

254  
VA  
449

IN THE  
**Supreme Court of Virginia**  
AT RICHMOND

UNIVERSITY  
LAW LIBRARY  
APR 24 1997  
U.S. DEPOSITORY  
CLERK: 06308  
SUPREME COURT OF VIRGINIA  
RECEIVED  
JUL 21 1997  
RICHMOND, VIRGINIA

RECORD NOS. 970069 and 970071

**GEORGE ATKISSON, et al.,**

v.

**WEXFORD ASSOCIATES, INC. et al.,**

*Appellants/Cross-Appellees,*

*Appellees/Cross-Appellants.*

**CONSOLIDATED JOINT APPENDIX  
VOLUME II**

Bernard E. Goodman, Esquire  
Nancy DiMauro Greene, Esquire  
GOODMAN, GARY &  
LICKSTEIN, PC  
8500 Leesburg Pike, Suite 7000  
Vienna, VA 22182  
(703) 848-2828

Scott E. Snyder, Esquire  
ANDERSON & CORRIE  
12600 Fair Lakes Circle  
Suite 220  
Fairfax, VA 22033  
(703) 222-2200

*Counsel for Wexford Associates,  
Inc., James E. Henry, Susan H.  
Henry, Katherine Kowalczyk,  
Patrick G. Deasy, James M. Deasy,  
Charles E. Andrews, Jean S.  
Andrews, Brian T. McVay, Elizabeth  
J. McVay, M. Jack Wilkenfeld,  
Joanne Wildenfeld, Mark Eckman  
and Vivian P. Datoff*

*Counsel for George Atkisson  
and Carlotta T. Atkisson*

*Additional Counsel Listed on Inside Cover*



**John A. C. Keith, Esquire**  
**David J. Gogal, Esquire**  
**BLANKINGSHIP & KEITH, P.C.**  
**4020 University Drive**  
**Suite 312**  
**Fairfax, VA 22030**  
**(703) 691-1235**

*Counsel for David D. O'Brien  
and Jane B. O'Brien*

**William L. Stauffer, Esquire**  
**Adam M. Spence, Esquire**  
**STAUFFER, MANNIX, ROMMEL,**  
**DECKER & DULANY, LLC**  
**8300 Greensboro Drive**  
**Suite 1000**  
**McLean, VA 22102**  
**(703) 506-4023**

*Counsel for Thomas Healy  
and Victoria Healy*

**David Bobzien, County Attorney**  
**Jan L. Brodie, Assistant**  
**County Attorney**  
**COUNTY ATTORNEY'S OFFICE**  
**12000 Government Center Parkway**  
**Suite 549**  
**Fairfax, VA 22035-0064**  
**(703) 324-2421**

*Counsel for Fairfax County  
Park Authority*



**TABLE OF CONTENTS**  
**Volume I**

**Appendix Page**

Bill of Complaint (with attachments), filed July 18, 1986 .....	1
Amended Bill of Complaint, filed January 29, 1988 .....	25
Final Order, entered March 10, 1993 .....	61
Mandate from the Supreme Court of Virginia, dated September 8, 1993 and filed September 10, 1993 .....	68
Mandate from the Supreme Court of Virginia, dated August 19, 1993 and filed December 27, 1993 .....	70
Mandate from the Supreme Court of Virginia, dated September 17, 1993 and filed December 27, 1993 .....	71
Mandate from the Supreme Court of Virginia, dated June 10, 1994 and filed December 21, 1994 .....	72
Opinion by the Honorable Leroy R. Hassell, dated June 10, 1994 and filed December 21, 1994 .....	75
Mandate from the Supreme Court of Virginia, dated August 1, 1994 and filed December 21, 1994 .....	84
Decree, entered February 10, 1995 .....	85
Order, entered March 7, 1995 .....	89
Motion by Special appearance to Advise Court of Lack of Jurisdiction Over Lot 3 and Owners of Lot 3, filed May 23, 1995 .....	91
Petition to Intervene in Order to Request the Court Vacate Prior Judgments and Set a New Trial, filed July 28, 1995 .....	96



<b>Memorandum in Support of Petition to Intervene in Order to Request the Court Vacate Prior Judgments and Set a New Trial, filed August 1, 1995 .....</b>	<b>102</b>
<b>Order, entered August 3, 1995 .....</b>	<b>108</b>
<b>Intervenors David D. O'Brien's and Jane B. O'Brien's Motion and Memorandum in Support of Motion to Declare Prior Judgments Void Due to Lack of Necessary Parties, filed December 1, 1995 .....</b>	<b>109</b>
<b>Intervenors David D. O'Brien's and Jane B. O'Brien's Motion to Dismiss for Failure to Join Indispensable Parties, filed December 1, 1995 .....</b>	<b>111</b>
<b>Intervenors David D. O'Brien's and Jane B. O'Brien's Memorandum in Support of Motion to Dismiss for Failure to Join Indispensable Parties with attachments, filed December 1, 1995 .....</b>	<b>113</b>
<b>Motion in Limine, filed December 4, 1995 .....</b>	<b>123</b>
<b>Motion and Memorandum in Support of Motion to Declare Prior Judgment Void Due to Lack of Necessary Parties (with attachment), filed December 4, 1995 .....</b>	<b>125</b>
<b>Motion and Memorandum in Support of Motion to Determine if Alleged Easement is Terminated as a Matter of Law at Bird Road, filed December 4, 1995 .....</b>	<b>137</b>
<b>Motion and Memorandum in Support of Motion to Compel Plaintiffs to Join Additional Party Plaintiffs or Dismiss the Case, filed December 4, 1995 .....</b>	<b>145</b>
<b>Motion for Dismissal With Prejudice of Improper Parties, filed December 4, 1995 .....</b>	<b>151</b>



Opposition of Plaintiffs, George Atkisson and Carlotta T. Atkisson, to Motion to Compel to Join Additional Party Plaintiffs or Dismiss the Case, filed December 15, 1995 .....	154
Opposition of Plaintiffs, George Atkisson and Carlotta T. Atkisson, to Motion of Intervenors, David O'Brien and Jane O'Brien for Failure to Dismiss for Failure to Join Indispensable Parties, filed December 15, 1995 .....	157
Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendants' Motion to Declare Prior Judgment Void, filed December 15, 1995 .....	161
Opposition of Plaintiffs, George Atkisson and Carlotta T. Atkisson, to Motion to Determine if the Atkisson Easement is Terminated as a Matter of Law at Bird Road, filed December 15, 1995 .....	181
Order, entered January 5, 1996 .....	186
Order, entered January 5, 1996 .....	189
Order, February 16, 1996 .....	191
Order, entered February 16, 1996 .....	194
Fourth Amended Bill of Complaint, filed February 28, 1996 .....	195
Order of Publication, entered February 28, 1996 .....	212
Opinion Letter, dated April 4, 1996 .....	214
Memorandum of Lis Pendens (undated) .....	224
Answer and Grounds of Defense for Defendants Raymond Cavanagh and Eileen Cavanagh, filed April 23, 1996 .....	227



<b>Motion and Memorandum in Support of Motion for Reconsideration, filed April 26, 1996</b>	<b>235</b>
<b>Intervenors David D. O'Brien and Jane B. O'Brien's Motion for Clarification and for Reconsideration, filed April 26, 1996</b>	<b>246</b>
<b>Order, entered May 6, 1996</b>	<b>248</b>
<b>Order, entered May 7, 1996</b>	<b>251</b>
<b>Decree, entered July 12, 1996</b>	<b>253</b>
<b>Order, entered August 2, 1996</b>	<b>257</b>
<b>Order, entered August 2, 1996</b>	<b>259</b>
<b>Notice of Entry of Appearance, filed August 26, 1996</b>	<b>261</b>
<b>Agreed Order, entered August 26, 1996</b>	<b>263</b>
<b>Pretrial Order, entered August 26, 1996</b>	<b>265</b>
<b>Stipulations, entered in Open Court on August 26, 1996</b>	<b>267</b>
<b>Answer and Grounds of Defense for Defendant David D. O'Brien and Jane B. O'Brien, filed September 11, 1996</b>	<b>271</b>
<b>Answer and Grounds of Defense for Defendant Donald D. Hall and Joan P. Hall, filed September 11, 1996</b>	<b>280</b>
<b>Defendants' Thomas and Victoria Healy's Answer and Grounds of Defense, filed September 11, 1996</b>	<b>289</b>
<b>Agreed Order, entered September 12, 1996</b>	<b>299</b>



<b>Intervenors' Trial Brief, filed September 13, 1996 .....</b>	<b>302</b>
<b>Defendants' Thomas and Victoria Healy's Trial Brief, filed September 16, 1996 .....</b>	<b>327</b>
<b>Defendant Wexford Associates, Inc., the Individual Defendant's, Raymond Cavanagh's and Eileen Cavanagh's and Donald D. Hall's and Joan P. Hall's Trial Memorandum (with attachments), filed September 16, 1996 .....</b>	<b>329</b>
<b>Defendant Fairfax County Park Authority's Trial Brief, filed September 17, 1996 .....</b>	<b>344</b>
<b>Intervenors' Trial Memorandum on Issue of Location, filed in Open Court on September 18, 1996 .....</b>	<b>346</b>
<b>Final Decree, entered October 11, 1996 .....</b>	<b>350</b>
<b>Notice of Appeal (Plaintiffs), filed November 8, 1996 .....</b>	<b>362</b>
<b>Notice of Appeal (Plaintiffs), filed November 8, 1996 .....</b>	<b>365</b>
<b>Notice of Appeal (Defendants), filed November 8, 1996 .....</b>	<b>368</b>
<b>Notice Pursuant to Rule 5:11(B) of the Rules of the Supreme Court of Virginia, filed December 10, 1996 .....</b>	<b>370</b>
<b>Notice Pursuant to Rule 5:11(B) of the Rules of the Supreme Court of Virginia, filed December 16, 1996 .....</b>	<b>373</b>
<b>Fourth Amended Bill of Complaint (telecopied version), served February 27, 1996 .....</b>	<b>375</b>



**TABLE OF CONTENTS**  
**VOLUME 2**

**Appendix Page**

Transcript of Proceedings before the Honorable Thomas A. Fortkort on January 7, 1993 .....	396
Testimony of Jack B. Conner .....	400
Transcript of Proceedings before the Honorable M. Langhorne Keith on May 25, 1995 .....	403
Transcript of Proceedings before the Honorable Jane M. Roush on August 3, 1995 .....	412
Testimony of David O'Brien .....	415
Transcript of Proceedings before the Honorable Jane M. Roush on December 28, 1995 .....	435
Transcript of Proceedings before the Honorable Jane M. Roush on September 16, 1996 .....	466
Testimony of Robert J. Simpson .....	496
Testimony of George Atkisson .....	548
Transcript of Proceedings before the Honorable Jane M. Roush on September 17, 1996 .....	586
Testimony of Mark Albanese .....	598
Testimony of Pedro Capestany .....	626
Defendant O'Brien's Motion to Strike .....	632
Defendant Healy's Motion to Strike .....	648



Defendant Park Authority's Motion to Strike . . . . .	649
Defendant Cavanagh's Motion to Strike . . . . .	649
Testimony of Richard Sacchi . . . . .	686
Testimony of Herman Courson . . . . .	700
Testimony of George Atkisson (former testimony read into evidence) . . . . .	748
Testimony of George Atkisson . . . . .	756



**TABLE OF CONTENTS**  
**VOLUME 3**

**Appendix Page**

Transcript of Proceedings before the Honorable Jane M. Roush on September 18, 1996 . . . . .	772
---	-----

Transcript of the Honorable Jane M. Roush Ruling in Open Court on September 18, 1996 . . . . .	841
---	-----

**TRIAL EXHIBITS:**

Intervenors' Exhibits, admitted August 3, 1995

Exhibit 1 - Policy of Title Insurance . . . . .	873
---	-----

Exhibit 2 - Letter . . . . .	877
------------------------------	-----

Plaintiffs' Exhibits, admitted September 16, 1996

Exhibit AAA - Plat . . . . .	879
------------------------------	-----

Exhibit ZZZ - Plat . . . . .	880
------------------------------	-----

Defendants' Exhibits, admitted September 17, 1996

Exhibits 2A-F - Maps . . . . .	881
--------------------------------	-----

Exhibit 3 - Indenture . . . . .	882
---------------------------------	-----

Exhibit 4 - 1892 Deed . . . . .	888
---------------------------------	-----

Exhibit 5 - 1896 Deed . . . . .	892
---------------------------------	-----

Exhibit 6 - 1978 Deed . . . . .	904
---------------------------------	-----

Exhibit 9 - Record Plat .....	914
Exhibit 11C - Plat of Graves .....	915
Exhibit 11D - Plat .....	916
Exhibit 12 - 1995 Survey .....	917
Exhibit 14 - Plats Hunter Mill .....	918
Exhibit 15 - Plats Hunter Mill .....	919
Exhibit 16 - Plats Hunter Mill Prelim. Plan .....	920
Exhibit 17 - Plats Hunter Mill Sanitary Sewer Plan .....	921
Exhibit 18 - Correspondence .....	922
Exhibit 25 - Partition Easement .....	923
Exhibit 26 - Double Cert. Tax Map .....	924
Exhibit 27 - Tax Map .....	925
Exhibit 28 - Deposition of Carlotta T. Atkisson .....	926
Exhibit 29 - O'Brien's Photos with Pool .....	950
Exhibit 31 - Deposition of George B. Atkisson .....	952
Assignments of Error (970069) .....	956
Assignments of Error (970071) .....	957



970064  
970071

930819

93 MAR 25 AM 8:40

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

-----X

GEORGE ATKINSON, :

Plaintiff, :

versus, :

WEXFORD ASSOCIATES, INC., :

et al, :

Defendant. :

-----X

CLERK  
SUPREME COURT OF VIRGINIA  
**RECEIVED**  
JAN 14 1993  
RICHMOND, VIRGINIA

IN CHANCERY NO. 97823

CLERK  
SUPREME COURT OF VIRGINIA  
**RECEIVED**  
MAY 28 1993  
RICHMOND, VIRGINIA

Fairfax, Virginia

Thursday, January 7, 1993

The above-entitled action came on to be heard before the Honorable Thomas A. Fortkort, a Judge in and for the Circuit Court of Fairfax County, Fairfax County Judicial Center, 4110 Chain Bridge Road, Fairfax, Virginia 22030, beginning at approximately 10:10 o'clock a.m., before Lisa S. Stablier, a Certified Verbatim Court Reporter.

\* \* \* \* \*

LS93-04

296



**Anita B. Glover & Associates, Ltd.**  
10521 West Drive  
Fairfax, Virginia 22030

**(703) 591-3004**

1 APPEARANCES:

2 For the Plaintiff:

3 SCOTT E. SNYDER, ESQUIRE  
 4 QUENTIN R. CORRIE, ESQUIRE  
 5 Anderson & Corrie  
 12450 Fair Lakes Circle, Suite 370  
 Fairfax, Virginia 22033

6 For the Fairfax County Park Authority:

7 RUTH E. SOULIER, ESQUIRE  
 8 Assistant County Attorney  
 9 County of Fairfax  
 12000 Government Center Parkway  
 Suite 549  
 Fairfax, Virginia 22035

10 For Wexford Associates, Inc., et al:

11 BERNARD E. GOODMAN, ESQUIRE  
 12 DANIEL J. O'CONNELL, ESQUIRE  
 13 Goodman and Associates Law Offices  
 Suite 800  
 8245 Boone Boulevard  
 14 Vienna, Virginia 22182

15 C O N T E N T S :

16	17	18	19	20	21	22	23
	<u>WITNESSES</u>		<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	
	JACK B. CONNER	19	31	44			
		98	101				
	TIMOTHY D. SCOTT	47	59				
	THOMAS REED	64	81				
	GEORGE ATKINSON	105					

297





EXHIBITS :

	<u>PAGE</u>
Plaintiff's Exhibit No. 1 --Form appraisal for Lot 2	28
Plaintiff's Exhibit No. 2 --Form appraisal for Lot 3	29
Plaintiff's Exhibit No. 3 --Form appraisal for Lot 38	29
Plaintiff's Exhibit No. 4 --Form appraisal for Lot 25	30
Plaintiff's Exhibit No. 5 --Photographs of comparable single-family dwellings; photographs of Lots 2, 3, 25, and 38	31
Plaintiff's Exhibit No. 6 --CV of Jack Conner	32
Wexford Exhibit No. 32 --Deed of easement	34
Wexford Exhibit No. 33 --Resume' of Thomas Reed	63
Wexford Exhibit No. 34 --Letter from Thomas Reed to Bernard Goodman	63



1 it's appropriate.

2 The court also ruled very clearly that it  
3 would not order the removal of obstructions, and they wish to  
4 contest that. I believe, Your Honor, that there has been a  
5 ruling on that point. I can tell you, as defendants'  
6 counsel, I have taken exceptions to many of your rulings, and  
7 that's their remedy at this point.

8 Also, I would tell the court, if it's  
9 going to listen to any damages with respect to replacement  
10 cost, I just found out that lot three, which was owned by  
11 Mr. and Mrs. Kowalczyk when this suit started, is now owned  
12 by Mr. and Mrs. O'Brien. They bought the property in June of  
13 last year.

14 That house has a swimming pool on it, and  
15 that easement goes right through the swimming pool. Mr. and  
16 Mrs. O'Brien, I found out last night, don't even know about  
17 this lawsuit. Well, maybe they have constructive notice, but  
18 in my written communications with the Kowalczyks since  
19 O'Brien purchased the property, nobody bothered to tell me,  
20 we don't own that house anymore. I'm just reporting that to  
21 the court for it to do as it chooses.

22 Thank you, Your Honor.

23 THE COURT: Thank you.







1 THE COURT: The value of the cemetery is  
2 irrelevant to the inquiry.

3 MR. GOODMAN: If the court will please  
4 note my objection. The only reason the question was asked is  
5 that we are going to produce evidence with respect to when  
6 you value an easement, you have to take into consideration  
7 what it's serving. I just wanted to elicit a response, but  
8 note the objection and we'll go on.

9 THE COURT: Okay.

10 BY MR. GOODMAN:

11 Q. Mr. Conner, you have got a total take for  
12 four houses. If the easement was to cross those properties  
13 in a way so as not to impact in the dwelling, would your  
14 opinion be different?

15 A. It's not up to me to make that  
16 determination. When we do this type of work, we are told  
17 what is being done. In the case with VDOT, VDOT makes the  
18 determination whether it's going to be a total take or a  
19 partial take. It's not up to me to decide that.

20 Q. Mr. Conner, I'm just asking you a  
21 question as an expert. Let's focus on lot number three, with  
22 the swimming pool. The easement goes through the swimming  
23 pool, right?

400



1 A. That's correct.

2 Q. Is the swimming pool attached to the  
3 house or is it inside the house?

4 A. No. It's directly behind the house.

5 Q. So you have determined that since the  
6 easement goes through the swimming pool, that that destroys  
7 the use of the house, correct?

8 A. No, I didn't say it destroys the use of  
9 the house. I said, in my opinion, based on my past  
10 experiences, VDOT would conclude that that would be a total  
11 take.

12 Q. Did you consider the fact, in your  
13 appraisal of lot three, that David and Jane O'Brien purchased  
14 that property on June 16th, 1992, for \$620,000?

15 A. No.

16 Q. I would like you to consider that, if you  
17 would, sir. If they paid \$620,000 for the house just this  
18 past June, do you think that the easement, as found by this  
19 court, has had any impact on the market value of that  
20 property?

21 MR. SNYDER: Objection, Your Honor. He  
22 has already stated that these people had no knowledge of the  
23 easement. I don't think there is any foundation for that





1 question at all. It's not relevant, because the facts, as I  
2 understand them, are that they didn't know about it.

3 MR. GOODMAN: Your Honor, I'm sure  
4 plaintiff is going to argue that there was constructive  
5 notice by virtue of the lis pendens on the property.

6 THE COURT: There's no doubt about that,  
7 but that doesn't necessarily mean that these people, in their  
8 bargain, knew about it.

9 BY MR. GOODMAN:

10 Q. If, Mr. Conner, somebody paid \$620,000  
11 for lot three in June, is it your opinion that this easement  
12 had any impact on their bargain?

13 MR. SNYDER: Objection. Again, this is  
14 pure speculation. It's not relevant to the actual facts that  
15 we have.

16 MR. GOODMAN: He can give value opinions,  
17 Your Honor.

18 THE COURT: Well, what it demonstrates to  
19 me, Mr. Goodman, is that his estimate of \$615,000 is  
20 reasonably accurate.

21 MR. GOODMAN: For market value.

22 THE COURT: Right.

23 MR. GOODMAN: I'm just trying to -- I



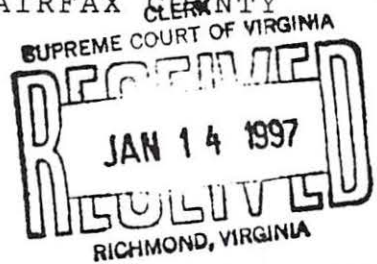
970069

970071

filed in  
open court  
11/1/95  
JMR/dm

1 VIRGINIA:

2 IN THE CIRCUIT COURT OF FAIRFAX COUNTY



CHANCERY NO: 097823

3  
4 GEORGE ATKINSON, et al

5 Plaintiff,

6 -vs-

7 WEXFORD ASSOCIATES, INC., et al,

8 Defendants

9 Thursday, May 25, 1995

10 Fairfax, Virginia

11 The above-entitled matter came on for  
12 hearing before THE HONORABLE LANGHORNE M. KEITH,  
13 Judge, in Courtroom 5D, commencing at 10:40 o'clock  
14 a.m, the proceedings being reported in stenotype by  
15 Jerome T. Mattingly and transcribed under his  
16 direction.

17 - - -

18  
19  
20  
21  
22  
23  
MATTINGLY REPORTING  
(703) 321-8838

## 1 APPEARANCES:

2 On Behalf of the Plaintiff:

3 SCOTT E. SNYDER, ATTORNEY AT LAW  
4 Anderson & Corrie  
5 12450 Fair Lakes Circle.  
6 Suite 370  
7 Fairfax, Virginia 22033

8 On Behalf of Defendant Wexford Associates:

9 BERNARD E. GOODMAN, ATTORNEY AT LAW  
10 Goodman, Gary & Lickstein  
11 8500 Leesburg Pike  
12 Suite 7000  
13 Vienna, Virginia 22182

14 On Behalf of the O'Brien's:

15 DAVID J. GOGAL, ATTORNEY AT LAW  
16 Blankenship & Keith  
17 4020 University Drive  
18 Suite 312  
19 Fairfax, Virginia 22030

20 - - -



## INDEX

Testimony of:	Plaintiff	Defendant
---------------	-----------	-----------

None		
------	--	--

- - -

1 have updated the title search to make sure that we got  
2 the necessary parties. But I refer Your Honor to.

3 THE COURT: Why wasn't a lis pendens filed  
4 on Lot 3, when they were filed on all of the rest of  
5 them?

6 MR. SNYDER: Well, a lis pendens is to put  
7 people on notice of something that wouldn't otherwise  
8 be in the chain of title. The 1892 deed is in their  
9 chain of title. The 1978 deed of George Atkinson is  
10 in their chain of title.

11 If you were to go back to the transcripts,  
12 both plaintiff and defendants submitted chains of  
13 title on behalf of everybody. And those are the  
14 binders that were put together by the defendants and  
15 they included the 1892 deed and the 1978 deed. That  
16 is part of their chain of title.

17 Now, I could not find a Virginia case  
18 directly on point, but I did find a West Virginia --

19 THE COURT: If you're saying only Wexford  
20 has been ordered to do this, suppose there is an  
21 obstruction, let's use an easier lot, on Lot 4, and  
22 Wexford goes to the owner of Lot 4, and says "I'm here  
23 to remove the obstruction." And the owner of Lot 4,

1 says, "I'm not going to let you do it." Where are we  
2 then? If only Wexford is required to operate. Aren't  
3 all these lot owners, having been made parties to the  
4 suit, aren't they going to going to be required to let  
5 Wexford come on and do what they need to do?

6 MR. SNYDER: If they did not, we would have  
7 to do at that point is to show file a rule to show  
8 cause against them.

9 THE COURT: You just told me that they  
10 weren't ordered to do anything.

11 MR. SNYDER: They're ordered to -- they're  
12 going to have to let the Wexfords come in to do  
13 whatever they need to do. The fact of, I mean --

14 THE COURT: That is where I get the problem.  
15 The biggest problem is the swimming pool. And we  
16 haven't got the O'Briens as a party to this suit. How  
17 is Wexford going to do anything on Lot 3?

18 MR. SNYDER: Well, Your Honor, the O'Briens  
19 have no right to obstruct the easement.

20 THE COURT: Aren't you going to have to  
21 bring a separate lawsuit against the O'Briens at this  
22 time, if you want that easement to be unobstructed.

23 MR. SNYDER: By them?





1 THE COURT: Yes. Or by anybody.

2 MR. SNYDER: My understanding of what the  
3 Virginia Supreme Court has ruled was that the effect  
4 of the 1892 deed and the 1978 deed was that if the  
5 Atkinsons have a property right that dates back to  
6 1892.

7 THE COURT: Right.

8 MR. SNYDER: So that is res judicata. So if  
9 the court ruled, I have to file a separate lawsuit,  
10 against O'Brien, all I would do is show O'Brien is on  
11 this property, there's an obstruction, it has to be  
12 removed pursuant to the order of this court.

13 But, that property right allows  
14 Mr. Atkinson, whether the O'Briens are party to this  
15 action or not, the easement which they took their  
16 property subject to allows him access to their  
17 property.

18 THE COURT: But wouldn't they be able to  
19 come in and rechallenge everything that the defendants  
20 challenged?

21 MR. SNYDER: I think only if you found that  
22 they were necessary parties.

23 THE COURT: All right.



\*      \*      \*

1      them when they transferred this property.      \*

2                    MR. GOODMAN:    Correct.

3                    THE COURT:    What we certainly know is the  
4      present owners of the property are not a party to the  
5      lawsuit.

6                    MR. GOODMAN:    Yes, sir.

7                    THE COURT:    And I'm not persuaded that you  
8      can take the kind of actions that are going to be  
9      required on Lot 3 without them being before the court.  
10     I mean, I can't order the O'Briens to do anything.    I  
11     think I could order Wexford to take whatever steps  
12     necessary to get that obstruction out of there.    I  
13     mean, they might have to file suit against the  
14     O'Briens to enforce the easement.    Then the O'Briens,  
15     I presume, are going to have a lawsuit against the  
16     Kowalczyks.    It looks like another significant problem  
17     in this already significant litigation.

18                   MR. GOODMAN:    If I may state for the court,  
19     Mr. Kowalczyks is deceased.    He was a murder victim in  
20     Vienna a couple of years ago.    Mrs. Kowalczyks is out  
21     of the area.    I don't know where she is.    I'm told  
22     that Mr. Kowalczyks' estate is in Fairfax County and  
23     it's still open.      \*      \*      \*



1 going to have to somehow force --

2 THE COURT: Presumably, your client is going  
3 to resist the enforcement.

4 MR. GOGAL: I understand that. But I don't  
5 know how Mr. Atkinson -- the proper party to do that,  
6 would be Mr. Atkinson in a new action against us in  
7 which we could fully litigate all of the issues. We  
8 never had a chance to litigate. And we would then  
9 take a position in that case that we're not subject to  
10 it, based on the fact that they never filed the lis  
11 pendens. It's not clear from the record.

12 THE COURT: The failure to file a lis  
13 pendens, doesn't extinguish an express easement in the  
14 land records.

15 MR. GOGAL: It may depend -- my concern,  
16 Your Honor, it may not be clear in the land record  
17 that there is an express easement. If there is one,  
18 the location may not be clear. If it took a legal  
19 action to enforce it, and that legal action was  
20 pending, our clients were not noticed. I think that  
21 we have an argument that we may have purchased that  
22 property without being subject to that easement.

23 THE COURT: Presumably you will have an



1 opportunity to argue that. But unless you want to  
2 enter an appearance now, so you can argue it.

3 MR. GOGAL: No. The only point I want to  
4 make is, I do believe that we're a necessary party.  
5 And I do believe that if for any reason, it's because  
6 their failure to file a lis pendens made us a  
7 necessary party. In fact, if they had filed the lis  
8 pendens and they had the proper parties before the  
9 court, if there were subsequent conveyances, those  
10 parties would have been subject to it, any decision of  
11 the court. We were never in that situation. If after  
12 the lis pendens was filed, they realized there was  
13 conveyances and we weren't subject to it, they could  
14 have brought us in. They were aware of that in the  
15 course of the litigation, they did nothing about it.

16 The failure of the necessary party means  
17 that these judgments very well may be void, Your  
18 Honor. And I raise that issue because I think that it  
19 is based on precedence that I have reviewed that  
20 without us in the litigation, as a necessary party,  
21 this suit to establish, locate and enforce an  
22 easement, you know, any of these judgments to date are  
23 void. And I'm very concerned about that. And that is

970069

970071

1

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

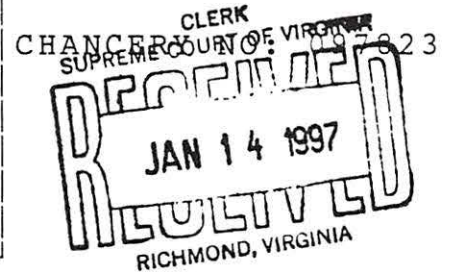
GEORGE ATKISSON, et al

Plaintiff,

-vs-

WEXFORD ASSOCIATES, INC., et al,

Defendants



Thursday, August 3, 1995

Fairfax, Virginia

The above-entitled matter came on for hearing before THE HONORABLE JANE MARUM ROUSCH, Judge, commencing at 10:00 o'clock a.m, the proceedings being reported in stenotype by Jerome T. Mattingly and transcribed under his direction.

- - -

ORIGINAL

MATTINGLY REPORTING  
(703) 321-8838

## 1 APPEARANCES:

2 On Behalf of the Plaintiff:

3 SCOTT E. SNYDER, ATTORNEY AT LAW  
4 &  
5 PAMELA SHAW, ATTORNEY AT LAW  
6 Anderson & Corrie  
7 12450 Fair Lakes Circle  
8 Suite 370  
9 Fairfax, Virginia 22033

7 On Behalf of Defendant Wexford Associates:

8 BERNARD E. GOODMAN, ATTORNEY AT LAW  
9 Goodman, Gary & Lickstein  
10 8500 Leesburg Pike  
11 Suite 7000  
12 Vienna, Virginia 22182

12 On Behalf of the O'Brien's:

13 DAVID J. GOGAL, ATTORNEY AT LAW  
14 Blankenship & Keith  
15 4020 University Drive  
16 Suite 312  
17 Fairfax, Virginia 22030

17 - - -



## INDEX

Testimony of:	Plaintiff	Defendant
DAVID O'BRIEN	60	54

## EXHIBITS

		Marked	Admitted
No. 1,	Title Policy	57	58
No. 2,	2-24-95 Letter	59	59

- - -

1 first witness.

2 MR. GOGAL: Thank you, Your Honor. I call  
3 Mr. David O'Brien.

4 MR. GOODMAN: Can we have a rule?

5 THE COURT: Any one that's going to be a  
6 witness on the issue of the O'Briens' notice on the  
7 pending litigation, please stand. Other than  
8 Mr. O'Brien. All right. I don't think any witnesses  
9 are effected.  
10 Whereupon,

11 DAVID O'BRIEN,  
12 was called for examination by counsel for the  
13 Defendant and on his own behalf, and having  
14 been first duly sworn by the Court, was  
15 examined and testified as follows:

16 DIRECT EXAMINATION

17 BY MR. GOGAL:

18 Q Mr. O'Brien, can you state your full name  
19 for the record, please?

20 A David Duncan O'Brien.

21 Q Your address?

22 A 2024 Spring Branch Drive, Vienna, Virginia.

23 Q Is that Lot 3 in the Windover subdivision?

1 A Yes, it is.

2 Q When did you buy your current residence?

3 A In June of 1992.

4 Q At the closing of your purchase of your  
5 home, were you represented by counsel?

6 A Yes, I was.

7 Q Did you see the policy of title insurance?

8 A Yes, I did.

9 MR. GOGAL: May I approach the witness, Your  
10 Honor.

11 THE COURT: Yes.

12 BY MR. GOGAL:

13 Q Can I ask you to identify that?

14 A It certainly appears to be the policy of  
15 title insurance to David D. O'Brien and Jane B.  
16 O'Brien.

17 Q Is there any mention in that policy of title  
18 insurance of the suit by the Atkissons against  
19 Windover -- Wexford and Windover subdivision lot  
20 owners?

21 A When I reviewed it at the time, I'm sure I  
22 would have noticed had it been there. A few months  
23 ago, I reviewed it, it's not in there.



1           Q       I would ask you to direct your attention to  
2       the top of Page 3, Schedule B. Did you put those  
3       cross outs through that?

4           A       No, I did not.

5           Q       Do you have any idea what was underneath  
6       there?

7           A       I have no idea.

8           Q       And the copy that you have, is there  
9       anything under those markings or does it look like  
10      that?

11          A       I don't know, quite frankly.

12               THE COURT: Are you going to move that in as  
13      an exhibit.

14               MR. GOGAL: Your Honor, I move to admit this  
15      in.

16               THE COURT: Any objection to the admission  
17      of this exhibit?

18               MR. SNYDER: Well, actually yes. Maybe I  
19      need to work on it. But there is a portion on it that  
20      is indicated that is crossed out. We don't know what  
21      it says.

22               THE COURT: Let me take a look at it. We  
23      will mark this as Intervenors Exhibit Number 1.

1 MR. GOGAL: Intervenor's Exhibit Number 1.

2 (Document referred to was

3 Marked Intervenor's Exhibit

4 No. 1 for identification)

5 THE COURT: Those are the preprinted --

6 MR. GOGAL: Boiler plate, right.

7 THE COURT: I don't remember what the

8 preprinted exception is to Schedule B on these titles.

9 It's easy enough to find out. It's the American Land

10 Title Association owner's policy, 1970 version of it.

11 This preprinted form, we could fill that -- figure out  
12 what it is.

13 MR. GOGAL: I guess the point is there

14 nothing in there about the Kowalczyk suit.

15 THE COURT: It certainly wouldn't be

16 tailor-made to this litigation. It probably is a  
17 survey exception.

18 MR. GOGAL: Right.

19 THE COURT: I'm not sure what else. I could

20 run back to my office and pull my own owners title  
21 insurance policy and see.

22 I overrule the objection and Intervenor's  
23 Exhibit Number 1 is admitted into evidence.

1 (Intervenor's Exhibit No. 1  
2 was admitted into evidence.)  
3

4 BY MR. GOGAL:

5 Q At closing, did your attorney tell you there  
6 was any reason not to go to closing?

7 A No, he did not.

8 Q Had you known about the following, had a lis  
9 pendens been filed or had you been notified about the  
10 litigation involving the acts in this claim, would you  
11 have gone to closing?

12 A I would not have gone to closing.

13 Q When did you first find out about the case?

14 A We were notified by Mr. Goodman by letter on  
15 February 24th. I believe it was 1994.

16 Q Let me show you this document and ask if you  
17 can identify that?

18 A 1995. February 24th, 1995.

19 Yes, this is indeed the letter that was sent  
20 to us by Mr. Goodman. And that morning, he had spoken  
21 to my wife and explained the case. And this is the --  
22 that's the actual notice.

23 Q That's the first time you learned about the



1 litigation and the claim of the lis pendens?

2 A Yes.

3 MR. GOGAL: I move that in evidence, Your  
4 Honor.

5 THE COURT: Any objection?

6 MR. GOODMAN: No objection.

7 MR. GOGAL: Let me go ahead and show --  
8 sorry, Mr. Snyder. I offer this as Intervenor's  
9 Number 2.

10 THE COURT: Any objection?

11 MR. SNYDER: No objection.

12 THE COURT: It's admitted.

13 (Document referred to was  
14 Marked Intervenor's Exhibit  
15 No. 2 for identification and  
16 admitted into evidence.)

17 MR. GOGAL: No further questions at this  
18 time, Your Honor.

19 THE COURT: Any cross examination?

20 CROSS EXAMINATION

21 BY MR. SNYDER:

22 Q You say you were represented by counsel at  
23 closing?

1 A Yes.

2 Q Same counsel represented Kowalczy or did you  
3 have your own counsel?

4 A I don't recall. He was my counsel, and  
5 Kowalczy had counsel as well.

6 Q Was your counsel the settlement attorney?

7 A Yes.

8 Q What was his name?

9 A Mark A. Heacock.

10 Q How do spell his last name?

11 A H-e-a-c-o-c-k.

12 Q And did you have -- did you purchase this  
13 property through a using a realtor?

14 A Yes, I did.

15 Q Who was your realtor?

16 A Her name escapes me at the moment.

17 Q Do you remember or recall who she works for?

18 A No, I don't recall at the moment. If it  
19 would come to me, I can provide it to court.

20 Q Now, you bought the property --

21 A Excuse me, Carla Kennedy.

22 Q Carla Kennedy?

23 A Yes.

1           Q     You say you bought this property in June of  
2     '92, did you talk to the -- did you ever meet the  
3     previous owners?

4           A     Yes, we did.

5           Q     And did you ever talk to them?

6           A     Certainly.

7           Q     And in your conversations, did they ever  
8     mention the fact that there was an easement or lawsuit  
9     or anything to that fact?

10          A     No, they did not.

11          Q     Do you participate in the your homeowners  
12     association?

13          A     No, I do not.

14          Q     At no time before -- it's your testimony  
15     that at no time before February 24th that you heard  
16     from anybody that there was a law suit that the  
17     Windover subdivision was subject to?

18          A     That is correct.

19               MR. SNYDER: I have no further questions.

20               THE COURT: Any further questions of this  
21     witness?

22               MR. GOGAL: No.

23               THE COURT: Thank you very much Mr. O'Brien.



1 You may step down and rejoin your counsel. All right.  
2 Does counsel want to argue by way of closing arguments  
3 for the petition to intervene for a new trial?

4 MR. GOGAL: Your Honor, I don't have a great  
5 deal to add to what I have argued. I think I will  
6 stand on the brief, the memorandum I have filed. I  
7 believe that both because of the lack of a lis  
8 pendens, the necessary parties and also due process  
9 and protection rights under the U.S. and Virginia  
10 Constitutions, my client has a right to his day in  
11 court. And he has a right to be heard on these  
12 issues. And I don't think -- I point out some of the  
13 issues that we would raise, once which have an  
14 opportunity to litigate the case. I think it is clear  
15 from the record that given the way this case proceeded  
16 procedurally, there are a number of issues that the  
17 Virginia Supreme Court could not address and that it  
18 would be folly to assume that just because it was  
19 appealed and because there are other parties in the  
20 case, that they somehow represented the my clients  
21 interest.

22 As the Court is aware, my client, of the  
23 remaining lot owners to Bird Road, my client is the

1     only one that has a swimming pool in the back yard, I  
2     mean, the rest of them is just around the back of  
3     their lots. I mean, we're certainly in a different  
4     position than those lot owners.

5             I also do want to point out on the issue of  
6     actual notice, Your Honor, that Your Honor is  
7     absolutely correct about the Vickers case in addition  
8     to being a case about the need to have a lis pendens  
9     indexed properly. It is also a case about actual  
10    notice. And it does say that the notice has to be  
11    sufficient. It's not sufficient, but merely puts the  
12    party in inquiry, it must be clear and strong and such  
13    is to fix upon the imputation of bad faith. The  
14    effect of the notice, which will charge a subsequent  
15    purchaser for valuable consideration, exclude him from  
16    protection of the registry law, lis pendens statute,  
17    is to attach the purchaser of the guilt of fraud. It  
18    is therefore never to be presumed, but must be proved  
19    and proved clearly, a mere suspicion of notice, even  
20    though there is a strong suspicion it will not  
21    suffice.

22            THE COURT: How do you have a suspicion of  
23    notice in this case?

1 MR. GOGAL: Did not even have a suspicion.

2 THE COURT: There was a search of the  
3 litigation records. And it disclosed a lawsuit by  
4 Continental Federal Savings Bank against the  
5 Kowalczyks and the Kowalczyk's divorce suit -- I'm  
6 assuming it was a divorce, chancery number 122114,  
7 Kowalczyk versus Kowalczyk.

8 I know that they were involved in a lengthy  
9 divorce at the time, just from subsequent events. And  
10 that is all of this case.

11 MR. GOGAL: That's right, Your Honor. And  
12 you know that it discloses information only, and as I  
13 explained before, the only thing that a pendente lite  
14 search is required to do is to look at the land  
15 records. They're not required to go to look at the  
16 case files because that's the whole purpose of the lis  
17 pendens statute. Thank you, Your Honor.

18 THE COURT: All right. Mr. Snyder, do you  
19 have anything you would like to add?

20 MR. SNYDER: Just two points, Your Honor.  
21 Again, I would say that the Supreme Court decided this  
22 on the land records. It is the same land records,  
23 that the new purchasers are taking subject to -- and I



1 think that the land records provide the notice, it  
2 provided the notice to the prior or owners, it  
3 provided the notice to them. My biggest concern, Your  
4 Honor, is that if you decide to grant this petition  
5 and I certainly agree that the interest of three,  
6 four, five, six, some of these other defendants are  
7 not necessarily the same, but if you did decide to  
8 grant the petition, the interest of these other  
9 parties are not effected in any way. They had an  
10 opportunity to fully, completely, exhaustively  
11 litigate this.

12 THE COURT: How was it that Judge Fortkort  
13 latched on to the Park Authority as kind of an easy  
14 solution to a thorny problem and the Supreme Court has  
15 told him since then that he was wrong. He didn't  
16 really make any of the hard decisions in the case.  
17 The Supreme Court now told them to send it back with a  
18 mandate to this court to do --

19 MR. SNYDER: Exactly.

20 THE COURT: Agree or move it.

21 MR. SNYDER: Exactly. And what I have said  
22 before, Your Honor, I do not believe that the  
23 petitioners --

1           THE COURT: I will say that I'm not being  
2 partial to Judge Fortkort. It's only in hind-sight  
3 with the guidance of the Supreme Court that I say  
4 that. I think it was certainly a reasonable solution  
5 at the time. The Supreme Court told him it wasn't a  
6 permissible solution.

7           MR. SNYDER: If, as you had mused earlier  
8 from the bench that --

9           THE COURT: I'm afraid that phrase is going  
10 to come back to haunt me.

11          MR. SNYDER: I will try to forget it, that  
12 if we had the other defendants before the Court for  
13 the purposes of ZZZ, and that if the Court were to  
14 grant the relief ordered on March 7th, 1995, by Judge  
15 Fortkort, it would not prejudice the rights, any  
16 rights whatsoever of the lot owners of Lot Number 3.  
17 Because if you would grant their petition and say, you  
18 have the right to participate fully and completely,  
19 and put the burden on the Atkissons, there is -- and  
20 this is my concern, there is no reason why the  
21 individuals represented by counsel, by Mr. Goodman  
22 here today, should have a right to get, you know,  
23 three more swings at the ball, when they had it all.

1           And the addition of this party isn't going  
2     give them any additional arguments they didn't have  
3     before or any additional rights or any additionally  
4     liabilities. And if we should have filed the lis  
5     pendens in order to put them on notice, and if they  
6     aren't before this Court, then perhaps we need to  
7     bring them before the Court in a separate action, but  
8     I don't believe that this should open the door to  
9     relitigate what was started in '86. Nine years was  
10    sufficient time for the remaining defendants to come  
11    up with whatever theories it was that they had to this  
12    case.

13           I don't think it is necessary to grant that  
14    petition, but I would -- I am much more concerned  
15    about the fact that if that petition is granted, that  
16    I do not have to relitigate all of my easement, but  
17    all I have got to do is litigate this portion, which  
18    would include every issue. I mean, certainly you  
19    could mandate that he's not prejudiced by any rulings  
20    of the prior case, as I understand ratio decato, it  
21    may not be -- I'm not sure if there is actually  
22    identity of parties or not, as far as we can construe  
23    identity of parties, but in any event --

1 THE COURT: No identify of the clients --

2 MR. SNYDER: I'm not familiar with if there  
3 such thing as a constructive identity of the parties,  
4 because there is somebody identically situated to him  
5 who has participated fully in this proceeding.

6 But in any event, because his rights may  
7 have been effected without notice, that should not  
8 open the door to everybody else that was before the  
9 Courts, that was before the Supreme Court of Virginia,  
10 and that was before the Court on March 7th, when Judge  
11 Fortkort ruled.

12 THE COURT: All right. I'm going to grant  
13 the petition to intervene, and I'm going also the  
14 grant the request for a new trial. I think that the  
15 O'Briens were necessary parties, without which the  
16 Court could not afford complete relief and do not  
17 believe that their interests were adequately  
18 represented or that there was an identity of interest  
19 with the other representatives of the lot owners in  
20 this case. I note that Judge Fortkort made all of his  
21 rulings or most of his dispositive rulings that were  
22 appealed to the Supreme Court after the O'Briens were  
23 already in title owner and completely unaware of the



1 suit.

2 The title insurance policy which they had  
3 and Mr. O'Brien's testimony is unreputed, does not  
4 disclose the pendency of litigation. And I think that  
5 they were a necessary party. And I hate to do it, but  
6 I hate to start another nine years of litigation, but  
7 I think that is the inescapable effect of this. So  
8 I'm going to grant a new trial.

9 MR. SNYDER: Can I make an inquiry, Your  
10 Honor?

11 THE COURT: Yes.

12 MR. SNYDER: I guess, I'm not clear on if  
13 Lot Owner 3 is not on notice and their rights have not  
14 been effected, how does the litigation, as to Lots 1,  
15 6, 5, 4, have any effect then if he's not bound by the  
16 rulings of this Court and the Supreme Court? I mean,  
17 why should Lot Owner 1 be allowed to completely  
18 relitigate --

19 THE COURT: Lot Owner 3. It binds Number 3.

20 MR. SNYDER: I know. But you're ordering a  
21 new trial. Maybe I'm not clear on who the defendants  
22 are at the trial. Is it all the defendants?

23 THE COURT: Well, I think you should sort

1 through that. I think you have the opportunity to  
2 sort through that. All of the people who were  
3 non-suited before, can stay non-suited I would  
4 suggest.

5 MR. SNYDER: My question is, for Lot Owners,  
6 7, 6, 5, and 4, do I have to relitigate? Are they  
7 going be given an opportunity to redefend all of the  
8 issues that were brought up in a defense against our  
9 case in this new trial that your ordering?

10 THE COURT: I think it depends on -- there  
11 might be some issues on collateral estoppel or res  
12 judicata, and I think that has to be sorted out later.  
13 And again, I keep getting back to the same problem, is  
14 that Judge Fortkort really didn't rule on what now the  
15 Supreme Court told us is the issue in the case, which  
16 is locate the express easement and then move the  
17 obstructions.

18 Now, what I would suggest you do, is now  
19 that all of the parties are at the table, maybe I'm  
20 very concerned about Lot 1, I'm not going to hide the  
21 ball on that. Lot 1 has a little corner under at  
22 least one plat I saw, you might want to look hard and  
23 see if you want bring Lot 1 into it. Get all of the

1 parties to the table and try to work this out rather  
2 engage in another nine years of litigation. But  
3 Mr. O'Brien, Mrs. O'Brien are definitely entitled to  
4 the their day in Court. And I think they certainly  
5 can relitigate everything.

6 MR. SNYDER: I understand.

7 THE COURT: I don't know about the other lot  
8 owners. I will leave that for another day.

9 MR. SNYDER: I guess my problem is when we  
10 appear before the next Judge --

11 THE COURT: Unfortunately, it's going to be  
12 me. I think this case was assigned to me. So there  
13 will be some continuity. I don't mean unfortunatately.  
14 I think fortunately, maybe, for the parties.

15 MR. SNYDER: Just so I can understand for  
16 the purposes of when counsel draws up the order,  
17 you're going to remand this for trial -- you're  
18 remanding this for trial as to all issues as to the  
19 O'Briens, you're not ruling as to whether or not any  
20 of the other defendants are going to be allowed to  
21 relitigate these issues.

22 THE COURT: But what did Judge Fortkort  
23 decide that the other parties were bound by? I think

1 he did decide and I think the Supreme Court decided  
2 that there is an easement. I don't think it's been  
3 located.

4 MR. SNYDER: I think that the finding of  
5 punitive damages against Wexford, which was never  
6 appealed, has to remain binding. And certainly, they  
7 should not be allowed -- Wexford doesn't even own any  
8 property in there anymore. They should not be allowed  
9 to come in and try to attack that finding of punitive  
10 damages or anything like that.

11 THE COURT: I think I agree with you there.

12 MR. SNYDER: I'm just -- I anticipating -- I  
13 really don't want to have to come back just on the  
14 wording of the order.

15 THE COURT: You're not leaving here today  
16 without giving me an order.

17 MR. SNYDER: That's fine. We will make  
18 that.

19 THE COURT: All right. The petition is  
20 granted and a new trial is granted, as to all issues  
21 as to the O'Briens. And I think that we will leave  
22 for another day -- my unstudied musing at this point  
23 as to Wexford is that what was decided as to Wexford



1 was decided, but there's a lot of stuff that is  
2 undecided, specifically the location of the easement.  
3 The actual plotting of the easement, I think still  
4 needs to be done because I don't think Judge Fortkort  
5 actually got to that issue. We're going to go with  
6 the Park Authority property. The Supreme Court has  
7 told him that's clearly wrong. I think the Park  
8 Authority can stay out the case and I think all of the  
9 other lot owners are out of the case.

10 MR. SNYDER: Can I bring something to your  
11 attention. It's not going to change between now and  
12 whenever that trial date might be.

13 THE COURT: I can give it to you today. Do  
14 you all have your calendars?

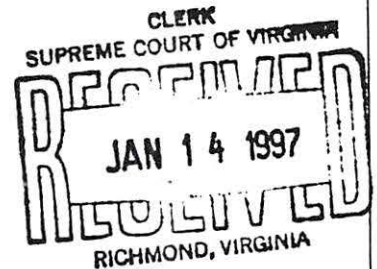
15 MR. SNYDER: No, I don't. But I can get my  
16 over the phone. One thing that will not change is the  
17 fact that we cannot locate the express easement.  
18 That's an impossibility because defendant Wexford  
19 built the development on it that took out the natural  
20 land markings. The ruling which was never appealed by  
21 the people left in this party, that there was an  
22 express easement and that if we read the evidence that  
23 was presented before, that essentially people used



Original

filed  
2/16/96  
JMR/dmr

1 VIRGINIA  
2 IN THE CIRCUIT COURT FOR FAIRFAX COUNTY  
3 \_\_\_\_\_ X  
4 GEORGE ATKISSON, :  
5 and :  
6 CARLOTTA T. ATKISSON, :  
7 Plaintiffs, :  
8 vs. : Chancery No. 097823  
9 WEXFORD ASSOCIATES, INC., :  
10 et al., :  
11 Defendants. :  
12 \_\_\_\_\_ X  
13 Fairfax, Virginia  
14 Thursday, December 28, 1995  
15  
16 The above-entitled matter came on for  
17 hearing before the Honorable Jan Marum Roush, Judge,  
18 in and for the Circuit Court of Fairfax County,  
19 Fairfax, Virginia, commencing at 10:03 a.m.  
20  
21  
22  
23



## 1 APPEARANCES:

2

3

Scott E. Snyder, Esquire

4

Quentin R. Corrie, Esquire

5

Counsel for the Plaintiff

6

7

Bernard E. Goodman, Esquire

8

Counsel for the Defendants Wexford,

9

Eckman &amp; Datoff

10

11

David J. Gogal, Esquire

12

John A.C. Keith, Esquire

13

Counsel for Defendants O'Briens

14

15

Reporter: Deborah A. Larson, RPR

16

17

18

19

20

21

22

23

1 partition --



2 MR. GOGAL: That's right, your Honor, so  
3 Mr. Atkisson has no more interest than any of the  
4 heirs of the seven parties. To the extent  
5 Mr. Snyder is telling this Court that they should  
6 not be added as a party because their interest is  
7 abandoned and of no value today, then he is arguing  
8 against his own client, because his client is no  
9 better than they.

10 Finally, your Honor, I would just say I  
11 asked Mr. Atkisson about this Outlot A survey, and  
12 he explained to me that he had no role in it. It's  
13 surveyors and engineers for this development, people  
14 that were working for him located that. That's what  
15 Outlot A is, located by developer to serve a  
16 developer's needs. There is no magic to it. There  
17 was no finding of where the burial lots were and  
18 trying to locate exactly where the -- you know,  
19 based on any historical record. That's all made  
20 up. This was a developer's plan for where is it  
21 best located to get access through someone else's  
22 land.

23 THE COURT: I am going to grant the



1 motion to dismiss for failure to join indispensable  
2 parties and grant leave to amend the bill of  
3 complaint to add the additional parties. I do think  
4 that the owners of Lot 1 need to be brought back  
5 into the suit because, at least under one survey  
6 which has been submitted to the Court of the  
7 location of the easement, the easement touches in a  
8 small degree upon Lot 1, although I haven't heard  
9 any evidence that there are any obstructions on Lot  
10 1.

11 But it does seem to me that the necessary  
12 parties are the parties by whom the land easements  
13 <sup>the traverses</sup> ~~perverses~~, not just where there is an obstruction,  
14 so I do think Lot 1 needs to be brought back in. I  
15 also think that all of the heirs to all of the  
16 parties to the partition deed of 1896 need to be  
17 brought into this by publication or for those where  
18 you know where they are.

19 I don't believe you need to do an  
20 exhaustive search for these heirs but by publication  
21 for those that you don't know, and the ones that you  
22 do know about and the ones that have quitclaim  
23 deeds, as an example, need to be brought in, not the

1 publication, but more directly as parties as to  
2 plaintiff to this case.

3           And in the interest of finalizing this  
4 litigation for once and for all by bringing  
5 everybody to the table who has an interest in this  
6 easement. I'm not sure if there is a motion before  
7 me to add Fairfax County, but, again, you might want  
8 to take a look at that and see if Fairfax County  
9 should come back in because the easement is not  
10 terminated at Bird Road. It looks like a  
11 substantial portion of it crosses county property.

12           MR. SNYDER: I'm asking the Court for  
13 guidance on that. If you believe them to be a  
14 necessary party to it, then we will bring them back  
15 in.

16           THE COURT: I keep coming back to the one  
17 fact that I believe will state the intention of the  
18 Supreme Court is that Judge Fortkort never really  
19 located the easement. To the extent that the  
20 location of the easement is still at issue I think  
21 that they should be brought back in. I think what  
22 Judge Fortkort did is when it got down to determine  
23 if there was an easement, prescriptive easement and

1 an express easement, but when it came down to  
2 actually locating it, he did not locate it, at least  
3 certainly not prior to the Supreme Court's ruling,  
4 because he said, "Let's move it on to Park land,  
5 Park people, and Park Authority, you give these  
6 people an easement," so that's the difficult issue  
7 that remains for us is actually locating the  
8 easement as best we can.

9 MR. SNYDER: I certainly can amend and  
10 add them. Your Honor, with all due respect to the  
11 ruling you have of granting the motion to dismiss,  
12 then I think any other rulings that you would do on  
13 any of these other motions are moot at this point  
14 because I think all these other people may want to  
15 participate in these proceedings also, and who knows  
16 what my amended motion is going to say? I don't  
17 know at this point.

18 I have a feeling what I probably am going  
19 to have to do is refile as we originally filed and  
20 include everybody in the subdivision, and I assume  
21 that all these different people are going to want to  
22 be able to participate in all the different motions  
23 that we now have -- well, I don't think they're



1 pending anymore because there is no case pending at  
2 this point.

3 THE COURT: I'm granting you leave to  
4 amend. I mean, the case isn't really thrown out for  
5 failure to join a party. You add parties.

6 MR. SNYDER: But you're granting the  
7 motion to dismiss, as I understand it?

8 THE COURT: It like ~~withstanding~~ <sup>sustaining</sup> a JMR  
9 demurer with leave to amend, I believe. Do you want  
10 to wait until you actually amend before we go any  
11 further?

12 MR. SNYDER: What if somebody says, "We  
13 want to argue some of these motions"? Is any ruling  
14 you make on these other motions going to be binding  
15 for the people who aren't before the court?

16 THE COURT: That's a good question. Do  
17 you have a position on that, Mr. Gogal?

18 MR. GOGAL: Your Honor, I think the only  
19 remaining motion that I am aware of is the motion  
20 that deals with Mr. Atkisson's testimony at trial.  
21 I don't think that that --

22 THE COURT: I haven't ruled about whether  
23 the easement should terminate at Bird Road or not.



1                   MR. GOGAL: That may be well if that's  
2 put off for another day, your Honor, but I do think  
3 that the one dealing with Mr. Atkisson involved in a  
4 trial can be dealt with. He is represented by his  
5 counsel, and we're here today, and we're going to  
6 make good use of the time.

7                   MR. GOODMAN: Your Honor, I would also  
8 respectfully suggest that my motion to dismiss  
9 Kowalczyk and Deasy be argued.

10                  THE COURT: All right. I will defer  
11 ruling then on whether easement terminated on Bird  
12 Road, and you can notice that for another day after  
13 all the new parties are properly before the Court.  
14 They will have a great interest in that, certainly  
15 Fairfax County would be.

16                  Let's take up the motion to dismiss  
17 Kowalczyk and Deasy. Let me say that based on the  
18 pleadings it does strike me that there is an  
19 existing judgment against those two parties, and to  
20 dismiss it now would be to relieve them from that  
21 judgment, would it not?

22                  MR. GOODMAN: But the judgment is against  
23 their property, your Honor. It's not a personal

1 judgment against --

2 THE COURT: Wasn't there a \$100 --

3 MR. GOODMAN: If they've obstructed the  
4 easement.

5 MR. SNYDER: We don't know who that is.

6 MR. GOODMAN: Well, your Honor, with all  
7 due respect, I mean, I understand that every lawyer  
8 tries to put forth the best argument that they can  
9 for their client. All this talk about "We don't  
10 know where the easement is and we don't know who is  
11 going to be affected," we're talking about a matter  
12 of inches. We're not talking about, "Gee, there are  
13 40 lots in Wendover III, and they all have to be  
14 brought back in because we don't have the foggiest  
15 notion where the easement is."

16 I mean, plaintiffs' theory is that it's  
17 represented by that exhibit that has been called  
18 triple Z, and the defenses' main theory is that the  
19 express easement is real clear, almost to Bird Road,  
20 and beyond that we have to make a determination if  
21 it goes beyond Bird Road.

22 Deasy has at the same property that  
23 Eckman and Datoff have, and I think if you look at

1 either triple Z or the express easement that goes  
2 880 feet down the property line, it's in about the  
3 same place, excepting a few feet, and I don't  
4 believe that there is anything that obstructs it, so  
5 Deasy is rather easy.

6 Kowalczyk might be just a little bit  
7 harder because that's the O'Brien property and  
8 there's a swimming pool there, which may be right in  
9 the middle of one of these easements, but first of  
10 all, John Kowalczyk is dead, and the rules of court  
11 provide an easy means under Rule 216 to substitute  
12 parties. He's just not a proper party, and that  
13 ought to be done at the very least, although since  
14 O'Brien --

15 THE COURT: As the successor in interest  
16 the O'Briens are in the suit now.

17 MR. GOODMAN: Yes. They are in the suit  
18 so that's -- and also Eckman and <sup>Datoff</sup> ~~Deasy~~ are in the Jmr  
19 suit, the successor in interest to Deasy, so that is  
20 really the basis for our motion. Over in the  
21 eastern district Judge Bryan always likes to tidy up  
22 pleadings and get things on course. I, frankly,  
23 think that's what ought to be done here, and that's

1 why we've raised the motion.

2 THE COURT: Mr. Snyder, why if we have  
3 the successor to interest to the Kowalczyks and the  
4 Deasys in the case, why do we need the original  
5 owners in the case?

6 MR. SNYDER: Let me back you up one step  
7 further. By granting the motion to dismiss, what  
8 affect does that order have on the finding of  
9 punitive damages against Wexford and the individual  
10 lot owners?

11 THE COURT: I don't know.

12 MR. SNYDER: Are you dismissing the case  
13 as to them?

14 THE COURT: Maybe the motion to dismiss  
15 for failure to join an indispensable party is not  
16 the right verbiage I should be using. Let me check  
17 the rule. The way the motion was phrased was a  
18 motion to compel plaintiffs to join additional party  
19 plaintiffs or to dismiss the case, and that's the  
20 motion that I was granting.

21 MR. SNYDER: So if you're granting the  
22 motion to compel to add additional parties, then let  
23 me go back and answer your other question as far as



1 the Deasys and the Kowalczyks. My understanding  
2 from this Court is that there is no judicial finding  
3 of where the easement is, and I think particularly  
4 with the requirement to add a lot more new parties,  
5 to let the Kowalczyks and Deasys go when they were  
6 before the Court at the right time and subject to a  
7 final order that wasn't appealed, and they never  
8 paid us the money.

9               We never received the 10,000 nor the \$100  
10 from anybody, so to let them go without satisfying  
11 the judgment, that may be appropriate if this Court  
12 finds that their house blocks the easement. It was  
13 the Kowalczyks that that was entered against. It  
14 wasn't against the property address.

15              And if the O'Briens took without any  
16 notice, there's no reason that they would step up  
17 and pay that \$100 or be required to, but the people  
18 that were properly before the Court would be. If he  
19 wants to substitute the estate, he has a right to  
20 request that the executor be appointed or to file a  
21 motion to substitute the executor of John Kowalczyk  
22 or whatever to clean up the way it looks, but those  
23 people were properly before the court. They had a

1 judgment entered against them, and then to dismiss  
2 it without satisfaction of that judgment, I think it  
3 is inappropriate.

4 THE COURT: All right. I'm going to take  
5 this motion under advisement. It strikes me that it  
6 would depend on whether my ruling on the first two  
7 motions, whether it's void as to everybody or just  
8 the O'Briens who didn't receive notice of the prior  
9 litigation, but if the prior rulings in this case  
10 were binding on the Kowalczyks, I think it would be  
11 inappropriate to dismiss it if there was a judgment  
12 entered, however, a nominal amount.

13 MR. SNYDER: If I may just add one thing,  
14 your Honor; that -- Mr. Corrie just pointed this out  
15 to me. I guess I've never noticed this before, but  
16 on page 144 of the Supreme Court decision 248 Va 142  
17 Fairfax County Park Authority versus Atkisson, the  
18 second sentence of the third full paragraph starts  
19 by saying, "The Chancellor established the location  
20 of the easement, but decided that he would not grant  
21 injunctive relief to the dominant owners, because  
22 such relief would require the surveying owners to  
23 remove improvements such as homes and swimming

1 pools."

2 I guess maybe as you make your decision  
3 on the necessary parties, I believe in order to  
4 figure out who the necessary parties are you still  
5 have to stand by the determination of whether or not  
6 the location was found, and that's just from the  
7 recitation because of the facts from the Supreme  
8 Court.

9 THE COURT: There has to be a basis for  
10 that, and as I said before, the Court <sup>speaks through</sup> ~~sticks to~~ its Jm2  
11 orders, and I've reviewed every order that is  
12 entered in this case; and other than the order  
13 entered in March 1995 I don't see any order in which  
14 Judge Fortkort located the easement.

15 MR. SNYDER: Your Honor, I guess maybe  
16 it's because when you're looking at the World Trade  
17 Center you're not really sure how high it is, but  
18 you know it's there, and you know it's really tall.  
19 When we walked out on that property with Judge  
20 Fortfork we walked the easement, and we had a  
21 surveyor accompanying with us who said to the judge,  
22 "Here is point G."

23 And then the judge figured out on his own



1 where the cemetery was, and the surveyor who found  
2 point G is the one who drew ZZZ, which is before the  
3 judge, and maybe we're 99 degrees from -- we're  
4 missing one degree for the judge to have said in his  
5 final opinion "that the easement is accurately  
6 represented on plaintiffs' ZZZ."

7 I think he remedied that in his March  
8 1995 order, and I think you got to read the March  
9 '95 order, that that was an order that was issued  
10 by somebody who had been out there and had walked  
11 it. It wasn't somebody who just looked at some  
12 pleadings and decided, "Well, I will just enter this  
13 order." I think there is a reason why he explains  
14 reference to there. I submit to the Court it was so  
15 obvious prior to that, but --

16 MR. GOGAL: Your Honor, may I speak  
17 briefly to this motion?

18 THE COURT: Yes --

19 MR. GOGAL: I'm sorry. I don't know if  
20 the Court was aware, we did file an objection to it,  
21 and, basically, I don't think that this is a basis  
22 to keep Mr. Kowalczyk -- he was dismissed in this  
23 case by the murder. I mean, he is no longer around.



1 THE COURT: How about his estate?

2 MR. GOGAL: His estate would have to be  
3 added, and that would be either my burden or  
4 Mr. Atkisson's counsel's burden to bring the estate  
5 back in. My only interest is that we had difficulty  
6 locating Mrs. Kowalczyk or the former Mrs.  
7 Kowalczyk, Katherine Hyman, and that we may need to  
8 consider filing some sort of cross-claim depending  
9 on how this litigation proceeds.

10 We're trying not to muck up the work too  
11 much, but we may at some point have to consider that  
12 because we don't have the same interest as they do.  
13 We don't want to at all suggest that we are being  
14 substituted for them because he never represented  
15 our interest, but they are liable to us for what has  
16 happened.

17 THE COURT: Don't you have a separate  
18 suit going on against them, though?

19 MR. GOGAL: We do, your Honor.

20 THE COURT: Have you been able to get it  
21 served on Ms. Hyman?

22 MR. GOGAL: The Secretary of the  
23 Commonwealth.

1           THE COURT: I tell you there is a lot of  
2 litigation pending in this Court on the  
3 Kowalczyk/Hyman -- the fallout from that horrible  
4 murder, and I know there are civil suits back and  
5 forth. This is just an advisory opinion. You might  
6 check with Peter Greenspun who represented  
7 Mr. Shamball who eventually pled guilty to the  
8 murder for hire of Mr. Kowalczyk and I believe he is  
9 representing him with the guardian ad litem civil  
10 suit. He might be able to tell you where some of  
11 these people are.

12           All right, well, I'm going to keep that  
13 motion under advisement until I determine the first  
14 two motions. We've already agreed we are going to  
15 defer the ruling on the Bird Road issue, and I guess  
16 the last issue then on our plate for today is what  
17 Mr. Atkisson is going to be allowed to testify to at  
18 trial as to the location of his easements.

19           Maybe, Mr. Snyder, you can help me out  
20 there in terms of I haven't seen the transcripts  
21 from the prior trial. I haven't seen any  
22 transcripts. In fact, it's been a real problem from  
23 my point of view. I have no confidence that I have

1 all of the files in this litigation. The clerk's  
2 office is continually sending the trial transcripts,  
3 what I do have, back to archives, and it's been a  
4 struggle to try to keep what I have here at the  
5 courthouse, and it's on <sup>its</sup> ~~his~~ face incomplete. Tell *me*  
6 me what Mr. Atkisson testified to in terms of this  
7 historic hearsay.

8 MR. SNYDER: Essentially, what he  
9 testified to that as a child he was told where the  
10 easement was because he had to use that easement as  
11 ingress and egress from the 15-acre parcel where  
12 Thomas Adams built the residence, and that's where  
13 Mr. Atkisson was born and was raised there.

14 And, for instance, they have used that  
15 easement to get to Clark Crossing Railroad, and they  
16 would drive cattle on that easement, and then he was  
17 -- the hearsay was what he was told as to the  
18 location of the easement. What is not hearsay is  
19 his testimony of where the easement is.

20 From that point G how did he access the  
21 property? And he could also testify, and this is  
22 well within this case law -- counsel has got to  
23 admit that the monuments are gone with the exception

1 of point G, and he can testify that "I walked along  
2 to this particular location where Aunt Mary's barn  
3 was, and then it turned a corner," and then it went  
4 on from there.

5           The problem with saying that Mr. Atkisson  
6 shouldn't be allowed to testify as to the location  
7 of the easement is -- unlike the other cases that  
8 have been relied upon by counsel, if you've located  
9 all the landmarks that are referenced in the  
10 description of the easement, you couldn't draw it.  
11 You couldn't locate it, because there is not enough  
12 information.

13           It goes from Aunt Mary's barn, which,  
14 like I said, we can locate that, and it says, "From  
15 there to the county road." It doesn't tell you what  
16 direction. It doesn't tell you what length. It  
17 doesn't tell you what point of the county road. The  
18 only person I would put forth that knows that is  
19 Mr. Atkisson.

20           THE COURT: So what you're proposing is  
21 not that he testify, "I was told this is where the  
22 easement is," but "When I was a boy, Aunt Mary's  
23 barn was located right here."



1                   MR. SNYDER: I'm saying under the  
2 historical exception to hearsay, he is allowed to  
3 testify as to what he was told when he was a child,  
4 and --

5                   THE COURT: Hearsay is admissible as long  
6 as it's old enough?

7                   MR. SNYDER: Yeah. There is like a  
8 20-year exception.

9                   THE COURT: But some of that family law  
10 stuff is so plainly erroneous.

11                  MR. SNYDER: It may go to the weight of  
12 it, and I don't have Friend here to give you the  
13 cases.

14                  THE COURT: For example, you hit  
15 something that maybe I've had a little bit of  
16 personal experience with, but I'm interested in the  
17 genealogy of my family, and I've been told for years  
18 and years and years that my great, great grandmother  
19 had been murdered by an axe in Fall River,  
20 Massachusetts, not by Lizzie Borden, but at the same  
21 time that Lizzie Borden was wielding her axe in Fall  
22 River, Massachusetts.

23                  This summer I spent a good deal of time

1 in the library up there and in the courthouse trying  
2 to find records of this, and what I was told is  
3 there is some kernel of truth, but that's about it.  
4 She died, and that's where the family lore was  
5 accurate, and beyond that is completely inaccurate.

6 MR. SNYDER: It goes to weight, your  
7 Honor. If we were to take their motion, which is to  
8 not allow him to testify, under those cases relied  
9 upon by the Supreme Court is you locate the  
10 monuments and have your surveyors draw it out, but  
11 we can't do that. There is not enough information  
12 to draw the easement based upon the legal  
13 description.

14 The same as with the cemetery. There is  
15 a reference to it, and I say it's ambiguous as to  
16 exactly whether it's included within the  
17 27-and-a-half acres, and my understanding is if you  
18 have a surveyor add up the area within the legal  
19 description drawn that is 27-and-a-half acres, and  
20 it probably includes a quarter acre for a burial  
21 lot, but there is no survey of the burial lot.

22 And it doesn't say -- there is no shape  
23 of it. It doesn't say it's a square quarter acre.

1 It doesn't say it's a long, narrow quarter acre.  
2 And, again, and I think this is what I would call  
3 the law of the case if we see this is a continuing  
4 case is that without having the cemetery being  
5 surveyed, how are you going to know where it is?

6 One way is to go out there and you can  
7 see an area that Mr. Atkisson is able to identify as  
8 a cemetery that straddles point G. You can say,  
9 "Oh, that is all a creation that was done solely  
10 for the purpose of putting him in this  
11 predicament."

12 At best that's far-fetched. But, again,  
13 that would go to weight, motivation. Is his  
14 testimony accurate? But it's impossible to use the  
15 legal description to draw out the family cemetery,  
16 so therefore you have to have parol evidence to  
17 describe it.

18 THE COURT: I think that he could say,  
19 "This is where Aunt Mary's barn was. I remember  
20 Aunt Mary's barn being right here," but in terms of  
21 saying, "I was told that this is where the easement  
22 was," I'm just not familiar with this historic --

23 MR. SNYDER: I would ask that you reserve

1 your ruling on that until I'm able -- I didn't  
2 really realize that this is what we were talking  
3 about. I realize that he can testify to what he  
4 did, what he knew, but, see, there is a specific  
5 exception for this, and we had it prepared at trial  
6 when we presented that testimony, and Fortkort  
7 overruled the objection based upon there is a  
8 historical hearsay exception, and I didn't think  
9 this is what we were talking about.

10 I thought we were just talking about  
11 whether he should be allowed to testify as to  
12 location because the location is so clearly set out  
13 in the legal documents, and that's what we argued.  
14 I didn't think we would be arguing this point. I  
15 would like an opportunity to present the case as  
16 dealing with historical exception to hearsay.

17 I guess I'm also concerned that, again,  
18 if you were to rule it either way on this motion, I  
19 don't know what -- Fairfax County objected to that  
20 same testimony also; and if I bring them back in,  
21 will they be bound by your ruling to whatever you  
22 decide today? If they're not, maybe there shouldn't  
23 be a decision today.



1 THE COURT: Anybody else want to address  
2 this point?

3 MR. GOODMAN: Yes, may I be heard?

4 THE COURT: Yes.

5 MR. GOODMAN: Your Honor, I want to say  
6 something first since you brought it up about this  
7 historical fact exception that Mr. Snyder is talking  
8 about as an exception to the hearsay rule in  
9 Virginia. Virginia does not recognize it, and where  
10 it's recognized, it's very, very narrow. It talks  
11 about a family Bible that has birth --

12 THE COURT: That's what I'm thinking of,  
13 entries in a family Bible and other things that have  
14 some indicia of reliability.

15 MR. GOODMAN: Exactly, and Virginia does  
16 not recognize even that narrow historical fact  
17 exception, and there was no brief submitted on that  
18 and there was no extensive argument before Judge  
19 Fortkort. He just let the man testify, and,  
20 frankly, we would like the rules of evidence  
21 observed this time.

22 And I would point the Court, without  
23 belaboring the facts because I've already talked

1 about the 15-acre deed and the separate easement  
2 that went to that, and Mr. Atkisson's theory of the  
3 case, we've already talked about the partition deed,  
4 and it's clear the burial plot is a quarter acre on  
5 the partition deed.

6           Mr. Snyder argues that, "Well, it was  
7 Partition Lot 2, 27-and-a-half acres or  
8 27-and-three-quarter acres. I respectfully submit  
9 to you that that does not create an ambiguity as to  
10 the location of the quarter-acre burial lot. It is  
11 clearly on Partition Lot 2.

12           We rely heavily on two Virginia cases.  
13 Langman versus Alumni Association of the University  
14 of Virginia, 247 Va 491. It's a 1994 case. The  
15 rule of that case is that parol evidence is  
16 inadmissible to vary or contradict the terms of a  
17 clear, unambiguous deed, and the facts of that case  
18 are worthy of note, your Honor.

19           Professor Langman was employed by the  
20 university, and she and a business partner were also  
21 real estate investors. They had purchased the  
22 shopping center in West Virginia, a little strip  
23 center, for \$800,000, and they got a \$600,000

1 mortgage; and after a few years, it was worth about  
2 a million dollars.

3           They donated the center to the University  
4 of Virginia Alumni Association. The administration  
5 told them it was better to have an operating  
6 business in the Alumni Association than in the  
7 university, perhaps because it was a state  
8 institution.

9           In any event, that particular shopping  
10 center ran a negative cash flow on an annual basis.  
11 Professor Langman's partner used to make a  
12 contribution of about \$100,000 annually to make up  
13 the shortfall. The shopping center was donated to  
14 the university in a deed of gift and it also added  
15 an assumption paragraph where they assumed the  
16 existing deed of \$600,000, so, in effect, it was a  
17 gift of about \$400,000, not a million dollars.

18           The university entered that obligation on  
19 its books and they knew they had it. Well, the real  
20 estate market turned sour in that part of the  
21 country around 1990. Professor Langman's business  
22 partner was not able to make up that shortfall  
23 anymore, so the mortgage lender, none other than

1 Dominion Savings and Loan from right around here  
2 called --

3 THE COURT: Bad Dominion.

4 MR. GOODMAN: Bad Dominion, correct.

5 THE COURT: First Dominion in Roanoke is  
6 a Bad Dominion --

7 MR. GOGAL: Correct. The local bad  
8 Dominion as it became Trust Bank called on Professor  
9 Langman to make good the shortfall. Professor  
10 Langman called on the Alumni Association at the  
11 university saying, "This is your loan. This is your  
12 property. You assumed it." They said, "Oh, no. We  
13 never, never assume debt when we're given a gift,"  
14 and the case went to court, and the university said,  
15 "This was a scrivener's error."

16 Well, there was a very clear paragraph,  
17 and it was a paragraph of assumption in the deed,  
18 and the Supreme Court ruled that "You can't bury  
19 this by parol evidence." It was real clear, the  
20 terms in the deed were clear, and that's it.  
21 They're in the land records.

22 I suggest to you that this quarter acre  
23 is clearly on partition lot -- this quarter acre



1 burial plot is clearly on Partition Lot 2 for which  
2 there is a means of egress and ingress which I  
3 pointed out to the court before between Lots 2 and 3  
4 and 4 and 5 which was obliterated by Mr. Atkisson  
5 when he did Hunter Mill Forest.

6 More closely to our facts is the case of  
7 Gilbert versus Summers, 240 VA 155, and it's a 1990  
8 case, and both of those cases are in the tab binder  
9 that we handed up. There, curiously enough, you had  
10 a boundary dispute to a 15-acre parcel, and there  
11 were two deeds that described the 15-acre parcel.

12 There was one that was drafted in 1905,  
13 and there was a second one that was drafted in 1906,  
14 and they both had different metes and bounds, and  
15 there was a dispute between the neighbors as to  
16 which one was accurate, and the trial court allowed  
17 the 1906 deed in because you could find the  
18 monuments; you could locate the monuments.

19 The surveyors had disagreed as to certain  
20 falls in the deed, and there were monuments that no  
21 longer existed. The Supreme Court of Virginia held  
22 that the 1905 deed was not ambiguous even with the  
23 missing monuments, and no other deed should have

1   been admitted.

2                   Your Honor, what it means in our case is  
3 we clearly know where the burial lot is. We don't  
4 have a historical fact expectation, "I was told  
5 this" or "I was told that." That is just the  
6 rankest hearsay and it's also serve self-serving.  
7 Mr. Atkisson may be able to say that, "The red barn  
8 was here and the chestnut tree was there, and I  
9 remember it from my youth."

10                   We don't contest that, and he can also  
11 testify as to where the burial lot is located on  
12 Partition Lot 2, but he can't bootstrap or change  
13 the terms of that partition deed and put it on the  
14 15-acre parcel, so he can use an easement that goes  
15 through Wendover. That's why we respectfully  
16 suggest that his testimony should be limited, and  
17 that's what we ask for.

18                   THE COURT: I am going to grant the  
19 motion in limine regarding Mr. Atkisson's testimony  
20 to the extent he is not going to be permitted to  
21 testify as to what anybody else told him no matter  
22 how long ago. He can testify from his own memory  
23 about the location of the monuments in his deeds,

1 however, "This is where the oak tree was and this is  
2 where the barn was," and some of the other  
3 monuments.

4 I'm, frankly, making this up. I don't  
5 remember the specific monuments in this deed which  
6 are no longer existing. I do think that there is  
7 some ambiguity in the documents as to whether the  
8 burial lot is entirely on Partition Lot 2 or not, so  
9 I think he will be able to testify if he recalls  
10 headstones or other burial features of the cemetery  
11 on the 15-acre parcel.

12 But beyond that, certainly he can't  
13 testify as to what somebody told him where the  
14 easement was located. That is hearsay. All right?  
15 I think I ruled on everything I can rule on at this  
16 point. Let me ask you, Mr. Snyder, how long do you  
17 want to amend your bill of complaint?

18 MR. SNYDER: I'm going to need at least a  
19 couple of weeks because I'm going to have to -- I  
20 had title brought down, I think, after the last time  
21 we were -- sometime prior to the scheduling  
22 conference we had the title brought down to see who  
23 the current owners are. I am going to have that

1 updated from whenever that was.

2 THE COURT: Why don't we say 21 days.

3 MR. SNYDER: That's fine.

4 THE COURT: All right. Mr. Gogal, I'm  
5 going to assign you the task of drafting the order  
6 just reflecting the rulings that were made today,  
7 including those motions that were taken under  
8 advisement. If you circulate that, I would  
9 appreciate seeing that within ten days.

10 MR. GOGAL: Yes, your Honor.

11 THE COURT: Thank you very much.

12 MR. GOODMAN: Thank you, your Honor.

13 (At 12:48 p.m. this concludes the  
14 deposition.)

15

16

17

18

19

20

21

22

23



970069  
970071  
1  
VIRGINIA

2 IN THE CIRCUIT COURT OF FAIRFAX COUNTY

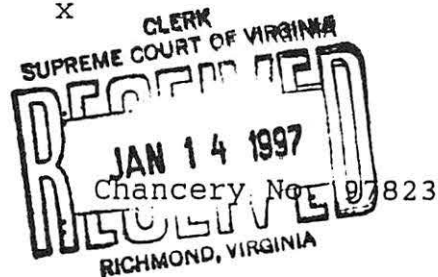
3 - - - - - X  
4 GEORGE ATKISSON, et al.,

5 Plaintiffs,

6 -VS-

7 WEXFORD ASSOCIATES, INC.,  
8 et al.,

9 Defendants.  
10 - - - - - X



11 Circuit Courtroom 4B  
12 Fairfax County Courthouse  
13 Fairfax, Virginia

14 Monday, September 16, 1996

15 The above-entitled matter came on to be heard  
16 before the HONORABLE JANE MARUM ROUSH, Judge, in and for  
17 the Circuit Court of Fairfax County, in the Courthouse,  
18 Fairfax, Virginia, beginning at 2:10 o'clock p.m.

19 APPEARANCES:

20 On Behalf of the Plaintiffs:

21 SCOTT E. SNYDER, ESQUIRE

22 On Behalf of the Defendants:

23 LORA A. BRZEZYNSKI, ESQUIRE

BERNARD E. GOODMAN, ESQUIRE

NANCY DIMAURO, ESQUIRE

JAN L. BRODIE, ESQUIRE

DAVID GOGAL, ESQUIRE

C O N T E N T S

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>
ROBERT J. SIMPSON	31	48, 63, 76	79
GEORGE ATKISSON	83	--	--

<u>EXHIBITS</u>	<u>IDENTIFIED</u>	<u>RECEIVED</u>
PLAINTIFFS' EXHIBIT AAA	41	41
PLAINTIFFS' EXHIBIT ZZZ	42	48
PLAINTIFFS' EXHIBIT FF	43	114
PLAINTIFFS' EXHIBIT DD	104	--
PLAINTIFFS' EXHIBIT EE	104	--
PLAINTIFFS' EXHIBIT HH	109	--
PLAINTIFFS' EXHIBIT II	109	--
PLAINTIFFS' EXHIBIT GG	109	--

467

P R O C E E D I N G S

THE COURT: This is the case of Atkisson v. Wexford Associates, et al. Counsel and parties ready for trial today?

MR. SNYDER: Plaintiffs are, Your Honor.

MS. BRZEZYNSKI: Yes, Your Honor.

THE COURT: All right, why don't we start with everyone introducing himself or herself for the record?

MR. SNYDER: Scott Snyder here for the Plaintiff, and George Atkisson is here.

MR. GOGAL: David Gogal and John Keith for David O'Brian and Jane B. O'Brian, Intervenors.

MS. BRZEZYNSKI: Lora Brzezynski for Thomas and Victoria Healy.

MS. BRODIE: Jan Brodie for the Fairfax County Park Authority.

MS. DIMAURO: Nancy DiMauro and Bernard Goodman for Wexford and the individual Defendants and Paul Cavanaugh.

THE COURT: All right, and where is Mr. Goodman?

MS. DIMAURO: He is on his way, Your Honor, I

1 believe. He's coming in from the parking lot.

2 THE COURT: Okay, did you want to wait a  
3 couple of minutes until he got here? I'm sorry, I thought  
4 everybody was ready to go. Do you want to just go ahead  
5 and get started?

6 MS. DIMAURO: Can we wait for a couple of  
7 minutes?

8 MR. GOGAL: Just for a couple of minutes; I'm  
9 sure he'll be here, Your Honor. Security and everything  
10 takes a while, but I'm sure he'll be in any minute.

11 THE COURT: Sure, all right, well, I'll take a  
12 very brief recess. And when Mr. Goodman gets here, we'll  
13 get started with the opening statements.

14 (Brief Recess)

15 THE COURT: Okay, Mr. Snyder, did you want to  
16 make an opening statement?

17 MR. SNYDER: Well, perhaps, just a brief one,  
18 Your Honor. Let me just tell you, too, I'm expecting  
19 Quintan Corrie from our firm to be here, but we can get  
20 started.

21 MR. GOODMAN: Your Honor, before we begin, can  
22 we have a rule on witnesses?

23 THE COURT: All right, will anyone who is



1 going to be a witness in this case, other than the  
2 parties, if you're a named party, you don't have to stand.  
3 But will anyone who is going to be a witness in this case  
4 and is not a party, please stand?

5 All right, sir, there's a rule on witnesses,  
6 and I granted that. This means you must remain outside of  
7 the courtroom. Please don't discuss your testimony with  
8 anyone until it's your turn to testify.

9 MR. SNYDER: Your Honor, I believe after  
10 everything we've been through, you have a fair idea of the  
11 issues in this case. The evidence that we intend to  
12 produce in our case in chief, starting with Mr. Simpson,  
13 will be, first of all, his description of how he -- what  
14 will be marked AAA, how he drew this. This is what we had  
15 when we were out there. It doesn't have rain spots on it,  
16 so it may be a little easier to follow.

17 But he will -- Mr. Simpson is going to testify

18 --

19 THE COURT: He's the surveyor, is that right?

20 MR. SNYDER: Right. He will testify that what  
21 he had done in addition, if you look at this, in these  
22 corners, the back corners of outlot A; point G is up here.  
23 The intersection of these lines indicates that there are

1 posts there. And that's what we -- he'll testify that  
2 that's what it was that we had looked at. And he had  
3 compared the angle measurements from the 1896 plat to the  
4 1979 plat of Hunter Mill -- of Hunter Mill Forrest. And  
5 Hunter Mill Forrest is this area up here; Wendover is the  
6 area down here.

7 And he's going to say -- he's going to testify  
8 that the one way that he was able, in his mind, to come to  
9 the opinion that point G was in fact where it was located,  
10 was by comparing other points, which he will describe, and  
11 angles to the 1896 plat, the 1979 plat, to what is  
12 currently out there. They were accurate, as close as you  
13 could possibly measure them.

14 And I think using that as a starting point,  
15 again, there's a cleaner copy of ZZZ that has outlot A  
16 diagrammed on it as it appeared from the 1979 plat. And  
17 he'll testify as to how he determined which portions are  
18 not shaded, which were. He'll also testify as to how he  
19 determined that this was, in fact, the easement that was  
20 referenced in the Deed of the 15 acre parcel.

21 We also, through Mr. Atkisson, will present  
22 testimony concerning his efforts to preserve the easement  
23 that existed. He'll also testify concerning his

1 involvement with the maintenance of the area, that is, the  
2 cemetery maintenance of the area that surrounds the  
3 cemetery, his own knowledge of the layout of these areas.  
4 As I mentioned when we were on the -- when we were out  
5 behind the cemetery, I had said that it was my  
6 understanding we'll hear from somebody interpreting an  
7 aerial photograph that is going to be saying that there's  
8 an area in here that is dirt. And Mr. Atkisson is going  
9 to be able to testify as to what that is at the time that  
10 that photograph was taken in 1937.

11 Mr. Atkisson is also going to be able to  
12 testify as to various monuments, which I pointed out to  
13 Your Honor, his knowledge of them, and his use of this  
14 particular area of land. Additionally, there will  
15 testimony concerning -- this is a tax map which shows the  
16 30 foot outlet road --

17 THE COURT: Wait a second. Is that a current  
18 tax map, or is that --

19 MR. SNYDER: Yes, it is. It is current to the  
20 year I made it, which was, I think, 1995. I had it blown  
21 up. And actually, it's not blown up as big as it could  
22 be, I guess, but you can see lots 38, 39, and 40, what's  
23 indicated as the 30 foot outlet road and Clark's Crossing



1 Road, in the area that we looked over.

2 We'll hear testimony, although it will  
3 probably be on rebuttal, but there will still be testimony  
4 from the Virginia Department of Transportation that this  
5 road, the 30 foot outlet road that runs from the  
6 termination of the easement, Clark's Crossing Road, is a  
7 part of the roads of the State of Virginia. It is  
8 maintained as a road within the State of Virginia records  
9 and has never been abandoned.

10 There may be additional evidence that may be  
11 presented on rebuttal, but essentially, Your Honor, the  
12 case in chief will be to present you with the evidence  
13 that shows the location of the cemetery, the actual  
14 physical location of the cemetery as we saw it in relation  
15 to the points that the surveyors, Mr. Simpson, and the  
16 people that work for him, were able to locate and  
17 corroborate as point G in relation to the cemetery; point  
18 G as in relation to the 15 acre parcel and lot 2, and  
19 point G and the easement itself.

20 THE COURT: All right. Mr. Gogal, are you  
21 going to make an opening statement?

22 MR. GOGAL: Yes, Your Honor. I did have one  
23 preliminary matter, Your Honor. We have a little bit of



1 confusion; there was a Fourth Amended Complaint that was  
2 telecopied to both Mr. Goodman and I on February 27th. As  
3 it turns out, that is the only copy that Mr. Goodman and I  
4 had until yesterday, when Ms. Brzezynski showed us a  
5 different version. It appears that Mr. Snyder filed a  
6 slightly altered one, which basically the paragraphs are  
7 off, and there's some other changes. What we'd like to  
8 do, and Mr. Snyder has agreed, is to allow -- we don't  
9 have the time to sort of change and file a new answer.  
10 But we'd ask the Court if we could file this, so that if  
11 our case goes up on appeal or whatever, for purposes of  
12 the record, our answer will be able to tie into a  
13 pleading. And this was the copy of that pleading. We  
14 would ask that it be filed.

15 THE COURT: All right, now how do I identify  
16 this?

17 MR. GOGAL: It's got a telecopy on the top,  
18 and that's the telecopied version, but I don't know how  
19 we'd want to identify that. We can just say Fourth  
20 Amended Complaint A or something. I don't have any --

21 MR. GOODMAN: Well, Fourth Amended Complaint  
22 telecopy, February 27th.

23 MR. GOGAL: Right, that's --

1 THE COURT: All right.

2 MR. GOGAL: Now, the Defendants in this case  
3 and the Intervenors have tried to the extent we can to  
4 cooperate in terms of exhibits and also in dividing of  
5 arguments and some of the testimony that we do. I'd like  
6 to provide the Court with a copy, our court copy of the  
7 exhibits that we intend to introduce. It will just make  
8 things go a lot quicker.

9 THE COURT: All right.

10 MR. GOGAL: Mr. Snyder also has a copy. On  
11 the very beginning, if you open up, there's a stipulation;  
12 we just provided an extra copy for the Court's reference.

13 I did file a memorandum; I don't know if the  
14 Court had an opportunity to review that, but I'll try not  
15 to --

16 THE COURT: I did.

17 MR. GOGAL: If the Court has, this may be a  
18 little redundant, but I did want to show the Court  
19 graphically what this case is about. This case is not  
20 about whether a cemetery exists; it's not about whether  
21 there was ever an easement for the 1892 parcel. This case  
22 is about whether or not the easement that you now saw some  
23 of the remains of was intended to serve the cemetery that

1 Mr. Atkisson now claims to be -- has an interest in.

2 To start off, Your Honor, and I think the  
3 history is important. The evidence is going to show that  
4 this entire tract here once belonged to Mary Saunders.  
5 And the first thing that happened in the chain of title is  
6 in 1887 -- actually, 1888, Mary Saunders conveyed to  
7 Robert Adams this parcel here, which is called parcel 48.  
8 And because she owned the rest of this property, she  
9 reserved an easement through that property. And this is  
10 shown here as a hypothetical easement. We don't know the  
11 exact location of it.

12 The next thing that happened is she sold --  
13 then in 1892, and this is one of the three, I would say,  
14 critical deeds in the case, or critical records from the  
15 land records, Thomas Adams acquired from Mary Saunders  
16 what we've referred to as a 15-acre parcel.

17 She conveyed with the parcel an easement  
18 through her property. It's also depicted here for the  
19 Court's reference. We're not admitting any particular  
20 location; it's there for the Court's reference. As you  
21 can see, this was located for the purpose of this 15-acre  
22 parcel. And indeed, the evidence is undisputed that  
23 Thomas Adams built a house here. And this road, in fact,



1 led to that house.

2 The next event occurred -- the second  
3 significant record for the Court to consider is in 1896,  
4 there was a partition of property belonging to the  
5 Saunders/Adams family. And in that partition, Thomas  
6 Adams acquired what we are referring to as partition lot  
7 2, shown here in green. There are number of important  
8 references in that partition deed.

9 Significantly, the Commissioners, the  
10 surveyor, and the Court, when it approved the  
11 Commissioner's report, confirmed that there was a one-  
12 quarter acre cemetery in the southeast corner of partition  
13 lot 2. Access for that cemetery and Thomas Adams'  
14 partition lot 2 was specifically provided in the 1896  
15 partition decree. And that is this road that's depicted  
16 on the -- on a plat filed with this partition decree. And  
17 it's between lots 3, 4, and lots 5 and 6. And that is  
18 what we refer to as the partition easement. It  
19 specifically provided for partition lot 2 and the quarter  
20 acre cemetery. According to land records, the cemetery is  
21 located on partition lot 2.

22 The next -- well, this is sometime between  
23 approximately 1902 and when the first tax map showed up in



1 the 1957-60 range. We find that an outlet road was  
2 created that came up along the railroad tracks. And it's  
3 clearly depicted on aerial photos beginning in 1937.  
4 That's the first aerial photo that was taken. And that's  
5 demonstrated there. But this shows access for Thomas  
6 Adams' 15-acre parcel, alternative access for him that is  
7 reflected in the tax maps all the way through the '70s and  
8 '80s. Today, that is what I think Your Honor would recall  
9 is basically what's there, but it doesn't have the bike  
10 trail, and I think there's a horse trail there as well.

11 THE COURT: Well, the bike trail was on the  
12 railroad right-of-way, so I'm not sure that's --

13 MR. GOGAL: Right. Maybe that's nearby, but  
14 there may be some remnants of it. We didn't actually go  
15 out and view that.

16 The next thing that happened, Your Honor, it's  
17 not actually depicted here, but in 1978, and this is very  
18 significant, the heirs got together and -- the heirs of  
19 Thomas Adams, that is, and includes Florence Atkisson, who  
20 was Mr. Atkisson, George Atkisson, the Plaintiff's,  
21 mother, got together and sold what was partition lot 2 and  
22 the 15 acres. They sold that to Harold Miller, Trustee,  
23 and he was a partner of George Atkisson and David Ralston.

1           When the heirs conveyed the property, the  
2       excepted out the cemetery. Indeed, they had to, because  
3       the cemetery was reserved -- in the partition decree, it  
4       was reserved for all the families of all the parties in  
5       the partition decree. That's not just Thomas Adams;  
6       that's a number of -- there's some 16 parties to the  
7       partition decree. So they had no -- they had absolutely  
8       no right to convey the cemetery because it belonged to  
9       other heirs in addition to them. So they specifically  
10      excepted it. 1978, it's excepted out.

11           At the same time that they except out the  
12      cemetery, they convey the rest of the land, and they  
13      convey with it the 15-acre parcel easement. That's  
14      specifically conveyed to the developer. Shortly after --

15           THE COURT: And was Mr. Atkisson a signatory  
16      to that deed?

17           MR. GOGAL: He was not, Your Honor.

18           THE COURT: His mother was, though?

19           MR. GOGAL: His mother was, so he would be  
20      estopped by the deed, because he takes through her. But  
21      that evidences the intent, that none of the heirs thought  
22      that this easement went with them, because they  
23      specifically conveyed it away. That's our -- that's why

1 that is significant.

2 The Hunter Mill subdivision then was  
3 developed. It obliterated whatever was left of the access  
4 that existed before. They did not provide for access  
5 through Hunter Mill subdivision, and Mr. Atkisson was  
6 involved in the planning of that subdivision. The land  
7 records reveal that shortly after Harold Miller acquired  
8 the 15-acre parcel and this, he then conveyed it to Anmar  
9 Development Company, which Mr. Atkisson will testify the  
10 developer actually built the lots. It's interest to note  
11 that --

12 THE COURT: Tell me again about the conveyance  
13 to Anmar. When was that done and by whom?

14 MR. GOGAL: That was done in 1978; shortly  
15 after Harold Miller acquired it, a few months later, he  
16 conveyed it to Anmar, Anmar Development Company. After he  
17 conveyed it to Anmar Development Company, Harold Miller  
18 purported to convey the easement all by itself to George  
19 Atkisson. That has been conceded to be a nullity, but  
20 it's interesting to note that there was an attempt to  
21 acquire that easement solely for himself, according to the  
22 land records.

23 And then next came the Wendover subdivision,



1 Your Honor, which was then built over what was once Mary  
2 Saunders' property. And that was -- the dedication there  
3 was filed in 1984.

4 I want to back up. The one thing I failed to  
5 point out was the first time we see what is referred to as  
6 outlot A was in 1979 when the deed of dedication was filed  
7 by this developer. And for the first time, the developer  
8 has located this parcel -- has located the quarter-acre  
9 cemetery off partition lot 2, has moved it over so that it  
10 now contains part of the 15-acre parcel. And we will  
11 argue, and the evidence will demonstrate that's it a  
12 transparent effort to try to take advantage of what was  
13 once the easement to this old house.

14 Mr. Corson will testify, Your Honor, these are  
15 at -- these are plats that are in the book; I'll just try  
16 to show them to the Court. The Hunter Mill subdivision  
17 plats, the plans that were filed with the county revealed  
18 that at the time the development was being considered in  
19 the '70s, there existed a patchwork of roads on the  
20 development which show the access for the cemetery through  
21 -- you know, through the partition lot 2. So there were  
22 existing roads that were obliterated when Hunter Mill was  
23 built.



1           They will also show that there were a number  
2 of opportunities that this developer had to provide access  
3 to the cemetery, but they did not do it. This plat will  
4 also show that one particular plan they had was to -- they  
5 had two options, and one option actually showed a road  
6 going right next to the cemetery. But even when it was  
7 right next to the cemetery, this developer tried to show  
8 access through this easement. It made absolutely no  
9 sense.

10           And finally, this will -- this plat  
11 demonstrates Mr. Atkisson purchased lot 22 here in  
12 Hillington Court, just how close he is to the cemetery,  
13 and if he really wanted access, he could easily have  
14 provided access much closer to where he lives.

15           And finally, the letters that are on file with  
16 the County demonstrated conclusively that all the open  
17 space was supposed to go to Fairfax County. Mr. Simpson,  
18 the surveyor for Mr. Atkisson has prepared a plat, and  
19 we've actually listed it as our exhibit, because it's  
20 interesting to note how this exhibit demonstrates, and  
21 you'll see on that exhibit, there's the granite marker;  
22 here's the boundary between partition lot 2 and the 15  
23 acres. And what they're claiming as part of the cemetery

1 is this little sliver of land here in the corner, because  
2 the bulk of this is really the road up to the house. And  
3 the view, Your Honor, I'm pretty sure that the Court will  
4 remember, there's an incline going down into a creek.  
5 There was no way that a grave would have been buried  
6 there. In fact, Mr. Atkisson has admitted that there's no  
7 graves buried on the 15 acres. They're entirely on  
8 partition lot 2, as the land records would reveal.

9 Finally, Judge, on behalf of the O'Brians, I  
10 did want to remind the Court we'll have evidence that  
11 demonstrates that even if there was an easement, and we  
12 would contend again that Mr. Atkisson has no claim to that  
13 easement, that easement would miss the swimming pool. It  
14 would not actually -- the actual easement used did not go  
15 through the swimming pool.

16 I would now turn it over to Mr. Goodman, who  
17 will talk a little bit more about the location, Your  
18 Honor. Thank you.

19 THE COURT: All right, thank you. Mr.  
20 Goodman?

21 MR. GOODMAN: Good afternoon, Your Honor. For  
22 the record, I'd like to state that I'm Bernie Goodman, and  
23 I'm representing -- I'm here with Nancy DiMauro from my

1 firm, and we're representing Wexford and the individual  
2 Defendants. Those are the parties that were before this  
3 Court before. And they have a judgment against them, and  
4 this Court has previously ruled that the only thing that  
5 we can litigate is the location of the easement.

6 We also represent two new parties, Mr. and Mr.  
7 Hall, who are the owners of lot 1, and Mr. and Mrs.  
8 Cavanaugh, the owners of lot 39. They are not bound by  
9 any previous orders of the Court. With respect to the  
10 existence of the easement, in an effort to save time, we  
11 will adopt Mr. Gogal's argument on behalf of Hall and  
12 Cavanaugh.

13 We believe that the evidence will show that  
14 the land records have no notice of the claimed easement.  
15 Yes, the land records show an express easement to a  
16 15-acre parcel in 1892. The land record's first mention  
17 of a burial plot is in 1896 in the partition decree, and  
18 as Mr. Gogal demonstrated, there is a partition easement  
19 along lots 3, 4, 5, and 6 that get to lot 2 and to the  
20 burial lot, which is in the southeast corner of partition  
21 lot 2.

22 There is just no discernable way that one  
23 could look at the land records and determine that the



1 express easement to the 15-acre parcel that goes 880 feet  
2 down the line --

3 MR. SNYDER: I'm going to object to the  
4 argument. I tried to restrict myself just to the facts,  
5 and I'd love to argue to start off with, but I don't think  
6 it's appropriate.

7 THE COURT: All right.

8 MR. GOODMAN: I thought I was repeating what  
9 some of these documents say. Forgive me if the Court  
10 considers this argument.

11 THE COURT: Well, just every couple of  
12 sentences, say that the evidence will show that, and then  
13 I think that takes it out of the realm of argument.

14 MR. GOODMAN: Thank you. Your Honor, we  
15 believe the evidence will show that the easement is  
16 indefinite. In fact, a simple view of the Plaintiff's  
17 ZZZ, which they rely on, show that great portions of it  
18 are not shaded. The unshaded portions are the ones that  
19 are indefinite and they're not sure of. We --

20 THE COURT: Well, I thought that the shading  
21 on the plats meant that one can today, in 1996, see some  
22 visible evidence of a path.

23 MR. GOODMAN: Well, that is correct in part,



1 Your Honor, but if the Court will remember, when we walked  
2 down behind lot 25 towards the retention pond, I believe  
3 on ZZZ, that portion is shaded, yet that is a trail that's  
4 maintained by the Fairfax County Park Authority today.

5 MR. SNYDER: It's not shaded. It's not shaded  
6 in the area of the retention pond at all. It's not till  
7 you get to lot 39 and 40 is it shaded.

8 MR. GOODMAN: Well, the exhibit will show  
9 where the shading is, but I certainly don't mean to  
10 misinterpret it.

11 We believe that the evidence will show that if  
12 the easement exists at all, it will end at Bird Road. The  
13 easement was designed to reach a county road. In 1892,  
14 the county road was beyond the property which was parcel  
15 49, which was conveyed to R. L. Adams in 1887. Today, the  
16 first county road is Bird Road, which is right next to Mr.  
17 and Mrs. Henry's property, which is lot 2.

18 The Court, of course, has seen what is  
19 contended by the Plaintiff today is a county road. You  
20 will hear evidence about the condition of that road. The  
21 evidence will show that the easement that exists can be  
22 relocated. There is -- there will be no hard historical  
23 or factual evidence from which the Court can determine

1 whether the easement is after it goes 880 feet and 320  
2 feet.

3 I submit that from the aerial photographs that  
4 the Court will see, and from other documents, the evidence  
5 at best is in conflict. If the Court was to find that ZZZ  
6 was the true easement, it would destroy a pool -- well,  
7 either that or the express easement, it would destroy a  
8 pool; it would destroy a house; it would destroy a couple  
9 of sheds. It would touch the county stormwater detention  
10 pond. And we think that the evidence will show that the  
11 easement is so indefinite that any easement that the Court  
12 may fashion can easily be done to serve its purpose  
13 without disturbing any of the property that's out there.  
14 Thank you.

15 THE COURT: Thank you. Ms. Brzezynski?

16 MS. BRZEZYNSKI: Good afternoon, Your Honor.

17 THE COURT: Good afternoon.

18 MS. BRZEZYNSKI: As you have heard, my name is  
19 Lora Brzezynski, and I have the pleasure of representing  
20 Thomas and Victoria Healy, owners of lot 40. Lot 40 is  
21 located on the other side of the Wendover subdivision,  
22 about 3,000 feet from the cemetery, and in fact, is the  
23 farthest lot from the cemetery.

1 My clients, the Healys, purchased their home  
2 on July 10, 1991. They were not part of the prior  
3 litigation. Their sellers, the Wallers, were also not  
4 part of the prior trial, because they were nonsuited. The  
5 Healys were only added as a necessary party and were  
6 served with the Fourth Amended Bill of Complaint in May of  
7 this year. The Healys would have liked to be here, Your  
8 Honor, but Mr. and Mrs. Healy were transferred to Canada,  
9 but they do still own the home.

10 The Healys are in this case because the  
11 Plaintiffs allege that they have rights to an easement  
12 that they would like to run through the Wendover  
13 subdivision. They will suggest that this claimed easement  
14 meanders throughout the subdivision, and may graze the  
15 very rear corner of lot 40, if the easement touches it at  
16 all. Because the Healys were not part of the prior trial,  
17 the Healys have the right to contest both the existence of  
18 the easement, and if the Court finds the existence of the  
19 easement, the location of the easement.

20 THE COURT: Well, let me ask, I thought  
21 originally, everyone in the subdivision was named as a  
22 party. Were they one of the parties who was nonsuited, or  
23 was their predecessor in title one of the parties who was

1 nonsuited at the start of the trial?

2 MS. BRZEZYNSKI: That's my understanding, the  
3 predecessor in title was nonsuited.

4 THE COURT: The Wallers?

5 MS. BRZEZYNSKI: The Wallers. The Healys were  
6 never part of the prior trial. The testimony will show  
7 that the Plaintiffs are not entitled to an easement. In  
8 any event, any conceivable easement does not and should  
9 not touch in any manner my clients' lot.

10 Now, Mr. Gogal has already spoken at length  
11 regarding the existence of the easement, and Mr. Goodman  
12 has spoken about the location of the purported easement.  
13 I will therefore only highlight the points important to  
14 the Healys. First, regarding the existence of the  
15 easement, Plaintiffs have alleged three bases for this.  
16 They claim an express easement. They claim a right to a  
17 prescriptive easement, and they claim a right to an  
18 easement by necessity.

19 Three items are important to the existence of  
20 an express easement. First, the 1892 deed from Mary  
21 Saunders to Thomas Adams of the 15-acre parcel, this deed  
22 grants Thomas Adams the 15-acre parcel easement, which  
23 runs from the 15-acre parcel to the county road. It is



1 significant that this deed contains no mention of the  
2 burial lot.

3 Second, the 1896 partition decree which  
4 conveyed to Thomas Adams partition lot 2, a 27 and a half  
5 acre parcel, including a burial lot located therein. And  
6 this partition decree gave partition lot 2 and the  
7 cemetery its own easement. And we're calling that the  
8 partition easement.

9 Third, you'll hear Mr. Atkisson's own  
10 testimony that there are no graves on the 15-acre parcel.  
11 Based on these three pieces of evidence, Plaintiffs cannot  
12 prove an express easement, because the cemetery is located  
13 solely on partition lot 2, and the 15-acre parcel easement  
14 that Plaintiff is claiming a right to does not belong to  
15 the cemetery.

16 As to the prescriptive easement claim, there  
17 are also three pieces of evidence which rebut any claimed  
18 prescriptive easement. First, the 1892 deed, again, from  
19 Mary Saunders to Thomas Adams of the 15-acre parcel, that  
20 deed specifically granted the use of the parcel easement  
21 to the 15-acre parcel. The use of the easement by the  
22 heirs of Thomas Adams, if any use occurred, could not have  
23 been adverse.

1           Second, the 1978 deed from the heirs of Thomas  
2           Adams to Harold Miller of the 15-acre parcel, partition  
3           lot 2, and specifically including the 15-acre parcel  
4           easement. This deed will show that the use of the parcel  
5           easement was not adverse until 1978, the year the heirs  
6           conveyed away their rights to the easement. Because this  
7           transfer only occurred in 1978, adverse use of the  
8           easement, if any, has not occurred for 20 years.

9           Third, you will also hear testimony from  
10          Thomas Merritt, Defendants' expert cartographer that the  
11          claimed easement has been overgrown and incapable of  
12          vehicular traffic. And when it was used, beginning in  
13          1978, its use was indicative of dirt bikes. Merritt's  
14          testimony will show that the use was not continuous nor  
15          exclusive.

16          With respect to the issue of an easement by  
17          necessity, Plaintiffs must prove that the dominant and  
18          servient parcels originated from a common grantor. The  
19          1892 deed and the 1896 partition decree again become  
20          important. These documents will show that the dominant  
21          estate, the cemetery, and the purported servient estate,  
22          the Wendover subdivision, did not originate from a common  
23          grantor.

1           The second point important to the Healys is if  
2           the Court finds that the easement exists, then its  
3           location becomes critical. There will be no credible  
4           evidence that the easement should proceed from Bird Road  
5           to the Healys' lot. The 1892 deed from Mary Saunders to  
6           Thomas Adams of the 15-acre parcel is significant. That  
7           deed specifically reserves a right-of-way for the 15-acre  
8           parcel, which runs from point G through what is now the  
9           Wendover subdivision to the county road. You will hear --

10           THE COURT: This is the 1892 deed we're  
11           talking about now?

12           MS. BRZEZYNSKI: Yes. Yes, you will hear that  
13           this county road is no longer in use, is overgrown, and  
14           incapable of vehicular traffic because of a large gully or  
15           ravine that crosses it.

16           THE COURT: That's the creek we hopped over  
17           this morning?

18           MS. BRZEZYNSKI: Yes.

19           THE COURT: It certainly did -- I don't know  
20           whose idea it was to start this trial with a view, but it  
21           strikes me in retrospect now as being a brilliant idea,  
22           and I congratulate whoever thought of it.

23           MR. GOODMAN: It was Your Honor's idea.



1 THE COURT: My idea? It certainly helps to  
2 visualize it. Go ahead.

3 MS. BRZEZYNSKI: You will also hear testimony  
4 that Plaintiffs have created what they think may be the  
5 original path of the easement. Plaintiffs' path cuts  
6 right across Bird Road. Bird Road is a county road  
7 currently in use and maintained by the State. Based on  
8 this evidence, the Court will be able to determine --

9 THE COURT: That is my question -- or is one  
10 of my questions. Bird Road is a state-maintained road?  
11 It's not a private road maintained by the homeowner's  
12 association, for example?

13 MS. BRZEZYNSKI: That's my understanding.

14 THE COURT: All right.

15 MS. BRZEZYNSKI: Based on that evidence, the  
16 Court will be able to determine that easement, if it  
17 exists at all as a matter of law, terminates at Bird Road.  
18 Nonetheless, even if the Court finds that the easement  
19 continues past Bird Road, my clients' lot, lot 40, should  
20 not be affected.

21 You will hear evidence that if you walk this  
22 path that Plaintiffs claim is the easement from the  
23 cemetery, you will have to walk 3,000 feet before you



1 reach lot 40. Mr. Merritt, who you have heard is an  
2 expert in reading aerial photography, will tell you that  
3 Plaintiffs' claimed path is only one to two feet wide in  
4 the 1980 aerial photo. The experts will also testify that  
5 if the Plaintiffs' claimed path touches lot 40 at all, it  
6 is up to a maximum of 12 inches. One thing the evidence  
7 will clearly show, however, is that no one can be  
8 reasonably certain that this one to two-foot path grazes  
9 the rear corner of lot 40.

10 The easement Plaintiffs claim they have a  
11 right to does not serve the cemetery and no longer exists.  
12 And in any event, the purported easement does not touch  
13 lot 40. Plaintiffs are entitled to no relief whatsoever  
14 against Mr. and Mrs. Healy.

15 THE COURT: All right, thank you. Ms. Brodie?

16 MS. BRODIE: Your Honor, the Park Authority is  
17 here before the Court in a very limited capacity. On a  
18 remand from the Supreme Court, the Supreme Court stated  
19 that the Park Authority would not be responsible for any  
20 remedy to Mr. Atkisson absent proof of obstruction of the  
21 easement. The parties have agreed that the Park Authority  
22 has no obstructed the easement in any way. Consequently,  
23 the sole issue that the Park Authority may challenge,

1 since they are precluded now from challenging the  
2 existence of the easement, is the location of the  
3 easement.

4 The evidence will show that there are not  
5 metes and bounds which define the easement across the Park  
6 Authority's property. There's no evidence of existence of  
7 a road based on the aerials since 1937, when the first  
8 aerials were taken of the county. Furthermore, it's  
9 clearly not possible to transverse any parts of the  
10 easement by vehicle today as it exists.

11 In the absence of a clear indication of where  
12 the easement should go, this Court should find under --  
13 that it should end the easement at the public road there  
14 at Bird Road. We adopt the arguments made by Mr. Goodman  
15 as to the location to the easement.

16 And as a side issue, Your Honor --

17 THE COURT: Could it possibly -- is the storm  
18 detention pond, is that a possible obstruction by the Park  
19 Authority?

20 MS. BRODIE: The parties have agreed that is  
21 not.

22 THE COURT: All right.

23 MS. BRODIE: Just as an aside, Your Honor, I'm

1 suffering from an intestinal malady of some sort, and I  
2 may need to leave the Court periodically, and I will not  
3 ask permission each time; I'll just leave quietly.

4 THE COURT: That's fine. I hope you feel  
5 better.

6 MS. BRODIE: Thank you.

7 THE COURT: I hope I don't catch it. All  
8 right, Mr. Snyder, call your first witness.

9 MR. SNYDER: I'll call Mr. Simpson.

10

11 Whereupon,

12

ROBERT J. SIMPSON

13 a Witness, was called for examination by counsel on behalf  
14 of the Plaintiffs, and, after having been duly sworn by  
15 the Clerk of Court, was examined and testified, as  
16 follows:

17

DIRECT EXAMINATION

18

BY MR. SNYDER:

19

Q Would you please state your name?

20

A My name is Robert J. Simpson.

21

Q What's your current occupation?

22

A I'm a professional land surveyor.

23

Q Can you tell me what your educational

1 background is?

2 A I attended the University of Virginia in the  
3 early '70s, studying architecture. And after leaving  
4 school, I went to work for a land surveying firm.

5 Q When did you first start working for a land  
6 surveying firm?

7 A As a summer job in 1971.

8 Q What company?

9 A Alexandria Surveys.

10 Q And what were you doing for them?

11 A When I started in 1971, I started out at the  
12 bottom of the ladder as a rodman, chainman, working in the  
13 field. My second summer, I moved up to operate an  
14 instrument. And my third summer, I was a party chief in  
15 charge of the three-man field crew. My two summers after  
16 that were working in the office as a draftsman.

17 Q And what did you do after you graduated?

18 A Well, I technically did not graduate. I left  
19 school and went back to work in, well, land surveying.

20 Q And from 1976 to 1979, what were you doing?

21 A I was working as a draftsman for Alexandria  
22 Surveys.

23 Q And what did that involve?



1           A       The primary job description was the drafting  
2 of house location surveys, but we also did other types of  
3 surveys, boundary surveys, topographic surveys.

4           Q       And what did you do after 1979?

5           A       I went to work for Urban Engineering, and my  
6 drafting responsibilities there were increased to handle  
7 larger subdivision plans and site plans.

8           Q       How long were you at Urban?

9           A       I was there for six years.

10          Q       And what did you do after, I guess, 1985 or  
11 '86?

12          A       Well, in 1986, I went back to work for  
13 Alexandria Surveys, and I've been with them ever since.

14          Q       And what have you been doing for Alexandria  
15 Surveys since 1986?

16          A       Gaining additional experience in surveying,  
17 which enabled me to qualify to take the land surveying  
18 exam.

19          Q       Are you saying you were certified as a land  
20 surveyor?

21          A       That's correct.

22          Q       And what does certification as a land surveyor  
23 involve?

1           A       To qualify to take the land surveying exam,  
2           you need a certain number of years either education or  
3           experience. The education portion is fairly new, where if  
4           you went to a accredited university and studied land  
5           surveying, you would then get your degree in land  
6           surveying, and only need to work approximately six months  
7           before you could qualify to take the exam.

8                     If you do not have a degree in land surveying,  
9           it was more like ten years of experience in a responsible  
10          position to qualify to take the exam.

11           Q       And did you pass this exam?

12           A       Yes, I did.

13           Q       And are you currently certified as a land  
14          surveyor?

15           A       Yes, I am.

16                     MR. SNYDER: I would move Mr. Simpson at this  
17          time as an expert in the area of land surveying and  
18          associated draftsmanship.

19                     THE COURT: Any objections?

20                     MR. GOODMAN: No, Your Honor.

21                     MR. GOGAL: No, Your Honor.

22                     THE COURT: He is so accepted as an expert.

23                     BY MR. SNYDER:

1           Q       Mr. Simpson, did there come a time where I or  
2           somebody from my office had asked you to locate what is  
3           known as point G?

4           A       Yes.

5           Q       And can you tell me what you did in your  
6           attempt to -- or did you locate point G?

7           A       Well, there were two phases to this. The  
8           first phase was to evaluate this right-of-way in question  
9           with respect to point G, just based on the available  
10          records. And these included Fairfax County topographic  
11          maps, tax maps, and various subdivision and development  
12          plans for the two subdivisions, one which holds the  
13          cemetery, and the other which had the right-of-way to lead  
14          to the cemetery.

15                 The second phase was to actually conduct field  
16          survey work using surveying instruments to verify the  
17          information that we had gathered in the beginning to  
18          actually locate it on the ground with our instruments.

19          Q       And were you able to locate point G?

20          A       Yes.

21          Q       Let me show you what we'll mark as Exhibit  
22          AAA. Can you identify that?

23          A       Yes, that's what you've just noted as being

1 Exhibit AAA, is a drawing that was prepared by our office  
2 to show the location of point G with respect to the  
3 current Hunter Mill Forest subdivision, the current  
4 Wendover subdivision, and going back 100 or so years to  
5 the original tracts of land that existed at that time.

6 THE COURT: Let me ask, is this AAA from the  
7 original trial?

8 MR. SNYDER: Yes.

9 THE COURT: It's already been admitted in the  
10 Court's records then?

11 MR. SNYDER: It was in the original trial.

12 THE COURT: What I'd like to do is start  
13 afresh, if we can, and try to -- as you know, the file in  
14 this case over the last ten years is a hit or miss  
15 proposition. But I'd like to have all these exhibits  
16 marked and not just rely on them being in the Court's  
17 files.

18 MR. SNYDER: No, I intend to introduce each of  
19 these and have them labeled before I give them to the  
20 Court.

21 MR. GOODMAN: I think we've already done that.  
22 We exchanged exhibit lists and exhibits those of us asked  
23 for, and we also had to object by, I think, the 10th of



1 September or so. So --

2 MR. SNYDER: Well, I think she's just talking  
3 about for her own record, the Court's record.

4 THE COURT: Yes, I'm talking about the Court's  
5 record keeping.

6 MR. GOODMAN: Oh, I'm sorry.

7 MR. SNYDER: Is it okay, just for continuity  
8 sake, to continue with the same labeling system?

9 THE COURT: That's fine. I just want to have  
10 them all introduced afresh, so we can have a complete set  
11 of the trial exhibits, rather than say I ask the Court to  
12 take judicial notice of this exhibit from the last trial,  
13 because there may be a problem locating it. I'm not sure  
14 about that specific exhibit. But I want to --

15 MR. SNYDER: Actually, I don't think that  
16 one's in the Court's file. But in any event, the ones  
17 that I have here, I intend to introduce.

18 THE COURT: That's fine, and you can use  
19 whatever numbering or lettering system that you all have  
20 exchanged ahead of time.

21 BY MR. SNYDER:

22 Q Mr. Simpson, you referenced something about  
23 looking at a survey 100 years old and drawing up this?

1           A       Yes, there was a deed of partition which  
2       created, I think, lots 1 through 7 or 8. And part of  
3       those lots are shown on this drawing, along with the  
4       adjoining tract, which is labeled in the name of Thomas  
5       Adams, and an adjoining tract, which is labeled in the  
6       name of Mary Saunders.

7           Q       Now, did you have an opportunity to compare  
8       some of the measurements and angles from that survey of  
9       1896 to the 1979 plat?

10          A       Yes. We looked at the partition plat that had  
11       been prepared, and we also looked at the subdivision plat  
12       for Hunter Mill Forest, which included several of the lots  
13       from that partition, along with the Thomas Adams property.  
14       And we located several points that were common to both the  
15       partitioned lots and the Hunter Mill Forest subdivision.  
16       We compared the measured angles at the corners between the  
17       two, and we found them to be virtually identical.

18                 And through our surveying measurements, we,  
19       just for comparison purposes, measured from one of those  
20       corners to the point in question, point G, and compared  
21       what we had measured in the field back in 1991, I believe  
22       it was, to what would have been a computed distance from  
23       the partition plat. And it differed by only -- I can't

1 read it from here. Maybe I --

2 Q Well, actually, why don't you approach this  
3 and show to the Judge some of the -- well, show to the  
4 Judge the comparisons that you did make?

5 A In my note number 2, I mentioned the angle  
6 measurements at point C, point D, and point T. And the  
7 1896 plat of the partitioned lots to the 1979 plat, the  
8 entire Hunter Mill Forest, those are the angles that I  
9 mentioned being virtually identical.

10 For comparison purposes, even though there is  
11 not a line on the ground, or there never was a line,  
12 directly from point T to point G, there was a line at one  
13 time separating lot 2 from Thomas Adams' that came to a  
14 point here, a point here, and a point here. But just for  
15 comparison purposes, going from point T to point G, the  
16 computed distance from the partitioned plat had a distance  
17 of 623.54 feet. According to our survey measurements from  
18 actually locating this point T and locating the stone,  
19 which is point G, it was a distance of 623.68 feet, which  
20 is a difference of 14/100 of a foot, which is in round  
21 numbers, about an inch.

22 Q Those were the points of comparison?

23 A Yes.

1           Q       Just so we're on the same page, this is the  
2 Defendant's trial exhibit tab 1R, the last page. This is  
3 part of the stipulated deeds. The last page of 1R, is  
4 this the deed that you're referring to in your comparison?

5           A       Yes. Yes, it is.

6           Q       Now, at what point in time -- or did there  
7 come a point in time where you actually, physically saw  
8 point G?

9           A       I was advised by your office to actually visit  
10 the site just to lend credibility to the fact that I had  
11 been to the property, and while I was out there, I saw the  
12 marker at the cemetery. I -- without surveying  
13 instruments, I just thought I would see if I could find  
14 point G, and in the brush, I saw orange flagging around a  
15 stone, so I assumed this to be point G.

16          Q       And then from that point, you took the  
17 measurements that you've just described?

18          A       Well, with that information, I had instructed  
19 the field crew who actually went out and did the survey, I  
20 have found point G; this is where you should look for it;  
21 these are other points I think you should look for and  
22 locate, and then we can make our surveying measurements  
23 from your observations.



1           Q       And then those comparisons with the other  
2       plats and deeds were done?

3           A       Yes.

4                   MR. SNYDER: Your Honor, I'd like this marked  
5       as Plaintiffs' AAA, and I'd move it into evidence at this  
6       time.

7                   THE COURT: Any objection to AAA?

8                   MR. GOGAL: No objection, Your Honor. It's  
9       the exact same as Defendants' Exhibit 12.

10                  THE COURT: All right, it's admitted.

11                               (Whereupon, the document was identified  
12                               as Plaintiffs' Exhibit AAA and admitted  
13                               into evidence.)

14                  MR. GOGAL: Defendants' Exhibit 13, Your  
15       Honor.

16                  THE COURT: All right.

17                  BY MR. SNYDER:

18               Q       Did you have an opportunity at my office's  
19       request to prepare this survey?

20               A       Yes.

21               Q       Can you tell me what it represents?

22               A       This is a --

23                  THE COURT: What will that be marked?

1 MR. SNYDER: It will be marked -- we'll mark  
2 it now as ZZZ.

3 THE COURT: ZZZ, all right.

4 (Whereupon, the document was marked as  
5 Plaintiffs' Exhibit ZZZ for  
6 identification.)

7 BY MR. SNYDER:

8 A This, Your Honor, represents the current  
9 Wendover subdivision, and it also represents some field  
10 work that we did to locate physical evidence of a roadway  
11 going through the property. And it was superimposed over  
12 a topographic survey of the subdivision prepared by our  
13 firm prior to development, which showed this roadway -- or  
14 the roadway along with others that wound through the  
15 property.

16 And based on the description of the right-of-  
17 way in question, the layout that we show here and the one  
18 that we traversed in the field today was the one that we  
19 felt was the one that led from the cemetery out to the  
20 county road.

21 Q And how did you arrive at that conclusion?

22 A There were other roads that we entered through  
23 the property, but others departed off the property and did

1 not go toward the county road. This was the only one that  
2 went from the cemetery to the county road.

3 Q And can you please tell me what the difference  
4 is between the shaded and the unshaded portion?

5 A The shaded portion indicates the areas that  
6 were actually able to identify in the field as  
7 representing a roadway. The dashed areas represent areas  
8 that were taken from the topographic survey done for  
9 development of this subdivision. And the two were  
10 compared and were virtually the same. So it was a matter  
11 of showing what we have located in the field, which was  
12 possible to locate because it was there, but since  
13 development of the subdivision, there's certain sections  
14 of the roadway which have been obliterated because of  
15 grading, construction of roads, houses, things like this.

16 Q Can you tell me whether or not, say this line  
17 that was drawn from the box that says existing cemetery,  
18 down towards the end of lot 4, does that represent  
19 something that you've actually surveyed?

20 A Yes, the shaded area indicates areas where we  
21 found physical evidence of a roadway.

22 Q And let's mark this FF.

23 (Whereupon, the document was marked as

1                   Plaintiffs' Exhibit FF for  
2                   identification.)

3               Q       Let me show you what's been marked as FF. Can  
4               you identify that?

5               A       This is a portion -- well, I don't believe  
6               it's a -- this drawing shows the topographic survey that  
7               was performed on this piece of land prior to development.

8               Q       And was this topographic survey one of the  
9               ones that you just referred to that you relied upon in  
10              preparing Exhibit ZZZ?

11             A       Yes, it is.

12             Q       Could you approach that topographic and  
13             indicate where it is that you see the easement or the  
14             trail that you surveyed?

15             A       Runs from this corner up here, down the  
16             property line like this, angle in, has a slight drop to  
17             it, runs up in this direction, comes down to here. And  
18             it's hard to read, but I believe it wound around here and  
19             then worked its way out here to this T intersection with  
20             the other road.

21                   MR. SNYDER: I'd move Exhibit FF at this time.

22                   THE COURT: Any objection?

23                   MS. BRZEZYNSKI: Your Honor, yes, I object.



1 There's been no foundation given for FF, apart from Mr.  
2 Simpson approaching it and testifying as to what he sees  
3 on the plat. There's been no testimony by the surveyors  
4 of that plat as to what they did when mapping it out or  
5 how they mapped out the supposed path on there or what it  
6 represents. The plat is underlied with hearsay; there's  
7 no foundation for it. I object to it.

8 THE COURT: Mr. Snyder, did you want to  
9 respond?

10 MR. SNYDER: Yeah, I would. This is a plat  
11 that is prepared by -- prepared at the request of Wexford,  
12 the named Defendant who, I understand, is still a party to  
13 this. And this was prepared by their agents, Huntley,  
14 Nyes & Associates. And I believe if need be, we can wait  
15 for it's submission through George Atkisson, who was given  
16 a copy of this by a representative of Wexford. It doesn't  
17 have to go in evidence at this time, if you think a  
18 further foundation is necessary.

19 THE COURT: All right, well, at this point,  
20 I'd sustain the objection.

21 MR. SNYDER: Okay. At this time, I would move  
22 in -- well, actually, let me ask you if I can have AAA  
23 back.

1 BY MR. SNYDER:

2 Q Mr. Simpson, were you present with us this  
3 morning when we were walking around in this area, the  
4 cemetery and easement?

5 A Yes, I was.

6 Q Can you tell me whether or not the -- we had  
7 located whether or not the post or the back end of outlot  
8 A as it goes into the Hunter Mill Forest were located?

9 A I believe we did, yes.

10 Q Were you present when those were pointed out  
11 to the Judge?

12 A Yes, I was.

13 Q Now, were you present with us today when we  
14 walked on those -- when we walked on areas of the easement  
15 that were shaded on this diagram, ZZZ?

16 A Yes, I was.

17 Q And did those areas that we walked on today --  
18 does it have any affect on your opinion that you may need  
19 to alter this Exhibit based upon what you saw today?

20 A No.

21 Q Let me ask you, if you were told that the  
22 length from point G to this point in lot 4, where it  
23 starts to angle off was not 880 feet, would that have any

1 affect on your opinion as to whether or not ZZZ represents  
2 the easement described in the deed?

3 A I don't believe so. As I've discussed with  
4 you, the description of that right-of-way said it followed  
5 the line 880 feet, and then it angled off from the line  
6 with a bearing, and as I mentioned to you, that 880 feet,  
7 when it actually measured in the field at 830 feet,  
8 somewhere along the line, whether it was an error in the  
9 surveyor's measurement of that line or in the  
10 transposition of the numbers, where a 3 could have been  
11 interpreted as an 8, I still feel that that section that  
12 we found in the field which measured 830 feet is the same  
13 length of line which had been described as 880 feet.

14 MR. SNYDER: I would move ZZZ in at this time.

15 THE COURT: Any objection?

16 MS. BRZEZYNSKI: Objection, Your Honor. Lack  
17 of foundation and hearsay. Mr. Simpson has testified that  
18 he relied on the 1983 Wendover plat in creating this path.  
19 We've already argued that that plat is unreliable hearsay.  
20 And there certainly is no testimony that the path shown on  
21 ZZZ is the express easement in question. Because of that,  
22 I think there's lack of foundation, and this is based on  
23 hearsay.

1 THE COURT: All right, I'd overrule the  
2 objection, and ZZZ is admitted into evidence.

3 (Whereupon, the document identified as  
4 Plaintiffs' Exhibit ZZZ was admitted  
5 into evidence.)

6 MR. SNYDER: Thank you, Your Honor. I have no  
7 further questions.

8 THE COURT: Mr. Gogal, any cross-examination?

9 MR. GOGAL: Yes, Your Honor.

10 CROSS-EXAMINATION

11 BY MR. GOGAL:

12 Q I think it might move things along a little  
13 bit if I could give Mr. Simpson some of the previous trial  
14 transcripts, just in case he needs to refer to it.

15 THE COURT: Certainly.

16 Q May I approach the witness? Well, I'm already  
17 here. These are some transcripts, and I'll hand you some  
18 exhibits as well.

19 Mr. Simpson, you have relied on a number of  
20 documents for your opinion as to the location of the  
21 easement, isn't that true?

22 A That's correct.

23 Q And I've heard you on direct mention the 1896



1 partition plat as one of the documents that you relied on?

2 A Yes.

3 Q In fact, that's one of the documents you  
4 relied on primarily?

5 A That's correct.

6 Q Are you aware that in -- I guess I could  
7 direct your attention, but I'll just ask you if you  
8 recall, on that plat, does it not reflect that the quarter  
9 acre lot is located in the southeast corner of partition  
10 lot 2?

11 A Yes, I recall that, yes.

12 Q And the plat also, does it not, depicts a 15  
13 foot outlet road providing access for partition lot 2  
14 between lots 3, 4, and 5 and 6?

15 A That's something that is not reflected in our  
16 -- the scope of our drawings here.

17 Q That's right, but I'm just saying you recall  
18 when you looked at that plat, it did have a partition  
19 easement?

20 A Yes, I recall that now.

21 Q I'd like to ask you to look to -- if you hold  
22 up Exhibit 5 -- right there -- do you recall there was  
23 also attached to the plat, there was a commissioner's

1 report, and also a decree by the Court. And the  
2 commissioner's report, it describes, when it talks about  
3 lot 2, partition lot 2, the one to Thomas Adams, that's  
4 the same partition lot 2 you show on your plat here that  
5 was marked as AAA. It says included in the description of  
6 lot number 2 is a burial lot of one-quarter acre, am I  
7 correct?

8 A I'm supposed to see that here?

9 Q Do you recall that?

10 A I recall seeing that that lot did have a  
11 burial lot of about a quarter acre, yes.

12 Q Right, and it also said that the burial lot  
13 reserved was in the southeast corner of lot 2, and it was  
14 reserved as a family burial lot?

15 A Yes.

16 Q And also, the survey -- Mr. Perry's survey,  
17 the actual handwritten notes or the description of the  
18 survey itself -- not the plat, but the survey -- was also  
19 included in that partition decree, and you must have  
20 relied on that as well?

21 A Yes.

22 Q And that survey says containing exclusive of a  
23 burial lot, which is one-quarter of an acre in the

1 southeast corner of this lot, 27 and a half acres, and  
2 also an outlet road 15 feet wide between lots 3 and 4, and  
3 lots 5 and 6 through Piney Branch. There's another  
4 reference in not only the plat but also in the survey  
5 description as well?

6 A Yes.

7 Q And there's a note at the very end, and it  
8 says there is reserved an outlet road 15 feet wide,  
9 beginning at the northwest corner of lot 2, the middle  
10 line of the outlet road being the dividing line between  
11 lots 3 and 4 on the east and lots 5 and 6 on the west of  
12 Piney Branch. There are a number of references in what  
13 you've relied on to -- what we're referring to here as the  
14 partition unit?

15 A Uh-huh.

16 Q Now, so you would agree, according to the land  
17 records, specifically, the 1896 partition decree and the  
18 commissioner's report and survey, that the cemetery,  
19 according to both records, is located in the southeast  
20 corner of partition lot 2?

21 A Yes.

22 Q In fact, that is where you located it on your  
23 plat with the cemetery symbol in the previous drawing?

1 A Yes.

2 Q In fact, in this litigation, you've not  
3 actually been asked to locate the cemetery, have you?

4 A To locate the cemetery with respect to lot 2?

5 Q No, just locate where the cemetery is? You  
6 haven't been asked to locate the cemetery?

7 A There is no actual description on record of  
8 the cemetery, other than being in the southeast corner of  
9 lot 2, until we reach the point where Hunter Mill Forest  
10 is created. And at that time, an outlot was created  
11 around the area which was the cemetery.

12 Q That's correct. Basically, the only  
13 description in land record records is in the corner --  
14 southeast corner of partition lot 2, there was at some  
15 point, the developer created outlot A, which contains the  
16 cemetery, contains a part of the cemetery, at least?

17 A Yes.

18 Q And you've shown that very well in your AAA  
19 that this outlot A does in fact -- a majority of outlot A,  
20 in fact, is partition lot 2, is the southeast corner of  
21 partition lot 2?

22 A Yes.

23 Q It's just it has a little bit of the 15 acres



1 in there as well?

2 A That's true also, but at the time that the  
3 Hunter Mill Forest subdivision was created, the lot 2,  
4 which we see here in Thomas Adams' piece, which we see to  
5 the left and right, respectively, along with possibly  
6 other properties, were all consolidated and then  
7 resubdivided to create this subdivision of Hunter Mill  
8 Forest.

9 Q So partition lot 2, the 15-acre parcel, and  
10 some other parcels were all brought together and sold to  
11 developers at one time?

12 A Yes.

13 Q And that's not disputed. Outlot A was created  
14 by a developer, correct?

15 A Yes.

16 Q You aren't aware of any basis in the land  
17 records for outlot A as the cemetery, are you? You're not  
18 aware of anything?

19 A No.

20 Q In fact, it contradicts what the 1896  
21 partition record would say is the cemetery, does it not?

22 A If it -- well --

23 Q Well, it certainly isn't a -- the partition

1 lot 2 is now, developers moved it over to the right a  
2 little bit, isn't that true?

3 A That is true.

4 Q Now, you've also, in this AAA, you've shown us  
5 the path of what was the 15-acre parcel easement, is that  
6 not correct?

7 A The 15-foot right-of-way?

8 Q That's right.

9 A What that drawing shows is just a portion of  
10 what had been field located as it came up the dividing  
11 line between section -- or Wendover 2 and Wendover 3, and  
12 then as it went through a portion of the outlot which was  
13 created around the cemetery.

14 Q Mr. Simpson, could you tell me -- I would be  
15 happy to bring this over to you if you need it. If you  
16 could give me an estimate of how far to the right of point  
17 G is that road bed that you've shown? Is there any way  
18 you can give us an estimate?

19 A Maybe 10 or 15 feet.

20 Q So the actual road bed of that easement,  
21 you've depicted as 15 feet to the right of point G on the  
22 15-acre parcel?

23 A Now, that's from the point G to the center of

1 the right-of-way.

2 Q And as you've depicted it, it actually -- once  
3 it enters the 15-acre parcel, it kind of veers to the  
4 right, is that not correct?

5 A That's true.

6 Q And are you aware there was a house up here on  
7 the 15-acre parcel?

8 A I've heard that, yes.

9 Q And that's up to the right as well. You also  
10 considered the 1892 deed from Saunders to Thomas Adams of  
11 the 15 acres as well, did you not?

12 A Did that transference describe the 15-foot  
13 right-of-way leading from point G through Saunders'  
14 property?

15 Q That's the one that did that, yes. The 1892  
16 where Thomas Adams acquired the 15 acres, and in that was  
17 the easement itself, a description of the easement. Do  
18 you recall that?

19 A Yes.

20 Q And that's one of the deeds you relied on?

21 A Exactly.

22 Q And in that deed, it says that this 15 acre --  
23 this 15-foot outlet road that was reserved for Thomas

1 Adams, that was for his 15 acres, is that correct?

2 A I believe the description I read was the  
3 description of the right-of-way leading from the cemetery  
4 out to the county road.

5 Q Do you know what county road that was?

6 A It was --

7 Q Was it from the cemetery?

8 A From the cemetery to the county road.

9 Q All right, let's look back, because we have to  
10 correct that. Why don't you take a look at Defendants'  
11 Exhibit -- I believe it's -- we've got it typed up. The  
12 first few pages is the typed up 1892 conveyance from  
13 Saunders to Adams.

14 THE COURT: The second brilliant idea I've  
15 witnessed today. Thank you for typing that up.

16 Q I can't take credit for that, Your Honor. It  
17 was done in the first trial, but I'm also happy it was  
18 done.

19 You can take your time if you want to read  
20 that. Is there any reference to the 1892 deed to a  
21 cemetery?

22 A On briefly looking at this, this is a  
23 description of the Adams' property, along with the 15 foot



1 right-of-way leading to the property.

2 Q Right, so we're talking about the 15-acre  
3 parcel here, right?

4 A Yes.

5 Q And there's no mention of a cemetery here. In  
6 fact, as you've just testified, the 1896 partition decree  
7 talks about the cemetery being in the southeast corner of  
8 petition lot 2?

9 A So this description of the Adams' property as  
10 compared to 1896 which had the cemetery on it, there would  
11 probably be no need to mention the cemetery on this  
12 description, because it was not on the Adams' property.

13 Q That's right, Mr. Simpson; in the 1892, there  
14 was no cemetery mentioned. Thomas Adams was only on the  
15 15 acres, correct?

16 A Yes.

17 Q And this easement went to his 15 acres,  
18 correct?

19 A According to this, yes.

20 Q I just wanted to clear that up. To sum up,  
21 Mr. Simpson, you would agree that if the cemetery is on  
22 partition lot 2 and the 15-foot outlet road was intended  
23 in 1892 to serve the 15 acres owned by Thomas Adams, that

1 according to the land records, this 15-foot outlet road  
2 does not serve the cemetery?

3 MR. SNYDER: I object. He's making a legal  
4 conclusion. He's also ignoring the physical evidence  
5 which we all just saw.

6 THE COURT: I overrule the objection. I think  
7 the witness can answer.

8 THE WITNESS: Would you restate that, please?

9 BY MR. GOGAL:

10 Q Yes, just to sum up, the 15-foot outlet road  
11 in 1892 was created for the 15 acres, and in 1896, the  
12 cemetery described as the quarter acre in the southeast  
13 corner of partition lot 2, then this 15-foot outlet road  
14 was not intended to serve the cemetery, is that not  
15 correct, according to the land records?

16 A According to what you've just stated, the 1892  
17 deed for Thomas Adams describing an outlet road through  
18 the Saunders' property to get to his property, but I tend  
19 to recall there was a description that said from the  
20 cemetery along the Saunders line, and then as we've shown  
21 on the other drawings, out to the county road.

22 Q Can you recall ever -- I mean, where you saw  
23 that?

1           A       No, I can't recall it. I'd have to research  
2 everything you've got here.

3           Q       I can tell you there will be no evidence of  
4 that, because there's no document --

5                   MR. SNYDER: I'm going to object to him  
6 testifying.

7           Q       All right, that's fine. Well, you can't  
8 recall exactly where you may have seen something like  
9 that?

10          A       No.

11          Q       Now, I understand you've also relied on the  
12 Fairfax County topographic maps?

13          A       This was back in the preliminary stages before  
14 any actual field surveying was done.

15          Q       Okay, well, then let's say between this and  
16 ZZZ, you've relied on Fairfax County topographic maps?

17          A       Nothing that has been presented in evidence so  
18 far today was based on Fairfax County topographic maps.  
19 This was in the very early stages of this trial before any  
20 actual field surveying was performed.

21          Q       Well, let me just ask you this. Have you ever  
22 reviewed any Fairfax County topographic maps in preparing  
23 for your testimony today?



1 A No.

2 Q Perhaps you might want to turn to page 113,  
3 and this is going to be in the trial transcript, well,  
4 this one here, and look under tab 1.

5 MR. SNYDER: What date was that?

6 Q The date is July 30, 1991.

7 MR. SNYDER: And the page number?

8 Q This is going to be page 113. The question  
9 was, "Okay, was there other information -- well, what  
10 types of things, in order for you to perform the task that  
11 I've requested of you, what did you need to utilize."  
12 Would you like to read your answer? It's on the bottom of  
13 the page, line 16.

14 A "I wanted the deeds that were in question from  
15 the late 1890s. Other things that I obtained on my own  
16 were Fairfax County tax assessment maps and the Fairfax  
17 County topographic maps, and I was primarily interested in  
18 seeing what the subject subdivision looked like  
19 topographically before it was developed, if this was the  
20 property that had the roadway -- the right-of-way that was  
21 in question."

22 Q So you did review Fairfax County topographic  
23 maps?



1 A Not for the --

2 MR. SNYDER: Objection.

3 A Not for the professional sealed drawings that  
4 you are referring to today. This was in the early stages  
5 of this trial when --

6 Q I only asked you in preparing for your  
7 testimony at trial. Did you --

8 A Well, that would go back to day one when --

9 Q Right, okay, so at some point you did. I  
10 don't mean to get technical --

11 A So I will restate that, yes, at some point, in  
12 the very early stages of this trial or previous trials, I  
13 did, yes, look at Fairfax County topographic maps.

14 Q And those included aerial topos as well,  
15 Fairfax County aerial topos?

16 A Well, all of the Fairfax County topos are  
17 aerial.

18 Q Did you look at aerial photos?

19 A I believe I did see some, yes.

20 Q Was that like the '72 aerial photo? Do you  
21 recall the year?

22 A I don't recall which year it was that I saw.

23 Q Did you review the historical photos like

1 1937, 1960s, '57, those sort of older photos, do you  
2 recall?

3 A The review of these photos or topographic maps  
4 in the very early stages of this case, I'll use the term,  
5 it was like looking at a road map to get you into the  
6 neighborhood of what you're looking for. As this case  
7 progressed, it reached the point where it was determined  
8 that actual field surveying was needed to determine the  
9 location of point G with respect to the cemetery. And  
10 additional field work was then requested to see if remains  
11 of this roadway could be located.

12 Q Did you look at any other roadways, any other  
13 roads leading to the property; did you consider them?

14 A No.

15 Q You weren't asked to do that?

16 A No.

17 Q So you did not go out in the field and measure  
18 anything yourself, did you?

19 A No, I did not.

20 Q And you did not go out with the field crew  
21 when they did the measurements, either?

22 A No.

23 Q Are you aware of any swimming pools in the

1 Wendover subdivision?

2 A We saw a swimming pool today.

3 Q You did; that's the first time you saw it?

4 A Yes.

5 Q And that was on lot 3?

6 A I believe it was.

7 MR. GOGAL: Your Honor, I would pass the  
8 witness to Ms. Brzezynski.

9 THE COURT: All right.

10  
11 CROSS-EXAMINATION

12 BY MS. BRZEZYNSKI:

13 Q Good afternoon, Mr. Simpson. Could I ask you  
14 to please take a look at Exhibit ZZZ?

15 Your Honor, may I approach?

16 THE COURT: Yes.

17 Q Mr. Simpson, if you can't see it from where  
18 you are, I'll bring it to you.

19 A I can go up there; that's fine.

20 Q Could you please take a look at ZZZ, and you  
21 might not have to get up for this question. The path that  
22 you have drawn on ZZZ, it crosses Bird Road, doesn't it?

23 A Yes, it does.

1           Q       You testified that you reviewed the 1892 deed  
2 from Mary Saunders to Thomas Adams, is that correct?

3           A       Yes.

4           Q       And in that deed, you reviewed the description  
5 of the easement?

6           A       Ye.s

7           Q       And that description of the easement contained  
8 metes and bounds measurements for only part of the  
9 easement?

10          A       That's correct.

11          Q       And the metes and bounds measurements were 880  
12 feet along the line of Mrs. Adams' to near a pair of bars,  
13 and then it's across Mary C. Saunders' land, south 32  
14 degrees, 50 feet, east 320 feet?

15          A       I believe that's correct, yes.

16          Q       After that 320 foot measurement, there are no  
17 additional metes and bounds, correct?

18          A       That is correct.

19          Q       The only description in the 1892 deed after  
20 that 320 foot point is through landmarks, right?

21          A       That's correct.

22          Q       The first landmark after the 320 foot point is  
23 to a -- excuse me, to a point near a pair of bars after a



1       stable, is that right?

2               A       I don't have that in front me, but, yes.

3               Q       Why don't you take a look at it? It's  
4       Defendants' Exhibit Number 4, please. The first landmark?

5               A       Yes, to a point near a pair of bars after a  
6       stable.

7               Q       Did you -- you never located the stable, did  
8       you?

9               A       There was no stable to locate.

10              Q       So if you attempted to locate the stable, you  
11       wouldn't be able to find it, right?

12              A       That's correct.

13              Q       The next landmark is fence passing near her  
14       house, is that right?

15              A       That's what it reads next, yes.

16              Q       And you didn't locate her house, right?

17              A       Again, it's not there.

18              Q       The next landmark is with the present outlet  
19       used by her through her land and through R. L. Adams, is  
20       that right?

21              A       Yes.

22              Q       And you're not certain where the present  
23       outlet was, are you?

1 A The present outlet?

2 Q Well, the present outlet as described in the -  
3 - as the landmark is described in the 1892 deed.

4 A It says passing to a point near a pair of bars  
5 at her stable, which cannot be located because it is no  
6 longer, and then it's passing near her house, which is no  
7 longer there, and with the present outlet road used by her  
8 through her land and through R. L. Adams' to the county  
9 road. Now, this section of Wendover, section 3, I  
10 believe, encompasses more than what Mary Saunders'  
11 property contained at that time. So --

12 Q Well, why don't we just leave it to -- let's  
13 go one landmark at a time. Let's talk about the present  
14 outlet used by her through her land.

15 A Well, in this context here, present outlet is  
16 in 1892.

17 Q Yes, that's correct. Were you able to locate  
18 that outlet?

19 A It would be very difficult to say without  
20 asking her what she actually used.

21 Q Right, so you weren't able to locate it?

22 A No.

23 Q So based on the description in the 1892 deed,

1 a surveyor would not have been able to plat out the exact  
2 remaining portion of the easement, isn't that correct?

3 A He probably could have platted it out. It  
4 would have taken additional time, and it may have cost  
5 additional money for whoever was paying the surveyor's  
6 bill.

7 Q I'm not talking about a surveyor in 1896. I'm  
8 talking about a surveyor today.

9 A The only area that -- or the only parts of the  
10 right-of-way that he could locate would be those that were  
11 either described by metes and bounds or distances, or if  
12 he could actually locate physical evidence that is  
13 described here, the pair of bars, the stable, the house.

14 Q And you already testified that those landmarks  
15 are no longer there today?

16 A Not that we could find, anyway.

17 Q Mr. Simpson, you stated that you relied on the  
18 Wendover plat in preparing ZZZ, is that correct?

19 A There was -- the first stage in the  
20 development of a piece of property is for the surveyor to  
21 perform a boundary survey. The next step would be to  
22 prepare a topographic survey. And usually, the two of  
23 them are combined and called a boundary and topographic

1 survey.

2 Q And that was titled an erosion and siltation  
3 control plan for the subdivision, is that right?

4 A That's what the drawing is -- has been entered  
5 in for evidence. Now, this boundary --

6 Q Actually, it hasn't been entered into  
7 evidence.

8 A Well, it's been offered for evidence. This  
9 boundary and topographic survey, the erosion siltation  
10 control plan was in effect superimposed on that to show  
11 Fairfax County reviewers who were looking at this  
12 subdivision and considering it for approval, that when  
13 this subdivision is developed, that certain erosion  
14 siltation controls are in place at various stages in the  
15 development to protect the adjoining properties, streams,  
16 things like this.

17 Q But you didn't prepare that plat, correct?

18 A No.

19 Q And you didn't work for the surveyors who did  
20 prepare that plat?

21 A That's correct.

22 Q You testified that that Wendover plat showed a  
23 path on it?



1           A       It showed what looked like a roadway and  
2 several roadways winding through the property.

3           Q       And those paths were hard to read?

4           A       No, in one area, which is around the present  
5 detention facility, the copy of the plat which is several  
6 generations old, it was just a little difficult to read in  
7 there. But when we were in our office, and we were  
8 preparing this drawing, we had a chance to look at it more  
9 closely, and that is the route that we have shown on our  
10 drawing as what we think was the road that led down the  
11 Saunders' line and then came in, meandering past the  
12 stable, et cetera.

13          Q       And that -- let me stop you. And that path  
14 that's shown on the Wendover plan, that was in a very  
15 approximate position, isn't that correct?

16          A       I don't think that was approximate at all. If  
17 the surveyors did their work properly, when they performed  
18 the boundary survey, they ascertained where the property  
19 lines are for the subject property that is going to be  
20 developed.

21          Q       But you didn't prepare it though?

22          A       I'm speaking from experience from having  
23 prepared others, that once this shape that is the property

1 to be developed is determined, then within that shape,  
2 measurements are made. In this case, the topographic  
3 measurements to determine various elevations. Based on  
4 the elevations, contour lines are drawn, physical  
5 improvements that may be out there are located. And from  
6 that survey, I did not see any pairs of bars or stable or  
7 original house. But I did see from their drawing  
8 indications of various roadways running through the  
9 property.

10 Q Do you remember testifying in this trial the  
11 first time -- actually, on February 27, 1992?

12 A I'll take your word for it that was the date.

13 Q And do you remember being asked at that trial  
14 about the Wendover plat?

15 MR. SNYDER: Can I ask you what page you're  
16 referring to?

17 MS. BRZEZYNSKI: Yes, Scott, it's page 19 and  
18 20 of the trial transcript.

19 THE COURT: Let's take a 10-minute recess  
20 right now. We'll start back at 10 minutes of 4:00. We  
21 need to give the Court Reporter a chance to catch her  
22 breath.

23 (Brief Recess)

1 BY MS. BRZEZYNSKI:

2 Q Mr. Simpson, before we left for a break, you  
3 testified that you previously testified in this case in a  
4 trial held on February 27, 1992, is that correct?

5 A That's correct.

6 Q And in response to a question that was asked  
7 to you by Mr. Goodman regarding the Wendover plat, and  
8 I'll read the question to you -- the question was, "What  
9 survey was that, sir? Do you have that?" And you  
10 answered, "I don't have it. It had been provided to me in  
11 my initial investigation of this. But it was an erosion  
12 and siltation control plan for the subdivision which  
13 showed the existing topography superimposed over a layout  
14 of the subdivision itself with the lots and the streets.  
15 And that plan showed a roadway going from what is denoted  
16 there as the cemetery in a very approximate position as I  
17 have shown on this drawing, leading out to the county  
18 road." That was your testimony in the prior trial?

19 A Yes.

20 Q What topographical maps exactly did you rely  
21 on in creating ZZZ?

22 A The primary one is this one that has been  
23 referred to as an erosion siltation plan, which was not of

1 paramount importance to me as far as the erosion siltation  
2 plan goes. It was what was underneath the erosion  
3 siltation controls which was important to me, which was  
4 the topography that had been measured, along with any  
5 physical improvements that had been located on the  
6 property --

7 Q I understand. You've already testified about  
8 the Wendover plan. Any other plans, any other topographic  
9 plans?

10 A No.

11 Q How often in your job as a land surveyor do  
12 you review topographical maps?

13 A Almost every day.

14 Q So you would know then that a double dotted  
15 line on a topographical map represents a roadway?

16 A There is no set standard for how a draftsman  
17 may delineate what he is showing. However, there are  
18 certain standards which are fairly accepted, and maybe a  
19 dotted line -- a dotted line is something I would use to  
20 delineate possibly gravel. A dashed line, maybe varying  
21 the lengths of the dash to differentiate from the  
22 topographic lines, which would make it stand out a little  
23 better, is something that I might use to delineate a



1 roadway.

2 Q What did you say, a long dashed --

3 A Varying the lengths of the dash of the line,  
4 for example, the topographic map we saw, a fairly standard  
5 drafting practice is to show in a heavier line weight, and  
6 also a longer line weight, the 10-foot contour lines, as  
7 opposed to 2, 4, 6, and 8, which would be between, let's  
8 say, zero and 10.

9 Q What is your understanding of the distinction  
10 between a double dotted line and a single dotted line?

11 A Well, possibly the double would be both sides  
12 of the roadway.

13 Q Mr. Simpson, I understand that you testified  
14 that you relied on the 1972 aerial photo in creating ZZZ?

15 A I don't believe I relied on it to create it.  
16 I believe -- well, I believe I saw the 1972, you said,  
17 aerial --

18 Q Yes, any aerals.

19 A Simply to confirm that what I was seeing on,  
20 we'll say, this erosion siltation plan, was substantiated  
21 by evidence of -- that would be denoted in a photograph.

22 Q In your occupation as a land surveyor, how  
23 often are you involved in the examination and

1 interpretation of aerial photographs?

2 A Not very often.

3 Q You say not very often, about how often, how  
4 many times a year?

5 A Maybe not even once.

6 Q Do you have any specialized training in  
7 reading aerial photography?

8 A No.

9 Q But you would agree then that the use of  
10 overhead aerials are helpful in determining whether a  
11 roadway or a path is actually used?

12 A Yes.

13 Q You testified that you visited the Wendover  
14 subdivision, is that correct?

15 A That's correct.

16 Q Prior to today, when was the first time --

17 A The first time was in one of the previous  
18 cases where the entire court met out where we went today.

19 Q So that was obviously after you first created  
20 ZZZ?

21 A Yes.

22 Q You also had an opportunity to visit lot 40,  
23 is that correct, my clients' lot?

1           A       I believe that's the one that's in the lower  
2 right corner of the Wendover subdivision?

3           Q       Yes.

4           A       Today was the first time, yes.

5           Q       So you didn't conduct a survey of that lot,  
6 obviously?

7           A       No.

8           Q       You also did not locate the iron pipe in the  
9 northeast rear corner of lot 40?

10          A       No.

11          Q       So you weren't able to locate the rear  
12 boundary of that lot?

13          A       That was not in our scope of work.

14          Q       So you cannot be certain that Plaintiffs'  
15 claimed easement actually touches the corner of lot 40,  
16 can you?

17          A       Based on the scale of the drawing that we have  
18 shown for the Wendover subdivision and what we have  
19 actually physically located, portions of that roadway,  
20 from what I can see here, it does look like it touches it.

21          Q       But, again, you did not locate the rear  
22 boundary of lot 40?

23          A       This is correct.

1 Q The surveys you performed didn't show any  
2 graves, correct?

3 A It did not show any graves; it showed a  
4 granite marker, which we saw today. I understand that the  
5 grave sites have since been located by a county  
6 archeologist.

7 Q But you didn't locate any graves, did you?

8 A No.

9 MS. BRZEZYNSKI: Your Honor, may I have a  
10 moment?

11 THE COURT: Yes.

12 MS. BRZEZYNSKI: That's all I have, Your  
13 Honor.

14 THE COURT: All right, any other defense  
15 counsel wish to question this witness?

16 MS. BRODIE: No, Your Honor.

17 MR. GOODMAN: I just have a couple of  
18 questions, Your Honor.

19 THE COURT: All right.

20

21 CROSS-EXAMINATION

22 BY MR. GOODMAN:

23 Q Mr. Simpson, before today, have you ever been



1 to lot 38 before on Carrhill Road?

2 A No.

3 Q And you haven't been to lot 39 either, have  
4 you?

5 A No.

6 Q Did you survey lot 38 ever?

7 A When we did our survey to locate whatever  
8 remains of the road we could find throughout the Wendover  
9 subdivision, I instructed our field crews also to locate  
10 any houses which may have been impacted by that roadway.  
11 So when our field crews located what remains of the road  
12 there were, and you see from this drawing some lots have  
13 houses on them, those are the ones that we physically  
14 located at the same time that we located the remains of  
15 the roadway. So although I was not at the site until  
16 today, our field crews were when they located the houses  
17 that you see on there now.

18 Q Well, you're referring to your Exhibit ZZZ,  
19 are you not?

20 A That's correct.

21 Q All right, I want to make sure you see this  
22 fairly well. As I understand your testimony, the portion  
23 of this path that's not shaded is where you don't have any

1       remnants on the ground, is that correct?

2               A       That's correct.

3               Q       So the portion of this path that goes through  
4       the house on lot 38 is not shaded, correct?

5               A       That's correct.

6               Q       So, again, just to help me understand this,  
7       you didn't do a survey of lot 38, did you?

8               A       We did not survey lot 38. We located the  
9       house that was on lot 38 with respect to the Wendover  
10      subdivision.

11              Q       But you've already testified that you know  
12      that this easement to the 15-acre parcel goes 880 feet  
13      down the line, correct?

14              A       That's the way it was written, yes.

15              Q       And then it goes south so many minutes, 320  
16      feet, correct?

17              A       32 degrees, 15 minutes east, southeast, 320  
18      feet.

19              Q       And beyond that, unless you were around in  
20      1892 to review the actual monuments that are described,  
21      you don't know exactly where it goes, do you?

22              A       Based on this description, no.

23              Q       So you also don't know where it goes on lot

1 38, if it goes through lot 38 at all, do you?

2 A Based on this description no. What is shown  
3 on that drawing is remains of a roadway, which according  
4 to our field measurements, does go through lots 39 and 40.

5  
6 Q But you don't know about 38?

7 A Based on the physical evidence in the field,  
8 there's no sign of a roadway there now.

9 Q Thank you.

10 THE COURT: Any redirect?

11 MR. SNYDER: Yes, Your Honor.

12  
13 REDIRECT EXAMINATION

14 BY MR. SNYDER:

15 Q Mr. Simpson, I believe that Mr. Gogal pointed  
16 out for you the legal description of the cemetery?

17 A Yes, as being in the southeast corner of lot 2  
18 of the partition.

19 Q Is there enough information to conduct a  
20 survey?

21 A To locate the cemetery?

22 Q No, no, could you go out and conduct a survey  
23 in 1892 or 1896 based upon that word description?

1           A       Conduct a survey of where the cemetery is  
2 located based on that?

3           Q       Yes.

4           A       It is very vague. If you look at the  
5 southeast corner of lot number 2, it simply says a quarter  
6 acre. Now, a quarter acre could be one inch wide by who  
7 knows how many feet long; it could be a square; it could  
8 be in shape of a rectangle. It is simply not defined  
9 except in its area.

10          Q       Prior to the 1979 plat showing outlot A, are  
11 you aware in the land records or any other records of any  
12 attempt to survey the cemetery that's referenced?

13          A       No.

14               MR. SNYDER: Objection, lack of foundation.  
15 There's been no evidence he even looked for it. I don't  
16 think the question is appropriate when there's no  
17 foundation.

18               MR. GOODMAN: Well, it's a stipulation. We've  
19 stipulated to the fact that there's only two references to  
20 land records.

21               THE COURT: Which is the 1896 partition, and  
22 then not again until 1977?

23               MR. GOODMAN: '79. And I'm just asking him if



1 he's aware of any other attempts to survey this cemetery,  
2 other than those two instances.

3 THE WITNESS: No, I'm not.

4 BY MR. GOODMAN:

5 Q Now, can you tell me if what's indicated as  
6 outlot A on Exhibit AAA -- let me rephrase that. Can you  
7 tell me if outlot A, which is referenced on AAA, is its  
8 dimensions close to equating to a quarter acre or a half  
9 acre, or something else?

10 A It's very close to being a quarter of an acre.

11 Q How many feet, do you know?

12 A Well, an acre is 43,560 square feet. If  
13 somebody wants to do the math, they can come up with what  
14 a quarter acre is, but in round numbers, 43, 44; half of  
15 that is 22; half that is 11, and this outlot is 10,800  
16 something. So it's very close to being a quarter acre.

17 Q Now, you've said to counsel that you were not  
18 able to locate the pair of bars, the stable, or the house.  
19 Given all that, does your inability to locate those  
20 landmarks have any impact on your opinion of the easement  
21 as described in ZZZ?

22 A No. In the discussions with you and your  
23 client in what this access was like over the years, and in

1 viewing the erosion siltation control plan, which had the  
2 boundary and topographic survey on it, this was the only  
3 road that led from the cemetery out to the -- we'll say  
4 the T intersection, which is how your client described how  
5 he accessed the property. So that is the outlet road that  
6 we have shown on our drawing, based on what we could  
7 actually locate in the field that we saw in the field  
8 today. And that was superimposed over the boundary and  
9 topographic survey that had been done for this subdivision  
10 prior to development. And those two roadways lined up  
11 very closely.

12 Q Thank you very much.

13 THE COURT: Thank you very much, Mr. Simpson.  
14 I appreciate your coming. Is he subject to recall?

15 MR. SNYDER: Yes.

16 THE COURT: We'd ask that you remain outside  
17 of the courtroom. Please don't discuss your testimony  
18 with anyone else. It's possible you may be asked to  
19 testify again. You may discuss your testimony with the  
20 lawyers in the case; that's the one exception. I'm sure  
21 we won't need you today. You're certainly excused for  
22 today.

23 THE WITNESS: Thank you.

1 THE COURT: Call your next witness, please.

2 MR. SNYDER: Mr. Atkisson.

3

4 Whereupon,

5

GEORGE ATKISSON

6

the Plaintiff, was called for examination by counsel on

7

behalf of the Plaintiff, and, after having been duly sworn

8

by the Clerk of Court, was examined and testified, as

9

follows:

10

DIRECT EXAMINATION

11

BY MR. SNYDER:

12

Q Please state your full name?

13

A George D. Atkisson.

14

Q What is your date of birth?

15

A June 7, 1923.

16

Q What's your current address?

17

A 10194 Hillington Court, Vienna, Virginia.

18

Q Now, what is your relation to Thomas Adams?

19

A I'm his nephew. I was his nephew.

20

Q Can you tell me where it is that you lived at

21

the time that you were born?

22

A I was born in that house on the 15 -- so-

23

called 15-acre parcel.

1 Q If I could just get you, for illustration  
2 purposes, to perhaps indicate with your finger  
3 approximately where that house is located on the AAA?

4 A It would be right about down in here. I could  
5 do it better on the topographic map that you have, but  
6 right about there (indicating).

7 Q Could you see that, Your Honor?

8 THE COURT: No.

9 Q Could you do that again?

10 A It was -- when you exit from the this lot,  
11 you'd go down about a 45 degree curve, and it would be  
12 down here about 150 yards, maybe.

13 Q Near what's indicated as lot 40 off of  
14 Hillington Court?

15 A Yes, close to there.

16 THE COURT: Now, is that the same lot 40 that  
17 Ms. --

18 MR. SNYDER: No.

19 THE COURT: It's a different lot 40?

20 MR. SNYDER: Lot 40 is Hunter Mill Forest.

21 THE COURT: Okay.

22 BY MR. SNYDER:

23 Q And who lived in that property?



1           A       Well, at the time I was born, Thomas Adams and  
2       Ida Adams, Idella Adams; my mother, Florence Atkisson,  
3       Ethel Adams, Stan Hope Adams, my two brothers. And I was  
4       born there, and later, another -- my grandmother took care  
5       of another child, a Dudley Page.

6           Q       Can you tell me what years did you live at  
7       that property? From 1923 to when?

8           A       I lived there from 1923 until I went in the  
9       Army in 1942.

10          Q       And following the Army, where did you go?

11          A       Well, I -- give or take a month or two, I  
12       lived with my brother part-time, would come up there till  
13       I got settled. I was going to school, and I lived there  
14       and with my brother in D.C. And then I married on the 3rd  
15       of August, 1946. And that's been 50 years.

16                 THE COURT: Congratulations.

17          A       And my wife and I rented an apartment, or I  
18       think a room and kitchen privileges for a year or so.  
19       Then we moved back on the farm in probably '47 and lived  
20       there till the middle of '50, 1950.

21          Q       And do you recall from the time that you were  
22       growing up whether there was a cemetery somewhere in the  
23       vicinity of Thomas Adams' house?

1 A Yes, that cemetery was there.

2 Q Who was buried in the cemetery?

3 A Charles Wessley Adams, Thomas' father; Adeline  
4 Saunders -- Sanders Adams, who was his wife. Then they  
5 had a Charles Wessley, Jr., and a Joseph, both sons, and a  
6 daughter, Margaret. And they were -- I think died when  
7 they were young children, probably anywhere from 11 to 15  
8 years old. I don't recall it right now.

9 But then there was Leroy McDaniel -- Leroy  
10 McDaniel, and a girl -- I don't know what the girl's name  
11 was. There was only two stones this morning. There's  
12 nine people there. And Nicholas Saunders, who was Mary  
13 Saunders, and Adeline Saunders, my great grandmother's  
14 father, are buried there.

15 Q Now, when you were living at the Thomas Adams'  
16 house that you had indicated as being similar in to lot 40  
17 of Hunter Mill Forest, can you tell me what ways were  
18 there possible for you to get in and out of -- at the  
19 Thomas Adams property to an adjoining property?

20 A What were they? Well, I mean, you could go  
21 back the right-of-way in question. In the later years,  
22 the railroad allowed my grandfather to go down parallel on  
23 the railroad --

1 Q Excuse me, who is your grandfather?

2 A Thomas.

3 Q I believe --

4 THE COURT: You said that Thomas was your  
5 uncle, or you were his nephew.

6 THE WITNESS: Oh, well, I misspoke.

7 THE COURT: He's your grandfather?

8 THE WITNESS: Yes, I'm sorry about that.

9 THE COURT: That's all right.

10 THE WITNESS: Stan Hope was my uncle. I  
11 misspoke.

12 BY MR. SNYDER:

13 Q Now, when you say in later years, what years  
14 are you talking about?

15 A Oh, I'd say close -- coming upon 1940,  
16 probably.

17 Q All right, and I interrupted you.

18 A And we would drive down there and come and --  
19 come up the hill from the railroad tracks. And the  
20 railroad company allowed us to do that for about 363 days  
21 a year. They'd change it off every year.

22 Q Could you tell me approximately where these  
23 railroad tracks were located in relation to AAA?

1 A AAA -- what's AAA?

2 Q There's Thomas Adams' property, as indicated;  
3 Mary Saunders' property, lot 1, lot 2.

4 A Oh, I can't see from here. I can come down  
5 there and show it to you, but I can't see from here.

6 THE COURT: Why don't you bring it over to  
7 him, if you can.

8 A Well, the railroad came through about here. T  
9 his map doesn't encompass the railroad.

10 Q I'm just trying to do this for location  
11 purposes. If you could give me an approximation. It  
12 would have been above lot number 4?

13 A No, it didn't as far as lot 4. It went -- we  
14 would cut off the railroad about there -- no, at Clark's  
15 Crossing, come right down, and when you get to Piney  
16 Branch, where Piney Branch crosses the railroad tracks, we  
17 would make a left and come --

18 Q Why don't we look at a --

19 THE COURT: Actually, this is the first part  
20 of the testimony that I'm following, because I know  
21 exactly where he's talking about.

22 Q That's all right, I was going to reference the  
23 exhibit, but the --



1 THE COURT: You're on what is now the W&OB  
2 Trail, and then you cross Piney Branch, which is now a  
3 wooden bridge across the trail?

4 THE WITNESS: Yes.

5 THE COURT: I know it well. What do you do  
6 when you're there?

7 THE WITNESS: Well, you would, at that time,  
8 the bridge is located on the southern side of that --  
9 you'd go through the creek and make a turn and go back and  
10 go up the hill.

11 THE COURT: Okay.

12 BY MR. SNYDER:

13 Q Now, during the time that you were living --  
14 I'll just refer to it as the Thomas Adams' property, can  
15 you tell me who maintained the unimproved portions of your  
16 grandfather's property? That's everything but the house.

17 A Oh, who maintained it?

18 Q Yes.

19 A Well, you started out pretty young on the  
20 farm; my two brothers and I -- I had two older brothers,  
21 Dudley Page. Then my uncle went to school and worked, and  
22 he would do work on the weekends. He was single and never  
23 took up with girls, so he would work on the farm on the

1 weekends.

2 Q What kind of farm was Mr. Adams' farm?

3 A Oh, I'll describe it this way, and I think it  
4 will be informative to you. It was divided into four  
5 nine-acre fields, right down across the axe handle part of  
6 that thing. And then there was another four and a half  
7 acre portion down on the northwestern part. And these  
8 fields were divided into four nine-acre parcels, and they  
9 would have corn in the field A, wheat in field B, hay in  
10 field C, and pasture in field D. And they were rotated,  
11 as you can surmise, I assume.

12 Q Right, one every four years, or something like  
13 that?

14 A Yes, right. You'd come around, and a field  
15 would be in pasture every four years; corn, wheat, hay,  
16 likewise.

17 Q And on the -- any area -- well, strike that.  
18 Were there any physical monuments that you recall when you  
19 were living at the Thomas Adams' house that were either on  
20 the cemetery or near the cemetery?

21 A Physical monuments? Yes, you could see the  
22 tombstones or the stones. I don't know where the  
23 tombstone is, actually. But the stones, they were what we

1 would call field stones. And there would be a stone at  
2 the head and a stone at the feet. And you could pretty  
3 well tell the children, where they were buried, because  
4 the stones would be not as far separated or would be  
5 closer. And you could tell that. And I, in those days,  
6 was told who was buried here and there, but I don't know  
7 exactly -- I know my great grandfather, Nick, the one they  
8 called Uncle Nick, was buried up there close to G, the  
9 point of reference. And his son-in-law, there's some  
10 conversation about that, was buried on the --

11 MS. BRZEZYNSKI: Objection.

12 MR. GOODMAN: Objection, that's hearsay, Your  
13 Honor.

14 THE COURT: Sustain the objection.

15 MR. SNYDER: That's fine.

16 BY MR. SNYDER:

17 Q As far as the area where the fieldstones are  
18 located, when you were growing up, do you know who it was  
19 that maintained that part of the property?

20 A The same people. We just shared all the  
21 chores, the work, and everything else. This cemetery was  
22 not that much of a burden, because it had trees on it; it  
23 had -- that cedar tree was even big then. It had trees on

1 it, and I must confess, I believe when it was in pasture,  
2 maybe the cows would graze in there. But there was  
3 nothing to graze in there, because it was -- in the woods,  
4 you don't do much maintaining.

5 Q Was that area plowed?

6 A No, we plowed around it.

7 Q How close would you come to it, or would you -  
8 - are you one of the people that would operate the plow?

9 A Yes, I plowed that in 19 -- almost all the  
10 fields in 1940. We would plow on the side northwest of G  
11 -- of point G. We would plow down that, right where the -  
12 - about on the edge, there's a utility easement there that  
13 shows on the map, and we would plow right down there. And  
14 then we'd come up to it; you'd turn the horse around, and  
15 then when we got up on the eastern side of that, we would  
16 come up about the way you could see where it -- actually,  
17 I could see today where it was -- where the lot is staked  
18 out. I pretty much -- whoever staked it out pretty well  
19 went by where I remember, the way it's marked out, the way  
20 I remember plowing around it.

21 Q You mean whoever staked out outlot A?

22 A Yes.

23 Q Did you tell the surveyor that created the



1 survey of outlot A where to stake it out?

2 A No, I did not. Definitely did not, because I  
3 wasn't there.

4 Q Now, during the time that you lived on the  
5 property, this area that you've described as the cemetery  
6 and the area beside it that was plowed, did that location  
7 ever change?

8 A No.

9 Q Let me refer you to -- you have an exhibit  
10 book in front of you. Let me refer you to the exhibit at  
11 the back of Exhibit 5, 1-5. No, I'm sorry, it's Exhibit  
12 5.

13 A Exhibit 5.

14 Q Do you recognize that?

15 A Yes, sure.

16 Q What is that?

17 A That's the partition map.

18 Q Now, could you describe to me in relation to  
19 this partition map where your relatives lived at the time  
20 -- and I'm using this only for reference, at the time that  
21 you were growing up, since I'm aware that you weren't  
22 there at the time of the partition.

23 A My relatives? How immediate? Do you mean my

1 grandfather, his brother, that --

2 Q Yes.

3 A Okay, that's good. Down on -- where you went  
4 down to the -- on the right-of-way, about where 38 and 39  
5 lot you were discussing a minute ago, when you came in  
6 from Clark's Crossing Road, you came in there; you turned  
7 off the Clark's Crossing Road, and you came around there.  
8 And you went about 150 yards, and the -- R. L. Adams lived  
9 up there. He also used the roads, up on the hill there.

10 When you went on around to Aunt Mary's old  
11 house, it was up on the side of the hill there. That was  
12 always rented out from time to time. And they used the  
13 road. I'm getting off this question.

14 Q Well, no, you're right on it, but you're  
15 getting away from my reference, and I don't want to  
16 confuse the Judge too much.

17 Let me refer you to ZZZ. Where are you  
18 talking about R. L. Adams and your Aunt Mary --

19 A They lived right down in the -- you see where  
20 the round circle, it looks like a cul-de-sac right there?  
21 Yeah, they lived pretty close to that.

22 Q All right.

23 A But it would be about 200 feet off the

1 easement there, because they looped around and came back  
2 around the house. They didn't go right straight up there;  
3 they looped around and came back.

4 Q All right, then who would have lived in this  
5 area between where they lived and, say, the cemetery?

6 A Oh, I remember one family. All I remember,  
7 their name was -- her name was Nora, and his name was  
8 Willie. And then other people, but I couldn't, you know,  
9 remember that now. There were black families that lived  
10 there --

11 MR. GOODMAN: Your Honor, I object to him  
12 continuing along this line. He said he doesn't know, and  
13 he's continuing to speak.

14 THE WITNESS: My memory is coming to me  
15 slowly, okay.

16 THE COURT: All right, well, there is a  
17 question pending at the moment.

18 BY MR. SNYDER:

19 Q Well, let me ask another question. What  
20 about, again, looking at ZZZ, up to the left of the  
21 existing cemetery, did you have any relatives who lived  
22 off on this side?

23 A No. If you -- Uncle Lewis lived over on

1 Hunter Mill Road.

2 Q That's a little further than I was thinking  
3 about. Now, when -- did you ever have an occasion when  
4 you were living on Thomas Adams' property to use the  
5 easement that's referenced in ZZZ?

6 A You mean the easement in question?

7 Q Yes.

8 A Sure, certainly, yes.

9 Q And do you know who maintained that easement?

10 A Well, primarily, my uncle did, but we would  
11 all help. We'd do it by horses at first, and later, about  
12 -- I don't know whether it was in 1940 or -- and after the  
13 war, we had a grader that they bought from -- he bought  
14 from the Town of Vienna. You hook it behind the car and  
15 we'd --

16 Q Let me ask you concerning approximately --  
17 well, say in the year 1937, that you are aware, were there  
18 any people using the easement that owned a motor vehicle?

19 A No, other than visitors, guests, no. Nobody  
20 owned a car.

21 Q When is the first time that somebody living  
22 that area that used an easement owned an automobile?

23 A It would be about 1939 or '40.



1           Q       Now, you mentioned something about this  
2 grading. Can you tell me exactly what you mean when it  
3 was graded by this thing pulled by a car?

4           A       Well, the -- a dirt road like that, especially  
5 that one on the side of a hill, erodes because of freezing  
6 and thawing, and weather like we've just had. So it just  
7 washes down there, and you just go back and level it off  
8 again. And that road, we tried to maintain it so it  
9 wouldn't wash on the side of the hill there, but that's  
10 about it.

11          Q       Do you recall whether this easement ran  
12 through open fields, or if it went through forest -- areas  
13 that were forest?

14          A       Probably -- the so-called State road, Clark's  
15 Crossing Road, up and past Uncle Bud's house, it was kind  
16 of -- it was in the field. And then when it went up the  
17 side of the hill to Aunt Mary's house, it was -- when it  
18 first went up, it was on the edge of the woods, the big  
19 old trees there.

20                   And when you went on towards Aunt Mary's  
21 house, that was pretty open. But then when you got by her  
22 house a little bit, it started -- it was wooded area all  
23 the way to the cemetery, pretty much, except it was cut

1 out a little bit where the road from the 880 foot,  
2 starting at point G where it went up there and says it  
3 meets a -- it met an intersecting road that Uncle Bud used  
4 to get to what is parcel 1 on the partition map.

5 So and then from that point, the 880 foot was  
6 pretty much all woods. It was all woods. It may have  
7 been an opening in the top of it, but I don't know. It  
8 was all wooded area, never cultivated.

9 Q With the exception of the accompaniment of a  
10 Circuit Court Judge, when was the last time that you used  
11 the easement?

12 A I think it would be probably about 1983, as I  
13 recall.

14 Q Now, did there come a point in time where the  
15 land that is subject to this easement became rezoned or  
16 was proposed to be rezoned?

17 A Yes.

18 Q Approximately when was that?

19 A '77, '78, somewhere along there.

20 Q How did you find out about that?

21 A They asked me to sell the property, and I was  
22 supposed to have been --

23 MR. GOODMAN: I object. This is hearsay.

1 MR. SNYDER: This is -- I'm asking him how he  
2 came to find out it was rezoned. I'm not asking him any  
3 testimony concerning -- that's presented for the truth --

4 THE WITNESS: Well, I was involved in the --

5 THE COURT: Wait a minute, now. Before you  
6 start testifying, wait till I rule on this objection. All  
7 he said was that he was asked to sell the property, and  
8 then he was going on to something else that did not sound  
9 like hearsay to me. I mean, I don't think they asked me  
10 to sell the property is hearsay, so I overrule the  
11 objection.

12 BY MR. SNYDER:

13 Q You can answer the question. The question was  
14 how did you become aware that this property was proposed  
15 to be rezoned?

16 A They asked me to sell it, and I talked to an  
17 engineer about engineering. He took me over to a zoning  
18 attorney, Harold Miller, and I had known him when he was  
19 going to law school. And so we -- you know, one thing led  
20 to another, and we bought it and went into business, a  
21 joint venture, along with his partner.

22 Q Let me rephrase the question.

23 A Is that the answer?

1 Q No. The question is when did you become aware  
2 that the property, or did you become aware --

3 THE COURT: Can I ask a question before you  
4 move on from that? Was Harold Miller one and the same as  
5 the zoning attorney, or was it a zoning attorney plus  
6 Harold Miller?

7 THE WITNESS: One and the same.

8 THE COURT: Okay.

9 BY MR. SNYDER:

10 Q Did you ever become aware that the property  
11 that is subject to the easement was --

12 A Oh, wrong property, I'm sorry. When I became  
13 aware of that was -- I guess I just saw a notice. I don't  
14 recall at all.

15 Q Did you do anything as a result of finding out  
16 that it was proposed to be rezoned?

17 A Yes.

18 MR. GOODMAN: Your Honor, I object. He says  
19 he doesn't recall, and now --

20 MR. SNYDER: He said he doesn't recall when.

21 THE WITNESS: When or how I became I aware.

22 THE COURT: He said he saw a notice but he  
23 doesn't recall when. But at some point, he became aware



1 of it, and I think the now question is whenever he became  
2 aware of it, what did he do about it. Is that the  
3 question?

4 MR. SNYDER: Yes, ma'am, that's my question.

5 THE COURT: I overrule the objection.

6 BY MR. SNYDER:

7 A Okay, briefly, what I did was I talked to --  
8 well, I went up to the commissioner's hearing when it was  
9 up for zoning. I had written out a statement, because I  
10 wanted to be precise, and I wanted the record to be  
11 precise, stating to them that I had a right-of-way through  
12 there. Nothing much was done, but then it went through  
13 the -- to the board for the final zoning, and I did the  
14 same, went through the same effort to do that. And they -  
15 - during the course of that, when I stated my concern  
16 about the right-of-way, they -- the zoning attorney who  
17 was a Mr. Lawrence, and I don't know what his first name  
18 is, but he stated that --

19 MS. BRZEZYNSKI: Objection, hearsay.

20 Q Do you know if Mr. Lawrence did anything?

21 A Yes, he --

22 Q After you appeared at --

23 A Yes, he talked to his client, and he told by

1 letter in writing, which you have a copy here somewhere,  
2 he said he would take care of it.

3 MS. BRZEZYNSKI: Objection, hearsay. Move to  
4 strike.

5 THE COURT: What's your response to the  
6 hearsay objection, Mr. Snyder?

7 MR. SNYDER: Well, my response is I have the  
8 letter here, which I'm going to get him to identify. And,  
9 again, I would say that this is offered merely to show the  
10 course of conduct taken by Mr. Atkisson. It's not taken  
11 that any -- it's not taken for the fact that anything,  
12 opinions or other things expressed in the letters are  
13 true. We're merely presenting this on the issue, and  
14 frankly, I don't know if anybody is asserting the defense  
15 of latches, but this is the evidence that there was a  
16 continued interest in the property. So the fact that  
17 we're not -- this is not being presented for the truth of  
18 the matter that's presented in these letters.

19 THE COURT: All right.

20 MS. BRZEZYNSKI: Your Honor, if there's an  
21 exhibit, I don't think the exhibit is -- there's been a  
22 proper foundation for the exhibit. Additionally, I --

23 THE COURT: Well, he's not moving an exhibit

1 in; he's just asking a few question. The objection was to  
2 Mr. Atkisson's statement that Mr. Lawrence said he'd do  
3 something about it. And then that was the objection,  
4 hearsay. I overrule the objection. I accept Mr. Snyder's  
5 statement that it's not being admitted for the truth, and  
6 it's not going to be accepted for the truth.

7 MR. SNYDER: This is DD, and this is EE.

8 MS. BRZEZYNSKI: Your Honor, I'm sorry, I  
9 misunderstood. My objection was to Mr. Atkisson's  
10 testimony. I have a different objection to the exhibit if  
11 Mr. Snyder --

12 THE COURT: Well, why don't we wait until he  
13 moves it in.

14 MS. BRZEZYNSKI: Okay, I'm sorry, I thought  
15 that's what he just --

16 THE COURT: He's just having it marked.

17 MS. BRZEZYNSKI: Okay, I'm sorry.

18 THE COURT: Aren't you?

19 MR. SNYDER: For now.

20 THE COURT: All right, at some point we'll  
21 have a nice discussion about this. That's probably when  
22 I'll decide to break for the evening, when we start going  
23 head to head on this.

1 BY MR. SNYDER:

2 Q Let me show you what has been marked as  
3 Exhibit DD and EE.

4 (Whereupon, the documents were marked as  
5 Plaintiffs' Exhibits DD and EE for  
6 identification.)

7 Q First of all, let me draw your attention to  
8 DD. Do you know who Sidney Steel is or was at the time  
9 this --

10 A Yes, he was involved -- he was a zoning -- in  
11 the zoning evaluation branch.

12 Q Did you talk to -- is he one of the  
13 individuals you talked to?

14 A Yes.

15 Q And was it at a meeting or in what form was it  
16 that you talked to Mr. Steel?

17 A It was in his office.

18 Q And following -- what was the subject of your  
19 discussion with Mr. Steel?

20 A My concern that the right-of-way be preserved  
21 or taken into consideration, whatever.

22 Q And following your meeting, did you receive  
23 Exhibit DD from Mr. Steel?



1 A Yes.

2 MR. SNYDER: I would move DD in at this time.

3 THE COURT: Any objection?

4 MS. BRZEZYNSKI: Objection, it's hearsay.

5 MR. SNYDER: Again, it's not going for the  
6 truth of the matter, merely that he had a meeting with a  
7 county official concerning the zoning of Wendover; had a  
8 meeting with him, and received a letter following his  
9 meeting.

10 THE COURT: All right, is anyone arguing  
11 latches here?

12 MR. GOGAL: I'll be happy to, on behalf of the  
13 Intervenors, Your Honor, we're not arguing latches.

14 THE COURT: Is anyone else going to argue that  
15 Mr. Atkisson was somehow inattentive to his rights during  
16 the period from --

17 MS. BRZEZYNSKI: The Healys are not arguing  
18 latches.

19 MR. SNYDER: Maybe I could do it with a  
20 proffer. My concern is I know this would never happen in  
21 this case, but if Wexford were to appeal the previously  
22 argued latches, I'd just like to have on record what the  
23 evidence would be concerning latches. And I'll do it very

1 quickly.

2 THE COURT: All right, did you say, Mr.  
3 Goodman, whether you are going to be arguing latches or  
4 not?

5 MR. GOODMAN: We did the first time, Your  
6 Honor. I don't believe we're going to do it this time.  
7 It's in our affirmative defenses though.

8 THE COURT: It is in your affirmative  
9 defenses?

10 MR. GOODMAN: Yes.

11 MR. SNYDER: But it's not going to be heard at  
12 this hearing, because it goes to something other than the  
13 location of the easement.

14 THE COURT: Right.

15 MR. GOODMAN: I've got two other clients this  
16 time.

17 MR. SNYDER: Well, then I don't know. Mr. --

18 MR. GOODMAN: I'm not going to argue latches.

19 MR. SNYDER: Then I can wrap this up just with  
20 a proffer, this part of the questioning.

21 THE COURT: All right.

22 MR. SNYDER: Mr. Atkisson would testify that  
23 DD represents a letter he received from Mr. Steel,

1 following a meeting with him, and Mr. Steel is the zoning  
2 evaluation branch chief. Subsequent to that, or on the  
3 same day, a letter was sent to Mr. Lawrence, who was  
4 involved with the rezoning of what became Wendover. And  
5 subsequent to, and this is, again, September 18, 1980 --

6 THE COURT: Is that EE then, the letter to Mr.  
7 Lawrence from Mr. Steel?

8 MR. SNYDER: EE is a letter to Mr. Lawrence  
9 from Sidney Steel, and talking -- and the letter talks of  
10 Mr. Atkisson's concerns that the zoning branch chief is  
11 conveying to Mr. Lawrence, and Mr. Atkisson was copied in  
12 on the letter. And he would testify he did receive a copy  
13 of it. He would also testify that prior to Wendover being  
14 developed, he met with the person in charge of the  
15 development of this section of Wendover. And they walked  
16 a portion of the easement, and he pointed out where it  
17 was, and was told -- this is a Mr. Porter, who is actually  
18 listed as one of Defense's witnesses. And Mr. Porter --  
19 in conversations with Mr. Porter, Mr. Porter would testify  
20 that Mr. Porter was told where the easement was. He also  
21 told -- Mr. Porter told Mr. Atkisson we'll take care of  
22 your easement; we'll take care of problems --

23 MR. GOODMAN: Your Honor --

1 MR. SNYDER: This is just a proffer. I mean,  
2 it's not evidence. In the event -- and I'm saying --  
3 well, I mean, if you want me to go through all this --

4 MR. GOODMAN: All right, just relax; it's all  
5 right. I mean, there's going to be testimony on these  
6 points, and it's going to be radically different from his  
7 proffer.

8 MR. SNYDER: All right, well, this is -- well,  
9 I'm not going to -- I mean, I'm just trying to short  
10 circuit this for the Court, so that -- this is my evidence  
11 of latches.

12 THE COURT: Well, I have the patience of a  
13 saint. I mean, you can take as much time as you want to  
14 put on your case.

15 MR. SNYDER: Well, the only thing that we're  
16 going to say on the -- that the evidence --

17 THE COURT: As long as it's concluded on  
18 Thursday, because I'm going on vacation Friday.

19 MR. SNYDER: That's no problem. The only  
20 other evidence that would be presented on the issue of  
21 latches was that ultimately, Mr. Porter told Mr. Atkisson  
22 that they did not feel that they had to honor the  
23 easement. And subsequently, Mr. Atkisson wrote a letter



1 to Wexford, and then hired an attorney, who sent a letter  
2 to Porter, Wexford, and some of the property owners. And  
3 I need these marked.

4 Give me one minute, I've lost the --

5 THE COURT: Sure. Let me make sure I  
6 understand the proffer. Your proffer is that at first,  
7 when they walked the property, Mr. Porter said he would  
8 take care of it, but later met and said I don't have to  
9 honor the easement; we don't have to honor the easement?

10 MR. SNYDER: That's correct. As far as this  
11 proffer, we would offer as Plaintiffs' Exhibit II, the  
12 letter from Meta, and then HH, a letter from George  
13 Atkisson to Wexford Associates. And GG, a letter to Steve  
14 Bacon at First American Title Insurance. Let me get this  
15 marked.

16 (Whereupon, the documents were marked as  
17 Plaintiffs' Exhibits GG, HH, and II for  
18 identification.)

19 MR. SNYDER: I would ask at this time that the  
20 Court accept for the purposes of the proffer only, Exhibit  
21 DD, EE, GG, HH, II.

22 THE COURT: All right, well, they would be  
23 part of the record of the case then, if I assume -- if I'm

1 following you, but they wouldn't be admitted into evidence  
2 as exhibits in this trial, is that right?

3 MR. SNYDER: That's correct. I'm just asking  
4 that they be made part of the record.

5 THE COURT: They will be made part of the  
6 record in the case.

7 MR. SNYDER: Before I go to my next exhibit,  
8 which is going to be FF, I'd ask the Court, as Mr. Simpson  
9 has testified, and he may have to testify on this again,  
10 that FF, the topographical is not a good copy. This is  
11 like a third generation. Does the Court have this  
12 particular exhibit?

13 THE COURT: Let me see what I have in here.

14 MR. SNYDER: FF, the original -- I believe it  
15 looks like this.

16 THE COURT: Y-1, Y-2, and Y-3, dated 1991, the  
17 mylars; it looks like mylars of VV. And then I have ZZZ,  
18 but that appears to be all I have, at least readily  
19 available. If you want to -- we've got a couple of boxes  
20 here. Let's see.

21 MR. SNYDER: They're probably not there.

22 THE COURT: All right, if you want to come  
23 tomorrow and look through the boxes, maybe you'd have

1 better luck.

2 MR. SNYDER: Well, I think while we have Mr.  
3 Atkisson on the stand, can I at least ask him some  
4 questions about what has been marked as FF?

5 THE COURT: Yes.

6 BY MR. SNYDER:

7 Q Would you look at FF? Have you seen that  
8 before, Mr. Atkisson?

9 A Yes.

10 Q What is that?

11 A That's a -- the plat for the Wendover 3  
12 subdivision showing the --

13 MS. BRZEZYNSKI: Objection. Your Honor, Mr.  
14 Atkisson has not been qualified to examine and interpret  
15 topographic maps.

16 MR. SNYDER: He's not interpreting it. He's  
17 just saying what it is. If you'd like, I'll get him to  
18 read the label out loud, if counsel would prefer that.

19 THE COURT: I overrule the objection.

20 BY MR. SNYDER:

21 A It's a grading and siltation plan for  
22 Wendover, Section 3, Centreville District, Fairfax County,  
23 Virginia.

1 Q Can you tell me -- well, let me ask you a  
2 question. Is that your document? I mean, did that come  
3 out of your possession?

4 A Yes, yes.

5 Q Where did you obtain a copy of it?

6 A I obtained a copy of it from Huntley and Nyes.

7 Q Who were Huntley and Nyes?

8 A They were the engineers that did the work on  
9 this, on the --

10 Q When did they give you a copy of it?

11 A Well, about the time -- I couldn't say  
12 specifically, but it would have been about the time the  
13 zoning came up, when it came up for zoning, and maybe a  
14 little bit after that. I'm not sure, but it was certainly  
15 before they started building in there or doing anything.

16 Q Well, do you know what the relationship was  
17 between Huntley and Nyes and Wendover -- I'm sorry,  
18 Wexford?

19 A Yes, he was their engineer -- they were his  
20 engineer -- Wexford's engineer.

21 MR. GOGAL: I'm going to object, lack of  
22 foundation. He would only know that through hearsay.

23 THE COURT: Well, we know a lot of things



1 through hearsay.

2 MR. SNYDER: Well, actually, he was involved  
3 in the zoning, and that was Wexford --

4 THE COURT: Well, let him say that.

5 MR. SNYDER: Well, he's already testified to  
6 that. I mean, if you want to repeat that, I mean --

7 BY MR. SNYDER:

8 Q How do you know that, Mr. Atkisson?

9 A How do I know -- I'm not sure what you're  
10 saying.

11 Q How do you know who the engineers were for  
12 Wexford?

13 A Well, I went out there with the Wexford  
14 representative and the engineer.

15 Q Went out where?

16 A Out on the site, and they -- and he said -- he  
17 told me he was.

18 Q And you met with --

19 A Mr. Porter.

20 Q You met with Mr. Porter and who?

21 A And Pete Nyes, Mr. Nyes.

22 Q Were you then provided with what you have  
23 there, marked as --

1           A       Yes, either Mr. Huntley or Mr. Nyes gave it to  
2 me physically, I think, as I recall.

3           MR. SNYDER: Then I would again offer this as  
4 evidence, offer it into evidence, which is marked as FF.

5           MS. BRZEZYNSKI: Again, Your Honor, I would  
6 have to object based on hearsay and lack of foundation.  
7 We have not heard from the surveyors who have prepared  
8 this plat; we don't know why it was prepared or if there's  
9 a path shown on it, we don't know why the path was drawn,  
10 how it was drawn, or what the path represents.

11           THE COURT: All right, I overrule the  
12 objection, and FF will be admitted into evidence as a plat  
13 that was given to Mr. Atkisson by Wexford's engineers.

14                   (Whereupon, the document identified as  
15 Plaintiffs' Exhibit FF was admitted into  
16 evidence.)

17           BY MR. SNYDER:

18           Q       Now, do you know whether or not your  
19 grandfather, Thomas Adams, had a Will at the time that he  
20 died?

21           A       No, he did not.

22           Q       Do you know who survived him?

23           A       The nine children, and Idella Adams. Now, I

1 don't know what the arrangement was, but --

2 Q Was Thomas Adams' wife alive at the time that  
3 he died?

4 A Yes.

5 Q And at the time --

6 THE COURT: Is Idella the same as Ida?

7 A Yes, Ida is an abbreviation for Idella.

8 Q When Idella Adams died, do you know whether or  
9 not she had a Will?

10 A I know she did not.

11 Q Do you know who she was survived by?

12 A She was survived -- no, I know she was  
13 survived by -- I think probably seven children. I think  
14 two of them may have died, predeceased her, but I'm not  
15 sure of that now, because -- but I could name them off to  
16 you, but I --

17 Q Well, just tell me whether or not your mother  
18 was any of those?

19 A Yes, my mother was living.

20 Q And when your mother died, do you know whether  
21 or not she died with a Will?

22 A My mother?

23 Q Yes.

1 A Yes, she had a Will.

2 Q And who were the beneficiaries of her estate?

3 A It was -- what's the word -- tripartately  
4 separated, Horace Atkisson's two sons, my older brother,  
5 and John Atkisson, and George, myself.

6 Q And it was equal between those beneficiaries?

7 A Yes.

8 THE COURT: John was your brother?

9 THE WITNESS: Yes, ma'am.

10 THE COURT: And he predeceased your mother, is  
11 that right?

12 THE WITNESS: No, ma'am. John just died a  
13 month ago.

14 THE COURT: You said your older brother, was  
15 that not John?

16 THE WITNESS: He predeceased my mother.

17 THE COURT: What was his name?

18 THE WITNESS: Horace.

19 THE COURT: Horace, all right. That's what I  
20 was thinking of. I'm sorry. Okay.

21 BY MR. SNYDER:

22 Q Have you ever had an occasion to remove any  
23 trees from the area of the cemetery?



1 A Yes.

2 Q Can you describe what it is that you've had to  
3 do?

4 A Well, I -- my nephew and I cut down a cedar  
5 tree that was dead, or it was on its last leg, and I think  
6 you saw the evidence of the stump there. And I have the  
7 other part in my back yard.

8 Q When was that done?

9 A That was done about '76, '77.

10 Q And I believe there was -- can you tell me  
11 whether or not there is a tree near point G that has  
12 barbed wire on it?

13 A Yes, there's a cedar tree.

14 Q Do you have any recollection of where that  
15 barbed wire went from or where it went to?

16 A Yes. That cedar tree was kind of used as a  
17 corner post. And there would be -- there were strands  
18 attached to it that went south along the 880 foot strip.  
19 And then if you come back to the tree and made a right  
20 angle west or northwest, that ran down between Robert --  
21 R. L. Adams' and Thomas Adams' property. Right there at  
22 the corner where -- at point G, it made a right angle  
23 there.

1           Q       Which way did it go, towards lot number --  
2       what's indicated as lot number 1 or to Mary Saunders'  
3       property, when you say a right angle?

4           A       Well, it went -- put your hand back there, if  
5       you would, please. It went right along that line. No,  
6       keep going straight. That's it, right along that line.  
7       And then it came right back -- it will come right back to  
8       G and go at a right angle, right there -- no, that's a  
9       right angle. Didn't get that in law school, I guess.

10          Q       Do you know -- do you have any recollection as  
11       to what point in time this barbed wire existed in that  
12       area?

13          A       Yes. I recall the fence that went right down,  
14       the first one, that went in a westerly that you marked, I  
15       helped Robert Adams, or Uncle Bud, put that up when I was  
16       a kid, in about 1936, maybe '37; '36, I think. And I  
17       remember him teaching me how to make the wires. You had  
18       to cut a board out; you'd have a notch, notch, notch,  
19       notch, four strands. And you'd tack the board on the side  
20       of the post, and you just ran a strand down there; then  
21       you'd put a staple in that. Then you went to the next  
22       post. And I remember doing that. It was about that time,  
23       but that was his part of the fence. He had to maintain

1 that fence from there up past the mulberry tree.

2 Q I have no further questions of this witness.

3 THE COURT: Your timing is absolutely perfect,  
4 because I was planning to stop at 5:00 o'clock. Let's  
5 resume again tomorrow at 10:00 o'clock. I'd like to --  
6 normally, I like to start earlier once we get going, but I  
7 have a settlement conference tomorrow morning at 8:30, so  
8 10:00 o'clock it will have to be.

9 I would say the courtroom is going to be  
10 locked over the evening. You can feel free to leave your  
11 papers here. I don't believe it's going to be used  
12 tomorrow for the settlement conference, and if it is,  
13 we'll certainly see that nobody touches your papers, all  
14 right. So we'll see you back tomorrow morning at 10:00  
15 o'clock.

16

17

18 (Whereupon, at approximately 5:00 o'clock  
19 p.m., the hearing in the above-entitled case was  
20 adjourned.)


21

22

23

## 1 CERTIFICATE OF COURT REPORTER

2  
3 I, COLLEEN MOORE, a Certified Verbatim  
4 Reporter, do hereby certify that I took the stenographic  
5 notes of the foregoing proceedings and thereafter reduced  
6 the same to typewriting; that the foregoing is a true  
7 record of the testimony given by said witnesses; that I am  
8 neither counsel for, related to, nor employed by any of  
9 the parties to the action in which these proceedings were  
10 held; and, further, that I am not a relative or employee  
11 of any attorney or counsel employed by the parties hereto,  
12 nor financially or otherwise interested in the outcome of  
13 the action.

14  
15  
16   
17 COLLEEN MOORE, CVR-CM  
18 Court Reporter  
19  
20  
21  
22  
23



970069  
970071

ORIGINAL

1

V I R G I N I A

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

CLERK

SUPREME COURT OF VIRGINIA

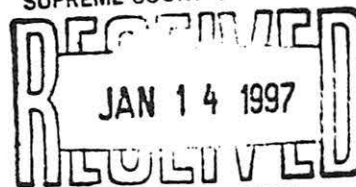
GEORGE T. ATKISSON, et al.,

Plaintiffs,

-vs-

WEXFORD ASSOCIATES, et al.,

Defendants.



RICHMOND, VIRGINIA

IN CHANCERY NO. 97823

Fairfax County Courthouse

Courtroom Number 4B

Fairfax, Virginia

Tuesday, September 17, 1996

The above-entitled matter came on to be heard  
before the HONORABLE JANE MARUM ROUSH, Judge, in and for  
the Circuit Court of Fairfax County, in the Courthouse,  
Fairfax, Virginia, beginning at 10:03 o'clock a.m.

APPEARANCES:

On Behalf of the Plaintiffs:

SCOTT E. SNYDER, ATTORNEY AT LAW

On Behalf of the Defendants:

NANCY DIMAURO, ATTORNEY AT LAW

JAN BRODIE, ATTORNEY AT LAW

LORA A. BRZEZYNSKI, ATTORNEY AT LAW

BERNARD E. GOODMAN, ATTORNEY AT LAW

DAVID J. GOGAL, ATTORNEY AT LAW

\* \* \* \* \*

## C O N T E N T S

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
Mark Albanese	13	30	35	---
Pedro Capestany	41	43	--	---
Richard Sacchi	101	109	--	---
Herman Corson	115	141	--	---
George T. Atkisson	171	179	--	---

\* \* \* \* \*

## E X H I B I T S

FOR IDENTIFICATION IN EVIDENCE

Plaintiff's Exhibit Nos. A-W	--	8
Defendant's Exhibit Nos. 1-9, 25, 27 39		39
Defendant's Exhibit No. 10	144	146
Defendant's Exhibit No. 12	160	150
Defendant's Exhibit Nos. 14 & 15	151	151
Defendant's Exhibit No. 16	155	155
Defendant's Exhibit No. 17	156	156
Defendant's Exhibit No. 18	161	161
Defendant's Exhibit No. 26	169	169
Defendant's Exhibit No. 28	163	163

\* \* \* \* \*

## E X H I B I T S

FOR IDENTIFICATION IN EVIDENCE

Defendant's Exhibit No. 29

170

170

## P R O C E E D I N G S

(The Court Reporter was sworn.)

THE COURT: We seem to be missing a fair number of people.

Mr. Atkisson, you go ahead and take the witness stand.

MS. BRODIE: I had called -- to provide for a light box in the room and I don't know if this is one or not, if there is anything here.

THE COURT: I think we might have a portable one. Is that what you meant, an X-ray viewer?

MS. BRODIE: Yes. We won't need it immediately, but sometime during the case.

THE COURT: We have some portable ones. There's no built-in one in the courtroom.

Are you expecting Mr. Goodman?

MR. GOGAL: Yes, Your Honor.

THE COURT: I know it's a busy day today. It's criminal term day and I understand the parking is at even more of a premium than it usually is.

MR. GOGAL: There is a line waiting to get in. He was going to walk across the street from our office. The elevators were also packed.



1 THE COURT: Any cross-examination of Mr.  
2 Atkisson?

3 MR. GOGAL: Not at this time.

4 THE COURT: Mr. Atkisson, I'm sorry I made you  
5 walk over there. No one has any questions for you at this  
6 time. You can rejoin your attorney.

7 MR. SNYDER: That presents me with a  
8 difficulty, Your Honor, seeing that there were at least  
9 four attorneys who were going to be cross-examining him.  
10 My last witness is from the Virginia Department of  
11 Transportation who I asked to be here at 11:00 o'clock.  
12 He's not going to be here until then.

13 The only other thing that I needed to do was  
14 on our exhibit list --

15 THE COURT: I'm not sure I have your exhibit  
16 list.

17 MR. SNYDER: I have a file stamped copy.

18 THE COURT: The problem might be mine because  
19 if you recall, in the early stages of my dealing with this  
20 case, that was probably beginning year eight and a half  
21 and following the history of this case, it seemed like  
22 every time that this file had been programmed by the  
23 Clerk's Office to be archived and so every time anything

1 was done in the case it went back to the Clerk's Office  
2 and was sent to off site archiving.

3 So then I took control of the file and it has  
4 been housed in my secretary's office the last several  
5 months. So that might explain some of the lag of getting  
6 things from the Clerk's Office into the file.

7 MR. SNYDER: What I would like to do is move  
8 in the Plaintiff's deeds which were Exhibits A through W,  
9 most of which are contained in the Defendant's trial  
10 exhibits, but unfortunately I had a list of how they  
11 corresponded by number, but they've changed the numbering  
12 system.

13 So what I can do is provide to the Court, not  
14 today, hopefully maybe tomorrow, but provide to the Court  
15 what A through W would translate as. None of these were  
16 objected to, so I don't think there's any issue as to  
17 their admissibility. All but four of them are already  
18 contained in the notebook of the Court.

19 MS. DIMAURO: Your Honor, we have an extra  
20 copy of the Plaintiff's exhibit list if that would help  
21 you.

22 THE COURT: Yes, it would.

23 Is there any objection to Plaintiff's Exhibits

1 A through W coming into evidence?

2 MR. GOGAL: No, Your Honor.

3 THE COURT: They will be admitted subject to  
4 them actually being received by the Court. I think you  
5 just need to submit a package separately basically of your  
6 A through W as opposed to taking the Defendant's exhibits  
7 and remarking them. The record just becomes hopelessly  
8 confused if you do that.

9 MR. SNYDER: All right.

10 MR. GOGAL: Your Honor, we would have no  
11 objection if you would like to basically -- I mean if we  
12 had had the opportunity we might have just said these are  
13 joint exhibits and we don't have any objection if he --  
14 since we have copies for everybody, if he wants to use --

15 MR. SNYDER: Why don't I redesignate my A  
16 through W and call them joint exhibits, but they'll be  
17 based on the numbering system of the notebook that's  
18 before you?

19 THE COURT: That's fine.

20 MR. GOGAL: The only reservation -- we don't  
21 want to call them joint because we're not putting any  
22 exhibits in in his case. They're his exhibits. He wants  
23 to use our exhibits as his exhibits rather than have a

1 duplication where the Court is accommodating him in that  
2 respect rather than requiring him to make additional  
3 copies, but at this time we're not putting them in as  
4 evidence ourselves.

5 THE COURT: I think what we should do then is  
6 have them filed separately as Plaintiff's Exhibits A  
7 through W.

8 (The documents heretofore marked,  
9 for identification, as Plaintiff's  
10 Exhibit Nos. A-W, were received in  
11 evidence.)

12 MR. SNYDER: I'll do that, Your Honor. Now my  
13 only problem is Mr. Capestany is not going to be here  
14 until 11:00 o'clock. I'm sure the motions the Defendants  
15 would like to argue, I'm not sure that his testimony would  
16 have any effect, if you would like a proffer on his  
17 testimony to see whether or not there are motions that  
18 could be argued now.

19 THE COURT: I assume you're expecting a motion  
20 to strike then?

21 MR. SNYDER: Yes.

22 THE COURT: It's hard to rule on a motion to  
23 strike based on a proffer, I think.



1 MR. SNYDER: I guess my point is that I think  
2 that Mr. Capestany's testimony may not be going to any  
3 motions to strike except for the possibility of Mr.  
4 Goodman.

5 THE COURT: How do defense counsel want to  
6 proceed? Do you want to take a proffer of what this last  
7 witness' testimony will be and then argue your motion to  
8 strike or do you want to call your first witness without  
9 waiving your right to make a motion to strike?

10 MR. GOODMAN: Your Honor, we can't answer  
11 affirmatively for the second proposition because we don't  
12 have our first witness here. We expected him to finish  
13 his case. He's across the street, we can try to get him.

14 THE COURT: Why don't we do that? I would  
15 like to keep the case moving.

16 MR. GOODMAN: We have another issue that we  
17 want to address at this point and I'll let Mr. Gogal  
18 present it.

19 THE COURT: All right.

20 MR. GOGAL: I don't know that it's really an  
21 issue. I just wanted to bring it to the Court's  
22 attention. We, in my office, one of our staff apparently  
23 is related to -- I guess it would be Robert L. Adams and

1 it came to my attention yesterday that her father, George  
2 Adams, I think technically is a necessary party to this  
3 case.

4 On the other hand, Mr. Atkisson has served him  
5 by publication by virtue of the fact that he filed an  
6 affidavit that he did not know -- these are only the  
7 people he knew about and then the other people he did not  
8 know about.

9 I don't think that this is a problem with  
10 being that I'm involved in the case and a staff person in  
11 our office who, because we were preparing for the trial,  
12 sort of saw what was going on and said I think my dad is  
13 somehow related to this and then it turns out his name is  
14 George Adams and I briefly discussed it with -- the  
15 details, but I just asked him if, in fact, he is who the  
16 staff person thought.

17 I don't believe he's aware of the litigation.  
18 In talking to him, he had no interest in appearing here or  
19 coming to court and so I could not bring him here for any  
20 reason.

21 THE COURT: What is George Adams' relationship  
22 then? Would he be a first cousin or a second cousin of  
23 Mr. Atkisson?

1 MR. GOGAL: Mr. Atkisson can probably better  
2 tell you that. I believe he would be a -- Robert L. Adams  
3 would have been -- I think he's grandfather's brother, so  
4 that's the relationship and I -- just for purposes of  
5 disclosure, but I --

6 THE COURT: His father is Mr. Atkisson's --  
7 their grandfathers were brothers; is that what you're  
8 saying?

9 MR. GOGAL: Grandfathers are brothers. Yeah,  
10 that's right, the grandfathers were brothers because  
11 George Adams, his grandfather was Robert L. Adams, and Mr.  
12 Atkisson's grandfather was Thomas Adams.

13 THE COURT: They're second cousins.

14 MR. GOGAL: I really don't know how that  
15 works.

16 THE COURT: Does anybody have an objection to  
17 that? I take it there's a remote conflict of interest  
18 then that one of your staff members is a second cousin  
19 once removed of the Plaintiff.

20 MR. GOGAL: The staff member wouldn't be a  
21 party to the case because her father is still alive. I  
22 don't believe there's any conflict. I'm not saying that  
23 Mr. Atkisson, when he signed his affidavit, he knew about

1 this particular individual. So I don't think there's any  
2 issue of -- the parties are here, but when it came to my  
3 attention, I thought --

4 THE COURT: So you're just disclosing a remote  
5 potential conflict of interest; is that it?

6 MR. GOGAL: Perhaps that's it, I guess, but  
7 I'm not sure why I brought it to the Court's attention.  
8 We discussed it and thought in the exercise of due caution  
9 we ought to disclose --

10 THE COURT: Nobody ever got in trouble for  
11 over-disclosing these things.

12 MS. BRADZYNSKI: I think our concern also was,  
13 David, that we don't know -- we didn't know if he was --  
14 he could perhaps be a necessary party, but we know that  
15 from the order of publication that he probably had some  
16 notice, so we wanted -- I think that's what we wanted the  
17 Court to know.

18 THE COURT: Does anybody have anything further  
19 they want to say on this point?

20 Why don't we take a brief recess and the  
21 parties call their respective witnesses and see if they  
22 can move up the schedule a little bit and when we have a  
23 witness ready to go, either for the Plaintiff or the



1 Defendants, I'll come back on the bench?

2 (Brief recess.)

3 THE COURT: Whose witness do we have here?

4 MR. GOODMAN: We've got our first witness,  
5 Your Honor, Mark Albanese.

6 Whereupon,

7 MARK ALBANESE,

8 a Witness, was called for examination by counsel on behalf  
9 of the Defendants, and, after having been duly sworn, was  
10 examined and testified, as follows:

11 DIRECT EXAMINATION

12 BY MR. GOODMAN:

13 Q Mr. Albanese, would you please identify  
14 yourself for the record?

15 A Yes. My name is Mark Albanese.

16 Q What is your address, sir?

17 A I'm at 3752 Center Way in Fairfax, Virginia.

18 Q What is your occupation?

19 A I'm an attorney with the law firm of Albanese  
20 & Associates, P.C.

21 Q Would you tell us what your educational  
22 background is, sir?

23 A Undergraduate degree, I received back in 1983

1 from George Mason University. Subsequent to that I read  
2 the law beginning in 1986 and completed that program in  
3 1989 and passed the Virginia Bar at that time, became a  
4 licensed attorney in 1989.

5 Q Before that did you have some experience in  
6 examining titles?

7 A I began examining titles back in 1981, did  
8 that while I was doing my undergraduate work, and  
9 subsequent to that I started a title company, which I  
10 formed back in 1984, State Title & Escrow, and I am  
11 currently counsel to that company as well as the chairman  
12 of the board.

13 Q Since 1981, approximately how many titles have  
14 you examined?

15 A I'd have to estimate several thousand.

16 Q Have you examined titles in the Northern  
17 Virginia area?

18 A All over Northern Virginia and Washington,  
19 D.C. and some portions of Maryland.

20 Q You're being called to testify in the case of  
21 Atkisson versus Wexford Developers and several homeowners.  
22 Did you testify in this case about five years ago?

23 A Yes, sir, I did.

1 Q Were you qualified as an expert then?

2 A Yes, I was.

3 MR. GOODMAN: Your Honor, I move to qualify  
4 Mr. Albanese as an expert to testify on the status of the  
5 titles in this case and their related documents.

6 THE COURT: Any objection?

7 MR. SNYDER: I'm not sure what he means by the  
8 status of titles, but I would stipulate that he's an  
9 expert in the area of title examination.

10 THE COURT: All right. Do you accept that  
11 stipulation?

12 MR. GOODMAN: Yes.

13 THE COURT: All right. He is admitted as an  
14 expert in the area of title examination in Virginia.

15 BY MR. GOODMAN:

16 Q Mr. Albanese, did you examine the chains of  
17 title for the property that's now known as Wendover III in  
18 Hunter Mill Forest in Fairfax County?

19 A Yes, sir, I did.

20 Q You have Defendant's exhibit book in front of  
21 you. If you'll look at Exhibit Number 1, there are some  
22 letters which -- they go all the way to Y. Are those the  
23 same documents that you had put together as Wexford 27 in

1 the prior case?

2 A Yes, sir, it is.

3 Q Did you also make a pictorial display of  
4 certain of those deeds?

5 A Yes, sir, I did.

6 Q I direct your attention to Exhibit Number 2 in  
7 that book and we have a large Exhibit Number 2 up here and  
8 ask you if this is a blow up of Defendant's Exhibit Number  
9 2.

10 A Yes, sir, it is.

11 Q I have turned the easel to Page A, Exhibit 2-A  
12 and I ask you if you would describe that for the Court,  
13 please. What does that demonstrate?

14 A What we have here is a -- we selected a map  
15 that basically included all the various parcels that  
16 encompassed the two subdivisions and --

17 Q When you say a map, do you mean a tax map?

18 A Well, actually this is basically -- I got this  
19 exhibit actually from the prior case and this was used as  
20 a Plaintiff's exhibit. I had used an original exhibit in  
21 the prior case of a tax map. I liked their exhibit a  
22 little bit better because it was set to scale whereas ours  
23 -- again, the tax maps are close, but I felt this was



1 actually a better depiction of the property.

2 I can't give you a definitive answer if that's  
3 an actual tax map or just a Plaintiff's exhibit from  
4 previous time, but it does clearly identify the areas in  
5 question and I'll take you through those as I describe  
6 them.

7 Q Start with Exhibit A and forgive my  
8 interruption.

9 A The first exhibit shown there, Exhibit A, what  
10 we selected there was a -- and I'm doing this more in a  
11 time frame manner than really a title matter. What we  
12 show there, and I believe you all have copies of these  
13 exhibits which are a little easier to read than staring  
14 across the room, but under our Exhibit A there,  
15 highlighted in orange down in the right-hand corner, I've  
16 shown what I call parcel 48.

17 That was actually a parcel depiction that  
18 occurred back in the early 70s and just for reference  
19 purposes gives us a basis and a little bearing as to which  
20 parcel we're referencing to.

21 What that shows there is a conveyance of a  
22 parcel of land and that occurred back in, I believe, 1888,  
23 October of 1888, and was recorded in deed book H-5, Page

1 287. That particular exhibit is housed under, I believe,  
2 Tab 1-L in your Defendants' material.

3 Q Yeah. We also have some selected deeds.

4 A As well as some selected deeds. I believe  
5 it's under Tab 3 in the selected deeds.

6 What that shows is the deed from Mary  
7 Catherine Saunders, who was a landowner of a good portion  
8 of the land that I'll describe to you in a moment, and she  
9 conveyed that particular parcel to Robert Adams.

10 Across that parcel you'll see depicted in blue  
11 a 15 foot right of way. I've stated on there on the plat  
12 that the complete location of that right of way is not  
13 shown per the land records. We did that simply for  
14 illustration purposes.

15 The best that the deed tells you is that it  
16 leads to the old county road, which you see in the far  
17 bottom right-hand corner, and it leads through the parcel  
18 to remaining land, unsold land, of Mary Catherine  
19 Saunders.

20 Q Now I direct your attention to Exhibit 2-B and  
21 I ask you if you'll explain to the Court what that  
22 depicts.

23 A The area that's now toward the center of the

1 document is highlighted in yellow, depicts another parcel  
2 of land that was also owned by Mary Saunders, and she  
3 conveyed this parcel to Thomas Adams. That conveyance  
4 occurred in October of 1893 and again that was by Mary  
5 Saunders to Thomas Adams and it conveyed approximately 15  
6 acres of land.

7 I've also highlighted in blue that that  
8 conveyance was subject to or was together with actually a  
9 15 foot right of way that extends through the property up  
10 to access the 15 acre parcel above.

11 Again, that easement is not totally shown per  
12 the land records, that particular deed, and again that was  
13 housed under Tab 1-L -- actually that was under 1-V and  
14 again under individual Tab 4.

15 What that shows there is a right of way to  
16 access that parcel. It's not all clearly defined in the  
17 land records. They do describe a portion of it beginning  
18 at Point G, which is the point on the -- I would call that  
19 the southwest corner of the property, extending downward  
20 approximately 880 feet, and then southeast at 32 degrees,  
21 I believe 50 minutes, it extends another 330 feet east.

22 From that point on they just define that as  
23 passing through particular monuments that no longer are



1 present on the property, so there's no clear definition of  
2 where the easement goes beyond the 330 feet point, but it  
3 states that it does go through the R.L. Adams property,  
4 which was the first property we talked about, and extends  
5 to the old county road.

6 Q Mr. Albanese, this sheet 2-B says that the  
7 conveyance was October of 1893. Would you take a look at  
8 Tab 4 and tell me if that doesn't say 1892 on it?

9 A I believe the reference that I was giving you  
10 was -- it states Fairfax County on Page 2 of that deed  
11 under Tab 2.

12 Q No, Tab 4.

13 A I'm sorry. Tab 4. The date that the County  
14 received the document, I believe, shows 1893. It's a very  
15 difficult document to read and I actually had to have it  
16 retyped for court purposes, but I believe it was recorded  
17 --

18 Q Actually if you look on the second page --

19 A It was acknowledged in July of '92. The final  
20 paragraph there was 1893, so I generally reference them  
21 for recording purposes.

22 Q Now I direct your attention to Exhibit 2-C and  
23 ask you if you would explain to the Court what 2-C



1 represents.

2           A       What Exhibit 2-C represents is a partition  
3 decree and it's the area that's actually outlined on the  
4 map there in red. There's seven parcels and that actually  
5 stemmed out of a chancery case back in 1896, I believe.  
6 Adams v. Adams was the case and in that the heirs were  
7 fighting over the land and the Court came out with this  
8 decree and divided the land up amongst the various Adams  
9 heirs.

10                   What you'll see also highlighted in green in  
11 that document is a partition lot 2 in that decree and in  
12 that, that particular parcel went to one of the heirs  
13 known as Thomas Adams, who also owned the 15 acre parcel  
14 that we previously discussed, and in the southeast corner  
15 of that parcel was located a one quarter acre burial lot.

16           Q       Was there access provided in the partition  
17 decree to the burial lot or partition lot?

18           A       Yes, there was. I'll direct you up to the --  
19 a little bit left of the center of the document there  
20 highlighted in brown. There's an outlet road. Now, that  
21 outlet road was 15 foot in width. It fell 7 and 1/2 feet  
22 in parcels 5, 6 and 4 and 3, so it divided the parcels.  
23 It was 15 foot in width and it was designated for

1 permanent use for access to what they call parcel 2,  
2 particularly for access to the family burial plot.

3 Q Is that partition decree that you've just  
4 described the same as what's in Tab 5 in the book in front  
5 of you?

6 A It's the partition decree -- it's under two  
7 tabs. It's actually under Tab 1-R and individually under  
8 Tab 5.

9 Q I now direct your attention to Page 2-C1 and  
10 ask you what that represents, Mr. Albanese.

11 A What this represents is actually something  
12 that I received or that we ascertained out of the County  
13 tax maps. The original publication on the County maps  
14 occurred back in the early 60s. I believe it was 1961,  
15 but this outlet road is shown on all the tax maps  
16 beginning with the first published map in the early 60s  
17 and it shows all the way up to the present tax maps that  
18 we have at present date.

19 It identifies a little outlet road that starts  
20 right there at the Clark's Crossing Road, as well as the  
21 County road, and extends upward along the railroad bed and  
22 then as you see, it turns into the 15 acre parcel, Thomas  
23 Adams parcel, that we originally talked about a few plats

1 back.

2 Q Did you find any portions of that road in the  
3 land records?

4 A I did an extensive search trying to locate the  
5 origin of the outlet road and I only found small portions  
6 of it. Back in a deed back in 1902 there was a partition  
7 decree that occurred on the west side of the railroad bed,  
8 but it did encompass the portion, and I didn't highlight  
9 it, but it's actually -- I can point to it.

10 If you want to go to the board there, I can  
11 point to the area. It's down right where the County  
12 Clark's Crossing Road is, that little parcel there that  
13 you have your pen at. I call that Parcel 50.

14 That was known back in time as parcel 6 and 5.  
15 It was approximately 4 and 1/3 acres each and when the  
16 partition deed occurred back in the early 1900s, they  
17 established across the lower parcel lot 6 to access lot 5.  
18 So that was the beginnings of that outlet road.

19 I believe what you have here is some common  
20 owners through time and I just believe it extended up  
21 through the various parcels for whatever means, I assume  
22 access up to the 15 acre parcel.

23 Q I next direct your attention to Page 2-D and I



1 would ask you to explain to the Court what that  
2 represents.

3 A Exhibit 2-D represents the Hunter Mill Forest  
4 Subdivision. Taking you back a couple of plats, that's  
5 actually a makeup of three of the partition lots that we  
6 discussed prior, which was partition lot 6, partition lot  
7 5, partition lot 2 and a portion of the 15 acre parcel.

8 So those are the four parcels that make up the  
9 Hunter Mill Subdivision.

10 THE COURT: I'm sorry. 6, 5, 2 and part of?

11 THE WITNESS: Partition lot 6, lot 5, lot 2  
12 and the 15 acre parcel.

13 THE COURT: Okay.

14 THE WITNESS: In that, that shows -- and that  
15 subdivision was dedicated and created back in, I believe,  
16 1979, July of '79, and again that identifies a 60 lot  
17 subdivision with an out lot A down at the bottom portion.

18 There was also an addition, I think, parcels A  
19 through H, which were subsequently conveyed to the Park  
20 Authority. They're not actually identified there. We  
21 just concentrated on the actual lot locations.

22 In addition, I just highlighted for reference  
23 purposes that there was a 15 foot Fairfax County easement



1 that was shown per the dedication plat that ran along  
2 parcels -- or actually between lots 43, 42 and then along  
3 the west side of what they call out lot A.

4 BY MR. GOODMAN:

5 Q Is that through the Water Authority?

6 A Yes, Fairfax County Water Authority easement.

7 Q I now direct your attention to Page 2-E and  
8 I'd ask you to tell the Court what that represents.

9 A Exhibit 2-E represents, and that's outlined  
10 there in purple, the window resection 3 subdivision. The  
11 dedication of that subdivision is shown under Tab 1-A and  
12 that subdivision was created in October of 1984.

13 Q I now direct your attention to Page 2-F,  
14 Exhibit 2-F, and ask you to explain to the Court what that  
15 represents.

16 A 2-F just actually gives you a total picture of  
17 all the parcels together, basically just gives you a feel  
18 for how the two subdivisions lay out with one another, and  
19 I just gave you a combination of everything that you had  
20 been seeing in bits and pieces through the previous  
21 displays.

22 Q Mr. Albanese, you've testified about the 15  
23 acre parcel with the access easement which goes through

1 what today is Wendover. Was that designed to serve the 15  
2 acre parcel?

3 MR. SNYDER: I'm going to object to him  
4 interpreting the deed. I think the deed and its intention  
5 speaks for itself.

6 THE COURT: Mr. Goodman, how does he known  
7 what was intended?

8 MR. GOODMAN: I'll rephrase it.

9 THE COURT: All right.

10 BY MR. GOODMAN:

11 Q Does the express easement to the 15 acre  
12 parcel serve Partition Lot 2?

13 A No, it does not. It runs solely to the 15  
14 acre parcel and is never found in title running to  
15 Partition Lot 2.

16 Q Does the express easement to the 15 acre  
17 parcel serve the burial lot, which is in the 1896  
18 partition deed?

19 A No, it does not. Again, it runs solely to the  
20 15 acre parcel and not to the burial lot. The burial lot  
21 was actually west of that parcel and if you were looking  
22 at Point G, which I spoke of earlier, the burial lot was  
23 actually in Partition Lot 2, the southeast corner of that

1 lot and that was west of Point G.

2 Q I want to direct your attention to Exhibit D-  
3 25, which is in the book in front of you, which is the  
4 1972 topo map of the 1996 overlay.

5 THE COURT: Exhibit what?

6 MR. GOODMAN: D-25.

7 THE WITNESS: Exhibit 25?

8 MR. GOODMAN: Yes, Defendants' Exhibit 25.

9 THE COURT: Not E-25, just 25?

10 MR. GOODMAN: Just 25.

11 BY MR. GOODMAN:

12 Q I want to ask you if the partition easement  
13 that you described, that you testified about that was in  
14 the 1896 deed, shows in that 1996 map?

15 MR. SNYDER: I'm going to object to him  
16 interpreting topographical maps. There's been no  
17 foundation that he has any expertise in this area.

18 THE COURT: You need to lay a better  
19 foundation for what exactly this is I'm looking at.

20 MR. GOODMAN: Your Honor, this is a tax map  
21 with a -- it's a tax map overlay with a topographical map.  
22 I'm not asking him to read any topography, just the tax  
23 map portions, and the question simply is this partition

1 easement that he's testified about and put on this  
2 exhibit, that's illustrated on this exhibit, I'm just  
3 asking him if it's on the 1996 tax map.

4 THE COURT: I overrule the objection. He can  
5 answer the question.

6 THE WITNESS: Yes, it is. Actually when they  
7 did the subdivision, the Hunter Mill Forest Subdivision,  
8 they didn't show the west side of the out lot road, but  
9 they did show the -- as I told you earlier, it fell 7 and  
10 1/2 feet to the east and 7 and 1/2 feet to the west.

11 They did show the eastern portion of the 7 and  
12 1/2 feet, so it is still shown on current tax maps.  
13 Again, they're showing only 7 and 1/2 feet of it, but it  
14 is still identified on current tax maps.

15 BY MR. GOODMAN:

16 Q I direct your attention to Tab 27 --

17 THE COURT: Let's back up. Where are you  
18 seeing it on Exhibit 25?

19 THE WITNESS: On Exhibit 25 they've actually  
20 done a dotted line on both sides.

21 MR. GOODMAN: Why don't you show the Court?

22 THE WITNESS: Up here --

23 MR. GOODMAN: You've got to show her on this.



1 THE COURT: I know how to read these tax maps,  
2 double circles and all of that.

3 MR. SNYDER: If you look at where Point G is,  
4 you can see a dotted line starting above and below it that  
5 runs --

6 MR. GOODMAN: He's talking about something  
7 else.

8 THE WITNESS: If you'll actually look -- it  
9 will be easier to see on the Hunter Mill Forest plat. If  
10 you'll turn back to Exhibit D, I can give you some  
11 bearings there, Your Honor.

12 THE COURT: All right.

13 THE WITNESS: If you'll direct your attention  
14 to Lots 20 and 22?

15 THE COURT: Yes.

16 THE WITNESS: Starting right at that point, if  
17 you would go north, you'll see there's a dotted line  
18 that's shown all the way leading up to the railroad bed?

19 THE COURT: Yes.

20 THE WITNESS: As you see, it's only dotted on  
21 one side and not on the other side, because that's the way  
22 it was shown per the dedication plat, but that actually  
23 takes you 7 and 1/2 feet to the east portion there, so it

1 is still shown on current tax maps.

2 THE COURT: Then I can see where you're  
3 referring. You're referring to the lines -- it's near the  
4 Clark's Crossing Park on Exhibit 25?

5 THE WITNESS: That's correct.

6 THE COURT: It runs from that corner up to  
7 what's now the W&OD Trail?

8 THE WITNESS: That is correct.

9 THE COURT: Okay. I'm with you.

10 BY MR. GOODMAN:

11 Q I ask you to look at Exhibit 27, which is a  
12 1970 tax map. Is that same partition easement shown on  
13 the 1970 tax map?

14 A Yes, sir, it is.

15 MR. GOODMAN: I have no further questions for  
16 the witness, Your Honor.

17 THE COURT: Any cross-examination?

18 MR. SNYDER: Yes, Your Honor.

19 CROSS-EXAMINATION

20 BY MR. SNYDER:

21 Q I'm going to refer you to Defendant's Exhibit  
22 Number 25. Do you see there where out lot A is indicated?

23 A It's very faint, but, yes, I can see it.

1           Q     Is there a dotted line that runs through out  
2 lot A, runs towards the number 13?

3           A     Yes, I do see a --

4           MS. BRADZINSKI: Objection, Your Honor. I  
5 think that Mr. Snyder is now asking the witness to  
6 interpret the topographical part of this exhibit --

7           MR. SNYDER: I just asked if he saw a dotted  
8 line.

9           THE COURT: I overrule the objection.

10          Out lot A is the one that was shown with the  
11 cross on it denoting a cemetery; is that right?

12          MR. GOODMAN: That's correct.

13          THE COURT: I was asking the witness.

14          THE WITNESS: In answer to your question, yes,  
15 per this Defendant's Exhibit 25, I do see a dotted line  
16 that runs through a portion of out lot A.

17          BY MR. SNYDER:

18          Q     Can you show me the dotted line that you were  
19 just discussing with Mr. Goodman?

20          A     I was discussing this dotted line right here  
21 (indicating), sir.

22          Q     What is that dotted line that you were  
23 discussing with Mr. Goodman represent?

1           A       That represents an outlet road that was  
2       established in the partition decree and in that, that  
3       provided a means of access as defined in the document.

4           I could refer you to the actual paragraph in  
5       the document, but in the partition decree, they  
6       established an outlet road that ran through partition lots  
7       3, 4, 5 and 6 down to partition lot 2 and that was clearly  
8       established for access to the burial lot. It was actually  
9       shown in the document as permanent access to the family  
10      burial lot.

11          Q       Then can you tell me what the dotted line that  
12      runs through out lot A represents?

13          A       Again, the dotted line that runs through out  
14      lot A is not a matter that I can give you that was found  
15      in title. Again, there were only portions of it that were  
16      identified in title.

17          Q       What portions?

18          A       There was the portion that began at Point G,  
19      which is our common point there, I guess right in the  
20      center of what you call out lot A, extending south 880  
21      degrees, and then again it turned inward south, southeast  
22      32 degrees, 50 minutes east, for approximately 330 feet.

23                 That's the only clear identification of the



1 outlet road that extended up to the 15 acre parcel that I  
2 found in the title.

3 Q Is that what's represented near the dotted  
4 line on Exhibit 25, the portions you just described?

5 A A portion of that is similar, but again  
6 there's other portions of that that are at best a  
7 guesstimate.

8 Q Let me refer you to in your exhibit book 2-D.  
9 THE COURT: My clerk has just raised an  
10 interesting question. Are these combined defense  
11 exhibits?

12 MR. GOODMAN: Yes.

13 THE COURT: Does she need to specify which  
14 Defendant's exhibits these are for purposes of the record?

15 MR. GOODMAN: They're combined defense  
16 exhibits and our list states by Defendant's exhibits.

17 THE COURT: All right. Sorry. You're at 2-D  
18 now; is that right?

19 MR. SNYDER: That's correct.

20 BY MR. SNYDER:

21 Q The deed of dedication which this represents,  
22 did that include an out lot A?

23 A Yes, it did. Yes, sir.

1 Q Did a portion of out lot A encompass what was  
2 formerly known as the 15 acre parcel?

3 A Well, again, out lot A was a creation that  
4 took place in 1979 when that dedication occurred and the  
5 way I see the location of out lot A per that dedication  
6 plat, a portion of that would fall in the 15 acre parcel,  
7 a portion of that would fall in partition lot 2. It  
8 actually almost splits the two parcels.

9 Q This deed of dedication was recorded in the  
10 land records?

11 A That is correct; yes, sir.

12 Q I had a question about one more thing that you  
13 testified on I wasn't sure. If you would look at 2-C1,  
14 can you tell me in 2-C1 how much of this location is  
15 derived from land records?

16 A It's actually very limited. At best I can  
17 only find the beginning portions of it and that would have  
18 actually started at the corner where you see the County  
19 road and Clark's Crossing Road and if you were to extend  
20 northward in that area that I had shaded previously in  
21 gray, it went up to -- well, I would say about halfway  
22 through the first parcel.

23 Beyond that point I was never able to

1 establish anything per the actual land records, but again  
2 it's a matter that I just picked up per tax map, which is  
3 actually housed -- land records do include the tax maps.  
4 So I included that as an additional exhibit.

5 Q But as far as the deeds and the other land  
6 records that you reviewed other than tax records, there is  
7 no location of this road once you get past the halfway  
8 point of that first parcel?

9 A That is correct; yes, sir.

10 MR. SNYDER: I have no further questions.

11 MR. GOODMAN: Your Honor, I just have one  
12 question, if I may, which is sort of related.

13 THE COURT: All right.

14 REDIRECT EXAMINATION

15 BY MR. GOODMAN:

16 Q Mr. Albanese, would you please look at Tab 6,  
17 which is the heir's deed to Harold Miller dated 1978? The  
18 property conveyed in that deed, does that include the 15  
19 acre parcel that you've been discussing?

20 A Let me just verify that. I believe it does.  
21 I believe that deed actually encompassed partition lot --  
22 well, actually it was all the heirs of Thomas Adams and  
23 Thomas Adams owned partition lot 5, he owned partition lot

1       2 and the 15 acre parcel.

2               So this is the conveyance by the heirs of  
3 Thomas Adams to Harold Miller, Trustee, so, yes, that did  
4 include the 15 acre parcel.

5               MR. GOODMAN: Your Honor, based on his  
6 testimony, I want to start moving in some of the defense  
7 exhibits; 1, 2, 3, 4, 5, 6 and 9.

8               THE COURT: Any objection?

9               MR. GOODMAN: Pardon me. I've got two more;  
10 25 and 27, the two tax maps that he discussed.

11              THE COURT: Any objection to any of those  
12 exhibits?

13              MR. SNYDER: I'm going to object on 2, to  
14 those portions which -- starting from C-1 on which reflect  
15 what he says is an approximation of whatever -- location -  
16 - he was really able to find is halfway through the first  
17 parcel and that's reflected on C-1, C-F -- I'm sorry -- 2-  
18 F.

19              What were the other exhibits?

20              MR. GOODMAN: I can go through the numbers.

21              THE COURT: Let's go through them one at a  
22 time. What's the first exhibit you want to move in?

23              MR. GOODMAN: 1.



1 MR. SNYDER: There's no objection to 1.

2 THE COURT: It's admitted.

3 MR. GOODMAN: 2.

4 MR. SNYDER: 2-C, 1 and 2-F is objected to as  
5 far as the outlet road is concerned, after you go past the  
6 first part.

7 THE COURT: He's already stated that it's a  
8 guesstimate at that point.

9 MR. SNYDER: I just think that for the record,  
10 the purpose of maintaining the record, to have that in  
11 there is very misleading.

12 THE COURT: I overrule the objection and those  
13 exhibits will be admitted. I think his testimony stands  
14 as to how far he could trace that in the land records and  
15 the rest, I think he said, pretty much was an educated  
16 guess and I think that would go to the weight that I'm to  
17 give the exhibit and not the admissibility of the exhibit.

18 MR. GOGAL: Your Honor, may I make just two  
19 quick points? It's not to interfere with what's going on,  
20 but we do want to make sure that this is not without  
21 prejudice to our right to move to strike if the Court is  
22 taking this out of turn, and the only thing we would want  
23 to point out for the record is that we did have an

1 opportunity to file an objection within five days and this  
2 was not one of the exhibits that was objected to.

3 MR. SNYDER: I reserve the right to object on  
4 any of these exhibits, particularly since I didn't have  
5 some of them, such as, one of them, 1937 map. We have a  
6 very poor copy of it, so I have objected on the grounds of  
7 relevancy and foundation to all of them, particularly the  
8 ones we didn't have.

9 MR. GOGAL: That one he did have. That's just  
10 something for the record.

11 MR. SNYDER: I didn't have the foundation for  
12 it. She's overruled my objection. I'm not sure we really  
13 need to argue it.

14 MR. GOODMAN: Defense Exhibit Number 3.

15 THE COURT: If you're going to argue when I  
16 rule in your favor, this trial is going to be a quite long  
17 trial.

18 MR. SNYDER: There's no objection to 3.

19 THE COURT: 3 is admitted.

20 MR. GOODMAN: 4.

21 MR. SNYDER: There's no objection to 4.

22 THE COURT: It's admitted.

23 MR. GOODMAN: 5.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

MR. SNYDER: Aren't all these part of 1-A?

MR. GOODMAN: Yes. Those are just selected  
deeds so they're easier to find. 6.

THE COURT: 5 is admitted. 6, any objection?

MR. SNYDER: No.

THE COURT: Admitted.

MR. GOODMAN: 9.

THE COURT: Any objection to 9?

MR. SNYDER: No objection to 9.

THE COURT: It's admitted.

MR. GOODMAN: 25.

MR. SNYDER: No objection to 25.

THE COURT: Admitted.

MR. GOODMAN: 27.

THE COURT: Any objection?

MR. SNYDER: No objection.

THE COURT: It's admitted.

(The documents heretofore marked,  
for identification, as Defendant's  
Exhibit Nos. 1-9, 25 & 27, were  
received in evidence.)

THE COURT: Any further questions for this  
witness?

1 MR. GOODMAN: No, Your Honor.

2 MR. SNYDER: I just have one follow up.

3 THE COURT: Which was what the 1978 deed to  
4 Harold Miller, Incorporated included? That was the only  
5 question he asked.

6 MR. SNYDER: Then I have no further questions.

7 THE COURT: I'm sorry. After all that, I'm  
8 not sure I heard your answers to what the 1978 deed to  
9 Harold Miller was. Was it all of the land that Thomas  
10 Adams had once owned?

11 THE WITNESS: Yes, ma'am. Actually it was  
12 partition lot 5, partition lot 2 and -- well, actually the  
13 15 acre parcel was what that referenced. Mr. Miller  
14 picked up partition lot 6 in another deed, so he actually  
15 did the assemblage of all the parcels that made the Hunter  
16 Mill Forest Subdivision.

17 THE COURT: All right. Thank you very much.

18 Is Mr. Albanese subject to being recalled?

19 MR. GOODMAN: Probably not, but tell him to  
20 stay him out of the courtroom anyway.

21 THE COURT: Mr. Albanese, you're free to go  
22 back to your office. It's possible you might be asked to  
23 testify again in this trial, so I'd ask that you not



1 discuss the case with other witnesses in the trial. You  
2 may discuss it with the attorneys. We'll let you know if  
3 we need you again.

4 (The Witness stood aside.)

5 MR. SNYDER: I understand that Mr. Capestany,  
6 my last witness, is here. If I could have thirty seconds  
7 to talk to him?

8 THE COURT: Certainly.

9 (Pause.)

10 Whereupon,

11 PEDRO CAPESTANY,  
12 a Witness, was called for examination by counsel on behalf  
13 of the Plaintiff, and, after having been duly sworn, was  
14 examined and testified, as follows:

15 DIRECT EXAMINATION

16 BY MR. SNYDER:

17 Q Please state your name?

18 A Pedro Capestany.

19 THE COURT: Would you spell your last name,  
20 please, for the court reporter?

21 THE WITNESS: C-a-p-e-s-t-a-n-y.

22 BY MR. SNYDER:

23 Q How are you employed?

1           A       I'm the Assistant Resident Engineer for  
2 Maintenance with the Virginia Department of  
3 Transportation.

4           THE COURT:   Keep your voice up, if you would,  
5 please.

6           THE WITNESS:   Sorry.

7           BY MR. SNYDER:

8           Q       Can you tell me what your job responsibilities  
9 are in that position in a general way?

10          A       I manage the maintenance program within VDOT  
11 for Fairfax County.

12          Q       Can you tell me whether or not your office  
13 maintains records of what roads are owned and maintained  
14 by the Commonwealth of Virginia?

15          A       Yes, we do.

16          Q       At my request did you review your records  
17 concerning a 30 foot outlet road that ran from Post Road  
18 to Clark's Crossing Road?

19          A       Yes, I did.

20          Q       What did your records indicate?

21          A       That that road is not in the state system for  
22 maintenance.   It is owned by Fairfax County.

23          Q       Did your records indicate at any time that

1 that road had been abandoned?

2 A Not that I could see in the records that we  
3 have.

4 MR. SNYDER: I have no further questions.

5 THE COURT: Any cross-examination?

6 CROSS-EXAMINATION

7 BY MR. GOODMAN:

8 Q Mr. Capestany, can you demonstrate for us  
9 where this outlet road is? Do you have anything with you?

10 A I actually did bring a copy of our -- one of  
11 our record plat sheets that show where the road is. I  
12 don't have it with me, but I could have brought them.

13 Q Look at Exhibit 27. It's in that book in  
14 front of you.

15 MR. GOODMAN: May I approach the Witness, Your  
16 Honor?

17 THE COURT: Yes, you may.

18 BY MR. GOODMAN:

19 Q I would ask you to look in the lower right-  
20 hand corner of this exhibit. You see where Clark's  
21 Crossing Road is up here?

22 A Yes.

23 Q Do you see on the very bottom where Post Road

1 is?

2 A Uh-huh.

3 Q Is that the outlet road that you were  
4 describing?

5 A Yes.

6 Q You say that's not owned by the State of  
7 Virginia?

8 A According to the records that we have, and I  
9 checked from those records this morning, it is not.

10 Q So the State of Virginia does not maintain  
11 that road?

12 A Correct.

13 Q Do you have any plans to maintain that road?

14 A Since it's not owned by the state, I don't  
15 have any involvement in the maintenance or any plans to  
16 maintenance the road.

17 Q You testified that it belongs to the State of  
18 Virginia, did you not -- pardon me -- to Fairfax County?

19 A Correct.

20 Q How do you know that?

21 A Our Permits Office, which maintains our  
22 records, as to what's in our -- in the state system and  
23 what's not in the state system provided that information



1 to me.

2 Q Could the road have been abandoned by Fairfax  
3 County and you not know it?

4 A I guess it's possible, but I don't know.

5 Q How current is that information that you  
6 checked?

7 A It is our current record, the most up to date  
8 plat that our Permits Office keeps with respect to what  
9 roads are in the state system. That is updated daily  
10 based on the amount of development that goes in this  
11 County.

12 Q So as far as you know, that outlet road is  
13 owned by the County?

14 A As far as I know, yes.

15 Q Does Fairfax County maintain its own roads?

16 A They have a maintenance department, part of  
17 their Public Works, that they do maintain roads that  
18 belong to them.

19 Q Do you know if Fairfax County -- have you seen  
20 that road?

21 A Yes, I've been out and visited the site.

22 Q What does it look like?

23 MR. SNYDER: I'm going to object to that

1 question. We've been on the road. We know what it looks  
2 like. I'm not sure what's relevant to him or what it  
3 looks like to Mr. Capestany.

4 THE COURT: That's the road that we came up  
5 yesterday and hopped the creek and went under the bridges  
6 and over the bridges?

7 MR. GOODMAN: Yes, Your Honor.

8 THE COURT: I've seen that.

9 MR. GOODMAN: Actually in both directions.

10 THE COURT: Right.

11 MR. GOODMAN: You walked north to the creek  
12 and back to the T and then we did the bridge dance.

13 THE COURT: Right. I don't need his opinion  
14 or thoughts on what the road looks like since we all  
15 walked it ourselves yesterday.

16 MR. GOODMAN: I have no further questions of  
17 the witness.

18 THE COURT: Any other defense counsel wish to  
19 cross-examine this witness?

20 Any redirect?

21 MR. SNYDER: No, Your Honor.

22 THE COURT: Thank you very much, sir. I  
23 appreciate you coming today. You're free to go.

1 (The Witness was excused.)

2 MR. SNYDER: That concludes the Plaintiff's  
3 case, Your Honor.

4 THE COURT: Do the defense attorneys have any  
5 motions they want to make at this time?

6 MR. GOGAL: Judge, maybe I missed it, but did  
7 Mr. Snyder put in his land record exhibits with letters?  
8 Has he got them identified for the record?

9 THE COURT: Yes.

10 MR. SNYDER: They're in subject to me  
11 providing the actual exhibits.

12 THE COURT: Plaintiff's A through W were  
13 admitted with the understanding he would actually submit  
14 the physical exhibits later on.

15 MR. GOGAL: Your Honor, we would move to  
16 strike the Plaintiff's case on all counts. As the Court  
17 is aware, we have some stipulations that were filed at the  
18 pre-trial. I'd like to go through some of the  
19 stipulations.

20 As I said in my opening statement, there are  
21 basically three documents that I think are the critical  
22 documents in the case, the first one being the 1892 deed  
23 which created an express easement, described as a right of

1 way of 15 feet, extending from the County Road to the 15  
2 acre parcel.

3 It was created in 1892 and it's been  
4 stipulated that it was to serve only the 15 acre parcel  
5 and that is stipulation number 1.

6 In 1896 there was a partition and those  
7 partition records, collectively a partition deed, I guess  
8 you can refer to it, includes the Commissioner's Report,  
9 the surveyors, plat and surveyor's description of the  
10 land, as well as the Court's decree, and that was filed as  
11 Plaintiff's Exhibit B.

12 In Plaintiff's Exhibit B, Your Honor, which  
13 the Court can find that PBR, it's our Exhibit 5, if the  
14 Court would like to refer to it. Again, I'm not moving  
15 that into evidence. I'm just referring to it as  
16 Plaintiff's Exhibit B.

17 THE COURT: I don't always enforce that old  
18 rule in civil cases about you can't move to strike if  
19 you've introduced evidence. Somebody pointed out to me  
20 that there's authority for that in criminal cases, but no  
21 authority for it in civil cases, so I'd have to say I'm  
22 very inconsistent on that, on how I rule on that issue, so  
23 I don't want to be overly concerned about it.



1 MR. GOGAL: I went through with Mr. Simpson  
2 some of those highlightings in the particular deed and the  
3 things that -- since he considered this particular deed  
4 and plat.

5 The plat which is the last page of Exhibit 5  
6 depicts a quarter acre of burying lots in the southeast  
7 corner of partition lot 2. It may be hard to read, but  
8 it's one quarter acre burying lot and the plat also  
9 depicts the 15 foot outlet road between lots 3, 4 and 5  
10 and 6. The Court can probably see that as well.

11 The Commissioner's Report talks about -- this  
12 would be on Page 357, about halfway down the page and  
13 there are little smudge marks there from prior  
14 highlighting, I guess, that Thomas Adams will be assigned  
15 27 and 1/2 acres gracing the house. There was a house  
16 there at one time. That's lot number 2.

17 It says included in the description of lot  
18 number 2 is a burial lot of one quarter acre.

19 THE COURT: All right.

20 MR. GOGAL: The next page, on Page 358, this  
21 would be halfway down where you see the story, Your Honor?

22 THE COURT: Uh-huh.

23 MR. GOGAL: A burial lot of one-fourth of an

1 acre in the southeast corner of lot number 2 is reserved  
2 as a family burial lot.

3 The next document would be Mr. J. Owens, Berry  
4 & Company survey. If you were to look at Page 359 and as  
5 you go down the page, there's a line on the side there, a  
6 reference to the burial lot, which is one-fourth of an  
7 acre and in the southeast corner of this lot.

8 It also goes on to say that at outlet road, 15  
9 feet wide, between lots 3 and 4 and lots 5 and 6.

10 Finally, at the very end of Mr. Berry's  
11 survey, and this is on Page 361, he again, parenthesis,  
12 note there is reserved an outlet road, 15 feet wide,  
13 beginning at the northwest corner of lot number 2, the  
14 middle line of the outlet road being the dividing line  
15 between lots 3 and 4 on the east and lots 5 and 6 on the  
16 west.

17 Finally, Your Honor, in the Court's decree,  
18 this is on Page 363, about halfway down, the Court says  
19 that the outlet roads designated in said plat survey and  
20 report are established and shall remain a -- to the lots  
21 for whose convenience they are designated, that the burial  
22 ground designated therein with egress thereto, egress  
23 thereto, shall remain for the permanent use of the

1 families of all the aforesaid parties.

2 Your Honor, this 1896 partition deed and the  
3 plats conclusively establish the location of the cemetery  
4 as in the southeast corner of partition lot 2 and also  
5 it's been stipulated that it provides a partition easement  
6 for both partition lot 2 and the burial lot.

7 The next critical document, Your Honor, I  
8 would say is the 1978 deed and that is located -- it would  
9 be Plaintiff's Exhibit -- it's our 6, but the Plaintiff's  
10 Exhibit I.

11 THE COURT: It doesn't look like that is one  
12 of the Plaintiff's exhibits.

13 MR. GOGAL: It's not one of the Plaintiff's  
14 exhibits. I will refer to the stipulation then. I'll put  
15 that exhibit in.

16 THE COURT: Was Defendant's 6 you said?

17 MR. GOGAL: Defendant's 6.

18 THE COURT: Okay.

19 MR. GOGAL: It was not put in as an exhibit by  
20 the Plaintiff, Your Honor, but I'll refer to stipulation 4  
21 where it explains that Mr. Thomas S. Adams died in testate  
22 and his heirs inherited both properties, including the  
23 easement, when his wife, -- Adams died in 1971 and this is

1 the part -- by deed date of March 31, 1978, recorded deed  
2 book 4865 at Page 13, the heirs of Mr. Adams conveyed  
3 their interest in the property, the Adams estate, to  
4 Harold L. Miller, Trustee, specifically including the 15  
5 acre parcel, easement, but excepting the existing  
6 cemetery.

7 It also stipulated that prior to the  
8 dedication of the Hunter Mill Forest Subdivision, the only  
9 mention of the burial lot in the land records of Fairfax  
10 County was as the one quarter acre in the southeast corner  
11 of partition lot 2 and that the out lot A that was created  
12 in that subdivision was created by Mr. Atkisson's  
13 surveyors, stipulation number 9.

14 I would also note, Your Honor, there are some  
15 exhibits that the Plaintiff put in that would purport to  
16 convey that Mr. Atkisson a bare interest in that easement  
17 and also a sole interest in out lot A, but those deeds  
18 have been stipulated as nullities and there are various  
19 reasons they are --

20 THE COURT: For one thing, Harold Miller never  
21 got the cemetery to give back to Mr. Atkisson.

22 MR. GOGAL: That's right. Of course, an  
23 easement can't be conveyed all by itself, but that has



1       been conceded and stipulated. It's not my understanding  
2       the Plaintiffs are making a case on anything other than  
3       Mr. Atkisson's interest as an heir and that is why I  
4       focused on both my trial memorandum and I'm focusing that  
5       on the motion to strike.

6               It's undisputed that the express 15 acre  
7       parcel easement was created for the 15 acre parcel. It is  
8       undisputed that the cemetery was located as a quarter acre  
9       burial lot in the southeast corner of partition lot 2, at  
10      least until the subdivision was dedicated.

11             Under Walton v. Holland, Your Honor, that's a  
12      case that I cited in my brief and I'd be happy to provide  
13      a copy to the Court --

14             THE COURT: If you would.

15             MR. GOGAL: This is 238 Va, 687, a 1989 case.  
16      Walton v. Holland stands for the proposition, and indeed  
17      it's a rather fundamental principle of law of easements,  
18      that an express easement cannot be expanded to benefit  
19      other properties because that would impose an additional  
20      burden on the surrogate state which is not intended in the  
21      grant.

22             Walton v. Holland is a strikingly similar case  
23      in terms of what is attempted here. The easement was

1 created a prior deed and it was very clearly noted to one  
2 particular parcel. The Plaintiff in the case -- actually  
3 the Defendant, because it was an injunction to try to  
4 prevent them from using it, tried to use it for three  
5 other parcels of land they owned that were contiguous and  
6 the Court held that that was invalid.

7 Even though the intermediate owner purported  
8 in the land records to convey the easement to the benefit  
9 of these other three parcels, the Court said no, it had no  
10 authority to do so and the Court held that there was no  
11 easement for those three other parcels.

12 Similarly, Your Honor, this cemetery -- this  
13 easement cannot be interpreted to benefit the cemetery  
14 which has always been located in the quarter acre in the  
15 southeast portion of partition lot 2. So the express  
16 easement is invalid principally for that reason.

17 I would also point out to the Court that in  
18 1978, when they conveyed all this property, the heirs  
19 excepted the cemetery. So the only land that the Hunter  
20 Mill Forest developer had to dedicate or to work with or  
21 to assemble was the 15 acre parcel and partition lot 2,  
22 with the exception of that quarter acre in the southeast  
23 portion.

1           They had no authority to move that location or  
2 to locate it anywhere other than where it was located in  
3 the land records, and Mr. Atkisson, at the time, was not  
4 even an heir. His mother was still alive. That was  
5 stipulated. She was alive until December 31, 1987.  
6 That's stipulation number 25.

7           So the time in 1979 when that subdivision plat  
8 was created, Mr. Atkisson didn't even have any interest in  
9 the cemetery, and so that's the second reason why I  
10 believe there is no --

11          The third reason, Your Honor, I would point  
12 out is that the heirs made it very clear in the 1978  
13 conveyance that they had no interest in the 15 acre parcel  
14 because they conveyed it away to Harold Miller.

15          Finally, Your Honor, we are well aware, based  
16 on the land records, that the cemetery has its own  
17 easement, express easement, and that is the partition  
18 easement and that's established in that 1896 partition  
19 agreement.

20          So for those four reasons, Your Honor, there  
21 is no basis for the express easement for Mr. Atkisson to  
22 claim as an heir to a cemetery, that he has an interest in  
23 that express easement.



1 I don't think there's been any evidence, Your  
2 Honor, to establish prescriptive easement. The standard  
3 of clear and convincing evidence is not even -- hasn't  
4 even been addressed. They haven't even come close to  
5 meeting that standard, the elements, 20 years of open,  
6 continuous, uninterrupted use under claim of right.

7 We know that until 1978 the Adams family had  
8 every right to use the easement because they owned the 15  
9 acre parcel, but in 1978, when they conveyed it away, that  
10 would have been the time period in which a 20 year -- if  
11 they were continuing to try to use that for the cemetery,  
12 but we know that this suit was filed in '86.

13 1983 was when the Wendover Subdivision was  
14 created. It was blocked by then. So there's absolutely  
15 no way that they can establish a 20 year period of adverse  
16 use.

17 The final claim they make is easement by  
18 necessity and, Judge, I think that's -- the 1896 partition  
19 decree provides an express easement for them and that's  
20 been stipulated so that there is -- there can be no  
21 necessity to find an easement elsewhere.

22 Indeed, if you were to try to find -- if there  
23 was an easement by necessity today, it would have been by



1 virtue of the fact that the Hunter Mill Subdivision  
2 obliterated that access when they created the Hunter Mill  
3 Subdivision, so easement by necessity would naturally run  
4 through Hunter Mill.

5 Again, there's no basis for that claim, Your  
6 Honor.

7 They argue that Mr. Atkisson and Carlotta  
8 Atkisson have no standing. There's been no evidence of  
9 Carlotta Atkisson's interest. George Atkisson, only  
10 interest as an heir to a cemetery that's located on  
11 partition lot 2.

12 The other argument we make, Your Honor, is  
13 that there's an estoppel by deed. Since Florence Atkisson  
14 was Mr. Atkisson's predecessor in interest and she was a  
15 party to the conveyance in 1978, George Atkisson is  
16 estopped by that deed from now claiming that he has an  
17 interest in the 15 acre parcel easement.

18 A final note, Your Honor, and this probably is  
19 much the same argument, but it's important to remember  
20 that the O'Briens, when they bought this property, they  
21 bought subject to land records and there's been no  
22 evidence in the land records to establish a right to this  
23 easement for the cemetery, and as good faith purchasers,

1 they take free of any latent claims or claims that don't  
2 appear in the land records.

3 To the extent there is any evidence, it's  
4 outside the land records and I would say that they are not  
5 subject to any such claim, Your Honor, for that reason  
6 additionally.

7 THE COURT: Doesn't their property -- the part  
8 of the easement which is reflected in the metes and bounds  
9 description, the 880 feet and then it curving off 330  
10 feet?

11 MR. GOGAL: I guess the point I'm making, Your  
12 Honor, is that they bought that subject to an easement to  
13 a 15 acre parcel, which is now Park Authority land. The  
14 only thing that exists is the cemetery and the cemetery is  
15 on the partition lot 2. So the easement doesn't go there.

16 Any attempts by George Atkisson now to say  
17 really I know that the partition lot 2 -- the quarter acre  
18 partition lot 2 is in the land records, but really I think  
19 out lot A is a better way to depict it for whatever reason  
20 he wants to claim, that's outside the land records and  
21 there's no way anybody relying on the land records would  
22 know that even if it were true or even if it would be  
23 enough to move the cemetery and that's the point I'm

1       trying to make. Thank you, Your Honor.

2               THE COURT: Thank you. Any other defense  
3 counsel wish to argue a motion?

4               MS. BRZEZYNSKI: Your Honor, Plaintiffs have  
5 failed to establish a prima facie case that they have  
6 either an express easement, prescriptive easement or an  
7 easement by necessity which touches lot 40.

8               Mr. Gogal has spoken about the existence of  
9 the easement in his motion to strike and I will therefore  
10 adopt his argument as it pertains to lot 40, but even if  
11 there is doubt in the Court's mind at this point regarding  
12 the existence of an easement, there can be no doubt that  
13 the Plaintiffs have not proven the location of the  
14 easement after it reaches the 320 foot metes and bounds  
15 measurement and that their claimed easement touches lot  
16 40.

17              First, Mr. Simpson, Plaintiff's own expert  
18 witness, testified about the 1892 deed from Mary Saunders  
19 to Thomas Adams. That deed is in evidence. It conveyed  
20 the 15 acre parcel and granted the partial easement which  
21 runs from the 15 acre parcel to the County road.

22              You heard Mr. Simpson testify that that deed  
23 does not contain metes and bounds measurements for the

1 parcel easement past what is now as lot 2 in the Wendover  
2 Subdivision.

3 Second, Robert Simpson testified that based on  
4 the 1892 deed, a surveyor today cannot have been able to  
5 plat out the exact remaining portion of the easement  
6 because the landmarks no longer exist.

7 Furthermore, Mr. Simpson testified that he  
8 relied upon the Wendover plat, Exhibit FF, in creating  
9 Exhibit ZZZ, and the path shown on the Wendover plat was  
10 in a very approximate position.

11 Additionally, with respect to lot 40  
12 specifically, what --

13 THE COURT: What is the law? I mean there are  
14 hundreds and hundreds, if not thousands, of old deeds in  
15 evidence. I remember the first house I bought was out in  
16 Loudoun County and my land description was thence with the  
17 line of Colonel Paul's garden, thence to the big red barn  
18 and then to the big rock and thence to the big oak tree  
19 and who knew where any of that was.

20 Does that mean that all those land  
21 descriptions are invalid? Don't you just do the best you  
22 can under the circumstances?

23 MS. BRZEZYNSKI: I have two responses to that.



1 First, I think you have to first rely on the land records  
2 and Mr. Gogal spoke about the land records and what they  
3 say and what the easement runs from and goes to when  
4 purchasing a home and I don't think there's any basis for  
5 a buyer, such as buyer of lot 40, to know that an easement  
6 could possibly have touched their property based on land  
7 records.

8 Second, I think it's --

9 THE COURT: It's not -- the knowledge of the  
10 buyer doesn't end it. I mean that might be -- maybe  
11 between the buyer and the buyer's title insurance company  
12 whether it shows up on the land records, but if it's  
13 there, it's there, isn't it?

14 I mean the ignorance of the buyer doesn't  
15 obliterate the easement.

16 MS. BRZEZYNSKI: I would therefore cite the  
17 case that Mr. Gogal cited and spoke about, that a buyer  
18 takes free of latent claims, and then also specifically  
19 with respect to lot 40, the Plaintiff has not made out a  
20 case with respect to lot 40 because Mr. Simpson admitted  
21 that he did not survey the lot, he did not locate the iron  
22 pipe, he did not locate the rear boundary.

23 Plaintiff has failed to prove that the

1 easement touches lot 40 at all, especially with respect to  
2 the closeness of the easement, which they're showing on  
3 Exhibit ZZZ. No surveyor, I think, can state with  
4 certainty that Plaintiff's claimed easement touches lot  
5 40, especially when Plaintiff's own surveyor did not  
6 locate the rear boundary of lot 40 or the iron pipe.

7 Even if the Court determines that Plaintiff's  
8 claimed path on ZZZ creates some uncertainty at this point  
9 in the trial, the Court has heard sufficient evidence to  
10 determine if the easement should terminate as a matter of  
11 law at Bird Road.

12 First, you've seen for yourself that the  
13 County road is not used anymore, it's overrun with  
14 vegetation, it's crossed by a gully or a creek and it's  
15 wholly incapable of vehicular traffic.

16 THE COURT: It was almost incapable of  
17 pedestrian traffic, at least in my case with the too tight  
18 skirt I was wearing yesterday.

19 MS. BRZEZYNSKI: I would certainly agree with  
20 that, Your Honor. Second, you've heard from Mr. -- you  
21 heard Robert Simpson testify that Plaintiff's claimed  
22 easement path now crosses Bird Road.

23 Third, you've heard from Pedro Capestany this

1 morning, Plaintiff's witness from the Virginia Department  
2 of Transportation, that Bird Road is a County road -- to  
3 access all other roads in the County including Post Road.

4 The cases of American Oil Company v. Leman,  
5 199 Va 637, 101 SE 2D 540 a 1958 case, and McCreary v. the  
6 Chesapeake Corporation, 257 SE 2D 828, a 1979 case, are  
7 controlling.

8 In American Oil Leman brought suit against  
9 American Oil, alleging that he was the owner of two lots,  
10 an easement that afforded access to a public highway.  
11 That public highway was known as Goodwin's Net Road in  
12 that case.

13 The Court found that Goodwin's Net Road had  
14 been abandoned and the purpose for which the easement was  
15 granted and ceased to exist because ample and convenient  
16 access to Leman's lots was afforded by a new road, State  
17 Route 631.

18 Accordingly, the purpose for which the  
19 easement in question in this case was granted is fulfilled  
20 when the easement reaches Bird Road. Defendant Thomas and  
21 Victoria Healy therefore request a summary judgment in  
22 their favor.

23 THE COURT: Do any other defense counsel wish

1 to argue a motion to strike?

2 MS. BRODIE: Your Honor, we would argue and  
3 like to adopt Ms. Bradzinski's argument only as to the  
4 extent that it addresses the issue of location of the  
5 easement across the Park Authority's property.

6 THE COURT: I'm not sure I understand your  
7 motion. I need to visualize again the Park Authority's  
8 property. You mean in terms of terminating as a matter of  
9 law on Bird Road?

10 MS. BRODIE: Yes, Your Honor.

11 THE COURT: All right. That I understand.

12 MR. GOODMAN: Your Honor, I'd like to be heard  
13 briefly.

14 THE COURT: All right.

15 MR. GOODMAN: On behalf of -- I will adopt Mr.  
16 Gogal's argument as well as Ms. Bradzinski's argument and  
17 I just want to bring to the Court's attention a couple of  
18 things with respect to those arguments.

19 Mr. Simpson, the surveyor, conceded that  
20 there's no reference to any easement running from the  
21 cemetery that serves the 15 acre parcel and he talked  
22 about the partition easement. He also talked about the 15  
23 acre parcel easement. The 15 acre parcel easement doesn't



1 serve the burial lot from the land records.

2 Mr. Gogal went through in detail the crucial  
3 deeds in this case, the 1892 15 acre grant, the partition  
4 suit in 1896. He talked about the decree. He talked  
5 about the survey and everything.

6 I want to draw the Court's attention to the  
7 case of Langman v. Alumni Association of the University of  
8 Virginia, 247 Va 491, 1994. Would the Court like a copy  
9 of that case?

10 THE COURT: Yes.

11 MR. GOODMAN: Forgive my highlighting.

12 THE COURT: That's quite all right.

13 MR. GOODMAN: The facts of this case are  
14 relatively simple. The Plaintiff, Professor Langman, was  
15 also a real estate developer and investor. She and her  
16 partner donated a shopping center in West Virginia to the  
17 University around 1988 or 19987.

18 The shopping center had a net deficit at the  
19 end of every year and when times were good, Professor  
20 Langman's partner used to contribute the deficit. So the  
21 University had the land and it cost them nothing. They  
22 took this gift by deed of gift and it also had an  
23 assumption clause in it.

1           So Professor Langman's partner was also  
2           feeding the mortgage that happened to be held by Dominion  
3           Federal, which became Trust Bank around here. When the  
4           real estate recession hit in --

5           THE COURT: Dominion Bank down in Roanoke paid  
6           Dominion up here to stop using the Dominion name, as I  
7           recall.

8           MR. GOODMAN: That's correct. That's why they  
9           became Trust Bank. In any event, when times got tough for  
10          Professor Langman's developer partner, he stopped kicking  
11          in the shortfall on the mortgage every year. Trust Bank  
12          called the mortgage. They saw that it was assumed.

13          They made a call on the University and the  
14          University went to Professor Langman and said, Professor  
15          Langman, you've got to make up this shortfall. Professor  
16          Langman relied on the expressed language of the deed.  
17          Parole evidence wasn't allowed. There was no ambiguity.  
18          The deed of gift also included an assumption clause for  
19          the deed of trust or the pre-existing mortgage.

20          Now, there were other issues in that case as  
21          to whether or not there was a scrivener's error or whether  
22          there was a mutual mistake because the Alumni Association  
23          said we only take gifts, we don't take liabilities, this

1 is some sort of mistake, but the Court held that where  
2 language is clear, unambiguous and explicit, a Court that  
3 construes a deed should look no farther than the four  
4 corners of the instrument under review.

5 Here we have an 1892 15 acre grant with an  
6 express easement to it. We have an 1896 partition suit  
7 with a burial lot located in the southeast corner and  
8 there's no confusion between the two documents. There  
9 just is no ambiguity.

10 The terms are unambiguous and I don't believe  
11 the Court can look to the parole evidence or it can look  
12 to subsequent creations like this out lot A, which the  
13 surveyor, Mr. Simpson, expressly stated included portions  
14 of the 15 acre parcel and the partition lot 2.

15 I think the land records are very clear, Your  
16 Honor. I think the motion to strike should be granted as  
17 to the existence of the easement. Thank you.

18 THE COURT: Thank you.

19 MS. BRZEZYNSKI: Your Honor, I failed to give  
20 you the two cases that I cited in my motion.

21 THE COURT: If you'll hand them up, please.

22 (Ms. Brzezynski handed the documents to the  
23 Court.)

1 THE COURT: Mr. Snyder, did you want to  
2 respond?

3 MR. SNYDER: To what, Your Honor?

4 THE COURT: To these various motions to  
5 strike. I don't know where to start.

6 MR. SNYDER: I just took them down in the  
7 order they were shown. I'll start with Mr. Gogal. Mr.  
8 Gogal's arguments are all based upon, as he says in his  
9 trial brief and as he said here, what he calls the  
10 physical evidence that the cemetery does not exist on lot  
11 15. If the cemetery is on lot 15, Mr. Gogal says, that's  
12 because it was improperly moved by Mr. Atkisson or others.

13 The first point that I would want to make is  
14 the cemetery is on the 15 acre parcel, a portion of the  
15 cemetery is on the 15 acre parcel. I believe everybody  
16 out here -- everybody that went to the site was able to  
17 see that.

18 THE COURT: A portion of out lot A is on the  
19 15 acre parcel.

20 MR. SNYDER: I would say that from the  
21 evidence that you've heard concerning from Mr. Atkisson,  
22 the areas in which were maintained so far as the cemetery,  
23 where the fields were plowed, the cemetery was not plowed,



1 I think that just looking from the lay of the land it is  
2 clear that there is a portion of what I would call  
3 undisturbed land that is on either side of point G.

4 Additionally, there was the monument that Mr.  
5 Atkisson testified to as being on the area maintained as a  
6 cemetery, the cedar that he removed.

7 There has been no other evidence to contradict  
8 Mr. Atkisson's representations as to where the cemetery  
9 was located. As Mr. Simpson said, you can't survey what's  
10 represented in the deed of 1896, which makes the three  
11 references to the cemetery, and as far as -- all it says  
12 is a quarter acre in the corner.

13 Now, it's obvious from reading the surveyor's  
14 notes, from reading the report --

15 THE COURT: Let's back up again to Mr.  
16 Atkisson's testimony about, for example, the cedar tree.  
17 He testified the cedar tree was used as a corner post  
18 basically; is that right?

19 MR. SNYDER: That was a different cedar tree.  
20 That was the cedar tree with the barbed wire on it.

21 THE COURT: That that was the corner post?

22 MR. SNYDER: That's correct.

23 THE COURT: What did he testify then about --

1 I'm trying to recall his testimony that would enable me to  
2 conclude that he said that part of the cemetery was in the  
3 partition lot.

4 MR. SNYDER: That he identified a cedar tree -

5 -

6 THE COURT: The 15 acre parcel I should say.  
7 I'm sorry.

8 MR. SNYDER: In his testimony he identified a  
9 cedar tree, the stump of which was pointed out to Your  
10 Honor.

11 THE COURT: Right.

12 MR. SNYDER: As you sight the plain from point  
13 G to the back lot of the dividing line between the 15 acre  
14 parcel and partition lot 2, it's clearly in the 15 acre  
15 parcel. That's why we were identifying those specific  
16 points and as Mr. Simpson testified, those points were the  
17 ones that were indicated to the Court.

18 THE COURT: What was it though that Mr.  
19 Atkisson said about the cedar tree which is now a stump?

20 MR. SNYDER: He said that that was part of the  
21 improvements that he did in the late 70s, early 80s to the  
22 cemetery, that he removed that cedar tree and the stump  
23 remains.

1 I think also from seeing the confines of out  
2 lot A, what out lot A would appear to do is encompass an  
3 area of what I would call undeveloped area. I don't know  
4 the geographic terms for it, but the sides of out lot A,  
5 which borders the area where the bodies are actually  
6 located, according to -- or where the headstones and  
7 footstones are indicated, there is a depression that  
8 levels out.

9 You're able to see the areas of existing trees  
10 and the areas of new growth, all of which were plainly  
11 visible on the view.

12 Now, as far as the location being moved, there  
13 is no evidence that Mr. Atkisson moved the cemetery. In  
14 fact, the evidence is to the contrary. He specifically  
15 said that the area that he participated in maintaining the  
16 cemetery remains in the same area as it was when we saw it  
17 yesterday, always through the time that he was a child.

18 THE COURT: I don't think there's any  
19 allegation or argument that he actually moved the graves  
20 that constitute the cemetery. I think the argument is  
21 that when the surveyors in this 1970s created out lot A,  
22 that that was done artificially to include some of the old  
23 15 acre parcel in out lot A.

1 MR. SNYDER: That is the statement that has  
2 been made and I'd say there's no evidence to support that.  
3 All that is is the very first time that anybody surveyed  
4 the area that locates the cemetery. We also have from Mr.  
5 Simpson, although I wasn't able to do the math, he says  
6 that that is very nearly a quarter acre.

7 Again, we don't have any indication from the  
8 creating documents, the configuration of this quarter  
9 acre. Nobody, until 1978, actually performed a survey  
10 that would contain that area, and what Mr. Simpson  
11 testified, is that -- I mean obviously from looking at the  
12 area where we saw the headstones and feetstones, that's  
13 not a quarter acre.

14 I think we all can take notice that that was  
15 much less than a quarter acre, the actual -- where the  
16 bodies are, as indicated by the stones, would not take up  
17 a quarter acre.

18 The question then is where is that quarter  
19 acre. I think that the answer to that question is what is  
20 out lot A. There is no evidence that Mr. Atkisson somehow  
21 or somebody else improperly influenced the surveyors to  
22 create this and to put it where it was put.

23 THE COURT: How about if the surveyors were



1 just wrong?

2 MR. SNYDER: There's no evidence that they're  
3 wrong. The evidence so far is Mr. Simpson, who indicated  
4 that the measurements taken from out lot A, if you look at  
5 AAA, he was able to match up the number of points as  
6 nearly as possible, the distance and measurements, by  
7 comparing the distance and measurements from the 1892 deed  
8 -- I'm sorry -- 1896 deed to that of the 1978 deed, which  
9 basically is very strong evidence that the 1978 out lot A  
10 is accurate.

11 We don't have anybody who has come in to say  
12 that out lot A did not adequately or properly encompass  
13 the area which is the cemetery.

14 THE COURT: There is the testimony of Mr.  
15 Simpson and also Mr. Albanese that -- I can't consider Mr.  
16 Albanese at this point, the motion to strike. Mr.  
17 Simpson, that in the land records at least, the cemetery  
18 is never described as being on anything but the partition  
19 lot, the southeast corner of the partition lot, and that  
20 out lot A clearly includes some portion of what was the 15  
21 acre parcel.

22 MR. SNYDER: That's correct.

23 THE COURT: That no part of the land records

1 ever described the 15 acre parcel as having the cemetery  
2 on it.

3 MR. SNYDER: That's correct, but there is  
4 nothing to indicate that anybody, other than the surveyors  
5 in 1978, attempted to locate where that cemetery was. Let  
6 me say that you could -- it would be at least at this  
7 stage in the proceedings, I think I certainly can argue,  
8 when Thomas Adams received the 15 acre or purchased the  
9 parcel in 1892, the 15 acre parcel in 1896, he receives  
10 the second partition lot 2, now he owns both sides of  
11 point G, and as the owner of that, he's deciding where  
12 exactly that cemetery is going to lie and he's making the  
13 decision of where those bodies are going to be and that's  
14 what he's done.

15 Nobody from the time of 1892 to 1896 until  
16 1978 ever surveyed that actual area and now we have a  
17 survey showing where the cemetery is located. It's  
18 corroborated by the measurements and the angles that were  
19 recorded in the plat recorded in 1896, and so far that's  
20 the best evidence of where the cemetery is, not to mention  
21 I genuinely believe that based upon being present at the  
22 cemetery, locating point G and looking down the property  
23 line between partition lot 2 and the 15 acre parcel, it is

1 clear that there are, first of all, stones that are marked  
2 as possible head or footstones and the cemetery marker  
3 itself are nearly on that line.

4 To somehow slice that area into half, and  
5 again I'm talking about something that's clear to the eye  
6 as an undisturbed area that is basically a pie shaped  
7 section that goes back towards the back of the lot,  
8 narrowing to a point as you come back to the end of that  
9 lot A, that -- in addition to the discussion that we've  
10 had concerning the two monuments of the standing cedar  
11 with the barb wire on it and the cedar stump.

12 I think at this point that is more than  
13 sufficient evidence.

14 THE COURT: The cedar stump is indisputably on  
15 the 15 acre parcel, what was the 15 acre parcel; is that  
16 right?

17 MR. SNYDER: That was my understanding. I  
18 mean I have heard nobody dispute its location.

19 THE COURT: Did you want to address the  
20 question of whether the easement terminated as a matter of  
21 law at Bird Road?

22 MR. SNYDER: Sure. If you read American --  
23 the vast majority of this decision is talking about the

1 abandonment of public roads. There are two basic  
2 procedures to doing it. The last thing you get to on Page  
3 652, it says, and this is Note 5, when Route 630 was  
4 legally abandoned and closed, was --

5 THE COURT: Hold on just a minute. I have a  
6 Southeast Second version here. It's going to take me a  
7 minute to locate it.

8 MR. SNYDER: It would be in the last several  
9 pages.

10 MR. We have our Virginia copy.

11 THE COURT: That would be more helpful to me.  
12 I have Footnote 5.

13 MR. SNYDER: Footnote 5.

14 THE COURT: It begins at General Assembly made  
15 no provision?

16 MR. SNYDER: No. We're working on different  
17 headnotes. I don't know if this will help. When Route  
18 630 was legally abandoned.

19 THE COURT: Okay. It was way back there.  
20 It's on Page 551, Headnote 11 on the Southeast version,  
21 Southeast Reporter version. Go ahead.

22 MR. SNYDER: It says when Route 630 was  
23 legally abandoned and closed, was -- easement which became



1 a mere cul-de-sac as indicated on Figure 6, extinguished  
2 by succession of the purpose for which it was granted.

3 My response to their argument that it  
4 terminates Bird Road is that there isn't any evidence that  
5 that road was abandoned and it seems to me that the  
6 Supreme Court takes extreme caution in determining whether  
7 or not a public road is abandoned and it goes through all  
8 of these notices, the hearings, the rationale, the  
9 procedure.

10 It goes through all of that before it reaches  
11 this point. So it is not merely a matter of saying if it  
12 reaches a county road, it's extinguished. You have to  
13 have something first. There is no evidence before this  
14 Court that that road is abandoned.

15 As we walk that road, we know it's difficult  
16 to traverse. The other thing is to consider, according to  
17 the evidence of this Court, the last time this easement  
18 and therefore that county road was used is approximately  
19 '82 or '83. That hasn't been used, at least by my  
20 clients, because of the blocking of the easement by  
21 Wexford in developing Wendover.

22 If you take a period of time where you have a  
23 country road that was never paved and you let it waste for

1 15, 16 years, whatever that would be, of course you're  
2 going to have trees down on top of it, but I don't think  
3 that there's any issue that -- it's clear, particularly in  
4 the portions from the T termination of the easement going  
5 towards Clark Crossing, you could see the road, you could  
6 see the fence posts that border that road, was much  
7 clearer -- the testimony from Mr. Atkisson was that  
8 easement was used in exiting the 15 acre parcel to reach  
9 Clark's Crossing Road.

10 Now, the testimony that we had concerning all  
11 the way from the post to Clark's Crossing Road, I'm not  
12 sure it's really even relevant because we're not seeking  
13 anything in terms of this Court ordering that that road be  
14 improved, but my client has the right to get all the way  
15 down to where their easement is granted and to take that  
16 to Clark's Crossing Road.

17 Frankly, they could do that by foot if they  
18 wanted to. They could even do it by vehicle. It would  
19 involve some clearing, but not much.

20 THE COURT: I think the point of the argument  
21 was though that not -- that the easement was to get -- the  
22 purpose of the easement was to get the heirs to the county  
23 road.

1 MR. SNYDER: The county road.

2 THE COURT: Another county road or a state  
3 maintained road has intervened, therefore does the  
4 easement need to be as extensive as it was.

5 MR. SNYDER: I think it might be different if  
6 it said to a public road or to a county road or to  
7 someplace else, but the deed itself says to the county  
8 road. We've had the testimony of where the county road --  
9 of the county road at the time that Mr. Atkisson, in the  
10 1920s and 30s, was using this, that was Clark's Crossing  
11 Road. No evidence to the contrary.

12 The fair, clear meaning is a specific road,  
13 not to any public road. The deed could have said that if  
14 that's what they wanted to do.

15 As far as some of these other arguments are  
16 concerned, I'll address the issue of Walton v. Holland,  
17 you can't expand the use of the easement. In that case  
18 the Court says you can't expand the use of the easement  
19 because that would be an increased burden on the servient  
20 landowners.

21 They recited the facts in that case where the  
22 increased burden they were talking about was serving at  
23 least two additional lots, each one, I believe, had a

1 residence on it.

2           There is no evidence in this case so far that  
3 if this easement is allowed to remain to the cemetery,  
4 where it's physically connected, that there would be an  
5 increased burden. There's no evidence to that. I mean it  
6 would be impossible, I think, even to produce that  
7 evidence since nobody has been out there for eons.

8           You don't get to that conclusion of you can't  
9 expand the use of the easement without reading all of it,  
10 which is because there would be an increased burden on the  
11 servient landowners. I don't think they can show that.

12           At the time it was created there was a  
13 household with a farm being operated and who knows how  
14 many individuals that were on there, and I'm not sure that  
15 we can take judicial notice of a fact if there is a  
16 cemetery with approximately nine -- remains of nine  
17 decedents on that cemetery that there would therefore be  
18 an increased burden on the servient landowners. I don't  
19 think that that's the case.

20           Now, as far as the issue of prescriptive  
21 easement, on these same facts or essentially these same  
22 facts, Judge Fortkort found that there was prescriptive  
23 easement as to -- as against Wexford and the individual --



1 what we refer to as the individual lot owners before him  
2 at that time.

3 That finding was never appealed and that  
4 finding was not reversed in the Supreme Court decision.  
5 So there's certainly -- counsel has argued that this  
6 easement that has been used, when it's been used to access  
7 the cemetery, was adverse, then perhaps that's the basis  
8 for the prescriptive easement, but frankly, I'm not sure,  
9 in terms of consistency with ruling, exactly how the Court  
10 addresses which parties -- we already know that as to  
11 Wexford and the individual lot owners, Mr. Atkisson has a  
12 prescriptive easement to them because that determination  
13 was never appealed or addressed by the Supreme Court.

14 THE COURT: Well, it did. The Supreme Court  
15 said it was a prescriptive easement. I believe that's  
16 what the Supreme Court said.

17 MR. SNYDER: I'm not sure they used the word  
18 prescriptive. I think they said -- they did recite the  
19 fact that a prescriptive easement was found, but when they  
20 were giving their own ruling portion outside of the  
21 statement of facts, I don't think they ever went back and  
22 addressed the issue.

23 THE COURT: It does say the chancellor held

1 among other things that the Atkissons have an express  
2 easement that granted them access to the cemetery.

3 MR. SNYDER: My memory of that is it was never  
4 actually --

5 THE COURT: All right.

6 MR. SNYDER: In any event, it's theirs. I  
7 guess it's a matter of fact and a matter of law that  
8 exists to most of the people that are being represented  
9 here today.

10 I'm not quite sure I understand the relevance  
11 of the argument that describes the easement that goes to  
12 lot 2 that's created in the partition deed. First of all,  
13 where that easement connects lot 2 in the partition deed  
14 is about as far away as you can possibly get to the  
15 cemetery. There is no provision from that point of access  
16 to go to the cemetery.

17 You would still need a way to get across  
18 Thomas Adams' property at that point --

19 THE COURT: There was access until it  
20 subdivided in the Hunter Mill Subdivision. It was all  
21 part of the same parcel.

22 MR. SNYDER: I don't follow you.

23 THE COURT: Once the easement gets to the

1 property line of the parcel in which --

2 MR. SNYDER: But that easement only runs to  
3 lot 2. You'd still need a way -- for instance, if you  
4 were a relative and you were not Thomas Adams and you  
5 wanted to get to the cemetery, you had a way to get to  
6 Thomas Adams' lot, but you didn't have a way to go from  
7 that lot to the cemetery.

8 Despite that, regardless of whatever there is  
9 concerning access to the lot 2, you still have the fact  
10 that there is the 15 acre parcel easement, is accessible  
11 to the cemetery, and the express easement is still there.  
12 So it doesn't matter whatever actions were taken by the  
13 developers on Hunter Mill Forest, there is still access  
14 there.

15 The argument of saying it was no standing  
16 because they conveyed away the 15 acre parcel, even though  
17 they deserved the cemetery, that argument also is based  
18 upon, I think, ignoring the physical facts of what we saw  
19 and what's been testified as to where the cemetery is  
20 actually located.

21 The argument of what Mr. Gogal's referenced --

22 THE COURT: Why do the heirs not reserve to  
23 themselves the easement rights to get to the cemetery?

1 MR. SNYDER: They do when they reserve the  
2 cemetery. I think there's a matter of law.. When you  
3 subdivide and you do some sort of subdivision of the  
4 dominant estate, any portion of that dominant estate is  
5 allowed to use that easement and I think all -- I think a  
6 fair reading of it is that the people conveying away the  
7 15 acre parcel, they want to make it clear to the new  
8 owners of the 15 acre parcel that they had the rights to  
9 the easement also, as they did, because they reserved the  
10 cemetery which is right there on top of the easement.

11 I mean they knew that the people to sign that  
12 deed, such as George Atkisson's mother, knew where the  
13 easement and the cemetery were, and the idea that the  
14 O'Briens have taken their property subject to a latent  
15 defect or something to that effect --

16 THE COURT: Going back to the deed out, 1978,  
17 instead of conveying the right of way to Mr. Miller, they  
18 should have made it subject to the right of way in favor  
19 of themselves, shouldn't they?

20 MR. SNYDER: That would probably be more  
21 artful. I mean the only thing that we can say is that  
22 this deed that was -- I can't remember if it's in evidence  
23 or not, whether or not Harold Miller drafted it, but we



1 can say that at the very least this deed is not very well  
2 written.

3 I mean it's already been subject to one  
4 Supreme Court decision trying to interpret a portion of  
5 it. I think regardless of the language that's in the  
6 deed, when you subdivide the dominant estate, you do a  
7 subdivision of the dominant estate, as a matter of law you  
8 are entitled to use the easements that are pertinent to  
9 them.

10 If there's any confusion to that, and this  
11 goes to the argument the O'Briens are making concerning  
12 this being some sort of latent defect, I believe it was  
13 testified that the 1978 plat, which showed out lot A, was  
14 recorded in the land records and if anybody had seen that  
15 and they had reviewed the 1896 deed, which shows point G  
16 also, it is very clear that the easement is running right  
17 into out lot A.

18 So there's record notice for anybody that is  
19 going to review those land records. So I don't think that  
20 it is a latent defect.

21 As to lot 40, I think I've represented this to  
22 the Court before, we don't believe that lot 40 interferes  
23 with the easement. We ask for no affirmative action taken

1 against lot 40 other than as in the instance of Fairfax  
2 County, that we, according to our surveyor, he said that  
3 the location for the rear end of the property where he  
4 actually shows them touching, is approximate because they  
5 weren't able to find the rear of the property, is so far  
6 the best evidence that we have.

7 THE COURT: They weren't asked to find the  
8 rear end of the property. I mean presumably lot 40, a  
9 platted subdivision lot, can be located quite easily.  
10 Someone could have gone out and set corner markers --

11 MR. SNYDER: Presumably I would say that. It  
12 should have been marked by the original developers, but  
13 I'm not sure if their position -- our evidence is the  
14 roadway that we were standing on, as it relates to that  
15 particular lot, it still exists and that's the one that we  
16 walked and that's the roadway that Robert Simpson has  
17 identified as being basically the tail end of the  
18 easement.

19 I'm not really sure how to address lot 40's  
20 position because I don't believe that there's any  
21 affirmative relief that we are seeking from that. If the  
22 easement is on their property line, then it's on -- if it  
23 touches their property line, then that's a matter of fact,

1 it touches their property line.

2 THE COURT: If I were to locate the easement  
3 across part of the property of lot 40, what would Mr.  
4 Atkisson's intentions be towards that? Does he intend to  
5 improve the condition of the easement, to make it passable  
6 by a vehicle, for example?

7 MR. SNYDER: Yes.

8 THE COURT: That might impact on lot 40,  
9 wouldn't it? That's a road in the backyard instead of the  
10 woods?

11 MR. SNYDER: I'm sorry?

12 THE COURT: They now have a road in their  
13 backyard with vehicular traffic on it, albeit probably  
14 once or twice a year, I guess, at the most, but --

15 MR. SNYDER: The only relief we ask is that  
16 they not block it. We're not asking that they remove  
17 obstructions because there's no obstructions there. We're  
18 not asking them to lay a roadway because an unimproved  
19 roadway is there.

20 I believe that by the measurements contained  
21 on the survey, the touching -- I believe this is what was  
22 said by Ms. Bradzinski in her opening statement, there's  
23 only 12 inches of their property involved, which means

1 there's another undisturbed 14 feet available to my  
2 client.

3 So I think the Plaintiff's evidence is --  
4 there isn't any affirmative relief being requested against  
5 lot 40 other than for the purposes of locating the  
6 property easement where the evidence shows it actually  
7 exists and that is what Simpson testified to. That is one  
8 of the -- what comes near the property line on 40 is one  
9 of those portions of the easement that still exists and it  
10 was walked by this Court.

11 THE COURT: Thank you. Anybody want to  
12 respond?

13 MR. GOGAL: Your Honor -- motions to strike  
14 and preserve their rights, but, Judge, I really think this  
15 case ought to be stricken. I'd just like to chart what  
16 the evidence is. Basically we just had some factual  
17 evidence here and a lot of statements by Mr. Snyder about  
18 things that I think he may have wished he had gotten in,  
19 but they didn't really go in.

20 What we have in evidence right now is the 1892  
21 deed, the 15 acre parcel easement --

22 THE COURT: You did it again. I saw a bumper  
23 sticker the other day that said dyslexics of the word



1 untie.

2 MR. GOGAL: We have 1892, 1896 and we have  
3 1978 and basically, Your Honor --

4 THE COURT: '78.

5 MR. GOGAL: 1978, I got that right.

6 THE COURT: You did get it right? It looks  
7 like a '98 from here.

8 MR. GOGAL: It's probably not showing too  
9 well, but, Your Honor, Mr. Simpson, his testimony was  
10 pretty clear. 1892, by its own terms, only serves the 15  
11 acre parcel. 1896, by its own terms, provides for a  
12 quarter acre cemetery in the southeast corner of partition  
13 lot 2 and provides a partition easement.

14 So there's access in 1896, partition decree  
15 for the cemetery. In 1978 we have the heirs conveying the  
16 15 acres and partition lot 2 and they accept the existing  
17 cemetery. In 1978 the only cemetery existing is this  
18 cemetery, Your Honor, and we have the intent to convey  
19 away the easement. There's no evidence that they withheld  
20 that.

21 On this side, Your Honor, we have -- in fact,  
22 we got Mr. Simpson to concede that based on the land  
23 records this easement does not serve the cemetery. The

1 only thing he said was but I thought I saw some reference  
2 to a description and he never could recall where that was  
3 and it's not in evidence.

4 So, Your Honor, we can take their expert's  
5 testimony that this easement does not serve the cemetery.  
6 All that we heard on this side, Your Honor, was that  
7 there's a stump and we heard -- and they put in the out  
8 lot A. They put that in as a factual issue and that came  
9 in to show where the Hunter Mill Subdivision tried to  
10 locate the cemetery.

11 Your Honor, the stump has never been located  
12 by any surveyor. There's no way -- it's not in evidence  
13 that it's on 15 acres or partition lot 2, but, Judge, the  
14 stump is not the cemetery. There was no evidence as to  
15 what its significance was other than I went out when I was  
16 maintaining the cemetery and I cut a cedar tree and now  
17 there's a stump.

18 I mean I don't know how in the world that can  
19 contradict the weight of all the land records anyway. In  
20 the Langman case, which says these land records govern and  
21 you only look at these land records unless they're  
22 ambiguous and there's nothing ambiguous in these land  
23 records. So we don't even get to admitting the stump,

1 even if it had any weight.

2 Out lot A, Your Honor, it's an interesting  
3 thing. Out lot A is in here because it's where the  
4 subdivision tried to locate it, but, Judge, that is not  
5 evidence of the cemetery. It can't be evidence of the  
6 cemetery because there was no expert taking the stand, no  
7 surveyor who took the stand and said I located the graves,  
8 I've looked at the land records and this is where the  
9 cemetery is located, because if he had, we would have torn  
10 him apart because it's not based on the land records and  
11 we know it's not based on the land records because Mr.  
12 Simpson, who was the only surveyor who testified, conceded  
13 that out lot A does not represent the cemetery.

14 It contradicts partition lot 2 as a quarter  
15 acre, which is what the land records says. So he says --  
16 Mr. Simpson concedes that out lot A contradicts the land  
17 records.

18 THE COURT: As being coextensive with the  
19 cemetery?

20 MR. GOGAL: As being coextensive with the  
21 cemetery, and, Judge, again, there's no -- Mr. Atkisson  
22 has not really put in evidence exactly what his interest  
23 in this litigation, I don't think it's been clear, but to

1 the extent he has any interest it would be as an heir, one  
2 of many heirs, one of many heirs who own this quarter acre  
3 in the southeast corner of partition lot 2.

4 Another way to look at this, Judge, is you  
5 have partition lot 2 -- and then we have the 15 acres  
6 which goes off like this (indicating). There's the 15  
7 acres, here's partition lot 2 and then the quarter acre  
8 and I'm just going to throw out -- because it's never  
9 actually been -- we know it's there, we don't know how  
10 it's drawn and it doesn't matter that the surveyor -- the  
11 family owned all this property. They didn't need to draw  
12 where the cemetery was.

13 The issue never arose, but these people, all  
14 these heirs, all these heirs who own this cemetery, and  
15 there are more than just Mr. Atkisson, they own a  
16 partition easement and all that that developer did -- and  
17 George Atkisson can say I didn't have anything to do with  
18 it, I know I was involved, I owned the land or whatever,  
19 distance himself all he wants, but all that subdivider did  
20 is say, look, I don't want to provide access to this  
21 cemetery and this is in 1979, a year later.

22 I'm going to draw this thing so I can use  
23 this. I'm going to obliterate, take away these people's



1 access and I'm going to force these people down here to  
2 try to bear the burden of this cemetery's access in the  
3 craziest dimensions --

4 THE COURT: What evidence is there of that  
5 other than conjecture?

6 MR. SNYDER: Note my objection, Your Honor,  
7 because we're going on the evidence that's before the  
8 Court right now.

9 MR. GOGAL: There's the evidence. Mr.  
10 Simpson's plat, Judge. Mr. Simpson's plat shows that the  
11 developer, when he -- and this is supposedly the  
12 subdivision, when the developer created this subdivision  
13 he wasn't faithful to the land records, he conceded he was  
14 not, he did not locate it in -- there's a quarter acre in  
15 the southeast portion of lot 2.

16 He included a part of the 15 acres and there's  
17 no other reason to have done that other than to try to  
18 grab this access. That's why it's conceded by Mr.  
19 Simpson. There is no other basis for out lot A. There's  
20 no physical basis. We don't have a surveyor who  
21 physically located any of these graves except Mr. Simpson  
22 did show the granite marker on out lot A.

23 So to the extent there's any physical

1 location, the gravestones are here in out lot A. No  
2 physical location of any graves in the 15 acres, no  
3 evidence --

4 THE COURT: You mean that portion of the 15  
5 acres which is part of out lot A?

6 MR. GOGAL: That's right, Your Honor.

7 THE COURT: The gravestones are all to the --  
8 what would have been partition parcel 2?

9 MR. GOGAL: Yes, Your Honor, partition lot 2.  
10 Mr. Simpson shows the granite stone there.

11 THE COURT: Which exhibit is that?

12 MR. GOGAL: That is Mr. Simpson's survey.  
13 It's AAA. The Plaintiff's own exhibit illustrates that.

14 THE COURT: Let me take a look at that.

15 MR. GOGAL: Yes, Your Honor.

16 THE COURT: I think you all walked off with  
17 Exhibit A or maybe it's up there instead of back here.

18 So basically, I guess, what we're referring to  
19 as the pie shaped piece here is the area that is part of  
20 the 15 acre parcel, which is now out lot A; is that right?

21 MR. GOGAL: That's correct, Your Honor.

22 As the Court will recall from when we walked  
23 out there, that's just a depression leading down to the

1 creek.

2 THE COURT: All right. What you would argue  
3 is an unlikely place for a burial?

4 MR. GOGAL: There's no evidence there's  
5 anything there anyway. We saw where the stones were and  
6 that was way up from that.

7 Mr. Snyder talks about the law in the Holland  
8 case, Judge, and I think that case is pretty clear. I  
9 mean this is exactly what they're trying to do. As I  
10 showed here, partition lot 2 has the cemetery located in  
11 the quarter acre in the southeast portion of the lot.

12 If Mr. Adams were to have sold that lot over  
13 the years, he would have sold it subject to this cemetery  
14 and subject to an easement for these people. The 15 acres  
15 had this easement. So if he sold this plan, clearly it  
16 would have been subject to this particular easement.

17 Now, this is a classic case of trying to  
18 expand the burden. These people only are serving owners  
19 for an easement going to the 15 acres. These partition  
20 lots here are the servient owners for the quarter acre  
21 cemetery and what they did is, just like Walton v.  
22 Holland, they tried to say I've got property right next  
23 door, I want to use it for the cemetery and the

1 subdivision plan they used to do that is to scoot it over,  
2 even though there's no basis in the land records, no  
3 evidence in the Plaintiff's case to support such a  
4 location.

5 In addition, Your Honor, I did mention the  
6 Green in my brief, the Green V. Soloman case, and I just  
7 hand that up. That's the case that talks about estoppel  
8 by deed and I would again reiterate as an additional  
9 argument that the 1978 deed where Florence Atkisson and  
10 the other heirs conveyed this 15 acre parcel and  
11 specifically conveyed the easement that Mr. Atkisson has  
12 now stopped, to claim that he owns an interest in that  
13 easement.

14 Just for housekeeping, there's been absolutely  
15 no evidence of Carlotta Atkisson's interest and I don't  
16 think there's any evidence of what standing she might have  
17 and I also think she should --

18 Finally, there's been no discussion of  
19 easement by necessity, no substantiation of prescriptive  
20 easement. The only thing Mr. Snyder said Judge Fortkort  
21 last time thought there was one and, of course, my clients  
22 aren't bound by that, but my understanding is from talking  
23 to Mr. Goodman, I wasn't there, was that was based on an



1 argument using Freshlock v. Brenner, which is a case -- I  
2 think they argued using the headnotes and didn't discuss  
3 the actual case.

4 THE COURT: That's a big mistake. When I was  
5 in law school they told me that the headnotes are -- by  
6 people who couldn't get -- law school graduates that  
7 didn't pass the bar and couldn't get a real job. You have  
8 to read carefully those headnotes.

9 MR. GOGAL: All that Freshlock stood for is  
10 that if you own -- if there was an easement in a location,  
11 someone else could also get a prescriptive easement over  
12 it in addition to the existing easement. It didn't mean  
13 you could have both, but Judge Fortkort's decision that  
14 there was both did not make any sense.

15 In fact, the evidence of that is where the  
16 Supreme Court, when they decided the case, it said that --  
17 they only mention in the last page the express easement.  
18 They didn't even get into that concern about the  
19 inconsistencies and having a prescriptive and express  
20 easement.

21 Most importantly, Judge, there's been no  
22 evidence of 20 years continuous, uninterrupted use to  
23 establish such an easement, and as I pointed out, it was

1 only -- it only arises after '78 because until '78 they  
2 owned the 15 acres, they could use the 15 acre parcel  
3 easement. So that claim has to be thrown out at this  
4 stage.

5 The easement by necessity, there's been  
6 absolutely no evidence and no argument on that. So I  
7 would also ask the Court -- I would hope the Court would  
8 throw the entire case out. Thank you, Your Honor.

9 THE COURT: All right. Are there defense  
10 counsel who wish to respond?

11 I'm going to take the motion to strike the  
12 Plaintiff's case in the entirety under advisement. I'd  
13 like a chance to read all of these cases and we'll go  
14 ahead and hear the Defendant's case while I mull it over.

15 I am though going to rule now that the  
16 easement is terminated at Bird Road as a matter of law and  
17 so I grant the motion to strike for everything beyond Bird  
18 Road.

19 So Ms. Brzezynski, it's been nice having you  
20 with us, but you are excused now.

21 MS. BRZEZYNSKI: Thank you, Your Honor.

22 MR. SNYDER: Your Honor, I would note my  
23 exceptions to that and incorporate by reference my

1 arguments previously made a few minutes ago why that  
2 should not occur.

3 THE COURT: Yes, sir. Let's break for lunch  
4 now. We'll start back at ten minutes of 2:00.

5 MS. BRODIE, I believe you still have some land  
6 that we need to worry about; is that right?

7 MS. BRODIE: It stops at Bird Road, Your  
8 Honor.

9 THE COURT: It does stop at Bird Road? So you  
10 will be on your way as well.

11 MS. BRODIE: I guess, Your Honor.

12 THE COURT: Are you sure? I thought when we  
13 were up there at the cemetery that I was told that the  
14 park land was on either side of the cemetery.

15 MS. BRODIE: But it stops.

16 MR. SNYDER: There's no park land between the  
17 easement and the cemetery.

18 THE COURT: Ms. Brodie, you might take a  
19 chance I might do at the end of the case what Judge  
20 Fortkort did.

21 MS. BRODIE: I'll stay, Your Honor.

22 THE COURT: I'm only kidding. If you would  
23 like to go, that's fine.

1                   \* \* \* \* \*

2                   (Whereupon, at approximately 12:50 o'clock  
3 p.m., a luncheon recess was taken.)  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23



1 that road had been abandoned?

2 A Not that I could see in the records that we  
3 have.

4 MR. SNYDER: I have no further questions.

5 THE COURT: Any cross-examination?

6 CROSS-EXAMINATION

7 BY MR. GOODMAN:

8 Q Mr. Capestany, can you demonstrate for us  
9 where this outlet road is? Do you have anything with you?

10 A I actually did bring a copy of our -- one of  
11 our record plat sheets that show where the road is. I  
12 don't have it with me, but I could have brought them.

13 Q Look at Exhibit 27. It's in that book in  
14 front of you.

15 MR. GOODMAN: May I approach the Witness, Your  
16 Honor?

17 THE COURT: Yes, you may.

18 BY MR. GOODMAN:

19 Q I would ask you to look in the lower right-  
20 hand corner of this exhibit. You see where Clark's  
21 Crossing Road is up here?

22 A Yes.

23 Q Do you see on the very bottom where Post Road

1 is?

2 A Uh-huh.

3 Q Is that the outlet road that you were  
4 describing?

5 A Yes.

6 Q You say that's not owned by the State of  
7 Virginia?

8 A According to the records that we have, and I  
9 checked from those records this morning, it is not.

10 Q So the State of Virginia does not maintain  
11 that road?

12 A Correct.

13 Q Do you have any plans to maintain that road?

14 A Since it's not owned by the state, I don't  
15 have any involvement in the maintenance or any plans to  
16 maintenance the road.

17 Q You testified that it belongs to the State of  
18 Virginia, did you not -- pardon me -- to Fairfax County?

19 A Correct.

20 Q How do you know that?

21 A Our Permits Office, which maintains our  
22 records, as to what's in our -- in the state system and  
23 what's not in the state system provided that information

1 to me.

2 Q Could the road have been abandoned by Fairfax  
3 County and you not know it?

4 A I guess it's possible, but I don't know.

5 Q How current is that information that you  
6 checked?

7 A It is our current record, the most up to date  
8 plat that our Permits Office keeps with respect to what  
9 roads are in the state system. That is updated daily  
10 based on the amount of development that goes in this  
11 County.

12 Q So as far as you know, that outlet road is  
13 owned by the County?

14 A As far as I know, yes.

15 Q Does Fairfax County maintain its own roads?

16 A They have a maintenance department, part of  
17 their Public Works, that they do maintain roads that  
18 belong to them.

19 Q Do you know if Fairfax County -- have you seen  
20 that road?

21 A Yes, I've been out and visited the site.

22 Q What does it look like?

23 MR. SNYDER: I'm going to object to that

1 question. We've been on the road. We know what it looks  
2 like. I'm not sure what's relevant to him or what it  
3 looks like to Mr. Capestany.

4 THE COURT: That's the road that we came up  
5 yesterday and hopped the creek and went under the bridges  
6 and over the bridges?

7 MR. GOODMAN: Yes, Your Honor.

8 THE COURT: I've seen that.

9 MR. GOODMAN: Actually in both directions.

10 THE COURT: Right.

11 MR. GOODMAN: You walked north to the creek  
12 and back to the T and then we did the bridge dance.

13 THE COURT: Right. I don't need his opinion  
14 or thoughts on what the road looks like since we all  
15 walked it ourselves yesterday.

16 MR. GOODMAN: I have no further questions of  
17 the witness.

18 THE COURT: Any other defense counsel wish to  
19 cross-examine this witness?

20 Any redirect?

21 MR. SNYDER: No, Your Honor.

22 THE COURT: Thank you very much, sir. I  
23 appreciate you coming today. You're free to go.



A F T E R N O O N   P R O C E E D I N G S

(Court reconvened at 1:50 o'clock p.m.)

THE COURT: Mr. Goodman, are you going to call the next witness?

MR. GOODMAN: Yes, ma'am. We call Richard Sacchi.  
Whereupon,

RICHARD SACCHI,  
a Witness, was called for examination by counsel on behalf of the Defendants, and, after having been duly sworn, was examined and testified, as follows:

DIRECT EXAMINATION

BY MR. GOODMAN:

Q Mr. Sacchi, would you identify yourself for the record, please, state your name and address?

A My name is Richard Sacchi and I live at 6916 Harrison Lane, Alexandria, Virginia.

Q Where are you employed, sir?

A I'm employed with the Fairfax County Park Authority.

Q How long have you been employed there?

A Nine years and a few weeks.

Q In what capacity?

1 A As the archeologist.

2 Q The County archeologist?

3 A No; the Park Authority.

4 Q What's your educational background, sir?

5 A I have an undergraduate degree in History, a  
6 graduate degree in Anthropology, specializing in  
7 Archeology.

8 Q When did you get those degrees, sir, and from  
9 where?

10 A The undergraduate -- both from American  
11 University; the undergraduate degree was in 1972, the  
12 graduate degree was in 1980.

13 Q Would you describe your professional work  
14 experience in archeology for the Court, please?

15 A Well, briefly I attended the necessary field  
16 schools and passed the necessary competence examinations  
17 for a master's degree in anthropology, archeology. I  
18 supervised three field schools and I have also  
19 participated in two other field schools.

20 I have worked with American University, the  
21 University of Maryland and North Carolina State's Historic  
22 Site Section and I've also worked for the National Park  
23 Service in the capacity of archeology.

1 Q Would you tell the Court what sort of work  
2 you've done as an archeologist with these various  
3 institutions or governments?

4 A Most of those projects, I was project director  
5 for field operations with regard to mitigating the effects  
6 of federal undertakings on projects, on cultural  
7 resources, archeological sites.

8 Q Did any of this work include locating graves?

9 A When I was part of -- that would always be  
10 part of a project, was to locate all the cultural  
11 resources within a specific area.

12 Q That includes graves?

13 A That includes graves.

14 Q Have you written any research papers?

15 A I've authored over thirty research papers and  
16 had five of those published with the North Carolina  
17 Division of Historic Research.

18 Q Where have you -- can you name some specific  
19 projects for the Court where you have conducted research  
20 or written papers?

21 A Sure. Fort Fisher Historic Site, North  
22 Carolina, the Bennett Place, North Carolina, -- Gold Mine,  
23 North Carolina, Ellis Island, Catoctin National Forest,

1 Jamestown, Flood Memorial National Park Service.

2 THE COURT: Johnstown?

3 THE WITNESS: Johnstown.

4 THE COURT: I was going to say I didn't think  
5 there was a big flood in Jamestown.

6 THE WITNESS: Thank you, Your Honor.

7 There's also the Connecticut -- Springfield  
8 Armory in Connecticut.

9 BY MR. GOODMAN:

10 Q Would you explain to the Court what  
11 archeological reconnaissance is, please?

12 A Well, it's the lowest level of survey that an  
13 archeologist will perform in an area or to find a site.

14 Q Have you done that?

15 A Yes.

16 Q When you say the lowest level, what does that  
17 involve?

18 A It's merely to identify the site and possibly  
19 gather minimum data about the site.

20 Q Mr. Sacchi, you were here about five years ago  
21 and you testified as an expert in a case styled as  
22 Atkisson v. Wexford about certain graves in a family  
23 burial plot in Fairfax County; do you recall that?



1           A       Yes.

2                   MR. GOODMAN: Your Honor, based on his  
3 qualifications, I would move that he be qualified as an  
4 expert to testify about archeology and finding graves.

5                   THE COURT: Any objection?

6                   MR. SNYDER: No objection.

7                   THE COURT: He is so accepted.

8                   BY MR. GOODMAN:

9           Q       Did you visit the cemetery site recently, Mr.  
10 Sacchi?

11           A       Yes.

12           Q       When did you go out there?

13           A       That would be in July of this year.

14           Q       Who did you go to the site with; do you  
15 recall?

16           A       I went to the site with a surveyor. I met the  
17 surveyor at the site. I met you at the site and I met the  
18 County Attorney at the site.

19           Q       Did you identify any graves when you were  
20 there?

21           A       Yes.

22           Q       You've got a book in front of you. Would you  
23 turn to Exhibit 11-C, please? Do you have 11-C in front

1 of you, sir?

2 A Yes.

3 Q That's a survey that was done by Springfield  
4 Engineering?

5 A Uh-huh.

6 Q Mr. Corson and it's got some gravestones  
7 marked there. Are those the gravestones that you found?

8 A Yes.

9 Q How did you go about finding them, sir?

10 A We -- when I say we, my assistant and myself,  
11 noted the surrounding topography and seeing that this was  
12 a bit of an anomaly, topographically speaking, this area  
13 is higher than the others, higher than the other area, we  
14 -- I felt that this would be a good spot for a graveyard  
15 and given the knowledge beforehand that there was one in  
16 the area, we chose this spot to take a look at and indeed,  
17 when we pulled back some of the brush and leaves and so  
18 forth, we found -- started to find unmarked gravestones.

19 Q What did the gravestones look like, sir?

20 A Pyramid in shape, most of them, and they're  
21 about a foot high off of the present grave.

22 Q Were they in a pattern?

23 A Generally there's a pattern of north, south.

1 The rows are running north, south. The grave would be  
2 running east, west.

3 Q Did you mark the graves?

4 A Yes. This last visit?

5 Q Yes, on the last visit.

6 A Yes. I marked the graves with flagging tape,  
7 each headstone, not the grave, but each headstone.

8 Q Each headstone or each stone that you found?

9 A Each stone that could possibly be, in my  
10 opinion, a gravestone.

11 Q Does this Exhibit 11-C accurately represent  
12 what you found?

13 A Yes.

14 Q I direct your attention to the next page,  
15 which is Defendant's Exhibit 11-D, which is the same  
16 exhibit except it's got a rectangle around it showing the  
17 approximate area of the graves. Do you believe that to be  
18 accurate? That box is 30 feet by 45 feet?

19 A Well, I happened to have been on that one  
20 prior to -- I was on Exhibit 11-A.

21 Q Turn to 11-C.

22 A This is the one that we were referring to.

23 Q No. I was referring to 11-C where there's no

1 box around it. Do you believe that to be accurate?

2 A Yes.

3 Q Please turn the page to 11-D and the only  
4 difference there is there's a box that's about 30 by 45  
5 feet around the gravestones. Do you believe that that  
6 measurement is accurate?

7 MR. SNYDER: I'm going to object to the  
8 generalness of the question. Accurate as to what?

9 THE COURT: I assume you meant you general  
10 proportions of this box that's been drawn around the  
11 graves; is that right?

12 MR. GOODMAN: Yes, Your Honor.

13 BY MR. GOODMAN:

14 Q Do you believe that that 30 by 45 foot box  
15 accurately encompasses the gravestones that you found?

16 A Yes, I do.

17 MR. GOODMAN: Your Honor, I have no further  
18 questions for the witness.

19 THE COURT: Any cross-examination?

20 MR. SNYDER: Yes.

21

22

23



CROSS-EXAMINATION

BY MR. SNYDER:

Q Referring to 11-D, what does that 30 by 45 foot box represent?

A The size of the graveyard.

Q Is it the cemetery?

A It's the outer limits of what I would consider the cemetery.

Q How do you determine that?

A Well, basically by the topographic anomaly that I found on the -- in the terrain as we came up the hill. As soon as you get off that area, you start to slide down very quickly and it's not normal to have graves dug on the side of a slope.

Q So you've cut it off before the descent of the slope begins?

A That's correct.

Q Would you have any way of knowing whether or not the bottom of the slope where you've cut these lines off would be included in the cemetery?

A I'm sorry. Could you repeat that question?

Q Would you have any way of knowing whether or not the bottom of the slope where you have -- which you

1 have not included in this 30 by 45 foot box, would be  
2 included in the cemetery?

3 MR. GOODMAN: Your Honor, I object to the form  
4 of the question. The witness has testified that he  
5 located gravestones. He didn't locate a cemetery and all  
6 the gravestones he found are in the confines of this 30 by  
7 45 foot box.

8 MR. SNYDER: If his testimony is that he did  
9 not locate a cemetery, then I'll --

10 THE COURT: That's the way I understand his  
11 testimony. He was just testifying as an archeologist  
12 about the location of the graves. Now, all of the graves  
13 could be clustered at one area of the cemetery.

14 BY MR. SNYDER:

15 Q So you don't have an opinion then as to where  
16 the cemetery itself -- what the boundaries of the cemetery  
17 is?

18 A Well, yes. Graves make up -- the headstones  
19 make up the cemetery, graves make up the cemetery with or  
20 without headstones. They generally are in an area that,  
21 in my opinion, they generally are located on high ground,  
22 and when you take a look at the box, that's basically  
23 topographic information. It's not something that's just

1 drawn there.

2 Q The way that you've drawn this, you've based  
3 this on the top of the swell before it begins to descend  
4 from the high ground to the low ground?

5 A Yes, conservatively.

6 Q Let me ask you another question. When you  
7 were out there in July of 1996, did you have permission --  
8 strike that. Yeah. Did you have permission to be on the  
9 cemetery from any of the owners of the cemetery?

10 A No.

11 Q Did you attempt to obtain their permission?

12 A No.

13 Q Did you provide notice to them that you were  
14 going to be there?

15 A No.

16 MR. SNYDER: Your Honor, I would move to  
17 strike this witness' testimony. He has just admitted that  
18 he's trespassed on the property and without any notice to  
19 the owners of the property. It would be very similar to  
20 conducting some sort of IME without telling the patient  
21 that you're doing it, then coming in and presenting that  
22 testimony. I don't think it should be permitted.

23 If he was going to do this, he should have

1       gotten permission from the owners of the cemetery.

2               THE COURT: Do you have any authority for that  
3       proposition that an expert who goes on private property  
4       without permission can't testify about what he had seen  
5       there?

6               MR. SNYDER: I would say that it's just common  
7       sense. It would be the same thing if you had -- like I  
8       said, in a personal injury case, if you were to have a  
9       doctor testify -- try to attempt to get a doctor to  
10      testify concerning a physical examination that was taken,  
11      that the plaintiff was not aware it was being taken, or in  
12      the case of -- if there were some item of personal  
13      property that was subject to litigation that was in the  
14      custody of the plaintiff and the defendants were to,  
15      unbeknownst to the plaintiff, improperly, criminally  
16      remove it from them, then had it examined and then try to  
17      present that testimony, I don't think it would be allowed.

18              THE COURT: Mr. Goodman, did you want to  
19      respond?

20              MR. GOODMAN: Yeah. I want to say a couple  
21      things about that. First of all, Mr. Sacchi was out there  
22      with me. I took a surveyor out there and I took the  
23      archeologist to locate the graves. It's interesting, the



1 last time we tried this case five years ago, Mr. -- who  
2 tried the case the first time, argued that nobody went out  
3 and located the graves and Mr. Atkisson testified that  
4 they were on both parcels, therefore nobody took the  
5 trouble so the graves are on both parcels.

6 This time we took the trouble, we went out  
7 there, we located them. It's no different than when Mr.  
8 Simpson went out there and did his Exhibit ZZZ and walked  
9 across my client's property and they didn't ask my  
10 permission.

11 MR. SNYDER: We got a court order for that,  
12 Your Honor. There was a court order entered allowing us  
13 to survey the easement. That was an agreed to order.

14 MR. GOGAL: They didn't have any permission on  
15 behalf of my clients.

16 MR. SNYDER: They weren't there at the time.

17 THE COURT: I'm going to deny the motion to  
18 strike.

19 MR. SNYDER: I have no further questions.

20 THE COURT: Any redirect?

21 MR. GOODMAN: No, ma'am.

22 THE COURT: Thank you very much, sir. Would  
23 you spell your last name for my clerk, please?

1 THE WITNESS: S-a-c-c-h-i.

2 THE COURT: Thank you.

3 (The Witness was excused.)

4 MR. GOODMAN: Your Honor, based on the  
5 witness' testimony regarding Exhibits 11-C and D, I move  
6 their admission.

7 THE COURT: Any objection?

8 MR. SNYDER: I think they still haven't  
9 properly laid the foundation for the accuracy of these  
10 exhibits and also, particularly to 11-D, where he has  
11 decided to put this box in terms of on top of the swells  
12 as opposed to the bottom of it, which would make it  
13 larger.

14 THE COURT: I think that goes to what weight  
15 I'm to give this. I do think that the exhibits are  
16 admissible and he's authenticated them as being accurate  
17 depictions of where he located, in his opinion, the  
18 graves. He's admitted that this box is just something  
19 that he drew based on his opinion of what are the outer  
20 limits of where the actual graves are located.

21 I do think that's a separate question of where  
22 the cemetery is located, so I think it all goes to the  
23 weight I'm to give it and not just admissibility. So 11-C

1 and D are admitted into evidence.

2 (The documents heretofore marked,  
3 for identification, as Defendant's  
4 Exhibit Nos. 11-C & 11-D, were  
5 received in evidence.)

6 THE COURT: Call your next witness, please?

7 MR. GOODMAN: We call Herman Corson, who is  
8 outside.

9 Whereupon,

10 HERMAN CORSON,

11 a Witness, was called for examination by counsel on behalf  
12 of the Defendants, and, after having been duly sworn, was  
13 examined and testified, as follows:

14 DIRECT EXAMINATION

15 BY MR. GOODMAN:

16 Q Mr. Corson, would you please identify yourself  
17 for the record by stating your name and address?

18 A Herman L. Corson, 5112 -- Place in Fairfax,  
19 Virginia.

20 Q Where are you employed, sir?

21 A Springfield Engineering.

22 Q What is your position there?

23 A I'm vice president of surveys.

700

1           Q       What are your duties as vice president of  
2 surveys?

3           A       Oversee all of the field and office surveys.

4           Q       Are you a licensed surveyor, sir?

5           A       Yes, I am.

6           Q       When were you first licensed?

7           A       In 1951.

8           Q       In the State of Virginia?

9           A       In the State of Virginia.

10          Q       Would you tell the Court what your experience  
11 is in conducting surveys since you've been licensed?

12          A       Well, I've done quite a bit. I have performed  
13 surveys for Dulles Airport and the Airport Road, which  
14 consists of about 14,000 acres, and I've done many jobs at  
15 Fort Belvoir and I've done multiple surveys for the metro  
16 stations around Washington and in Virginia.

17               I've done design surveys for Interstate 64 and  
18 other Department of Highways jobs.

19          Q       Have you worked with subdivision plats?

20          A       I've done hundreds of surveys for private  
21 clients doing subdivision plats. I've platted and planned  
22 thousands of single family lots along with -- we've done a  
23 bunch of site plans and as built surveys for many shopping

701



1 centers, including Springfield Mall and Tyson's Corner  
2 Mall and numerous neighborhood shopping centers.

3 Q I direct your attention to Exhibit Number 10,  
4 Mr. Corson. There's a three ring binder in front of you.  
5 Could you open it up to Number 10, please? Is that your  
6 resume, Mr. Corson?

7 A Yes, sir, it is.

8 Q Is that accurate?

9 A Yes, sir, it is.

10 Q Did you testify in this case when it came to  
11 trial five years ago and subsequently about the location  
12 of an easement and about the meanings of language in  
13 certain deeds?

14 A Yes, sir, I did.

15 MR. GOODMAN: Your Honor, based on the  
16 witness' testimony, I move to qualify him as an expert on  
17 the subject of surveying and preparation of survey plats.

18 THE COURT: Any objection?

19 MR. SNYDER: No objection.

20 THE COURT: He's admitted.

21 BY MR. GOODMAN:

22 Q Mr. Corson, I'd like you to look at  
23 Defendant's Exhibit Number 4, which is in that binder.

702

1 It's a deed dated 1892, which we refer to as the 15 acre  
2 deed. Are you familiar with that deed, sir?

3 A Yes, sir, I am.

4 Q You've read that before?

5 A Yes, I have.

6 Q Would you please turn the folder to Exhibit  
7 Number 5? That is a partition deed and decree dated 1896  
8 and I ask you if you're familiar with the portions of that  
9 deed.

10 Here's an illustration of it with respect to  
11 the dimensions of partition lot 2, the partition easement,  
12 which is marked in brown here, and the burial lot in the  
13 southeast corner of partition lot 2.

14 A I am familiar with it, yes, sir.

15 Q How large is partition lot 2?

16 A It calls for 27 and 1/2 acres.

17 Q Did you check the calls and distances for that  
18 deed?

19 A Yes. We ran it through two different  
20 computers.

21 Q What did you come up with?

22 A We come up with 27.9 in one computer and about  
23 28 with a little over in another computer.

703

1 Q 28 point what; 9?

2 A 28.4 in the one computer and 27.9 in the other  
3 computer.

4 Q How do you account for the difference, sir?

5 A It's the difference in the computers in which  
6 they round off decimal places.

7 Q In 1896 that survey done by Mr. Berry wasn't  
8 done by computer. How did he do his?

9 A It was done --

10 MR. SNYDER: I'm going to object to how Mr.  
11 Berry prepared it. I don't think there's any evidence  
12 he's a historian of surveying or has any personal  
13 knowledge of this.

14 MR. GOODMAN: Your Honor, he's been a licensed  
15 surveyor since 1951. I think he would be familiar with  
16 the methods used unless there were so many different  
17 methods and he can tell us that.

18 THE COURT: I think you need to lay the  
19 foundation that he is familiar with surveying methods in  
20 1896.

21 BY MR. GOODMAN:

22 Q Mr. Corson, are you familiar with surveying  
23 methods before the modern computer age you're talking

704

1 about?

2 A Yes, I am because I've had to follow them all  
3 these years.

4 Q What are those methods?

5 A Generally in that era they were using magnetic  
6 compasses.

7 Q When did magnetic compasses stop being used?

8 A Well, in some places they're still used, but  
9 not very often.

10 Q How about here in Northern Virginia?

11 A In Northern Virginia they haven't been used  
12 for the last twenty or thirty years.

13 Q If you were to do a survey of partition lot 2  
14 with a magnetic compass, would the result differ, if you  
15 know, from using a computer?

16 A You mean if I used modern instruments?

17 Q Yes.

18 A It would be some different, yes.

19 Q What would you attribute the difference to?

20 A Well, the difference could be in the method by  
21 which the lines were measured, whether they were used with  
22 a -- one of the modern instruments, you would be using an  
23 infrared ray. Back in '96 they would use poles, which

705



1 were 16 and 1/2 foot long, or they used a chain, which was  
2 66 feet long, and in this case I don't know which was  
3 used.

4 Q If you were to take, from your experience --  
5 have you dealt with meets and bounds deeds before from the  
6 last century, from the turn of the century?

7 A Oh, yes, clear back to the 1700s.

8 Q Just focusing on from the period of 1880 or  
9 1890 to 1900 or 1910, what happens when you take a meets  
10 and bounds survey and apply it today with respect to the  
11 gross area reported at the time and the gross area that  
12 you find?

13 A The gross area is one of the secondary things  
14 as far as a survey is concerned in the thirteen original  
15 states because the objects that they're called for in the  
16 deed are the points that are held. So the distances  
17 between them could vary depending on how they were made.

18 Q Does that account for the difference in your  
19 current measurement of 28.4 acres and 27.9 acres when Mr.  
20 Berry reports 27 and 1/2?

21 A Yes, because we close it in accordance with  
22 the recitation in the deed itself using a modern computer.

23 Q You're familiar with point G that's described

706

1 in both the partition deed and partition decree and the 15  
2 acre, are you not?

3 A Yes, I am.

4 Q Did you recently draw a plat showing where the  
5 gravesites are?

6 A Yes, we did.

7 Q I would direct your attention to Exhibit 11-C  
8 an ask you if that's the plat that you prepared.

9 A Yes, I prepared that.

10 Q How were the gravesites located?

11 A They were located and pointed out by the  
12 archeologist from the Park Authority and I sent my field  
13 crew out and using the lot's corners that they found on  
14 the subdivision, in the Hunter Mill Subdivision, Hunter  
15 Mill Forest, they then tied them and coordinated them,  
16 brought the field work back to the office wherein we  
17 computed them and plotted them.

18 Q I direct your attention to the next page,  
19 which is marked as Defendant's Exhibit 11-B. That's got a  
20 box around the gravesites. It's 30 feet by 45 feet. Did  
21 you draw that, sir?

22 A Yes, sir, I did.

23 Q That represents the area where the graves were

707

1 located?

2 A Yes, sir. That encompasses all of the graves  
3 that we found and tied, an area of about 1350 square feet.

4 Q I want to direct your attention to Exhibit  
5 11-B. You recall from reading the partition decree that  
6 the burial lot is only designated as being in the  
7 southeast corner of partition lot 2; correct?

8 A Yes, sir.

9 Q Would you explain to the Court what this heavy  
10 box is on Exhibit 11-B?

11 A That's one possible shape. That shows the  
12 southeast corner of lot 2 of the partition deed and it  
13 could have been that shape. We don't know what the shape  
14 was because the deed did not give the shape. It just  
15 simply said it was a quarter acre in area.

16 Q Since you've located the graves, in your  
17 experience as a surveyor, you believe that that's a  
18 reasonable shape?

19 MR. SNYDER: I'm going to object to that. He  
20 just said he doesn't know. It's only a possibility and  
21 there's no basis that he has any experience in identifying  
22 shapes of cemeteries or burial lots.

23 MR. GOODMAN: Your Honor, here's the problem.

703

1 We have these documents, this document in the land records  
2 that tells us that there is a quarter acre burial lot in  
3 the southeast corner. It doesn't give us metes and  
4 bounds. There's metes and bounds for everything else.

5 We sent an archeologist out who locates the  
6 gravesites. He goes out with a surveyor. The surveyor  
7 plats exactly where the gravesites are and we ask him -- I  
8 grant you, we asked him to draw a quarter acre, where do  
9 you think it would be as a surveyor who has done this type  
10 of thing before.

11 He's been licensed for 45 years in the  
12 Commonwealth. That's all it is. WE don't know that  
13 that's exactly where it is, but there is a likelihood, a  
14 strong likelihood, that that's, in fact, where it may be  
15 and the Court has got to figure out where it is and we're  
16 trying to assist the Court.

17 THE COURT: Mr. Gogal?

18 MR. GOGAL: Your Honor, this is also our  
19 exhibit number and our witness as well. I think this is a  
20 fairly critical juncture because what we're talking about  
21 here, our argument is that the developer who did Hunter  
22 Mill Subdivision should have done exactly what Mr. Corson  
23 is doing right now.

703



1           He should have been faithful to the land  
2 records, should have located those graves. He should have  
3 sat down and created a quarter acre that is consistent  
4 with the land records of Fairfax County, and that is why  
5 this exhibit is important, Your Honor, and entirely, I  
6 think, relevant to this case.

7           MR. SNYDER: Can I address that, Your Honor?

8           THE COURT: Yes, sir.

9           MR. SNYDER: I think again what this is doing  
10 is ignoring -- it's looking at the land records and  
11 shutting the eyes to the physical ground, and as this  
12 witness just said, he doesn't know where that quarter acre  
13 is located. This is a possibility that he's drawing.

14           Mr. Goodman's question was in your opinion, do  
15 you think that this accurately reflects the quarter acre  
16 burial ground.

17           THE COURT: No. His question was is this a  
18 reasonable shape.

19           MR. SNYDER: In your opinion.

20           THE COURT: Based on your experience. He's an  
21 expert so he's allowed to give his opinion.

22           MR. SNYDER: Not in terms of surveying, but  
23 he's not an expert in locating cemeteries. I believe

710

1 that's what the archeologist was. He's an expert in  
2 surveying. So for him to give an opinion that's based  
3 upon land records and use that to draw this is very  
4 misleading and very prejudicial, because there is no  
5 indication in this that --

6 THE COURT: He's actually been very candid  
7 about the limitations of his line. He said that we don't  
8 know the shape, this is one possible shape, and Mr.  
9 Goodman says is this a reasonable guess.

10 MR. SNYDER: I mean is it more likely -- I  
11 think he's got to be able to say it with some degree of  
12 expert certainty before it should even be considered and  
13 just saying it's a possibility, I don't think, is  
14 acceptable as an exhibit.

15 MR. GOODMAN: Your Honor, I would remind the  
16 Court that the Plaintiff did not object to this exhibit  
17 and he was given a copy of it at the time he was given the  
18 exhibit list.

19 MR. SNYDER: I did object to it. I reserved  
20 my right to object to all exhibits based upon foundation  
21 and this is foundation.

22 THE COURT: Let me see the objections. That's  
23 the whole point in we do this exchange ahead of time.

771

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

(Pause.)

He reserved the right to object to all exhibits on the grounds of relevance and lack of foundation. What we really want to do is have authenticity stipulated to the extent we can.

MR. SNYDER: There's no objection to authenticity, Your Honor.

THE COURT: For example, some other witness could sponsor this survey and you're not going to take task that that's not, in fact, the actual survey?

MR. SNYDER: Right. I mean if they have a witness that can say within a reasonable degree of certainty that this is where the burial lot is, then maybe it's admissible. They don't have to authenticate it. I'm just saying that.

THE COURT: I sustain the objection to the question as phrased, whether this is a reasonable drawing of a quarter of an acre or not.

BY MR. GOODMAN:

Q Mr. Corson, that box in Exhibit 11-B states a quarter acre. Is it, in fact, a quarter acre?

A Yes, it is.

Q I direct your attention to the preceding page,

712

1 which is Defendant's Exhibit 11-A, and ask you if that's a  
2 drawing of the same quarter acre as 11-B, but with the box  
3 that's 30 by 45 feet around it showing exactly where the  
4 graves are.

5 A Yes, it is.

6 Q Mr. Corson, I want to direct your attention to  
7 Defendant's Exhibits 14 through 17, which are Hunter Mill  
8 Subdivision plats. We have some blow ups. Maybe it will  
9 be easier for you to look at.

10 I show you Exhibit 14, which is marked Hunter  
11 Mill Forest Subdivision Erosion and Siltation Control.  
12 Have you seen that before, sir?

13 A Yes, I have.

14 Q I show you Exhibit 15, which is a Hunter Mill  
15 Forest -- Have you seen that before, sir?

16 A Yes, I have.

17 Q I show you Defendant's Exhibit 16, which is a  
18 preliminary plan for Hunter Mill Forest. Have you seen  
19 that before, sir?

20 A Yes, I have.

21 Q Number 17, which is a sanitary, sewer plan for  
22 Hunter Mill Forest, have you seen that, sir?

23 A Yes, I have.

713



1           Q       In your review, I believe you testified in  
2 your review of the partition decree, the 1896 deed, you're  
3 aware of the partition easement which is shown over here  
4 in brown between lots 3, 4, 5 and 6?

5           A       Yes, I am.

6           Q       Does looking at Exhibit 14, does that show --  
7 see where it says cemetery on here?

8           A       Yes.

9           Q       Is that out lot A from the Hunter Mill Forest  
10 Subdivision plat; do you know?

11           THE COURT: I'm sorry. What exhibit are you  
12 looking at?

13           MR. GOODMAN: 14, Your Honor.

14           THE COURT: The question was again, please?

15           BY MR. GOODMAN:

16           Q       Whether the box near the bottom that's marked  
17 cemetery, which is adjacent to lots 42 and 43, is the out  
18 lot A in the Hunter Mill Forest Subdivision plat?

19           A       That is correct.

20           Q       Would you speak louder so the court reporter  
21 can hear you?

22           A       That is correct. It is out lot A in the  
23 Hunter Mill Forest Subdivision.

711

1 Q Does that plat show any roads around out lot  
2 A?

3 A There are roads shown running around.

4 Q Where do they go, sir?

5 A They go out through the cemetery.

6 Q Do they go out to the partition easement?

7 A Yes. They run through this whole area down  
8 through here and go down to this point G.

9 Q Do they go to the same partition easement,  
10 which is marked in brown, on Defendant's Exhibit 2-C?

11 A It's very faint. It goes up in that  
12 direction, yes, out through --

13 Q From your experience as a land surveyor, I  
14 mean that is a -- erosion and siltation control, that's a  
15 preliminary drawing in the subdivision, is it not?

16 A That's correct.

17 Q Those are existing roads --

18 A On the topography, yes.

19 THE COURT: I'm sorry. I'm not seeing where  
20 he sees the brown easement on the plat. Maybe it's just  
21 because I didn't see where he was pointing.

22 MR. SNYDER: I didn't see where he was  
23 pointing also.

715

1 BY MR. GOODMAN:

2 Q Would you show the Court --

3 A It's going up in this direction, this road  
4 that comes in through here (indicating). There's an  
5 intersection there.

6 THE COURT: There's a dot in the middle of it,  
7 is that right, when it comes to some sort of juncture?

8 THE WITNESS: That's the sanitary sewer. The  
9 roads that are alongside -- there's an intersection to the  
10 right side of the sanitary sewer.

11 THE COURT: I see what he's talking about now.

12 THE WITNESS: Going in this direction  
13 (indicating).

14 THE COURT: All right.

15 BY MR. GOODMAN:

16 Q Show the Court where this out lot A is.

17 A Out lot A is here (indicating).

18 THE COURT: I saw that.

19 BY MR. GOODMAN:

20 Q I want to direct your attention to the --  
21 plan, which is Defendant's Exhibit 15. I'm looking at  
22 that -- plan. Do you see where it shows driveways on lot  
23 43 and 42?

716

1           A       Yes, I do.

2           Q       How far is that from the cemetery?

3           A       It's a width of about 43, which is roughly a  
4 hundred and some feet.

5           Q       As a planner, would you describe the degree of  
6 effort that would be required to provide an easement from  
7 that road, which is Hillington Court, to the cemetery over  
8 those driveways?

9                   MR. SNYDER: Your Honor, I'm going to object  
10 to him testifying as a planner. He hasn't been qualified  
11 as one.

12                   THE COURT: I sustain the objection.

13                   BY MR. GOODMAN:

14           Q       As a surveyor, you do -- you testified you did  
15 do subdivision plats, did you not?

16           A       That's correct.

17           Q       When you do subdivision plats, does that also  
18 involve platting easements?

19           A       Yes, it does.

20           Q       Does it involve platting driveways?

21           A       Yes, it does.

22           Q       Would you describe the degree of difficulty in  
23 this -- is this a sewered subdivision, if you know?

717



1 A Yes, it is.

2 Q When you have a sewered subdivision, let's  
3 talk about this one which is a sewered subdivision. Would  
4 you describe the degree of difficulty there is in platting  
5 an easement from a street to a parcel like this out lot A  
6 that is a few hundred feet from the street?

7 A Well, it depends on the topography and this  
8 would be -- it looks like it's very regular.

9 Q Regular meaning plat?

10 A From the driveway shown against lot 40 -- next  
11 to 43, which is actually lot 44, it appears that the house  
12 and the driveway are about level with out lot A and a  
13 distance of roughly 70, 80 feet.

14 Q Does that mean it would be easy to provide  
15 access to the cemetery and easy -- in the easement to the  
16 cemetery through that driveway?

17 MR. SNYDER: I'm going to object to --

18 THE COURT: I'm sorry. Object to what?

19 MR. SNYDER: Leading.

20 THE COURT: I sustain the objection.

21 BY MR. GOODMAN:

22 Q Would you describe the degree of difficulty in  
23 platting an easement to out lot A from Hillington Court

713

1 across lot 43, that driveway that you described?

2 A It would be very simple because it's level  
3 with the contour that runs through the cemetery.

4 Q Does that grading plat also show a Fairfax  
5 County Water Authority easement that goes back to the  
6 cemetery?

7 A Yes, it does. It shows --

8 Q As a surveyor, could you provide an easement  
9 over that Fairfax County Water Authority easement?

10 A Yes, you could.

11 Q For access to the cemetery?

12 A Yes, you could.

13 Q I want to direct your attention now to Exhibit  
14 16, which is a preliminary plan for Hunter Mill Forest.  
15 This appears to be an alternate plan, Mr. Corson. Is  
16 there a road over on the right side of this plan that's  
17 not on the others?

18 A Yes. It's Adams Hill Court.

19 Q Does that go near the cemetery?

20 A Yes. It's approximately -- the edge of the  
21 road is only about five or six feet from the edge of the  
22 cemetery.

23 Q Is there any access provided on this plan from

713

1 the road to the cemetery?

2 A No, there isn't.

3 Q Would you describe the topography between the  
4 cemetery and the road?

5 A The road itself is about the same -- it's the  
6 same contours as the cemetery.

7 Q Would you describe the degree of difficulty in  
8 providing the access from that road to the cemetery?

9 A It wouldn't be difficult to curve the road so  
10 it came down to the edge of the cemetery.

11 Q Would you put in a curb cut so one could get  
12 into the cemetery?

13 A It could be a turn-out or a curb cut, either  
14 one.

15 Q Is either one of those difficult?

16 A No, sir.

17 Q I now direct your attention to Exhibit 17,  
18 which is the sanitary, sewer plat. I want you to look at  
19 lot 22. Could you tell me how far lot 22 is from the  
20 cemetery that's on out lot A along Hillington Court?

21 A It's about 900 feet down Hillington Court or  
22 Hillington -- yeah, Hillington Court, and the cemetery is  
23 about 300 feet south of that.

720

1 THE COURT: I'm sorry. Where is the cemetery  
2 on this Exhibit 17?

3 BY MR. GOODMAN:

4 Q Would you point to it for the Judge, Mr.  
5 Corson?

6 A Right over here (indicating).

7 THE COURT: All right. I see it. I'm sorry.  
8 You're asking him questions about lot 22 to there?

9 MR. GOODMAN: Yeah. The distance from lot 22.  
10 That's where Mr. Atkisson said he lived.

11 THE COURT: Okay. I guess I was missing the  
12 significance of 22. How many feet away did you say, now  
13 that I realize what you're talking about?

14 THE WITNESS: About 900 feet down the street  
15 and about 300 foot south to the cemetery.

16 BY MR. GOODMAN:

17 Q Mr. Corson, I want to direct your attention to  
18 Exhibit D-12. We have a large one of that also. Mr.  
19 Corson, can you identify Exhibit D-12 for the Court,  
20 please?

21 A Yes, sir. This is a plat --

22 THE COURT: It's just 12, isn't it?

23 MR. GOODMAN: 12.

721



1 THE COURT: Defendant's 12?

2 MR. GOODMAN: Yes, Your Honor. I'm sorry.

3 Yes, it is just 12. I'm sorry.

4 THE COURT: I'm trying to keep the record  
5 straight.

6 MR. GOODMAN: Thank you. I could use the  
7 assistance.

8 THE COURT: Defendant's Exhibit Number 12. Go  
9 ahead.

10 BY MR. GOODMAN:

11 Q Would you explain what Exhibit 12 is, Mr.  
12 Corson?

13 A Exhibit 12 is a survey that we made using the  
14 iron pipe and the lot corners that we found on the site  
15 and at the time the existing trail, road bed, that  
16 paralleled more or less the 15 foot right of way in deed  
17 book P-5 at Page 361.

18 Q When did you prepare that, sir?

19 A This was back in 1995.

20 Q Is it drawn to scale?

21 A Yes, sir, it is.

22 Q Did you locate any obstructions that were in  
23 the path of the 15 foot easement?

722

1           A       We located the houses on lots 2, 3 and 4 and  
2           on the number 3 we located the swimming pool in the back  
3           along with a pool pump. It shows the prescriptive  
4           easement paralleling the -- the 15 foot easement  
5           paralleling the property line.

6           Q       So you're showing 880 feet down the property  
7           line?

8           A       According to what was called for in the 15  
9           acre deed of 1892.

10          Q       Then you also measured the next 320 feet that  
11          went south 32 minutes, so many degrees?

12          A       Yes, sir, we did. We plotted that on this  
13          plat.

14          Q       It ends just before Bird Road?

15          A       Yes, sir, it does.

16          Q       Would you tell the Court what this existing  
17          road bed is that is near the 15 foot easement?

18          A       The existing road bed, about 8 to 9 feet wide,  
19          that ran all the way from the cemetery down, in and out of  
20          the 880 feet.

21          Q       When you say the cemetery, you mean what's  
22          been called cemetery in out lot A --

23          A       Out lot A.

723

1 Q On the Hunter Mill Forest plat?

2 A Yes.

3 Q From your review of the deeds, the 15 acre  
4 parcel deed, does that 15 acre parcel easement serve the  
5 cemetery?

6 A It goes to the cemetery, yes.

7 Q In the Hunter Mill Forest plat, in 1892, is  
8 there an easement in the 1892 deed that goes to the 15  
9 acre parcel that serves the cemetery?

10 A I assume it would stop --

11 Q No. When you get up to the point G --

12 A Which is here (indicating).

13 Q Is there any mention in the 15 acre deed of  
14 1892 of a cemetery?

15 A I don't remember. I'd have to look at it.

16 Q If you were to go down that easement trail,  
17 when you get on lot 2 near the end of your 320 feet, what  
18 is the easiest way, if you recall, to get to Bird Road  
19 from lot 2, which portion of lot 2 is better to use?

20 A It would be to parallel the lot line of lot 1.

21 Q Would you explain to the Court why?

22 A Because the grave is -- steep at that point  
23 than it is up by the house.

724

1 Q Do you recall what the difference is in grade?

2 A About 2 or 3 percent.

3 Q How significant is that?

4 A It would be very significant as to putting a  
5 driveway up close to the house versus as far away from the  
6 house as you could get it.

7 MR. GOODMAN: If the Court would give me just  
8 a moment.

9 (Pause.)

10 MR. GOODMAN: Your Honor, I have no further  
11 questions for the witness.

12 THE COURT: Mr. Gogal.

13 Let me ask; who owns lot 1?

14 MR. GOODMAN: Mr. and Mrs. Hall. They're new  
15 parties in this case.

16 THE COURT: They are parties in the case and  
17 they're represented by you?

18 MR. GOODMAN: Yes, and they filed an answer.

19 BY MR. GOGAL:

20 Q The plat that we've just been talking about,  
21 Defendant's Exhibit 12, the path that is called existing  
22 road bed, you surveyed that; isn't that correct?

23 A Yes, I did.

725



1           Q       As reflected on this Exhibit 12, that path, as  
2 far as you can tell, would miss the swimming pool on lot  
3 3; isn't that correct?

4           A       The existing road bed you're talking about?

5           Q       Yes.

6           A       Yes, it would.

7           THE COURT: Any further questions?

8           MR. GOGAL: No, Your Honor.

9           THE COURT: Any cross-examination?

10          MR. SNYDER: Yes, Your Honor.

11                   CROSS-EXAMINATION

12           BY MR. SNYDER:

13          Q       Let me draw your attention to Exhibit 12, Mr.  
14 Corson. You calculated the angle of the turn after the  
15 880 feet?

16          A       Yes, sir.

17          Q       In order to do that, wouldn't you have to know  
18 what the angle was starting at point G or did you make any  
19 assumptions?

20          A       No. The plat -- there is a plat in the 1896  
21 that gives a bearing down through there.

22          Q       That gives a bearing from point G to 880 feet?

23          A       And also the angle at that point.

726

1 Q It gives you the angle at point G?

2 A Yes, sir. Well, it gives me the angle here  
3 where it turns, where the 320 feet goes.

4 Q I understand that. My question is, if you're  
5 going to do that calculation, aren't you going to have to  
6 make some sort of assumption about the angle where this  
7 begins at point G?

8 A Well, I had a bearing on that line and I also  
9 had a bearing on the line running up to point G.

10 Q The bearing meaning distance or angle?

11 A I just used the angle.

12 Q Where did you get that from?

13 A I got that from the old plat.

14 Q The 18- --

15 A 1896 partition.

16 Q Let me draw your attention to Exhibit Number  
17 16. Did you have any knowledge based upon your review of  
18 the plats and other surveys done as to whether or not 16  
19 was ever built as proposed?

20 A I'm sorry. I was looking for it and I didn't  
21 hear your question.

22 Q Have you found it yet?

23 A No.

727

1           Q       It looks like it's out of its pocket. Is it  
2 in front of you?

3           A       Okay.

4           Q       Based upon your review of the surveys and the  
5 plats and of the actual development that's out there, do  
6 you know whether or not what's represented in 16 was ever  
7 constructed?

8           A       No, it wasn't.

9           Q       Do you know whether or not that was approved?

10          A       I would assume that it had been approved.

11          Q       Do you have any knowledge to that effect?

12          A       No, I do not.

13               MR. SNYDER: I have no further questions.

14               THE COURT: Any redirect?

15               MR. GOODMAN: No, Your Honor, except I'd like  
16 to move some exhibits in based on his testimony.

17               MR. GOGAL: For the accuracy of the record, he  
18 referred to the 1896 and I think he meant to refer to is  
19 the 1892 15 acre parcel easement he was discussing, and I  
20 think just for the purpose of the record I would ask a  
21 redirect question.

22               THE COURT: All right.

23

728

REDIRECT EXAMINATION

BY MR. GOGAL:

Q When you mentioned the 1896 as the deed that contained a metes and bounds description, did you mean to intend the 1892 that we discussed earlier?

A Yes, it was the 1892.

Q That's the one that Thomas Adams from Mary Saunders with the easement?

A Correct.

THE COURT: I'm not sure what his testimony was about Exhibit 12 and I take it that that's key since you've blown it up. So he shows on there the 15 foot right of way as per deed book, Page 5, deed book, key 5, Page 361?

MR. GOODMAN: Correct.

THE COURT: Then shows another line that goes into Wendover, Section 2. Is that just to show the linear measurement or is that straddling the 15 feet over the property line or what is that?

MR. GOODMAN: No. That just shows the 880 feet, Your Honor. He's done the same thing across lot 1 that shows the 320 feet.

THE COURT: Right. I've seen that.

729



1           Mr. Gogal, didn't you ask him then if the way  
2 he drew it whether it missed the swimming pool?

3           MR. GOGAL: No. I was asking is that -- in  
4 there you contend that one exhibit is the metes and bounds  
5 according to the land records and then we also have the  
6 actual path that was used.

7           THE COURT: The actual path doesn't go to the  
8 pool?

9           MR. GOGAL: The actual path that was used does  
10 not and that's -- from my client's respect that's  
11 important because we maintain the law is that if you use a  
12 path and it's at variance with what's actually metes and  
13 bounds that the party is estopped from later trying to  
14 enforce the metes and bounds.

15           THE COURT: I understand. I'd have to say,  
16 Mr. Gogal, it was your question that threw me into the  
17 state of confusion because I'm looking at the path that  
18 goes right through the pool, at least the metes and bounds  
19 does and that's what caused me -- now I'm straight. Thank  
20 you.

21           Mr. Goodman, you wanted to admit some  
22 exhibits?

23           MR. GOODMAN: Yes, Your Honor. I'd move,

730

1 based on his testimony, we would admit Exhibit 10, which  
2 is Mr. Corson's CD.

3 THE COURT: Any objection?

4 MR. SNYDER: No objection.

5 THE COURT: It's admitted.

6 (The document heretofore marked,  
7 for identification, as Defendant's  
8 Exhibit No. 10, was received in  
9 evidence.)

10 MR. GOODMAN: Exhibits 11-A and B, I believe C  
11 and D are already admitted. Those are the plats of the  
12 burial lot.

13 THE COURT: I'm sorry. 11 what and what?

14 MR. GOODMAN: A and B.

15 THE COURT: Any objection to A?

16 MR. SNYDER: Yes. It contains the same one  
17 quarter acre burial lot indication that is on 11-B.

18 THE COURT: I'm not sure why it's not  
19 admissible, if not as evidence that that is where the lot  
20 was. I sustain the objection to the question whether he  
21 thought that was a reasonable way to draw it. Isn't that  
22 admissible just as being his best guess rather than  
23 substantive evidence?

731

1 MR. SNYDER: Are you asking for me to respond  
2 to that?

3 THE COURT: Yes.

4 MR. SNYDER: I would say no, Your Honor. I  
5 think, first of all, when you look at the face of this  
6 document, it says right on it one quarter acre burial lot,  
7 southwest corner lot number 2, and this is based upon, as  
8 he said, it's a possibility, and to put that into evidence  
9 is contrary to -- the things that are not really in  
10 controversy have already --

11 THE COURT: 11-C is already in evidence.

12 MR. SNYDER: Right.

13 MR. GOODMAN: As is 11-D.

14 MR. SNYDER: As is 11-D. So the only addition  
15 is this thing which if we had taken that as face value, it  
16 has no probative value whatsoever. So it can only exist  
17 to prejudice.

18 MR. GOGAL: Judge, may I --

19 THE COURT: Yes.

20 MR. GOGAL: It's interesting -- I mean in this  
21 case we're talking about the location of the cemetery. As  
22 Defendants we've allowed them to talk ad nauseam about out  
23 lot A. Out lot A was just fiction by the developer.

732

1 There's been no evidence by any surveyor saying that that  
2 is in any way relevant to the land records, that there was  
3 any attempt to locate graves, that that is in any way  
4 admissible as the location of the cemetery.

5 Here we have a surveyor who has gone out there  
6 with an archeologist, who has located the graves and Mr.  
7 Snyder got his expert to say I don't -- based on the land  
8 records, you can't exactly locate it, but what this  
9 witness shows is that if Hunter Mill Forest Subdivision,  
10 the developer of that subdivision, had taken the time or  
11 wanted to locate those correctly, Mr. Corson shows you can  
12 do it, and that's why this exhibit is entirely relevant.

13 It certainly reflects Mr. Snyder's position  
14 that it can't be done. He's done it. He's shown you what  
15 it could look like.

16 THE COURT: Sure, anybody could go out and  
17 draw up the quarter acre of the corner of what was  
18 indisputably the partition lot. The question is, there's  
19 nothing to indicate the shape of it or the proportions of  
20 it other than that it probably -- within the southeast  
21 corner and it encompassed these graves.

22 MR. GOGAL: Which is what the developer of  
23 Hunter Mill should have done and that's what it's showing.

733



1 If nothing else, it certainly -- it shows what this  
2 developer could have done if he had done it in accordance  
3 to whether the physical graves were located and faithful  
4 to the land records.

5 This is where we would contend it ought to be  
6 anyway. This is where the cemetery is.

7 MR. SNYDER: That's the whole point. That's  
8 what they're contending.

9 THE COURT: If you think that the cemetery  
10 should be -- have equal sides and that type of thing and  
11 be roughly square, I mean it could have been a crescent or  
12 half a quarter moon shape. It could have been anything.

13 MR. GOGAL: I agree with that, Your Honor. It  
14 could be a lot of different things. As long as it  
15 contains those graves and it's in the quarter acre -- in  
16 the southeast corner of partition lot 2.

17 THE COURT: Right.

18 MR. GOGAL: At least at the minimum it shows  
19 what could have been done and --

20 THE COURT: What could have been done, I don't  
21 think is -- reaches the level of a reasonable degree of  
22 certainty as the surveyor. So I'm going to sustain the  
23 objection to 11-A.

734

1 I take it you have the same objection to B as  
2 well?

3 MR. SNYDER: That's correct, Your Honor.

4 THE COURT: I sustain the objection to those  
5 two exhibits. I think all of that is more appropriate as  
6 argument.

7 What's next, Mr. Goodman?

8 MR. GOODMAN: Exhibit 12.

9 MR. SNYDER: No objection.

10 THE COURT: It's admitted.

11 (The document heretofore marked,  
12 for identification, as Defendant's  
13 Exhibit No. 12, was received in  
14 evidence.)

15 MR. GOODMAN: Exhibits 14 through 17. We can  
16 take them one at a time; 14. These are the Hunter Mill  
17 plats.

18 THE COURT: How about 13?

19 MR. GOODMAN: 13 is Mr. Simpson's.

20 THE COURT: 14, any objection?

21 MR. SNYDER: Not to 14.

22 THE COURT: It's admitted.

23 735

1 (The document heretofore marked,  
2 for identification, as Defendant's  
3 Exhibit No. 14, was received in  
4 evidence.)

5 THE COURT: 15?

6 MR. SNYDER: Not to 15.

7 THE COURT: 15 is admitted.

8 (The document heretofore marked,  
9 for identification, as Defendant's  
10 Exhibit No. 15, was received in  
11 evidence.)

12 MR. GOODMAN: 16.

13 MR. SNYDER: Object to 16. He's testified  
14 that this isn't what was built. He doesn't even know  
15 whether or not this plan was approved, so I believe the  
16 purpose of this document is to show how easy it could have  
17 been for somebody to have included it. We don't even know  
18 if this plan that was proposed would have been approved by  
19 the County.

20 THE COURT: It's not just somebody. Mr.  
21 Atkisson testified and said at this point he was a joint  
22 venturer with Harold Miller in the development of Hunter  
23 Forest, wasn't he?

736

1 MR. SNYDER: Not in the development. He was  
2 involved in putting the parcels together. It was Ann Marr  
3 that had done the actual development. There's no evidence  
4 that he participated and frankly if this wasn't built,  
5 what relevance does it have?

6 THE COURT: What relevance does this have?

7 MR. GOGAL: Your Honor, first of all, this was  
8 not a plat that was filed by Ann Marr. It was filed by  
9 Hunter Mill Forest Partnership, but I will address the  
10 relevancy --

11 THE COURT: It does say site data, owner,  
12 Harold Miller, Trustee.

13 MR. GOGAL: Exactly, Your Honor. So it was  
14 well -- it was still within -- I mean it's true Ann Marr  
15 sold the lots, eventually Ann Marr got the subdivision,  
16 but clearly Mr. Atkisson was involved at this stage, but  
17 let me tell you the additional relevance, Your Honor.

18 What this shows is -- we talked about intent.  
19 I don't think we need to prove any kind of intent in this  
20 case, but this does prove an intent to carve out the  
21 cemetery and not provide access.

22 I mean it even goes beyond because here --  
23 this is an option they have to bring the road right next

737



1 to the cemetery and you can see at the bottom there, they  
2 still shoot out this 15 foot outlet road. Even when  
3 there's a road that they are providing within 5 feet and  
4 all they had to do was move it over a little bit or even  
5 just provide a little bit of access, it just demonstrates  
6 -- I mean we have an unclean hands defense, Your Honor,  
7 and this is relevant to our unclean hands argument.

8 THE COURT: What's the year of this plat?

9 MR. GOGAL: It would have been after '78 when  
10 Miller acquired it and before he made it to Ann Marr.

11 THE COURT: Which was like '79; is that right?

12 MR. GOGAL: Right.

13 THE COURT: You're talking about a very short  
14 window of time. So under your theory at this point,  
15 almost twenty years ago Mr. Atkisson is deviously setting  
16 up this ten years of vexatious litigation; is that your  
17 theory?

18 MR. GOGAL: Judge, I don't believe it has to  
19 be my theory, but if you want to ask me what I think  
20 really happened, I think this does reveal an intent to  
21 create an out lot A, to use this access when there were  
22 lots of opportunities to do what they should have done and  
23 this is an additional exhibit to demonstrate that, that

733

1 there was no real earnest attempt to provide legitimate  
2 access through partition lot 2, which was the required --  
3 which is required to provide the access.

4 Here you have a road within 5 feet on  
5 partition lot 5 for the quarter acre cemetery. In fact,  
6 this road would have gone through the cemetery  
7 hypothetical or I mean where the cemetery probably is  
8 maybe, because out lot A is actually drawn still, moved  
9 over on the 15 acres, but the point is, Judge, they didn't  
10 in good faith try to provide the access.

11 Here is a perfect opportunity to have done it  
12 with this alternative plan and they still weren't doing  
13 it.

14 MR. SNYDER: Your Honor --

15 MR. GOODMAN: If I can be heard as to why this  
16 is relevant?

17 THE COURT: I'm about to admit it.

18 MR. SNYDER: Can I address the arguments then?

19 THE COURT: I think this is admissible jus  
20 based on the testimony. I'm not sure whether this is  
21 going to carry the day or not. I doubt it will, but if  
22 they have an unclean hands defense, Mr. Atkisson's  
23 testimony was yesterday that he was a joint venture

739

1 partner with Harold Miller who submitted this.

2 So I would say that it's some evidence that  
3 while he was a partner with Mr. Miller that there were  
4 plans considered that may not have gotten anywhere, might  
5 have been off a drawing board, that would put a public  
6 road within a few feet of the cemetery.

7 MR. SNYDER: Your Honor, what relevance would  
8 that have? We don't know why it wasn't built.

9 THE COURT: That's what rebuttal testimony is  
10 about. Defense Exhibit 16 is admitted.

11 (The document heretofore marked,  
12 for identification, as Defendant's  
13 Exhibit No. 16, was received in  
14 evidence.)

15 THE COURT: What's next?

16 MR. GOODMAN: Next is Exhibit 17, Your Honor.  
17 That's the sanitary, sewer plan.

18 THE COURT: Any objection?

19 MR. SNYDER: No objection.

20 THE COURT: It's admitted.

21  
22  
23 (The document heretofore marked,

740

1 for identification, as Defendant's  
2 Exhibit No. 17, was received in  
3 evidence.)

4 THE COURT: What's next?

5 MR. GOODMAN: Next is 18. These are all  
6 double certified, Your Honor. This is a series of  
7 correspondence between the County and the developer and  
8 this explains why that alternate wasn't built. The County  
9 wanted them to buy what became Wendover II and developed  
10 them together. The owners of Wendover II declined to  
11 sell.

12 THE COURT: Any objection?

13 MR. SNYDER: Yeah. I'm going to object to  
14 anything written by the County as being hearsay. There's  
15 been no foundation for this at all of any kind. There's  
16 no testimony concerning any of this.

17 MR. GOODMAN: Your Honor, it's not hearsay.  
18 We've got a double certified copy. These are authentic  
19 government records and the letters explain why that  
20 alternate deed was not built, which is what the County  
21 wanted.

22 THE COURT: Why alternate what wasn't built  
23 now?

741



1 MR. GOODMAN: They called it Alternate B.

2 THE COURT: Which is the 16 that we were just  
3 talking about?

4 MR. GOODMAN: Yes.

5 THE COURT: What difference does it make why  
6 it was or wasn't built?

7 MR. GOODMAN: It doesn't matter. I mean the  
8 fact is that when the County wanted them to buy the  
9 adjacent property and develop that as well and they had to  
10 develop a plan for it, they had this road that went right  
11 by the cemetery that they didn't provide access for.

12 Counsel seems to think it's significant that  
13 it wasn't built. We're only talking about the planning  
14 process. We concede it wasn't built.

15 MR. SNYDER: I assume that the only purpose  
16 for this is for the truth of the matter asserted in these  
17 representations from Fairfax County.

18 THE COURT: Doesn't the double certification  
19 of government records get it by the hearsay?

20 MR. SNYDER: I don't think so because you're  
21 still presenting expert witness opinion that can't be  
22 cross-examined.

23 THE COURT: I haven't read them. Are there

742

1 opinions contained in these letters?

2 MR. GOGAL: Basically this is the  
3 correspondence file on file with the County, which is part  
4 of the subdivision. These are the only letters that go  
5 with all those plans. There are literally 26 plans that  
6 were filed with these letters and these letters are part  
7 of the zoning file that the County preserves.

8 They're relevant to issues concerning the  
9 zoning of this property and in addition to what Mr.  
10 Goodman just said about the fact that explains why they  
11 didn't actually do Alternate B, these letters also  
12 establish that there's a proffer of all open space of the  
13 County, so the County owns all the land except --

14 MR. SNYDER: Your Honor, this also contains  
15 correspondence to Ann Marr, which is not a party to this  
16 action. It contains correspondence from --

17 MR. GOGAL: This is the zoning file. It's  
18 going to have the developer's correspondence and it has  
19 the proffers in it, Your Honor. These proffers are  
20 binding on the developer when they're part of the zoning  
21 file.

22 THE COURT: But what difference does it make?

23 MR. GOGAL: The proffer is important because

743

1 basically all the land except for the lots is owned by  
2 Fairfax County now and with the exception of the cemetery,  
3 so our argument is the County owns everything but the  
4 quarter acre cemetery.

5 THE COURT: Again, two words are floating in  
6 my mind. So what?

7 MR. GOGAL: I'll tie it in. Because, Your  
8 Honor, once the Court recognizes that this out lot A does  
9 not represent the cemetery and there's no evidence that  
10 could possibly substantiate that this is the cemetery,  
11 then what we know is the cemetery is in the quarter acre  
12 of the southeast corner of partition lot 2.

13 This little sliver here belongs to Fairfax  
14 County, because it's open space that was proffered to the  
15 County and the County is not asserting any right to use  
16 the easement.

17 THE COURT: The sliver of out lot A that was  
18 the old 15 acre lot should be County land?

19 MR. GOGAL: Yes, Your Honor.

20 THE COURT: Then the County doesn't want an  
21 easement?

22 MR. GOGAL: Yes, that's right, Your Honor.  
23 That's why the easement doesn't have any purpose anymore.

744

1 It never was intended to serve the cemetery. The County  
2 has no use for it. That's why this case should be  
3 dismissed and that's why these proffers are relevant.

4 MR. GOODMAN: Your Honor, under 8.01-390, non-  
5 judicial records as evidence, copies of records of this  
6 Commonwealth that are double certified are admissible.

7 THE COURT: That includes political  
8 subdivisions of the Commonwealth?

9 MR. GOODMAN: Yes.

10 THE COURT: I'm not having trouble with the  
11 hearsay, it's the relevancy of it. I don't think we need  
12 to revisit every decision that was made in the development  
13 process of this area of Fairfax County.

14 MR. GOODMAN: If I may make a proffer, Your  
15 Honor, to sort of tie this up. You'll hear testimony from  
16 the developer how he went and met with Mr. Atkisson, what  
17 transpired between them and how he ultimately offered Mr.  
18 Atkisson access to the gravesite.

19 MR. SNYDER: I'm going to object. First of  
20 all, I think we're now talking settlement negotiations.

21 MR. GOODMAN: No.

22 MR. SNYDER: Secondly, what relevance does it  
23 have?

745



1 THE COURT: I'm going to admit 18  
2 provisionally on the theory that it's going to connect up  
3 at some point based on what Mr. Gogal said about his  
4 theory about this land now being Fairfax County land, that  
5 portion of out lot A which was originally the 15 acre  
6 parcel is County land and the County doesn't want the  
7 easement.

8 (The document heretofore marked,  
9 for identification, as Defendant's  
10 Exhibit No. 18, was received in  
11 evidence.)

12 THE COURT: What's next?

13 MR. GOODMAN: My next witness, Your Honor.

14 THE COURT: Let's take a fifteen minute  
15 recess. I forgot we started early today. We need to give  
16 our court reporter a rest. We'll start back at 3:30.

17 (Brief recess.)

18 THE COURT: Mr. Goodman, call your next  
19 witness, please.

20 MR. SNYDER: Your Honor, before he does that,  
21 if I could just bring to your attention, on your last  
22 ruling on Exhibit Number 18?

23 THE COURT: Yes, sir.

746

1 MR. SNYDER: The case of Smith v. Woodlawn  
2 Construction, which says that document -- basically stands  
3 for the proposition that documents that come in under the  
4 official documents exception to hearsay does not permit  
5 the introduction of opinion evidence contained in any such  
6 records.

7 THE COURT: I think that's true. If there are  
8 opinions in there they should be stricken. It's medical.  
9 This always comes up in medical records. You introduce a  
10 stack of medical records from the hospital and assuming  
11 they're properly authenticated, what was done in the  
12 factual statements in those records are admissible, but  
13 not the opinions of doctors, for example, and I think the  
14 same rule is going to apply to Exhibit 18.

15 If there's something specific that you want to  
16 rule on, some statement in there about whether it's  
17 opinion or not, let me know.

18 Mr. Gogal, are you going to be questioning the  
19 next witness?

20 MR. GOGAL: Your Honor, we're going to  
21 actually move into evidence Plaintiff's Exhibit 28 in lieu  
22 of calling Carlotta Atkisson, move in her deposition as a  
23 party in the case.

747

1 THE COURT: Is there any objection to my  
2 considering Mrs. Atkisson's deposition in lieu of her  
3 testimony?

4 MR. SNYDER: No, Your Honor.

5 THE COURT: It's admitted.

6 (The document heretofore marked,  
7 for identification, as Defendant's  
8 Exhibit No. 28, was received in  
9 evidence.)

10 MR. GOGAL: I had two exhibits, 30 and 31,  
11 Your Honor. I'm not going to move those into evidence.  
12 Much of that is material I don't need at this time. I'm  
13 not sure I'm going to need it, but in lieu of that I'd  
14 like to read into evidence portions of Mr. Atkisson's  
15 transcript from the previous trial as well as his  
16 deposition.

17 THE COURT: Is there any objection to it?

18 MR. SNYDER: I'm not sure about reading in the  
19 portions from the previous trial. I think the deposition,  
20 he's certainly entitled to use that --

21 THE COURT: Do you have a response to that  
22 about the previous -- the previous trial is this case.

23 MR. GOGAL: That's right, Your Honor, and it's

748

1 prior recorded testimony. There's absolutely hearsay  
2 exception for any party. I mean there's no -- he's a  
3 party. It's a party admission and it's contained in the  
4 things I had filed. He's got a copy of the transcript.  
5 It's not an issue of authenticity.

6 Your Honor, I would go ahead and read this  
7 into evidence.

8 THE COURT: All right.

9 MR. GOGAL: This is July 31, 1991, Wednesday,  
10 Page 112. The question was asked, "Mr. Atkisson, you  
11 testified that your grandfather, Thomas Adams, died  
12 without a will in 1941?"

13 "Yes.

14 "You are one of his heirs; correct?"

15 "No. My mother would have been his direct  
16 heir. I was not an heir legally speaking. I do not want  
17 to interpret the law for you, but I did not get anything  
18 out of it."

19 "You're still living in the house that was in  
20 your grandfather's house in 1941?"

21 "No." He says they left there in '68 and  
22 rented it out.

23 On Page 113, at the bottom, Line 17 -- Line

743



1 13. "When you came back after the war did you live in  
2 your grandfather's house?"

3 "Yes."

4 "How long did you stay there?"

5 "Until 1950."

6 Question: "The property stayed in the family  
7 until you sold it in 1978?"

8 Answer: "They sold it to me. I bought it,  
9 but they sold it, yes."

10 Question: "They sold it to you and you put  
11 this Hunter Mill Forest Subdivision together and you sold  
12 it; right?"

13 Answer: "Yes, but I did it with two other  
14 people, Miller and Ralston."

15 Question: "Miller and Ralston, they were your  
16 partners?"

17 Answer: "Yes. Miller did the zoning work,  
18 the legal work. I did not do any."

19 Then on Monday, December 4, 1995 we took Mr.  
20 Atkisson's deposition, Your Honor, and if you want to find  
21 the pages, it would be Exhibit 31, Page 136. I'm sorry I  
22 didn't do that before.

23 THE COURT: That's all right.

750

1 MR. GOGAL: This is Line 10. "As far as going  
2 back to that out lot A question, what instructions did you  
3 give your surveyors and engineers in terms of dealing with  
4 locating the cemetery?"

5 Answer: "Absolutely nothing, never even  
6 discussed it. Me and Harold did -- as a matter of fact,  
7 he is a gentleman, but he is one of these guys that you  
8 don't tell how to do something. I knew that. We get  
9 along all right, but I never told him anything."

10 Question: "What was his name?"

11 Answer: "Charles Johnson."

12 Question: "So he didn't ask your advice as to  
13 where the quarter acre should be drawn up or --"

14 Answer: "No. They don't do things like that.  
15 If I go to talk to him about hills and he has got a  
16 topographic map there, they look at it through two feet,  
17 the marks and things like that. He wouldn't talk to me  
18 about that."

19 Question: "How do you know it was a quarter  
20 acre?"

21 Answer: "I don't know. They look up deeds  
22 and go into deeds and all."

23 Question: "He was relying on the deeds?"

751

1 Answer: "I guess that he did."

2 Then on Page 145, Your Honor, at the top, Line  
3 1, question, "My question is, if it was described in the  
4 land records as a quarter acre in the southeast portion of  
5 lot 2, why did the surveyors draw it so that it encroaches  
6 on the 15 acres? Do you know of any reason why the  
7 surveyors drew it that way?"

8 Answer: "Country boy that he was, they are at  
9 home outside where you guys are at home in the city. I  
10 tell you, it's defined there. That's the only thing that  
11 I could suppose. I didn't tell them to do it."

12 Question: "So you don't know? That's the  
13 answer; no?"

14 Answer: I don't know at all."

15 Finally, Your Honor, on Page 159, Line 8, "You  
16 don't know of anybody specifically being buried over here  
17 on the 15 acres because you weren't around then?"

18 Answer: "No, there is nobody buried there."

19 THE COURT: Okay. Call your next witness,  
20 please.

21 MR. GOGAL: Your Honor, I just want to double  
22 check our exhibits. I believe we're finished. I believe  
23 the record should show that we have offered and admitted

752

1 into evidence Exhibits 1 through 7 --

2 THE COURT: Let's make sure of that.

3 MR. GOGAL: I'm sorry. 1 through 6, Your  
4 Honor. I'm sorry.

5 THE COURT: Is 1 admitted, Ms. Rhodes?

6 THE CLERK: Yes.

7 THE COURT: Including all the subparts, I take  
8 it. 2, was that admitted?

9 THE CLERK: Yes.

10 THE COURT: All the subparts?

11 THE CLERK: A, B, C, D, E, F.

12 THE COURT: Right. 3, was that admitted?

13 THE CLERK: Yes.

14 MR. GOODMAN: Excuse me, Your Honor. On  
15 Exhibit 2 there was a C and a C-1 also.

16 THE CLERK: Right.

17 THE COURT: 3 was admitted. 4, that was  
18 admitted?

19 THE CLERK: Yes.

20 THE COURT: 5 was admitted?

21 THE CLERK: Yes.

22 THE COURT: 6, was that admitted?

23 THE CLERK: Yes.

753



1 THE COURT: 6 was admitted.

2 MR. GOGAL: 7 and 8 are duplicative of other  
3 exhibits so we don't see any reason to put them in in  
4 addition.

5 THE COURT: 9 was admitted. 10 was admitted.  
6 11-A and B were not and C and D were. I've already ruled  
7 on those though. 12 was admitted.

8 MR. GOGAL: 13 is duplicative of AAA, so  
9 there's no reason to put it in.

10 THE COURT: 14 through 18 were admitted. 19,  
11 the photographs, we never saw those.

12 THE CLERK: 25, 27 and 28.

13 MR. GOGAL: Your Honor, we'd also ask to put  
14 26 in as the double certified Fairfax County tax records.

15 THE COURT: Any objection to 26 coming in?

16 MR. SNYDER: No, Your Honor.

17 THE COURT: It's admitted.

18 (The document heretofore marked,  
19 for identification, as Defendant's  
20 Exhibit No. 26, was received in  
21 evidence.)

22 MR. GOGAL: I would also like to move in the  
23 O'Brien's photographs, Your Honor.

754

1 THE COURT: 27 and 28 were admitted. 29, is  
2 that the photographs? Is that the O'Brien's swimming  
3 pool?

4 MR. GOGAL: Yes, Your Honor.

5 THE COURT: Any objection?

6 MR. SNYDER: There's no objection.

7 THE COURT: They're admitted.

8 (The photographs heretofore  
9 marked, for identification, as  
10 Defendant's Exhibit No. 29, were  
11 received in evidence.)

12 THE COURT: That's all that was admitted. Did  
13 yo want any of these other exhibits admitted?

14 MR. GOGAL: Carlotta's Exhibit 28, is that  
15 admitted?

16 THE COURT: Yes.

17 MR. GOGAL: That's it, Your Honor.

18 THE COURT: The Defendants rest?

19 MR. GOODMAN: Yes, we rest, Your Honor.

20 THE COURT: Mr. Gogal, you rest on behalf of  
21 the O'Briens?

22 MR. GOGAL: Yes, Your Honor. The Defendant's  
23 Intervenors rest.

755

1 THE COURT: Any rebuttal testimony?

2 MR. SNYDER: Your Honor, I would ask, since I  
3 believe the rebuttal testimony is going to be very brief,  
4 if we could have about five or ten minutes so we can get  
5 it a little quicker.

6 THE COURT: Certainly. I'll take a ten minute  
7 recess and we'll start back at 4:00 o'clock.

8 (Brief recess.)

9 THE COURT: Any rebuttal evidence, Mr. Snyder?

10 MR. SNYDER: Yes, briefly, Your Honor. I call  
11 Mr. Atkisson.

12 Whereupon,

13 GEORGE T. ATKISSON,  
14 Plaintiff, was recalled for examination by counsel on his  
15 own behalf, and, after having been previously duly sworn,  
16 was examined and testified further, as follows:

17 DIRECT EXAMINATION

18 BY MR. SNYDER:

19 Q Mr. Atkisson, let me show what's been  
20 previously marked as Defendant's Exhibit Number 16.

21 (Mr. Snyder handed the document to the  
22 Witness.)

23 A Yes, sir.

756

1 Q Do you know whether or not that particular  
2 plan was ever approved?

3 A No, it was not.

4 Q Can you tell me, based upon your involvement  
5 in the Hunter Mill Forest Partnership, why, if at all, a  
6 road was not built such as it's reflected there down to  
7 the cemetery?

8 A The reason was that it was based on the  
9 assumption that this land -- Pritchard & Trotter, which  
10 was Wendover II, I guess, would be bought, acquired by  
11 parties in the zoning of the Hunter Mill Forest, but they  
12 did not sell it.

13 Q While we're on that subject, do you know  
14 whether or not at the time that Exhibit 16 was created and  
15 the time that you were working with Harold Miller in  
16 regards to the Hunter Mill Forest Subdivision, do you know  
17 if Mr. Miller was involved in a similar project with other  
18 individuals?

19 A Yes; at least two or three with Bob Elfondry.

20 Q Did you ever meet with the surveyors that  
21 surveyed the Hunter Mill Forest Subdivision?

22 A You mean at the site?

23 Q Any place. Did you ever meet with them?

757



1 A The people that actually did it, no.

2 Q What about the people in charge of the  
3 survey?

4 A I met with them from time to time.

5 Q Did you tell the person in charge of the  
6 surveyors that there was a cemetery located in the general  
7 area of point G?

8 A Yes.

9 Q Did you tell that individual or anybody else -  
10 -

11 MR. GOGAL: Your Honor, I object. This is  
12 leading.

13 THE COURT: I sustain the objection to  
14 leading.

15 MR. SNYDER: Should we rephrase the last  
16 question?

17 THE COURT: I think the last question can  
18 stand, but hence forward if you would ask open ended  
19 questions.

20 MR. SNYDER: All right.

21 BY MR. SNYDER:

22 Q Did there ever come a time where you got an  
23 opportunity to discuss with the surveyors the exact

758

1 location of the cemetery?

2 MR. GOGAL: Same objection.

3 THE COURT: It's still leading. I sustain the  
4 objection.

5 BY MR. SNYDER:

6 Q Did you ever have an opportunity to discuss  
7 with the surveyors --

8 MR. GOGAL: Same objection, Your Honor.

9 THE COURT: What did you say to the surveyors  
10 about the cemetery?

11 BY MR. SNYDER:

12 Q What did you say to the surveyors about the  
13 cemetery?

14 THE COURT: What, if anything, I guess.

15 BY MR. SNYDER:

16 Q If anything?

17 A This cemetery, I simply said there was a  
18 cemetery up there. We were required by law to plot it out  
19 in any subdivision -- but you have to do that. Anybody  
20 knows that.

21 Q Did you say anything other than that?

22 A No.

23 Q Let me refer you to Exhibit 11-D. I believe

759

1 it's in the exhibit book in front of you.

2 A All right. I have it.

3 Q Did you have an opportunity as a child or when  
4 you were living on the property -- strike that.

5 Do you have an opinion as to --

6 MR. GOGAL: I'm not sure -- opinion -- I'm not  
7 sure if he's leading -- give opinions. If it's a fact  
8 witness, he's going to qualify him as an expert, but he's  
9 not allowed to give opinions.

10 THE COURT: The only thing I could think of  
11 that would finish that sentence that would be admissible  
12 would be do you have an opinion of the value of the  
13 property, for example, which an owner in Virginia can  
14 testify to, but otherwise he's not an expert witness.

15 MR. SNYDER: I think he's entitled to say  
16 whether or not this box that's 30 by 45 feet that's marked  
17 here is smaller than the area or how it reflects to the  
18 area that he maintained as part of the cemetery.

19 THE COURT: That's fine. I think you need to  
20 rephrase your introduction to that question.

21 MR. GOGAL: I'd like to just -- objection for  
22 the record to Mr. Atkisson testifying to anything about  
23 the location of the cemetery that's in -- Langman case.

760

1 I believe you have to first show an ambiguity  
2 in the 1896 deed and there's no ambiguity. In the absence  
3 of such ambiguity, Mr. Atkisson cannot relocate that  
4 cemetery and it's inadmissible for this Court to receive  
5 evidence as to the location from Mr. Atkisson.

6 THE COURT: I overrule the objection. He can  
7 testify as to the area that he maintained. Whether or not  
8 that's the cemetery or not is a whole other question.

9 MR. SNYDER: I understand that.

10 BY MR. SNYDER:

11 Q Would you tell me whether or not the box that  
12 is marked as 30 feet by 45 feet on Exhibit 11-D is -- or  
13 can you specify -- can you tell me whether or not this box  
14 has any relation to the area that you maintained as the  
15 cemetery?

16 A No, and it doesn't include all the gravestones  
17 that were there on the west, northwestern part of his  
18 square and on the southern end of it. Great-grandfather  
19 Nicholas Saunders was buried right there --

20 MR. GOGAL: I'm going to object, Your Honor.  
21 I can tell Your Honor, we have a stipulation that he does  
22 not know where any particular people are buried and that  
23 is going outside the stipulation.

761



1 THE COURT: Let's take a look at the  
2 stipulation. Which stipulation are you talking about?

3 MR. GOGAL: Your Honor, actually I would --  
4 it's actually discovery. I would point to the discovery  
5 that we received in the case. I'll leave it for cross-  
6 examination.

7 THE COURT: All right.

8 MR. GOGAL: But I would like to just interpose  
9 an objection. I don't think he's qualified. He's not  
10 surveyed the property. I don't think he's qualified to  
11 analyze the survey in relation to any particular physical  
12 features.

13 THE COURT: As I recall in my pre-trial ruling  
14 on the motion in limine, he could testify from his  
15 recollection if he knew where landmarks were, for example.  
16 He couldn't testify as to hearsay testimony, but if it's  
17 all recollection, he remembers the two gate posts, for  
18 example, where they were located, he could have testified  
19 to that. I think this is in the same vein as that.

20 You were starting to say that doesn't include  
21 all of the gravestones that were there and what else were  
22 you going to say?  
23

762

1 THE WITNESS: If I was going to say anything,  
2 I'm afraid it's entirely skipped my mind.

3 THE COURT: Go ahead and rephrase your  
4 question, if you would, Mr. Snyder.

5 BY MR. SNYDER:

6 Q Can you tell me whether or not this box that's  
7 marked on Exhibit 11-D as 30 by 45 feet has any relation  
8 to the area that you maintained as a cemetery?

9 A It's part of it, but certainly not -- it's  
10 about one-third of it maybe -- no, it's not even that.  
11 It's less than a third of the area we maintained.

12 Q What areas, if it's not included --

13 A We maintained all the way from 50 feet --  
14 about 50 feet from point G going west to 53, going east --  
15 we maintained pretty much the way it's plotted out there  
16 now. That's the way I remember maintaining it and in  
17 maintaining it, I mean to say that's preserved, too.

18 In other words, we did not plow it nor disturb  
19 it if that's what you meant.

20 MR. SNYDER: I have no further questions.

21 THE COURT: Cross-examination.  
22  
23

763

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

CROSS-EXAMINATION

BY MR. GOGAL:

Q Mr. Atkisson, you don't know any particular person that's buried in this cemetery, do you?

A Do I know them or know of them?

Q No. I'm saying you don't know any particular person who is buried there. You know that there are nine people buried in the cemetery; isn't that correct?

A I am told there were nine. I have no proof that they were. I was not to bury them.

Q So you don't have any personal knowledge whether there are nine people there, but you and your aunt put a gravestone there listing nine people?

A Based on historical information that she and the other family members gave me.

Q You don't know if anybody other than the nine people on that gravestone -- two other people, historical or otherwise, that you have any knowledge of being buried there?

A I don't know of them, but I do not know that there are not either.

Q Of all the people that are buried -- listed on that modern gravestone in the burial plot, you do not know

764

1 exactly where any of them are buried?

2 A That's not correct.

3 Q I'm sorry?

4 A Certainly.

5 Q So you don't know where Grandfather Nicholas  
6 is buried?

7 A Only what I was told as a child and on up  
8 through.

9 MR. GOGAL: Strike that. He doesn't have any  
10 personal knowledge.

11 THE WITNESS: Historical knowledge is what --

12 BY MR. GOGAL:

13 Q I'd like to direct your attention -- if you  
14 look at Exhibit 31 on Page 52 --

15 THE COURT: I'm sorry?

16 MR. GOGAL: I'm sorry. Exhibit 31,  
17 Defendant's Exhibit 31, which is his deposition, Your  
18 Honor.

19 THE COURT: Page?

20 MR. GOGAL: Page 52, Line 12. I would just go  
21 ahead on and read in the record, Your Honor, the question  
22 I asked him.

23 "Of all of these people who are on this modern

765



1 gravestone at the burial plot that you know of, do you  
2 know exactly where any of them are buried?" The answer  
3 was no.

4 "So if I were to ask you to draw me a map  
5 showing where the people are buried, you would not be able  
6 to do that?"

7 "No, I would not be able to do that."

8 Now, continuing on Page 159 --

9 THE WITNESS: 159?

10 MR. GOGAL: Yes, Mr. Atkisson, Page 159 of the  
11 same Exhibit 31.

12 BY MR. GOGAL:

13 Q I asked you, "You don't know anybody  
14 specifically being buried over here on the 15 acres" --

15 A What line were you talking about? You got  
16 ahead of me.

17 Q I'm sorry. Line 8.

18 "You don't know of anybody specifically being  
19 buried over here," and that would be on the 15 acre parcel  
20 (indicating) because you went around that, and your answer  
21 was, "No, there's nobody buried there," isn't that  
22 correct?

23 A What correct?

766

1 Q That's what your testimony was? Let me ask  
2 you this question --

3 A -- my testimony today is.

4 Q Let me ask you a question. This is a plat  
5 that was prepared by Mr. Simpson --

6 THE COURT: What is that you're showing him?

7 MR. GOGAL: I'm just going to show him --

8 THE WITNESS: I can see it from back there.

9 THE COURT: Which exhibit? I'm just trying to  
10 have the record clear.

11 MR. GOGAL: It's actually AAA.

12 BY MR. GOGAL:

13 Q You're aware, are you not, that in the corner  
14 (indicating), and this would be the southeast corner of  
15 this out lot A cemetery?

16 A Yes.

17 Q That is the depressed area going down to a  
18 creek, is that not correct?

19 A No, absolutely not. There's no creek down  
20 there unless it's developed here in the last couple of  
21 minutes.

22 Q It's a hill going downhill? Isn't it a  
23 depressed area going downhill?

767

1           A       No. It slopes off --

2           Q       It slopes off downhill? It does not slope  
3 down?

4           A       If it slopes it's got to be going downhill or  
5 slope up.

6           Q       So there is a slope going downhill at that  
7 corner?

8           A       You mean where the brush pile the County put  
9 there, the brush pile the County -- is that where you're  
10 talking about?

11          Q       Mr. Atkisson, I'm talking about that corner --

12          A       Where the brush pile is.

13          Q       Where the 15 acre parcel is and that's a  
14 downhill slope, is that not?

15          A       Yeah, where the brush pile was, yeah, the  
16 County put there.

17               THE COURT: Any further questions?

18               MR. GOGAL: No, Your Honor.

19               THE COURT: Any redirect?

20               MR. SNYDER: No, Your Honor.

21               THE COURT: Thank you very much, Mr. Atkisson.  
22 You may rejoin Mr. Snyder.

23                               (The Witness was excused.)

763

1 MR. SNYDER: That's all for rebuttal, Your  
2 Honor.

3 THE COURT: All right. Any surrebuttal?

4 MR. GOGAL: No, Your Honor.

5 THE COURT: This is the point where I like to  
6 turn to the jury and say, ladies and gentlemen of the  
7 jury, you've now heard all of the evidence you're going to  
8 hear in this case, your decision must be unanimous.

9 Do we want to do closing arguments tonight or  
10 do you want to come back tomorrow?

11 MR. GOODMAN: Your Honor, we would prefer to  
12 renew our motion to strike and if you want to ponder it  
13 overnight, that's fine. We would like to come back and  
14 argue in the morning.

15 MR. GOGAL: I would also ask the Court, we did  
16 offer into evidence -- I believe it's Exhibit 28, which  
17 would have been Carlotta Atkisson's deposition?

18 THE COURT: Yes. I read that.

19 MR. GOGAL: You did read that already?

20 THE COURT: I did. I read it during the  
21 break. I would say it's not complete. Was that  
22 intentional on your part? There are a couple pages here  
23 that are missing.

769



1 MR. GOGAL: Yes, Your Honor. I just put in  
2 the portions that were relevant. We had asked her a lot  
3 about the information about heirs and things like that  
4 which were not relevant.

5 THE COURT: Yes. I meant to state that.  
6 During the break I read Carlotta Atkisson's deposition.

7 I understand you want to renew your motion to  
8 strike. Why don't we break for the evening and come back  
9 tomorrow morning? This will give me a chance to read a  
10 lot of these cases you've submitted and what I would like  
11 to do is rule tomorrow, if I can, rather than take it  
12 under advisement. Let's start at 10:00 o'clock. See you  
13 back tomorrow at 10:00 o'clock.

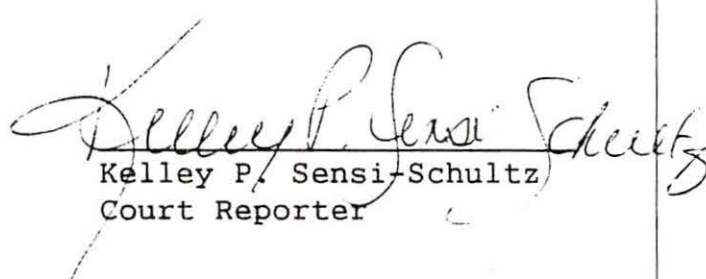
14 \* \* \* \* \*

15 (Whereupon, at approximately 4:23 o'clock  
16 p.m., the proceedings were recessed, to reconvene on  
17 Wednesday, September 18, 1996 at 10:00 o'clock a.m.)  
18  
19  
20  
21  
22  
23

770

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
CERTIFICATE OF COURT REPORTER

I, Kelley P. Sensi-Schultz, a Verbatim Reporter, do hereby certify that I took the stenographic notes of the foregoing proceedings and thereafter reduced the same to typewriting; that the foregoing is a true record of the testimony given by said witnesses; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were held; and, further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.

  
Kelley P. Sensi-Schultz  
Court Reporter

771