IN THE

Supreme Court of Virginia

RECORD NO. 160582

CHARLES D. CHAFFINS, et al.,

Appellants,

v.

ATLANTIC COAST PIPELINE, LLC,

Appellee.

OPENING BRIEF OF APPELLANTS

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SCV: Submitted on 01-23-2017 13:20:56 EST for filing on 01-23-2017

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STATEMENT OF THE CASE

In this appeal, Appellants Charles D. Chaffins, Linda Chaffins, Beverly B. McQuary, and Michael W. Huntley (collectively, "the Landowners"), respectfully seek reversal of the Final Orders entered in favor of Appellee Atlantic Coast Pipeline, LLC (hereinafter, "the Pipeline"), on April 13, 2016 by the Circuit Court of Buckingham County, the Honorable Donald Carl Blessing presiding.

This case presents a single issue of statutory compliance affecting the fundamental property rights of private landowners throughout the Commonwealth. The Code of Virginia explicitly requires that natural gas companies seeking to conduct surveys without the landowners' permission must first "set forth the date of the intended entry" in a written notice sent to the landowner at least 15 days before entry. In this case, the Pipeline flatly failed to set forth a date, and merely notified the Landowners that it would enter "on or after" a given date and that the surveys would last for weeks following the unspecified commencement, giving the Landowners no notice of the actual entry by an uncertain

number of survey crews onto their property. The Pipeline's notices do not satisfy the plain language of the statute and are inconsistent with the policy of meaningful notice embodied therein. In approving those notices, the circuit court created an open-ended license to enter private property without permission — a ruling that cannot be reconciled with the statute's express terms. At least one court has recognized this fact: in a separate case following the ruling in Buckingham County, the Circuit Court of Nelson County ruled that identical notices by the same pipeline company do not satisfy the statute and that this brand of "on or after" notice is effectively no notice at all. The result is an irreconcilable split of authority on an important property rights issue.

The statute at issue is Section 56-49.01 of the Virginia Code, a standalone statute enacted in 2004 allowing natural gas pipeline companies to survey private property without the landowner's permission — but only if they comply with the statute's request and notification requirements. For purposes of this appeal the most important requirement is that the company

send a certified letter notifying landowners that the gas company will enter their property without their consent. The statute requires all such notices to "set forth the date of the intended entry."

FACTS AND MATERIAL PROCEEDINGS BELOW

The Landowners hold title to certain real property located in Buckingham County, Virginia. Joint Appendix ("J.A.") 2, 92, 136. The Pipeline is a Delaware limited liability company seeking federal approval to construct and operate a natural gas transportation pipeline extending from West Virginia, through Virginia, and into North Carolina. J.A. 553, 2.

As required by subsection B of Section 56-49.01, the Pipeline first sent certified letters to the Landowners seeking permission to survey their property in advance of application for approval. J.A. 7, 96, 140. When the Landowners withheld permission, the Pipeline then sent each of them a "Notice of Intent to Enter Property" under subsection C of the statute, expressing the Pipeline's intent to enter their properties without their permission to conduct surveys. J.A. 10, 102, 150. The

notices did not, however, set forth the date of the intended entry, stating instead that the Pipeline would "commence surveys on your property on or after April 27, 2015." Id. The notices did not specify whether an entry would *actually* occur on April 27, as opposed to the days or weeks "after April 27." The notices stated that surveys last several weeks. Id. Notably, the notices set forth no end date, nor did they state the number of intended entries.

The Pipeline did not conduct surveys. Instead, the Pipeline sued the Landowners in separate actions, seeking a court order stating that the notices complied with Section 56-49.01 and that the Pipeline was therefore permitted to enter the Landowners' properties. J.A. 1, 91, 135. The Landowners demurred on several grounds, including the assertion that the Pipeline had failed to "set forth the date" as required by subsection C of the statute. J.A. 24, 108, 193. That issue was briefed and argued at a hearing on October 13, 2015. At the conclusion of that hearing, the circuit court determined that the Pipeline's notifications were sufficient and overruled the demurrers. J.A. 117.

The Landowners answered the Petitions and the case was scheduled for an evidentiary hearing. Following that hearing, the circuit court again heard argument on the date issue in the context of motions to strike and closing arguments on the sufficiency of the Pipeline's evidence. In announcing its ruling, the circuit court reasoned that because the statute requires a company to set forth the date of intended entry, that date "may have to change." J.A. 466. The court found the notices sufficient to satisfy the statute and granted the Pipeline the relief it requested. J.A. 467. The court entered final orders, and the Landowners promptly filed their notice of appeal. J.A. 81, 125, 209.

ASSIGNMENTS OF ERROR

1. The trial court erred in overruling the Landowners' demurrers because the Pipeline failed to satisfy the plain language requirement of Virginia Code Annotated § 56-49.01(C) that requires that notices of intent to enter "set forth the date of the intended entry." J.A. 74, 116, 201

2. The trial court erred in granting the Pipeline's Motions for Entry of Order Allowing Entry on Property Pursuant to Virginia Code § 56-49.01 and Petitions for Declaratory Judgment because the Pipeline failed to satisfy the plain language requirement of Virginia Code Annotated § 56-49.01(C) that requires that notices of intent to enter "set forth the date of the intended entry." J.A. 81, 125, 209

STANDARD OF REVIEW

This Court applies a de novo standard of review to the questions of law presented by this appeal. David White Crane Serv. v. Howell, 282 Va. 323, 327 (2011). Because statutory interpretation presents a pure question of law, it is subject to de novo review by this Court. Boynton v. Kilgore, 271 Va. 220, 227, 623 S.E.2d 922, 925 (2006); Ainslie v. Inman, 265 Va. 347, 352, 577 S.E.2d 246, 248 (2003).

AUTHORITIES AND ARGUMENT

The question presented is whether the circuit court erred by ruling, both on demurrer and at trial, that the Pipeline's Notices of Intent to Enter satisfied the requirements of Section 56-49.01 of the Virginia Code.[1] That statute authorizes a natural gas company to survey private property without the landowner's consent if it complies with certain notice procedures. Specifically, the statute provides:

> A. Any firm, corporation, company, or partnership, organized for the bona fide purpose of operating as a natural gas company as defined in 15 U.S.C. § 717a, as amended, may make such examinations, tests, hand auger borings, appraisals, and surveys for its proposed line or location of its works as are necessary (i) to satisfy any regulatory requirements and (ii) for the selection of the most advantageous location or route, the improvement or straightening of its line or works, changes of location or construction, or providing additional facilities, and for such purposes, by its duly authorized officers, agents, or employees, may enter upon any property without the written permission of its owner if (a) the natural gas company has requested the

1 Although this Court granted this appeal for two assignments of error to two distinct orders by the trial court, both assignments address the same question of statutory interpretation: whether the Pipeline's "on or after" notices satisfy the requirement to "set forth the date" of the surveyors' intended entry on the Landowners' property. Accordingly, Landowners present a single argument on the issue.

owner's permission to inspect the property as provided in subsection B, (b) the owner's written permission is not received prior to the date entry is proposed, and (c) the natural gas company has given the owner notice of intent to enter as provided in subsection C. A natural gas company may use motor vehicles, self-propelled machinery, and power equipment on property only after receiving the permission of the landowner or his agent.

B. A request for permission to inspect shall (i) be sent to the owner by certified mail, (ii) set forth the date such inspection is proposed to be made, and (iii) be made not less than 15 days prior to the date of the proposed inspection.

C. Notice of intent to enter shall (i) be sent to the owner by certified mail, (ii) <u>set forth the date of the intended entry</u>, and (iii) be made not less than 15 days prior to the date of mailing of the notice of intent to enter.[2]

D. Any entry authorized by this section shall not be deemed a trespass. The natural gas company shall make reimbursement for any actual damages resulting from such entry. Nothing in this section shall impair or limit any right of a natural gas company obtained by (i) the power of eminent domain, (ii) any easement granted by the landowner or his predecessor in title, or (iii) any right-of-way agreement, lease, or other agreement by and between a natural gas company and a landowner or their predecessors in title or interest.

Va. Code Ann. § 56-49.01 (2016) (emphasis added).

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2 That apparent drafting or scrivener's error appears in the original, and is not pertinent to this appeal.

The Pipeline's Notices of Intent only provided that the surveys would occur "on or after" either April 27, 2015. No date or even set of identifiable dates was set forth. Accordingly, the Notices of Intent were legally deficient and the circuit court erred in concluding otherwise.

I. THE PLAIN LANGUAGE OF SECTION 56-49.01(C) REQUIRES NOTICES OF INTENT INCLUDE A DATE OR DATES CERTAIN PRIOR TO ENTRY.

The plain language of Section 56-49.01(C) requires that notices of intent to enter under the statute "set forth the date of the intended entry." That means that a notice of intent must provide a specific date or dates certain. In this case, the Pipeline's notices of intent to enter were deficient because they only notified the Landowners that involuntary surveys would occur "on or after" a future date. J.A. 10, 102, 150.

Virginia courts apply the plain language of a statute unless the terms are ambiguous. Boynton v. Kilgore, 271 Va. 220, 227, 623 S.E.2d 922, 926 (2006). When the General Assembly has used words of a plain and definite import, courts cannot assign them a construction that would amount to holding that the

General Assembly meant something other than that which it actually expressed. Alcoy v. Valley Nursing Homes, Inc., 272 Va. 37, 41, 630 S.E.2d 301, 303 (2006). Rules of statutory construction prohibit adding language to or deleting language from a statute. Appalachian Power Co. v. State Corp. Comm'n, 284 Va. 695, 706, 733 S.E.2d 250, 256 (2012). "[W]hen analyzing a statute, we must assume that the legislature chose, with care, the words it used when it enacted the relevant statute, and we are bound by those words as we interpret the statute." Frazier v. Com., Dep't of Soc. Servs., Div. of Child Support Enf't ex rel. Sandridge, 27 Va. App. 131, 135, 497 S.E.2d 879, 881 (1998) (internal quotations omitted).

The circuit court erroneously rejected the Landowners' argument regarding a date certain, concluding that there was "no flaw in the [Pipeline's] notification process that's taken place to date under the statute." J.A. 236. That conclusion is irreconcilable with the statutory language requiring a natural gas company "set forth the date of the intended entry." Va. Code Ann. § 56-49.01(C).

By allowing the Pipeline to proceed under defective notices of intent, the circuit court failed to give effect to the language chosen by the General Assembly to protect the Landowners' rights under Virginia law. Had the General Assembly intended to allow natural gas companies free rein to enter private property without the landowners' consent merely through notice of intent to enter "on or after" a future date, it would have drafted the statute differently. It could have provided, for example, that the notice must "set forth the date after which the natural gas company intends to enter the property."

The plain meaning of "set forth the date" is equivalent to "specify a calendar day or days." To "set forth" is "to give an account or statement of". Merriam-Webster Dictionary (2017), available at www.merriam-webster.com/definition/set forth. A "date" is the "time at which an event occurs," as in a "date of birth". Merriam-Webster Dictionary (2017), available at www.merriam-webster.com/definition/date. In common usage, if a person is asked to "set forth the date" of an upcoming group meeting, the person is expected to specify a calendar day on

which the meeting will occur, such that all persons involved know when to arrive. Stating that the meeting will occur "on or after May 1, 2017" would be meaningless and would not satisfy the plain language and common usage of the phrase "set forth the date."

The circuit court's analysis suggested that because the "intended" date is prospective, and therefore subject to change, it need not be specific. J.A. 466. However, "intended" does not mean "approximate." Virtually all statements of future intention are subject to change due to illness, accident or other unforeseen circumstance. The prospective nature does not prohibit the setting forth of actual dates and times for intended meetings, trials, appointments, and other events.

II. THE CIRCUIT COURT'S INTERPRETATION OF SECTION 56-49.01 IS INCONSISTENT WITH THE STATUTORY CONTEXT AND WITH CANONS OF CONSTRUCTION.

A. Read in the context of the entire statute, the applicable subsection requires notices to set forth a date or dates certain.

Statutory terms must be given their ordinary and plain meaning, "considering the context in which [they are] used." Grimes v. Commonwealth, 288 Va. 314, 318 (2014). If there were any doubt that the phrase "set forth the date of intended entry" in Section 56-49.01 requires the specification of a date or dates certain, that doubt could be resolved by looking at the context of the rest of the statute.

Subsection A of the statute provides that a natural gas company:

> may enter upon any property without the written permission of its owner if (a) the natural gas company has requested the owner's permission to inspect the property as provided in subsection B, (b) the owner's written permission is not received prior to the date entry is proposed, and (c) the natural gas company has given the owner notice of intent to enter as provided in subsection C.

Va. Code Ann. § 56-49.01(A) (emphasis added). Subsection B likewise requires that a request for permission to enter must "set

forth the date such inspection is proposed to be made . . . ." Va. Code Ann. § 56-49.01(B).

From these provisions, it is evident the General Assembly intended the phrase "the date" to refer to a date or dates certain. If a date or dates certain were not required, then it would be impossible for a natural gas company to determine whether it had received written permission "prior to <u>the date</u> entry is proposed." Va. Code Ann. § 56-49.01(A) (emphasis added). That is, if a natural gas company requested permission to survey "on or after April 27, 2015," the specification of an open-ended date range would render it impossible to know that permission had been received "prior to the date entry is proposed." Accordingly, when Section 56-49.01 is read as a whole, it is clear that the General Assembly intended notices include a specific date or dates certain for the involuntary entry. The circuit court erred in concluding otherwise.

B. When the General Assembly requires notices "set forth a date" elsewhere in the Code, it requires a date certain.

This Court has long recognized the "common canon of statutory construction that when the legislature uses the same term in separate statutes, that term has the same meaning in each unless the General Assembly indicates to the contrary." Commonwealth v. Jackson, 276 Va. 184, 194, 661 S.E.2d 810, 814 (2008) (citing Virginia Elec. & Power Co. v. Board of Supervisors, 226 Va. 382, 387–88, 309 S.E.2d 308, 311 (1983); Prillaman v. Commonwealth, 199 Va. 401, 405, 100 S.E.2d 4, 7 (1957)).

Further, proper statutory construction seeks to harmonize the provisions of a statute both internally and in relation to other statutes. Com. Dep't of Motor Vehicles v. Wallace, 29 Va. App. 228, 233, 511 S.E.2d 423, 425 (1999). Because the Code of Virginia is one body of law, other Code sections using the same phraseology may be consulted in determining the meaning of a statute. Newton v. Com., 21 Va. App. 86, 90, 462 S.E.2d 117, 119 (1995).

It is important, then, that when the General Assembly uses the phrase "set forth the date" elsewhere in the Code, it requires an actual date certain. Three examples are illustrative:

1. Virginia Code Section 33.2-723 provides for notice to the public of the when ballot measures for incurring highway indebtedness will occur:

> The local governing body shall cause notice of such election to be given by the posting of written notice thereof at the front door of the county courthouse at least 30 days prior to the date the same is to be held and by publication thereof once a week for two successive weeks in a newspaper published or having general circulation in the county, which notice shall <u>set forth the date</u> of such election and the question to be voted on.

   Va. Code Ann. § 33.2-723(B) (emphasis added). Notice of an election is meaningless for voters if the notice states only that the election will occur "on or after" a certain date.

2. Virginia Code Section 8.01-217(G) similarly requires that court orders changing a person's legal name "<u>set forth the date</u> and place of birth of the person whose name is changed" (emphasis added). Date of birth is a crucial and

widely used vital statistic. An order stating that a person was born on or after a date, however, is useless.

3. Finally, Virginia Code Section 55-370 requires notice of a property sale in the execution of a lien "set forth the date, time, place, and terms of sale," among other details. Va. Code Ann. § 55-370(D)(5)(b)(2) (emphasis added). Without a specific date certain, a prospective buyer would be helpless to participate in the sale.

Without an actual, identifiable date, none of the statutes cited above make sense or accomplish their purpose. Whether the date at issue is the date of an election, a person's date of birth, or the date of a property sale, the General Assembly requires notification of a specific, discrete, calendar day. By employing identical language in Section 56-49.01, the General Assembly has spoken plainly to the question raised by this appeal.

C. The decision below is inconsistent with canons requiring strict construction of statutes that encroach on common law rights.

While the circuit court's interpretation is incorrect even if the statute is read in a vacuum, its interpretation is wholly untenable against the backdrop of well-established Virginia common law. The Commonwealth affords all landowners a right to exclude others from their properties. Tate v. Ogg, 170 Va. 95, 99 (1938). That right "has traditionally been considered 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). The right to exclude is a core element of property ownership, and it is protected as fundamental under the Virginia Constitution. Va. Const., Art. I, § 11.

Because Section 56-49.01 affects fundamental, common-law property rights, it must be strictly construed. See, e.g., Chesapeake & O. Ry. Co. v. Kinzer, 206 Va. 175, 171 (1965) ("Statutes in derogation of the common law are to be strictly construed and not to be enlarged in their operation by construction beyond their express terms."). Cf. PKO Ventures,

LLC v. Norfolk Redevelopment & Hous. Auth., 286 Va. 174, 182 (2013) ("Statutes authorizing the power of eminent domain must, therefore, be strictly construed . . . ." (internal quotation marks omitted)).

By effectively granting the Pipeline open-ended licenses to enter the Landowners' properties at their whim — a license wholly unsupported by the relatively unassuming terms of the statute — the circuit court failed to read Section 56-49.01 against the backdrop of Virginia common law. Perhaps more explicit statutory language would warrant such a departure from time-honored property rights. But the court's interpretation of Section 56-49.01 in this case stretches the General Assembly's chosen language far beyond its breaking point.

III. THE STATUTORY LANGUAGE OF SECTION 56-49.01 EMBODIES A POLICY OF REASONABLE NOTICE THAT BENEFITS BOTH LANDOWNERS AND SURVEYORS.

Though it could have drafted Section 56-49.01 differently, the General Assembly requires notice of a date or dates certain of intended entry for good reason. As written, the statute strikes a balance between the competing rights of landowners and

surveyors and encourages coordination that ultimately protects all parties. Property owners need specificity with regard to when an intrusive survey will occur in order to secure livestock or domestic animals and to adjust planned gatherings. The landowners' preparation, in turn, ensures surveyors can perform their jobs safely and without unnecessary interference.

Many landowners understandably wish to be present and observe the survey, and they have a property right to do so. And because Section 56-49.01 expressly provides for "reimbursements for any actual damages" caused by surveying, the coordination contemplated by the statute affords landowners an opportunity to document any irregularities. At the same time, it provides surveyors an opportunity to explain their actions, to identify any pre-existing damage, and thereby to limit their exposure to liability.

At bottom, the circuit court's endorsement of the Pipeline's "on or after" language deprives both landowners and surveyors of the benefits of clarity, communication, and coordination. Under the decision below, the Landowners have no idea when various

survey crews may appear at their gates to traipse across their properties. Such crews may include an engineering crew, a separate wetlands crew, a separate historical artifacts crew, a separate crew for endangered species, and so on. The General Assembly could not have intended that landowners live under the shadow of such uncertainty.

It is for this very reason that the Circuit Court of Nelson County rejected identical "on or after" Notices of Entry sent by the Pipeline, concluding that these notices failed the statutory requirements of Section 56-49.01 and amounted to virtually "no notice at all." Atlantic Coast Pipeline, LLC v. Avery, Case No. CL150000280 (Nelson Cnty. Cir. May 9, 2016).[3] The operative facts of Avery and its thirty-six sister-cases are identical to those underlying this appeal: After sending notices of intent to enter the properties of more than fifty Nelson County landowners, the Pipeline requested a declaration of its right to enter the properties without consent under Virginia Code Section 56-49.01. Id. at 2.

3 On May 13, 2016, the Landowners filed with this Court a Notice of Supplemental Authority Under Rule 5:6A, briefly summarizing the Avery decision and attaching a copy of the Nelson County court's May 9, 2016 Opinion and Order.

The landowners demurred, arguing the Pipeline's notices failed to satisfy the statutory requirements: rather than set forth an actual "date of intended entry," the notices stated only that the Pipeline's surveys would occur "on or after" a certain date. Id. at 15.

The circuit court agreed, holding that notice of entry "on or after" a certain date fails, as a matter of law, to "set forth [a] date of intended entry." Id. at 18. The court reasoned that Section 56-49.01 contemplates "reasonable notice," lest landowners be deprived of an opportunity to observe the process, to remedy any dangerous conditions, or to plan events on their properties. Id. at 16–17. "A notice that the [entry] will take place 'on or after'" a certain date, the court concluded, amounts to "no notice at all." Id.

CONCLUSION AND RELIEF SOUGHT

The Landowners respectfully submit that the circuit court erred in overruling their demurrers and in granting the Pipeline's motions for entry and petitions for declaratory judgment. The Pipeline's vague and open-ended "on or after" notices are not

sufficient to satisfy Section 56-49.01. This Court should therefore reverse the ruling of the Circuit Court of Buckingham County.

Dated: January 23, 2017

Respectfully submitted,

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5. This brief does not exceed 35 pages in length, excepting the cover page, table of contents, table of authorities, 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 23rd day of January, 2017.

By Counsel,

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