In The

Supreme Court of Virginia

RECORD NO. 160305

MOUNT ALDIE, LLC,

Appellant,

v.

LAND TRUST OF VIRGINIA, INC.,

Appellee.

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. The Trial Court erred by awarding Partial Summary Judgment on liability against Mt. Aldie by concluding that "clearing" the Indian Spring Trail of dead and diseased trees was creating a "new opening or clearing… in the forest"; was a misapplication of the plain language of the Conservation Easement; and was decided erroneously notwithstanding disputed material facts. See Mount Aldie's Corrected Reply Memorandum in Opposition to LTV's Motion for Summary Judgment, May 18, 2015, pp. 7-14 (JA 936-943); Mount Aldie's Memorandum in Support of Reconsideration of Partial Summary Judgment, May 22, 2015 (JA 1036-1042); Trial Transcript, June 10, 2015, pp. 14-45. (Assignment of Error 2)

B. The Trial Court erred as a matter of Virginia law by awarding expert witness fees, and staff costs of LTV employees as the plain language of the Conservation Easement did not provide for such a recovery, and no such recovery was requested in the Complaint. See Defendant's Memorandum in Opposition of Award of Attorney's Fees and Costs to Plaintiff, October 9, 2015, pp. 5-6 (JA 1381-1382); and Defendant's Surreply in further Opposition to an Award of Attorney's Fees and Costs to Plaintiff, October 15, 2015, pp.4-5. (JA 1620-1621) (Assignment of Error 4)

II. STATEMENT OF NATURE OF CASE AND MATERIAL PROCEEDINGS BELOW

This civil action arises from a dispute between the title owner of real property and the holder of a conservation easement encumbering the property. In August 2013, the Land Trust of Virginia, Inc. ("LTV") filed a Complaint to enforce its rights pursuant to a Deed of Gift of Easement dated of December 12, 2008 ("Conservation Easement") against the record title owner, Mount Aldie, LLC. ("Mt. Aldie"). In essence, the LTV Complaint

contended that Mt. Aldie had violated the terms of the Conservation Easement by creating a new 'clearing' in the heavily wooded area the Conservation Easement sought to protect. The LTV Complaint also stated a separate claim against Mt. Aldie's manager, John A. Andrews ("Andrews"), for the tort of trespass upon Mt. Aldie's own property.[1]

Prior to trial, the Circuit Court of Loudoun County ("Trial Court") granted Partial Summary Judgment as to liability in favor of LTV against Mt. Aldie, concluding that Mt. Aldie had violated the Conservation Easement. Specifically, the Trial Court found that Mt. Aldie violated Conservation Easement Article II, Section 5(i), which prohibited Mt. Aldie from creating a "new opening or clearing, and no new openings or clearings greater than 1,000 square feet, in the forest… unless approved in advance…" by the easement beneficiary, LTV. The Trial Court denied Cross-Motions for Summary Judgment filed by Mt. Aldie and Andrews which, in part, sought a ruling diametrically opposite to that of LTV; that the undisputed facts supported that no such violation of Article II, Section 5 occurred.

Prior to the Partial Summary Judgment ruling, Andrews demanded a jury trial on the tort claim consistent with his understanding of his right to a jury trial under Virginia's Constitution (*See* Article I, Section II, Const. of

[1] The tort claim is not apparent from a review of the Complaint, but was clarified by a subsequent Bill of Particulars and at a pretrial conference.

Va.). The Trial Court denied Andrews' Motion, but impaneled an advisory jury with respect to the determination of factual issues and as to Andrews' individual liability. The jury was additionally charged with determining the value of damages suffered by LTV.

Following a six-day trial the Trial Court instructed the advisory jury that liability against Mt. Aldie on the Conservation Easement had been pre-determined by the Trial Court. Based on this instruction, the advisory jury recommended a $25,000 judgment against Mt. Aldie and found against Andrews on the tort claim and recommended a $90,000 judgment against him.

After the trial concluded, the Trial Court acknowledged several motions by the litigants. First, the Trial Court granted Andrews' Motion to Vacate the Judgment against him individually and dismissed him from the case. *See* Order dated August 27, 2015 (JA 1370-1371). However, the Trial Court combined the recommended judgment of $90,000 against Andrews that had been dismissed with the $25,000 recommended judgment against Mt. Aldie, for a total verdict against Mt. Aldie of $115,000. (JA 1372-1375).

Second, the Trial Court then denied LTV's request for attorney fees (which exceeded $1.5 Million), but granted costs and expert witness fees in

the amount of $81,679.64, and LTV staff costs in the amount of $41,284.81 in addition to the recommended judgment. *See* October 22, 2015 Opinion Letter (JA 1670-1674) and December 1, 2015 Final Order. (JA 1718-1719)

Mt. Aldie appeals the award of Partial Summary Judgment awarded against it and seeks reversal with instruction. Mt. Aldie also seeks the reversal of the award of expert witness and LTV staff fees and costs.

III. STATEMENT OF FACTS

The 60 acres of forested mountain land at issue in this case was purchased by Mt. Aldie in May of 2009 JA 45-46. In December 2008, Mt. Aldie's predecessor in title conveyed the Conservation Easement (JA 23-44) to the Land Trust of Virginia, a charitable organization formed to hold conservation easements pursuant to the Virginia Conservation Easement Act ("VCEA").

The Little River forms a natural boundary for Mt. Aldie, where the 60 acres abuts the Village of Aldie. The Conservation Easement refers to the area within 100 feet of Little River as a "Riparian Buffer". (JA 31). One of the few undisputed facts at Summary Judgment was that the Indian Spring Trail had been in existence for a period of more than 200 years, and was located within the Riparian Buffer adjacent to Little River. *See* May 20, 2015 Transcript, p. 44, lines 7-11. (JA 993) The Indian Spring Trail begins

behind what is now the Aldie Volunteer Fire Department in the Village of Aldie, in Loudoun County, and follows Little River approximately 900 feet to the Indian Spring. The trail then follows Little River 200 to 300 feet beyond the Indian Spring, for a total distance of approximately 1,100-1,200 linear feet.

The Conservation Easement limited the property owner's use within the Riparian Buffer, but reserved the owner's right to maintain the property on the following terms:

> Within this buffer strip there shall be no buildings or other structures constructed, no storage of compost, manure, fertilizers, chemicals, machinery or equipment, and **no** cultivation or **other earth disturbing activity** conducted, **except as may be reasonably necessary for** (a) wetland or stream bank restoration and erosion control pursuant to a government permit, (b) fencing along or within the buffer area, (c) **removal of individual trees presenting a danger to persons or property and removal of diseased, dead or invasive trees, shrubs or plants** (as defined in the Virginia Department of Conservation and Recreation's publication: "Invasive Alien Plant Species of Virginia" or other, independent authoritative source), or (d) **creation and maintenance of foot or horse trails with unimproved surfaces**. Emphasis Added. *See Conservation Easement, Article II, Section 3(ii).* (JA 31).

The Conservation Easement also reserved to the owner of the property the right to conduct commercial and noncommercial forestry and forestry management on the entire 60 acres:

> Forest Management – Non Commercial. Grantor reserves the right to manage forested land by selective cutting, pruning, and

> planting for noncommercial purposes, **which may include forest management for the creation of trails and recreation areas**; **for safety of users** of the Property; for **control of active fire**, and **prevention of fire and disease**; for **prevention or removal of invasive species** (as defined in the Virginia Department of Conservation and Recreation's publication: "Invasive Alien Plan Species of Virginia," or other, independent, authoritative source); for restoration or enhancement of wildlife habitat and riparian areas (as to riparian areas, subject to the Terms and Conditions applicable to riparian buffer areas in Section 3 of this Conservation Easement); for household gardening and landscaping in the Building Envelope or the general maintenance of healthy wildlife habitat on the property. Emphasis Added.
> *See Conservation Easement, Article II, Section 5(i).* (JA 31-32).

Shortly after purchasing the property, Mt. Aldie provided LTV with notice of its intention to commence with commercial forestry. (JA 101). In fact, Mt. Aldie commenced harvesting timber in 2009 until the LTV filed the Complaint in this case.

The August 29, 2013 Complaint was filed following the course of events that began in May 2013. Specifically, on May 29, 2013, a representative of LTV conducted a "stewardship inspection", an event that happens annually for the LTV to confirm that the property owner is in compliance with the restrictions imposed by the Conservation Easement. John A. Andrews, Mt. Aldie's manager, attended the 2013 inspection with an LTV employee. (JA 118-119).

During the inspection, Andrews became aware of hundreds of windblown, dead and diseased trees that covered the Indian Spring Trail, and rendered it impassable. A "derecho" occurred in the summer of 2012, resulting in significant wind damage to trees on Mt. Aldie's property, which exacerbated damage to a rare hemlock forest on the rock cliffs above the Indian Spring Trail. See Mt. Aldie Memorandum in Support of Summary Judgment. (JA 519-54). Specifically, hemlock trees were dying as a result of an infestation of the hemlock woolly adelgid, an insect that is decimating hemlock forests throughout North America[2]. Days following the inspection, Andrews and his brother, Bud Andrews, used a mini excavator, bobcat and farm tractor to make the trail passable, and to remove the dead and diseased fallen trees as depicted in 14 photographs attached to Mt. Aldie's Summary Judgment Memorandum as Exhibit C(1-14). (JA 640-653). Indeed, and in fact, Andrews and his brother "cleared" debris and dead

[2] Mt. Aldie requested leave to file a counterclaim to permit the use of the Indian Spring Trail as means to access the dying Hemlock forest with equipment necessary to deploy the fertilizer and biologic means of fighting the wooly adelgid, a pest that was killing the Hemlock forest. On March 11, 2015 the Trial Court denied leave for the filing of a counterclaim, but expedited a separate Temporary Injunction proceeding (*Mount Aldie, LLC v. Land of Trust of Virginia, Inc.,* CL92871), that ultimately was resolved by agreement that the Indian Spring Trail could be used for the forest management purposes of treating the Hemlock wooly adelgid infestation. See Order Resolving Motion for Temporary Injunction, Exhibit F to LTV's Brief in Opposition to Defendant's Motion for Summary Judgment, (JA 923-926).

trees from the Indian Spring Trail for a distance of approximately 1,200 feet, at a width of between 5 and 6 feet. (JA 654-724). The essence of violation of the Conservation Easement alleged in the Complaint was that Mt. Aldie's earth disturbance in the Riparian Buffer was the construction of a "road", without notice and consent as required by the easement. (JA 1-22). The essence of Mt. Aldie's defense was that it repaired an existing trail, for the removal of dead and diseased trees as part of forest management, as expressly reserved in the Conservation Easement. (JA 23-44).

Just prior to trial in 2015, LTV filed a Motion for Summary Judgment. LTV's 20 page Memorandum in Support of Summary Judgment and the 285 pages of exhibits attached thereto addressed many topics. (JA 235-516). Only a single sentence was devoted to an alleged violation of Article 5(ii):

> Additionally, Mt. Aldie violated the Easement by failing to provide advance written notice of, or to get LTV's written approval for, it's clearing of an area greater than 1,000 square feet. (Exhibit E at 10, art. II § 5(i); Exhibit C at 19, No. 84; Exhibit D at 19, No. 84.
> *See Plaintiffs Memorandum in Support of Summary Judgment.* JA 230.

Exhibit E to the Summary Judgment Memorandum was a copy of the Conservation Easement. (JA 285-307). Exhibits C and D are Answers to

Requests for Admissions seeking admission that "LTV never provided Andrews or Mt. Aldie with permission to construct, replace or enlarge a road over and through the footpath that ran along the banks of Little River." (JA 239-261 and JA 368-371). Not a single exhibit at Summary Judgment identified even a single undisputed material fact about creating a "new opening or clearing of… greater than 1,000 square feet in the forest." The facts were unequivocally contested.

Mt. Aldie asserted repeatedly that the Indian Spring was an opening or clearing that existed for more than 200 years, and that improving an existing trail, or creating a new trail for forest management purposes, was a reserved right under the Conservation Easement. Mt. Aldie's Answer to the Complaint (JA 167-176), Memorandum in Support of Summary Judgment (JA 517-542), and Opposition to LTV's Motion for Summary Judgment (JA 930-948) all asserted expressly that "disturbing soil" to make the Indian Spring Trail passable for forest management, specifically removing dead and diseased trees from the Indian Spring Trail, was an expressly reserved right under multiple sections of the Conservation Easement.

The Trial Court granted Partial Summary Judgment on liability, explaining its conclusion during argument on Reconsideration as follows:

> THE COURT: Let me ask you this Mr. Campbell, in your memorandum in support of motion for summary judgment, page

> three, paragraph one, you said in May and June 2013, Mount Aldie and its agents used - - utilized a mini excavator bobcat and farm tractor to clear a trail - - clear, clear.
>
> Now, you're using the term clear, not open. Beginning at the northern most boundary of Mount Aldie property, property in quotes, continuing parallel to Little river for a distance of approximately 1,100 feet, Mount Aldie refers to the area cleared as the Indian Spring Trail.
>
> ***
>
> THE COURT: I am saying that I am going to apply what I believe to be a definition of clearings as the term is used which would encompass land disturbing activity that is described or really alluded to in the papers in that you have stated in your Motion for Summary Judgment that you filed in this case which I believe would constitute a recognition that activity was involved that involved land disturbing activity.
>
> And this doesn't involve the canopy and opening the canopy of 1,000 feet. I don't - - I don't read this covenant that way and I'll note your exception.
>
> *See June 10, 2015 Trial Transcript, p. 41, lines 6-17; p. 45, lines 2-13.*

The Court did not explain, or address, that "land disturbance" is expressly reserved for the purpose of forest management such as the creation of "trails and recreation areas…" and to remove "diseased, dead or invasive trees…" *See* Article II, Sections 3 and 5 of the Conservation Easement. While it is true that Mt. Aldie "admitted" that it disturbed the earth in the area of the Indian Spring Trail for forest management purposes, by clearing the trail of dead and fallen trees and obstructions,

material facts supported that Mt. Aldie was exercising reserved rights pursuant to the Conservation Easement.

A six day trial before an advisory jury commenced in June 2015. At the conclusion of the evidence, the jury was instructed that liability under the Conservation Easement had been predetermined against Mt. Aldie. The jury returned a verdict on liability and damages against Andrews for $90,000, and a verdict against Mount Aldie for $25,000.

The Trial Court later vacated the judgment against Andrews entirely, and dismissed him from the case. The Trial Court then added the $90,000 verdict vacated against Andrews to the $25,000 recommended by the advisory jury against Mt. Aldie, for a total judgment of $115,000. The Trial Court rejected LTV's claim for attorney fees in excess of $1.5 million, but granted expert witness fees and costs of $81,679.64, and $41,284.81 in staff expenses claimed by LTV.

IV. SUMMARY OF THE ARGUMENT

Conservation easements containing restrictions on the free use of land are subject to strict construction with all inferences and ambiguities towards the free use of property. *Wetlands Am. Trust, Inc. v. White Cloud Nine Ventures*, 782 S.E.2d 131 (2016). Conservation easements are also construed with an eye toward the entirety of the document, with disputed

provisions viewed in light of the entirety of the document. In ruling against Mt. Aldie at the Cross Motions for Partial Summary Judgment, the Trial Court both failed to adhere to both of these principles of law. As set forth herein, the facts presented by the parties tend to show that Mt. Aldie acted consistently with its reserved property rights in disturbing the soil for the maintenance and construction of trails for permitted forest management, removing diseased and dead trees, and for recreation. The Trial Court's interpretation of the Conservation Easement was contrary to the plain language contained within the Easement, as required by *PMA Capital Ins. Co. v. U.S. Airways*, *Inc.,* 271 Va. 352, 357-58, 626 S.E.2d 369, 372 (2006); *Envtl. Staffing Acquisition Corp. v. B & R Constr. Mgmt.*, 283 Va. 787, 793-794; 725 S.E.2d 550, 554; 2012 LEXIS 89; 2012 WL 1377178. The Trial Court simply did not consider that clearing the existing Indian Spring Trail of dead and diseased trees was consistent with a right reserved to the grantor under the Conservation Easement, without any obligation for approval by the easement holder. At a minimum, these facts were in dispute and not subject to summary judgment.

The Trial Court concluded that the phrase "new opening or clearing…in the forest" prohibited the removal or clearing of any debris from the Indian Spring Trail. *See* June 10, 2015 Trial Transcript, p. 41-45.

However, the term “clearing”, as utilized in the Conservation Easement, plainly refers to a “newly open” place “in the forest”, and not the act of removing dead trees and debris from the Indian Spring Trail. In addition, the term “clearing” in the Conservation Easement is clarified by the term “new opening,” which confirms that the action prohibited is creating a new “place” in the forest devoid of trees rather than removing dead trees from an existing trail.

Partial Summary Judgment was error because no undisputed material facts identified by LTV at Summary Judgment supported a conclusion that even a **single living tree** was “cleared... in the forest…” Rather, the bulk of the material facts support that Mt. Aldie’s actions were undertaken to maintain permitted trails both for forest management, including for the removal of dead and diseased trees, and for recreation. Pursuant to the well-settled standards, Mt. Aldie was entitled to all appropriate inferences regarding these facts. See *Fultz v. Delhaize Am., Inc.,* 278 Va. 84; 677 S.E.2d 272; 2009 Va. LEXIS 63; *Dickerson v. Fatehi*, 253 Va. 324, 327, 484 S.E.2d 880, 882 (1997); *Carson v. LeBlanc*, 245 Va. 135, 139-40, 427 S.E.2d 189, 192, 9 Va. Law Rep. 908 (1993).

Finally, it was error for the Trial Court to award $122,964.45 in expert witness fees and LTV staff costs because neither were specified in the

Conservation Easement, and neither were specifically claimed in the Complaint. *See Wetlands Am. Trust, Inc. v. White Cloud Nine Ventures*, *782* S.E.2d 131 (2016); *Dabney v. Augusta Mut. Ins. Co.*, 282 Va. 78, 86, 710 S.E.2d 726, 731 (2011).

V. STANDARD ON APPELLATE REVIEW

Under well-settled principles, this Honorable Court reviews awards of Summary Judgment *de novo* on appeal, applying the same standard a trial court must apply, accepting as true those inferences from the facts that are most favorable to the non-moving party, unless the inferences are forced, strained, or contrary to reason. In addition, Summary Judgment must be based upon undisputed material facts. (Assignment of Error 2) See *Fultz v. Delhaize Am.*, *Inc.,* 278 Va. 84; 677 S.E.2d 272; 2009 Va. LEXIS 63; *Dickerson v. Fatehi*, 253 Va. 324, 327, 484 S.E.2d 880, 882 (1997); *Carson v. LeBlanc*, 245 Va. 135, 139-40, 427 S.E.2d 189, 192, 9 Va. Law Rep. 908 (1993). In this context, this Court has repeatedly held that summary judgment is a drastic remedy, available only when there are no material facts genuinely in dispute. *Stockbridge v. Gemini Air Cargo, Inc*., 269 Va. 609, 618, 611 S.E.2d 600, 604 (2005); *Smith v. Smith*, 254 Va. 99, 103, 487 S.E.2d 212, 215 (1997); *Slone v. General Motors Corp*., 249 Va. 520, 522, 457 S.E.2d 51, 52 (1995).

The interpretation of Conservation Easements are also subject to *de novo* review. *See PMA Capital Ins. Co. v. U.S. Airways, Inc.*, 271 Va. 352, 357-58, 626 S.E.2d 369, 372 (2006); *Envtl. Staffing Acquisition Corp. v. B & R Constr. Mgmt.*, 283 Va. 787, 793-794; 725 S.E. 2d 550, 554; 2012 LEXIS 89; 2012 WL 1377178.

Finally, the recovery of expert witness fees and LTV staff costs, not provided for expressly in the Conservation Easement and Complaint, are also issues of law to be reviewed *de novo* on appeal. (Assignment of Error 4) *City of Chesapeake v. States Self-Insurers Risk Retention Group, Inc.*, 271 Va. 574, 578, 628 S.E.2d 539, 541 (2006); *Bentley Funding Group, L.L.C. v. SK&R Group, L.L.C.*, 269 Va. 315, 324, 609 S.E.2d 49, 53 (2005).

VI. ARGUMENT

1. THE TRIAL COURT ERRED BY AWARDING PARTIAL SUMMARY JUDGMENT ON THE FACTS PRESENTED AND IN UTILIZING AN IMPROPER CONSTRUCTION OF THE CONSERVATION EASEMENT. (Assignment of Error 2)

A. At Summary Judgment the Trial Court misapplied the Plain Language of the Conservation Easement.

The Trial Court awarded Partial Summary Judgment in favor of LTV on the specific issue of the alleged violation of notice and approval required pursuant to the following language in Article II, Section 5(i) of the Conservation Easement. This section is reproduced verbatim:

> **No more than one new opening or clearing**, and **no new opening or clearings, greater than 1000 square feet, in the forest** are permitted for noncommercial purposes, **unless approved in advance** and in writing by grantee as necessary to safeguard the health of the forest and acreage, to prevent or mitigate greater harm to the Conservation Values or the Property or to enhance wildlife habitat.[3] Emphasis added.

Applying the disputed facts to the Conservation Easement in a light most favorable to Mt. Aldie could not have produced a ruling of partial summary judgment in favor of LTV.

i. The Trial Court did not grant Mt. Aldie required inferences in relation to its permitted rights under the Conservation Easement.

The earth disturbance performed by Mt. Aldie occurred within 100 feet of the Little River in an area identified in Article III of the Conservation Easement as a "Riparian Buffer". The first paragraph in this article defines the limitations created by the Conservation Easement in this Riparian Buffer, the so-called "veto rights". The second paragraph of this Article identifies Mt. Aldie's reserved rights within this buffer:

> Within this buffer strip there shall be no buildings or other structures constructed, no storage of compost, manure, fertilizers, chemicals, machinery or equipment, and **no** cultivation or **other <u>earth disturbing</u> activity conducted, <u>except as may be reasonably necessary for</u>** (a) wetland or stream bank restoration and erosion control pursuant to a government permit, (b) fencing along or within the buffer area, (c) **<u>removal</u> of individual trees presenting a danger to**

[3] Article II, Section 5(ii) also prohibits clear cutting.

> **persons or property and removal of diseased, <u>dead</u> or invasive trees, shrubs or plants** (as defined in the Virginia Department of Conservation and Recreation's publication: "Invasive Alien Plant Species of Virginia" or other, independent authoritative source), or (d) **<u>creation</u> and <u>maintenance</u> of <u>foot</u> or <u>horse trails</u> with unimproved surfaces**. Emphasis added. (JA 31).

In granting Summary Judgment, the Trial Court did not address Mt. Aldie's reserved rights in Article II, Section 3 within the Riparian Buffer, nor the express rights reserved in Article II, Section 5, which permits the construction of trails for management of the forest and for recreation.

The plain and unambiguous language in the first sentence of Article II, Section 5(i) should have been considered at Summary Judgment:

> (i) Forest Management – Non Commercial. Grantor reserves **the right to manage forested land by** selective cutting, pruning, and planting for noncommercial purposes, which may include **forest management for the creation of trails and recreational areas**; for safety of users of the Property; for control of active fire, and prevention of fire and disease; for prevention or removal of invasive species (as defined in the Virginia Department of Conservation and Recreation's publication: ("Invasive Alien Plant Species of Virginia," or other, independent, authoritative source); for restoration of enhancement of wildlife habitat and riparian areas (as to riparian areas, subject to the Terms and Conditions applicable to riparian buffer areas in Section 3 of this Conservation Easement); for household gardening and landscaping in the Building Envelope or the general maintenance of healthy wildlife habitat for the Property. Emphasis added. (JA 31-32).

Mt. Aldie's use of the verb "clear" or "clearing" in pleadings and interrogatory answers stood for the concept of the removal of obstructions,

specifically dead trees, diseased trees and other debris blocking the pre-existing "clearing," the Indian Spring Trail.

Mt. Aldie was entitled to the inference at Summary Judgment that clearing the Indian Spring Trail, was the expressly permitted creation or maintenance of a trail, as provided for in the first sentence of Article II, Section 5(i) of the Conservation Easement. Mt. Aldie's reserved rights under the Conservation Easement, and the numerous disputed material facts related to these reserved rights, included, but were not limited to, the following:

- Removal of individual trees (Article II, Section 3(ii))
- Removal of diseased trees (Article II, Section 3(ii))
- Removal of dead trees (Article II, Section 3(ii))
- Creation of foot trails (Article II, Section 3(ii))
- Maintenance of foot trails (Article II, Section 3(ii))
- Creation of horse trails (Article II, Section 3(ii))
- Maintenance of horse trails (Article II, Section 3(ii))
- Repair of existing structures (Article II, Section 3(ii))
- Creation of trails for forest management (Article II, Section 5(i))
- Creation of recreation areas (forest management) (Article II, Section 5(i))

- Safety of uses (foreign management) (Article II, Section 5(i))
- Prevention of forest fires (Article II, Section 5(i))
- Prevention of forest disease (Article II, Section 5(i))
- Non-exclusive right to access and use area to be utilized for the Bull Run Mountain Trail (Article V, Section 2)

When considering summary judgment, a trial court "must adopt those inferences from the facts that are most favorable to the nonmoving party, unless those inferences are forced, strained, or contrary to reason." *Dickerson v. Fatehi*, 253 Va. 324, 327, 484 S.E.2d 880, 882 (1997). Summary judgment is not appropriate and shall not be granted if any material fact is genuinely in dispute. *Id.* at 327. Summary judgment applies to cases in which no trial is necessary because no evidence could affect the result. *General Acci. Fire & Life Assurance Corp. v. Cohen*, 203 Va. 810, 814, 127 S.E.2d 399 (1962).

Clearing of debris, dead and fallen trees from an existing trail, was not the creation of a "new clearing or opening", as defined by the Conservation Easement. Conversely, creating a new trail or maintaining the Indian Spring Trail to "manage the forest" by removing dead and fallen trees was expressly permitted by multiple reservations within the Conservation Easement. Granting Partial Summary Judgment was error.

ii. Material facts were disputed regarding a "new opening or clearing… in the forest."

No material facts[4] were presented at Summary Judgment that Mt. Aldie created a "new opening or clearing" in the forest. *See* LTV's Brief in Support of Summary Judgment dated May 1, 2015 (JA 209-513). No evidence was in the record at Summary Judgment that Mt. Aldie removed even a single living tree, much less created a "clearing" or "new opening" of more than 1,000 square feet. *See* LTV's May 1, 2015 Brief in Support of Plaintiff's Motion for Summary Judgment on Liability. (JA 209-513)

Summary Judgment in Virginia must be based upon undisputed facts established by the pleadings or party admissions. This standard has been established by this Court on numerous occasions.

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[4] This Court must consider the information before the Trial Court at Summary Judgment to determine whether or not error occurred. At Summary Judgment, LTV attached 21 exhibits to its Motion asserting them to be "undisputed facts." Four of these asserted "undisputed facts" were documents related to alleged zoning violation notices issued by Loudoun County. At Summary Judgment, Mt. Aldie asserted that the County was without jurisdiction to issue zoning violations, and that alleged violations were irrelevant to the Conservation Easement dispute with LTV. This assertion by Mt. Aldie was later confirmed by the Loudoun County Circuit Court in *Mount Aldie, LLC v. Loudoun Cnty. Bd. of Zoning Appeals*, 2016 Va. Cir. LEXIS 91 which vacated the zoning violation due to lack of subject matter jurisdiction, concluding: *"it is appropriate silviculture management for a property owner to remove dead and diseased fallen trees from his property as it may help to eliminate or remove some insect and disease problems that can occur in live standing trees. Additionally, the fire danger is less and the physical hazards of dead and fallen trees is removed."*

> A grant of summary judgment must be based upon undisputed facts established by pleadings, admissions in pleadings, and admissions made in answers to requests for admissions. Additionally, the trial court must consider inferences from the facts in the light most favorable to the non-moving party, unless the inferences are strained, forced or contrary to reason. *Carson v. LeBlanc*, 245 Va. 135, 139-40, 427 S.E.2d 189, 192, 9 Va. Law Rep. 908 (1993). *Andrews v. Ring*, 266 Va. 311; 585 S.E.2d 780 (2003).

The only facts asserted to be undisputed are attached to LTV's Summary Judgment Memorandum as Exhibits A through S. The only Summary Judgment exhibits that might theoretically contain party admissions are LTV Summary Judgment Exhibit H (JA 368-371) and Exhibit R (JA 489-498). Exhibit H (JA 368-371) are Responses to Requests for Admission. No response to admissions established that the Indian Spring Trail was not cleared for the purposes of forest management, or the removal of dead and diseased trees. No argument is submitted in the Summary Judgment Memorandum that Exhibit H contains admissions on this issue.

LTV Summary Judgment Exhibit R is Mt. Aldie's Answers to Interrogatories. Once again, a quick review of the Summary Judgment Memorandum makes clear that no admissions on this issue are contained in the interrogatory answers. The remaining 19 Summary Judgment

exhibits are not admissions, and do not establish undisputed material facts, as a matter of law.

The Summary Judgment transcript and the Reconsideration transcript also reveal the absence of undisputed material facts with respect to Mt. Aldie's reserved rights to earth disturbance for the purposes of forest management and recreation.

> [The Court]: And so I looked at your Motion to Reconsider. I went through all of these papers and clearly **there's sufficient allegations in the record** that this activity occurred over the distance of approximately 1,100 feet of this trail. So, I disagree with you. I think clearings has to be given its definition that is the dictionary definition of clearings. Emphasis added.
> *See June 10, 2015 Trial Transcript, p. 27, lines 17-22; p. 28, line 1.*
>
> MR. CAMPBELL: And we intend - - we would like the opportunity to make the full record that it's not the new opening or clearing of the forest under forestry management practices so that if you still disagree with me at the end of the hearing that full record is developed because if their measure of damages includes some calculation for missing trees, removed trees, aren't we going to hear some of that same evidence anyway?
> *See June 10, 2015 Trial Transcript, p. 29, lines 18-22; p. 30, lines 1-4.*
>
> So, that's why I'm asking you that I understand that's your interpretation, but I think I should - - my client should have the benefit at summary judgment of the inferences that can be achieved from the record and if the finder of fact found that the Indian Spring Trail was five to seven feet wide for the entire length of the 1,100 feet in January of 2009 before Mount Aldie purchased it and/or at June of 2011 when Ms. Collum walked it,

> then will this be a new opening or clearing of the forest that we accomplished in June of 2013?
>
> We think not because it would be an existing opening. And our evidence will be that we didn't create a new opening. That we created a new - - we repaired an existing opening in the forest, including two specific locations where large trees fell with gigantic root balls and created a channel for sediment to come off - - off the trail into the river.
> *See June 10, 2015 Trial Transcript, p. 30, lines 15-22; p. 31, lines 1-11.*

At Summary Judgment, the goal is to provide trial courts with authority to bring litigation to an end at an early stage when it clearly appears that one of the parties is entitled to judgment within the framework of the case as it is presented. *See Carwile v. Richmond Newspapers, Inc.*, 196 Va. 1, 82 S.E.2d 588 (1954). The purpose is to expedite litigation, but not to substitute a new method of trial where an issue of fact exists. *See id.* It is a drastic remedy that is disfavored in Virginia. *See e.g.*; *Slone v. General Motors Corp.*, 249 Va. 520, 457 S.E.2d 51 (1995)(citing *Turner v. Lotts*, 244 Va. 554, 422 S.E.2d 765 (1992)). Granting that drastic remedy here was error.

iii. It was error to consider a new opening or "clearing" as a verb rather than a noun at Summary Judgment.

The term "clearing" in the Conservation Easement is a gerund referring to a place "in the forest" where all trees have been removed

creating a "new opening." A gerund according to Merriam-Webster Dictionary is defined as follows:

> Gerund[5] – a noun in the form of the present participle of a verb (that is, ending in –ing) for exampling travelling in the sentence I preferred travelling alone.

At Reconsideration of Summary Judgment, Mt. Aldie argued that the gerund "clearing" as defined by the Oxford Dictionary is "an open space in a forest where there are no trees." The verb "clear" as defined in the Oxford Dictionary means to "free of obstructions or unwanted objects." The Indian Spring Trail that Mt. Aldie "cleared", was an **existing** rather than **new** opening or clearing.

After announcing Partial Summary Judgment on May 20, 2015, the Trial Court entertained Reconsideration of Summary Judgment on the first day of trial, June 10, 2016. During dialogue with counsel, the Court acknowledged that the term "clearing" which resulted in the grant of Summary Judgment was a "gerund" rather than a verb:

> Mr. Campbell: And so clearing in that respect is not a verb. Clearing is a noun and no new opening, or clearing in the conservation easement, the word clearing there is not a verb. The word clearing is a noun and that's the distinction...

[5] Stated differently, but with greater clarity, a gerund is the form of a word that is derived from a verb but that functions as a noun, in English ending in "ing." See Oxford English Dictionary.

The Court: Surely a gerund isn't it?

Mr. Campbell: I think that probably is a gerund rather than a noun, but the point is it's not a verb. *June 10, 2015 Trial Transcript p. 39, line 16 through p. 40, line 5.*

Notwithstanding the acknowledgement that the word "clearing" was a not a verb in the context of the Conservation Easement, the Trial Court applied the word as if it were:

The Court: And I quite frankly think it's for the Court to interpret this provision of the covenant and doing so I'm left with the inescapable conclusion that there's no ambiguity in the term clearings as it's used in this covenant in that in your own papers you have stated that you cleared an area 1,000 feet along the river and to me I'm not sure it's accrediting the litigation process by finding that by not getting the notice that constitutes a violation of the plain meaning of the easement.
June 10, 2015 Trial Transcript, p. 44, lines 8-17.

During this dialogue with the Trial Court, the Court disclosed that it relied upon the Webster's Dictionary definition of "clearing" and found that definition to be synonymous with "ground disturbance":

> Well the reason the Court rules the way it did is for the Court to construe the easement. The words of the easement and quite frankly I looked at Webster's Dictionary and clearings includes any land disturbing activity that might take place.
> *See June 10, 2015 Trial Transcript, page 27, lines 1-6.*

The Court did not provide a copy of the Webster's Dictionary relied upon, but a review of the most recent version of Webster's cannot be reconciled with the conclusion reached by the Court.

The most recently available Merriam-Webster's Dictionary (Merriam-Webster N.D. Web. 27 July, 2016) definition of the word "clearing" is as follows:

> Full Definition of CLEARING
> 1 : the act or process of making or becoming clear
> 2 : **a tract of land cleared of wood and brush**
> 3 : the settlement of accounts or exchange of financial instruments especially between banks. Emphasis added.

Mt. Aldie assumes that the Trial Court relied upon the second definition of "clearing": "a tract of land cleared of wood and brush." In order to understand the "Merriam Webster's" meaning, it is also important to understand the definition of the word "wood":

> Full Definition of WOOD
> 1 a : **dense growth of trees** usually greater in extent than a grove and smaller than a forest – often used in plural but singular or plural in construction
> b : WOODLAND
> 2 a : the hard fibrous substance consisting basically of xylem that makes up the greater part of the stems, branches, and roots of trees or shrubs beneath the bark and is found to a limited extent in herbaceous plants.

b : wood suitable or prepared for some use (as burning or building)
3 a : something made of wood
b : a golf club having a thick wooden head; *also*: a golf club having a similar head made of metal. Emphasis added.

Utilizing the first definition of "wood", it becomes evident that the dictionary definition of "clearing" is to remove a "dense growth of trees" in the forest.[6]

The Trial Court's conclusion that "clearing" in the Conservation Easement is synonymous with "land disturbance" cannot be reconciled with the plain language of the Conservation Easement, nor with any definition to be derived from Merriam's Webster's Dictionary. Consequently, it was error for the Trial Court to grant Summary Judgment.

iv. *Noscitur a sociis* confirms the misapplication of the word "clearing" at Summary Judgment.

In Virginia, a contract must be construed as written and as a whole, with all parts being harmonized whenever possible. *See Ward's Equip. v. New Holland N. Am.*, 254 Va. 379, 384 (1997). The doctrine of *noscitur a sociis* instructs trial courts, and appellate courts alike that "the meaning of the word takes color and expression from the purport of the entire phrase of

[6] The fictional "Hundred Acre Wood" created by A.A. Milne in the four volume Winnie the Pooh series, known to many by the Disney cartoon, is an example of such a dense growth of trees.

which it is a part and it must be read in harmony with its context." *See Andrews v. American Health and Life Insurance Company*, 236 Va. 221, 225; 372 S.E.2d 399, 401 (1988), quoting *Turner v. Commonwealth*, 226 Va. 456, 460; 309 S.E.2d 337, 339 (1983).

In this context the concept of "clearing" should have been reconciled with the words "new opening" in the same sentence. Rather than apply this construction, the Trial Court simply ignored any definition of "new opening." The language utilized in the Conservation Easement mandates that "clearing" is to be considered synonymous with "opening."

A return to Merriam-Webster's Dictionary as relied upon by the Trial Court is instructive on the issue of what is or what is not an "opening", as defined by the Conservation Easement:

> 1 a : an act or instance of making or becoming open
> b : an act or instance of beginning; COMMENCEMENT; *especially* : a formal and usually public event by which something new is put officially into operation
> 2 : something that is open: as
> a : BRACH, APERTURE (2) : an open width : SPAN
> b : **an area without trees or with scattered usually mature trees that occurs as a break in a forest**
> c : two pages that face one another in a book
> 3 : something that constitutes a beginning: as

a : a usually planned series of moves made at the beginning of a chess or checkers – compare ENGAME, MIDDLE GAME
b : a first performance
4 a : OCCASION, CHANCE
b : an opportunity for employment. Emphasis added.

Pursuant to Merriam-Webster, an "opening" as referenced in the Conservation Easement, refers to a "place", specifically "an area without trees or with scattered usually mature trees that occurs as a break in the forest."

"Where an agreement is complete on its face, is plain and unambiguous in its terms, the court is not at liberty to search for its meaning beyond the instrument itself." *Waynesboro v. BMC Props*., 255 Va. 75, 79, 496 S.E.2d 64 (1998). A disagreement between the parties as to the meaning of an easement's provision does not render it ambiguous; instead, ambiguity exists if it is objectively reasonable to interpret the language in different ways. See *Pocahontas Mining LLC v. Jewell Ridge Coal Corp.*, 263 Va. 169, 173, 556 S.E.2d 769 (2002).

When a provision is ambiguous, it will be construed against the party seeking to enforce it because valid covenants restricting the free use of land, although widely used, are not favored. See *Waynesboro* at 80. The burden is on the party seeking to enforce restrictions to demonstrate that

they are applicable to the acts of which he complains. See *Id*. (quoting *Riordan v. Hale*, 215 Va. 638, 641, 212 S.E.2d 65, 67 (1975); see also *Williams v. Brooks*, 238 Va. 224, 228, 383 S.E.2d 712 (1989)(restriction on mobile homes overruled because the restriction was ambiguous, and "restrictive covenants are not favored and are to be strictly construed against limitation on use"); see also *Scott v. Walker*, 274 Va. 209, 645 S.E.2d 278 (2007)(reversing enforcement of a restrictive covenant that alleged to prohibit short term rental of single-family dwelling because ambiguous restrictions must be construed against persons seeking to enforce them). Granting Summary Judgment construing "clearing" as a noun cannot be reconciled with the words "new opening", and must be reversed.

B. Conservation Easements are Disfavored, and Must Be Strictly and Narrowly Construed at Summary Judgment. (Assignment of Error 2)

Conservation easements are negative easements in gross. Negative easements are construed in favor of the free use of land and against the party attempting to enforce it. In *Wetlands Am. Trust* this Court confirmed this rule of construction:

> Under this common law principle, consistently recognized and applied by this Court for over a century, "[v]alid covenants restricting the free use of land, although widely used, are not favored and must be strictly construed and the burden is on the

> party seeking to enforce them to demonstrate that they are applicable to the acts of which he complains. *Friedberg*, 218 Va. at 665, 239 S.E.2d at 110 (citing *Riordan v. Hale*, 215 Va. 638, 641 212 S.E.2d 65,67 (1975); *Traylor v. Holloway*, 206 Va. 257, 259, 142 S.E.2d 521, 522-23 (1965). Accordingly, [s]ubstantial doubt or ambiguity is to be resolved against the restrictions and in favor of the free use of the property." Id. (citing *Schwarzschild*, 186 Va. at 1058, 45 S.E.2d at 155); see *Stevenson v. Spivey*, 132 Va. 115, 119, 110 S.E. 367, 368 (1922) (restrictive covenants "will not be aided or extended by implication"). *Wetlands* at 137.

Where substantial doubt or ambiguity arises from the language of the property restriction, or the right to demand that the owner of a servient tract refrain from certain uses of his own land (that is to say the assertion of <u>negative rights</u>) every instrument creating such servitude has been consistently interpreted by this Court in favor of the free use of land by the property owner. *See Schwarzschild v. Welborne*, 186 Va. 1052 (1947); *Waynesboro Vill.,* 255 Va. at 79; *Scott v. Walker*, 274 Va. 209 (2007); *Bain v. Bain*, 234 Va. 260 (1987); *Lovelace v. Orange County BZA*, 276 Va. 155 (2008); *Dart Drug Corp. v. Nicholakos*, 221 Va. 989 (1981). Accordingly, the Trial Court should have construed the Conservation Easement in favor of the free use of land by the grantor consistent with Mt. Aldie's reserved rights to construct and maintain trails for forest management and recreation. The record at Summary Judgment reveals that the Trial Court did not do so and Summary Judgment must be reversed.

2. EXPERT WITNESS FEES AND STAFF EXPENSES WERE NOT REQUESTED IN THE COMPLAINT AND EXCEEDED THE CONTRACT REMEDY. (Assignment of Error 4)

Virginia steadfastly adheres to the American Rule, requiring each litigant to pay his own attorney's fees. *See Russell County Dep't of Soc. Servs. v. O'Quinn*, 259 Va. 139, 142, 523 S.E.2d 492 (2000). In the absence of any contractual or statutory liability, attorneys' fees and expenses incurred by the plaintiff are not recoverable as an item of damages in action *ex contractu. Hiss v. Friedberg*, 201 Va. 572, 112 S.E.2d 871 (1960). Parties are free to shift the responsibility of attorney's fees to the losing party in contract disputes. However, the court must construe the plain meaning of an attorney's fees provision, and the fee-shifting terms must be clear and unambiguous. *See Bridgestone/Firestone v. Prince William Square*., 250 Va. 402, 463 S.E.2d 661 (1995). In its interpretation of a fee shifting provision, a court will not insert a term that is not expressly contained in the contract, whether the omission is by design or neglect. *See id*.

In the present case, the fees and costs provision, which is contained in Article III, Section 2 of the Conservation Easement, reads as follows:

> If the court determines that the Grantor failed to comply with this Easement, the Grantor shall reimburse the Grantee for any costs of enforcement, including costs of investigating, preventing, stopping and correcting the non-compliance,

> restoration costs, court costs and attorney's fees, in addition to any other payments ordered by such court.

This provision does not clearly and unambiguously allow LTV to recover expert witness fees or LTV staff costs. Two main categories of costs are recoverable under the Easement: "costs of enforcement" and "court costs and attorney's fees." "Expert witness fees" and "LTV staff costs" are not mentioned.

Simple contract construction shows that "costs of enforcement" is modified by the phrase "including costs of investigating, preventing, stopping and correcting the non-compliance." The contract then provides separately for reimbursement for "court costs and attorney's fees." The plain meaning of the provision contemplates recovery for two types of expenditures; those expenses involved in determining and stopping the source of any easement violation, which does not expressly include expert witness fees and LTV staff costs, and those expenses involved in any court action. The term "costs of enforcement" must be strictly construed. The absence of "expert witness" fees and LTV "staff costs" in the Conservation Easement makes them unrecoverable.

"Costs" do not traditionally include expert witness fees or salaries of a plaintiff's employee. The recovery of costs and fees did not exist at common law in Virginia. In recent years, Virginia has statutorily provided

for the recovery of costs to the prevailing party, paid by the opposing party. *See* Va. Code Ann. § 17.1-601. They include "only those costs essential for prosecution of the suit, such as filing fees or charges for service of process," but do not include attorney's fees, expert witness fees and employment expenses of a plaintiff's employee. *See Chacey v. Garvey*, 281 S.E.2d 357 (2015) (citing *Advanced Marine Enterprises, Inc. v. PRC, Inc.*, 256 Va. 106, 501 S.E.2d 148 (1998)). Additionally, expert fees were not paid at common law. Changes to the law in derogation of the common law must be strictly construed. *See Mitchem v. Counts*, 259 Va. 179, 186, 523 S.E.2d 246 (2000); *Chacey v. Garvey*, supra ("the authority for awarding costs and attorney's fees is in derogation of common law, and therefore, subject to strict interpretation"). Accordingly, a contract that includes a provision for the reimbursement costs must explicitly include expert witness fees and LTV staff costs, if they are to be recovered.

In *Chacey v. Garvey,* this Court reiterated that "costs" are limited to the costs necessary for the prosecution of a suit and do not include attorney's fees or expert witness fees.[7] In *Advanced Marine Enterprises, Inc.*, supra, the court determined that an award of expert witness fees was

[7] *Chacey* reiterates this Court's requirement that expert witness fees are not "costs" and must be expressly included in a contract or statute in order to be recoverable.

an abuse of discretion under a statute awarding "costs of suit, including a reasonable fee to plaintiff's counsel."

Finally, LTV failed to request expert witness fees and LTV staff costs in the Complaint. The Complaint seeks the following on the issue of costs:

> C. All of the costs of enforcement of the terms of the Conservation Easement, including the costs of investigating, preventing, stopping and correcting the non-compliance of Mount Aldie with the terms of the Conservation Easement; and
>
> D. An award to LTV of its reasonable attorneys' fees and all costs incurred in enforcing the terms of the Conservation Easement, as expressly authorized by Article III of the Conservation Easement; and
>
> E. An award to LTV of all other costs, fees, and/or expenses to which it may be entitled to recover under the applicable law, together with any other relief that the Court deems necessary or appropriate. (JA 21).

"In Virginia, a plaintiff cannot recover more than he sues for though he can recover less." *EER Sys. Corp. v. Armfield, Harrison & Thomas, Inc.*, 51 Va. Cir. 84 (1999)(sustaining demurrer for failure to include a specific amount in the *ad damnum* clause). This is because "a defendant is entitled to notice of the size and amount of the claim against her as she is entitled to notice of its nature." *Powell v. Sears*, *Roebuck & Co.*, *23*1 Va. 464, 469, 344 S.E.2d 916, 919 (1986). If a plaintiff fails to request adequate fees or damages in the complaint, it is the plaintiff's duty to move to amend the *ad damnum* clause to include any damages and fees sought.

For example, in *School Board of Newport News v. Comm.*, 279 Va. 460 (2010), when it became clear that the plaintiff would incur previously unforeseen fees, it amended its petition to include the additional fees and costs. This was the proper avenue for LTV to pursue prior to the conclusion of the litigation. However, as in *Coady v. Strategic Resources, Inc*., 258 Va. 12 (1999) LTV failed to request expert witness fees and LTV staff costs in its original pleadings and failed to move the court to amend the *ad damnum c*lause to include expert witness fees. As such, expert witness fees and LTV staff costs are precluded from being recovered, and the award of such fees and costs was error.

VII. CONCLUSION

For the reasons stated herein, Mount Aldie, LLC prays that this Honorable Court reverse the summary judgment ruling and the Final Order of the Trial Court and rule in favor of the Mount Aldie, LLC. Alternatively, the Mount Aldie, LLC Appellant prays that the partial summary judgment ruling be reversed and the Final Order vacated with instructions to the Trial Court for further hearing based upon the reversal of the partial summary judgment order. Mount Aldie also prays that the award of expert witness fees and costs be vacated; and for such further relief as the Court deems proper.

Respectfully submitted,

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CERTIFICATE PURSUANT TO RULE 5:26(h)

(a) Pursuant to Rule 5:26(h), I certify that, on this 3rd day of August, 2016, electronic copies of the Brief of Appellant and Appendix were filed, via VACES, and ten paper copies of the Brief of Appellant and three paper copies of the Appendix were hand-filed with the Clerk of this Court. On this same day, an electronic copy of the Brief of Appellant was served, via email, and electronic copies on CD of the Brief of Appellant and Appendix were served, via UPS Ground Transportation, upon:

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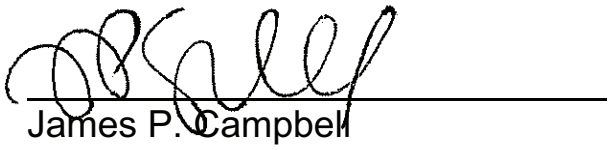
(b) The page count for the Brief, excluding cover, tables and certificate, is 36 pages, that is less than the 50 page limit, in length.

(c) Appellant's counsel on this appeal is privately retained.

(d) Counsel for Appellant desires to present oral argument to a panel of this Court.



James P. Campbell