the defendants paid real estate taxes on Outlot B, which was always assessed by Fairfax County as a *buildable lot* even though the defendants paid nothing for it. The facts supported the Chancellor’s finding that the defendants paid those real estate taxes from the beginning because they intended to develop from the beginning. OL 8.

The evidence also supported the trial court's finding that the defendants engaged in a deliberate pattern of deception regarding the true character and quality of the Outlot B for development. In the Spring of 1993, another potential purchaser visited the subdivision and was given a marketing plat which showed that Lot 4 was located next to another outlot (“Outlot A”) likewise designated as “Preserved Land”. However, *the defendants did not even own Outlot A*; and could not control its development. During the entire period from March 1993 through October 28, 1994, and thereafter until all lots were sold, the defendants continued to provide prospective purchasers with marketing plats depicting both outlots as “Preserved Land”.

The defendants told another potential purchaser that the “Preserved Land” was officially platted to the county as Preserved Land and although the defendants owned it, if they tried to

build on it, the homeowners could sue them. OL 6. In July 1992, when the defendants negotiated the purchase of Lots 6 and 16 of the subdivision from their seller, WNB Corp., the defendants stated that the lots were “totally worthless” and “will not accommodate any type of home”. OL 6. The defendants, therefore, offered to pay WNB only what they felt could be passed on to prospective purchasers as additional ground. On the other hand, in correspondence with their lender, the defendants called Lots 6 and 16 merely “questionable building lots”, and by April 1993, both Lots 6 and 16 had houses on them with septic systems. OL 6.

Furthermore, if the defendants had bothered to examine the soil profile tests that had been performed on the outlot in 1989, which were on file with the FCHD, they would have discovered that percolation of the outlot was not foreclosed and that it should have been perk tested. Thus, the defendants concealed the true facts, and misrepresented that their statements would be supported by the FCHD if the Bershadars checked with them.

Successful water percolations tests were also performed on Outlot B in 1996, which led to the defendants’ efforts to develop the property. In fact, the defendants obtained approval for a drainfield on Outlot B in 1996 in the exact same location where certain soil profile tests were performed in 1988 and 1989. Despite representations that Outlot B only perked in 1996 since new technology was used, both of the soils experts testified at trial that Outlot B was perked using techniques that had been employed in Fairfax County since the 1970’s.

The defendants’ own soils expert also testified that it is a common practice to retest property that has previously failed a perk test in order to try and increase bedroom sizes or obtain buildable lots. Even if Outlot B had failed a perk test prior to 1994, this would not justify a statement that it would never perk. A lot that does not perk one day under certain conditions and in a certain location, may perk on a different day. As developers, the defendants were uniquely

aware of this fact based upon experience and their own continuous efforts to retest other lots in the subdivision.

The evidence of fraudulent intent in *Bershader* was substantial. The defendants clearly misrepresented that water percolation tests had been performed when they had not. However, the cumulative effect of the pattern of misrepresentations to other purchasers should not be overlooked, as well as the inconsistent statements to the lenders and Fairfax County regarding the suitability of Outlot B for development. The testimony of the defendants was overwhelmed by the testimony of nonparty witnesses. Similar misrepresentations made to nonparties at or about the same time can be very persuasive evidence in such cases since the Chancellor has broad discretion to review evidence bearing on intent in an action for fraud. *See Ely v. Gray*, 125 Va. 708, 100 S.E. 660 (1919).

IV. Easement by Estoppel.

An easement by estoppel is a recognized property interest in Virginia. *See Oney v. West Buena Vista Land Co.*, 104 Va. 580, 584, 52 S.E. 343 (1905); *Walters v. Smith*, 186 Va. 159, 172, 41 S.E.2d 617, 623 (1947); *Jones v. Beavers*, 221 Va. 214, 219, 269 S.E.2d 775, 778 (1980); *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Corp.*, 65 F.3d 1113, 1121 (4th Cir. 1995). “Easements are sometimes created by *estoppel*; for example, if the vendor of land actually *or constructively makes representations* as to the existence of an easement appurtenant to the land sold to be enjoyed in land which the vendor has not sold.” *Walters*, 168 Va. at 172 (*quoting Minor on Real Property* (Ribble) Vol. 1, section 104 (1928)) (emphasis supplied). See also 3 Herbert T. Tiffany, *The Law of Real Property*, § 801, p. 317 (“Tiffany”) and cases cited therein. An easement by estoppel is established by proving the elements of estoppel *in pais*: inducement, reliance, user and injury. *Jones v. Beavers*, 221 Va. 214, 219, 269

S.E.2d 775, 778 (1980). *See also T. v. T.*, 216 Va. 867, 873, 224 S.E.2d 148, 152 (1976)

(holding that the elements necessary to establish equitable estoppel are a representation, reliance, change of position, and detriment).ⁱⁱⁱ Reference to a marketing plat during negotiations, such as in *Bershader*, even though not incorporated by reference into the sales contract or deed, operates to vest an easement in the grantee because it induces him to believe the state of facts indicated on the plat and the grantor is estopped to deny such representation. *Tiffany*, § 800, p. 311.

In *Oney v. West Buena Vista Land Co.*, 104 Va. at 583, the complainants sued to establish their easement rights in a bridge on the grounds that they and others similarly situated purchased their property based upon the good faith representations of the existence of the bridge. The court granted the complainants an easement in the bridge, because it “was one of the most important if not the principal inducement to them to buy.” *Id.* at 584. In *Jones v. Beavers*, 221 Va. at 219, the Virginia Supreme Court stated “it is clear that estoppel is the true basis of the action [in *Oney*].” Hence, the Virginia Supreme Court has recognized that the deed does not have to grant an express easement, as long as the elements of estoppel are found to exist.

The facts in *Oney* were similar to *Bershader* in that the principal, if not sole, reason the Bershaders purchased their lot was the inducement from the defendants that their home would be adjacent to, and enjoy a view of, the Preserved Land, for which they paid a \$15,000 premium. OL 3. The Bershaders acted upon the defendants's representations by creating a park on their triple septic field, altering the landscaping on their entire lot and taking time each day to watch the wildlife on the Preserved Land. OL 12. The fact that the marketing plat was not incorporated by reference into the Bershaders' deed does not change the estoppel analysis; the plat is simply one of the representations upon which the estoppel is based. *See also Putnam v. Dickinson* 142 N.W.2d 111 (N.D. 1966) (granting an easement by estoppel based upon written

advertisements and oral representations that induced purchasers to buy property adjacent to a "Park"); *Miller v. Lawlor*, 66 N.W.2d 267 (Iowa 1954) (upholding a view easement by estoppel); *Shipp v. Stoker*, 923 S.W.2d 100, 102 (Tx. 1996) (finding an easement by estoppel as an exception to the statute of frauds); 3 Richard R. Powell, *The Law of Real Property*, § 411[4].

In *Bershader*, 258 Va. at 90, the Court also held that “the statute of frauds ‘will not be applied when the result is to cause a fraud or perpetrate a wrong, because the object of the statute is to prevent frauds.’” The defendants’ misrepresentations and concealment estopped them from asserting the bar of the statute of frauds. *See T. v. T.*, 216 Va. 867, 224 S.E.2d 148 (1976); *Nargi v. CaMac Corp.*, 820 F.Supp. 253 (W.D. Va. 1992); *Marchiafava v. Haft*, 777 F.2d 942 (4th Cir. 1985) (citing *Trueheart v. Price*, 16 Va. (2 Munf.) 468 (1811)) (recognizing that an easement based upon a fraudulent factual representation bars the application of the Statute of Frauds.) *See also* 1 James H. Blackman and David A. Thomas, *A Practical Guide to Disputes Between Adjoining Landowners - Easements*, § 2.02[1] (noting that implied easements do not violate the statute of frauds, because a written document is involved and the doctrine is used to fill in the gaps created by the parties' lack of forethought.) Furthermore, many of the easements recognized in Virginia, including easement by estoppel, arise in equity and are therefore exempt from the statute of frauds. “No writing is necessary to create a good equitable title to real estate.” *Halsey v. Peters’ Executor*, 79 Va. 60, 65 (1884). *See also Burns v. Equitable Assoc.*, 220 Va. 1020, 1033, 265 S.E.2d 737, 745 (1980) (holding that the Statute of Conveyances did not bar the transfer of a beneficiary’s interest in a trust, in part because it is the conveyance of an equitable interest). If the rule were otherwise, easements by necessity, easements implied from prior use, and easements by estoppel would never be enforceable and such causes of action would not exist.

Finally, the Court in *Bershader* held that the easement by estoppel was appurtenant, because there is a dominant and servient estate. *Bershader*, 258 Va. at 89-90. Thus, the easement runs with the dominant estate and is capable of being transferred or inherited. There was no evidence indicating that the easement was intended to be solely personal to the complainants. “An easement is never presumed to be merely personal, . . . unless it plainly appears the parties so intended.” *Id.* at 90.

IV. Specific Enforcement of the Real Estate Sales Agreement.

On May 11, 1993, the parties entered into a New Home Agreement of Sale ("Sales Agreement"). The Sales Agreement identified the improvements and options being purchased by the Bershadars, including a “premium lot”, but did not define the term “premium lot” and was otherwise ambiguous in that regard. The Sales Agreement was also silent on the amount of the lot premium, as well as its purpose.

A salesperson for the defendants testified that the term “premium lot” in the sales contract meant Lot 23 had a premium cost, but you could not determine the amount of the premium or what it was paid for without reference to information beyond the Sales Agreement. The testimony established that the Bershadars paid a \$15,000 lot premium to the defendants in exchange for the view and privacy afforded by the “Preserved Land”. Moreover, the written marketing plats provided to the Bershadars specifically showed that they were purchasing property adjoining “Preserved Land”.

In *Georgiades v. Biggs*, 197 Va. 630, 631, 90 S.E.2d 850, 851 (1956), the sellers sought to specifically enforce a sales contract, and the purchaser defended and refused to buy the property on the grounds that the actual size, shape and dimensions of the lots were different than

what had been represented. *Id.* This Court allowed extrinsic evidence to aid in the interpretation of the contract by ruling that:

[I]t is equally as elementary that the [parol evidence] rule does not apply where the writing on its face is ambiguous, vague or indefinite or does not embody the entire agreement. In such a case, parol evidence is always admissible, not to contradict or vary the terms, but to establish the real contract between the parties.

Id. at 634. See also *Bershader*, 258 Va. at 84; *J. E. Robert Co. v. J. Robert Co., Inc.*, 231 Va. 338, 343 S.E.2d 350 (1986); *Putnam*, *supra* (parol evidence rule does not bar evidence of oral agreements regarding issues on which the sales contract is silent).

The facts and testimony in *Bershader* were not contrary to the final agreement clause in the Sales Agreement, but rather explained terms which were ambiguous and established the true intention of the parties: that the Bershadars purchased a lot adjacent to “Preserved Land”. The Virginia Supreme Court specifically enforced the Sales Agreement to effect that intent.

A purchaser of real estate must not execute a sales contract unless it identifies the property rights in detail. Any material promises or statements relied upon in making the decision to purchase should be included. Failure to do so makes them very difficult to enforce, but does not entirely eliminate the purchaser’s rights. If general and ambiguous language can be identified as the basis for certain rights, the meaning can be established by reference to extraneous communications between the parties.

Conversely, a seller and its agents must be careful when drafting the sales contract to avoid any such undefined, ambiguous language (*e.g.*, “premium lot”). The integration clause does not prohibit explanation of such language. As a preventive measure, sellers should include language in the sales contract that specifically disclaims any easement or other rights in property

not expressly identified in the written contract. If this issue is directly addressed in the sales contract, the court may not go outside of the four corners of the document for an explanation.

V. The “American Rule” Does Not Preclude an Award of Attorney’s Fees as Damages by a Chancellor in Equity Charged with the Task of Fashioning Complete Relief and Achieving Justice for a Defrauded Party.

Virginia observes the distinction between courts of law and courts of equity, a distinction which for the most part has been abolished in the rest of the United States. 27A Am.Jur. 2d, *Equity* § 4. “In this State we adhere to the *distinction* between actions at *law* and proceedings in *equity* and recognize the difference between the two, particularly as to the adequacy of the remedy to be afforded.” *Cooper v. Greenberg*, 191 Va. 495, 505-05, 61 S.E.2d 875, 879 (1950) (original emphasis supplied) (recognizing the different remedies in equity and law regarding contribution). Courts of equity have the power to devise an unlimited variety of remedies to fit the circumstances of every case and the complex relations of the parties:

In the administration of remedies, an equity court is not bound by the strict rules of the common law, but adapts its relief and molds its decrees to satisfy the requirements of the case. Its purpose is the accomplishment of justice, and it will administer such relief as the exigencies of the case demand. The absence of precedents, or novelty in incident, presents no obstacle to the exercise of its jurisdiction. 19 Am. Jur., *Equity*, § 123, p. 123; 30 C.J.S., *Equity*, § 12, p. 331; *Alexander v. Hillman*, 296 U.S. 222, 56 S.Ct. 204, 80 L.ed. 192; *Chapman v. Sheridan-Wyoming Coal Co.*, 338 U.S. 621, 70 S.Ct. 392, 94 L.ed. 393; *Baker Sand & Gravel Co. v. Rogers P. & H. Co.*, 228 Ala. 612, 154 So. 591, 102 A.L.R. 346. “Equitable remedies . . . are distinguished by their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use. There is in fact no limit to their variety and application; the court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties.” *Turner v. Citizens Bank*, 111 Va. 184, 192, 68 S.E. 407, 409.

First Nat. Exchange Bank of Roanoke v. Hughson, 194 Va. 736, 753-54, 74 S.E.2d 797, 809 (1953) (Buchanan, J., and Hudgins, C.J., concurring).

Courts of equity also have particular jurisdiction in cases like *Bershader* involving actual or constructive fraud and lawsuits seeking equitable title. 7A Michies Juris., *Equity* § 8. “It may be stated as a general rule that equity has the inherent jurisdiction to give relief in cases of fraud.” 8B Michies Juris., *Fraud and Deceit* § 45. For this reason, remedies in fraud actions historically mirror the flexibility of equity and are designed to address the circumstances of each case by restoring the defrauded party to the position it held prior to the fraud.

Precedent existed in Virginia for the granting of attorney’s fees in equity to afford complete relief. In *Heflin v. Heflin*, 177 Va. 385, 395-400, 14 S.E.2d 317, 320-22 (1941), this Court held that equity courts had jurisdiction *prior to the enactment of the divorce statutes* to entertain suits for alimony even though no divorce was sought in order to provide complete relief and a remedy where one did not exist at law, and further ruled that the complainant was entitled to her attorney’s fees incurred related to the matter. In *McKeel v. McKeel*, 185 Va. 108, 116-17, 37 S.E.2d 746, 750-51 (1946), the Court ruled that the appellee wife was entitled to recover the attorney’s fees she had incurred to enforce a foreign decree granting her alimony and support, even though the proceeding was not one for divorce pursuant to which the statute entitled her to recover her legal fees. *See also Alig v. Alig*, 220 Va. 80, 85-86, 255 S.E.2d 494, 498 (1979) (granting attorney’s fees in a contempt proceeding to enforce a foreign support decree because the offending party’s recalcitrance and resistance forced her to employ an attorney to enforce her rights).^{iv}

In *Carswell v. Masterson*, 224 Va. 329, 330, 295 S.E.2d 899, 900 (1982), the petitioner wife moved for an award of attorney’s fees she had incurred in pursuing a contempt proceeding

against her ex-husband. The petitioner argued that courts of equity originated to provide a complete remedy where none existed in a court of law, and have the power to provide complete relief by allowing her to recover her attorney's fees. *Id.* Citing its prior decisions in *Heflin*, *McKeel*, and *Alig*, *supra*, the Court held that it had discretion to award attorney's fees to an aggrieved party incident to a contempt proceeding against the offending party "for acting in *bad faith* or for willful disobedience of its order." *Id.* at 332.

No analysis of the doctrine commonly called the "American Rule" is complete without an understanding of its origins, its rationale, and its exceptions:

Although the traditional American rule ordinarily disfavors the allowance of attorney's fees in the absence of statutory or contractual authorization, federal courts, in the exercise of their equitable powers, may award attorney's fees when the interests of justice so require. Indeed, the power to award such fees "is part of the original authority of the chancellor to do equity in a particular situation," . . . and federal courts do not hesitate to exercise this inherent equitable power whenever "overriding considerations indicate the need for such recovery."

Hall v. Cole, 412 U.S. 1, 4-5 (1973). Instead of limiting the equity court's power to create exceptions, the United States Supreme Court in *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 164 (1939) stated that "[a]s in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility In any event such allowances are appropriate only in exceptional cases and for dominating reasons of justice." The exceptions to the American rule generally arise: (1) from conduct that is found to be in bad faith, *fraudulent*, wanton, willful, vexatious, harassing or oppressive; or (2) where the legal fees confer a substantial benefit on an ascertainable class of people. "The variety of factual circumstances in which this principle [of judicial exception] has been applied indicates that 'dominating reasons of justice' has been the guide to its application."

Local No. 149 International Union, United Automobile, Aircraft and Agricultural Implement Manufacturers of America v. American Brake Shoe Co., 298 F.2d 212, 214 (4th Cir. 1962), *cert. denied*, 369 U.S. 873 (1962).^v

The “American Rule” against granting attorney’s fees has always been subject to exceptions and modifications. *Hiss v. Friedberg*, 201 Va. 572, 577, 112 S.E.2d 871, 875 (1960). *See also* 22 Am.Jur.2d, *Damages* § 613. Attorney’s fees have been awarded to the prevailing parties in actions for malicious prosecution and false imprisonment. *Bershader*, 258 Va. at 92 (citing *Burruss v. Hines*, 94 Va. 413, 420, 26 S.E. 875, 878 (1897) and *Bolton v. Vellines*, 94 Va. 393, 404, 26 S.E. 847, 850 (1897)). In *Hiss v. Friedberg*, 201 Va. at 577-78, the Court recognized that “where a breach of contract has forced the plaintiff to maintain or defend a suit with a third person, he may recover the counsel fees incurred by him in the former suit” There is also an exception where the plaintiff brings a lawsuit that creates a fund which inures to the common benefit of others (*Norris v. Barbour*, 188 Va. 723, 741-42, 51 S.E.2d 334, 342 (1949)), or where a trustee has a good faith basis for defending his trust. *Cooper v. Brodie*, 253 Va. 38, 480 S.E.2d 101 (1997). Virginia has recognized an exception to the “American Rule” based upon bad faith or vexatious or willful or wanton behavior, and to do justice between the parties. *Kemp v. Miller*, 166 Va. 661, 680, 186 S.E. 99, 106 (1936) (recognizing an exception to the rule where injury is wanton or malicious *and exemplary damages are recoverable*). These holdings are consistent with exceptions to the “American Rule” recognized throughout the United States.

The American Rule is not a blanket prohibition against the award of attorneys' fees absent a contractual or statutory provision, it is rather a general rule or guide which must be construed consistently with the court's equitable powers, the needs of justice, and the rule of

complete relief-- *i.e.*, that a plaintiff is entitled to be restored to the position he enjoyed but for the defendant's fraud. That is why the “American Rule” is not violated by the recovery of attorneys’ fees in a fraud case.

This was the specific ruling of the Supreme Court of West Virginia in *Capper v. Gates*, 454 S.E.2d 54, 64-65 (W.Va. 1994) and *Bowling v. Ansted Chrysler-Plymouth Dodge, Inc.*, 425 S.E.2d 144, 150-51 (W.Va. 1992). In *Capper*, 454 S.E.2d at 57-58, the plaintiff landowner sued its surveyor for fraud and professional negligence for failing to inform and concealing from the plaintiff that its land had severe water percolation problems such that the property could not be economically developed as contemplated by the plaintiff. The court held that the plaintiff was entitled to an award of attorney’s fees as damages for fraud based upon the well-established exception to the American Rule where the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *Id.* at 64-65.

In *Bowling*, 425 S.E.2d at 147, the plaintiff auto purchasers sued the defendant dealership for fraud, violation of the Magnusson-Moss Warranty Act and violation of the Consumer Credit Protection Act. The case proceeded solely on the fraud claim, and the jury granted the plaintiffs compensatory damages, *but refused to award punitive damages.* *Id.* at 148. The trial court denied the attorney’s fees since punitive damages were not assessed. *Id.* at 150. The West Virginia Supreme Court reversed this ruling and held that the bad faith exception to the American Rule applied and “may be found in conduct leading to the litigation or in connection with the litigation.” *Id.* (quoting *Hall v. Cole*, 412 U.S. 1, 15). Fraud, by definition, includes an element of bad faith. *Id.* at 151 (quoting *Kuhn v. Chesapeake & Ohio Ry. Co.*, 118 F.2d 400, 405 (4th Cir. 1941)). In reaching this conclusion, the court stated that such acts were oppressive and wanton and should be discouraged. *Id.* The court then cited a string of cases throughout the

United States that have adopted this reasoning, including the United States Court of Appeals for the Eleventh Circuit, United States Court of Appeals for the District of Columbia, United States Court of Appeals for the Fifth Circuit, and various states. *Id.*

In summary, the case authority established the discretion of the Chancellor to award attorney's fees based upon the particular facts of each individual matter, but only in such circumstances where justice and the equitable concept of "complete relief" so demand. In *Bershader*, there was sufficient evidence to support the Chancellor's decision that justice and complete relief could not be obtained absent an award of attorney's fees. The Chancellor properly found that the defendants defrauded the Bershadars, which according to numerous authorities constitutes sufficient "bad faith" to support an award of attorney's fees, and to provide the Bershadars with complete relief.

The facts show that this case was not about a single act of fraud against the Bershadars, but a continuous pattern of fraud practiced against them and anyone else that inquired about purchasing property in the subdivision or the status of "Preserved Land". Separate and distinct misrepresentations were found to have been made related to Outlot A (also designated as "Preserved Land") when *that property was not even owned by the defendants*. That such acts are oppressive, wanton and should be discouraged is beyond question. For their part, the Bershadars were the only ones willing and able to spend the time, and financial resources required to challenge a substantial developer to expose these misrepresentations, even though the relief sought was primarily equitable and any monetary damages insubstantial in relationship to the costs of the lawsuit. Under the circumstances of this case, equity and justice were well-served by requiring the defendants to pay the Bershadars' attorney's fees.

VI. Conclusion: Attorneys Advising Sellers or Purchasers of Real Estate in Virginia Should be Aware That:

- *Bershader* discusses many of the causes of action and remedies available to home purchasers who have been orally promised or fraudulently misled to believe that they are receiving rights in surrounding properties which they are not purchasing^{vi}.
- Sellers of real estate are on notice that they cannot verbally mislead or make promises to potential purchasers in order to make a sale and avoid being bound by these remarks simply because they are not in writing. The Statute of Frauds and the doctrine of *caveat emptor* afford no protection to sellers in such instances.
- The use of undefined "sales" terms (*e.g.*, "Premium Lot") is an invitation to present oral and documentary evidence beyond the sales contract regardless of the existence of a merger clause.
- Purchasers may acquire an enforceable, transferrable, negative restrictive easement by principles of estoppel, despite the absence of express representations granting an easement in the sales contract or deed.
- Depending upon the circumstances of the case, *Bershader* recognizes the power of a court of equity to award attorney's fees to a defrauded party to give "complete relief," even where the evidence may not warrant punitive damages.
- Clients who own, develop or sell real estate should be advised to refrain from making representations regarding the suitability of property for development, even where such statements are founded upon scientific studies or tests. As an additional preventive measure, your sales contract should require, if it does not already, that purchasers disclaim reliance on such statements.

- Such preventive measures should also be employed to avoid parol evidence regarding ambiguous definitions of property rights. There should be a disclaimer of any easement or other rights in property not specifically identified in the sales contract or deed. Parol evidence is not admissible if it *contradicts* the terms of the sales contract.

ENDNOTES

i Fraud can be founded upon a promise where there is no intent to keep the promise at the time it is made. *Boykin v. Hermitage Realty*, 234 Va. 26, 29, 360 S.E.2d 177, 178-79 (1987). However, this is extremely difficult to prove since the evidence must be clear and convincing, and is typically circumstantial.

ii Oddly, the *Bershader* defendants relied upon the lower court's decision in *Boykin v. Hermitage Realty*, 234 Va. 26, 29, 360 S.E.2d 177, 178-79 (1987) to support their position regarding any promises they made not to develop Outlot B, even though the Virginia Supreme Court reversed the trial court. In *Boykin*, 234 Va. at 28, a defendant real estate agent working for the developer, in reply to express inquiries, represented to plaintiff purchasers that certain woodlands behind their Lots *would remain undeveloped*. A map of the development on the wall of the sales office showed only woodlands and reinforced the agents' representations. Relying upon these representations, the plaintiffs purchased condominiums and paid additional compensation for the privacy of the trees behind their homes. Several months later, the developer constructed a playground in the woodlands. *Id.* Reversing the trial court and finding the defendant liable for fraudulent inducement, the Virginia Supreme Court stated that the agent was aware when she made the promises that the developer had promised to provide playground areas and had seen the original plan of development that included playgrounds in the exact same woodland. *Id.* at 30. *Boykin* was inapposite to *Bershader* where the misrepresentations were statements of fact, not promises. Moreover, while there was no specific writing in *Bershader* revealing the defendants' plan to develop Outlot B at the time of their misstatements, there was substantial circumstantial evidence that the defendants always intended to develop Outlot B.

iii Virginia law recognizes the following easements: (1) express easements; (2) easements by prescription; (3) easements by necessity; (4) easements implied from a common scheme of development; (5) easements implied from prior use; and (6) easements by estoppel. *See, e.g., Russakoff v. Scruggs*, 241

Va. 135, 138, 400 S.E.2d 529, 531 (1991); *Minner v. City of Lynchburg*, 204 Va. 180, 129 S.E.2d 673 (1963). The elements of proof for each of these easements is different, although parties at times confuse them. *Carter v. County of Hanover*, 255 Va. 160, 168, 496 S.E.2d 42, 46 (1998) (County failed to recognize that elements of an easement by necessity are different than, and not to be confused with, those of an easement implied from prior use). For example, in *Bershader*, analysis of the intent of the parties and whether the easement was necessary for their beneficial use and enjoyment of the property conveyed was irrelevant. Necessity of beneficial use may be an element of proof related to an easement implied from prior use (*See, e.g., Carter v. County of Hanover*, 255 Va. 160, 168, 496 S.E.2d. 42, 46 (1998)) and intent of the parties may require consideration related to an easement implied from the common scheme of development (see *Minner v. City of Lynchburg*, 204 Va. 180, 129 S.E.2d 673 (1963)), but *neither* is an element of an easement by estoppel.

iv The first divorce statutes were enacted in 1827 (*Heflin v. Heflin*, *supra*), and codified the common law practice of granting attorney's fees based upon the equities of the parties. E. Meade, *Lile's Equity Pleading and Practice*, § 388, fn. 10a. Va. Code § 20-99 provides that costs may be awarded to either party as equity and justice may require.

v An exception to the American Rule has been recognized where a party has to defend his title to certain property against baseless and vexatious litigation. *See Guardian Trust Co. v. Kansas City Southern Ry. Co.*, 28 F.2d 233 (8th Cir. 1928), *rev'd on other grounds*, 281 U.S. 1 (1930). Relief may be necessary where an equitable damage award is premised on a finding that "the wrongdoers's actions were unconscionable, fraudulent, willful, in bad faith, vexatious, or exceptional." *Taussing v. Wellington Fund, Inc.*, 187 F.Supp. 179 (D.Del. 1960), *aff'd*, 313 F.2d 472 (3d Cir. 1963). The United States Supreme Court in *Vaughn v. Atkinson*, 369 U.S. 527 (1962) created an exception where the defendant's consistent refusal to discuss the plaintiff's claim or admit liability forced the plaintiff to hire a lawyer to obtain what was clearly owed to him under laws that were centuries old. In *Mills v. Electric Auto-Lite*

Co., 396 U.S. 375, 392-94 (1970), the United States Supreme Court held that the common fund doctrine may apply where no class action has been brought and no particular monetary fund is created, as long as the litigation confers a substantial benefit on an ascertainable class. *See also Local No. 149 International Union, United Automobile, Aircraft and Agricultural Implement Manufacturers of America v. American Brake Shoe Co.*, 298 F.2d 212, 215 (4th Cir. 1962), *cert. denied*, 369 U.S. 873 (1962) (holding that “[i]n actions for unfair competition attorney’s fees are assessed as an element of damages where the wrongdoer’s action is unconscionable, fraudulent, willful, in bad faith, vexatious or exceptional.”); *Carter Products, Inc. v. Colgate-Palmolive Co.*, 214 F.Supp. 383, 414 (D.Md. 1963).

vi The Amended Bill of Complaint filed in *Bershader* also set forth a claim for violation of the Virginia Consumer Protection Act ("Act"). However, this claim was dismissed prior to trial on a plea in bar to the statute of limitations set forth in the Act. The Circuit Court found that the statutory action accrued at the time of the transaction and would not apply the discovery rule otherwise applicable to actions for fraud. The Virginia Supreme Court declined to grant certiorari on the cross-errors assigned to this ruling.