In The

Supreme Court of Virginia

RECORD NO. 160305

MOUNT ALDIE, LLC,

Appellant,

v.

LAND TRUST OF VIRGINIA, INC.,

Appellee.

BRIEF OF APPELLEE

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I. STATEMENT OF THE CASE

Mount Aldie, LLC ("Mt. Aldie") obliterated a 200-year old footpath known as the "Indian Spring Trail" ("Trail") on its property in Loudoun County, Virginia. ("Property") This narrow historic footpath was protected by a Conservation Easement ("Easement") held by the Land Trust of Virginia, Inc., ("LTV") a §501(c)(3) non-profit Virginia Corporation. Finding that destruction of this footpath was a clear violation of the Easement, the Trial Court awarded LTV the sum of $115,000 in order to remediate the damage and expenses of $122,964.45 in enforcing the Easement. Mt. Aldie appealed from this judgment.

The Trial Court's finding of liability for destruction of the footpath came in response to LTV's Motion for Summary Judgment. Mt Aldie, in its appeal, challenges this ruling on the grounds that the Trial Court misinterpreted the Easement and ignored the existence of disputed material facts. Mt. Aldie also challenges the award of $95,283.20 of the expenses. Mt. Aldie is wrong in both of its challenges as the Trial Court's decision was correct.

Mt. Aldie admits that it "cleared" an area "5-6 feet" in width for a distance of "approximately1200 feet," but then makes the false claim that this was for the sole purpose of clearing dead and diseased trees which it

had a right to do under the terms of the Easement. Mt. Aldie makes a further claim that what it did was nothing more than "improving an existing trail," or "creating a new trail." *See* Opening Brief, pp.7-9.

These assertions are nothing more than a lawyer-driven effort by Mt. Aldie's new counsel to mask the truth in an effort to obtain reversal of the Summary Judgment. Moreover, they are the last in a series of three different explanations for having destroyed the Indian Spring Trail. Initially, Mt. Aldie represented that an "**equestrian**" road was being built to serve its Aldie Park development. Next, it claimed it was for a "**logging road.**" Finally, it claimed that the new "**road**" was for "removing dead and diseased trees" for "forest management purposes." The first two versions were advanced in emails sent in 2013 before LTV filed suit by Mt. Aldie's managing member, John A. Andrews,[1] when questioned by representatives from LTV, Loudoun County and Virginia state agencies and asked why the required prior written notice had not been given. The third and last explanation was advanced in Mr. Aldie's pleadings.

Although these conflicting explanations were raised in documents and pleadings referenced in and attached to the various motions and memoranda relating to the parties' Cross-Motions for Summary Judgment,

[1] John A. Andrews is generally referred to as "Jack" Andrews in documents and in emails as "Papajack2" and a real estate developer.

in not one of Mt. Aldie's filings or any of the arguments presented by its counsel at numerous hearings relating to these motions, did it dispute or explain the reasons for these versions. Notwithstanding these ever-changing explanations, the question of intent was irrelevant to the finding that Mt. Aldie violated the easement. Not only has Mt. Aldie mislead this Court by failing to disclose all its admissions of intent, it is now claiming a purpose for its prohibited conduct which it knows is not true and, in any case, irrelevant.

At the time Mt. Aldie was bulldozing the Indian Spring Trail, Andrews told adjacent property owners that Mt. Aldie's purpose was to open the Trail to equestrian use for its 525-acre "Aldie Park" development. (JA 236 and 238). In addition, in a July 4, 2013 Announcement, Andrews announced the "creation" of Aldie Park and the hosting of "River Walk along the Trail which is "now open to the public."(JA 145-147 and 1244). Thus, the motive for Mt. Aldie's decision to engage in these construction activities was not, as it now claims, for "forest management purposes," but for Aldie Park. In none of Mt. Aldie's filings or arguments has it offered any response to this claim as well.

Mt. Aldie states in its Opening Brief, pp.1 and 2, that LTV's Complaint "in essence" only alleged a violation of the Easement resulting from Mt.

Aldie "creating a new 'clearing' in the heavily wooded area." This is misleading and fails to describe the true nature and full extent of LTV's claims regarding Mt. Aldie's improper conduct which stated the following:

> Over the past several weeks, Mount Aldie, the current owner of the Property, and Andrews, Mount Aldie's managing agent and principal, have brought heavy machinery onto the Property and obliterated the historic primitive footpath ["Footpath"] that had run alongside the Little River in order to construct some sort of a road in its place. By doing this, they have bulldozed an area approximately 1,000 feet long within the Riparian Buffer zone of the easement, clearing all vegetation (including portions of a rare stand of Hemlock and Eastern Hardwood forest that is protected by the conservation easement), removing rock outcroppings with jackhammer equipment, excavating, re-grading and destroying protected steep slopes and sensitive soils, and sending soils, vegetation, tree debris and other sediment into the Little River.[2] *See* Complaint, "Notice of the Dispute", pp.1 and 2. (JA 1-2)

Although the Circuit Court granted Partial Summary Judgment in favor of LTV against Mt. Aldie for violating Article II, Section 5(i) of the Easement, this was but one of six distinct provisions upon which separate claims of summary judgment were requested in LTV's Brief in Support of Plaintiff's Motion for Summary Judgment. *See* JA 209-516 at 217-220.[3]

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[2] The Complaint sought temporary and permanent injunctive relief in an effort to prevent further damage to the Property and to ensure restoration to its condition before Mt. Aldie engaged in improper construction activities. As an alternative Request for Relief, in the event Mt. Aldie did not satisfactorily restore the Property, damages were requested for the full costs of completing the restoration. (JA 20-22).

[3] Five of these provisions were not addressed by the Trial Court but are relevant to this appeal and will be discussed beginning at p.38 of this Opposition Brief in the argument dealing with the Right Result For The Wrong Reason Doctrine.

During the May 20, 2015 hearing on the parties' Cross-Motions for Summary Judgment, LTV's counsel advised the Trial Court that he was "not going to repeat everything that's in the brief," but did present arguments addressing Mt. Aldie's failure to provide 30-day written notice and obtain approval as required under Article II, Section 5(i) Management of Forest – for "clearing an area greater than 1,000 square feet ("**1,000 Foot Requirement**") for non-commercial activity. *See* May 20, 2015 Hearing Transcript, p.7, line 2-5; p.10, lines 3-16; p.13, line 22 - p.14, line 4; p.42, line19 - p.43, line 20; p.45, line 18 - p.46, line 8. (JA 949-1035).

Mt. Aldie's counsel did not comment in any fashion to either LTV's counsel's arguments regarding the 1,000 Foot Requirement or to those of the Trial Judge when he and Mt. Aldie's counsel engaged in discussions after the decision had been announced to grant Partial Summary Judgment based on a breach of the 1000 Foot Requirement provision.[4] *See* May 20, 2015 Hearing Transcript and in particular p.59, line 5 – p.64, line 2. (JA 1008-1013).

The first time that Mt. Aldie provided an argument regarding the 1000 Foot Requirement Provision was in its Memorandum In Support Of Motion

[4] Similarly, Mt. Aldie's Corrected Reply Memorandum In Opposition to LTV's Motion For Summary Judgment failed to address the Article II, Section 5(i) provision dealing with the 1000 Foot Requirement. (JA 930-948).

For Reconsideration Of Partial Summary Judgment ("Motion for Reconsideration") filed two days after the Trial Court's decision granting Partial Summary Judgment. In that filing, the claim was made that the record before the Trial Court failed to establish "Creating A New Opening Or Clearing." (JA 1036-1042). LTV responded to Mt. Aldie's Motion for Reconsideration by filing an Opposition which provided numerous documents containing additional admissions, to which no objection was raised, and arguments refuting this new claim. (JA 1058-1121).

On June 10, 2015, before the start of the advisory jury trial, Mt. Aldie's counsel presented oral argument in support of its Motion for Reconsideration and stated "what we've admitted is that we've admitted that we **disturbed** more than 1,000 square feet of the soil" (emphasis added) but then argued "there is certainly no evidence of a new opening in the forest that would be undisputed and would justify summary judgment." (emphasis added). *See* June 10, 2015 Trial Transcript, p.19, lines 15-21.[5] This argument was rejected by the Trial Judge and the Motion was denied.

Although the Trial Court held the Easement's 1000 Foot Requirement had been breached during both the May 20, 2015 and June 10, 2015

[5] *See* Opposition Brief, pp.21 and 22 for further discussion on the Trial Court's reasons for denying the Motion. The entire trial transcript is included in the record.

hearings, the Trial Judge never ruled or offered any comment on LTV's claim that five other provisions identified and discussed in its Summary Judgment Motion had been breached, even though each constituted a separate basis for granting Partial Summary Judgment. *See* May 20, 2015 Hearing Transcript pp.1-85 and June 10, 2015 Trial Transcript, p.5, line 5 - p.45, line 9. (JA 949-1035).

During the trial addressing the issue of damage to the Trail resulting from Mt. Aldie's construction activities and Andrew's personal liability for trespass, Andrews presented fact and expert witness testimony and argument to support his claim that his activities were solely for removing dead and diseased trees and permitted by the Easement and consistent with the conservation values for the Property.[6] This is essentially the same claim Mt. Aldie makes at p.12 of its Opening Brief that "clearing the existing Indian Spring Trail of dead and diseased trees was consistent with the right reserved to the grantor under the Conservation Easement, without any obligation for approval by the easement holder."

One need only review closing arguments from opposing counsel to conclude that had Partial Summary Judgment not have been granted, the very same evidence and defenses would have been presented by Mt. Aldie

[6] The jury and Trial Judge also walked the entire 1100 foot Indian Spring Trail area where construction activities had occurred. (JA 1135-1138).

to a jury with the identical result; a rejection of the claim that Mt. Aldie's construction activities were for the purpose of removing dead and diseased trees and proper forest management consistent with good conservation values. *See* June 16, 2016 Trial Transcript, p.1615, line 7– p.1661, line 1. The following short excerpt from defense counsel's argument to the jury supports this conclusion:

> "So we suggest that you should accept as truthful what the Virginia Department of Forestry told you and what Jeremy Clem [Defendant's expert witness on the damages claim] told you; that what my client did in removing dead and diseased material is proper management of your property; and proper management of your property is consistent with the conservation values at Mount Aldie. That is the case." *See* Id. p.1646, lines 4-11.

Although the advisory jury awarded damages against Andrews on the trespass claim in the amount of $90,000 out of the total $115,000 it concluded would be required to remediate the damage to the Property, the Trial Court dismissed the claim against Andrews solely on the legal grounds that restoration related damages could only be awarded based on the Easement contract claim against Mt. Aldie and not the trespass tort claim against Andrews. *See* August 18, 2015 Hearing Transcript, p.5, line 10 – p.6, Line 16 and p.21, line 17 – p.22, line 6; (JA 1274-1291); (JA 1139-1141); (JA 1370 – 1371.) The Trial Court then reconciled the two advisory jury awards by combining them in the "aggregate sum of

$115,000" and granted judgment against Mt. Aldie for this amount. *See* August 18, 2015 Hearing Transcript, p.22, lines 1-17. (JA-1291).

II. STATEMENT OF THE FACTS

The Easement (JA 286-307) incorporated by reference, a Stewardship Documentation Report ("Report") (JA 309-362) relating to the 60 acres of forested land purchased by Mt. Aldie. (JA 290). The Report contained in its Appendix H, 29 photographs taken on October 28, 2008 of the Property (JA 338-367), several of which are noted as depicting the "forested trail along bank of Little River" and "rock outcropping in a steep sloped area of the Property." (JA 1810-1811) These few photographs are critical to this Appeal as they accurately represent the condition of the 200 year old "primitive footpath for pedestrian travel only" ("Footpath"), also referred to as the "Bull Run Mountain Trail" or "Mill to Mill Trail" in the Easement, which ran along the edge of the property adjacent to the Little River within a 100 foot area referred to as a "Riparian Buffer." *See* Easement at pp. 9 and 12; (JA 294 and 297). The Footpath remained substantially unchanged from the date of the photographs until Mt. Aldie commenced earth removal activities in or about June, 2013. Photographs

taken June 14, 2013 by LTV show how these activities by Mt. Aldie had obliterated the Footpath. (JA 1355-1366, PX-42)[7]

Jack Andrews, Mt. Aldie's managing member, had actual knowledge that it was protected by the Easement which granted LTV the right to construct and maintain the Indian Spring Trail. Andrews - and therefore Mt. Aldie - further knew that the Easement required advance written notice to, and prior written approval from, LTV before engaging in **road construction** or other **earth-disturbing** activities in the area of the Riparian Buffer where the Trail was located.

In June 2009, Mt. Aldie requested such approval to construct a logging road on the Property in an area outside of the Riparian Buffer. (JA 101-110, 381-389 and 1353). Four years later, in June and July, 2013, without any form of notice to LTV, and without obtaining LTV's prior written approval, Andrews, along with other Mt. Aldie representatives, drove heavy, mechanized equipment onto the Footpath and proceeded to obliterate it by excavating and clearing a **road** approximately 5 to 10 feet or more in width straight through the protected 100-foot, steep-sloped and

[7] Comparing the 2008 photographs of the Footpath (JA 1810-1811) with those taken in June, 2013 (JA 1355-1366) which show dramatic changes is sufficient evidence alone to support the Trial Court's decision granting Partial Summary Judgment.

wooded Riparian Buffer.[8] (JA 640-653, 654-724 and 1818-1831).This earth disturbing road construction activity was performed without regard to LTV's exclusive right to "**construct**" and "**maintain**" the Indian Spring Trail as expressly provided in Article V, Section 2 of the Easement. (JA 297-298). In 2013 when the earth removal and re-grading work was taking place, Andrews stated that this was done as part of the plan for Mt. Aldie's 525 acre Aldie Park development. (JA 236, 238,145-147 and 1244).

This claim that Mt. Aldie engaged in **road** construction activity as alleged in numerous paragraphs in the Complaint was admitted by Mt. Aldie in its first two pleadings and neither questioned nor disputed until much later in the litigation once present counsel entered his appearance on October 1, 2014, thirteen months after the case had been pending and a new defense theory was employed. Prior to this change of course, Mt. Aldie's had admitted the following regarding the "**road**" it had constructed:

- In its Verified Answer and Affirmative Defenses filed September 26, 2013, Mt. Aldie **admitted** the following allegations in the Complaint that:
    - Complaint Paragraph 30: "The entire length of the **newly-constructed road** lay well within the 100-foot Riparian Buffer

[8] In an email Andrews sent to a Loudoun County official, he stated that the average depth of the excavation "cut" was 18" on the uphill slope of the area of the Footpath but photographs taken by LTV in June, 2015 show this to be greater. (JA 1119-1121 and 1355-1366).

zone of the Little River, and in places, less than a yard from the edge of the Little River." (emphasis added).

- Complaint Paragraph 32: "At their June 15, 2013 meeting on the Property, Andrews told LTV's representatives that he was all but finished with the construction of his **new road**, and that any further work would be minor," and further averred "that the remaining work was in the nature of erosion and sediment control, chipping discarded brush, and making provision for water runoffs, drainage slopes, and diversion dikes as requested by the DOF." (emphasis added).

- Complaint Paragraph 37: "On June 19 and June 20, 2013, neighbors once again observed heavy equipment being used to continue construction of the **road** on the Property" but that it was "minor work." (emphasis added). *See* Complaint, JA 1 and 11-13; Answer, JA 167 and 170-172.

- At Paragraph 10 of its Plea in Bar filed September 27, 2013, Mt. Aldie stated it "cleared a long-existing but overgrown trail or **road** along the Little River bank within the 100' Area to remove dead trees and brush blocking the trail, **regraded the road bed**, substantially on the existing grade, stabilized and reseeded it, as a **permeable surface.** (emphasis added). (JA 180-183*).*

The importance of these judicial admissions and the legal estoppel obstacle they presented Mt. Aldie in opposing LTV's Summary Judgment Motion cannot be any more clearly shown than by reviewing how it attempted to retract them.[9]

[9] Unless these judicial admissions could be withdrawn, Mt. Aldie would be judicially estopped from denying them. This legal principle derives from the prohibition in Scottish law against approbation and reprobation and precludes a party from talking from "both sides of his mouth" and from "playing fast and loose with the counts" *Woofen v. Bank of America, N.A.*, 290 Va. 306, 307-308, 777 S.E.2d 848, 849-850 (2015).

On May 13, 2015, Mt. Aldie filed a Motion For Leave To File An Amended Answer whereby it requested Trial Court approval to amend its prior Verified Answers to Paragraphs 30, 32 and 37, the same three identified above, to be replaced by new answers which would have withdrawn the admission of **road** construction activities.[10] Mt. Aldie filed this motion after receiving LTV's Summary Judgment Motion that relied on these admissions in support of several of its grounds for Summary Judgment (JA 221-223). In response to this motion, LTV filed an Opposition which attached **ten** separate documents generated by Andrews constituting extra-judicial admissions of **road** construction activities in conjunction with legal authority supporting its position that Mt. Aldie was judicially estopped from withdrawing any of these admissions.[11] Mt. Aldie's

[10] Although neither Mt. Aldie's Motion for Leave to File an Amended Answer nor LTV's Opposition are included in the Appendix, they are part of the record transmitted by the Circuit Court in Volume 7, at pages 1591-1596 (Motion) and 1705-1834 (Opposition).

[11] Mt. Aldie, at p.21 of its Opening Brief argues that there were only two documents attached to LTV's Summary Judgment Motion that contain party admissions. Putting aside that the number is four, this argument is misleading in that it suggests that these were the only admissions the Trial Court had as it considered Summary Judgment, including written/oral Motions for Reconsideration, when Mt. Aldie knows this is not true. Mt. Aldie's failure to advise this Court of the numerous other documents/admissions such as the ten attached to LTV's Opposition is yet another example of its lack of candor with this Court.

Motion for Leave to File an Amended Answer was argued on May 20, 2015, after the Trial Court had granted LTV Partial Summary Judgment, and the Motion was denied. *See* May 20, 2015 Hearing (JA 949 and 1021-1029). Order dated June 12, 2015; JA 1135-1138.

Other extra-judicial admissions contained in documents Andrews generated and submitted to the Trial Court without objection, are even more damaging to this Appeal in that they establish conclusively that Mt. Aldie's true intent in constructing a **road** over the Indian Spring Trail was to further Andrew's and Mt. Aldie's plans for the Aldie Park development. More particularly, that its new road was intended to be an "Equestrian experience for the public" and for opening The Trail to the public for a "River Walk" opportunity.[12] (JA 145-147, 236, 238 and 1244).

These documents completely refute the newly formulated claim that Mt. Aldie was "improving an existing trail or creating a new trail for forest management purposes" by removing fallen or diseased

[12] In Mt. Aldie's Corrected Reply to LTV's Motion For Summary Judgment, p.11, paragraph 11, it is stated: "The resulting condition of the Indian Spring Trial, as improved by Mt. Aldie and Mr. Andrews is a beautiful foot or **horse** trail …" (emphasis added). (JA 940).This explains why Mt. Aldie cleared an area five to ten feet wide for the entire length of the Footpath, removed rock outcroppings and installed a form of wooden curbing on the side closest to Little River. (JA 145-147). The reason was to accommodate horses and opening it to the public for the River Walk.

trees.[13] But once Andrews was being questioned by LTV representatives as well as Loudoun County and Virginia Department of Forestry governmental officials as to why earth disturbing work was being performed over the Footpath without first giving notice and obtaining approvals/permits, he decided not to disclose his true intent but rather claimed that Mt. Aldie was building a "**logging road**" which it had the right to do. Even though this "logging road" claim was false, Mt. Aldie is bound by it as a matter of law for purposes of the Summary Judgment Motion.[14]

[13] In further support of this "forest management" contrived claim, at p.7 of its Opening Brief, footnote 2, Mt. Aldie references a Temporary Injunction action it filed on March 11, 2015, shortly before trial, seeking permission to use the "Indian Spring Trail/Road" to treat Hemlock trees being attacked by beetles. This suit was nothing more than a ploy by Mt. Aldie to develop an argument for use in the underlying litigation. LTV called Mt. Aldie's bluff by consenting to this treatment. As the Order referenced in the footnote indicates (1) use of the "Indian Spring Trail/Road" was for only one treatment with specific restrictions on how the road was to be used, and (2) was "a voluntary settlement of contested issues between the parties and cannot be used by them for any purpose, except its enforcement." (JA 923-926). Mt. Aldie violated the terms of this Order when it referenced the treatment in its Summary Judgment Motion as an undisputed fact. In LTV's Opposition, it objected to this treatment being considered and attached the Order in support of the claim this was improper. For Mt. Aldie to yet again try to introduce the treatment/Order into this Appeal is outrageous. (JA 517-542 and No.10 at 522; 846-870 and No.10 at 867).

[14] "A party cannot, either in the course of litigation or in dealings ***in pais,*** occupy inconsistent positions. Upon that rule election is founded: a man shall not be allowed, in the language of the Scotch law, 'to approbate and reprobate.' And where a man has an election between several inconsistent courses of action, he will be confined to that course which he first adopts; the election, if made with knowledge of the facts, is itself binding, it cannot be withdrawn without due consent; it cannot be withdrawn though it has not been acted upon by another by any change of position." (emphasis added). *Arwood v. Hills Adm'r*, 135 Va. 235, 243 (1923).

Andrew's statements regarding the logging road were first made after he had received two letters from LTV's Executive Director, Don Owen, ("Owen") raising concerns about Mt. Aldie's recent construction activities in the area of the Indian Spring Trail. In the first letter dated June 18, 2013, a request was made for further information concerning Mt. Aldie's "plans for the property including any further surface disturbances that you are considering." (JA 144) In the second letter dated June 22, 2013, Owen advised Andrews that based on the information he provided: (1) LTV had concluded that Mt. Aldie was in violation of the Easement and identified specific provisions that had been breached; (2) demanded that all work "cease and desist" and (3) demanded that Mt. Aldie provide LTV with "written notice of your intended work." (JA 159-160).

Thereafter, numerous emails were exchanged between Andrews, Owen, Loudoun County Department of Building and Development officials as well as Department of Forestry representatives which, in part, addressed these "road" construction activities. The following is just one of these emails, all of which contain similar references to the "logging road":

- In Andrews' June 23, 2013 email to Loudoun County Attorney, J. Randall Minchew he stated:

- "….As a part of the ongoing logging operation, we **graded and cleared** the Indian Spring Trail from the Fire House to the Spring."

- "I told him [Don Owen] we're completing the '**logging road'** and removing the large fallen trees and a rock outcrop that was **blocking the road."** (emphasis added).

- **"I'm certain I told him this road was being constructed as an 'ongoing' logging road which is permitted by the State and County**, and reminded him they had received written notice of the work…." (emphasis added).

- "Incidentally, I should have contracts ratified this coming week to acquire three other tracts totaling 730 acres surrounding Aldie to create **ALDIE PARK**." (emphasis added).[15] (JA 915-919).

[15] In July, 2013 when Andrews was claiming to LTV and governmental authorities Mt. Aldie was merely continuing "logging road" activities consistent with a prior 60 day notice to and approval from LTV obtained in 2009, he knew this was false. In a document shown to the Trial Judge during the May 20, 2015 Summary Judgment hearing and identified as a "big plat, and here it is, Loudoun County Mountainside Overlay Report" filed by Mt. Aldie in 2009 with Loudoun County to secure approval of a logging plan for the Property, the entire Riparian Buffer was marked as a cross-hatched area with the notation "will not be harvested." (JA 1353 but noted as PX27) Thus no "logging road" should have been constructed in the area of the Indian Spring Trail as it is within the Riparian Buffer where Mt. Aldie agreed no logging was ever to occur. Andrews fabricated this claim, as the emails show, to justify his failure to give proper advance notice. *See* May 20, 2015 Hearing Transcript, p.957, line 6 – p.959, line 2 for discussion regarding the "big plat."

III. STANDARD OF REVIEW

LTV agrees with the Standard of Review set forth in Mt. Aldie' s Opening Brief.

IV. ARGUMENT

1. THE TRIAL COURT CORRECTLY INTERPRETED THE CONSERVATION EASEMENT IN GRANTING PARTIAL SUMMARY JUDGMENT IN FAVOR OF LTV. [ASSIGNMENT OF ERROR 2]

The essence of Mt. Aldie's argument is that the Trial Court improperly interpreted the Easement in granting LTV Partial Summary Judgment and did not resolve contractual ambiguities and factual inferences in its favor. However, Mt. Aldie's argument is flawed. The Trial Court properly executed its function and adopted the only plausible interpretation of the Easement.

A. <u>There Is No Ambiguity Over The Word "Clearing" In The Easement</u>.

> It is the function of the court to construe the contract made by the parties, not to make a contract for them. The question for the court is what did the parties agree to as evidenced by their contract. *Meade v. Wallen*, 226 Va. 465, 467, 311 S.E.2d 103, 104 (1984).

When a contract is complete on its face, the court may not search for its meaning beyond the instrument itself. *Westbury Coal Mining Partnership v. J. S. & K. Coal Corp.*, 233 Va. 226, 229, 355 S.E.2d 571, 572-573 (1987). It is the court's duty to declare what the instrument itself says it says. *Ames v. American Nat'l Bank*, 163 Va. 1, 38, 176 S.E. 204, 216

(1934). Here, the duty was simple because the Easement's terms are unambiguous. The Trial Court held that Mt. Aldie breached its terms and therefore correctly entered Partial Summary Judgment in favor of LTV.

Despite Mt. Aldie's attempt to invent an ambiguity, the Trial Court's construction of the Easement is the only plausible interpretation as a matter of law. The primary language in the Easement on which Mt. Aldie's argument depends is in Article II, Section 5(i):

> No more than one new opening or clearing, and no new opening or clearings greater than 1,000 square feet, in the forest are permitted for noncommercial purposes, unless approved in advance and in writing by Grantee… *See* Easement, Article II, Section 5(i), JA 297-299.

The words "opening" and "clearing" are particularly important to Mt. Aldie's argument. Virginia courts adhere to the "plain meaning" rule. *Berry v. Klinger*, 225 Va. 201, 208, 300 S.E.2d 792, 796 (1983).[16] In an attempt to create an ambiguity, Mt. Aldie resorts to a tortured linguistics analysis. The burden of showing that words have been used in a way other than their ordinary sense is upon the party alleging it. *Id*. Mt. Aldie attempts to fulfill this burden by stating that the Trial Court used Easement language in its improper grammatical form. Mt. Aldie claims that "It was error to consider a

[16] The "words used by the parties are to be given their usual, ordinary, and popular **meaning**, unless it can be clearly shown in some legitimate way that they were used in some other sense." (emphasis added). *Ames v. American Nat'l Bank*, 163 Va. 1, 39, 176 S.E. 204, 217 (1934)).

new opening or 'clearing' as a verb rather than a noun at Summary Judgment." *See* Opening Brief, p. 23.[17]

This Court has defined "ambiguity" as "the condition of admitting of two or more **meanings**, of being understood in more than one way, or of referring to two or more things at the same time." (emphasis added). *Berry*, 225 Va. at 207, 300 S.E.2d at 796. "Contracts are not rendered ambiguous merely because the parties disagree as to the **meaning** of the language employed by them in expressing their agreement." (emphasis added). *Wilson v. Holyfield*, 227 Va. 184, 187, 313 S.E.2d 396, 398 (1984). Disagreements over a word's **substantive** definition do not always result in ambiguity, let alone disagreements over a word's grammatical usage.

However, for the sake of argument, LTV will respond to Mt. Aldie's desired grammatical semantics in order to demonstrate the argument's flaws. "Opening" and "clearing" are nouns in the context they are used in the Easement, but this is irrelevant to the Trial Court's holding. Mt. Aldie states that "The term 'clearing' in the Conservation Easement is a gerund." *See* Opening Brief, p. 23. A gerund is "a noun in the form of the present

[17] Mt. Aldie makes this argument despite the fact that Virginia courts consider "the contract as a whole and do not place emphasis on isolated terms." *Quadros & Assocs., P.C. v. City of Hampton*, 268 Va. 50, 54, 597 S.E.2d 90, 93 (2004). Referring to the grammatical form of two words in the Easement surely requires excessive emphasis on isolated terms.

participle of a verb (that is, ending in -ing)." *See Id.*, p.24. **Here, the act of clearing (verb) creates a clearing (noun) in the forest.** It is impossible to separate the noun's meaning from the meaning of the verb on which the noun is based. It is the same definition regardless of grammatical form.

The noun/verb argument's validity is further diminished by analyzing the Trial Court's actual use of the word "clearing." Mt. Aldie states that "Notwithstanding the acknowledgement that the word 'clearing' was not a verb in the context of the Conservation Easement, the Trial Court applied the word as if it were." *See Id.*, p.25. Mt. Aldie then cites to an excerpt from the June 10, 2015 hearing on Mt. Aldie's Motion to Reconsider:

> 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** 1,100 feet along the river and to me I'm not sure its's accrediting the litigation process by finding that that by not getting the notice that constitutes a violation of the plain meaning of the easement…(emphasis added).
>
> MR. CAMPBELL: I understand. So, your Honor, you're rejecting the Oxford Dictionary definition expressed.
>
> THE COURT: I am saying that I am going to apply what I believe to be a definition of clearings as that 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…" *See* June 10, 2015 Trial Transcript, p.44, line 8 – p.45, line 13.[18]

While the Court used the verb form of "clear," it did so in describing an **area** of 1,000 feet. The Trial Court recognized that Article II, Section 5(i) referred to a place, not an action. The 1,000-foot measurement describes "area" not "cleared." The Trial Court used the gerund form of "clearing:" "an area having been cleared." Substituting the gerund "clearing" for "area" demonstrates the correctness of the Trial Court's approach. "You have stated that you cleared an area (a **clearing)** 1,000 feet along the river." The Trial Court did not hold that Mt. Aldie breached the Easement by its act of **clearing** 1,000 feet. Instead, the Trial Court emphasized that the resulting **area** was 1,000 feet, and therefore granted Partial Summary Judgment.

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[18] The "papers" referred to by the Trial Judge is Mt. Aldie's Memorandum in Support of Motion for Summary Judgment where the following was stated as an undisputed material fact: (1). In May and June 2013, Mt. Aldie and its agents utilized a mini-excavator, bobcat and farm tractor to **clear a trail** beginning at the northernmost boundary of the Mt. Aldie property ("Property") continuing parallel to the Little River for a distance of approximately 1100 feet. Mt. Aldie refers to the **area cleared** as the "Indian Spring Trail." (6). When **clearing** "the trail along the eastern bank of the Little River" (the Indian Spring Trail) Mt. Aldie **disturbed soil in an area** identified in the Conservation Easement as an area to be reserved for the Bull Run Mountain Trail or Mill to Mill Trail. (emphasis added). (JA 517-542 at 521 and 522*).* As Mt. Aldie states in its Opening Brief, pp. 7 and 8 that the width of the area cleared was "between 5 and 6 feet," the total area cleared was far in excess of 1,000 square feet. *See* photographs taken by Mt. Aldie with large ruler that show a far greater width. (JA 654-724).

B. <u>The Noun/Verb Distinction Does Not Become Relevant Because Of The Qualifier "New" Describing "Clearing."</u>

Mt. Aldie argues that its actions did not create a **new** clearing as the Easement proscribes. It claims that because clearing is a noun, and because its actions occurred on land physically next to the existing Trail, it did not create a "new" clearing. In support, Mt. Aldie cites several dictionary definitions. However, even accepting Mt. Aldie's strategically chosen definition, of several variations of the words in the dictionaries, Mt. Aldie still unambiguously created a **new** clearing. In fact, Mt. Aldie created two new clearings, further violating Article II, Section 5(i)'s restrictions prohibiting more than one new opening or clearing without prior notice and approval.

Mt. Aldie's preferred definition of "clearing" is "a tract of land cleared of wood and brush."[19] Merriam-Webster N.D. Web.15 August, 2016. Mt. Aldie argues that the Indian Spring Trail was an existing clearing, and therefore the construction did not violate the Easement because it is the same clearing. However, the Trail **was** a narrow primitive footpath extending 1,100 feet in length. Mt. Aldie created a level road between five

[19] Mt. Aldie defines "wood" as a "dense growth of trees" omitting the definition "hard fibrous material that forms the main substance of the trunk or branches of a tree or shrub." The definition of "brush" is "1: Brushwood, 2a: scrub vegetation, 2b: land covered with scrub vegetation." *Id*.

to ten feet wide over the location where the Trail existed. (JA 654-724). Obviously, in order to create this road, Mt. Aldie cleared wood and brush from tracts of land outside the Trail. Otherwise, the resulting road would still be the same width as the original Trail. This is not the case.[20] Therefore, Mt. Aldie created two new clearings, one on each side of the Trail, spanning 1,100 feet in length with each being at least one foot wide. This is in direct violation of the Easement's prohibitions against a new clearing over 1,000 square feet as well as more than one new clearing.

Mt. Aldie's new clearings cannot be subsumed by the Trail's prior existence. First, the old Trail was a primitive footpath. The new road is different in topography (level, not steep-sloped), size, and purpose. Second, the specific definition of "clearing" is not limited to one form, such as a path or road. Instead, the definition is any "tract of land cleared of wood and brush." As described previously, Mt. Aldie created two such new tracts. Inferring the characteristics of a path in "clearing" violates Virginia law.[21] The Court may not read into "clearing" an exception for razing

[20] As the before and after photographs show, newly-razed tracts of land surround the Trail on both sides. (JA 1810-1811).

[21] Courts cannot read into contracts language which will add to or take from the meaning of the words already contained therein. *Virginian R. Co. v. Avis*, 124 Va. 711, 98 S.E. 638 (1919).

connected to previously cleared areas.[22] Even accepting the specific definition and grammatical form of the phrases in the Easement preferred by Mt. Aldie, its actions still **clearly** violated Article II, Section 5(i) of the Easement.

C. In Order To Fully Understand The Flaws In Mt. Aldie's Argument, All Of The Easement's Terms Related To Mt. Aldie's Authority Over Forest Maintenance Must Be Considered Together.

Mt. Aldie correctly states that "In Virginia, a contract must be construed as written and as a whole, with all parts being harmonized whenever possible." *See* Opening Brief, p. 27. The same rule applies to deeds. *Hinton v. Hinton*, 209 Va. 544, 545-546, 165 S.E.2d 386, 387 (1969). "Where possible, meaning must be given to every clause." *Berry v. Klinger*, 225 Va. 201, 208, 300 S.E.2d 792, 796 (1983). However, Mt. Aldie's own interpretation of the Easement violates this statement of law.

Mt. Aldie's arguments are rooted in one specific provision in Article II, Section 5(i). However, Mt. Aldie's **forest management** rights are not so confined. The language regarding clearings and openings must be read in

[22] Otherwise, the Easement would say "No new paths or roads." The fact that one new road exists where one footpath used to exist does not mean that the expansion did not involve additional clearings. If this argument were logically extended, Mt. Aldie could clear the entire forest and create a ten-lane highway as the same "clearing."

conjunction with the entire Easement. Mt. Aldie's rights are increasingly curtailed as the Easement discusses more specific areas of the Property.[23]

"A general provision in a contract must give way to a special one covering the same ground." *Bott v. N. Snellenburg & Co.*, 177 Va. 331, 339, 14 S.E.2d 372, 375 (1941).[24] The Easement reserves certain authority over the forest to Mt. Aldie. However, due to the heightened importance of the Riparian Buffer to the Property's conservation, more limited rights are reserved to Mt. Aldie within this area. Finally, when it comes to the Trail, the Easement almost entirely eradicates Mt. Aldie's management rights.

i. Article II, Section 5(i) Provides Limits To Mt. Aldie's Rights To Create Clearings And Openings In The Entire Forest.

> 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. (emphasis added). *See* Easement, Article II, Section 5(i), JA 294-295.

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[23] (1) Article II, Section 5(i) contains language restricting Mt. Aldie's rights in the forest at large, (2) Article II, Section 3 restricts Mt. Aldie's rights in the 100-foot wide Riparian Buffer, within which the Trail was located, and (3) Article V, Section 2 almost entirely extinguishes Mt. Aldie's rights in the Trail itself. *See* Easement, (JA 294-295, 297-298).

[24] This Court has recently reaffirmed this general rule, stating "[A] specific provision of a contract governs over one that is more general in nature." *Condo. Servs. v. First Owners' Ass'n of Forty Six Hundred Condo., Inc.*, 281 Va. 561, 573, 709 S.E.2d 163, 170 (2011).

This provision specifically limits Mt. Aldie's rights regarding new openings and clearings in the forest. While Mt. Aldie has a right to create one new opening or clearing that is less than 1,000 square feet, it may only do so through selective cutting and/or pruning. However, as the record before the Trial Court showed, there was nothing **selective** about the indiscriminate razing of the steep-sloped land to create a five to ten-foot-wide level road. Article II, Section 5(i) must be read in its entirety.

ii. Article II, Section 3 Provides Narrower Rights In The Riparian Buffer Located Along Little River.

Article II, Section 3 of the Easement further limits the creation of new openings and clearings within the Riparian Buffer, by requiring that all "earth disturbing activity" be **reasonably necessary** for certain enumerated purposes.[25] (JA 294). Based on the undisputed facts before the Trial Court, it must be concluded, as a matter of law, that Mt. Aldie's actions were not **reasonably necessary** for any of those purposes. There was no individual determination in bulldozing the five to ten-foot area: everything in its path was removed regardless the danger posed. Mt. Aldie's removal of vegetation was not limited to diseased, dead, or invasive trees, shrubs, or

[25] These purposes include removing **individual** trees presenting a danger to persons or property, removing diseased, dead, or invasive trees, shrubs, or plants, and creating and maintaining foot or horse trails with unimproved surfaces. *See* Easement, Article II, Section 3 (JA 294).

plants; it razed anything in its way, living or dead.[26] Finally, the bulldozing was not **reasonably necessary** for creating and maintaining foot or horse trails. Ignoring that pursuant to Article V, Section 2 of the Easement, only LTV could "construct and maintain" the Trail, (JA 297-298), since a foot trail already existed, no creation was necessary. Although theoretically one could argue it was reasonably necessary to foot path maintenance for Mt. Aldie to remove the trees that had fallen over the Trail, it was not reasonably necessary to use heavy machinery in the Riparian Buffer to level off a flat, five to ten-foot-wide, 1,100 feet long **road** to do so. This was not maintenance; it was construction, and it exceeded Mt. Aldie's authority.

iii. Article V, Section 2 Eliminates Mt. Aldie's Maintenance Rights In The Trail.

Article V, Section 2 of the Easement provides more stringently curtailed limitations regarding the actual Trail itself:

> The Grantor hereby conveys to the Grantee the right to **construct** and **maintain** a primitive footpath, for **pedestrian travel only**, across an area generally located within 100 feet of the western and southwestern boundaries of the property, in the area more specifically identified as the "Area to be Utilized for the Bull Run Mountain Trail or Mill to Mill Trail." (emphasis added). *See* Easement, Article V, Section 2, JA 297-298.

[26] Appellant's argument at its Opening Brief, p.13, that no evidence was before the Trial Court that a "single living tree" was cleared is of no consequence. The prohibitions in the Easement relating to earth disturbing activity or creating new openings or clearings are not limited in any fashion to "living trees." This strawman argument is not supported by any language in the Easement.

LTV's rights in the Trail are based on this conveyance. It is therefore vital to understand the legal meaning of the term "**convey**," which is:

> To **transfer** or **deliver** (something, such as a right or property) to another, esp. by deed or other writing; esp., to perform an act that is intended to create one or more property interests, regardless of whether the act is actually effective to create those interests. (emphasis added). BLACK'S LAW DICTIONARY 357 (8th ed. 2004).

The definition of "transfer" is:

> Any mode of **disposing** of or **parting** with an asset or an interest in an asset, including a gift, the payment of money, release, lease, or creation of a lien or other encumbrance. The term embraces every method—direct or indirect—absolute or conditional, voluntary or involuntary—of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption. (emphasis added). BLACK'S LAW DICTIONARY 1535 (8th ed. 2004).

The focus of "conveyance" is not the recipient of the interest, but the grantor. Under the Easement's terms, Mt. Aldie's predecessor in interest conveyed "the right to construct and maintain…" There was no language in the Easement indicating that this was a shared right. The conveyance parted with the right to maintain the Trail. This reading is supported by additional language found in Article V, Section 2, which states:

> Grantor retains the exclusive right to access and use of the remainder of the property, subject to the terms of this easement, as well as non-exclusive right to access and use of the "Area to be Utilized for the Bull Run Mountain Trail or Mill to Mill Trail." *See* Easement, Article V, Section 2, JA 297-298.

Mt. Aldie specifically reserved to itself certain rights, but notably not the right to construct or maintain the Trail. Mt. Aldie's rights are limited to the "non-exclusive right to access and use." The right to construct and maintain the Trail was conveyed, without exception or reservation, to LTV. Therefore, any activity on the Trail involving removing trees, expanding the Trail, or ground disturbance in any form, exceeded Mt. Aldie's rights.

D. Mt. Aldie's Argument Regarding The Term "Opening" Is Irrelevant To The Trial Court's Decision.

Mt. Aldie argues that because contract interpretation rules mandate that all parts of a contract be harmonized, the Trial Court erred by not interpreting "clearing" as synonymous with "opening." This is wrong for several reasons. First, it contradicts Mt. Aldie's argument of the definition of "clearing." Second, it violates contract interpretation law. Third, it goes against Mt. Aldie's own interests. The fact that Mt. Aldie wants to align the definition of "clearing" with the stricter definition of "opening" confirms that it is attempting to cause the Court to mistake confusion with an ambiguity.[27]

[27] The definition of "opening" preferred by Mt. Aldie is "an area without trees or with scattered usually mature trees that occurs as a break in a forest." *See* Opening Brief, p. 28. On the other hand, a "clearing" is a "tract of land cleared of wood and brush." *See Id. at p.23*. Because a clearing requires both the removal of wood **and** brush, it is stricter than the definition of an "opening." Bulldozing that preserves a few trees and brush on tracts of land may not constitute a clearing, but it would constitute an opening, and thus violate the terms of the Easement. This argument does nothing more than create confusion.

Mt. Aldie's claim that "opening" and "clearing" are synonymous ignores the Easement's plain language: "No more than one new opening or clearing…" *See* Easement, Article II, Section 5(i), JA 294-295. The argument that "clearing" should have the same meaning as "opening" violates Virginia law. "In the interpretation of written contracts, every part of the writing must be made, if possible, to take effect, and every word of it must be made to operate in some shape or other." *Tate v. Tate's Ex'r*, 75 Va. 522, 527 (1881). "The presumption always is that the parties have not used words aimlessly and that no provision is merely a superfluity unless it is plainly merely a repetition." *Ames v. American Nat'l Bank*, 163 Va. 1, 39, 176 S.E. 204, 217 (1934). The words "clearing" and "or" were deliberately incorporated. Therefore, "clearing" is a separate word with its own meaning and should not be interpreted as merely a repetition of "opening."

Finally, the argument is irrelevant to the Trial Court's holding. Mt. Aldie claims that "Granting Summary Judgment construing 'clearing' as a noun cannot be reconciled with the new words 'new opening', and must be reversed." *See* Opening Brief, p. 30. On the contrary, there is no ambiguity when interpreting "clearing" as a noun. The prohibition is in the disjunctive, so it could be violated by creating an opening **OR** clearing greater than 1,000 square feet. The Court properly granted Partial Summary Judgment

under the "clearing" provision as that was sufficient to find a violation, without resort to any further academic forays into the realm of linguistics.

E. <u>The Easement Should Be Read With Its Overall Purpose In Mind</u>.

The guiding light of contract construction "is the intention of the parties as expressed by them in the words they have used." *W.F. Magann Corp. v. Virginia-Carolina Electrical Works, Inc.*, 203 Va. 259, 264, 123 S.E.2d 377, 381 (1962). This is the overarching goal and must be the reasoning behind every decision a court makes. The Easement explicitly states its purpose. "WHEREAS, the conveyance of a Conservation Easement on the Property by this Deed is in furtherance of and will serve clearly delineated federal, regional, state and local **conservation policies**." (emphasis added). *See* Easement, p.3, (JA 288).[28] The Easement must be construed consistently with the parties' original intention to conserve the Property, and cannot be diluted, annulled, or defeated by rules of construction applied to deliberately undermine its very purpose. *See CNX Gas Co. v. Rasnake*, 287 Va. 163, 166, 752 S.E.2d 865, 867 (2014).

[28] "Recitals are often helpful in the construction of contracts and throw light on the meaning and intent of the parties." *Scott v. Albemarle Horse Show Ass'n*, 128 Va. 517, 526, 104 S.E. 842, 846 (1920). This recital does just that. Every provision in the Easement must be read with the purpose of conservation in mind.

F. <u>The Easement Should Be Liberally Construed In Favor Of LTV</u>.

Mt. Aldie argues that Partial Summary Judgment was improper because the Trial Court did not use the correct standard of construction for negative easements and in so stating relies on the following:

> Valid 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 v. Riverpoint Bldg. Committee*, 218 Va. 659, 665, 239 S.E.2d 106, 110 (1977).

Mt. Aldie then summarizes the law, stating that:

> 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 Opening Brief, pp.31 and 32*.

Of particular importance in this excerpt is "**substantial** doubt or ambiguity." Not only does there have to be a question as to the Easement's correct interpretation, but this doubt has to be **substantial**. When it does not rise to this high threshold, a Virginia court must uphold the restriction.

> Where the grantor has clearly restricted the use of the land granted, and the restriction itself is not illegal, the covenant creates a trust which, in a proper case, courts of equity will enforce by means of an injunction against an inconsistent use. *Virginian R. Co. v. Avis*, 124 Va. 711, 718, 98 S.E. 638, 640 (1919).

For the reasons already discussed, there is no ambiguity in the Easement's terms, particularly a "substantial" one. Furthermore, although the default rule holds that restrictive easements are interpreted strictly, the parties specifically provided otherwise in the Easement's terms:

> Any general rule of construction to the contrary notwithstanding, this Easement shall be **liberally construed in favor of the grant to effect the purposes of the Easement and the policies and purposes of Grantee [LTV]**. If any provision of this Easement is found to be ambiguous, an interpretation consistent with the purposes of this Easement that would render the provision valid should be favored over any interpretation that would render it invalid." (emphasis added). *See Easement, Article V, Section 5,* JA 298.

"The common law strict construction principle applied to restrictive covenants is exactly that—a contract construction principle." *Wetlands Am. Trust, Inc. v. White Cloud Nine Ventures, L.P.*, 782 S.E.2d 131, 138 (2016). A number of default rules govern contract interpretation. However, "a specific default rule applies to a particular contract only if the parties did not agree, through the contract, to displace the rule." *Morrison Comprehensive Learning Ctr., LLC v. Va. Dep't of Med. Assistance Servs.*, 2016 Va. App. LEXIS 122, 6.[29] Here, Grantor and LTV explicitly agreed that the Easement

[29] Rules of construction, such as the strict construction of restrictive easements, have no application where the language of the deed clearly and unambiguously expresses the intention of the parties. *Wetlands Am. Trust, Inc. v. White Cloud Nine Ventures, L.P.*, 782 S.E.2d 131, 135 (2016). It is merely an auxiliary method of construction to be resorted to if the contract does not provide otherwise. *Trailsend Land Co. v. Virginia Holding Corp.*, 228 Va. 319, 326, 321 S.E.2d 667, 671 (1984).

should be **liberally construed** to **promote conservation.** This binds Mt. Aldie. Therefore, even if "substantial doubt" did exist in the Easement's terms, Mt. Aldie is incorrect in claiming that such doubt should be resolved in its favor.

G. <u>The Trial Court Granted Summary Judgment Under The Appropriate Standard</u>.

Contract ambiguity is a question of law, properly determined by the trial court. *Eure v. Norfolk Shipbuilding & Drydock Corp.*, 263 Va. 624, 631, 561 S.E.2d 663, 667 (2002). Mt. Aldie argues that the Trial Court did not give it its entitled inferences in resolving questions of fact when holding that Mt. Aldie breached the Easement. However, analysis of the information properly before the Trial Court, including Mt. Aldie's own admissions, provides more than enough evidence to warrant summary judgment.

When considering summary judgment on a question of fact, 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**." (emphasis added). *Dickerson v. Fatehi*, 253 Va. 324, 327, 484 S.E.2d 880, 882 (1997). "A trial court may appropriately grant summary judgment only in cases in which material facts are genuinely in dispute." *Klaiber v. Freemason Assocs.*, 266 Va. 478, 484, 587 S.E.2d 555,

558 (2003). This Court has consistently articulated the necessary standard for a trial court to decide a question of fact as a matter of law.[30]

Here, the Easement unambiguously limits Mt. Aldie's rights with respect to different areas in the forest. Construction of the Easement and Mt. Aldie's rights are questions of law, decided by the Trial Court. Mt. Aldie claims that there is a genuine dispute as to whether its actions violated the Easement. However, considering the information properly before the Trial Court, reasonable minds could only conclude that Mt. Aldie's admissions that it "cleared," "re-graded," "excavated" and engaged in "earth disturbing" activities violated Article II, Section 5(i). These admissions were made in numerous documents generated by Andrews and attached to pleadings filed with the Trial Court.[31] Two such documents are as follows:

- In a June 18, 2013 e-mail to LTV, Andrews stated that what he had built "has been **cleared and re-graded** from the Aldie firehouse to

[30] Summary judgment is appropriately granted when reasonable minds could not draw different conclusions with respect to the facts. *See e.g. Poloquin v. Daniels*, 254 Va. 51, 57, 486 S.E.2d 530, 534 (1997).

[31] These filings were (1) LTV's Opposition to Defendant Mount Aldie, LLC's Motion for Reconsideration of the Court's Decision to Enter Partial Summary Judgment As To Liability Against It, filed June 8, 2015 (JA 1058-1121) (2) LTV's Brief In Opposition To Defendants' Motion For Summary Judgment filed May 15, 2015 (JA 846-929) (3) LTV's Brief in Support of Plaintiff's Motion for Summary Judgment As To Liability Only filed May 1, 2015, (JA 209-516) and (4) LTV's Opposition to File Amended Answer filed May 19, 2015.

the north end of the existing trail near the spring leading up the the 'Rock Outcrop' that was blocking passage on the trail." He advised LTV that he planned to remove all brush and debris cast to the side "during **clearing**…" (emphasis added). (JA 145-147).

- In an exchange of emails dated July 5, 2013 and July 8, 2013, Andrews told Loudoun County's Jim Brown that there is a "dispute [with LTV] regarding the **logging roads**," and further stated that "in redressing the **existing road bed** along the river, our land planner did a calculation of the '**disturbed area**' and concluded we cut an average of 18" off the uphill side of the road, and given the length of approximately 1,200 feet estimated about **2,000 sf feet** may have been '**disturbed**.'" (emphasis added). (JA 1119-1121).[32] [33]

It is clear from these excerpts that there is no genuine dispute over Mt. Aldie's actions in "clearing," "disturbing," and "re-grading," all in violation of the Easement. They confirm, as a matter of law, that Partial Summary Judgment was appropriately granted by the Trial Court.

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[32] An additional email from Andrews to J.R. Minchew containing similar admissions is discussed at Opposition Brief, p.17 (JA 915-919).

[33] Further admissions are found in Mt. Aldie's Response to Plaintiff's Request for Admissions No. 17 dated September 20, 2013, wherein Mt. Aldie admitted that "Mount Aldie and Andrews began **excavation, earth-disturbing and construction work** within the Riparian Buffer Zone of the Conservation Easement…" (emphasis added). *See* Exhibits G and H to Brief in Support of Plaintiff's Motion for Summary Judgment As to Liability Only filed May 1, 2015. (JA 364-367, at 366 and 369-370, at 370).

H. <u>This Court Can Further Grant Summary Judgment Under The Right Result For The Wrong Reason Doctrine</u>.

In seeking Partial Summary Judgment on liability, LTV raised separate grounds based on Mt. Aldie's breach of six distinct provisions of the Easement. (JA 217-220). The Trial Court granted Summary Judgment against Mt. Aldie on only one of the grounds, Article II, Section 5(i). Although the Trial Court did not rule on the five other grounds, the record before the Trial Court and now before this Court permits granting Summary Judgment on each of these five additional grounds.[34] "In instances where a trial court's decision is correct, but its reasoning is incorrect, and the record supports the correct reason, we uphold the judgment pursuant to the right result for the wrong reason doctrine." *Haynes v. Haggerty*, 784 S.E.2d 293, 294 (2016) (*citing Perry v. Commonwealth*, 280 Va. 572, 580 (2010)).[35]

The

specific provisions in the Easement, other than Article II, Section 5(i), as to

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[34] Although the Motion for Partial Summary Judgment alleged a breach of Article II, Section 5(ii) - Forest Management – **Commercial Activities**, this is not pertinent to this Appeal.

[35] "This Court may uphold a judgment even when the correct reasoning is not mentioned by a party in trial argument or by the trial court in its decision, as long as the record contains sufficient information to support the proper reason." *Id*. "[A]n appellate court's examination is not limited to the evidence mentioned by a party in trial argument or by the trial court in its ruling. Rather, an appellate court must consider all the evidence admitted at trial that is contained in the record." *Id*. at 295.

which Partial Summary Judgment was requested and should have been granted, are as follows:

- Article V, Section 2 – LTV's exclusive right to "construct" and "maintain" the Indian Spring Trail. (JA 297-298).
- Article II, Section 8 – Prohibition against "earth removal" that "alters the topography of the Property" if it "will be inconsistent with or will conflict with, diminish, impair or interfere with the Conservation Values protected by this Easement." (JA 296).
- Article II, Section 3 – Prohibition against "earth disturbing activity" in the Riparian Buffer except as may be "reasonably necessary" for the removal of dead or diseased trees. (JA 294).
- Article II, Section 2 – Written notice required before beginning "construction, replacement or enlargement" of any "road" on the Property regardless of usage. (JA 292-294).
- Article V, Section 6(ii) – Written notice required prior to undertaking any activity that "may be inconsistent with or that may conflict with, diminish, impair or interfere with the Conservation Values, Purpose or Terms and Conditions" of the Easement.[36] (JA 298-299).

[36] In LTV's Brief in Support of Summary Judgment, at p. 10 of the Undisputed Material Facts section, it is stated "The Defendants admit that they never gave LTV written notice of their activity, and LTV never gave its written approval" followed by the listing of various exhibits attached to the

The Easement defines “Conservation Values” as “scenic, open-space, water quality, forested, natural resource, recreational and historic values” and further identifies Conservation Values of the Property as those documented in the Baseline Documentation Report , which was incorporated by reference in the Easement. (JA 288-290).

As set forth in earlier sections of this Opposition Brief, the record before the Trial Court and in particular the before and after photographs (October, 2008 and June, 2013) and Mt. Aldie’s judicial and extra-judicial admissions, establish as a matter of law that Mt. Aldie did the following: (1) engaged in “earth disturbing” and “earth removal” activities in the Riparian Buffer that were not “reasonably necessary” to remove dead or diseased trees; (2) such activities were conducted without LTV first being provided written notice; (3) such activities resulted in the destruction of an historic 200 year old footpath which LTV had the exclusive right to construct and maintain; (4) the Conservation Values of the Property and the Easement’s purpose required the Trail’s character to remain unchanged; (5) the earth disturbing and earth removal activities negatively impacted and were inconsistent with, conflicted with, diminished, impaired and/or interfered with the Conservation Values and the Easement’s

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Brief supporting this statement. Mt. Aldie offered no denial of this statement. (JA 223).

purpose; (6) the earth disturbing activities altered the Trail's topography by removing on average at least 18 inches (estimated by Andrews) from the steep-sloped hillside that the Trail traversed along with rock outcroppings; (7) such activities resulted in the construction of a "road" (admitted by Mt. Aldie and Andrews) and (8) Mt. Aldie's true intent in conducting these activities was in support of its plans for the development of Aldie Park and not removing dead and diseased trees.

Based upon the record, Partial Summary Judgment should also be granted against Mt. Aldie on the issue of liability resulting from its breach of each of the above-referenced five separate provisions of the Easement.

2. EXPERT WITNESS FEES AND STAFF EXPENSES WERE REMEDIES PROVIDED UNDER THE CONSERVATION EASEMENT AND WERE PROPERLY REQUESTED IN LTV'S COMPLAINT. [ASSIGNMENT OF ERROR 4]

The essence of Mt. Aldie's argument is that the Easement did not provide for the recovery of expert witness fees and staff expenses because they are not "court costs" under Virginia law. However, this argument utilizes a mistaken reading of the provision assigning costs, and conflates the law applying to the American Rule's statutory exception with the law applying to a contractual exception. Ultimately, as with Mt. Aldie's violation of the Easement, the assignment of expert witness fees and staff expenses is a contract interpretation issue that the Trial Court properly awarded.

A. <u>Mt. Aldie's Interpretation Of The Provision Assigning Enforcement Costs Is Incorrect</u>.

LTV's right to expert witness fees and staff expenses is based on Article III, Section 2 of the Easement which provides for costs of enforcement in the event action is required to enforce the Easement's terms. It states:

> 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 investigation, 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. (emphasis added). *See* Easement, Article III, Section 2, JA 296-297.

Mt. Aldie argues that "simple contract construction" shows that this provision provides for the reimbursement of two separate types of reimbursable costs.[37] See Opening Brief, p. 33. Separating the costs into two categories is arbitrary and erroneous. The Easement provides for the recovery of **any costs of enforcement**. This phrase is explained by a non-exhaustive list of examples of possible costs of enforcement that might occur. However, **any** cost of enforcement, even one not listed in the

[37] The first is "costs of enforcement," which phrase is modified by "including costs of investigating, preventing, stopping and correcting the non-compliance." The second type of reimbursable expenditure under this provision is "court costs and attorney's fees."

provision, is properly recoverable from Mt. Aldie. The provision's clear intent is to "**reimburse**" LTV for all costs incurred in enforcing the Easement.

To further demonstrate Mt. Aldie's error, the arbitrary classification of enforcement costs completely ignore "restoration costs" which are explicitly included in the provision. This shows that the phrase "including costs of investigating, preventing, stopping and correcting the non-compliance" does not exclusively describe "costs of enforcement." Instead, all costs modify this phrase, including restoration costs and "court costs and attorney's fees."[38] Mt. Aldie cannot disregard "restoration costs" because it does not conform with its desired interpretation of the provision.

B. Mt. Aldie's Reliance On The American Rule Is Irrelevant To LTV's Request For Expert Witness Fees And Staff Expenses, And Improperly Conflates The Law Applying To The Statutory Exception With The Law Applying To The Contract Exception.

Mt. Aldie correctly states that Virginia follows the American Rule which provides that generally, litigants pay their own attorney's fees and litigation costs. However, LTV's claim for expert witness fees and staff

[38] "No word or clause in the contract will be treated as meaningless if a reasonable meaning can be given to it, and there is a presumption that the parties have not used words needlessly." *D.C. McClain, Inc. v. Arlington County*, 249 Va. 131, 135-136, 452 S.E.2d 659, 662 (1995).

expenses was not made on the basis that these expenses were litigation costs. The fact that these expenses resulted from litigation is irrelevant, except to the extent that litigation was the sole method available to **enforce** the Easement. These expenses are species of the enforcement costs specifically recoverable under Article III, Section 2. Because of this, reliance on the American Rule is misguided.

Furthermore, even if the American Rule were relevant, Mt. Aldie incorrectly applied the rule's exceptions.[39] Mt. Aldie's argument rests on precedent interpreting the statutory exception which does not apply to this case.[40] The cases Mt. Aldie cites rely on the statutory exception to the American Rule. They do not apply to the **contractual** assignment of enforcement costs in the Easement. There was no contract at issue in *Chacey*. *Chacey v. Garvey*, 781 S.E.2d 357, 360 (2015). While the court's decision in *Advanced Marine* limited the term "costs" to the costs

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[39] There are two such exceptions. The first occurs when a statutory provision assigns attorney's fees and/or court costs to one party. *See Hiss v. Friedberg*, 201 Va. 572, 112 S.E.2d 871 (1960). The second occurs when the parties to a contract adopt a provision that shifts the costs to a specified party. *Ulloa v. OSP, Inc.*, 271 Va. 72, 81, 624 S.E.2d 43, 49 (2006).

[40] Mt. Aldie cites *Chacey v. Garvey* and *Advanced Marine Enterprises, Inc. v. PRC, Inc.*, in claiming that "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." *See* Opening Brief, p.34.

necessary for the prosecution of a suit, this holding was limited to **statutes** assigning litigation costs, not **contracts**. *Advanced Marine Enterprises Inc. v. PRC, Inc.*, 256 Va. 106, 501 S.E.2d 148 (1998). This Court has explicitly recognized the irrelevance of precedent on the law regarding statutory assignments of litigation costs to contract cases.[41]

C. <u>The Trial Court Correctly Construed The Provision Assigning Enforcement Costs</u>.

The Trial Court correctly interpreted the cost assignment provision, and therefore assigned expert witness fees and LTV staff costs to Mt. Aldie. The intention of the parties as expressed by them in the words they have used must guide the court in all matters of contract interpretation. *W.F. Magann Corp. v. Virginia-Carolina Electrical Works, Inc.* 203 Va. 259, 264, 123 S.E. 377, 381 (1962). One cannot read specific contractual terms without considering the contract's **purpose**, and the parties' **intent** in entering into the contract.

The provision's specific words demonstrate an intent to assign all costs of enforcement. First and foremost, the assignment includes **any**

[41] "Moreover, we are not required to apply the same narrow construction to a contract that we apply to a statute in derogation of the common law." *Lansdowne Dev. Co., L.L.C. v. Xerox Realty Corp.*, 257 Va. 392, 403, 514 S.E.2d 157, 162-163 (1999).

costs of enforcement. The provision did not qualify this in any way. Any costs incurred in enforcing the Easement are assigned to Mt. Aldie. The fact that the provision's list did not specifically include expert witness fees does not preclude recovery of these fees. It would be a drafting absurdity to require the contracting parties to anticipate every means necessary to enforce the Easement. The fact that "court costs" may not include expert witness fees is irrelevant, because the expert witness fees and LTV staff costs were necessary "costs of enforcement" incurred in "correcting the non-compliance."[42]

The purpose of the provision is to make LTV financially whole if it is required to make expenses to protect its rights under the Easement. Ignoring some of these costs would directly contravene the wording and purpose of the provision. The expert witness fees were a necessary aspect

[42] LTV had to rely on expert witness testimony to establish the costs of restoration in enforcing the Easement. Without this testimony, LTV could not have obtained a judgment. LTV designated Jeffrey Lange, a landscape architect and forest hydrologist, and Charles Hennegar, a professional civil engineer, to offer opinion testimony on the cost of restoring the Footpath to its condition before Mt. Aldie began construction activities. Mt. Aldie and Andrews designated as their rebuttal expert, Jeremy Clem, with expertise in forestry. All three experts submitted reports, were deposed and testified at trial. *See* June 12, 2015 Trial Transcript, p. 849, line 21 – p.904, line 6 for Lange and p. 904, line 17-p. 975, line 6 for Hennegar and June15, 2015 Trial Transcript, p. 1339, line 3-p.1381, line 18 for Clem.

of LTV's enforcement of its rights. LTV could not have enforced its rights without securing a judgment, which required demonstrating liability and damages.[43]

D. Mt. Aldie Was Given The Necessary Notice To LTV's Request For Expert Witness Fees And Staff Expenses.

Mt. Aldie's final argument relates to LTV's Complaint, and the fact that the *ad damnum* clause did not specifically mention expert witness fees and LTV staff costs.[44] However, the fact that these fees and costs were not specifically identified does not mean that they were not sought. The Complaint specifically requested "all costs incurred in enforcing the terms of the Conservation Easement, as expressly authorized by Article III of the Conservation Easement," which for the reasons stated above, **include**

[43] Expert witness testimony was necessary to calculate the restoration damages from Mt. Aldie's razing, and therefore enforce LTV's rights under the Easement. Similarly, it was necessary for LTV staff to devote time directly related to Mt. Aldie's violation of the Easement and the legal proceeding seeking enforcement of its terms. All these costs were incurred by LTV in correcting the **non-compliance** by Mt. Aldie of the Easement.This resulted in a cost incurred by LTV for which it sought reimbursement.

[44] The Complaint did not contain a typical *ad damnum* clause seeking a specific dollar amount of damages suffered but a "Request for Relief" section which referenced each of the specific provisions in the Easement addressing "costs of enforcement" in Paragraphs C-F. (JA 20-22).

expert witness fees and LTV staff costs.[45] *See* Request For Relief Paragraphs C-F, (JA 21 and 22).

Virginia requires that "Every pleading shall state the facts on which the party relies in numbered paragraphs, and it shall be sufficient if it clearly informs the opposite party of the true nature of the claim or defense." Va. Sup. Ct. R. 1:4(d). This is known as the notice pleading standard. When pleading for costs of enforcement or litigation costs which shall accrue over the course of the litigation, it is sufficient to merely allege the facts and ask for fees at the early stage of the proceeding. *See Fidelity Nat'l Title Ins. Co. v. Southern Heritage Title Ins. Agency*, 42 Va. Cir. 408, 410 (1997).

Mt. Aldie was **on notice** that LTV was relying on Messrs. Lange and Hennegar, as it had received their expert reports in discovery in December, 2014. It would be inappropriate for Mt. Aldie to claim that it was not on notice that LTV was using expert witnesses to enforce its rights as the sole purpose of these two experts was to offer testimony on the cost to restore the Trail to its condition before Mt. Aldie's activities. The goal of the modern approach to pleading is to assure proper notice to the adversary of the claims and defenses being contested, and to begin the process of defining

[45] Pursuant to a January 5, 2015 Consent Order the parties agreed that the issue of the "reasonableness of the Plaintiff's attorneys' fee and costs" was bifurcated and would be determined after the trial on the merits of the underlying claims. (JA 1578-1580).

the issues. This was accomplished by the Complaint's Request For Relief prayer.

Mt. Aldie was also on notice that LTV was seeking reimbursement for LTV staff time expenses. In support of its claim for expert witness fees and staff costs, LTV relied upon the Expert Witness Disclosure of Rhonda Paice, a Loudoun County attorney, which included affidavits of Leslie VanSant, LTV's Executive Director at the time judgment was rendered. *See* Paice Disclosure Reports dated June 4, 2015 (JA 1582 -1591) and October 6, 2015 (JA 1593 - 1602). In response to the instructions of the Trial Court contained in Judge Horne's October 22, 2015 Letter Opinion, (JA 1670-1674), Ms. VanSant filed a Second Supplemental Affidavit on November 4, 2015 which provided details on the specific work performed by individual LTV staff members and rate of pay, all of which was directly relating to enforcement efforts and the resulting litigation (JA 1713-1717). The Trial Court thereafter entered its Final Order on December 1, 2015 awarding $41,284.41 for LTV's costs. (JA 1718-1719)

3. REQUEST TO REMAND TO TRIAL COURT A FURTHER AWARD OF ATTORNEY'S FEES.

Consistent with the procedure set forth in Va. Sup. Ct. R. 5:35(b), LTV requests that at such time as this appeal is denied, that an order issue permitting LTV to make application to the Trial Court for additional legal

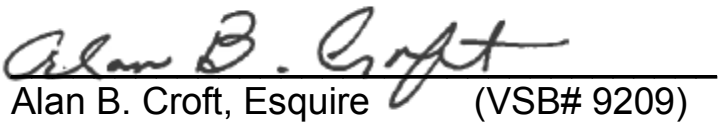
fees and costs incurred in this appeal as provided for in Article III, Section 2 of the Easement.[46]

V. CONCLUSION

For the foregoing reasons, Appellee, Land Trust of Virginia, Inc. respectfully requests that this Court affirm the ruling of the Trial Court in its entirety, for a remand to the Trial Court for a further award of legal fees and costs incurred by Appellee in this Appeal and for such other and further relief as this Court deems just and proper.

Respectfully Submitted,

Land Trust of Virginia, Inc.
By Counsel



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[46] New counsel replaced Hunton & Williams, LLP when Mt. Aldie filed its appeal. Although prior counsel had represented LTV *pro-bono publico,* LTV has been incurring and paying legal fees since that time.

CERTIFICATE PURSUANT TO RULE 5:26(h)

(a) Pursuant to Rule 5:26(h), I certify that, on this 29th day of August, 2016, an electronic copy of the Brief of Appellee was filed, via VACES, and ten paper copies of the Brief of Appellee were hand-filed with the Clerk of this Court. On this same day, an electronic copy of the Brief of Appellee was served, via email, upon:

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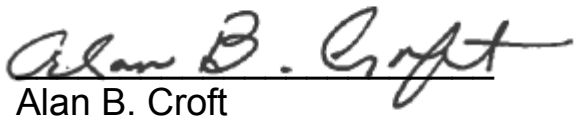
(b) The page count for the Brief, excluding cover, tables and certificate is 50 pages in length.

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

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



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