In The

Supreme Court of Virginia

RECORD NO. 160305

MOUNT ALDIE, LLC,

Appellant,

v.

LAND TRUST OF VIRGINIA, INC.,

Appellee.

REPLY BRIEF OF APPELLANT

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I. SUMMARY OF THE ARGUMENT

On June 18, 2013 the Land Trust of Virginia ("LTV") delivered a letter to Mount Aldie, LLC ("Mt. Aldie") by email claiming violation of the Deed of Gift of Easement ("Conservation Easement"). (JA 144). That same day Mt. Aldie responded by email asserting specifically that removing dead and diseased trees and improving an existing trail were reserved rights under the Conservation Easement. (JA 145).

On August 29, 2013 LTV filed the Complaint in this proceeding. (JA 1-163). On September 27, 2013 Mt. Aldie filed a Plea in Bar (JA 180-183) asserting that it improved the Indian Spring Trail consistent with its reserved rights in the Conservaton Easement which permitted removal of dead and diseased trees as well as construction of pedestrian and equestrian trails.

Notwithstanding these facts, LTV improperly claims that Mt. Aldie made judicial and non-judicial admissions of violating the Conservation Easement thus making Summary Judgment proper. This argument is inconsistent with the facts and the law.

On May 1, 2015 LTV filed a Motion for Partial Summary Judgment (JA 209-513) and Mt. Aldie filed a Cross-Motion for Summary Judgment (JA 517-725). Mt. Aldie's Motion included 14 photographs depicting use of

a Bobcat and farm tractor to remove dead trees from the Indian Spring Trail, as well as 70 photographs showing the view of the improved trail. The essence of Mt. Aldie's Motion was that creating a trail, and removing dead and diseased trees were each reserved rights pursuant to the Conservation Easement. LTV has failed to justify the Trial Court's failure to afford Mt. Aldie required inferences from the disputed facts and its reserved rights pursuant to the Conservation Easement.

Not only was it error for the Trial Court to fail to afford Mt. Aldie the required inferences at Summary Judgment, but this error was compounded by not correctly applying the plain language of the Conservation Easement. Specifically, the word "clearing" as used in the Conservation Easement concerned a new place in the forest devoid of vegetation from the ground to the open sky. Contrary to this plain language the Trial Court found the word "clearing" to be synonymous with "land disturbance activity." It was error for the Trial Court to apply the language in this manner. It was also error not to harmonize this limitation with Mt. Aldie's reserved rights to disturb the earth for the purpose of constructing trails or removing dead or diseased trees.

Regrettably, the Trial Court did not have the guidance from this Court in *Wetlands Am. Trust, Inc. v. White Cloud Nine Ventures*, *L.P.*, 782 S.E.2d

131 (2016), which was decided on February 12, 2016, approximately two months and two weeks following the Final Order of December 1, 2015 in this case. Consequently, the Trial Court applied the wrong standard of review to a Conservation Easement, which should have been construed in favor of the free use of the property, or at least consistent with the reserved rights pursuant to the Conservation Easement. Because of these errors Mt. Aldie was prejudiced during the six day trial before an advisory jury in Loudoun County and the December 1, 2015 order of the Trial Court must be reversed.

II. ARGUMENT

A. LTV DID NOT ADDRESS THE TRIAL COURT'S FAILURE TO AFFORD APPROPRIATE INFERENCES AT SUMMARY JUDGMENT IN RELATION TO MT. ALDIE'S RESERVED RIGHTS.

The first argument presented by Mt. Aldie related to the Trial Court's failure to grant the inferences mandated at Summary Judgment. *Fultz v. Delhaize Am., Inc.*, 278 Va. 84, 89; 677 S.E.2d 272, 275 (2009); *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). The most significant of these inferences related to the exercise of rights reserved in the Conservation Easement.

i. The right to manage the forests and build trails within the Riparian Buffer.

Article II, Section 3(ii) of the Conservation Easement at issue in this case expressly permits Mt. Aldie to engage in "earth disturbing activity" within the Riparian Buffer "as may be reasonably necessary" for "removal of individual trees presenting a danger to persons or property" and removal of "diseased, dead or invasive trees…." This Section also expressly reserves the right for the "creation and maintenance of foot or horse trails with unimproved surfaces." (JA 31)

At Summary Judgment Mt. Aldie identified 14 photographs showing dead and diseased trees being removed from the Indian Spring Trail with a Bobcat and farm tractor (JA 640-653) and 70 photographs after completion of tree removal (JA 654-724) showing the width and condition of the Indian Spring Trail.

LTV argues that it was not reasonably necessary to use equipment to improve the Indian Spring Trail and then to use the equipment to remove dead and diseased trees from the Trail. LTV also argues that from "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 these purposes." (Opposition, p. 27) At Summary Judgment a non-moving party is absolutely entitled to all inferences flowing from the facts. Mt Aldie

was entitled to the inference at Summary Judgment that the use of machinery to remove trees and to create and maintain an existing trail was in fact "reasonably necessary."

LTV claims that Andrews had "conflicting explanations" for the activity at Mt. Aldie...." (Opposition, p. 2) However, as a matter of well-settled mandates of Virginia law it is inappropriate for a trial court to determine the credibility of the factual allegations at summary judgment. "Such a task belongs to the trier of fact unless the testimony is 'irreconcilable with logic and human experience.'" *Bloodworth v. Ellis*, 221 Va. 18 (1980). "Although the inferences to be drawn from the evidence may differ in degree of probability, courts deciding upon motions for summary judgment must adopt those inferences most favorable to the party whose evidence it is sought to have struck, unless the inferences are strained, forced or contrary to reason." *Id*. (citing *Williams v. Vaughan*, 214 Va. 307, 310, 199 S.E.2d 515, 518 (1973)).

In *Semones v. Johnson*, 217 Va. 293 (1976), in the context of a motion to strike, this Court explained the differing degrees of possibilities of inferences, and confirmed that a trial court must adopt those most favorable to the non-moving party. In *Semones*, the evidence lent itself to multiple inferences relevant to primary negligence in a car accident. There

were permissible inferences of speed and control that favored the plaintiff. While the inferences differed in degree of probability, their existence required the trial court to adopt those favorable to the non-moving party. This is exactly what the Trial Court should have done with respect to Mt. Aldie's reserved rights.

It was blatant legal error to not to afford Mt. Aldie such inferences and to grant Summary Judgment when material facts were contested. Deciding the issue of reasonableness, in relation to the exercise of a reserved right pursuant to a conservation easement, cannot be properly determined at Summary Judgment. The Trial Court's failure to afford such inferences, and failure to identify contested facts are each reversible error.

ii. LTV's Right to Construct a "primitive footpath" does not impair Mt. Aldie's Reserved Rights.

In LTV's version of the Statement of Facts (Opposition, p.9) it is argued that the Conservation Easement (JA 286-307) and the Stewardship Documentation Report (JA 309-362) each identify a "primitive footpath" protected by the Conservation Easement. While the recitals to the Conservation Easement describe the property and the Conservation Values to be protected in great detail, not a single word in any sentence identifies an existing "primitive footpath" as a Conservation Value or otherwise. (JA 24-46)

The Stewardship Documentation Report (JA 47-100) is a seventy-five page document identifying "existing conditions" on Mt. Aldie's property on the date the Conservation Easement was granted. Pages 4 and 5 of the Report (JA 52-53) identify the "Conservation Values of the Property." Not a single word in any sentence in the Report identifies any existing "primitive footpath" to be protected. In fact, the words "primitive footpath" appear only in the following sentence in Article V, Section 2 of the Conservation Easement:

> The **Grantor** hereby **conveys** to the grantee **the right to construct and maintain a primitive footpath**, for pedestrian traffic only, across the area generally located within 100 feet of the Western and Southern boundaries of the property, in the area more specifically defined as the "Area to be utilized for the Bull Run Mountain Trail or Mill to Mill Trail" on the attached "Exhibit A." (JA 34) Emphasis added.

LTV urges this Court to conclude that it had the "exclusive right to construct such a footpath", and that this language curtailed Mt. Aldie's reserved rights within the Riparian Buffer. This argument simply cannot be reconciled with the plain language of Article V, Section 2 of the Conservation Easement.

B. THE CONSERVATION EASEMENT MUST BE CONSIDERED AS A WHOLE.

When considering the Conservation Easement as a whole, it is important to understand the Conservation Values contained therein. The

Conservation Easement makes eight specific references to the Conservation Values associated with the preservation and protection of forest land. (JA 23-28)

The central purposes of the Conservation Easement were to retain a healthy forest; limit residential development to one additional residential lot; to restrict the size of non-residential buildings; and to promote recreation. The Conservation Easement and the Stewardship Documentation Report each identify preservation and management of the forest as primary Conservation Values to be protected. Accordingly, forestry management is one of the central conservation purposes of the Conservation Easement.

The recitals to the Conservation Easement also identify recreation on the Mt. Aldie property as one of the Conservation Values. In order to promote these Values, the Conservation Easement in Article II, Section 3 allows Mt. Aldie to create and maintain foot and horse trails in the Riparian Buffer while also providing for "forest management for the creation of trails and recreational areas…" pursuant to Article II, Section 5.

The Conservation Easement must be interpreted consistent with the concept of conserving and protecting the forest, and providing foot and horse trails for recreation. Thus, the right to remove dead and diseased

trees and the right to create recreational trails must be construed in favor of Mt. Aldie, and its right to manage its property.

Because Mt. Aldie was entitled to manage the forest, the question for the Trial Court should have been whether the use of equipment to remove dead and diseased trees, and or to build a pedestrian or horse trails was "reasonably necessary." Whether or not something is reasonably necessary is not usually an uncontested matter. The photographs presented by Mt. Aldie at Summary Judgment (JA 654-724) certainly are evidence that using machinery was reasonably necessary for that purpose. However, at a minimum this was a question of disputed fact.

C. LTV'S ARGUMENT REGARDING ALLEGED ADMISSIONS IN THE RECORD IS IMPROPER.

The record before the Trial Court did not support Summary Judgment, even before the required inferences in favor of Mt. Aldie. This substantial record can be found at (JA 517-725). At Summary Judgment Mt. Aldie repeatedly pointed out that the Conservation Easement reserved unto Mt. Aldie the right to construct "trails and remove dead and diseased trees."

LTV argues that Summary Judgment was supported by judicial admissions in the Answer to the Complaint. This conclusion cannot be reconciled with a review of Mt. Aldie's Answer, specifically its answer to

paragraphs 30, 32 and 37 of the Complaint. (Opposition, pp. 11-12) LTV fails to mention that simultaneously with the filing of its Answer, Mt. Aldie filed a Plea in Bar (JA 180-183) which made it exceptionally clear that the defense of the exercise of a reserved right was expressly reserved:

> 6. The Easement's limitations in Article II(3) do not apply where "reasonably necessary" for the "removal of individual trees presenting a danger to persons or property and removal of diseased, dead or invasive trees." Defendant's activities in the 100' Area were reasonably necessary for the removal of individual trees presenting a danger to persons or property and removal of diseased, dead or invasive trees.
>
> 7. The Easement's limitations in Article II(3) also do not apply to prohibit the "creation and maintenance of foot or horse trails with unimproved surfaces."

The dispute between the parties began on June 18, 2013 when LTV emailed a letter to Andrews asserting that Mt. Aldie violated the Conservation Easement. That very same day Andrews replied by email asserting Mt. Aldie's right to disturb the soil within the Riparian Buffer "as reasonably necessary for… removal of individual trees presenting a danger to persons or property and removal of diseased or dead trees… to manage the forest....." (JA 145-146) Andrews also expressly identified Mt. Aldie's rights under the Conservation Easement to create trails and recreational areas. Notwithstanding the argument presented by LTV in its Opposition, from the first day that this dispute arose, Mt. Aldie specifically and

repeatedly asserted its rights under the Conservation Easement to remove dead and diseased trees, and to create trails. LTV's argument is not supported by the record.

D. THE TERM "CLEARING" AS A NOUN HAS DIFFERENT MEANING.

LTV admits that the word "clearing" in the Conservation Easement is a noun but asserts that the outcome should be the same whether it is a noun or a verb. This argument ignores how the Trial Court applied the language of the Conservation Easement.

The Trial Court considered the term "clearing" to be a verb and considered it to be a synonym for the phrase "land disturbance." In their briefs both parties quoted the language used by the Trial Court at Summary Judgment, which bears repeating a third time:

> 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 through page 45 line 13. Emphasis added.

The language in Article II, Section 5(ii) of the Conservation Easement, refers to a place in the forest, not the activity of land disturbance:

> 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 in writing by the grantee… Emphasis added.

A place that is a new opening or clearing in the forest is not synonymous with more than 1000 ft.² of earth disturbance. This is the essence of the Trial Court's error.

E. THE CONSERVATION EASEMENT MUST BE STRICTLY CONSTRUED AGAINST LTV.

LTV is legally wrong when it argues that the Conservation Easement should be broadly construed in its favor. LTV bases this conclusion on its catch-all "Conservation Values" argument and the Construction clause in Article V, Section 5. LTV argues that the Conservation Easement should always be interpreted in furtherance of the Conservation Values expressed in the Easement, which LTV believes means that ambiguities or uncertainties in the Easement should ***always be interpreted in favor of LTV's position***. This is simply not a proper interpretation of the Conservation Easement or a correct statement of the law on easements in Virginia.

Earlier this year, in *Wetlands Am. Trust, Inc. v. White Cloud Nine Ventures, L.P.*, 782 S.E.2d 131 (2016), this Court confirmed that a Conservation Easement is to be construed as any other easement that

purports to restrict or encumber the use of land in Virginia. This means that the party seeking to restrict the free use of land bears the burden of proving an easement violation. *See Wetlands Am. Trust, Inc.*, at 137. Ambiguity is to be resolved against the restrictions on land and in favor of its free use. *See id*. This Court emphasized the concern that comes with placing restrictions of perpetual duration on a property, and concluded that "the legislature must have viewed this principle as an appropriate additional incentive for those who draft the conservation easements to achieve clarity in light of the fact that they are subject to enforcement in perpetuity." *Id*. at 138.

LTV argues that Article V, Section 5 negates the rules of construction in *Wetlands Am. Trust, Inc.* Article V, Section 5 states that the "Easement shall be liberally construed in favor of the grant to effect the purposes of the Easement and the policies and purposes of Grantee." However, this Section was not meant to give LTV the right to determine what is and is not a violation of the Conservation Easement *carte blanche*, without a factual determination of whether an activity is expressly reserved in the Conservation Values, or whether it is prohibited.

The Conservation Values relevant hereto are principally forest management and recreation. A court must interpret whether the activity

advances or inhibits those values, not LTV. Article I states the purpose of the Conservation Easement - to "retain, preserve and protect the Conservation Values of the Property." The Conservation Values of the Property as noted above are primarily protection of the forest and recreation. Construction of buildings is not an issue at all in this dispute. Thus, removing dead and diseased trees, and improving the Indian Spring Trail was activity in furtherance of the Conservation Values and Mt. Aldie's reserved rights of trail maintenance, forestry management, agricultural use, preservation of open space and recreation.

LTV argues that Mt. Aldie presented these facts to the jury in the damages phase and the jury rejected Mt. Aldie's proof. However, the jury was instructed by the Trial Court that Mt. Aldie was liable to LTV for violating the Conservation Easement. Once that occurred the prejudice to Mt. Aldie was clear, and LTV's argument on this point is specious.

If this Court were to interpret the Easement's Construction clause in the manner advised by LTV, it would negate the public policy recognized in *Wetlands Am. Trust, Inc.* —that restrictions on land that survive in perpetuity must be drafted with clarity so as to avoid any unintended restrictions. LTV's argument for strict construction of all provisions against Mt. Aldie would set a precedent of eliminating the incentive to draft clear

language and would result in restrictions on land that were not intended. Therefore, LTV's strict construction argument would clearly violate public policy, and should be rejected.

III. CONCLUSION

For the reasons stated herein and in its Opening Brief, Appellant, Mount Aldie, LLC prays that this Honorable Court reverse the Summary Judgment ruling and the Final Order of the Trial Court and rule in its favor. Alternatively, Mount Aldie, LLC 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, LLC further 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 12th day of September, 2016, an electronic copy of the Reply Brief of Appellant was filed, via VACES, and ten paper copies of the Reply Brief of Appellant were hand-filed with the Clerk of this Court. On this same day, an electronic copy of the Reply Brief of Appellant was served, via email, upon:

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(b) The page count for the Reply Brief, excluding cover, tables and certificate, is 15 pages, that is equal to the 15 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