VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 29th day of October, 2020.

Present: All the Justices

Marble Technologies, Inc., et al., Appellants,

against Record No. 191131
Circuit Court No. CL18-1740

Steven M. Mallon, et al., Appellees.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Hampton.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that there is reversible error in the judgment of the circuit court.

In 2012, Stephen M. Mallon and several other landowners (collectively, the "landowners") brought a declaratory judgment action against Marble Technologies, Inc. and Sebastian Plucinski (collectively "MTI") seeking to establish the location of an express easement across MTI's properties as documented in a 1936 deed (the "first action"). Alternatively, the landowners asserted that they enjoyed an implied easement by necessity or an implied easement from existing use. After considering the matter, the circuit court ruled in favor of the landowners, finding that an express easement existed and the easement moved with the mean high water mark. The circuit court further ruled that, in light of the existence of the express easement, the landowners had no implied easements across MTI's properties.

MTI appealed the matter to this Court. In *Marble Techs., Inc. v. Mallon*, 290 Va. 27, 34 (2015) (hereafter, *Marble Tech. I*), the Court agreed that an express easement existed. However, contrary to the circuit court, the Court determined that the express easement "never moved from the mean high water line as it existed in 1936." *Id.* As a result, the Court reversed the judgment of the circuit court and entered final judgment in favor of MTI. *Id.* at 34-35.

In 2018, the landowners again filed a declaratory judgment action seeking to establish the existence of an implied easement by necessity and an implied easement based on prior use across

the MTI properties (the "second action"). MTI filed a plea in bar asserting the landowner's second action was barred by res judicata because the matters raised in it had already been raised and adjudicated in the first action. The landowners responded by asserting that there had been no final judgment on the merits with regard to the implied easements in the first action, as the circuit court's ruling was based on the existence of the express easement. The circuit court overruled the plea in bar.

After the circuit court made its ruling, MTI asked for a stay in the proceedings while it sought an interlocutory appeal. The landowners responded stating, "[w]e talked about this earlier. One way or another one of us was going to do it. I don't think we need an order staying it; I think it is going to happen." The landowners subsequently drafted an order overruling the plea in bar which contained language stating that the matter "shall be stayed if [MTI files] a timely Interlocutory Appeal of the Court's ruling." The order was endorsed by the landowners without any objections noted.

On June 7, 2019, MTI requested the circuit court certify its denial of the plea in bar for an interlocutory appeal. The landowners opposed MTI's request to certify the matter, asserting that they did not agree that it was in their best interests to seek an interlocutory appeal. After a hearing on the matter, the circuit court determined that the parties had agreed "that there would be an interlocutory appeal." The trial court found that both parties had contemplated that an interlocutory appeal would be filed, which implied that both parties had agreed that it was in their best interests to allow such an appeal to go forward.

In their assignment of cross-error, the landowners insist that the Court lacks jurisdiction over this matter because they did not agree that it was in their best interests to allow MTI to seek an interlocutory appeal. Under the version of Code § 8.01-670.1 in effect at the time this case was decided, a party seeking an interlocutory appeal was required to request that the court

> certify in writing that the order or decree involves a question of law as to which (i) there is substantial ground for difference of opinion, (ii) there is no clear, controlling precedent on point in the decisions of the Supreme Court of Virginia or the Court of Appeals of Virginia, (iii) determination of the issues will be dispositive of a material aspect of the proceeding currently pending before the court, and (iv) *the court and the parties agree it is in the parties' best interest to seek an interlocutory appeal.*

(Emphasis added.)[1]

This Court will not reverse a circuit court's findings of fact unless they are "plainly wrong or without evidence to support them." *Morris v. Mosby*, 227 Va. 517, 522 (1984). Here, the trial court found that the parties had agreed that it was in their best interests to seek an interlocutory appeal. Such a finding is neither plainly wrong nor without evidence to support it. Notably, it is undisputed that the landowners agreed to a stay if MTI sought an interlocutory appeal. If MTI was unable to seek an interlocutory appeal, such an agreement would be unnecessary. As an interlocutory appeal can only be granted if a circuit court certifies that the parties agree that it is in their best interests to seek such an appeal, the necessary implication that may be drawn from the landowners' agreement to a stay is that they agreed that an interlocutory appeal was in the parties' best interests. Accordingly, this Court has jurisdiction over this case.

In its appeal MTI argues that the circuit court erred in overruling its plea in bar because the landowners' claims are barred by res judicata. The concept of res judicata is embodied by Rule 1:6(a), which states in part:

> A party whose claim for relief arising from identified conduct, a transaction, or an occurrence, is decided on the merits by a final judgment, shall be forever barred from prosecuting any second or subsequent civil action against the same opposing party or parties on any claim or cause of action that arises from that same conduct, transaction or occurrence, whether or not the legal theory or rights asserted in the second or subsequent action were raised in the prior lawsuit, and regardless of the legal elements or the evidence upon which any claims in the prior proceeding depended, or the particular remedies sought.

Under Rule 1:6, a final decree is conclusive of every question raised and decided, as well as every claim properly belonging to the subject of the litigation which the parties might have raised in the first proceeding. *Funny Guy, LLC v. Lecego, LLC*, 293 Va. 135, 147 (2017).

Here, the landowners raised the issue of the implied easements in the first action. In a final order, the circuit court ruled that the existence of the express easements precluded the existence of the implied easements. On appeal, this Court explicitly found that an express

[1] Code § 8.01-670.1 has since been amended to remove the requirement that "the court and the parties agree it is in the parties' best interest to seek an interlocutory appeal. *See* 2020 Acts ch. 907.

easement existed under the 1936 deed[2] and entered a final order affirming the circuit court. *Marble Tech. I*, 290 Va. at 34-35. As all of the issues raised in the second action were addressed in the first action and that case was decided on the merits by a final judgment, any further action regarding the existence of such implied easements was barred by res judicata. Accordingly, the circuit court should have sustained MTI's plea in bar. The Court therefore reverses the circuit court's ruling and remands for further proceedings consistent with this order.

This order shall be certified to the Circuit Court for the City of Hampton.

A Copy,

Teste:

Clerk

[2] That it was subsequently extinguished as a result of erosion has no bearing on whether the express easement existed in 1936.