RECORD NO. 15-1446(L)
CROSS-APPEAL NO. 15-1447

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

JUSTIN D. THOMAS; IRENE S. THOMAS,

Plaintiffs - Appellants,

v.

CARMEUSE LIME & STONE, INCORPORATED;
O-N MINERALS (CHEMSTONE) COMPANY,

Defendants - Appellees,

v.

THOMAS M. HELMS, SR.,

Intervenor/Defendant - Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
AT ROANOKE

OPENING BRIEF OF APPELLANTS

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 15-1446(L) and 15-1447 Caption: Justin D. Thomas and Irene S. Thomas v. Carmeuse Lime & Stone, Incorporated, O-N Minerals (Chemstone) Company, Thomas M. Helms, Sr.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Justin D. Thomas and Irene S. Thomas
(name of party/amicus)

who is Appellants, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☒ NO

2. Does party/amicus have any parent corporations? ☐ YES ☒ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☒ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☒NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☒NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☒NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: J. Alan Sutton Date: 5-11-15

Counsel for: Appellants, Justin D. Thomas and Irene S. Thomas

CERTIFICATE OF SERVICE

****

I certify that on May 11, 2015 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

J. Alan Sutton
(signature)

5-11-15
(date)

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INTRODUCTION

Reverend Justin Thomas ("Thomas") and his wife Irene own a tract of land in Botetourt County near the James River (the "Property"). The court below held on summary judgment that a neighboring quarry company, Carmeuse,[1] could destroy the entire surface of their Property. This includes a rare historic stone house from the 1700's. The court's ruling threatens to erode longstanding Virginia property and mineral rights law. If affirmed, the judgment below will have profoundly negative consequences on the law in Virginia. It will also result in the destruction of a rare piece of history.

Carmeuse owns a partial limestone interest in the Property, to which Thomas retains the "surface" estate.[2] Any rights Carmeuse claims derive from an 1849 stone severance deed from Thomas's predecessor ("1849 Deed"). The language of the 1849 Deed specifically precludes quarrying or taking away stone in the area around the historic stone house. The grantee may "not blast, quarry, or take away any stone within the inclosure of the yard attached" to the grantor's house (the "Yard Clause"). But, the district court erroneously declared this deed provision

[1] Carmeuse Lime & Stone, Inc., and O-N Minerals (Chemstone) Company (collectively, "Carmeuse") is a multi-national conglomerate that operates one of its many quarries on a tract adjacent to the Property.

[2] Under Virginia law, the "surface" estate includes everything not included within the mineral estate, from the center from the of the earth to the sky – minus the conveyed limestone. *See Clinchfield Coal Corp. v. Compton*, 139 S.E. 308, 312 (Va. 1916) (citing *Stonegap Colliery Co. v. Hamilton*, 89 S.E. 305 (Va. 1916)).

void. The court reversed a prior ruling by Judge James C. Turk, Jr. in this case: "[a] plain reading of the language of the Deed places a restriction on all blasting, quarrying or taking away of stone within the enclosure of the yard … not conditioned upon occupancy, explicitly or implicitly." (JA 218). Compare Judge Conrad's opinion: "the deed is unclear as to exactly what the Yard Restriction was intended to reserve or restrict …" (JA 1753).

The district court's opinion does not explain any lack of clarity with regard to what the Yard Clause was intended to restrict. Instead, it focused upon what to call it. The court created an ambiguity as to whether the 1849 Deed grantee actually 'owned' the limestone under the house/yard and just could not quarry it --- or whether the Yard Clause precluded quarrying *and* reserved ownership of the limestone to the grantor. This is a distinction without a difference in this dispute.

More to the point, it does not comport with the relief Thomas requested. Thomas has only sought a ruling that *Carmeuse* has "no right to blast, quarry, or take away any stone within the area surrounding the old stone house." (JA 165). And, as Judge Turk previously ruled, there is no lack of clarity in that regard.

The district court strained to apply the so-called "repugnancy rule", and then compounded this error by ignoring other interpretative canons. This Court should reverse that ruling and restore the Yard Clause, which, prior to the district court's ruling, had remained valid for over 160 years.

The district court also disregarded the intent of the deeding parties by authorizing Carmeuse to use quarrying techniques unknown and unthinkable in 1849 – when the grantor plainly intended to continue using the Property as a viable farming operation. The district court acknowledged this, but nonetheless enlarged the rights granted by the 1849 Deed --- by authorizing complete destruction of the Property. This ruling should be reversed.

After the 1849 severance, the limestone estate on the Property was sold at a chancery auction in the early twentieth century and subdivided at the buyer's request, resulting in two commissioner's deeds: the "1901 Deed" and "1902 Deed" (or together, "Chancery Deeds"). The Chancery Deeds did not convey all of the stone under the Thomas's Property. Taken together, the two deeds demonstrate the intent to convey only a rich vein of grey limestone that runs through the southwestern portion of the Property. These intervening deeds thus limit the 1849 Deed.

The district court's ruling to the contrary has broad ranging practical impact on Thomas as well as neighboring property owners to the southwest of the Property. These neighbors hold valid easements of ingress and egress over the Property. The court's expansive interpretation of the Chancery Deeds strips these owners of their rights. This Court should correct that error.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1332(a). On January 16, 2015, the court entered final judgment. On February 13, 2015, Thomas filed a timely notice of appeal from the final judgment. The court then denied intervenor Thomas M. Helms, Sr.'s ("Helms") motion to amend/correct the court's January 16, 2015 order on April 7, 2015. This Court's jurisdiction over Thomas's appeal rests on 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Did the district court err by holding the Yard Clause ambiguous and void under Virginia law?
2. Did the district court err by holding that the 1849 Deed authorized the use of vastly more destructive quarrying practices than those intended by the parties?
3. Did the district court err by holding that the Chancery Deeds conveyed the entire stone estate, notwithstanding clear language to the contrary?

STATEMENT OF THE CASE

In 2012, Thomas sought a declaratory judgment that: (1) the Yard Clause in the 1849 Deed prohibited any quarrying activities in the area surrounding the stone house; (2) the successors-in-interest to the Chancery Deeds only owned the limestone in the southern portion of the Property; and (3) the 1849 Deed limited

Carmeuse's access to could the limestone it did own. (JA 24-36; 155-67). In response, Carmeuse claimed the rights to *all* of the stone on the Property and the right to destroy the entire surface. (JA 179; 258). Thomas then moved to join Helms, who opposed Carmeuse's claim to "all" the limestone. (JA 311-16; 346-49). Helms voluntarily intervened. (JA 331-33).

The district court denied Thomas's motion for summary judgment in its entirety, granted Helms's motion for summary judgment, and granted-in-part and denied-in-part Carmeuse's motion for partial summary judgment. (JA 1774-76). Thomas appeals the district court's ruling denying his motion for summary judgment and granting summary judgment in favor of the defendants.

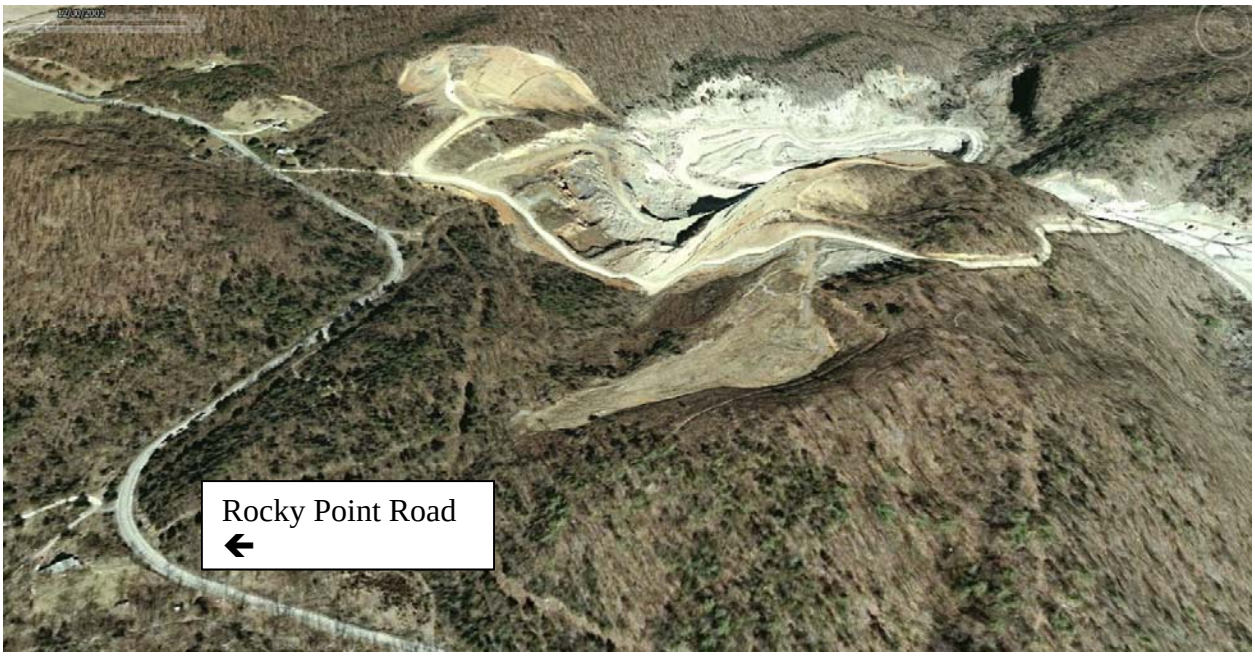
I. FACTUAL BACKGROUND

A. The Property

Thomas purchased the Property in October of 2002. (JA 817). He was the pastor at the Natural Bridge Baptist Church at the time, and he and his wife had been looking for land to "settle . . . [their] family to." (JA 817; 823). One of Thomas's parishioners, Bill Hayslette, told him of the Property. (JA 823).

Thomas investigated the Property prior to purchase. He inspected it with Hayslette, who had grown up nearby, and spoke with the owners – the Alphins. (JA 823-24). Carmeuse was then Global Stone. Thomas went to Global Stone and asked if it claimed any rights in the Property. (JA 842). Global Stone informed him

that it had no idea what interest – if any – it owned in the Property and it had no plans to quarry on the Property for the next eighty years. (JA 842-43). The neighboring quarry was not even visible from the Property and was, in fact, separated by a mountain. (JA 863-65). The 2002 aerial photo below depicts the quarry property to the right of Rocky Point Road and the Property to the left.



(JA 1156).

Thomas learned from his closing attorney that Global Stone owned at most half of the limestone within the "area of the limestone" on the Property. (JA 831). The upper part of the Property was zoned for agriculture,[3] the lower portion was zoned for mining, and "there was a protection around the yard that nobody could

[3] County officials confirmed this. JA 833-35.

do anything with." (JA 831-32). The house was designated on a one-acre lot for tax purposes. (JA 835; 1022).

A rare eighteenth-century stone house sits on the Property,[4] with a fresh spring located nearby. The previous resident had passed away several years earlier, but the house was wired for electricity. (JA 958). With the County's blessing, Thomas planned to renovate the structure and use the house as his family's primary residence.[5] (JA 835-37; 1738). He removed a substantial two-story wood frame addition to the house to better emphasize the original stone structure and promptly sought and obtained a permit to repair the foundation of the house.[6] (JA 836-37; 858-60). In April 2003, he applied to rezone the Property as residential in order to complete the renovations and additions to the house. (JA 912-15; 1737). Global Stone, however, refused to agree to the zoning change and the County denied the application as a result. (JA 914; 1738).[7]

Thomas merely sought to enjoy the Property in peace – "to be able to do – to hunt, to do our recreation without any aggravation." (JA 905-06). Thus, in 2004,

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[4] *See* JA 985.

[5] Botetourt County officials advised Thomas that the County had "no issue with doing whatever I [Thomas] wanted to with the house" and never informed him that occupancy of the house was prohibited. JA 835-36.

[6] Thomas was later advised that the permit was unnecessary because the walls of the house already had a firm limestone base. JA 837; 959.

[7] On May 5, 2003, zoning administrator Buck Heartwell wrote Thomas: ". . . it is my opinion that James River Limestone, Inc. has a legal ownership interest in the property, and that no rezoning of the property can be initiated under our ordinance without its consent." JA at 914; 1738.

Thomas approached Global Stone and offered to purchase its rights in the Property. (JA 842-43; 847-48). Global Stone declined. (JA 1738).[8]

Ownership of the other "half" of the limestone on the Property remained uncertain. Later in 2004, Thomas filed a quiet title action in Botetourt County Circuit Court to extinguish these unknown and unused limestone interests. (JA 874-75; 1152-54).[9] He had no intention of involving Global Stone or limiting its rights on the Property. (JA 895-96; 899-900; 1153). He merely wished to remove any cloud on the remainder of the Property. (JA 900-05; 1154). Despite having no interest in the litigation, Global Stone nonetheless intervened and ultimately forced Thomas to nonsuit the action. He could not afford to finance the litigation to the finish. (JA 900).

In 2007, Thomas moved to pastor a struggling congregation in North Carolina for several years, and then transferred to another parish in Ohio. (JA 818-19; 861). This is normal for his profession. (JA 818-19). Nonetheless, he often visits the Property for recreational purposes with his children. (JA 842; 858; 940).

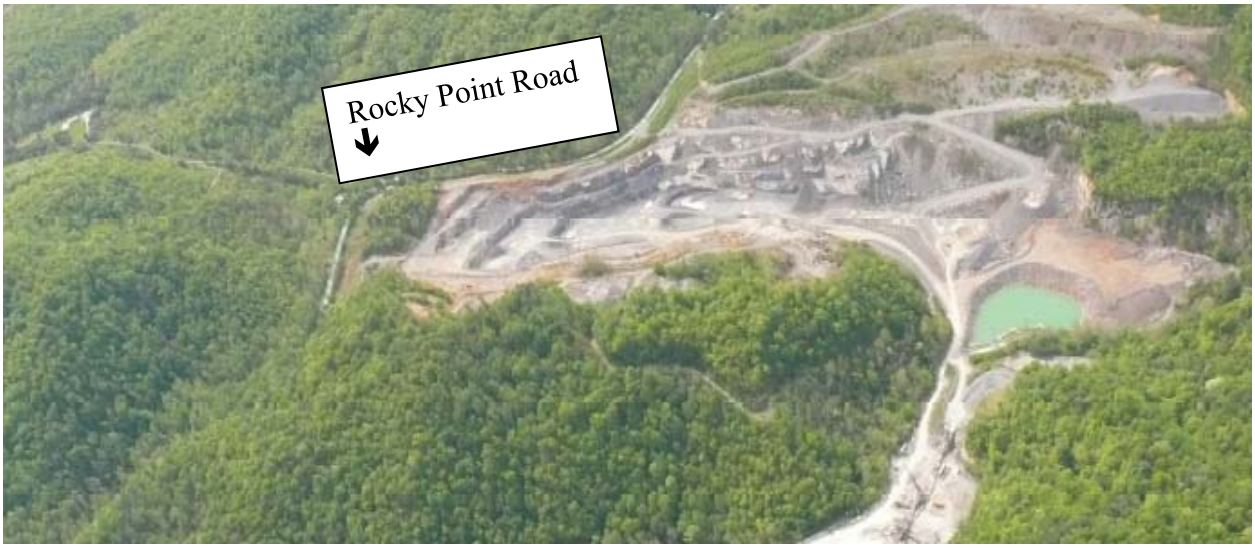
[8] Global Stone later expressed interest in purchasing the Property to allow the future expansion of quarrying. JA at 847-51. The forthcoming offer was rumored to be $600,000, but a change in quarry ownership quelled any further discussion. JA at 850-51.

[9] Virginia Code §§ 55-154-55 provides a statutory mechanism for extinguishing claims to minerals that lay unused for 35 years.

B. Carmeuse Expanded Quarry Operations and Threatened to Destroy the Property

In the years that followed, the operations at the distant quarry expanded. In 2008, Global Stone purchased the surface rights to a small tract adjacent to the Property from Gerald and Edna Newcomb ("Newcomb Tract") for approximately $300,000 – a price of roughly $30,000 per acre. (JA 827-28; 1026). The stone rights on the Newcomb Tract were originally conveyed by the 1849 Deed.[10] Carmeuse then approached Thomas about purchasing the Property shortly thereafter, but no agreement was reached. (JA 851-53; 1740).

As depicted in the 2013 photo below, Carmeuse's quarrying -- removed the mountain that once blocked the operation from view. (JA 865).



(JA 1158).

[10] These surface rights were conveyed out of the 200-acre surface tract that Reynolds retained after the 1849 severance. JA 1134-35.

The quarry is massive, and the high-wall benching now edges up to Rocky Point Road. The quarry's manager informed Thomas that the future quarrying would remove the Rocky Point Road as operations advanced onto the Property. (JA 866).

The 2013 photo above demonstrates that Carmeuse quarries deep into the vein to extract the maximum amount of valuable limestone. This creates large amounts of overburden that must be removed. Lateral "benches" are built into the high-wall to allow removal of overburden and stone as quarrying advances hundreds of feet down into the earth. Because these benches stand outside the actual veins of limestone, the width of the quarry pit extends – and therefore burdens – a substantial length of the surface beyond that above the desirable veins.

On June 27, 2012, Carmeuse's attorney sent Thomas a letter stating that Carmeuse had the right to "destroy and disturb the surface" of the Property "to extract the limestone." (JA 37-38). And during the week of August 15, 2012, Carmeuse's employees entered the Property and began constructing roads to enable core drilling for limestone samples. (JA 163). Thomas did not take Carmeuse's threats or actions lightly.

C. The Declaratory Judgment Action

On October 19, 2012, Thomas filed an amended declaratory judgment action in the court below seeking to prevent Carmeuse from destroying the Property.[11] Thomas sought declaratory relief on three main grounds: (1) Carmeuse could not quarry within the area surrounding the stone house; (2) Carmeuse owned only the limestone in a discrete and specified portion of the Property – half of the grey vein of limestone that runs across the southwestern portion of the Property; and (3) Carmeuse could not use its current destructive methods in quarrying the limestone that it did own. (JA 165-66).

D. The Chain of Title

Only a handful of deeds are material to the issues in this appeal. *First*, the 1849 Deed severed and conveyed the stone on the Property, but expressly limited the conveyance through several provisions. One such limitation is the Yard Clause, which protects the house and surrounding yard enclosure from quarrying. (JA 236-46). *Second*, the 1901 Deed conveyed a portion of the stone on the Property to the highest bidder at a chancery auction. (JA 1170-71). *Third*, the 1902 Deed conveyed another portion of the stone on the Property to that same bidder, and referenced the 1901 Deed. (JA 1247-48). *Fourth*, two 1992 deeds – one to James River Limestone

[11] Thomas filed the original Complaint on August 30, 2012. JA 24-36.

Company, Inc. ("James River"), and one to Helms – divided the stone estate that the Chancery Deeds conveyed. (JA 247-50; 1730). Each deed is addressed in turn.

1. The 1849 Deed

Thomas's predecessor-in-interest is G.B.W. Reynolds ("Reynolds"). (JA 236-46; 1133-34). In the mid-nineteenth century, Reynolds and his wife owned two adjacent tracts of land: a 127-acre tract and a 200-acre tract. (JA 243-46; 1117-18). In 1849, Reynolds conveyed the 127-acre tract to John S. Wilson ("Wilson"), but also conveyed Wilson a stone interest (particularly, the limestone) in the 200-acre tract. (JA 243-46; 1117-18).

Reynolds was a prosperous farmer at the time of the conveyance. (JA 985-87). He owned 15 to 16 slaves, raised nearly 1200 bushels of corn, wheat, and oats, and kept livestock. (JA 985-86; 990). He also operated a successful lime business. (JA 987). In 1850, he produced 460,000 pounds (roughly 2000 barrels) of lime and employed a cooper to build barrels to ship the lime to market. (JA 986-87).

a. The Yard Clause

The first reference to the stone conveyance in the 1849 Deed provides that the "conveyance is subject . . . to the following limitations or qualifications." (JA 244). A litany of limitations follows. Among these is the Yard Clause, which provides,

> And it is also agreed and understood between the parties that the said Wilson, his heirs or assigns, is not to blast,

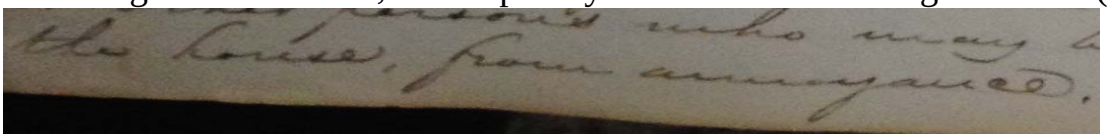
> or quarry, or take away, any stone within the inclosure of the yard attached to the said Reynolds' present dwelling house; this provision being inserted to protect the family of said Reynolds, and of his heirs and assigns, or other persons who may be in occupancy of the house,[12] from annoyance.

(JA 245). The 1849 Deed then reiterates that it conveys title to the stone "subject to the qualifications, reservations, and other stipulations set forth." (JA 246).

b. Other Limitations in the 1849 Deed

Other clauses in the 1849 Deed limited the stone conveyance and disclose the parties' intent for Reynolds to continue to operate the Property as a farm. Reynolds required "fair and reasonable compensation" to himself, his heirs, and assigns for any damage to crops on the land resulting from quarrying; required Wilson to erect fencing to protect Reynolds's livestock from any quarrying operations, and prohibited Wilson from cutting timber on the 200 acre-tract. Reynolds also reserved the privilege to produce and burn 5000 bushels of lime each year during his lifetime. And, he reserved the perpetual right for himself, his heirs, and assigns "to take and make use of any stone upon his own land . . . that may be suitable and needful for building purposes on his own land." (JA 244-45).

[12] Both Thomas's translation and the district court's opinions omitted the comma following "house." But, it is plainly evident in the original text (JA 240):



c. The District Court Held the Yard Clause Unambiguously Prevented Quarrying

When Thomas brought this action, Carmeuse moved to dismiss, arguing that the Yard Clause was unenforceable and dependent upon occupancy. (JA 216). Judge Turk rejected Carmeuse's argument, and held that "*[a] plain reading of the language of the [1849] Deed places a restriction on all blasting, quarrying, or taking away of stone within the enclosure of the yard . . . not conditioned upon occupancy, explicitly or implicitly.*" (JA 218 (emphasis added)). He thus concluded that Carmeuse's "legal right to mine the Property . . . is subject to the Yard Restriction, regardless of occupancy of the house." (JA 220).

d. Carmeuse Refused to Admit the 1849 Deed was in Its Chain of Title

Thomas later requested that the court enter partial summary judgment confirming its previous interpretation of the Yard Clause. (JA 226-28). Carmeuse countered by contending that its title work was incomplete and it was uncertain whether the 1849 Deed was even in its chain of title. (JA 307-08; 276-77). This directly conflicted with Carmeuse's prior assertions to Thomas and the court that "we've done title searches to confirm that we own all of the subsurface [sic] rights." (JA 174).

Noting Carmeuse's surprising contentions, Judge Turk denied Thomas's motion as premature, "in light of the fact that it is not clear to the Court that the

1849 Deed and the 1992 Deed are even in Defendant's chain of title." (JA 308; 309-10).

2. The Chancery Deeds

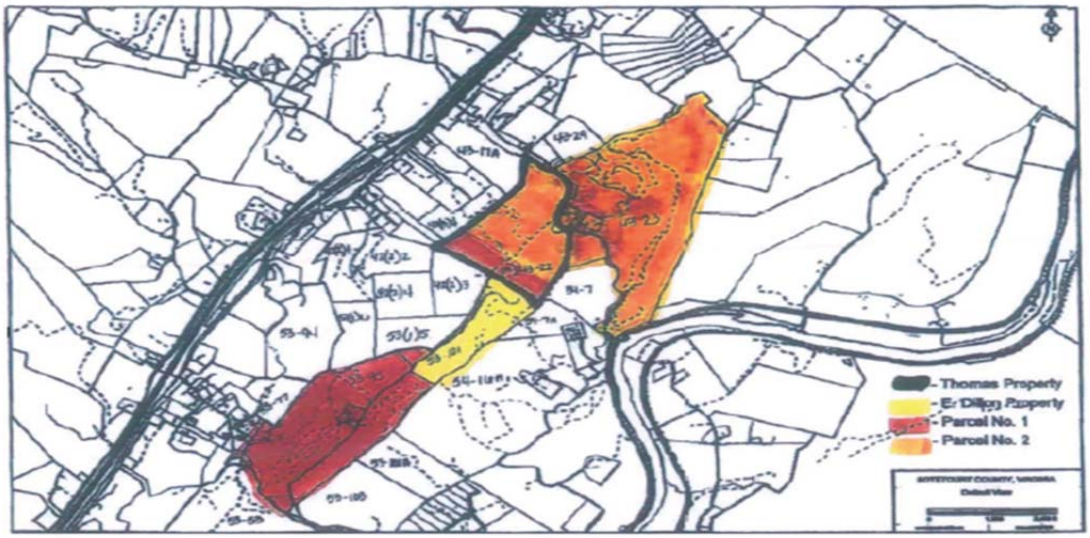
Wilson died in 1877, and his heirs initiated a chancery proceeding charging his executor with malfeasance. (JA 1010-15; 1119). At the resulting chancery auction, one of his heirs, Louise W. Turpin ("Turpin"), purchased the limestone that had been conveyed in the 1849 Deed, along with several other fee interests. (JA 1017; 1019-20; 1119-20). Later, at Turpin's request, the chancellor divided the limestone into two separate parcels – conveyed separately by deeds executed by the commissioner in 1901 and 1902, respectively. (JA 1017; 1019-20; 1119-22).

a. The 1901 Deed

The 1901 Deed conveyed the rights to "all the *limestone* on the land of the late G.B.W. Reynolds … adjoining the above lands [a 309.75-acre composite of fee tracts located to the east of Rocky Point Road],[13] and *along the vein of grey limestone*, on said Reynolds lands extending in a South-Westerly direction, to a line three hundred feet from *the line of the E. Dillon land* . . . All of which properties and rights, are described in the papers of the said causes, as Parcel No. 2." (JA 1170-71; 1120 (emphasis added)).

[13] As depicted in the previous photographs (pp. 6 and 9, *supra*), these tracts lie to the right of Rocky Point Road.

The 1901 Deed referenced a particular vein of grey limestone on the Property, with the grant measured from where the vein intersected with the adjoining 309.75-acre fee tract to a line three-hundred feet from the E. Dillon tract – the neighboring parcel that forms the southern part of the Property's western boundary. The Dillon tract extends a little less than half the full length of the Property's western edge, as depicted in yellow in Carmeuse's graphic below.

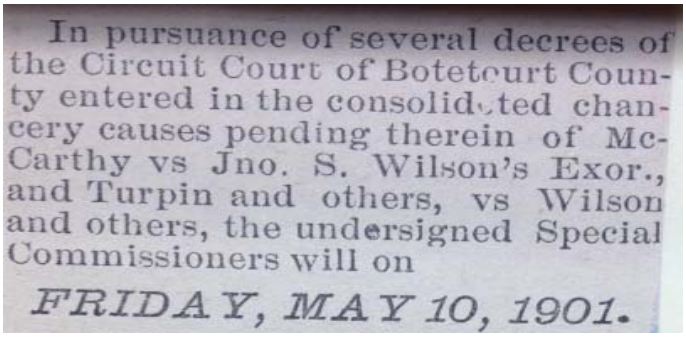


(JA 434).

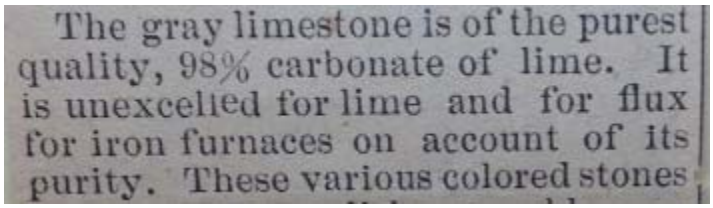
b. Chancery Decrees and Sale Advertisements Reiterated the Language of the 1901 Deed

In 1900, the chancellor entered an order directing the sale: "[a]nd it is ordered that the division line between the two parcels in which said property will be offered is to run three hundred (300) feet from the division line between E. Dillon heirs and the Pitzer tract [the Property], *along the vein of grey limestone* in a North Easterly direction . . ." (JA 432-33, emphasis added).

The chancery auction advertisements use the same "gray limestone" terminology:


In pursuance of several decrees of the Circuit Court of Botetourt County entered in the consolidated chancery causes pending therein of McCarthy vs Jno. S. Wilson's Exor., and Turpin and others, vs Wilson and others, the undersigned Special Commissioners will on

FRIDAY, MAY 10, 1901.

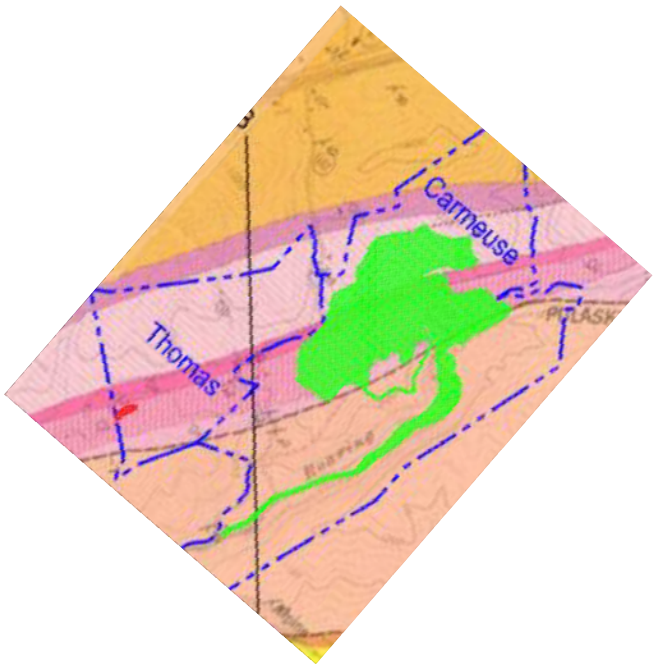

The gray limestone is of the purest quality, 98% carbonate of lime. It is unexcelled for lime and for flux for iron furnaces on account of its purity. These various colored stones

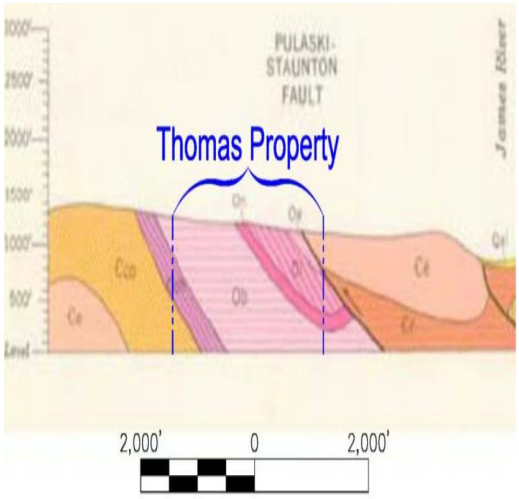
(JA 435-37; 1722). The chancellor's subsequent order separating the two parcels after the sale also described the stone conveyed as "limestone." (JA 1019-20; 439-40).

c. The Only Valuable Stone on the Property was the "Grey Limestone"

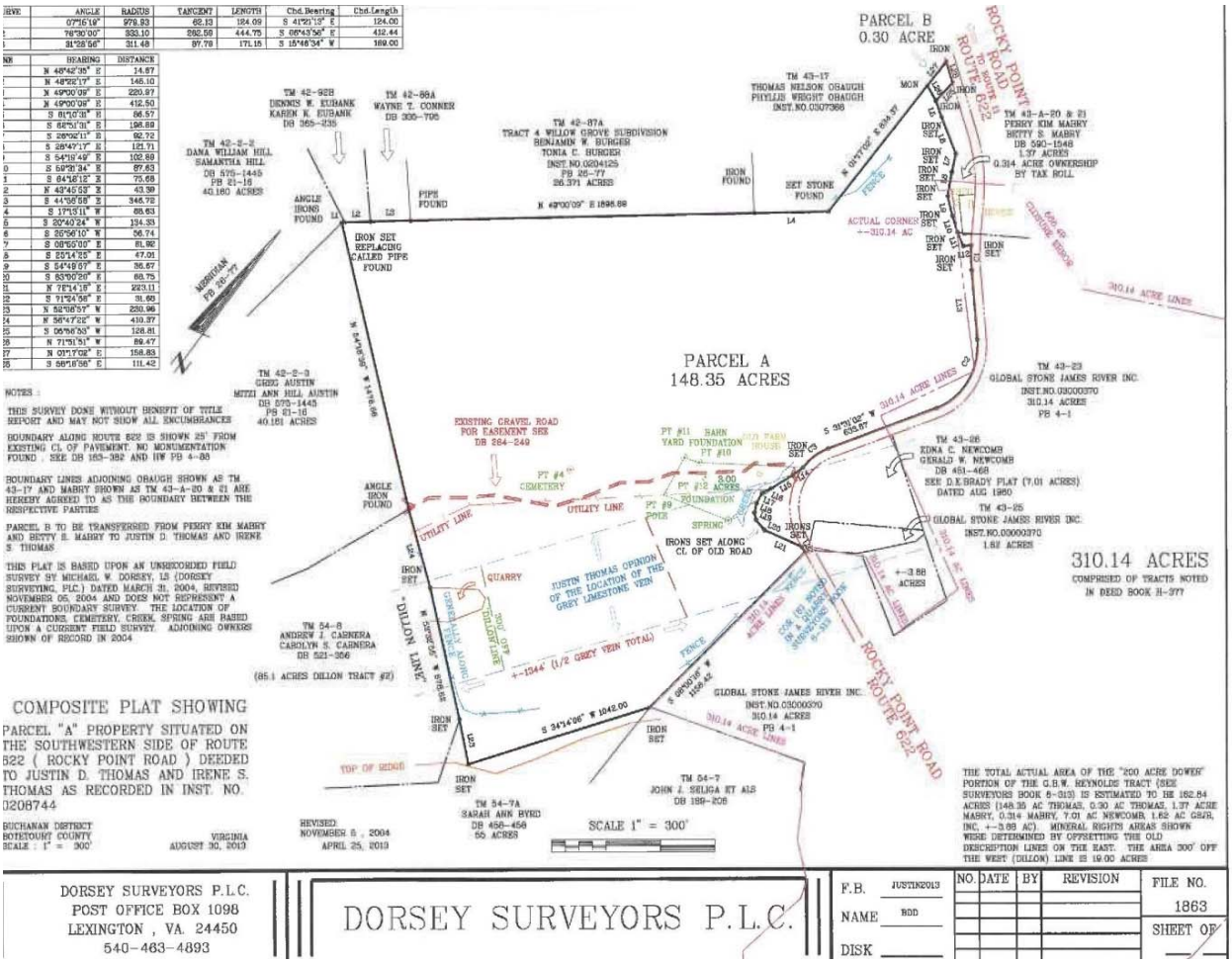
Carmeuse's expert explained that while Carmeuse's quarry and the Property are both located on a narrow belt of high calcium limestone, the majority of the stone on the Property is dolomite. (JA 1161-62). A diagram and cross-section of the Property taken from his expert report is shown on the next page. On the diagram, the light pink section is dolomite, while the "marketable high calcium limestone" is displayed in two shades of darker pink. (JA 1162). These darker

shades demonstrate the Lincolnshire and New Market formations, which state geological reports categorize as "being limestone." (JA 1162-63). The light pink shade is the Beekmantown Formation, composed of dolomite. (JA 1162-63).





The geologic cross-section of the Property is particularly helpful here. Dolomite (labeled "ob") occupies most of the Property. (JA 1162). The darker pink depicts the location of limestone from the New Market and Lincolnshire formations. (JA 1162). Thomas's surveyor depicted the visible grey vein in the southwest part of the Property – in line with Carmeuse's geological descriptions.



(JA 1298).

Carmeuse's expert further explained that Dolomite "was discovered and *differentiated* from limestone in the 18th century." (JA 1163 (emphasis added)).[14] Unlike high calcium limestone used to produce lime, "dolomitic and lower calcium ores are suited for aggregate industries." (JA 1163). The chancery advertisement (p. 17, *supra*) highlights the value of this high quality limestone in lime production. Dolomite, by contrast, has little, if any, value in lime production. (JA

[14] Thomas's expert agrees with this assessment. JA 1199-1201; 1213.

1211). In the late nineteenth century, limestone was the only stone with any commercial value. (JA 1203-04). "I've seen no evidence that dolomite was mined for any purpose . . . what's really obvious is the people were after the limestone...".

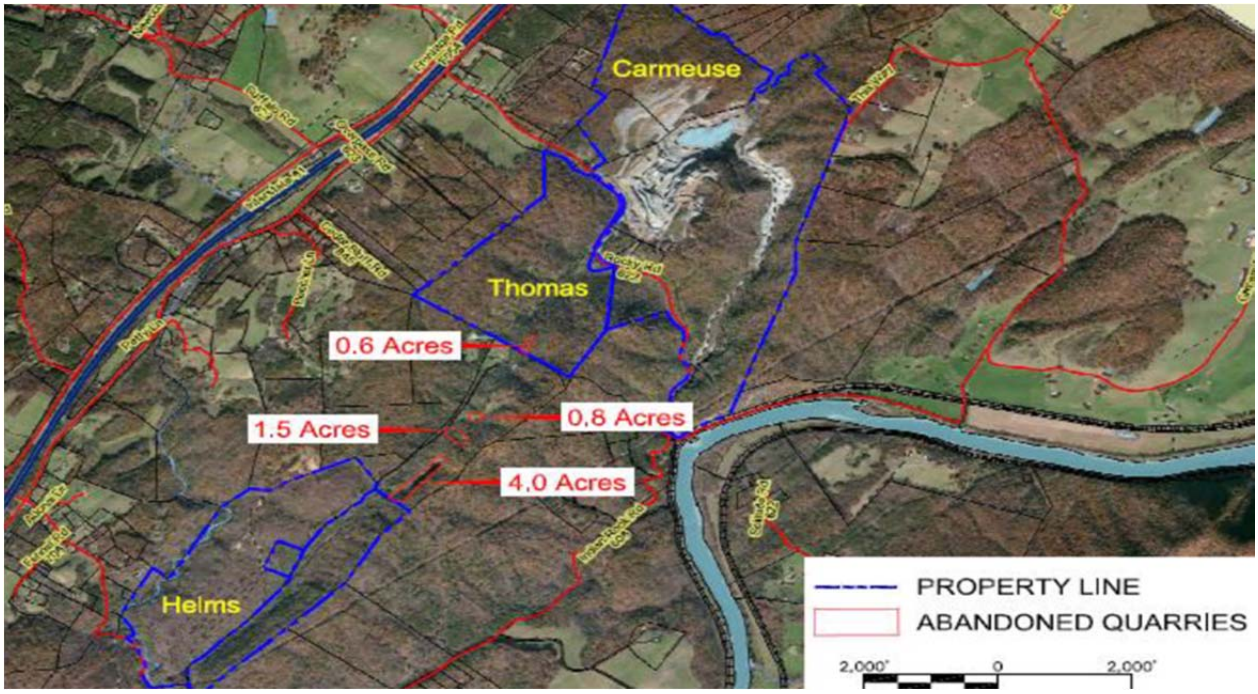
d. The 1902 Deed

The commissioner executed the 1902 Deed to Turpin on July 26, 1902. (JA 1121; 1247-48). The 1902 Deed conveyed fee interests in tracts described as "adjoining and near to Indian Rock," containing a total of 249.5 acres. (JA 1121; 1248). These tracts are now owned by Helms. (JA 1130-31).

The 1902 Deed then conveyed "all of the stone on the land of Levinia Pitzer, from the line of parcel no. 2 (which parcel has heretofore been conveyed by said commissioner to the parties of the second part, by deed of date the 23d day of December 1901) thence South West to E. Dillon's line." (JA 1121; 1247-48). Thus, the 1902 Deed conveyed the remaining estate from the boundary where the 1901 Deed left off.

e. Previous Quarrying On the Property

Carmeuse's expert unequivocally demonstrated that previous quarrying under the Chancery Deeds only occurred in the southwest part of the Property – in the area where the vein of grey limestone is located. A map from his expert report demonstrating the locations of previous quarries is reproduced below.



(JA 1168).

3. Remaining Deeds in the Chain of Title

a. The 1925 Deeds and Corresponding Leases

In 1924, the grantees under the 1901 and 1902 Deeds conveyed their interests to Wilson Lime Company, Incorporated ("Wilson Lime"). The deeds were recorded consecutively in 1925. (JA 1250-53; 1122-23).

Shortly afterward, Wilson Lime leased to Liberty Lime & Stone Company, Inc. ("Liberty") the right to quarry "on half of the *viens [sic] of limestone* on a 200-acres [sic] tract of land belonging to G.W. Webster"[15] and an adjoining 306 acre tract, "said half to be measured *along the veins of limestone* from the division line

[15] G.W. Webster's 200-acre tract is essentially the Property, plus the out-conveyance of the Eubank tract, which was conveyed out in 1958. JA 1124.

of said 306 acre tract in a southwesterly direction." (JA 415-16, emphasis added).[16] The parties renewed the lease on several occasions until Liberty dissolved in 1976 and transferred the lease interest to its parent, James River. (JA 1122-23).

b. The 1992 James River Deed

James River's lease interest merged into a fee interest via the "James River Deed" in 1992, when Wilson Lime conveyed to James River the "Rocky Point Farm" fee interests (the location of the current Carmeuse quarry) and "the right to quarry and remove the stone, *on one-half of the veins of limestone*" on the adjoining tract referenced as "the 200 acre tract of land belonging to G.W. Webster."[17] (JA 247-49; 1123-24, emphasis added).

Specifically, the James River Deed granted:

> . . . all of the mineral rights including all rights and privileges necessary to quarry and remove the stone, on *half of the veins of limestone* on a 200 acre tract of land belonging to G.W. Webster, and adjoining the said 306 acre tract, said half *to be measured along the veins of limestone* from the division line of said 306 tract in a southwesterly direction.

(JA 247-49, emphasis added). The language in this clause comes directly from the 1925 lease between Wilson Lime and Liberty. (JA 1124). And the derivative

[16] The language in the lease was taken from a September 6, 1917 lease between Anna Allen, et al. and J.W. Stull, Liberty's immediate predecessor in interest.

[17] G.W. Webster had not owned the 200 acre-tract since 1955, but the James River Deed relies on the description in the 1925 lease between Wilson Lime and Liberty and the subsequent renewals of that lease. JA 1124.

clause for the description of the "Rocky Point Farm" specifically references the 1901 Deed. (JA 1123-24).

c. The Helms Deed

Wilson Lime also deeded a tract in fee simple to Helms in 1992 ("Helms Deed"). (JA 481-82; 1131-33). The Helms Deed also provided: "[i]t is the purpose of this Deed to convey all of the property in this area owned by Wilson Lime Company, Inc., not previously conveyed by Deed dated July 22, 1992 to James River Limestone Company, Inc." (JA 481).

The Helms Deed never mentions limestone. And Helms had no discussions of purchasing any limestone interests with Wilson Lime when he negotiated the purchase of the tract conveyed under the Helms Deed. Helms "never gave mining a thought at the time" and understood that he had only purchased "the 329 acres" – not mining or quarrying rights. (JA 1732). It was only when Thomas brought the quiet title action in 2004 that Helms asserted an ownership interest in the limestone. (JA 1733-35).

II. SUMMARY JUDGMENT

The parties each sought summary judgment on the construction of the 1849 Deed, the Chancery Deeds, and the 1992 deeds. The court heard oral argument on the matter on October 16, 2014.[18] (JA 1587).

At the hearing, the court indicated its concern that the "rule of repugnancy" required assessment of "whether the grantee can exercise the rights that he purportedly purchased with the reservation in place." (JA 1629). In other words, "the grantor can't make that reservation, when it defeats the purpose of the granting of the rights." (JA 1675). Noting that such reservations are common in the coal industry, the court adopted a different standard in this case, dubbing it, "a different animal." (JA 1675).

After reviewing the limiting language of the 1849 Deed, the district court acknowledged: *"Well, I don't doubt that he intended to do that. I think that is what he wanted to accomplish."* (JA 1677 (emphasis added)). But, in the court's view, the *only* way that the grantor in the 1849 Deed could have accomplished such a reservation or exception was to explicitly retain the area of the house and yard in fee simple. (JA 1677).

[18] After over 40 years on the bench, Judge Turk passed away on July 6, 2014. The case was reassigned to the Honorable Glen E. Conrad on July 8, 2014. JA 718.

A. The Court Voided the Yard Clause.

The court issued its opinion on January 16, 2015. (JA 1742-73). The court improperly framed the issues at the outset, describing the dispute as being "which of [the parties] owns what portion of the mineral estate on a piece of property…"; and the relief requested as "a declaration concerning the ownership interests of the mineral estate…" (JA 1742; 1746).[19] Since the grantor did not explicitly retain fee simple interest in the area of the house and yard, the court found the Yard Clause void as repugnant. (JA 1756-57).

B. The Court Construed the Chancery Deeds as Conveying the Entire Stone Estate on the Property.

The court then turned to the 1901 and 1902 Deeds, but began its analysis – not by focusing on the actual language of the Deeds – but by referencing a document from the chancery proceeding describing the tracts conveyed. (JA 1760). The court then held the 1901 Deed ambiguous, and found that both Chancery Deeds were intended to convey the entirety of the stone estate. (JA 1763; 1764-65).

The court viewed the extrinsic evidence narrowly. It acknowledged the undisputed distinction between dolomite and commercially valuable high grade

[19] Thomas disputes this characterization. Thomas only sought a declaratory judgment that *Carmeuse* did *not* have the rights it asserted. Thomas' Amended Complaint and Motion for Summary Judgment did not allege – as the court incorrectly stated – that the limestone estate "reverted … and is now owned by plaintiffs." (JA 1747). Assuming that areas were determined not to be subject to Carmeuse's ownership, a subsequent action under Va. Code §55-154-55 could have been brought to quiet title. This was not that action.

limestone, but disregarded it. (JA 1762-63). The court also disregarded the "along the vein of grey limestone" language in the 1901 Deed, as well as a reference to the E. Dillon line, finding that these phrases merely provided "a description of the dividing line between the two parcels." (JA 1765).

C. The Court Authorized Carmeuse to Destroy the Surface of the Property.

Turning to the issue of Carmeuse's destructive quarrying methods, the court held that there was "no valid basis for the court to prohibit the use of modern quarrying techniques." (JA 1773). And "while the parties may not have anticipated the large cavernous pits that modern limestone quarrying creates," the quarrying contemplated by the 1849 Deed "could only be accomplished through destruction of the surface." (JA 1773).

III. THE RIGHTS OF THE EASMENT HOLDERS

A gravel road runs by the house on the Property. Numerous parties hold easements to use the road to access their land to the west of the Property. In 1980, the circuit court entered an order granting and establishing their right of access. (JA 1002-04; 1006-08). All deeds after 1980 in Carmeuse's chain of title were taken with actual or constructive knowledge of this court-ordered easement. The district court's ruling that Carmeuse could destroy the entire surface of the Property strips these easement holders of their rights.

SUMMARY OF ARGUMENT

This Court should reverse the decision below for the following reasons:

First, the district court's decision voiding the Yard Clause was wrong as a matter of black-letter Virginia property law and completely contradicted Judge Turk's previous reading of the 1849 Deed. The court misunderstood the law to require voiding of any clause inconsistent with the granting clause. But, by definition, *all* reservations and exceptions are inconsistent with granting clauses. Under the court's theory, unless the grantor explicitly retained a fee simple interest in the protected area surrounding the house, the clause was void. This holding is *completely* inconsistent with Virginia law. Where the intent of a deed is unambiguous, the reservation or exception applies. The court may look no further than the four corners of the deed.

Beginning with the false premise that the *only* enforceable restriction/reservation was a carve-out of fee simple, the court created an ambiguity on an un-litigated issue as to whether the grantor reserved a fee simple interest in the protected area around the house/yard. Thus, the court erred in finding the language of the Yard Clause ambiguous and necessarily erred in considering canons of deed construction and the surrounding circumstances.

The Yard Clause prohibits all blasting, quarrying, or taking away of stone within the enclosure of the yard. Whether the purpose of the Yard Clause is

accomplished by reservation, exception, or prohibition makes no difference, and certainly does not render the meaning of the clause ambiguous.

Second, even following the court's flawed analysis, the court improperly applied the repugnancy rule. Repugnancy only applies where the intent of the parties is not "clearly and unequivocally expressed" *and* there is a clear irreconcilable conflict between the granting clause and another part of a deed. There is no irreconcilable conflict here; nor is there a lack of clear intent. Reynolds conveyed over three hundred acres of stone interests to Wilson in 1849. He limited the stone conveyance by way of several clear clauses, including the Yard Clause.

The court improperly concentrated on repugnancy and excluded other canons. For example, the court identified the well-established rule that all parts of a deed should be considered together to effectuate every part of the instrument – and then ignored it entirely.

Third, the court misapprehended established Virginia law in authorizing Carmeuse to swallow the entire surface of the Property. The fact that the parties to the 1849 Deed contemplated "quarrying" does not mean that they contemplated the benching and extraordinarily deep pits that Carmeuse's modern-day methods produce. The court itself recognized that they did not. (*See* JA 1773). In authorizing Carmeuse to destroy the entire surface – including the yard and the house – the court gave Carmeuse a property right that it did not purchase.

Fourth, the Chancery Deeds are clear. The plain language of the 1901 Deed conveys "limestone" rights "along the vein of grey limestone" under the southwest portion of the Property. The 1902 Deed conveys the remaining portion of the limestone rights not conveyed by the 1901 Deed, and expressly references the 1901 Deed in locating those rights.

The court improperly created ambiguity within the Chancery Deeds. The chancery documents do not cast any doubt on the 1901 Deed. And the fact that the 1901 Deed conveyed the easement rights associated with the 1849 Deed does not render the Chancery Deeds ambiguous. Under Virginia law, mineral access rights correspond with the extent of the granted mineral estate. Here, the easement rights granted in the 1901 Deed are limited to the extent of the limestone estate conveyed. There is no ambiguity.

Fifth, assuming the district court properly considered evidence of the surrounding circumstances to determine the intent of the 1901 and 1902 Deeds, the court's construction of the 1901 and 1902 Deeds was fundamentally flawed. While the court acknowledged that Turpin purchased the stone estate as whole, it incorrectly treated the two deeds as analytically distinct.

Finally, the court erroneously disregarded important undisputed evidence – leading it to the wrong conclusion. The evidence plainly confirmed the language

and intent of the Chancery Deeds – to convey limestone along the vein of grey limestone in the lower part of the Property.

The court's analysis renders language in the 1901 Deed meaningless. There is no basis for the court's ruling that the 1901 Deed's references to "along the vein of grey limestone" and the "Dillon line" only served to provide a description of the dividing line between the two parcels. And the court provided none; save for the phrase, "when read in context." (JA 1765).

LAW AND ARGUMENT

I. STANDARD OF REVIEW

This court will review the district court's grant of summary judgment *de novo*, applying the same standard as the lower court. *Wilkins v. Montgomery*, 751 F.3d 214, 220 (2014). Summary judgment is appropriate when a party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

Deed construction in Virginia is a matter of law. *Realty Co. of Va. v. Burcum*, 106 S.E. 375, 376 (Va. 1921). Accordingly, the court, not the trier of fact, "determines the legal effect of a deed or contract." *Id.; see also Holston Salt & Plaster Co. v. Campbell*, 16 S.E. 274, 274 (Va. 1902) ("[i]t is a general rule that the construction of all written instruments is a question of law for the court"). The fundamental goal of deed interpretation is to ascertain the intention of the parties.

Hale v. Davis, 195 S.E. 523, 524 (Va. 1938); *see also Nature Conservancy v. Machipongo Club, Inc.*, 571 F.2d 1294, 1298 (4th Cir. 1978) (stating that the determinative issue is always the parties' intent).

II. THE YARD CLAUSE PLAINLY PROHIBITS ALL BLASTING, QUARRYING, OR TAKING AWAY OF STONE WITHIN THE ENCLOSURE OF THE YARD.

A. The District Court May Not Look Beyond the Four Corners of a Deed When the Deed is Clear.

Virginia adheres to the plain meaning rule. *Amos v. Coffey*, 320 S.E.2d 335, 337 (Va. 1984); *Berry v. Klinger*, 300 S.E.2d 792, 796 (1983). "[W]hen parties set out the terms of their agreement in a clear and explicit writing then such writing is the sole memorial of the contract and . . . the sole evidence of the agreement." *Amos*, 320 S.E.2d at 337 (quoting *Durham v. Pool Equipment Company*, 138 S.E.2d 55, 59 (Va. 1964)). "The guiding light . . . is the intentions of the parties as expressed by them in the words they have used, and courts are bound to say that the parties intended what the written instrument plainly declares." *Amos*, 320 S.E.2d at 337 (quoting *Magann Corp. v. Electric Works*, 123 S.E.2d 377, 381 (Va. 1962)). Thus, "[w]here a deed, clear in its terms, is to be construed, auxiliary methods of construction cannot be used." *Trailsend Land Co. v. Virginia Holding Corp.*, 321 S.E.2d 667, 671 (Va. 1984). A deed is not ambiguous "merely because the parties disagree as to the meaning of the language employed by them in expressing their agreement." *Amos*, 320 S.E.2d at 337 (quoting *Wilson v. Holyfield*,

313 S.E.2d 396, 398 (Va. 1984)). "[I]t is not permissible to interpret that which has no need of interpretation." *Bailey v. Town of Saltville*, 691 S.E.2d 491, 494 (Va. 2010) (citing *Conner v. Hendrix*, 72 S.E.2d 259, 265 (Va. 1952)).

The Supreme Court of Virginia applied these principles in *Yukon Pocahontas Coal Co. v. Ratliff*, 24 S.E.2d 559 (Va. 1943). There, a coal company purchased "[a]ll coal, oil, gas" on a 702-acre tract, but reserved "one half acre around the graveyard" and "two acres around the dwelling." *Id.* at 561. The company sought to void the graveyard and dwelling clauses, arguing that they described "unascertainable boundaries" and were "indefinite in regard to the privileges reserved." *Id.* at 563.

The Supreme Court rejected the company's arguments, holding that the language used "clearly" indicated that the grantor intended to protect the graveyard and dwelling from the burdens that the coal company sought to impose on the rest of the tract. *Id.* at 563. The parties could determine the boundaries of the half-acre tract by future survey if necessary. *Id.*

The Court rejected the company's argument for broader mining rights under the deed. *Id.* at 563. "To sustain this contention would mean that, though the appellants did not purchase the surface, they would be permitted . . . to . . . appropriate to its use every foot of the surface." *Id.*

B. The Yard Clause Plainly Precludes Blasting, Quarrying, or Taking Away Stone.

There is no doubt that the parties to the 1849 Deed agreed that there would be no quarrying in the area of the house/yard on the Property. The language only reads to that singular effect, Judge Turk issued a ruling *in this case* to that effect, and the district court acknowledged that the intent of the 1849 Deed was undeniable. (JA 1677; 1773). Carmeuse cannot quarry there. That is the clear meaning of the Yard Clause, and the district court was bound to "say that the parties intended what the written instrument plainly declares." *Amos*, 320 S.E.2d at 337. The court erred in finding the Yard Clause ambiguous.

Like the deed in *Ratliff*, the 1849 Deed demonstrates that the grantor intended to protect a particular area of the Property from the burdens of quarrying. Additionally, the 1849 Deed prohibited Wilson from totally appropriating the surface of the Property – an estate he did not purchase in the 1849 transaction.

This result is not changed by any modern difficulty in discerning the precise boundaries of the "enclosure of the yard" (a point that was *not* stated by the district court as a basis for its opinion, but that Helms[20] argued below). The boundaries of the yard enclosure can be identified through surveys and maps of the Property or other extrinsic evidence. *Matney v. Cedar Land Farms, Inc.*, 224 S.E.2d 162, 164-

[20] Notably, Helms did not assert any ownership interest in the limestone in the area of the house/yard.

65 (Va. 1976) (quoting *Midkiff v. Glass*, 123 S.E.329, 331 (Va. 1924)) ("[a] deed description is sufficient if it is possible, by any reasonable rules of construction to ascertain from the description, aided by extrinsic evidence, what the property is intended to convey"); *see also Blair v. Rorer's Administrator*, 116 S.E. 767, 778 (Va. 1923) ("if the description is sufficient when the deed is made no subsequent change in conditions can render it insufficient").

The most important landmark on the Property – the stone house – still stands; as do the barn and the spring. (JA 985-86). It is also *undisputed* that the yard contemplated by the 1849 Deed would extend at least 50 to 70 feet out from the house in each direction. (JA 1367). Any uncertainty as to the precise boundaries of the yard enclosure is: (1) ascertainable by evidence; and (2) not a basis for voiding the Yard Clause. Whether the boundaries of the yard are those of Carmeuse's or Thomas's evidence, the result is the same -- the house and a small area around it are protected. This is not a contested issue for purposes of the summary judgment ruling below.

Second, whether the Yard Clause is dubbed a reservation, prohibition, or exception is irrelevant. "When the intent [of a deed] is apparent, and not repugnant to some rule of law, it must prevail over mere technical terms." *Arbern Realty Co. v. Swicegood*, 109 S.E.2d 108, 110-11 (Va. 1959); *see also Ratliff*, 24 S.E.2d at 563 (disregarding the distinction between reservation and exception because the

grantor's intent was clear from the face of the deed). The Yard Clause clearly demonstrates Reynolds's intent to prevent quarrying in the yard enclosure. Virginia law requires that the court give effect to this intent. Otherwise, even though Carmeuse did not purchase the surface, it could nonetheless destroy every inch of it. *Compare Ratliff*, 23 S.E.2d at 563. The district erred by authorizing this precise result.

C. The District Court Had Already Determined the Plain Meaning of the Yard Clause.

Judge Turk already held that "[a] *plain reading of the language in the [1849] Deed* places a restriction on all blasting, quarrying, or taking away of stone within the enclosure of the yard." (JA 218, emphasis added). He further explained that the Yard Clause was "not conditioned upon occupancy, explicitly or implicitly." (JA 218). The district court's later summary judgment ruling finding the Yard Clause ambiguous completely reversed the court's previous holding – and for no good reason.[21] Rather, the court pursued this unprecedented and erroneous avenue to establish the criteria for its "repugnancy" ruling.

[21] Under the law of the case doctrine, a court should not revisit its own prior decisions "in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-16 (1988). When a court decides a question of law, that decision should govern in later proceedings of the same case. *Walker v. S.W.I.F.T.*, 517 F. Supp.2d 801, 808 (E.D. Va. 2007).

III. THE YARD CLAUSE IS VALID UNDER VIRGINIA LAW.

The district court incorrectly found the Yard Clause ambiguous. But even under this flawed analysis, the court misapplied the canons of deed construction.

A. The Repugnancy Rule Does Not Apply Because There is No Irreconcilable Conflict Between the Granting Clause and the Yard Clause in the 1849 Deed.

In citing *CNX Gas Co., LLC v. Rasnake*, 752 S.E.2d 865 (Va. 2014), the district court must have recognized that the repugnancy rule requires both an ambiguous intent *and* an irreconcilable conflict between the granting clause and another part of the deed. (JA 1749-50). Citing *Goodson v. Capehart*, 349 S.E.2d 130, 133 (Va. 1986) (which the district court also quoted (JA 1750; 1756-57)), the Virginia Supreme Court in *Rasnake* explained:

> [U]nder the modern rule, the intent of the parties, where clearly and unequivocally expressed, will be given effect. When, however, it is *impossible* to discover with reasonable certainty the parties' intent from the language of the deed, the common law rule still applies and the granting clause prevails.

Rasnake, 752 S.E.2d at 868 (citing *Goodson*, 349 S.E.2d at 133, emphasis added).

Neither part of this rule applies here. But even if it was impossible to ascertain whether the grantor could blast or quarry in the area of the house/yard, there is no irreconcilable conflict between the Yard Clause and the granting clause in the 1849 Deed. Thus, even under the court's flawed ambiguity analysis, the repugnancy rule cannot apply to void the Yard Clause.

Goodson illustrates such an *irreconcilable* conflict. There, the preamble of a deed purported to convey a life estate to the grantees, but the granting clause clearly granted a fee simple – two mutually exclusive estates. 349 S.E.2d at 131-132. The Court could not reconcile the two contradictory clauses, so it correctly ruled that the granting clause prevailed. *Id.* at 132-33 ("where there is an irreconcilable conflict between the granting clause and other parts of a deed, and it is impossible to discover with reasonable certainty the intention of the parties . . . the granting clause prevails").

Unlike the clauses in *Goodson*, the Yard Clause is not irreconcilable with the granting clause of the 1849 Deed. It does not purport to convey to the grantee two totally different property rights in a tract. In *Goodson*, it was obvious that a mistake had been made. There was simply no way to harmonize the purported life estate interest with the later-stated fee simple ownership of the same parcel. Here, by contrast, the parties' intent is patent, and the exclusions applicable to a small part of the large granted estate are not irreconcilable. *See Ratliff*, 24 S.E.2d at 563.

Reynolds conveyed Wilson 200 acres of stone rights, but prohibited quarrying in a small fraction of that acreage. Reynolds did not convey Wilson 200 acres of stone rights and then prohibit quarrying on the entire tract. The latter conveyance *would* present a irreconcilable conflict within the 1849 Deed, like the deed at issue in *Beury v. Shelton*, 144 S.E.2d 629 (Va. 1928).

In *Beury*, the primary question was whether a 1901 Deed which conveyed the surface, but "excepted and reserved . . . *all* the metals and minerals of every kind and character whatsoever in and underlying" the tracts also reserved the limestone under the tracts. 144 S.E.2d at 630 (emphasis added). The Supreme Court held it did not. *Id.* at 633.

The tracts, located in Giles County, were "everywhere underlain with limestone[.]" *Id.* The Supreme Court reasoned that construing the reservation to include the limestone would effectively nullify the conveyance of the surface because the conveyance "would reserve practically everything and grant nothing." *Id.* In other words, a deed which conveyed the surface but simultaneously reserved the right to destroy the whole surface through quarrying would be wholly contradictory.

Moreover, the grantor in *Beury* had also reserved the right to use a limited part of the surface conveyed. *Id.* The Court observed that the grantor would not have reserved this right if he had already retained the right to destroy the entire surface by quarrying. *Id.*

Like the grantor in *Beury*, Reynolds conveyed an estate subject to express limitations. And like the mineral reservation in *Beury* deed, the Yard Clause limited, but did not nullify, the conveyance. The Yard Clause, like the surface reservation in *Beury*, is crucial in determining the grantor's intention. Neither

Reynolds nor the grantor in *Beury* would have expressly included these provisions if they each contemplated the complete destruction of the surface.

The district court failed to recognize this point, instead reasoning that "[t]he 1849 Deed's references to quarrying demonstrates [sic] that the parties contemplated destruction of the surface" and "it would have been meaningless to convey all the stone, but then prevent quarrying of some portion of it for all eternity." (JA 1756). If spread across Virginia property law, such a ruling would nullify reservations in practically every mineral deed that has been executed since the 19th century.

Effectuating the Yard Clause does not nullify the grant in 1849 Deed as the reservation in *Beury* could have done. Read together, the two clauses are easily reconcilable and serve important roles in the 1849 Deed: Reynolds conveyed a vast majority of the stone he owned to Wilson, but precluded Wilson from quarrying around his home. Wilson thus received a sizeable stone estate, while Reynolds protected the stone house and the yard around it. Effectuating one clause does not require voiding the other.[22]

[22] The court's characterization of the Yard Clause as rendering the global grant of all limestone "meaningless" was clearly inaccurate. The limited conveyance was plainly meaningful to Reynolds. Additionally, such a conveyance benefitted Wilson by preventing Reynolds from conveying the limestone around his house to a competitor, or competing with Wilson for commercial lime production.

The essence of deed interpretation is to determine the intent of the parties. *Mullins v. Beatric Pocahontas Co.*, 432 F.2d 314, 319 (4th Cir. 1970); *Hale*, 195 S.E. at 524; *Phipps v. Leftwich*, 222 S.E.2d 536, 539 (Va. 1976) ("[t]he intent of the parties to a deed is paramount"); *Arbern Realty*, 109 S.E.2d at 111 ("[t]he purpose of all written contracts and conveyances is to say what the parties mean"); ("the intent of the parties governs the construction of deeds"); *see also Bradley v. Virginia Ry. & Power Co.*, 87 S.E. 721, 722 (Va. 1916) ("we must look to the intention of the parties as it appears from the deed and the surrounding circumstances"). Canons of construction cannot be used to disregard and destroy the parties' clear intent. *See Machipongo Club*, 571 F.2d at 1298.

The district court's analysis threatens the validity of any express limitation in any deed. Under the court's reasoning, a restriction that limits the grant in the deed and does not explicitly retain a fee simple is void, regardless of the parties' express intent. This reasoning is wholly contrary to fundamental Virginia property law.

B. The Canons of Deed Construction in Virginia Remain Unchanged – The 1849 Deed Can Be Reconciled as a Whole.

The district court leaned heavily upon the Virginia Supreme Court's decision in *Rasnake* -- believing it to mean something that is does not. In that case, the Supreme Court merely applied longstanding principles of Virginia property law.

In *Rasnake*, the granting clause of a 1918 deed conveyed a 75-acre tract, stating: "this sale is not ment [sic] to convey any coals or minerals. The same being sold and deeded to other parties heretofore." *Id.* at 866. The grantor had previously conveyed the coal on the tract, but his successors argued that the deed's language excluded all minerals from the conveyance – not just the coal that had been previously conveyed. *Id.*

The Court found the deed's language ambiguous because it was "obviously capable of being understood by reasonable persons in more than one way." There were three possible interpretations: (1) the grantors in the 1918 deed mistakenly believed that all the mineral rights had been conveyed prior to the deed's execution and wished to demonstrate that such rights were excluded from conveyance; (2) the grantors knew that coal alone had been previously conveyed and desired to reserve the rest of the mineral rights to themselves; or (3) the grantors intended to convey only the mineral rights not previously conveyed (i.e., everything but the coal). *Id.* at 867.

The Court adopted the third construction, finding that it gave "effect to all of the language employed by the grantors and eliminate[d] conflict among its parts . . . the last ten words modif[ied] the preceding sentence, denoting the grantors' intent to exclude from the conveyance only those mineral rights previously conveyed to others, namely, the coal." *Id.* at 868.

The Supreme Court did *not* find an irreconcilable conflict in the *Rasnake* deed. Nor did it void any of the deed's language. Rather, it interpreted the deed as a whole to effectuate all of the deed's language. The district court could have easily done the same here – with less effort. Unlike the deed in *Rasnake*, the Yard Clause demonstrates a clear intent to restrict the stone rights conveyed.

The district court acknowledged that "[t]he whole of a deed and all its parts should be considered together [and] [e]ffect should be given to every part of the instrument, if possible." (JA 1750, quoting *Rasnake*, 752 S.E.2d at 867). But, the court then failed to do so --- neglecting the fulcrum of the *Rasnake* decision. *Rasnake* requires that the Yard Clause be upheld, not voided.

"Where the meaning of language is not clear, or the deed is not artfully drawn, the court should interpret its terms to harmonize them, if possible, *so as to give effect to the intent of the parties*." *Rasnake*, 752 S.E.2d at 867 (emphasis added). The Supreme Court's deed construction in *Rasnake* – which effectuated all of the grantors' language – is a prime example of this canon at work.

Even if the 1849 Deed was not "artfully drawn," Virginia law requires that the court harmonize the deed's language to effectuate the parties' intent. The 1849 Deed plainly expressed a clear intent to prohibit quarrying around the stone house on the Property. The district court recognized that the 1849 Deed reflected "plans

by Reynolds to continue using portions of the tract" after the stone severance. (JA 1773).

The district court could have harmonized the clauses in the 1849 Deed without interpretative gymnastics or convoluted reasoning. The parties' intent is clear from the deed's language, which prohibited quarrying within the yard around the stone house. *Compare Benn v. Hatcher*, 81 Va. 25, 30 (1885) (upholding a clause in a deed which expressly reserved "three-fourths of an acre as a burying ground for the family and their descendants" and finding that it "could not be relinquished or assigned, in whole or in part, except by the concurrent act of all for whose benefit it was intended").

The district court erred by failing to harmonize the 1849 Deed as a whole to give effect to the parties' intent.

C. Courts Cannot Disregard the Actual Language of a Deed in Construing that Deed Against the Drafter.

"When land is granted without words of limitation, the grant shall be construed to covey the fee simple, or whole estate the grantor has power to convey, *unless a contrary intention appears in the deed*." *Goodson*, 349 S.E.2d at 134 (emphasis added). Thus, "[a] grantor must be considered to have intended to convey all that the language he has employed is capable of passing to his grantee." *Rasnake*, 752 S.E2d at 867. This rule did not authorize the court to disregard and void the actual language of the 1849 Deed. It is a rule of construction – not

invalidation – based on the language of the deed. *See Ellis v. Comm'r of Dep't of Mental Hygiene and Hospitals*, 142 S.E.2d 531 (Va. 1965) (construing a deed against the grantor but relying on the actual language of the deed to determine the parties' intent).

The Supreme Court's decision in *Bradley v. Virginia Ry. & Power Co.* illustrates this approach. Significantly, *Bradley* did not involve a mineral case with a split of estates. There, the heirless grantor was at the end of his life and conveyed a 600-acre farm but reserved "the family burying ground and also the servant's burying ground…" 87 S.E. at 721. Five years later, the grantor was buried there in 1867. *Id.* Decades later, the farm had become a public park, the burial plot had been sold, and the bodies disinterred. *Id.* But, the new owner claimed a fee simple interest in the land-locked quarter-acre tract and sought to transport building materials over the park land for purposes of constructing a new commercial establishment. *Id.* at 722.

The grantee's successor contended that the original grantor merely reserved the rights to use the tract as a cemetery, not a fee simple; and the easement rights for the property were so limited. *Id.* There was no easement to allow access for transporting construction materials, so the grantee prevented the new owner from using an easement for such purposes. The grantee did not seek to void the

reservation.[23] Rather, it refused to expand it to allow for commercial purposes not anticipated in the reservation and related easement. The Court agreed and held that the grantee agreed only to the "use of it and the right of way to it for the sole purpose of a family graveyard . . ." *Id.*

The Court discarded the "reservation" nomenclature in the deed, and instead "construe[d] the language . . . according to the character of the right intended to be created thereby" by looking to the intentions of the parties and the surrounding circumstances. *Id.* To the extent that the district court below believed that a missing "reservation" or "exception" label renders the Yard Clause ambiguous, *Bradley* confirms that this does not mean the clause is void.

The Court observed that the grantor conveyed his large farm and desired to be buried on the land next to his uncle, who had given him the farm. *Id.* Under the circumstances, the language of the clause demonstrated the grantor's desire that he and his family be buried on the farm, not retain a fee simple ownership of the quarter-acre tract. *Id.* at 722-723.

The district court completely misunderstood Bradley, which did not void the property interest and eliminate the graveyard – but simply defined that interest. The Virginia Court did not cast a presumption of doubt on every restriction or limitation in a deed. Rather, it narrowly held that the grantor did not intend to carve

[23] *See Bradley*, 87 S.E. at 721, 722 ("appellee does not deny the right of the family . . . to use this one-fourth acre lot as a burial ground . . .").

out a fee simple interest under the language of the deed and the circumstances of its execution. This does not mean that, because Reynolds did not explicitly carve out a fee simple interest around his house, the bargained-for limitation is void.

D. The Historic Stone House is not Abandoned.

Straining to apply *Bradley* to the present case, the district court improperly described the stone house on the property as "abandoned." (JA 1759). The evidence demonstrated that the exact opposite was true. Thomas had done substantial work to the house, planned to fully renovate the house, and uses the house – even staying there on numerous occasions. (JA 835-37; 842; 858-60; 912-15; 940; 1737-38).

More to it, Thomas's home is not "abandoned" simply because he does not 'reside' in it all the time. This flawed reasoning produces the precise nonsensical result that Judge Turk sought to avoid in denying Carmeuse's motion to dismiss. The district court's emphasis on occupancy[25] necessarily means that "the rights of the owner of the mineral estate . . . vary depending on whether the owners of the surface estate were living in the house at any given point or not . . . lead[ing] to uncertainty as to the rights of both parties." (JA 219). Virginia law requires that the court avoid this interpretation, which would bring about an absurd result. *Horvath v. Bank of N.Y., N.A.*, 641 F.3d 617, 624-25 (4th Cir. 2011) (rejecting the plaintiff's

[25] *See* JA 1757 ("no one occupies or has occupied the house for some time . . .").

reading of language in a deed of trust language because the plaintiff's construction resulted in an absurd outcome); *In re Wolf*, 77 B.R. 51, 53 (Bankr. E.D. Va. 1987) (rejecting the debtor's reading of release provisions in a deed of trust as illogical); *Shenandoah Land & Anthracite Coal Co. v. Clarke*, 55 S.E. 561, 563 (Va. 1906) (rejecting the coal company's proffered construction of a deed and accompanying addendum as creating a completely illogical result); *Augusta Nat'l Bank v. Beard's Ex'r*, 42 S.E. 694, 695-96 (Va. 1902) (finding that a deed warranty could not be construed to bind the debtor's wife personally or her separate estate because such a construction would be "manifestly in opposition to her intention, if not absurd").

The court also had no valid basis to consider current zoning restrictions.[26] "A deed must be construed as of the date and under the circumstances of its execution." *Ellis*, 142 S.E.2d at 536 (citations omitted). Zoning did not exist at the time of the grant. It cannot be a factor in determining the parties' intent. And, if zoning were determinative, then the district court could not have ruled that the defendants have unfettered quarrying rights to the upper half of the property – zoned to prohibit mining. (JA 1729).

[26] The district court's emphasis on zoning is somewhat unclear. Compare JA 1757 ("given modern zoning restrictions, no one can occupy the house") with JA 1757 ("Even if zoning were a critical factor here . . ."). In any event, to the extent the court did not rely zoning restrictions, its analysis was based solely on whether the house was "occupied."

Zoning is subject to change, and variances or exceptions may be granted by the proper authority. In fact, Carmeuse is the sole reason why the current zoning restrictions remain on the Property. Carmeuse's predecessor actively blocked Thomas's rezoning application, quashing Thomas's plans and renovations. (JA 914; 1738).

The district court's decision effectively allowed Carmeuse to exploit a zoning issue that Carmeuse itself created. Such a ruling runs wholly counter to notions of equity and fairness which pervade through Virginia courts. *See Cline v. Berg*, 639 S.E.2d 231, 234 (Va. 2007) (reversing the circuit court's decision and entering judgment for the appellant because the appellee was primarily responsible for the property dispute that formed the basis of the action).

The prevention doctrine further precluded such a result. Carmeuse cannot avail itself of a nonperformance for which it is responsible. *Moore Bros. Co. v. Brown & Root, Inc.*, 207 F.3d 717, 725 (4th Cir. 2000); *Parrish v. Wightman*, 184 Va. 86, 92-3 (1945). Carmeuse intentionally prevented any zoning change on the Property – it could not then use zoning as a sword to strike down Thomas's rights.[28] The court erred by allowing this result.

[28] The prevention doctrine is not cabined to "contract" law as suggested by the court. The same fundamental principles govern the construction of deeds and written contract. *See Chesapeake Corp. of Virginia v. McCreery*, 216 S.E.2d 22, 25 (Va. 1975) (describing the parties to a deed as the "contracting parties"); *see also*

E. The Court's Construction Renders Any Potential Interest Within the Yard Enclosure Void.

In a similar vein, the court's reliance on occupancy runs afoul of Virginia's Rule Against Perpetuities. The applicable common law rule invalidates purported non-donative transfers of property interests that are not certain to vest within a period measured by a life in being plus 21 years and 10 months. *Layne v. Henderson*, 351 S.E.2d 18, 21 (Va. 1986).[29] Here, according to the defendants and the court's reasoning, the grantee's rights to the stone under the yard enclosure did not vest in 1849 --- or for the next 140 years. Rather, the rights took the form of a future interest that would only arise if Reynolds (or his successors) failed to occupy the house.

Thus, any stone rights did not vest in Wilson (or any if his successors) until the late 1900's – at the earliest. And even then, these rights were subject to divestiture by a resumed occupancy. Accordingly, any right to quarry within the area of the house/yard was not certain to vest or terminate within twenty-one years after the death of a life in being in 1849 and is thus void under Virginia's Rule Against Perpetuities.

Wilson, 313 S.E.2d at 398 (citing both contract and property cases in a contract interpretation case).

[29] Neither the subsequently-enacted Uniform Act nor its predecessor provision (Va Code § 55-13.3) apply to the 1849 Deed. *See Lake of the Woods Ass'n v. McHugh*, 380 S.E.2d 872, 876 (Va. 1989) (holding that Code § 55-13.3 did not apply retroactively to save a non-donative transfer which violated the common-law rule against perpetuities).

IV. CARMEUSE CANNOT APPROPRIATE AND DESTROY THE ENTIRE SURFACE OF THE PROPERTY.

A. The Parties to the 1849 Deed Did Not Contemplate Carmeuse's Current Quarrying Practices or the Destruction of the Surface.

"[T]he purpose or intent of a written instrument must be determined from the language used in light of the circumstances under which it was written." *Leftwich*, 222 S.E.2d at 539; *Ellis*, 142 S.E.2d at 536; *Traylor v. Holloway*, 142 S.E.2d 521, 523 (Va. 1965). And, "[a] deed must be construed as of the date and under the circumstances of its execution." *Ellis*, 142 S.E.2d at 536.[30]

In *Leftwich*, the successors to a broad 1902 mineral severance argued that they had the right to surface mine the coal underlying the grantor's retained surface. *Id.* at 710. The Supreme Court rejected this argument. The undisputed evidence showed that "the only mining method used in Dickenson County in 1902 was 'deep mining' and . . . strip mining was not known in this country until the 1940's." *Id.* at 539, 540. Accordingly, "the parties to the 1902 deed contemplated only underground mining of coal" (*id.* at 542), and therefore the broad grant in the 1902 deed only applied to underground mining. *Id.* at 540.

Collateral to this, "where one grants the minerals under the surface with the privilege of mining such minerals, the support of the surface is a part of the estate

[30] In *Ellis*, the limestone owners argued that the rights to burden the surface when "convenient, useful and necessary" gave them the right to operate a related concrete plant. The Supreme Court rejected this contention because such operations were not contemplated by the parties to the original deed. *Id.* at 537-38.

reserved to the grantor." *Hamilton*, 89 S.E. at 310. Accordingly, the Supreme Court of Virginia has "been unwilling to construe a deed so as to hold that the owner of the mineral estate has the right to destroy the surface, unless such right has been clearly expressed in unmistakably plain terms." *Leftwich*, 222 S.E.2d at 540 (citing *Hamilton*, 89 S.E. at 310). This rule applies "even when open pit mining is contemplated, unless the owner of the surface estate has clearly waived his right of subjacent support." *Leftwich*, 222 S.E.2d at 540 (citing cases); *see Hamilton*, 89 S.E. at 310-11; *see also Large v. Clinchfield Coal Corp.*, 387 S.E.2d 783, 785 (Va. 1990).

The 1849 Deed does not contemplate the complete and utter destruction of the surface of the Property. To the contrary, as the district court recognized, the deed demonstrated the parties' intent for Reynolds and his successors to remain on the Property and use the surface for continued farming and lime production.[31] Neither Reynolds nor Wilson contemplated the use of Carmeuse's current benching techniques, which, like the strip mining at issue in *Leftwich*, destroys the value of the Property.

[31] JA 1773 ("Indeed, the 1849 Deed reflects plans by Reynolds to continue using portions of the tract for farming, lime production, and livestock, and reserved the right for his successors to use limestone from the property to build structures on the property forever. All of these restrictions tend to indicate that the parties to that Deed did not envision the complete destruction of the entire tract's surface").

B. Carmeuse Cannot Enlarge the Estate Granted by the 1849 Deed.

In keeping with the principles above, changes in technology and methodology over time can neither enlarge the estates granted nor diminish the estates retained by a past deed. *Leftwich*, 222 S.E.2d at 541; *Ellis*, 142 S.E.2d at 538; *see also Clayborn*, 105 S.E. at 122; *Hamilton*, 89 S.E. at 310; *Mullins*, 432 F.2d at 318 ("[t]he holder of mineral rights may injure the surface only so much as its deed allows"). If a grantee expects more than those rights specified by the deed, "he ought to stipulate for it." *Clayborn*, 105 S.E.2d at 122; *see also Ratliff*, 24 S.E.2d at 563.

This does not contradict the notion that operators "may take advantage of developments . . . which modern technology may make available." *Leftwich*, 222 S.E.2d at 541. But the key inquiry is the extent and effect that those developments may have on the rights originally conveyed and retained. As in *Leftwich*, a change "which destroys what was reserved by the grantor, is not permissible." *Id.* Modern developments cannot and do not authorize Carmeuse to destroy the entire surface of the property, effectively expanding the scope of rights conveyed in the 1849 Deed and reducing the retained surface estate to nothing.

Under these "modern" methods, no land owner would ever sell the limestone and retain the surface. There would be no point. That is why this type of limestone severance is virtually unknown in modern practice. It was appropriate to Reynolds

and Wilson in 1849, but not a hundred years later. This understanding explains Carmeuse's actions in buying the Newcomb Tract neighboring the Property. Carmeuse and its predecessors had simply never contracted to destroy the entire surface of the Property.[32]

C. The District Court Misapprehended Clear Virginia Law.

The district court's analysis accepts that the parties in 1849 did not intend to remove beneficial use of the surface. They intended it to have value – and they protected that value. On this, there is no mystery. But, the court believed itself to be compelled to disregard this reality in favor of allowing advancements in quarrying techniques --- no matter how drastic the consequences. Under this theory, if a future operator determined that nuclear explosives presented the newest and best means of quarrying limestone – then the surface owner would be required to suffer the effects. While this example may sound extreme, in effect it is no less extreme than the notion of telling Mr. Reynolds that his entire surface was rendered useless, valueless --- and, indeed a liability. He did not agree to such a conveyance, nor would he have without transfer of the entire fee.

Advancements cannot change the scope of what was originally granted or retained. And, *Leftwich* does not authorize the total destruction of surface rights in

[32] "No rule of construction of written instruments is better settled than that which attaches great weight to the construction put upon the instrument by the party themselves." *Chick v. MacBain*, 160 S.E. 214, 217 (Va. 1931); *Hamlin v. Pandapas*, 90 S.E.2d 829, 833-34 (Va. 1956).

the face of diametrically opposed intent demonstrated by the face of a deed. The district court erred.

V. THE CHANCERY DEEDS CONVEY LIMESTONE.

A. The Chancery Deeds Clearly Convey Rights to Limestone Along a Vein in the Southern Portion of the Property.

The Chancery Deeds were ordered by the court, repeating language directly contained within the authorizing orders.[33] The 1901 Deed conveyed "the right to all the limestone . . . along the vein of grey limestone, on said Reynolds lands extending in a South-Westerly direction, to a line three hundred feet from the line of the E. Dillon Land . . ." (JA 1170-71). The 1902 Deed then references the 1901 Deed and conveys the remaining stone from the three hundred-foot line "thence South West to E. Dillon's line." (JA 1247-48).

The district court ignored this and the authorizing order – effectively re-opening the ancient chancery matter to "correct" not only the actions of the commissioners, but also the presiding judge. To do so, the district court was required to bypass: (1) the authorizing order, (2) the advertisements; and (3) the deeds --- all of which reference the grey vein of limestone located in the southern half of the Property. The district court arrived at this point by crafting an ambiguity --- even though the deeds agree with the authorizing orders.

[33] "And it is ordered that the division line between the two parcels … is to run 300 feet from the division line between E. Dillon heirs and the Pitzer Tract, along the vein of grey limestone …" (JA 433).

1. The Chancery Deeds Demonstrate a Clear Intent.

The district court identified two sources of ambiguity in the 1901 Deed: (1) supposedly broad easement rights conveyed under the 1901 Deed; and (2) "Additional Special Terms of Sale" – a chancery document consistent with the deeds. The court was incorrect on both points.[34]

First, easement rights follow the underlying mineral grant – not the other way around. Any easement rights to the limestone conveyed are necessarily apportioned to the extent of the limestone conveyance. Mineral easements are appurtenant to the mineral estate. *Ratliff*, 24 S.E.2d at 563. These access easements serve a particular – and limited – purpose; any additional unauthorized use is a trespass. *Raven Red Ash Coal Co., Inc. v. Ball*, 39 S.E.2d 231, 233 (Va. 1946).

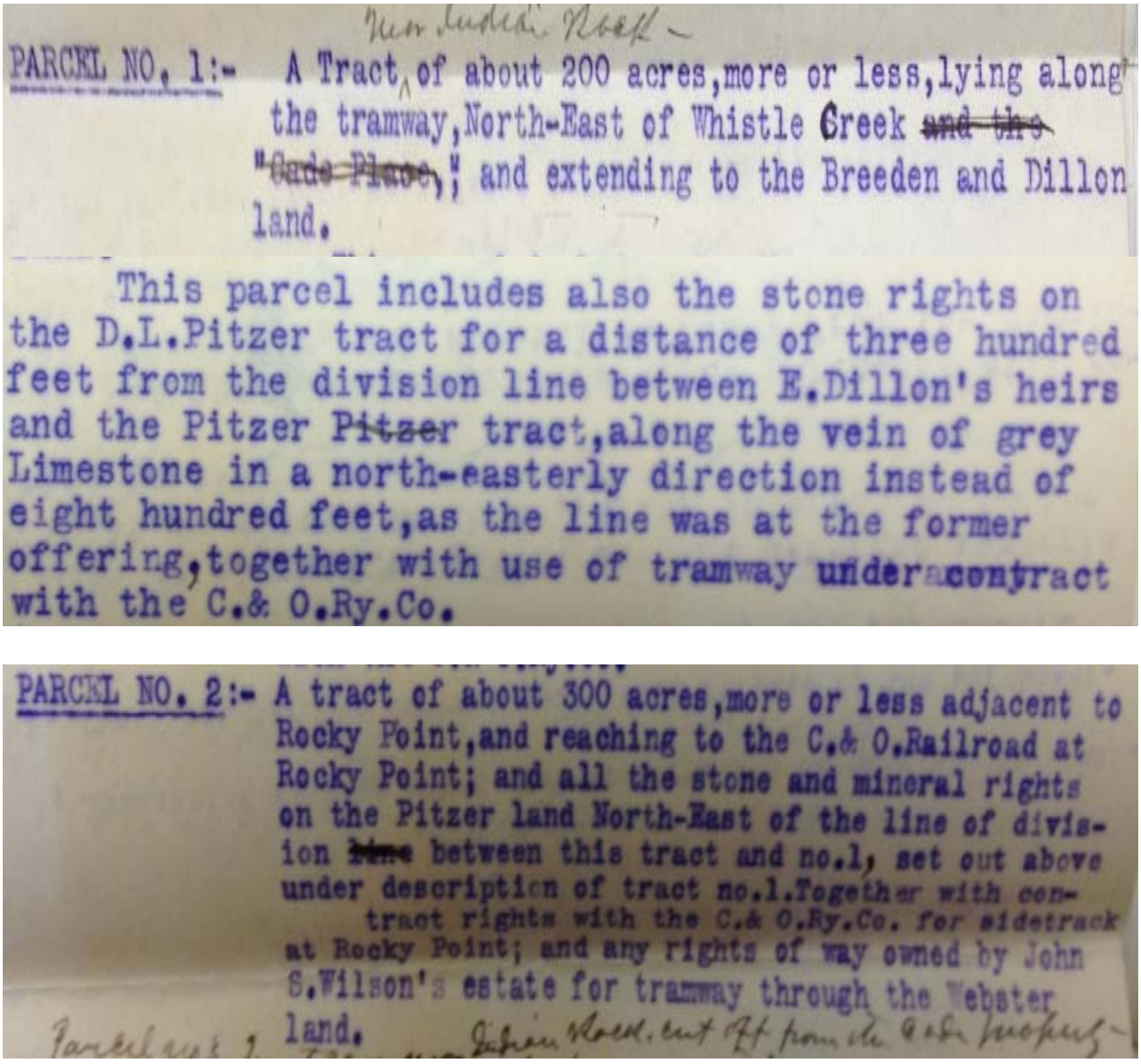
By definition, an easement appurtenant "inheres" in the dominant estate and cannot exist separate from it. *William S. Stokes, Jr. v. Matney*, 73 S.E.2d 269, 272 (Va. 1952). Accordingly, the owner of the easement appurtenant – in this case, the mineral owner – cannot transfer or retain its easement rights outside the granted mineral estate. *Lester*, 122 S.E.2d at 906-07; *Matney*, 73 S.E.2d at 272. In short,

[34] The district court stated that these two sources "suggest that all the stone rights were intended to be conveyed, or, at the very least, they render the deed ambiguous." JA 1763. The court thus either determined that these two factors rendered the deed ambiguous or established that the 1901 Deed conveyed all the stone rights on the Property. The court is wrong under either approach.

mineral access rights cannot exist beyond the extent of the mineral estate conveyed.

Thus, where a grantor only conveys part of the mineral estate, the corresponding easement is limited to the transferred portion of the mineral estate. *See Cooper v. Kolberg*, 442 S.E.2d 639 (Va. 1994) (affirming the trial court's decision to apportion easement appurtenant rights between the two owners of a subdivided the dominant tenement). A grantee cannot have the right to access and quarry stone that the grantee does not own. The easement rights granted under the 1901 Deed coincide with the limestone estate granted. They are not, and cannot be the source of any ambiguity.

Second, the court erred in identifying a chancery document styled "Additional Special Terms of Sale . . ." as an alternative source of ambiguity. (JA 1764). The document describes Parcel 2 as conveying "stone rights," but then explicitly references Parcel 1's description of the stone estate listed in the paragraph located directly above on the same document. (JA 429). Parcel 1's description defines the stone rights as located "*along the vein of grey limestone in a northwesterly direction* . . ." (JA 429). The document thus demonstrates that both parcels are directed at the valuable vein of grey limestone – the same vein that was ordered to be sold and advertised for sale:

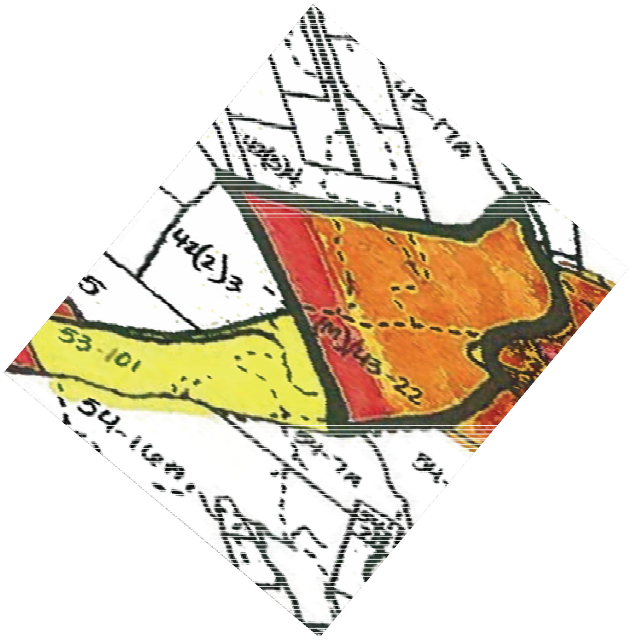


PARCEL NO. 1:- A Tract of about 200 acres, more or less, lying along the tramway, North-East of Whistle Creek ~~and the "Cade Place,"~~ and extending to the Breeden and Dillon land.

This parcel includes also the stone rights on the D.L.Pitzer tract for a distance of three hundred feet from the division line between E.Dillon's heirs and the Pitzer ~~Pitzer~~ tract, along the vein of grey Limestone in a north-easterly direction instead of eight hundred feet, as the line was at the former offering, together with use of tramway under contract with the C.& O.Ry.Co.

PARCEL NO. 2:- A tract of about 300 acres, more or less adjacent to Rocky Point, and reaching to the C.& O.Railroad at Rocky Point; and all the stone and mineral rights on the Pitzer land North-East of the line of division ~~line~~ between this tract and no.1, set out above under description of tract no.1. Together with contract rights with the C.& O.Ry.Co. for sidetrack at Rocky Point; and any rights of way owned by John S.Wilson's estate for tramway through the Webster land.

(JA 429). Note also that the fee portion of Tract No. 1 references a boundary of both the Dillon land (now Carnera) and the Breeden tract (now Hill). However, the limestone conveyance on the Property references only the Dillon line (yellow on the attached diagram), not the Breeden Tract (shown in white to the north of Dillon on the boundary of the Property).



(JA 434). This should dispel any notion of accidental omission with regard to the deed language that describes the boundary of the limestone grant as the "Dillon" line[36] (not "Dillon and Breeden").

2. The Chancery Deeds Plainly Convey the Limestone on the Property.

By its plain terms, the 1901 Deed conveys "all the limestone . . . along the vein of grey limestone" on the Property. (JA 1170-71). If the commissioner had intended to convey all stone, he would not have used the specific term "limestone" in the deed. Likewise, he would not have included the language, "along the vein of

[36] The references to the E. Dillon boundary, which only borders the Property in the southwest corner, demonstrate that the Chancery Deeds only intended to convey the limestone along the vein that terminates in that corner. The only *limestone* on the Property is located in the vein that terminates in this southwest corner of the Property. (*See* pages 17-20, *supra*; JA 1161-63). All previous quarrying operations occurred in the southwest corner of the Property – along the grey vein. (*See* page 21, *supra*; JA 1168).

grey limestone" if he had intended to convey any and all limestone (or even all the stone) on the Property. The 1901 Deed clearly conveys limestone found in a specific vein located in the southern half of the Property. This plain reading effectuates all the language in the 1901 Deed.

The 1902 Deed expressly references the boundary line established by the 1901 Deed. And, when read in conjunction with the 1901 Deed it references, the 1902 Deed plainly conveys all the limestone along the vein of grey limestone that the 1901 Deed did not previously convey. Three aspects of the Chancery Deeds compel this conclusion.

First, the 1902 Deed incorporates the boundary description in the 1901 Deed by its reference to that deed. *James River Kanawha Co. v. Old Dominion Iron & Steel Corp.*, 122 S.E. 344, 349 (Va. 1924) (a deed's reference to grants or conveyances in other deeds that relate to the referencing deed's description are incorporated into the referencing deed). And, "where two papers are executed at the same time or contemporaneously between the same parties, in reference to the same subject matter, they must be regarded as parts of one transaction, and receive the same construction as if their several provisions were one and the same instrument." *Bailey*, 691 S.E.2d at 493; *accord Oliver Refining Co. v. Portsmouth Cotton Oil Refining Corp.*, 64 S.E. 56, 59 (Va. 1909); *Anderson v. Harvey*, 51 Va.

386, 396 (1853). Accordingly, the 1902 Deed also conveys the limestone along the grey vein.

Second, the Chancery Deeds reference the E. Dillon Line, which only borders the Property at its southwest corner – the terminus for the grey vein. Thus, the Chancery Deeds designated the limestone at a specific location on the Property.

Third, the 1901 Deed conveyed "limestone," not all stone. There is no reason why the 1902 Deed, which specifically relies on the conveyance in the 1901 Deed, would convey a far greater estate than its predecessor.

The deeds are not ambiguous, and Virginia law requires that the court effectuate their clear meaning. *See Amos,* 320 S.E.2d at 337; *Ratliff,* 24 S.E.2d at 562 ("[w]here the meaning of the deed is plain, the court must enforce the instrument accordingly"). The Chancery Deeds convey the limestone that the judge ordered to be sold, that was advertised to be sold, and was located in a vein of grey limestone than runs through the southern portion of the Property.

B. The District Court Improperly Disregarded Important and Undisputed Evidence.

The court incorrectly concluded that "all indications were that the stone and quarrying rights conveyed to Wilson by Reynolds were being conveyed [by the Chancery Deeds]. . ." (JA 1765-66). To get there, the district disregarded the terms of the orders, the terms of the deeds, the historic quarrying practices on the Property (and adjacent), and the advertisements for sale (describing the "gray

limestone" as "the purest quality, 98% carbonate of lime." (JA 435-37; 1722). In so doing, the court's ruling ignored the rights of the easement holders over the Property in the area above the grey vein. The court stripped these owners of their rights and without so much as a mention.

CONCLUSION

For the above reasons, this Court should reverse the district court's entry of summary judgment, and enter judgment in Thomas's favor.

REQUEST FOR ORAL ARGUMENT

Thomas respectfully requests oral argument, which would be helpful to the court because this appeal presents many important questions of Virginia property and mineral rights law, including whether – as the district court held – the clear intent of the parties to a mineral severance deed is irrelevant in construing the deed. Thomas would welcome an opportunity to address any questions the Court may have.

Dated: July 21, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e)(2)(B)(i) AND LOCAL RULE 32(b)

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1. This brief complies with the type volume limitation of Fed. R. App. P. 28.1(e)(2)(B)(i) and Local Rule 32(b) because it contains 13,773 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) (*i.e.*, the corporate disclosure statement, table of contents, table of citations, requests for oral argument, and any certificates of counsel).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced 14-point serifed typeface, Times New Roman, using Microsoft Word 2010.

/s/ J. Scott Sexton
J. Scott Sexton

CERTIFICATE OF SERVICE

The undersigned, counsel of record for Appellants, does hereby certify on this 21th day of July, 2015, that the required copies of the foregoing **Opening Brief of Appellants** were filed with the Clerk of the Court electronically using the Court's CM/ECF system which will send notification of such filing to the following CM/ECF participants:

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