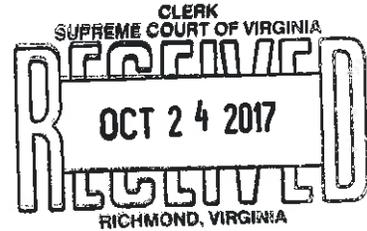


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In the
Supreme Court of Virginia

At Richmond



Record No. _____

WILLIAM W. NISSEN, II,
and
LORA J. NISSEN,

Appellants,

– v. –

APPALACHIAN POWER COMPANY,

Appellee.

PETITION FOR APPEAL

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PETITION FOR APPEAL

Pursuant to Rule 5:17 of the Rules of the Supreme Court of Virginia, and for the reasons that follow, William W. Nissen, II, and Lora J. Nissen (hereinafter “the Nissens”), hereby file their Petition for Appeal from the July 28, 2017 Final Order of the Circuit Court of Franklin County, Virginia, by which the trial court granted summary judgment in favor of Appalachian Power Company (hereinafter “APCO”).

ASSIGNMENTS OF ERROR

- I. The trial court erred in granting summary judgment for APCO because the trial court misconstrued the subject flowage easement as conveying to APCO absolute authority, rather than limited and discretionary easement rights, over the Nissens’ property. (Error preserved at R. 238, R. 238, ¶¶18, 24, 26, R. 721-1093, R. 1120, T. 74).
- II. The trial court erred in granting summary judgment for APCO because the trial court misconstrued the flowage easement as prohibiting the Nissens from constructing a dock on their property without APCO’s permission. (Error preserved at R. 238, R. 238 ¶¶18, 24, 26, R. 721-1093, R. 1120, T. 74).
- III. The trial court erred in granting summary judgment for APCO because there were genuinely disputed material facts as to APCO’s limited and discretionary easement rights to destroy or remove the Nissens’ dock. (Error preserved at R. 721-1093, R. 1120, T. 74).

STATEMENT OF THE CASE

On February 8, 2017, APCO filed a complaint in the Franklin County Circuit Court alleging that the Nissens were violating a Flowage Right and Easement Deed conveyed to APCO by the Nissens' predecessor in title on September 12, 1960 ("flowage easement") by constructing a dock on the Nissens' property. R. 1. APCO sought an injunction against the Nissens requiring them, among other things, to cease the construction of, and to remove, the dock. R. 1, p.15. This followed a decision by the United States Court of Appeals that there was no federal question at issue in this matter. Appalachian Power Co. v. Nissen, 2016 U.S. App. LEXIS 22469 (4th Cir. 2016).

APCO's Complaint relies on various assertions of fact that the Nissens dispute. For example, the Complaint repeatedly asserts that the Nissens' property located below the 800-foot contour is subject to regulation by the Federal Energy Regulatory Commission ("FERC"), and is subject to the terms and conditions of APCO's FERC license and APCO's Shoreline Management Plan. R. 1. The Complaint also asserts that the public would be harmed if the Nissens were allowed to build their dock. R. 1, ¶44. The Complaint also quotes extensively from an opinion of the U.S.

District Court in a case involving the same parties and similar subject matter. R. 1. That case was one of two cases vacated by the U.S. Court of Appeal for the Fourth Circuit. See, Pressl v. Appalachian Power Co., 842 F.3d 299, 305-306 (4th Cir. 2016); Appalachian Power Co. v. Nissen, 2016 U.S. App. LEXIS 22469 (4th Cir. 2016).

The Nissens filed their Answer on March 13, 2017. R. 238.

On March 22, 2017, APCO propounded discovery upon the Nissens which included requests for admissions, interrogatories and request for production of documents. The Nissens answered APCO's discovery on April 12, 2017. R. 254.

On May 19, 2017, APCO filed its Motion for Summary Judgment and its Memorandum in Support of Motion for Summary Judgment. R. 285, 288. In its Memorandum, APCO argued that the flowage easement gave it the right to (1) remove any structures, such as a dock, from the Nissens' property located below the 800-foot contour "at any time for any reason", and (2) require that the Nissens obtain APCO's approval before building any structures. R. 288. The Nissens filed a Memorandum in Opposition to APCO's Motion for Summary Judgment. R. 721-1074.

On June 6, 2017, the Nissens propounded upon APCO interrogatories and requests for production of documents. R. 721, Exh. F. The propounded discovery was relevant and material to the issues presented in APCO's Complaint and in APCO's Motion for Summary Judgment.

On June 16, 2017, the trial court heard arguments on the Motion for Summary Judgment and the Nissens' opposition thereto. T. 1-78. At the conclusion of oral arguments, the trial court granted summary judgment in favor of APCO, and stated its reasons for doing so on the record. T. 74-78. The trial court granted APCO's Motion for Summary Judgment before APCO's discovery responses were due. T. 77.

The trial court's Final Order granting APCO's Motion for Summary Judgment was entered on July 28, 2017. R. 1117.

STATEMENT OF FACTS

Because the trial court granted summary judgment for APCO before the Nissens were able to complete any discovery or were allowed to develop and present any meaningful evidence, the record in this case contains very little by way of facts. Thus, the facts presented herein are the

flowage easement at issue in this case and the allegations contained in APCO's Complaint and the Nissens' Answer.

On April 25, 1960, the Federal Energy Regulatory Commission's predecessor, the Federal Power Commission, issued a license to APCO that authorized APCO to construct and operate a dam and hydroelectric power station known as the Smith Mountain Pumped Storage Project. R. 1. The construction of the project created Smith Mountain Lake and Leesville Lake, with Smith Mountain Lake having 500 miles of shoreline and Leesville Lake having 150 miles of shoreline.

The license issued to APCO by FERC granted APCO no property rights whatsoever. Rather, under the terms of the license, APCO was required to "acquire title in fee or the right to use in perpetuity all lands, other than lands of the United States, necessary or appropriate for the construction, maintenance, and operation of the project." R. 1, ¶12. With regard to Smith Mountain Lake, the lands necessary or appropriate were those located below the contour elevation 800 feet above mean seal level ("fmsl"). APCO could obtain these property interests by contract or, if necessary, by means of federal eminent domain pursuant to section 21 of the Federal Power Act.

With respect to what is now the Nissens' property, APCO acquired its rights by contract. Specifically, on or about September 12, 1960, APCO acquired a flowage easement from the Cundiffs, the then owners of what is now the Nissens' property. R. 1, Exh. B. The flowage easement provided that APCO could:

overflow and/or affect so much of said premises [below the 800 feet elevation contour line] as may be overflowed and/or affected, continuously or from time to time in any manner whatsoever, as the result of the construction, existence, operation and/or maintenance of the aforesaid dam and/or power station, the impounding of said river and tributaries and/or varying of the level of the so impounded waters by reason of the operation of said power station, including any pumping as part of such operation. Id.

ALSO, for the above mentioned considerations, Grantors hereby grant to Appalachian the further right to enter upon said premises at any time and from time to time and, at Appalachian's discretion, to cut, burn and/or remove therefrom any and all buildings, structures, improvements, trees, bushes, driftwood and other objects and debris of any and every kind or description which are or may hereafter be located on the portion of said premises below the contour the elevation of which is 800 feet. Id.

The flowage easement further states that the Nissens' predecessor in title, the Cundiffs, retained the right to:

possess and use said premises in any manner not inconsistent with the estate, rights and privileges herein granted to Appalachian, including (a) the right to cross said land to reach impounded waters for recreational purposes Id.

APCO completed the construction of the dam at Smith Mountain in 1963, and Smith Mountain Lake reached full pond in 1966.

In their Answer, the Nissens asserted, and believe that they could prove at trial, that for much of the time Smith Mountain Lake has been in existence, APCO did not regulate the uses that waterfront property owners made of their property located below 800 feet. R. 238, ¶32. For well over 40 years, the construction of docks on Smith Mountain Lake was regulated only by local governmental authorities. Id. These local authorities enforced existing zoning and building codes as they pertain to dock construction without any action by APCO. Id. Many of the Nissens' neighbors and thousands of other owners of waterfront properties on Smith Mountain Lake have constructed docks. Id. Many of these waterfront properties are subject to flowage easements nearly identical to the one affecting the Nissens' property. See, e.g., Brown v. Haley, 233 Va. 210, 212; 355 S.E.2d 563, 565 (1987); R. 721, Exh. C (a copy of Brown v. Haley deed).

For many years, APCO did not assert a right under its flowage easements to regulate docks. The Nissens alleged, and believe that they could prove at trial, that the right to build a dock is encompassed within the right to use their property in any manner not inconsistent with the rights

granted to APCO in the flowage easement. R. 238, ¶18. The Nissens denied that their dock violates any provision of the flowage easement, and they further denied that APCO has any valid, discretionary, non-arbitrary, reason to object to their use of their property for the construction of a dock. R. 238, ¶¶24, 26.

SUMMARY OF ARGUMENT

The trial court erred in granting summary judgment for APCO for at least three reasons. First, the trial court erred in its interpretation of the flowage easement as giving APCO absolute authority to destroy the Nissens' dock. The trial court's interpretation of the flowage easement is inconsistent with the plain language of the easement, which provides that APCO's authority to destroy or remove structures is limited by the terms of the flowage easement and it is discretionary, rather than absolute, and discretionary authority cannot be exercised arbitrarily and capriciously. The trial court's interpretation of the flowage easement failed to give meaning to the term "discretion" and made the term "discretion" superfluous.

The trial court also erred in granting summary judgment for APCO because the trial court misconstrued the flowage easement as prohibiting the Nissens from constructing a dock on their property without APCO's

permission. On its face, the flowage easement contains no such prohibition.

The trial court further erred in granting summary judgment for APCO because there are material factual questions in genuine dispute. Specifically, the question of whether APCO's decision to destroy or remove the Nissens' dock is an arbitrary or capricious exercise of its discretion is in dispute, and the resolution of this dispute turns on questions of fact. For example, APCO's stated reason for seeking the destruction of the Nissens' dock is that it allegedly does not comply with APCO's Shoreline Management Plan, and the trial court granted summary judgment without any information as to the terms and conditions of the Shoreline Management Plan, which consists of about 200 pages and goes well beyond the issues of docks and other shoreline structures. T. 76. Summary Judgment having been awarded to APCO, the Nissens were precluded from presenting evidence as to why APCO's imposition of the terms and conditions of its Shoreline Management Plan on the Nissens was not a good faith exercise of APCO's contractual discretion.

STANDARD OF REVIEW FOR ALL ASSIGNMENTS OF ERROR

In an appeal of a decision awarding summary judgment, the trial court's determination that no genuinely disputed material facts exist and its application of law to the facts present issues of law subject to *de novo* review by the Supreme Court. Mount Aldie, LLC v. Land Trust of Va., Inc., 293 Va. 190. 196-97; 796 S.E.2d 549, 552 (2017). Further, the Supreme Court reviews a trial court's construction of a deed of easement *de novo*. Id.

PRINCIPLES OF LAW, ARGUMENT, & AUTHORITIES

I. The Trial Court Erred in Granting Summary Judgment for APCO Because it Misconstrued the Subject Flowage Easement as Conveying to APCO Absolute Authority, Rather Than Limited and Discretionary Easement Rights, Over the Nissens' Property (Assignment of Error I).

In support of its Motion for Summary Judgment, APCO argued that the Nissens violated APCO's Shoreline Management Plan, which is part of the license issued to APCO by the Federal Energy Regulatory Commission. This license authorizes APCO to operate the Smith Mountain Pump Storage Project, a hydroelectric project that created Smith Mountain Lake and Leesville Lake.

APCO recently made the same argument in a similar case before the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit rejected that argument. Pressl v. Appalachian Power Co., 842 F.3d 299, 305-306 (4th Cir. 2016) (“And, since FERC regulates only APCO, the Pressls themselves could not violate the Federal Power Act by constructing a dock.”). The Fourth Circuit explained, “[b]ecause neither the Federal Power Act nor APCO's FERC license provides APCO with the property rights necessary to operate the hydroelectric project, see, e.g., Appalachian Power Co., 153 FERC ¶ 61299, at ¶ 29 (Dec. 17, 2015), APCO must acquire these rights either through condemnation or contract.” Id. at 303.

The FPA does not confer upon APCO the right to enter, use, or regulate private property without the consent of the owner. Neither FERC, the 2003 Shoreline Management Plan, nor the APCO's Federal License binds private property owners. Pressl v. Appalachian Power Co., 842 F.2d 299, 306 (4th Cir. 2016). If APCO had wanted to bind the Nissens to its federal license, APCO should have done so in 1960, when the easement was granted. APCO knew how to do it. For example and in comparison, APCO did expressly incorporate its license in at least three deeds prior to shoreline management regulation. R. 721, Exh. E, see also VA Timberline,

L.L.C. v. Appalachian Power Co., 343 Fed Appx. 915; 2009 U.S. Appl. LEXIS 19490 (4th Cir. 2009).

The issue in this case should not be whether the Nissens violated APCO's FERC license, but whether the flowage easement itself gives APCO the private property right to destroy the Nissens' dock.

The trial court erred in granting summary judgment for APCO on this issue because the court misconstrued the flowage easement as giving APCO authority tantamount to a fee simple ownership of the Nissens' property, and, therefore, as giving APCO the absolute, unfettered right to destroy the Nissens' dock for any reason, or for no reason. Indeed, during the hearing on APCO's Motion for Summary Judgment, the trial court stated:

THE COURT: But as I read the flowage easement, it is almost indecipherable to figure out any way it could be different in any meaningful way than a fee simple. T. 74.

. . . .

THE COURT: As if they have as broad a right as that language to the Court implied, then they [APCO] absolutely have the right to destroy the Nissens' dock for whatever reason they want. It's stupid. It is – but, you know, people can make foolish contracts. And perhaps at the time that this was done there was an expectation that there really wasn't going to be any limitation on what was done, and I suspect for the first 30 or so years there wasn't any limitation. But times change and situations

change, and Appalachian has now essentially been pushed into limiting things. T. 75.

The trial court's interpretation of the flowage easement is contrary to the plain meaning of the easement, fails to give any meaning to the term "discretion", and makes the term "discretion" superfluous.

The cardinal rule in the construction of contracts is that the intention of the parties governs. Worrie v. Boze, 191 Va. 916, 925; 62 S.E.2d 876, 880 (1951). The court must bear in mind the situation of the parties, the subject matter of the contract and the purpose and intention of the parties in making it. Id. The whole of a deed and all of its parts should be considered together in order to determine the controlling intent. Mount Aldie, LLC v. Land Trust of Va., Inc., 293 Va. 190, 197; 796 S.E.2d 549, 552 (2017). The title of the document is relevant in determination of the rights granted under the contract. See McCarthy Holdings, LLC v. Burgher, 282 Va. 267, 272, 716 S.E.2d 461, 464 (2011). When the deed, so construed, is plain and unambiguous, the trial court is not at liberty to search for its meaning beyond the instrument itself. Mount Aldie, LLC, 293 Va. at 197; 796 S.E.2d at 552. An instrument will be deemed unambiguous if its provisions are capable of only one reasonable construction. Id. An unambiguous contract is interpreted according to its plain meaning; to

determine whether contractual provisions have a plain meaning, "words used are given their usual, ordinary, and popular meaning," and, "when considering the meaning of any part of a contract, we will construe the contract as a whole." Babcock & Wilcox Co. v. Areva NP, Inc., 292 Va. 165, 179, 788 S.E.2d 237, 244 (2016).

The trial court's interpretation of the flowage easement as giving APCO the absolute power to destroy the Nissens' dock is contrary to the plain meaning of the flowage easement, which provides in pertinent part:

ALSO, for the above mentioned considerations, Grantors hereby grant to Appalachian the further right to enter upon said premises at any time and from time to time and, **at Appalachian's discretion**, to cut, burn and/or remove therefrom any and all buildings, structures, improvements, trees, bushes, driftwood and other objects and debris of any and every kind or description which are or may hereafter be located on the portion of said premises below the contour the elevation of which is 800 feet. R. 1 (emphasis added).

The trial court interpreted the flowage easement as giving APCO absolute authority to destroy the Nissens' dock. This interpretation completely ignores the plain meaning of the term "discretion" as used in the easement. In fact, this interpretation failed to give any meaning to the term "discretion" and, instead, rendered the term superfluous. "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 term “discretion”, as used in the easement, is material to giving meaning to the easement. It is a limiting term and has a legal significance. Under Virginia contract law, no word or clause in a 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. Haisfield v. Lape, 264 Va. 632, 637; 570 S.E.2d 794, 796 (2002). In this case, the trial court interpreted the easement in such a way as to give absolutely no meaning to the word “discretion.” Id. In fact, the trial court completely reads the term “discretion” out of the easement.

Had the trial correctly interpreted the flowage easement, then the court would have had to address the issue of whether APCO, in seeking the destruction of the Nissens’ dock, was exercising its discretion in good faith. This would have required the trial court, at a minimum, to examine the terms and conditions of the Shoreline Management Plan and APCO permit that APCO seeks to impose on the Nissens. Indeed, a party may not exercise contractual discretion in bad faith, even when such discretion is vested solely in that party. Virginia Vermiculite, Ltd. V. W. R. Grace & Co.,

156 F. 3d 535 (4th Cir. 1997). In Virginia, every contract contains an implied covenant of good faith and fair dealing. Stoney Glen, LLC v. Southern Bank & Trust Co., 944 F. Supp. 2nd 460, 465 (4th Cir. 2013). By reading the term “discretion” out of the easement, the trial court was able to ignore this crucial fact-based question completely.

The trial court also failed to construe the flowage easement as a whole and failed to consider the title of the document. The parties titled the deed “Flowage Right and Easement Deed”, not a Deed of Bargain and Sale. R. 1, Exh. B. The title of the document is relevant in determination of the rights granted under the contract. McCarthy Holdings, LLC v. Burgher, 282 Va. 267, 272, 716 S.E.2d 461, 464 (2011). The title of the document therefore does not support the trial court’s conclusion that the easement grants APCO rights tantamount to fee simple rights. Also, in the flowage easement, APCO proposes to impound waters and operate “a power station”, not to regulate shoreline activities. R. 1, Exh. B. The flowage easement is silent as to any authority of APCO to regulate the construction on and occupancy of the Nissens’ property below the 800-foot elevation contour by any and all structures, including docks, and does not in any way prohibit construction of docks.

Furthermore, APCO's right to remove a structure, including a dock, is informed and limited by the reasonable necessity of APCO to overflow and/or affect by water the Nissens' land, also a fact-based question that the trial court failed to consider given the erroneous ruling that the flowage easement grants APCO the absolute authority to destroy a dock for any reason, or no reason at all.

The first conveyance paragraph provides that APCO can:

overflow and/or affect so much of said premises [below the 800 feet elevation contour line] as may be overflowed and/or affected, continuously or from time to time in any manner whatsoever, as the result of the construction, existence, operation and/or maintenance of the aforesaid dam and/or power station, the impounding of said river and tributaries and/or varying of the level of the so impounded waters by reason of the operation of said power station, including any pumping as part of such operation. Id.

This Court has characterized the word "affect", as used in a nearly identical flowage easement, as "affect with water." Brown v. Haley, 233 Va. 210, 212; 355 S.E.2d 563, 565 (1987).

By deed dated September 6, 1961, Rufus R. Brown and Sallie W. Brown conveyed to Appalachian Power Company (Apco) the right to *overflow and affect with water* that portion of a tract of 321.75 acres to the 800-foot elevation and *to enter* below the 800-foot contour and *clear the land for the impoundment of water. The deed reserved to the Browns the right to use the land below the 800-foot contour,...* Brown v. Haley, 233 Va.

210, 212; 355 S.E.2d 563, 565 (1987) (emphasis added). See also copy of Brown v. Haley Deed, R. 721, Exh. C.

The Brown v. Haley's characterization of the word "affect" as "affect with water" is correct for several reasons. In the flowage easement, the term "affect" immediately follows the term "overflow." Under the principle of *ejusdem generis*, where a general term follows a specific term, the general term is limited and informed by the specific term. Amos v. Coffey, 228 Va. 88, 94; 320 S.E.2d 335, 338 (1984). Furthermore, if the term "affect" was to be construed any other way than "affect by water", then the paragraph which follows would be made superfluous, which is contrary to the established rules of the contract construction. The flowage easement states:

ALSO, for the above mentioned consideration, Grantors hereby grant to Appalachian **the further right** to enter upon said premises at any time and from time to time and, **at Appalachian's discretion**, to cut, burn and/or remove therefrom any and all buildings, structures, improvements, trees, bushes, driftwood and other objects and debris of any and every kind or description which are or may hereafter be located on the portion of said premises below the contour the elevation of which is 800 feet. R. 1. (emphasis added).

If the first paragraph was a blank check giving APCO the absolute, unfettered right to "affect" the property in any way whatsoever, there would be no need to add the language permitting APCO to affect the property by

entering onto the property for the specifically enumerated purposes. Based on the foregoing, the first paragraph constitutes a clearly stated limitation on APCO's discretionary right to remove. In this case, APCO has not alleged that the existence of a dock interferes with its ability to overflow and/or affect by water the Nissens' land for purposes of operating and/or maintaining the dam and/or power station. R. 1. On the contrary, APCO's complaint is with the size of the dock not with the dock being in the way of the flow of water to be able to operate and/or maintain the dam and/or power station. The Nissens alleged, and believe they can prove at trial, that their right to build a dock is encompassed within their right to use the property in any manner not inconsistent with the rights granted to APCO, and present evidence that there are many similar docks and other structures along the shoreline of Smith Mountain Lake that APCO is not seeking to remove. R. 238, ¶18, R. 721. Upon information and belief, the Nissens' dock is one of only a few, and maybe the only, dock APCO has ever sought a court order to remove. R. 721. The Nissens denied that their dock violates any provision of the flowage easement. R. 238, ¶¶24, 26, R. 721. If the trial court construed the flowage easement correctly, it

would have had to conclude that summary judgment was not appropriate given the issue of genuinely disputed facts.

Based on all of the foregoing, the trial court erred in granting summary judgment for APCO because it misconstrued the subject flowage easement as conveying to APCO absolute authority, rather than limited and discretionary easement rights, over the Nissens' property.

II. The Trial Court Erred In Granting Summary Judgment For APCO Because The Trial Court Misconstrued The Flowage Easement As Prohibiting The Nissens From Constructing A Dock On Their Property Without APCO's Permission (Assignment of Error II).

The trial court further ignored the plain meaning of the flowage easement when it held that the Nissens' reserved rights under the flowage easement did not include the right to construct a dock on their property below the 800-foot elevation. In other words, the trial court held that the flowage easement gives APCO the absolute, unfettered right to grant or deny the Nissens the right to construct any structures below the 800-foot contour. R. 1117. This holding is not supported by, and is contrary to, the plain meaning of the flowage easement.

The law, carrying into effect the intention of the parties, does not intend to restrict the rights of ownership of the real estate subjected further than is necessary to give effect to the easement, and the owner of real

estate is allowed to make all the improvements upon it, which can be consistently made with the just rights of others. Mount Aldie, LLC v. Land Trust of Va., Inc., 293 Va. 190, 202; 796 S.E.2d 549, 556 (2017). No use can be made of an easement different from that established when the easement was created, which imposes additional burdens on the servient estate. Shooting Point, L.L.C. v. Wescoat, 265 Va. 256, 266; 576 S.E.2d 497, 503 (2003); see also McCarthy Holdings, LLC v. Burgher, 282 Va. 267, 273; 716 S.E.2d 461, 465 (2011).

The trial court's holding to the contrary notwithstanding, the flowage easement in no way precludes the Nissens from constructing a dock on their property below the 800-foot contour.

The flowage easement grants certain specific easement rights to APCO; prohibits certain specific acts of the Nissens; and reserves rights for the Nissens.

The certain specific rights conveyed to APCO are as follows:

Grantors hereby grant, bargain, sell and convey with covenants of general warranty, unto Appalachian forever the right to overflow and/or affect so much of said premises as may be overflowed and/or affected, continuously or from time to time in any manner whatsoever, as the result of the construction, existence, operation and/or maintenance of the aforesaid dam and/or power station, the impounding of said river and tributaries and/or varying of the level of the so impounded

waters by reason of the operation of said power station, including any pumping as part of such operation.

ALSO, for the above mentioned considerations, Grantors hereby grant to Appalachian the further right to enter upon said premises at any time and from time to time and, at Appalachian's discretion, to cut, burn and/or remove therefrom any and all buildings, structures, improvements, trees, bushes, driftwood and other objects and debris of any and every kind or description which are or may hereafter be located on the portion of said premises below the contour the elevation of which is 800 feet.

No other rights were conveyed to APCO. Nothing in these rights granted to APCO include the right to deny permission to build a dock. Indeed, it contemplates that structures "may hereafter be located" on the property.

The flowage easement further provides that the Nissens, through their predecessor in title,

shall have the right to possess and use said premises ***in any manner not inconsistent with the estate, rights and privileges herein granted to Appalachian***, including (a) the right to cross said land to reach impounded waters for recreational purposes and for obtaining their domestic water supply and water for their livestock and (b) the right to extend and maintain necessary fences across said land and into the impounded waters for a sufficient distance to prevent livestock from wading around said fences.

(emphasis added).

Construction of a dock is in no way inconsistent with the easement rights conveyed to APCO.

Finally, the flowage easement clearly states what the Nissens cannot do on their property:

Grantors will not cause, permit or suffer any garbage, sewage, refuse, waste or other contaminating matter to be cast, drained or discharged onto that portion of said premises below the contour the elevation of which is 800 feet or onto or into any of the other lands or waters referred to in (a) above or directly or indirectly into such impounded waters.

This is the only language within the four corners of the flowage easement that places any restrictions on the Nissens with regards to their property located below the 800-foot contour. Thus, while the Nissens are prohibited from polluting the property or the impounded waters, there is absolutely no language in the easement that prohibits them from constructing a dock without APCO's permission.

In order to build a dock, APCO would require the Nissens to sign a permit, which in turn, would bind the Nissens to all of the myriad terms of APCO's about 200 pages Shoreline Management Plan and any of its future amendments. R. 721, Exh. G. The requirement for the Nissens to comply with the Shoreline Management Plan would impose upon them new and additional duties that go far beyond what type or size of a dock the Nissens may build. Id. The Shoreline Management Plan regulates, for example, details on how the Nissens can or cannot stabilize their shoreline including

using rip rap; requires that all new construction shall utilize puncture resistant material; requires that the Nissens obtain a permit to dredge; prohibits the Nissens from removing and/or adding fill material; regulates details on what vegetation can be removed, planted or trimmed; requires vegetation replacement rates (e.g. for 1 large shrub, 1 large shrub @ 3'-4' or 3 small shrubs or woody groundcover @ 15"-18"); regulates how to construct access paths and what material can be used; requires that any use of or change in the features or vegetation must be authorized by APCO; requires that the Nissens protect cultural resources, if discovered. SMP, §2.5 (Regulations); R.1, Exh. A. There is nothing in the plain language of the flowage easement that justifies this far reaching regulation of another's property. Not only was the Federal License or Shoreline Management Plan, in any of its forms, not incorporated into the Flowage Easement, most importantly, the Shoreline Management Plan would vastly expand, not limit, the scope of the flowage easement, and APCO's rights over the Nissens' property. The trial court's construction of the flowage easement as requiring the Nissens to obtain a permit from APCO to construct a dock would thus impose additional burdens on the servient estate in contravention of Shooting Point, L.L.C. v. Wescoat, which

prohibits such interpretation. Given the vast scope of the Shoreline Management Plan in comparison to the limited rights granted to APCO under the flowage easement, it thus also cannot be said, the trial court's holding notwithstanding, that the right to remove includes the right to regulate. T. 76. That reasoning is faulty and is not applicable under the facts of this case.

The trial court's interpretation of the flowage easement as prohibiting the Nissens from constructing a dock on their property without APCO's permit is thus an impermissible restriction on the Nissens' ownership rights, it represents an impermissible expansion of APCO's rights, and it fails to recognize the plain meaning of the flowage easement.

III. The Trial Court Erred In Granting Summary Judgment For APCO Because There Were Genuinely Disputed Material Facts As To APCO's Limited And Discretionary Easement Rights To Destroy Or Remove The Nissens' Dock (Assignment of Error III).

A party is entitled to summary judgment only if it appears from the pleadings, orders, if any, made at a pretrial conference, or admissions that the moving party is entitled to judgment. Va. Sup. Ct. R. Rule 3:20.

"[S]ummary judgment is a drastic remedy, available only when there are no material facts genuinely in dispute." Fultz v. Delhaize Am., Inc., 278 Va.

84, 88; 677 S.E.2d 272, 274 (2009). A moving party is entitled to summary judgment only if there are no facts genuinely in dispute. Leslie v. Nitz, 212 Va. 480, 184 S.E.2d 755 (1971). This rule does not substitute a new method of trial where an issue of fact exists. Id. It applies only to cases in which no trial is necessary because no evidence could affect the result. Carwile v. Richmond Newspapers, Inc., 196 Va. 1, 82 S.E.2d 588 (1954).

The fundamental rule in construction of the contracts is to ascertain the intent of the parties. Moore v. Chesapeake & O. R. Co., 159 Va. 703, 729; 167 S.E. 351, 359 (1933). In ascertaining the intent of the parties, the courts look to the language employed, the subject matter, and the surrounding circumstances, and the courts will view circumstances as the parties viewed them, so as to judge the meaning of the words and the correct application of the language to the things described. Id. A construction should be avoided if it can be done consistently with the tenor of the agreement, which would be unreasonable or unequal. Id. In construction of contracts in which obscurity exists, a great weight is given by the courts to the acts of the parties done under the contracts, as an indication of their intention. Moore, 159 Va. at 730; 167 S.E. at 359. This is known as the rule of practical construction. Id.

In this case, whether APCO, in seeking the destruction of the Nissens' dock, is acting reasonably involves a factual inquiry and represents an issue of disputed material fact not appropriate for being decided on summary judgment. A determination of whether discretion to remove a dock is being exercised fairly, reasonably, rationally and not arbitrarily involves the examination and development of facts, including, but not limited to, evidence as to what the parties' to the flowage easement intended when they entered into the contract; evidence as to the conditions that existed at the time of the execution of the flowage easement in 1960 in order to determine the scope of the rights arising under the easement; evidence as to what is, and has been, the practical construction of the discretionary easement right to remove by the parties through their conduct over the years, especially in light of the history of dock construction on the lake and the existence of many similar docks along the shoreline of Smith Mountain Lake; evidence as to how many times APCO exercised its discretion to remove a dock or insisted that a property owner cease a construction of a dock at Smith Mountain Lake or Leesville Lake; how many and what docks it removed from Smith Mountain Lake or Leesville Lake since 1960; and/or evidence as to all the reasons for APCO to pursue

removal of this particular dock. R. 721, T. 48-50. Upon information and belief, the Nissens' dock is one of only a few, and maybe the only, dock APCO has ever sought a court order to remove. R. 721.

The Nissens are confident that, if not denied the opportunity, they would be able to prove at trial that the flowage easement does not give APCO the right to remove their dock. The evidence from over 50 years of operation of Smith Mountain dam and/or power station supports a conclusion that the dock, as constructed by the Nissens, does not interfere with APCO's operation and/or maintenance of the Smith Mountain dam and/or power station or the impounding of the waters of Roanoke River. On page 15 of its Memorandum, APCO stated that "APCO has decided not to remove some structures" at Smith Mountain Lake. R. 288. "Some structures" does not correctly portray the magnitude of what has been happening at Smith Mountain Lake over the past 50 or so years. If given the opportunity at trial, the Nissens could present evidence that there are many structures, including homes, part of homes, golf courses, docks and commercial facilities located below the contour of 800 feet of Smith Mountain Lake, without any impact on the operation and maintenance of

dam and/or power station or the impounding of the waters of Roanoke River.

In addition, there are 27 commercial facilities within the project boundary that provide access to the public (25 on Smith Mountain Lake and 2 on Leesville Lake). These businesses provide a variety of services including boat launching, concessions, gas, boat rental and equipment sales. Private homeowner docks contribute a large amount of recreational use to the lakes. It is estimated that there are 6,336 residential docks existing on Smith Mountain Lake and 98 residential docks on Leesville Lake. APCO SMP dated August 29, 2003, ¶2.15.

By APCO's estimate in 2014:

There is one (1) canoe launch at the Explore Park and eight (8) public boat launches within the project boundary [six (6) on Smith Mountain Lake and two (2) on Leesville Lake]. In addition, there are 31 commercial facilities within the project boundary that provide access to the public (29 on Smith Mountain Lake and 2 on Leesville Lake). These businesses provide a variety of services including boat launching, concessions, gas, and boat rental and equipment sales. Private homeowner docks contribute a large amount of recreational use to the lakes. It is estimated that there are 7,524 residential docks existing on Smith Mountain Lake and 146 residential docks on Leesville Lake. R. 1, APCO's SMP dated January 30, 2014, ¶ 2.15.

It is believed, and would be explored in discovery, and presented as evidence at trial that none of the improvements and structures identified in 2003 had been issued revocable licenses or permits and none complied with APCO's published 2003 SMP regulations. Over 80% of existing

residential docks continue to exist without revocable licenses/permits, which according to the trial court's holding, APCO now has the right to remove at any time and for any reason, thus jeopardizing the property rights of thousands of similarly situated shoreline property owners. There are additional structures and improvements not identified in the 2003 and 2014 SMPs existing without revocable licenses. R. 721, Exh. B., GIS maps, aerial photos of some of these encroachments.

In its Answer, the Nissens affirmatively alleged that for over 40 years the construction of docks on Smith Mountain Lake has been regulated by local governmental authorities and that these authorities have in the past enforced existing zoning ordinances and building codes as they pertain to dock construction without any action by APCO. R. 328, p. 13. Many of the Nissens' neighbors and thousands of other owners of waterfront property on Smith Mountain Lake have constructed docks to access Smith Mountain Lake for recreational purposes to include boating, fishing and swimming.

Id.

APCO's past behavior, or lack of it, over last 40 years with respect to allowing docks, piers, boat slips, commercial marinas, houses, swimming pools, gazebos, supports the inference, which must be made in favor of the

Nissens on summary judgment, that APCO's removal of the Nissens' dock would be an arbitrary decision, and that the Nissens' dock does not interfere with the limited flowage rights granted to APCO under the flowage easement.

In its decision, the trial court completely disregarded any facts bearing on what the contracting parties intended to accomplish at the time of the execution of the flowage easement and how the contracting parties themselves practically construed the flowage easement over past 50 years. Instead the trial court sought to accommodate responsibilities that the Federal Regulatory Energy Commission imposed upon APCO, not the landowners, many years after the flowage easement came into existence.

THE COURT: I mean, you've got – I mean, look, we all know what's driving this. I mean, FERC is driving this. The EPA is driving this. So it's – it's not a function of one side or the other's conduct. It's looking at it through the spectrum of federal decisions to regulate and mitigate environmental issues that nobody frankly cared about 50 years ago and they care about now, right? T. 45-46.

The trial court's holding notwithstanding, under Moore v. Chesapeake & O. R. Co., the flowage easement's construction is "a function of one side or the other's side conduct"; it does matter what the parties intended to accomplish in 1960; and it matters whether or not the parties to the flowage easement intended to subject the property owner to a vast spectrum of

federal regulation, which the trial court acknowledged “nobody frankly cared about 50 years ago”.

As of the time of the hearing on APCO’s Motion for Summary Judgment, there was outstanding discovery, which the Nissens propounded to APCO to explore these factual issues. R. 721, Exh. F. Instead of providing discovery responses, APCO filed a motion seeking an order that would provide that APCO need not respond to the discovery requests. R.675. Given the trial court’s ruling, APCO did not have to provide the requested discovery responses, and the APCO’s Motion for Protective Order was rendered moot.

Based on all of the foregoing, the trial court erred in granting summary judgment for APCO because there were genuinely disputed material facts as to APCO’s limited and discretionary easement rights to destroy or remove the Nissens’ dock.

CONCLUSION

The petition for appeal must be granted because the trial court erred in its construction of the flowage easement, which in turn led the trial court

to erroneously conclude that no genuinely disputed material facts existed that would preclude awarding the summary judgment for APCO.

For the foregoing reasons, the appellants, William W. Nissen, II, and Lora J. Nissen, respectfully ask that this Court (1) reverse the judgment of the trial court and set aside the Final Order dated July 28, 2017, and (2) order the case to be remanded for further proceedings.

Respectfully submitted,

WILLIAM W. NISSEN, II, and
LORA J. NISSEN

By: 

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CERTIFICATE

The undersigned hereby certifies that the foregoing complies with Rule 5:17, and further certifies as follows:

1) The appellants are: William W. Nissen, II and Lora J. Nissen.

2) Counsels for the appellants are:

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3) The appellee is: Appalachian Power Company.

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5) The undersigned hereby certifies that on this 24th day of October, 2017, seven (7) copies of the foregoing Petition for Appeal were

delivered to the Clerk of the Supreme Court of Virginia, and that one copy was sent via third party commercial carrier to Counsel for the Appalachian Power Company, at the above address.

6) James Frederick Watson, Esquire, counsel for appellants, respectfully requests to make an oral presentation, in person, to a panel of this Court in support of this Petition for Appeal.

A handwritten signature in black ink, appearing to read 'J.F. Watson', with a horizontal line underneath the name.

James Frederick Watson

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