Circuit Court for Baltimore County
Case No. 03-C-08-008443

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1652

September Term, 2016

FALLS ROAD COMMUNITY ASSOCIATION

v.

BALTIMORE COUNTY, MARYLAND, ET AL.

Wright,
Kehoe,
Berger,
JJ.

Opinion by Kehoe, J.

Filed: May 9, 2018

*This is an unreported opinion, and it may not be cited in any paper, brief, motion or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. *See* Md. Rule 1-104.

The Falls Road Community Association and Dennis Sutton (collectively, the "Association") appeal from a judgment of the Circuit Court for Baltimore County, the Honorable Susan Souder presiding, that entered a permanent injunction against Oregon, LLC ("Oregon"), requiring it to remove a portion of the existing parking lot at the Oregon Grille Restaurant in Hunt Valley. The appellees are Oregon and Baltimore County, which is the owner of the land subject to the injunction.

Background

This is the fourth time that this case has come before an appellate court. The previous instances were: *Falls Road Community Association v. Baltimore County*, 203 Md. App. 425 (2012) (*Falls Road I*); *Falls Road Community Association, Inc. v. Baltimore County*, 437 Md. 115 (2014) (*Falls Road II*); and *Oregon, LLC v. Falls Road Community Association*, 1234 Sept. Term 2014, 2016 WL 382968 (filed January 29, 2016) (*Falls Road III*).

In *Falls Road II*, the Court of Appeals set out the long and tangled history of the administrative proceedings that gave rise to this action. 437 Md. at 121-134. For our purposes, the Court's narrative can be summarized as follows:

We are concerned about a 2.63 acre parcel (the "Property") that is located adjacent to the Oregon Ridge Nature Center, a County park and open space area consisting of about 1,200 acres. The County has owned the Property for many years and, until the 1990s, it

was the location of a country store. Oregon acquired the leasehold interest in 1985 and, in the mid-1990s, sought permission from the County to operate a restaurant on the Property. As part of this process, Oregon also sought zoning permission to expand the existing parking lot.

In 1994, Oregon entered into a covenant with the Valleys Planning Council, another community association opposing its application, that "the parking area at the restaurant would remain a non-paved surface such as crushed stone, 'unless otherwise required by law.'" The Falls Road Community Association was not a party to this agreement. 437 Md. at 124–25 n.8.[1]

In 1995, the Baltimore County Board of Appeals approved the expansion with several conditions, including one that "[t]he parking area shall consist of a non-paved surface such as stone or a similar permeable surface unless otherwise required by law. All parking will be contained within the leased area." Oregon and the County apparently interpreted the phrase "stone or a similar permeable surface" to include crushed stone, and the expanded parking lot was finished with that substance.

In 2002, Oregon sought permission from the County to change the surface of the parking lot from crushed stone to bituminous asphalt. This matter eventually reached the Board of Appeals, which, in a 2004 order, denied Oregon's request. Seeking permission

[1] We will cite to specific passages from *Falls Road II* only when we directly quote from it.

having failed, Oregon and the County evidently decided to try their hands at begging forgiveness. In 2006, a contractor "well known to County officials whose bill was paid by Oregon" not only paved the existing parking lot with asphalt but also expanded the size of the lot by 44 parking spaces. *Id.* at 126. Some or all of the additional spaces are not located on the Property, but rather on adjacent land owned by the County.

This brings us to the present litigation. In August, 2008, the Association filed this action in the Circuit Court for Baltimore County against Oregon and the County seeking, among other forms of relief: (1) a writ of administrative mandamus to require the County to initiate an enforcement action against Oregon to remove the asphalt pavement and restore the parking lot to its previous condition; (2) an injunction requiring Oregon to do the same; and (3) a declaratory judgment that (a) the asphalt pavement violated the administrative orders issued by the Board of Appeals; and (b) the Board of Appeals' order that the parking lot consist of an unpaved permeable surface was fully enforceable.

The trial court found that the asphalt paving violated the Board of Appeals' administrative orders, but concluded that issuing a declaratory judgment to that effect would not resolve the controversy. The court declined to grant a writ of mandamus or injunctive relief.[2]

[2] There were other issues before the trial court and our summary gives short shrift to the trial court's handling of them. This is no reflection on the trial court. Rather, those issues, and how the court resolved them, are not relevant to the questions before us.

The Association appealed, and this Court affirmed the judgment. *Falls Road I*, 203 Md. App. at 452. The Court of Appeals granted the Association's petition for certiorari and, ultimately, affirmed the trial court's judgment on the issue of administrative mandamus, but reversed and remanded the case on the issue of the declaratory and injunctive relief.

The Court of Appeals concluded that in addition to issuing a declaratory judgment, the trial court was authorized to grant "further relief 'if necessary or proper.'" *Falls Road II*, 437 Md. at 146. The Court noted that, while the controversy between the parties may not be resolvable through a declaratory judgment alone, the controversy might be resolved through a declaratory judgment that included appropriate ancillary relief. *Id.* at 151. Accordingly, the Court reversed and remanded the case to the trial court.

On remand, the trial court issued a declaratory judgment stating: "the November 2006 paving of the parking lot at the Oregon Grille violated the Board of Appeals' February 8, 1995 order that the parking lot remain a 'non-paved surface.'" Additionally, the court ordered the County to "remove the paved parking lot from its property at the Oregon Grille no later than July 1, 2016." The trial court also concluded that responsibility for requiring the 2006 repaving lay entirely with the County.

Oregon appealed. In *Falls Road III*, a panel of this Court summarized Oregon's contentions and its resolution of them:

> The injunction is defective . . . because it provides inadequate detail on the parties' respective responsibilities for returning the parking lot to a useable condition after the paving is removed, or which parties are fiscally responsible

> for the removal and replacement of the parking surface. Oregon also suggests that both its and the County's interests would be better served by an injunction that provides greater detail on each party's specific responsibilities for returning the parking lot to a state that complies with the Board of Appeals' orders.
>
> * * *
>
> It is clear to us, and we so hold, that any injunction directed to the County to remove the parking lot must also address the condition of the property after the County has performed its court-ordered obligations.
>
> * * *
>
> Oregon's concerns can be encapsulated into two broad categories: a) the condition in which the County will leave the parking lot after it has removed the paving, and b) whether the County will charge Oregon for the expense of removing and resurfacing the parking lot.
>
> [W]e believe equity is best served by both the County and Oregon knowing **before** the paving is removed what their respective responsibilities will be in resurfacing the parking lot. Oregon's second concern is grounded in the record and is thus not speculative. . . .
>
> IV. Conclusion
>
> No party has challenged any part of the circuit court's declaratory judgment except for the ancillary injunctive relief ordered by the court. Therefore, we affirm the judgment except for the injunction. Turning to the injunction, no party challenges the court's order that the County remove the parking lot. But, as we have explained, the terms of the injunction are incomplete. Therefore, *we vacate the injunction and remand* the case to the circuit court for further proceedings *consistent with this opinion.*

2016 WL 382968, at *3–5 (bold emphasis in original; italicized emphasis added).

The mandate in *Falls Road III* stated:

> **THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY IS AFFIRMED IN PART AND VACATED IN PART. THIS CASE IS REMANDED TO THE CIRCUIT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE DIVIDED BETWEEN OREGON, LLC AND THE FALLS ROAD COMMUNITY ASSOCIATION.**

Id. at *5.

During this second remand, the trial court decided that (1) the Association bore the burden of production and persuasion because it was the party that sought injunctive relief; (2) the portion of the parking area that was not located on the Property (about 4,700 square feet) was to be removed at Oregon's expense; (3) the part of the 1995 decision of the Board of Appeals requiring that "[t]he parking area shall consist of a non-paved surface such as stone or a similar permeable surface" was ambiguous; and (4) after considering evidence regarding various options for removal or replacement of the asphalt parking lot, the trial court was in "equipoise" regarding removal or repaving of the remainder of the parking lot. Consistent with its reasoning, the trial court entered an injunction requiring Oregon to remove the 4,700 square foot portion of the parking lot at its expense and denied all other relief.

The Association has appealed and presents four issues, which we have rephrased and reordered for purposes of analysis:

> 1. Did the trial court err by conducting the trial in a manner that exceeded the scope of this Court's remand?
>
> 2. Did the trial court err in finding, for the first time, that the Board of Appeals' 1995 order is ambiguous?
>
> 3. Did the trial court err by assigning the burdens of production and persuasion to the Association?
>
> 4. Did the trial court err in finding a state of evidential equipoise and failing to find evidence to rule on the remand issues?

We find no error by the trial court, and therefore will affirm its judgment.

The Standard of Review

An injunction is "'a writ framed according to the circumstances of the case commanding an act which the court regards as essential to justice, or restraining an act which it esteems contrary to equity and good conscience. Thus, injunctive relief is a preventative and protective remedy, aimed at future acts, and is not intended to redress past wrongs.'" *El Bey v. Moorish Science Temple of America*, 362 Md. 339, 353 (2001) (quoting *Maryland Commission on Human Relations v. Downey Communications*, 110 Md. App. 493, 515 (1996), and *Carroll County Ethics Commission v. Lennon*, 119 Md. App. 49, 58 (1998)).

Injunctions are a form of equitable relief, and we review a court's ultimate decision to grant or deny a request for one for abuse of discretion. *Id.* at 157. Courts have articulated what constitutes an "abuse of discretion" in various ways. For example, a court abuses its discretion when it engages in "an obvious error in the application of the principles of equity." *El Bey*, 362 Md. at 355. A discretionary ruling by a trial court will not be reversed by an appellate court simply because appellate judges believe that they "would not have made the same ruling." *North v. North*, 102 Md. App. 1, 14 (1994). Instead,

> The decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable. That kind of distance can arise in a number of ways, among which are that the ruling either does not logically follow from the findings upon which it supposedly rests or has no reasonable relationship to its announced objective.

Id.

The remand proceedings were tried before the trial court. Therefore, we will set aside the trial court's findings of fact only upon encountering clear error, giving due consideration to its ability to judge the credibility of witnesses. Md. Rule 8-131(c). In injunction actions, as in all other appeals, we exercise *de novo* review over questions of law. *State v. Falcon*, 451 Md. 138, 157–58 (2017).

1. The trial court did not exceed the scope of the remand.

The Association argues that the trial court committed several reversible errors because the court misinterpreted the scope of the remand in *Falls Road III*. In the Association's view, the trial court's misconception is the reason why the court, erroneously in the Association's view, (1) decided that the Association bore the burden of proof in the second remand proceeding; (2) concluded that the Board's 1995 requirement that the parking area must be covered by "a non-paved surface such as stone or a similar permeable surface" was ambiguous; and (3) received expert testimony as to the pros and cons of various sorts of paving materials typically used in parking lots.

In the Association's view, all of these decisions were wrong because the trial court fundamentally misunderstood the scope of the second remand. The Association asserts that the *Falls Road III* panel intended the trial court only to:

> *clarify* or *complete* the injunctive relief it had already granted in order to address two issues: (i) the condition in which the parking lot should be left after the paving was removed, and (ii) who should pay for the cost of this work.
>
> * * *

> Thus, this Court's remand did not authorize the [trial court] to revisit the declaratory relief already granted and authorized revisiting the injunctive relief already only to clarify or specify the terms of that relief.

(Emphasis in original).

These contentions are not persuasive because, as we will explain, the injunction entered by the trial court was consistent with the mandate in *Falls Road III.* We begin with a review of the pertinent aspects of the law of mandates, which is, in turn, an application of the doctrine of the law of the case to remand proceedings. In *Kearney v. Berger*, the Court explained:

> Once this Court has ruled upon a question properly presented on an appeal, or, if the ruling be contrary to a question that could have been raised and argued in that appeal on the then state of the record, as aforesaid, such a ruling becomes the law of the case and is binding on the litigants and [courts] alike, unless changed or modified after reargument, and neither the questions decided [nor] the ones that could have been raised and decided are available to be raised in a subsequent appeal.

416 Md. 628, 641 (2010) (quoting *Reier v. Department of Assessments*, 397 Md. 2, 21 (2007)).

The mandate rule is an application of the law of the case doctrine to courts. *Tu v. State*, 336 Md. 406, 416-17 (1994) ("'When a case is appealed and remanded, the decision of the appellate court establishes the law of the case, which must be followed by the trial court on remand.'" (quoting 1B J.W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.404[1], at II-3. (2d ed. 1993) (emphasis in MOORE))).

These principles are reflected in Md. Rule 8-604 (d)(1) (emphasis added):

> (d) Remand. (1) Generally. If the Court concludes that the substantial merits of a case will not be determined by affirming, reversing or modifying the judgment, or that justice will be served by permitting further proceedings, the Court may remand the case to a lower court. In the order remanding a case, the appellate court shall state the purpose for the remand. *The order of remand and the opinion upon which the order is based are conclusive as to the points decided*. Upon remand, the lower court shall conduct any further proceedings necessary to determine the action in accordance with the opinion and order of the appellate court.

As a necessary corollary, "'[w]hat remains within the power of decision of the [trial court] after remand depends . . . on the scope of the mandate.'" *Tu*, 336 Md. at 417 (quoting MOORE ¶ 0.404[10], at II-61).

We construe court orders, including appellate opinions, in the same manner as we interpret "other written documents and contracts." *Taylor v. Mandel*, 402 Md. 109, 125 (2007). Thus, "if the language of the order is clear and unambiguous, the court will give effect to its plain, ordinary, and usual meaning, taking into account the context in which it is used." *Id.*

The mandate in *Falls Road III* was unambiguous. The panel did not leave the injunction in place and remand the case to the trial court for it to "clarify or complete" its terms. Instead, the panel "vacate[ed] the injunction and remand[ed] the case to the circuit court for further proceedings consistent with this opinion." The legal effect of this mandate was to restore to the trial court the full scope of its discretion to fashion appropriate injunctive relief. To be sure, the court would not have abused its discretion simply by specifying who was to pay for the removal of the parking lot and how the ground was to be left. However, and to the point, the trial court did not abuse its

discretion by taking a step back to assess what precisely an injunction ordering the removal of the entire parking lot would accomplish in terms of benefits to the environment when weighed against the cost and disruption of removal and reconstruction.

2. The trial court did not err in apportioning the burden of proof to the Association.

At trial, the court assigned to the Association the burden of proof because the Association was the party seeking injunctive relief with regards to the paving of the lot. But for the Association's complaint, there would have been no hearing to determine the pavement issue, the court reasoned.

Before this Court, the Association contends that the trial court incorrectly assigned it this burden when it really should have been Oregon's burden to meet. It maintains that the issues before the court on the second remand were raised by Oregon in its motion to alter or amend the trial court's prior opinion and its appeal from the denial of that motion, rather than anything raised by the Association. Therefore, the Association concludes that it was for Oregon to meet the burden of proof regarding the condition of the lot.

This argument is predicated on the unspoken but necessary assumption that the *Falls Road III* mandate left the previous injunction in effect, subject only to further elaboration, and that the second remand to the trial court was merely to iron out additional details. We have already explained why the Association's premise is incorrect. Once the injunction was vacated, the Association returned to its previous position of claimant seeking relief,

specifically the removal of the pavement in the parking lot. The trial court correctly placed the burden of persuasion on the Association rather than on Oregon or the County.

3. The trial court did not err in concluding that the Board of Appeals' order was ambiguous.

Some additional information will be helpful in placing the Association's arguments in context.

At the heart of this protracted litigation is a 1995 order issued by the Baltimore County Board of Appeals. The Board of Appeals granted the special exception Oregon sought to use the Property as a restaurant, but the approval was subject to a number of restrictions. The restriction most relevant to this proceeding was that "[t]he parking area shall consist of a non-paved surface such as stone or a similar permeable surface unless otherwise required by law. All parking will be contained within the leased area."

In the proceedings after the second remand, the Association advocated for complete removal of the asphalt pavement in the parking lot and its replacement by a permeable surface. The parties introduced expert evidence about the pros and cons of various types of paving suitable for parking lots.[3] Additionally, the County's witness testified from

[3] As relevant to the issues on appeal, the expert witness called by the Association testified that crushed stone parking lot could be either permeable or impermeable, but that he would not opine as to permeability of Oregon's parking lot without a soil test. The County's expert stated that crushed stone parking surfaces are generally impermeable, and all of them become impermeable over time as repeated traffic compacts the stone. He also explained that a crushed stone paving surface is about as permeable as an asphalt surface, which is to say, not very permeable. Oregon's witness testified that crushed stone parking lots had to be impermeable to bear the weight of cars and trucks.

personal observation that the Oregon Grille's parking lot was impermeable before it was repaved in 2006: "I was out there when it was a stone parking lot one evening and it had rained. It was clearly impervious; there was water laying everywhere in the potholes."

In addressing this matter, the Association contended that the "non-paved" language in the Board's order was surplusage and that the "permeable" requirement that controlled. The trial court noted the ambiguity in the Board of Appeals order that gave rise to these seemingly inconsistent positions: "One fair reading is non-paved means non-paved. The second reading of non-paved surface means permeable, you say." In other words, the court identified a lack of clarity from the Board of Appeals about whether "non-paved" or "permeable" was the operative term, or whether both applied.

The trial court also identified some uncertainty about what exact areas were subject to the Board of Appeals' requirement. The order refers to the "parking area," but the court noted that the Association used the term "parking lot" in papers filed with the court. Additionally, the court indicated that it found the term to be imprecise: Did it encompass all of the pavement on the property, including areas used for ingress, egress, and deliveries to the restaurant? Or did "parking area" refer only to the actual parking spaces?

The Association asserts that the trial court erred in only now, on the second remand, finding the Board of Appeals' order to be ambiguous. This argument is not persuasive. There is nothing in the holdings and mandates of *Falls Road II* or *Falls Road III* that addresses the meaning of the 1995 order. (Nor, for that matter, is there anything else in either opinion to support such a conclusion.)

As to the merits of the Association argument, we see no reason why we should treat the Board's order differently from a court decision when deciding if it is ambiguous. Accordingly, whether the administrative order is ambiguous is a question of law. *See Taylor*, 402 Md. at 125–26.

We agree with the trial court that the 1995 administrative order is ambiguous in one critical respect. The Board's order identified three permissible surfaces for the parking lot on the Property: "non-paved," which can only mean no pavement at all; "stone," that is, crushed stone; and a "similar permeable surface." While their testimony differed in some details, none of the expert witnesses testified that a crushed stone parking lot was as permeable as unpaved ground. The Association argues that the controlling term in the Board's order is "permeable," but actually the Board used the phrase "similarly permeable." Similar to what? A permeable non-paved lot, or a stone-paved, impermeable lot?[4] The trial court did not err when it recognized that there is an inherent inconsistency in the Board's order.

Interpreting the 1995 order was not outside the scope of the second remand, as we had vacated the injunction and the trial court was free to reconsider the order and the various possibilities available to resolve this long-standing dispute. The ambiguity of the

[4] The ambiguity is not cleared up by the 1994 covenant between Oregon and the Valleys Planning Council because that covenant did not address permeability.

1995 order became clear when the trial court focused on it while fashioning a remedy, and the court did not err in acknowledging that fact.

4. The trial court did not err in finding itself in a state of equipoise.

During its ruling from the bench, the trial court stated:

> I find that my mind has been in equipoise and so I'm going to find against the party who had the burden of persuasion. I am not convinced that injunctive relief should be ordered and even if I were required to issue injunctive relief other than as to the extended lease area, my mind would be in equipoise as to what the language of the Board of Appeals decision means…. I think there are several possible interpretations and I could not conclude that one was more persuasive than another interpretation… As I said, I found the testimony of all of the witnesses credible – none of the testimony disagreed in any material respects. I do not find conclusive evidence from which to draw the conclusions that have been urged on the Court by various parties.

Therefore, the trial court declined to order that the entire parking lot be removed and replaced, as the Association had sought, because the court concluded that the Association had failed to meet the burden of persuasion on that issue.

The Association contends that the trial court erred in finding itself in a state of equipoise after considering the evidence. Rather, it states that there was more than sufficient relevant evidence for the court to rule on all of the issues before it, making the court's position unreasonable.

The Association's argument is unpersuasive. The Association has conflated the concepts of the burden of production with the burden of persuasion. In order to prevail in this case, the Association needed to *present* legally sufficient evidence in support of the relief it sought. It did so. But the Association was also required to *persuade* the court that,

in light of *all* of the evidence, and not simply its evidence, it should prevail. The Association failed to do so. Judge Moylan described the phenomenon of failure to persuade in *Starke v. Starke*, 134 Md. App. 663, 680 (2000):

> It is far easier to sustain as not clearly erroneous the decisional phenomenon of not being persuaded than it is to sustain the very different decisional phenomenon of being persuaded. Actually to be persuaded of something requires a requisite degree of certainty on the part of the fact finder (the use of a particular burden of persuasion) based on legally adequate evidentiary support (the satisfaction of a particular burden of production by the proponent). There are with reasonable frequency reversible errors in those regards. Mere non-persuasion, on the other hand, requires nothing but a state of honest doubt.

The grant or denial of an injunction involves a careful balancing of interests, and in this case, there were compelling arguments from all parties. That the trial court was unconvinced by the Association's arguments is not a basis for appellate relief.

Conclusion

The trial court was presented with no easy task when this case was remanded to it for a second time. In light of the ambiguity of the 1995 administrative order, and the evidence presented to it, the court's injunction was a practical and common-sense solution to a long-standing dispute. The Association's contentions, both procedural and substantive, do not persuade us that the trial court abused its discretion in the way that it resolved the dispute between the parties.

We have some additional observations by way of a coda. The decisions by Oregon and/or the County to repave and expand the parking lot in 2006 certainly do not commend themselves. In *Falls Road II*, the Court of Appeals clarified the law of

administrative exhaustion, mandamus, and declaratory relief in some important ways. At all times, the parties have been represented by learned, energetic, and thoroughly professional lawyers. Nonetheless, at its heart, this action is about, and has always been about, whether the Oregon Grille should have an asphalt or a crushed stone parking lot. The case has been actively litigated for nearly ten years—just about twice as long as it took the United States and its allies to defeat the Axis powers in the Second World War. At this point, all parties may legitimately withdraw from the field with honor.

THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY IS AFFIRMED. COSTS TO BE PAID BY APPELLANTS.