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.

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

CLARIFICATION OF APPELLEE'S STATEMENT OF THE NATURE OF THE CASE 1

SUMMARY OF ARGUMENT 1

REPLY ARGUMENT 2

I. Specific evidence concerning restrictions on the Plaintiffs' use of the Easement was presented, although not necessary under these facts because the Plaintiffs' evidence shows significant interference with the Easement that entitles them to the injunctive relief requested 2

II. *Pizzarelle* cannot be distinguished from the case at bar in any meaningful way 7

CONCLUSION 10

CERTIFICATE 12

TABLE OF AUTHORITIES

Page(s)

CASES

Brown v. Haley,
233 Va. 210, 355 S.E.2d 563 (1987) 4

Hartsock v. Powell,
199 Va. 320, 99 S.E.2d 581 (1957) 4

Mobley v. Saponi,
215 Va. 643, 212 S.E.2d 287 (1975) 5

Nishanian v. Sirohi,
243 Va. 337, 414 S.E.2d 604 (1992) 5

Pizzarelle v. Dempsey,
259 Va. 521, 526 S.E.2d 260 (2000) .....*passim*

Preshlock v. Brenner,
234 Va. 407, 362 S.E.2d 696 (1987) 4

Walton v. Capital Land, Inc.,
252 Va. 324, 477 S.E.2d 499 (1996) 4

Willing v. Booker,
160 Va. 461, 168 S.E. 417 (1933) 8

OTHER AUTHORITY

19 Corpus Juris § 238(b)..... 8

CLARIFICATION OF APPELLEE'S STATEMENT OF THE NATURE OF THE CASE

The Brief of the Appellee accurately states that the trial court "found an express easement appurtenant to the Snead land," but suggests that McWhirt simply "had the right to use the easement for ingress and egress." (Brief of Appellee at 2.) The trial court's letter opinion and Final Decree state: "[T]he 1997 Snead-to-IDA deed creates an *express easement appurtenant in favor of the plaintiffs* and their successors across the delineated 60'-wide strip on the northernmost part of the defendants' property…" (App. 432, 433) (emphasis added).

SUMMARY OF ARGUMENT

The arguments presented in the Brief of Appellee by C & S Properties Holding Company, Ltd. (the "Defendant") do not properly consider the facts of this case or the law applicable to the facts. Jane F. Snead, Douglas and Bonnie McWhirt, and Snead Family Farm, LLC (together, the "Plaintiffs") are the dominant owners of a 60-foot wide easement for ingress and egress over the Defendant's property (the "Easement"). The Plaintiffs introduced evidence to show significant obstructions to the Easement and how the obstructions affected and restricted their use of the Easement. However, testimony concerning specific and particular uses of a portion of an easement that is blocked by obstructions is unnecessary when "a

significant portion of the easement would be rendered unusable for ingress and egress if injunctive relief were denied." *Pizzarelle v. Dempsey*, 259 Va. 521, 531, 526 S.E.2d 260, 266 (2000). This Court's rulings in *Pizzarelle* are directly on point and should be followed to compel the Defendant to remove the obstructions that interfere with and block the Easement.

REPLY ARGUMENT

I. Specific evidence concerning restrictions on the Plaintiffs' use of the Easement was presented, although not necessary under these facts because the Plaintiffs' evidence shows significant interference with the Easement that entitles them to the injunctive relief requested.

The Plaintiffs presented testimony, photographs, and a scaled plat at trial through a licensed land surveyor qualified as an expert witness to show the boundaries of the Easement and the location of the obstructions (specifically, the fence, storm water management basin filled with rip rap, and newly planted trees and shrubs) within the Easement. (App. 120-140, 392, 402, 403, 406.) Mr. McWhirt testified regarding his use of the Easement and the difficulties and concerns the obstructions in the Easement create. (App. 173-181, 189-195.) Contrary to the Defendant's assertions, Mr. McWhirt testified that the use of the Easement is restricted and affected by the obstructions on the Defendant's property ("[T]he way it is now I can't walk across my easement. If I wanted to ride a horse across

there, the fence is there. There's no way I can use that [obstructed portion of the] easement at all."). (App. 174-75.)

The Plaintiffs concede that neither Jane F. Snead nor any representative of Snead Family Farm, LLC testified regarding their specific use of the Easement. Considering the facts of this case and the rulings in *Pizzarelle*, it was not necessary for the Plaintiffs to introduce testimony to show that the obstructions make the Easement less useful or less convenient. *Id.* The evidence that approximately 40 feet of the 60-foot wide Easement is blocked and rendered impassible establishes significant interference with the Easement. The Plaintiffs are prevented from utilizing a significant portion of the Easement for ingress and egress, and this evidence shows that the Easement is less useful and less convenient as a matter of fact and law. It was unnecessary and would have been duplicative for each of the Plaintiffs to testify that they could not utilize the burdened portion of the Easement. The Defendant did not have evidence to support or assert theories of abandonment or adverse use of the Easement, so alleged non-use of the Easement by the Plaintiffs is not controlling of any issue in this case. Defendant acknowledges in its brief that "the [trial] Court made specific observations about the [Plaintiffs'] use of the easement," and it focused on this issue to justify denial of injunctive

relief. (Brief of Appellee at 8.) Those considerations were not a proper basis upon which the trial court could rely to deny injunctive relief in this case.

The Defendant asserts that the position advanced by the Plaintiffs would "strip reasonableness…from the decision of disputes over easements." (Brief of Appellee at 10.) To the contrary, when such a substantial portion of the Easement has been rendered unusable, reasonableness dictates that the obstructions be removed. This Court has "repeatedly held that the owner of the servient estate retains the right to use his land in any manner which does not unreasonably interfere with the use granted in the easement." *Walton v. Capital Land, Inc.*, 252 Va. 324, 326, 477 S.E.2d 499, 501 (1996) (*citing Preshlock v. Brenner*, 234 Va. 407, 410, 362 S.E.2d 696, 698 (1987); *Brown v. Haley*, 233 Va. 210, 216, 355 S.E.2d 563, 568 (1987); *Hartsock v. Powell*, 199 Va. 320, 324, 99 S.E.2d 581, 585 (1957)). Because the evidence shows that the made-made obstructions on the Defendant's property render a significant portion of the Easement unusable for ingress and egress, there is no question that the obstructions "unreasonably interfere" with the Plaintiffs' use of the Easement. *See Pizzarelle*, 259 Va. at 531, 526 S.E.2d at 265 ("[T]he

question here is not one of ‘reasonableness’…”). The obstructions unreasonably interfere with the Easement as a matter of fact and law.

The Defendant suggests, and the trial court ruled, that the injunctive relief sought by the Plaintiffs would not produce any actual benefit to them. (Brief of Appellee at 9; App. 431.) To the contrary, the benefit that would be gained by the Plaintiffs if the Defendant is compelled to remove the obstructions is apparent not only through the evidence presented, but also by the effect of the common law. The Plaintiffs would have the ability to freely utilize the full width of the Easement for the purpose which it was created. As important, compelling the Defendant to remove the man-made obstructions would prevent the appropriation and adverse use of the Easement by the Defendant that stands to eliminate a significant portion of the Easement if the obstructions are permitted to remain. *See Id.* at 530-31, 526 S.E.2d at 265 (*citing Nishanian v. Sirohi*, 243 Va. 337, 339, 414 S.E.2d 604, 606 (1992)). The creation and present location of the obstructions reflect the Defendant’s “intent to adversely use part of the easement for a purpose other than ingress and egress.” *Id.* at 530, 526 S.E.2d at 265. This Court’s ruling in *Mobley v. Saponi* (215 Va. 643, 212 S.E.2d 287 (1975)) is distinguishable from the facts of the present case for

the same reasons addressed in *Pizzarelle*, and there is no need to "balance the equities." *Pizzarelle*, 259 Va. at 531, 526 S.E.2d at 266.

Removal of the Fence (comprised of the "South Fence" and "Perpendicular Fence"; as defined in Brief of Appellants at 7) and storm water management basin filled with rip rap would restore the Plaintiffs' ability to utilize approximately forty (40) feet of the Easement's width. As evidenced by the testimony of Mr. Sullivan and photographs, and referenced by the trial court in its letter opinion, the line of trees on the south side of the gravel roadway is located only ***between*** the roadway and the portion of the fence parallel to the roadway, and the same line of trees borders the roadway over only about one-half of the Defendant's property. (App. 167-69, 403, 408, 411, 416, 418, 431.) Nothing but the Fence and storm water management basin filled with rip rap prevent the Plaintiffs from utilizing approximately forty (40) feet of the Easement's width for ingress and egress. Steven Robinson, testifying as owner of the Defendant, admitted that the Fence prevented the Plaintiffs from utilizing that portion of the Easement for ingress and egress, and the trial court concluded the same. (App. 254-58.) The obstructed portion of the Easement is generally flat and passable, without trees. (App. 168-69.) The telephone or power

pole, and sign for the industrial park referenced in the Brief of Appellee are not on the Defendant's property. (App. 402.)

The trial court's reasoning concerning the Plaintiffs' inability to utilize the "entire easement" even if the obstructions were removed is only accurate to the extent that the Plaintiffs could not travel in a straight line east and west directly through the line of trees on the south side of a portion of the gravel road. That does not justify denying injunctive relief and preventing the Plaintiffs from being able to utilize the Easement south of the line of trees at issue for ingress and egress.

II. *Pizzarelle* cannot be distinguished from the case at bar in any meaningful way.

The Brief of Appellants examines, in detail, the striking similarity between *Pizzarelle* and the case at bar. Attempts by the Defendant and the trial court to distinguish *Pizzarelle* from the facts of and law applicable to this case are inapposite. The differences between the language creating the easements is inconsequential, and there are no factual distinctions that bear any significance.

The Defendant attempts to distinguish the case at bar from *Pizzarelle* by pointing to the language creating the easements in each case, specifically addressing the "additional or qualifying language" in paragraph 2 of the *Pizzarelle* easement. (Brief of Appellee at 11-12.) The additional

provision in the *Pizzarelle* easement has no bearing because it merely incorporates the applicable tenets of the common law. As this Court stated in *Willing v. Booker* (160 Va. 461, 168 S.E. 417 (1933)), "where a reservation is of a certain width, that width cannot be encroached upon." *Id.* at 465, 168 S.E. at 418 (*quoting* 19 Corpus Juris § 238(b), p. 984). The Defendant seems to assert that an easement for ingress and egress without such a provision may be blocked, taken back, or interfered with by the owner of the servient tract without repercussions. The reasoning and interpretation suggested by the Defendant would have drastic and far-ranging effects, since many express easements for ingress and egress do not contain such a provision. It does not stand to reason that the "additional or qualifying language" in the *Pizzarelle* easement is necessary, or that the lack of such language would make a difference when determining the appropriateness of injunctive relief. An easement created solely for ingress and egress is of severely limited benefit, effect, or value to the dominant owner if any significant portion of it can be obstructed or blocked. Moreover, the terms of an express easement (such as the dominant owners' right to utilize a certain width) should not be modified absent compelling circumstances (such as clear and unequivocal evidence of abandonment).

The Defendant also seems to suggest that the easement in *Pizzarelle* was “completely blocked” as opposed to the case at bar where approximately forty (40) feet of the Easement’s width is blocked. (Brief of Appellee at 9.) In *Pizzarelle*, the only portion of the easement “completely blocked” was the four-to-five feet south of the south fence. 259 Va. at 531, 526 S.E.2d at 266 (“[T]he obstructions in the easement completely block all ingress and egress on the south side of the wooden fence.”). Similarly, in this case, approximately 40 feet of the 60-foot wide Easement is “completely blocked” and rendered impassible. The full width of the easement is not blocked or rendered impassible in either the case at bar or *Pizzarelle*. If any distinction may be made, it would be that the encroachment on the Easement in the case at bar is much more significant and substantial than the encroachment on the easement in *Pizzarelle*. Here, just like in *Pizzarelle*, a *portion* of the Easement is “completely blocked” and the man-made obstructions sought to be removed constitute significant and substantial “interference” with free passage along the Easement.

The simple fact remains that the Easement is being utilized by the Defendant for a purpose other than that which was originally granted, to the detriment of the Plaintiffs. Injunctive relief is necessary, and arguably

required, where obstructions within the bounds of an easement significantly interfere with and prevent the full and free use of the easement for the purpose which it was created. The obstructions to the Easement irreparably harm the Plaintiffs and they have no adequate remedy at law.

While granting or denying injunctive relief is generally a matter of discretion for the trial court, the trial court should not balance the equities, question whether the Easement is "less useful or less convenient", or concern itself with the question of "reasonableness" when "obstructions in the easement are a material encroachment on the dominant owners' rights" and "a significant portion of the easement would be rendered unusable for ingress and egress if injunctive relief were denied." *Id.* at 530-31, 526 S.E.2d at 265-66. As in *Pizzarelle*, the facts presented in the instant proceeding and the law applicable to those facts require mandatory injunctive relief to (1) restore the Plaintiffs' right to full and free use of the Easement for ingress and egress, and (2) prevent the Defendant's appropriation and taking of a significant portion of the Easement.

CONCLUSION

For the reasons stated in the Brief of Appellants and this Reply Brief, the trial court's Final Decree should be reversed insofar as it denies the mandatory injunctive relief requested by the Plaintiffs. The Plaintiffs pray

that the Court remand this case with instructions for the entry of a decree ordering mandatory injunctive relief, specifically (1) prohibiting the Defendant from interfering with and obstructing the Plaintiffs' use and enjoyment of the Easement, and (2) compelling the Defendant to remove and/or relocate all obstructions (including the Fence, the storm water management basin filled with rip-rap, and newly planted trees and shrubs) constructed and existing in the Easement.

Respectfully submitted,

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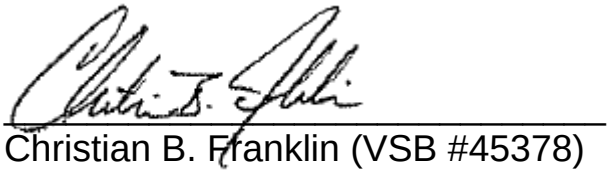
CERTIFICATE

Pursuant to Rule 5:29 of the Rules of the Supreme Court of Virginia, counsel for the Appellants certifies that Appellants have complied with Rule 5:26(d) of the Rules of the Supreme Court of Virginia. Fifteen (15) copies of the Reply Brief of Appellants, plus an electronic version of the same were hand filed in the Clerk's Office for the Supreme Court of Virginia on this 30th day of July, 2009. On that same date, three (3) copies of the same Reply Brief were served upon William E. Glover, Esq., Glover & Dahnk, P.O. Box 207, Fredericksburg, Virginia 22404, Counsel for the Appellee, via U.S. Mail, postage pre-paid.

Given under my hand this 30th day of July, 2009.



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