IN THE

Supreme Court of Virginia

RECORD NO. 160582

CHARLES D. CHAFFINS, et al.,

Appellants,

v.

ATLANTIC COAST PIPELINE, LLC,

Appellee.

REPLY BRIEF OF APPELLANTS

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REPLY BRIEF

The Pipeline's Response Brief offers two arguments. The first is that this appeal is moot because the Pipeline sent new notices with more specific dates following the entry of the Final Orders now on appeal. The second argument is that because the statute at issue requires only that an "intended" date be set forth, the date need not be specific. Both arguments fail.

This appeal is not moot. First, as described in a separate Motion to Strike, the new notices were submitted without leave of Court and do not satisfy the demanding standard for adding material from outside the record. Therefore, the letters are not properly before the Court and cannot demonstrate mootness. Second, even if the new letters were properly before the Court, the new letters do not supplant the older notices and do not show that the Pipeline will not rely on the Final Orders to enter the Landowners' property in the future. In fact, the new letters expressly refer to and rely upon the Final Orders now on appeal, showing that the Pipeline continues to employ the Final Orders to gain property access.

The Pipeline's second line of argument centers on the word "intended," a term it believes synonymous with "approximate" or "indeterminate." That interpretation contradicts the plain meaning of the statute. "Intended" refers to future activity, and having an intended date does not prevent the use of prospective, but no less certain, dates for future events such as trials, medical appointments, and surveys. The word "intended" does not weaken or defeat the obligation to "set forth the date" of the survey crews' entry.

I. The Pipeline has failed to demonstrate mootness and, even if it had, this case is capable of repetition yet evading review.

A "heavy burden of persuasion rests upon" the proponent of mootness. United States v. Concentrated Phosphate Exp. Ass'n, 393 U.S. 199, 203 (1968). The proponent must establish that "subsequent events [have] made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Id. (emphasis added). As especially relevant here, "mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave [a party]

'free to return to his old ways.'" Id. at 203 (quoting United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953)).

The Pipeline cannot carry its heavy burden. The Pipeline argues that the Revised Notices "supplant" the original notices and "have become the operative documents." Response Br. at 9. The Revised Notices prove otherwise. Each notice actually incorporates and relies on the Final Orders now on appeal. The Revised Notices state that "on April 13, 2016, the Circuit Court of Buckingham County, Virginia entered a Final Order confirming Atlantic's right, and permitting Atlantic, to enter the above-referenced Property for the purposes set forth in Va. Code § 56-49.01. Accordingly, Atlantic intends to enter" the property. Response Br., Ex. A. at 1.

Thus, the Revised Notices actually describe the Final Orders as the basis for entry without permission. Those Final Orders do not require any Revised Notices be sent. Therefore, even if this Court admits the Revised Notices to the record, they in no sense "supplant" the Final Orders. To the contrary, the Revised Notice itself explains that the April 13, 2016 Final Orders, without more,

operate to permit the Pipeline's entry without Landowner permission. Even the Revised Notices state that the truly "operative documents" are the Final Orders now on appeal. The Pipeline, in other words, seeks to have it both ways: tell the Landowners that the Final Orders permit entry, but tell this Court the Final Orders are of no effect.

In the W.T. Grant Co. case cited above, the Supreme Court held that a disclaimer of any intent to continue the challenged behavior "does not suffice to make a case moot . . . ." 345 U.S. at 633. In this case, the Pipeline does not even disclaim any intent to continue the challenged behavior. The Pipeline has not demonstrated or even asserted that the surveys are complete; nor has it asserted that it will send a new notice for each new survey.

Further surveys appear likely, and the Pipeline has not demonstrated otherwise. The Pipeline admits it is still "engaged in the regulatory approval process" and that the Federal Energy Regulatory Commission, which oversees that approval process, requires that certain surveys be conducted. Response Br. at 1. If

FERC requests further information from the Landowners' property, the Pipeline will presumably again seek entry, again using the Final Orders as justification.

This Court has held that a case is moot only where a party "unmistakeably surrender[s]" a challenged right. Ficklen v. City of Danville, 146 Va. 426, 433 (1926). No such surrender occurred here. The mere existence of the Final Orders keeps this appeal ripe, just as the mere existence of a water pollution permit kept the controversy alive in Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 193-94 (2000).

True mootness would require both (1) vacatur or other nullification of the Final Orders below and (2) a binding rescission of the challenged original Notices of Intent. The Revised Notices fall far short of that by expressly relying on the Final Orders. Accordingly, it is not "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Concentrated Phosphate, 393 U.S. at 203.

Even if the Pipeline could carry the heavy burden to establish mootness, a well-recognized exception clearly applies. This Court recognizes an exception to the mootness doctrine for cases where the underlying controversy is capable of repetition, yet evading review. Virginia Broadcasting Corp. v. Commonwealth, 286 Va. 239, 248 (2013). That exception applies where a party could be subjected to the same alleged illegality in a proceeding that is short-lived by nature. Id. See also Virginia Dep't of State Police v. Elliott, 48 Va. App. 551, 554 (2006).

Under Section 56-49.01(C), the Pipeline may attempt to enter the Landowners' private property as soon as fifteen days after the supplemental notice is sent. Consequently, even if the Court were to accept the Pipeline's mootness argument, it should still hear this appeal under the capable-of-repetition, yet-evading-review exception to the mootness doctrine.

The Pipeline insisted throughout the circuit court proceedings, as it does in this Court, that a single "on or after" notice fully satisfies Virginia Code § 56-49.01. The Pipeline has

not retreated from that position. The Pipeline is still explicitly relying upon the Final Orders on appeal. The case is not moot.

II. The Pipeline's statutory construction argument fails because intended future events are commonly stated with specificity.

The Pipeline's statutory construction argument is essentially that the word "intended" is synonymous with "approximate." The words are not synonyms or even corollaries, and the argument therefore fails.

The Pipeline argues that because "intended" means "planned," the statute connotes an "understanding that circumstances may necessitate changes in the interim." Response Br. at 11. The Pipeline cites the possibility of an April snowstorm that could delay a survey and require a new notice.

However, "intended" does not connote vagueness and does not mean "approximate" or "without a defined end." It defies plain meaning to argue that intended events and appointments cannot be specific. It is commonplace for intended events to have a date, place, and time. Such is the case for every intended trial date and every intended medical appointment. Every future trial

date is intended. Some of the trials occur as intended, others are canceled due to settlement. However, the plain meaning of the phrase "set forth the date of the intended trial" does not mean that an actual date cannot be specified.

If the Pipeline's argument were accepted, the word "intended" to mean "indeterminate" would render much law meaningless. Under its argument, the "intended parents" in a surrogate parent relationship need not be identified, because future plans are subject to change. See Va. Code § 20-160 (regarding court approval for a surrogacy contract). Under the Pipeline's argument, the "intended spouse" need not be identified in a petition for emancipation of a minor wishing to marry, even though such identification is a key component of the petition. See Va. Code § 16.1-331. Since "intended" dates need not be specific, it would be impossible to determine when an acquiring shareholder must request a shareholder meeting, which is to be done "no later than 30 days before the intended date of notice of an annual meeting of shareholders". Va. Code § 13.1-728.5 ("Meeting of Shareholders"). Under the Pipeline's argument, the

"intended date of closure" of a radioactive waste facility need not be specified. Va. Code § 10.1-500 (regarding a low level radioactive waste compact). The Pipeline is correct that "intended" is a word that is presumed to be carefully used by the General Assembly. However, the Pipeline is mistaken in asserting that the Virginia Code shows that "intended" means "indeterminate." On the contrary, the statutes cited above would be rendered unworkable if the Pipeline's argument is accepted.

Not surprisingly, courts have often used "intended date" in accordance with this plain meaning. See, e.g., Paine v. Wells Fargo Bank, N.A., 2011 WL 3236390, at *1 (E.D. Va. 2011) (using the term "intended date" to refer to January 25). See also United States v. Benthiem, 456 F.2d 165, 167 (1st Cir. 1972) (same, September 27); Scott v. Grand Prairie Indep. Sch. Dist., No. 3:11-CV-2094-G, 2012 WL 1361621, at *1 (N.D. Tex. Apr. 19, 2012) (same, July 21);Foster v. Compagnie Francaise De Navigation a Vapeur, 237 F. 858, 859 (E.D.N.Y. 1916) (same, August 10). And that is only to cite a few examples, as this usage of the term is so common that an exhaustive list would be

tedious. The Pipeline, for its part, fails to cite any usage of the term “intended date” or “intended entry” in cases, statutes, or common language, to mean “indeterminate range of dates” or even “approximate date.”

The Pipeline attempts to bolster its statutory construction argument by asserting that it would be “highly impractical for a company such as Atlantic to have to issue a revised notice”. Response Br. at 11. The Pipeline fails to recognize that it is much more impractical for a Landowner to effectively plan for a notice that merely states that numerous crews will enter the property “on or after” a certain date. Indeed, the imbalance of power in the statute argues in favor of protection of the landowners, particularly since the power being exercised here is in derogation of the common law right to exclude others from private property.

The General Assembly struck a balance. It required that if a Landowner does not grant permission, the Landowner is at least entitled to effective and compliant notice of when the otherwise unpermitted crews will enter. There is nothing especially impractical about sending another letter in the case of adverse

weather. Although the Pipeline argues it cannot be bothered with such an inconvenience, that is the price the statute demands in return for permission to invade the property rights of private citizens for potentially weeks at a time. The General Assembly weighed those competing interests, and determined that the privilege of curtailing a fundamental right must entail an obligation of meaningful and reliable advance notice. The statute reflects that balance, and it requires nothing more impractical than setting an intended date for school to resume after the students' winter break, even though the date may be subject to change due to inclement weather. Even if it were very impractical, the remedy would be an amended statute, not an "on or after" notice that obviates the statutory requirement.

The Pipeline invites this Court to rewrite the statute because, in its view, the Landowner's interpretation "leads to an absurd result." Response Br. at 13. Under Virginia law, "our case law uses the phrase 'absurd result' to describe situations in which the law would be internally inconsistent or otherwise incapable of operation." Cook v. Com., 268 Va. 111, 116, 597 S.E.2d 84, 87

(2004). The only “absurd result” the Pipeline envisions is the burden of sending a new notice in the event of unexpected delay. But sending a second notice is not absurd. It is not internally inconsistent and is not incapable of operation. It is not even very costly. Again, the Pipeline seeks to have it both ways: to argue it is absurd and impractical to send a second notice, but then to argue that it has sent such a superfluous second notice of its own volition, which moots the case.

Finally, the Pipeline asserts that the Landowners are “attempt[ing] to bootstrap their statutory interpretation argument with constitutional issues”. Response Br. at 8. The Landowners, in their Opening Brief, make a single reference to the Virginia Constitution, merely noting that the Commonwealth holds private property rights to be fundamental. That citation serves only to illustrate the importance of the issue on appeal. It does not, as the Pipeline suggests, frame a question of constitutional law or, for that matter, “bootstrap” constitutional issues.

To the contrary, the sole issues in this appeal are matters of statutory construction. The assignments of error are all framed in

those terms, and the Landowners' legal arguments flow directly from those assignments. Although the Pipeline might prefer to argue against constitutional phantoms, it fails to answer the Landowners' actual argument: all statutes, constitutional or otherwise, that encroach on fundamental, common law protections must be strictly construed. Chesapeake & Ohio Ry. Co. v. Kinzer, 206 Va. 175, 171 (1965). Because Section 56-49.01 infringes on the Landowners' right to exclude—"one of the most treasured strands in an owners' bundle of property rights," Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435–36 (1982)—this canon must guide this Court's interpretation of the statute.

In fact, the Pipeline's authorities say nothing different. Although the Pipeline mischaracterizes this Court's holding in South & W. Ry. Co. v. Va. & S.E. R. Co., 104 Va. 323 (1905),[1] it

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1 South & W. Ry. dealt solely with the availability of injunctive relief, and the Court expressly disclaimed any opinion as to the alleged-trespasser's legal authority to enter property for surveying purposes. South & W. Ry. is not, therefore, a decision "permitt[ing] a railroad company to enter upon another company's land," Response Br. at 19, so much as a decision declining to prevent that entry.

also fails to acknowledge the Court has elsewhere held that the exact statute at issue in South & W. Ry. (then-Virginia Code § 1105e) does in fact encroach on common law protections and must be strictly construed accordingly. See Great Falls Power Co. v. Great Falls & O.D.R. Co., 104 Va. 416 (1905). The Landowners ask nothing more here.

CONCLUSION

This appeal is not moot. The Pipeline's purported evidence of mootness is a letter that expressly relies upon the Final Orders now on appeal. The Pipeline's statutory construction argument fails because the plain meaning of "set forth the date of intended entry" is to identify actual dates when the entry is planned to occur. Therefore, the Landowners respectfully request that this Court reverse the ruling of the Circuit Court of Buckingham County.

Dated: March 3, 2017

Respectfully submitted,

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CERTIFICATE PURSUANT TO RULE 5:17(i)

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5. This brief does not exceed 15 pages in length, excepting the cover page and certificate.

6. A true copy of this brief has been e-mailed to counsel for the appellee on the date of this filing.

This 3rd day of March, 2017.

By Counsel,

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