IN THE

Supreme Court of Virginia

RECORD NO. 090524

JANE F. SNEAD; DOUGLAS and BONNIE MCWHIRT
and
SNEAD FAMILY FARM, LLC,

Appellants,

v.

C&S PROPERTIES HOLDING COMPANY, LTD.,

Appellee.

BRIEF OF APPELLEE

William E. Glover (VSB #25965)
GLOVER & DAHNK
1103 Princess Anne Street
Post Office Box 207
Fredericksburg, Virginia 22404-0207
(540) 373-8600
(540) 373-8629 (fax)
email: weg@gloveranddahnk.com

Counsel for Appellee

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
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IN THE SUPREME COURT OF VIRGINIA

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Appellants,

v. **Record No. 090524**

C & S PROPERTIES HOLDING
COMPANY, LTD.

Appellee.

BRIEF OF APPELLEE

INTRODUCTION

The trial Court properly refused to require, by injunction, the Appellee to remove items from an easement of ingress and egress, where the facts of the case showed no interference with the Appellants' use of the easement.

STATEMENT OF THE NATURE OF THE CASE

C&S Properties Holding Company, Ltd. (C&S) owns land in an industrial park developed by the Fredericksburg Industrial Development Authority. Jane F. Snead, Snead Family Farm, LLC, Douglas and Bonnie McWhirt sued C&S claiming the existence of a 60' easement of ingress and egress across one side of the lot owned by C&S. The Appellants, hereinafter collectively "Snead and McWhirt", also sued for an injunction

requiring the removal of man-made items they claimed encroached upon the easement.

The matter was heard *ore tenus* by the Court. The Court visited the scene with counsel. On September 15, 2008, the Court issued a letter opinion, which opinion was incorporated into the Final Decree of the Court entered December 22, 2008. (Appendix at 428).

The Court found an express easement appurtenant to the Snead land, and opined that McWhirt had the right to use the easement for ingress and egress. (Appendix at 429).

The Court specifically refused to require the removal of man-made objects within the 60' area included in the easement. (Appendix at 431).

Snead and McWhirt appealed, challenging the Court's refusal to enter a mandatory injunction.

QUESTION PRESENTED

Was the Court plainly wrong where it refused to force the removal of man-made objects from the easement area, after the court considered the testimony and exhibits, visited the site, and found no justification for such a requirement?

STATEMENT OF FACTS

C&S Properties Holding Company, Ltd. is the owner of a parcel of improved property in an industrial park created by the Fredericksburg Industrial Development Authority in the 1990s. (Appendix at 371). The industrial park is located on the southwest corner of the City of Fredericksburg. The industrial park was created by a purchase by the Authority of land owned by Emmett C. Snead, Jr. and Jane F. Snead who operated a dairy farm on that property as had Emmett C. Snead, Sr. (Appendix at 353).

Along the northern boundary of the industrial park, including the lot owned by C&S, runs a narrow gravel road in a straight line. That road has been in existence for over one hundred years and currently connects a public road created by the City of Fredericksburg with Lee Drive, a park road through the National Battlefield Park at the edge of the city. (Appendix at 402).

Snead and McWhirt do not allege that the gravel road has ever been obstructed or in any way blocked by C&S. Instead, they argue that in the 1997 deed from Emmett C. Snead, Jr. and Jane F. Snead to the Fredericksburg Industrial Park created a 60' wide easement containing the

gravel road; they argue that part of the 60' area contains improvements which they contend C&S should be ordered to remove. (Appendix at 5).

In September of 1997, when Emmett C. Snead, Jr. and Jane F. Snead accepted $443,188.50 from the Industrial Development Authority for the City of Fredericksburg in exchange for the conveyance of the land, including the land now owned by Defendants in this case, there was no recorded 60' easement across that property. (Appendix at 371. In the 1997 deed, the Sneads made the conveyance subject to any and all easements of record "and 60' ingress and egress easement as shown on the aforementioned plat (plat at Plat Book 9, Page 110) reserved for the benefit of the grantors and the owners of the property described in the plat as 'McWhirts'". (Appendix at 355).

The plat that was recorded contemporaneously with that deed draws a line showing a 60' wide area between the northern boundary of the properties by C&S, and extending 60' to the south along the course of that boundary. (Appendix at 353).

The road itself, located adjacent to the boundary, is bordered on both sides by trees and brush. In the development of their properties, C&S cleared land close to, but not reaching, the roadway. C&S allowed a stand of trees and brush on the southern side of the road to remain intact,

preserving the road in its original condition. (Appendix at 411, 412). C&S has constructed a fence and rip rap around a storm water management facility within 60' of their northern boundary. (Appendix at 402). None of the improvements complained of touch upon, or encroach, the roadway.

The roadway is used primarily by the McWhirts to reach Central Road. While the McWhirts claim that the easement constitutes their only "deeded access" to their property, the McWhirts also utilize a driveway onto Lee Drive which is immediately adjacent to their property, the address of which is actually stated as 119 Lee Drive, Fredericksburg, Virginia. (Appendix at 157, 437).

STANDARD OF REVIEW

Snead and McWhirt claim that the Court abused its discretion in refusing to enter a mandatory injunction in this matter. Where the Court specifically found that Snead and McWhirt offered no evidence that would support a mandatory injunction, the Court's decision cannot be reversed without a determination of abuse of discretion.

Snead and McWhirt also claim the decision of the Court was "plainly wrong". However, the Court identified factual and legal bases for its determination, and acted within its discretion in doing so.

PRINCIPLES OF LAW, ARGUMENT, AND AUTHORITIES

The trial Court properly rejected Snead and McWhirt's contention that equity required removal of man-made objects from the 60' easement area. The Court carefully reviewed the deeds, plats, photographs, letters and other documents presented to it by the parties. In addition, the Court considered the only testimony offered by Snead and McWhirt concerning the use of the road which was the testimony of Mr. McWhirt.

The Court then, and with the agreement of the parties and the participation of their counsel, traveled to the site of the easement and traversed the easement road to make its observation. (Appendix at 430).

Based on all of those facts reviewed by the Court, and the Court's own impressions of the physical circumstances of the easement road, the Court was well within its discretion to determine, as it did, that equity could not require the removal of the man-made objects within the claimed 60' easement. Appellants offer no real basis to challenge the trial court's findings.

"[W]hen a case is decided by a court without the intervention of a jury and a party objects to the decision on the ground that it is contrary to the evidence, the judgment of the trial court shall not be set aside <u>unless it appears from the evidence that such judgment is plainly wrong</u> or without

evidence to support it." Virginia Code § 8.01-680 (1950, as amended). (Emphasis added). "It is axiomatic that a chancellor's finding on conflicting evidence, heard ore tenus, will not be disturbed on appeal unless it is plainly wrong or without evidence to support it." Ivy Constr. Co. v. Booth, 226 Va. 299, 301, 309 S.E.2d 300, 301 (1983) (per curiam) (citing Rochelle v. Rochelle, 225 Va. 387, 393, 302 S.E.2d 59, 63 (1983)).

Snead and McWhirt rely heavily upon the case of Pizzarelle v. Dempsey, 259 Va. 521, 526 S.E.2d 260 (2000). In fact, Pizzarelle is the only case cited by the Court in its opinion. The Court distinguished Pizzarelle, as it should, from the evidence presented in the case at hand. The distinction made by the Court to Pizzarelle involves the difference in the reason for the creation of the easement and the evidence regarding the use of the easement. In this case, as the Court pointed out, the 60' wide easement along the northernmost boundary of the Defendants' property contains "an old variable width gravel road". The Court pointed out that,

> "At the eastern end of the easement -- i.e., where the gravel road begins at Central Road, a 10' wide curve cut has been constructed off the servient parcel by public authorities. Thus, the gravel portion of the easement actually varies in width from 10' at its eastern end to 15-20' as it crosses Defendants' parcel." (Appendix at 430).

The Court went on to observe,

> "The gravel road is bounded on the north by a row of mature trees and brush separating it from adjoining lands of the Battlefield Industrial Park Phase I. More important for purposes of resolving this dispute, the gravel road is also bounded on the south by another, thicker, line of mature trees, separating the gravel portion from the rest of the 60' easement." (Appendix at 430).

After identifying, for the record, the man-made items, portions of which are located within the 60' area identified by the Court, the Court made specific observations about the use of the easement.

In its opinion, the Court stated, "The Sneads offered no evidence whatever about their use or any interference with their ingress and egress to Lee Drive." (Appendix at 431).

In fact, neither Jane F. Snead, or her son, Emmett Snead, III, testified, nor did any other representative of the Snead family testify or provide any evidence in the case. As the Court pointed out, "in any event, the Sneads offered no evidence as to how their passage would be interfered with by the fence should any of their 'plans' come to fruition." (Appendix at 431).

The Court stated that while the McWhirts have used the gravel road for 36 years, they had never used any other portion of the alleged 60' easement. (Appendix at 431).

The Court finally found that the request made by Snead and McWhirt' in equity would not actually produce any benefit to them.

> "Significantly, the Court notes that even if equity compelled the Defendants to remove the man-made objects in the easement at a significant expense and inconvenience, the Plaintiffs would still be unable to use the entire easement, even if they wanted to, because of the stand of trees down the length of the easement. Those trees are located between the gravel portion and the man-made objects." (Appendix at 431).

The Appellants demand in equity for an injunction to remove the man-made objects was neither supported by evidence that suggested such an equitable remedy was required, nor by common sense since the remedy requested by Snead and McWhirt would garner them no additional benefit based on their own testimony.

The Court, in the case at bar, concluded its opinion by distinguishing the facts it found in this case from the facts in Pizzarelle.

The Court pointed out that in Pizzarelle there was a determination that the easement was "completely blocked" and that the items sought to be removed constituted an "interference" with free passage along the easement.

Snead and McWhirt argue for a mechanistic interpretation of Pizzarelle that any object placed within the bounds of an easement of ingress and egress is subject to removal upon demand by the dominant

State owner. This represents a misunderstanding of Pizzarelle and suggests a revision of property rights law which cannot be supported in the common law or in common sense.

The argument advanced by Snead and McWhirt herein is that Pizzarelle renders the grant of an easement to be equivalent to a relinquishment of all property rights in that portion of the property other than, perhaps, a coincident right of ingress and egress. The property covered by the easement could not be farmed, fenced, or otherwise used in any way given the interpretation demanded by Snead and McWhirt.

The ruling sought by the plaintiffs would strip "reasonableness" and, in fact, reason itself from the decision of disputes over easements. The plaintiffs would have this Court hold that any action which potentially obstructs any portion of any easement could be enjoined without more. That is to say, without consideration of the language of the grant, the nature of the use of the easement, any planned future use, or the nature of the conduct sought to be enjoined.

This Court did not make that standard the law in Pizzarelle, and for good reason. Pizzarelle examined the language of the easement, the history of the use of the easement, and the nature of the alleged encroachments in that case. The Court in Pizzarelle found no need to

"balance equities" in that case, but did not abolish that process as part of the law of easements. Pizzarelle distinguished Willing v. Booker on its facts, rejecting the consideration of reasonableness as the fulcrum for decision of the facts in Pizzarelle. This Court did not reject the analysis of Willing v. Booker, or overrule the precepts set forth in it. Similarly, the Court in Pizzarelle distinguished Mobley v. Saponi, 215 Va. 643, 212 S.E.2d 287 (1975) on its facts specifically mentioning how the facts in Mobley "showed no significant amount of Mobley's lakefront, usable property was flooded. . .also, their dock was no less usable."

Pizzarelle does not articulate the rule that the plaintiffs' urge on this Court. Pizzarelle found that upon consideration of the evidence regarding the language of the easement, the specific nature of the alleged encroachments and the historic use of the easement, that the Judge should have ordered the obstructions removed.

In the case at bar, the Court considered what evidence was adduced on each of these points. The easement language created an easement of ingress and egress only, not the broader and more specific grant in the reservation in Pizzarelle. The easement in the case at bar contained no additional or qualifying language such as that contained in Paragraph 2 of the Pizzarelle easement.

The Pizzarelle easement contains two enumerated provisions. They read as follows:

> "1. The easement shall be used exclusively for the purpose of ingress and egress to the lots.
>
> 2. No act shall be performed by any owner of a lot, their tenants, guests, or agents which would in any manner affect or jeopardize the free and continuous enjoyment of any other owner of a lot in and to the easement."

The easement in the case at bar is merely an easement of ingress and egress without any additional language which expands the rights of predominant tract or proscribes any other conduct.

"The use of an easement must be restricted to the terms and purposes on which the grant was based." Nishanian v. Sirohi, 243 Va. 337, 339, 414 S.E.2d 604, 606 (1992) (citing Robertson v. Bertha Min. Co., 128 Va. 93, 104, 104 S.E. 832, 835 (1920)). Thus, injunctive relief is available when an easement is being used for a purpose other than that originally granted. Nishanian, 243 Va. at 339, 414 S.E.2d at 606.

Further, the easement in this case is an easement that connects two properties bordering the servient tract and not an alley that connected the border of numerous lots with a road as was the case in Pizzarelle.

The Court considered the evidence regarding the use of the easement and found that the plaintiffs offered very little. Snead, for

reasons apparently satisfactory to them, gave no testimony at all, and offered no evidence on their family's use of the easement. McWhirt's testimony supported his need to go back and forth upon the road as he had done continuously and without interference by the defendants for 38 years. (Appendix at 178-180).

No witness gave any testimony to suggest that their use had been in any way restricted, or even affected by the actions of the defendants.

Finally, the Court analyzed the nature of the alleged offending improvements in the easement. He received photographs, heard testimony, and ultimately went to the scene with counsel and viewed the road and the items constructed by the defendants or the predecessors in title.

Based on his analysis of the language of the easement, the evidence regarding the use of the easement, and the nature of the encroachments complained of, the Court found no basis in law or equity to order the defendants to remove the fence or the storm sewer rip rap.

Central to this decision was the inescapable reality that the relief sought by the plaintiffs would cause expense and inconvenience for the defendants, but no corresponding actual benefit to the plaintiffs.

The way historically travelled through the easement is bounded on either side by mature trees; (Appendix at 411-412) the entrance to the road is contained within a curb cut and apron ten feet wide; (Appendix at 413-414) and the easement area itself contained a telephone or power pole, a telephone pedestal box, and a sign for the industrial park. (Appendix at 416). None of these items were put in place by the defendants. Perhaps even more importantly, the plaintiffs do not seek the removal of any of these items. What the plaintiffs seek is removal of the fence, some rip rap in a storm water management facility, and some of the "recently planted bushes."

The Court's observations regarding these items are noteworthy:

> ". . . the plaintiffs presented no evidence whatever that any of the objects complained of disrupt the plaintiffs' enjoyment of free passage along the easement; or that injunctive relief would in any way allow them to utilize more of the easement area than they are presently using, given the stand of trees more or less in the middle of the easement and traversing its length; or that they have future plans, trees or no trees, consistent with the nature of the easement, that would be blocked, interfered with, or disrupted by the defendants' actions." (Appendix at 431).

CONCLUSION AND STATEMENT OF PRECISE RELIEF SOUGHT

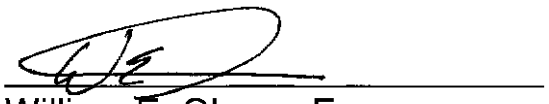
In addition, C&S asks this Court to reject the challenge by Snead and McWhirt to the determination by the trial court that no mandatory injunction

was appropriate. The trial court correctly found that Snead and McWhirt presented no evidence which required in equity an injunction to force the removal of man-made objects from the alleged easement area.

All of which is respectfully submitted this day.

C&S PROPERTIES
HOLDING COMPANY, LTD.

BY COUNSEL



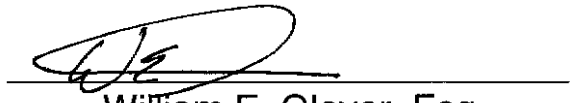
William E. Glover, Esq.
VSB #25965
GLOVER & DAHNK
P.O. Box 207
Fredericksburg, VA 22404-0207
Telephone: (540) 373-8600
Fax: (540) 373-8629
E-mail: weg@gloveranddahnk.com

CERTIFICATE PURSUANT TO RULE 5:26(d)

The Parties

Appellants:	Jane F. Snead, Douglas and Bonnie McWhirt, and Snead Family Farm, LLC
Counsel:	Christian B. Franklin, VSB #45378 PARRISH, HOUCK & SNEAD, PLC P.O. Box 7166 Fredericksburg, VA 22404 Telephone: (540) 373-3500 Fax: (540) 899-6394 E-mail: franklin@phslawfirm.com
Appellee:	C&S Properties Holding Company, Ltd.
Counsel:	William E. Glover, VSB #25965 GLOVER & DAHNK P.O. Box 207 Fredericksburg, VA 22404-0207 Telephone: (540) 373-8600 Fax: (540) 373-8629 E-mail: weg@gloveranddahnk.com

The undersigned hereby certifies that fifteen copies of the foregoing Brief of Appellee are being filed with Patricia Harrington, the Clerk of the Supreme Court of Virginia, 100 North 9th Street, Richmond, VA 23219, by hand-delivery; an electronic copy is being filed via email with the Clerk's Office of the Supreme Court of Virginia; and three true and exact copies were sent by U.S. Mail, postage prepaid to Christian B. Franklin, Esq., Counsel for Jane F. Snead, Douglas and Bonnie McWhirt, and Snead Family Farm, LLC, Parrish, Houck & Snead, PLC, P.O. Box 7166, Fredericksburg, VA 22404, on this 16th day of July, 2009.



William E. Glover, Esq.