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. and SYLVIA PROPERTIES, L.C.,

Appellees.

BRIEF OF APPELLANTS

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INTRODUCTION

The Appellants, Jane F. Snead, Douglas and Bonnie McWhirt, and Snead Family Farm, LLC (together, the "Plaintiffs"), request that this Court reverse, in part, the Final Decree of the Circuit Court of the City of Fredericksburg which denied them mandatory injunctive relief against Appellee, C & S Properties Holding Company, Ltd. (hereinafter, "Defendant").[1] The Plaintiffs seek mandatory injunctive relief (1) prohibiting the Defendant from interfering with and obstructing the Plaintiffs' use and enjoyment of the easement at issue, and (2) compelling the Defendant to remove and/or relocate the obstructions constructed and existing in the easement.

ASSIGNMENTS OF ERROR

The trial court erred in denying the Plaintiffs' prayer for mandatory injunctive relief because:

[1] Following issuance of the Certificate of Appeal by the Supreme Court of Virginia, the Plaintiffs reached an agreement to settle and comprise their claims with respect to defendant Sylvia Properties, L.C. The Supreme Court of Virginia was notified of the settlement by letter from Plaintiffs' counsel dated June 10, 2009. For this reason, the appeal before this Court remains only against C & S Properties Holding Company, Ltd. ("Defendant"), and concerns only the obstructions to and interference with the easement on the property owned by Defendant. As of this date, the Court has not entered an Order dismissing Sylvia Properties, L.C. from this appeal and the caption has not been amended.

1. The finding of an express easement appurtenant for ingress and egress in favor of the Plaintiffs across land owned by the Defendant, coupled with evidence of obstructions to, and significant interference with, that easement entitles the Plaintiffs to mandatory injunctive relief. (Error preserved by objection stated in Final Decree entered December 22, 2008.)
2. The trial court's refusal to grant injunctive relief under the facts of this case and applicable law was plainly wrong. (Error preserved by objection stated in Final Decree entered December 22, 2008.)
3. The decision of the trial court permits an unjust taking of the Plaintiffs' easement rights and modifies the express easement appurtenant. (Error preserved by objection stated in Final Decree entered December 22, 2008.)

STATEMENT OF THE NATURE OF THE CASE

The Plaintiffs filed a Complaint in the Circuit Court of the City of Fredericksburg on September 27, 2007, seeking mandatory injunctive relief (Count I) and asserting tortious interference with and obstruction of easement (Count II). (App. 1-17.) The Complaint requested, in relevant part, that the trial court order (1) permanent injunctive relief prohibiting Defendants C & S Properties Holding Company, Ltd. and Sylvia Properties,

L.C. (together, the "Defendants") from interfering with and obstructing the Plaintiffs' use and enjoyment of the easement, and (2) the Defendants to remove all obstructions from the easement, including but not limited to chain-link fencing, new and immature trees and bushes, and a storm water management basin filled with rip-rap that encroach upon and obstruct a portion of the easement. (App. 1-17.)

Prior to the commencement of trial, the Plaintiffs nonsuited their tortious interference with and obstruction of easement claim, and proceeded to trial only on the claim for injunctive relief (Count I). (App. 31.)

The case was tried in the Circuit Court of the City of Fredericksburg on September 15, 2008. On September 30, 2008, the trial court issued an opinion letter (the "Opinion Letter," attached to and incorporated in the Final Decree), and on December 22, 2008, the Final Decree was entered holding that "the 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, but that equity will not impose a mandatory injunction compelling the defendants to remove the man-made objects within the easement under the facts presented in this proceeding." (App. 428-432, 433-434.)

Plaintiffs duly noted their exceptions to the Final Decree. Notice of Appeal from the Final Decree and the transcript of the trial were filed with the trial court on January 8, 2009.

QUESTIONS PRESENTED

The questions presented are:

1. Whether obstructions in, and significant interference with, the Plaintiffs' express easement appurtenant for ingress and egress require mandatory injunctive relief compelling the Defendant's removal of obstructions. This question presented relates to Assignment of Error 1, and was preserved in the trial court by the Plaintiffs' objections stated in the Final Decree entered on the 22nd day of December, 2009. (App. 433-434.)

2. Whether the trial court's denial of mandatory injunctive relief was plainly wrong. This question presented relates to Assignments of Error 2 and 3, and was preserved in the trial court by the Plaintiffs' objections stated in the Final Decree entered on the 22nd day of December, 2009. (App. 433-434.)

STATEMENT OF FACTS

Plaintiffs are the owners of several properties in the City of Fredericksburg served by a deeded 60-foot wide express easement appurtenant for ingress and egress ("Easement") over, in part, the

northernmost portion of the property now owned by the Defendant. (*See* App. 345-348, 353-355.) The Easement was created by deeds from Emmett Snead, Jr. (deceased) and Jane F. Snead (*see* App. 345-348, 353-355), and it was subsequently referenced in various other deeds and plats of record (*see* App. 345-348, 353-357, 361-373, 379-387).

Defendant C & S Properties Holding Company, Ltd. is the owner of Lot 3A in Battlefield Industrial Park, Phase II, in the City of Fredericksburg ("Lot 3A" or "Defendant's Property"). (App. 371-373, 382-387.) Sylvia Properties, L.C. is the owner of Lot 3C in Battlefield Industrial Park, Phase II, in the City of Fredericksburg ("Lot 3C"). (App. 371-373, 379-381.) Lot 3A and Lot 3C were part of Lot 3, which was conveyed to the Defendant and Sylvia Properties, L.C. in 2004 by The Industrial Development Authority of the City of Fredericksburg. (*See* App. 371-373.) Lot 3 was a portion of a larger parcel owned by Emmett C. Snead, Jr. and Jane F. Snead (Parcel "A"), which they conveyed to The Industrial Development Authority of the City of Fredericksburg in 1997. (App. 353-355.)

Jane F. Snead owns property at 1130 Tyler Street ("Snead Property"), which is adjacent to the eastern boundary of what was Parcel "A." (*See* App. 349-355.) The Easement, which provides ingress and egress for the Plaintiffs, extends from the Snead Property to the

Fredericksburg and Spotsylvania National Military Park ("National Battlefield Park"). (App. 345-355.) Douglas and Bonnie McWhirt own property located at 119 Lee Drive, Fredericksburg, Virginia ("McWhirt Property"), which is located between the National Battlefield Park and Lot 3C owned by Sylvia Properties, L.C. (App. 345-348, 353-355, 385-387.) The McWhirts utilize the Easement to access Central Road, which is adjacent to the eastern boundary of Lot 3A owned by the Defendant. Without the Easement, the McWhirts would have no deeded access to their property from Central Road, and there would be no lawful access for commercial vehicles to the McWhirt Property because commercial vehicles are prohibited on Lee Drive in the National Battlefield Park. Snead Family Farm, LLC owns property deeded to it by Emmett C. Snead, Jr. and Jane F. Snead, which property is adjacent to the Snead Property, and adjacent to the southern boundary of what was Parcel "A." (App. 395-401.)

The Easement is located along the northern boundary of the Defendant's Property for the benefit of the Plaintiffs' properties. (App. 353-355.) An old gravel roadway exists within approximately 20 feet of the northernmost portion of the Easement between Central Road and Lee Drive in the National Battlefield Park. (App. 392, 402.) This gravel roadway is approximately twelve (12) to fifteen (15) feet wide depending on

where the road is measured. If one were to turn onto the gravel road from Central Road (which exists adjacent to the eastern boundary of Lot 3A) and travel west on the roadway, one would first pass over Lot 3A (owned by the Defendant), then pass over Lot 3C (owned by Sylvia Properties, L.C.), then pass over the McWhirt Property before arriving at the National Battlefield Park and Lee Drive. (App. 392, 402.) This gravel roadway within the Easement is the only access to the McWhirt Property, either from Lee Drive or from Central Road. (App. 172-176.)

In the fall of 2006, the Defendant constructed a chain-link fence within the Easement. The fence stands along the south side of and parallel to the gravel roadway (the "South Fence"), and at one point on the Defendant's Property, a section of the chain link fence extends south from and perpendicular to the South Fence (the "Perpendicular Fence"). The Perpendicular Fence is perpendicular to the length of the Easement, exists between the South Fence and the northeast corner of a building on the Defendant's Property, and extends beyond the southern boundary of the Easement. (App. 392, 402, 403, 406, 416.) The South Fence and the Perpendicular Fence (together, the "Fence") block ingress and egress along approximately forty (40) feet of the Easement's width, and prevent all ingress and egress and use of the Easement south of the South Fence.

The Fence is situated south of the gravel roadway, and south of a line of mature trees that parallels a portion of the gravel roadway. The Fence does not cross the gravel roadway at any point; however, the Fence does obstruct the Easement and it prevents the Plaintiffs' use of approximately 40 feet of the 60-foot wide Easement. (App. 122-126, 254-258, 402.)

By letter dated December 22, 2006 to the Defendant, Plaintiffs' counsel requested the removal of the Fence. (App. 391, 266.) The Defendant did not respond to the letter.

In addition to the Fence, other obstructions were constructed and installed within the Easement on the Defendant's Property, specifically including a storm water management basin filled with rip-rap (App. 126, 403, 406, 416), and several new trees and bushes (App. 126-127). (*See* App. 402.) A May 24, 2007 plat introduced into evidence by the Plaintiffs identifies and locates the boundaries of the Easement, and depicts the specific location of the Fence, the storm water management basin filled with rip-rap (identified on the plat as "RIP RAP"), and the new trees and bushes (identified on the plat as "BUSH" and "TREE") that the Defendant placed within the bounds of the Easement. (App. 392, 402.)

The uncontroverted evidence shows that roughly two-thirds of the width of the Easement over the Defendant's property is rendered useless

and impassible for the Plaintiffs' use as a result of the obstructions. (App. 236, 254-258, 402.) These obstructions within the Easement improperly encroach upon, interfere with, and prevent the Plaintiffs' full and free use of the deeded Easement.

SUMMARY OF ARGUMENT

The improvements and man-made obstructions within the burdened portion of the Easement prevent the Plaintiffs' use and enjoyment of a significant portion of the Easement. The Plaintiffs have a right to the full, free and unobstructed use of the full width of the Easement, and seek an order compelling the Defendant to remove and/or relocate the obstructions and improvements existing within the bounds of the Easement. The obstructions and encroachments irreparably harm the Plaintiffs and there is no adequate remedy at law.

The Defendant has deprived the Plaintiffs of their legitimate and rightful use of a significant portion of the Easement. Allowing the obstructions and encroachments to block the Plaintiffs' ingress and egress over the burdened portion of the Easement constitutes an unjust taking of the rights afforded the Plaintiffs by the deeded Easement, and permits the Defendant to appropriate a significant portion of the Easement for its own independent and adverse use. Under these circumstances, denial of

injunctive relief is inequitable and in direct conflict with this Court's rulings in *Pizzarelle v. Dempsey* (259 Va. 521, 526 S.E.2d 260 (2000)). In *Pizzarelle*, this Court ruled that a 4- to 5-foot encroachment upon a 24-foot wide easement for ingress and egress was not insubstantial and warranted an order for injunctive relief compelling removal of the encroachment. *Id.*

ARGUMENT

A. THE OBSTRUCTION AND INTERFERENCE WITH THE EASEMENT ENTITLES THE PLAINTIFFS TO MANDATORY INJUNCTIVE RELIEF.

In *Pizzarelle*, one of the two questions addressed by the Court was "whether an encroachment on the easement is too insubstantial to warrant injunctive relief." *Id.* at 523, 526 S.E.2d at 261. The Court answered that question in the negative, and reversed the judgment of the circuit court which had denied injunctive relief to the dominant owners of the easement at issue. *Id.* The easement at issue in *Pizzarelle* was a 24-foot wide express easement for ingress and egress created for the benefit of lot owners in a subdivision. *Id.* at 524, 526 S.E.2d at 261. The plaintiffs in *Pizzarelle* alleged that the defendants obstructed and interfered with the full use of the easement "by virtue of certain fences, a rock wall, and bushes and trees that the [defendants] placed in the easement." *Id.* at 525, 526 S.E.2d at 262. The plaintiffs sought "an injunction directing the

[defendants] to remove all obstructions placed in or along the easement, and restraining the [defendants] from any further obstruction of the easement." *Id*. The allegations and relief requested by the Plaintiffs in the case at bar are practically identical to those in *Pizzarelle*.

In *Pizzarelle*, a wooden picket-style fence, identified as the south fence, was located "approximately four to five feet inside the southern border of the easement." *Id.* at 526, 526 S.E.2d at 262. One of the plaintiffs testified that the south fence, a chain-link fence perpendicular to the south fence, and certain trees were "a permanent block to anyone getting through that portion of the easement." *Id.* at 527, 526 S.E.2d at 263. In relevant part, the trial court in *Pizzarelle* found that "the encroachment was insubstantial" and denied the plaintiffs injunctive relief. *Id.* This Court disagreed with the trial court, finding that "the obstructions in the easement are a material encroachment on the dominant owners' rights." *Id.* at 530, 526 S.E.2d at 265.

In *Pizzarelle*, the defendant argued that the easement was not "'less useful' because vehicular traffic on the paved portion [was] not affected by the obstructions." *Id.* at 531, 526 S.E.2d at 265-66. Yet the Court noted that though the roadway was not blocked, "the obstructions in the easement completely block all ingress and egress on the south side of the

wooden fence." *Id.* at 531, 526 S.E.2d at 266. Based upon this consideration, this Court stated "…the question here is not one of 'reasonableness' or whether the easement is now 'less useful or convenient'…[n]or is this a case in which the equities should be balanced." *Id*. at 531, 526 S.E.2d at 265. The Court held that because "a significant portion of the easement would be rendered unusable for ingress and egress if injunctive relief were denied," injunctive relief must be awarded and that a balancing of the equities was not appropriate. *Id.* at 531, 526 S.E.2d at 266; *See also*, *Ortiz v. Flattery*, 19 Cir. C181641, 63 Va. Cir. 309 (2003; Circuit Court of Fairfax County) ("In the case at bar, the fence runs lengthwise through the easement, narrowing the usable portion of the original fifty foot wide easement to eighteen feet at one point while blocking access to the remaining portion. As in *Pizzarelle*, denial of the injunctive relief would be to allow the Defendant landowners to appropriate a portion of the easement and reduce the easement from its original dedicated width. A balancing test is not appropriate.").

The facts in *Pizzarelle* parallel those in the present case. The gravel road in the Easement has not been affected by the obstructions. However, as in *Pizzarelle*, certain obstructions in the Easement (specifically the Fence and storm water management basin filled with rip-rap) completely

block all ingress and egress on the south side of the Fence. Yet in the case at bar, the obstructions (specifically the Fence) render two-thirds of the width of the Easement unusable for ingress and egress by the Plaintiffs, as opposed to the one-fifth to one-sixth rendered unusable in *Pizzarelle*. The specific depth of the intrusion into the Easement caused by the Fence is evidenced by the May 24, 2007 plat, which identifies and locates both the boundaries of the Easement and the Fence. (App. 402.)

If the unusable portion of the easement in *Pizzarelle* was considered "significant," there should be little question as to the significance of the encroachment in this case where the obstructions prevent the Plaintiffs' use of approximately 40 feet of the width of the 60-foot wide Easement existing over the Defendant's property. As in *Pizzarelle*, the present case is not one in which the equities should be balanced; there should be no question of reasonableness; and the injunctive relief requested by the Plaintiffs should be granted.

A distinction in favor the Plaintiffs here is that in *Pizzarelle* a restrictive covenant of record limited "the paved portion of the [24-foot wide] easement to a 15-foot strip along the northern edge of the easement." 259 Va. at 524, 526 S.E.2d at 261. There is no similar restriction upon the Plaintiffs' use of the Easement in the present case. In *Pizzarelle*, the fence

was built four to five feet inside of the 24-foot wide easement after the restrictive covenant was recorded and after the maximum 15-foot wide portion was paved. *Id.* The Court effectively ruled that it did not matter whether or not the 4- to 5-foot portion of the easement that was fenced off could be paved. In the case at bar, there is nothing other than the obstructions that prevents the Plaintiffs from being able to utilize the approximately 40 feet of the Easement south of the South Fence for ingress and egress. Since the Perpendicular Fence extends from the South Fence to a building on the Defendant's Property that is south of the southern boundary of the Easement, it is simply impossible for the Plaintiffs to use the burdened portion of the Easement for ingress and egress. (*See* App. 402, 403, 406.)

As this Court made clear, it is not a question of whether an easement is rendered less useful or less convenient due to obstructions within it. *Id.* In essence, the Easement is made less useful and less convenient as a matter of law when obstructions prevent the use of a significant portion of it for its intended purpose. In *Pizzarelle*, this Court ruled that the plaintiffs had a right to full and free use of the full width of that easement, and that the fence obstructing a part of the easement had to be removed. *Id.* 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 plaintiffs in *Pizzarelle* were entitled to injunctive relief for precisely the same reason that the Plaintiffs in the case at bar are entitled to injunctive relief.

The trial court had difficulty with the notion that the Plaintiffs requested removal of man-made obstructions located within the Easement, but did not specifically request removal of the line of trees between the gravel roadway and the Fence installed by the Defendant. The trial court's Opinion Letter states that "even if equity compelled the defendants to remove the man-made objects in the easement, at significant expense and inconvenience, the plaintiffs still would be unable to use the entire easement, even if they wanted to, because of the stand of trees down the length of the easement." (App. 431.) However, relying upon the evidence presented and its view of the Defendant's Property, the trial court's Opinion Letter states that "[t]hose trees are located between the graveled portion [of the roadway] and the man-made objects." (App. 431.) Approximately 40 feet of the Easement's width is located south of the referenced "man-made objects" (the South Fence), and the trial court acknowledges that the line of trees it is concerned with exists entirely in the small strip of land between

the south side of the gravel roadway and the South Fence. The stand of trees does nothing to prevent the Plaintiff's use of the obstructed portion of the Easement aside from preventing vehicles crossing directly from the gravel roadway to the approximately 40 feet of the Easement south of the trees and South Fence.

It must also be noted that the trees border the south side of the length of the gravel road over only about one-half of the Defendant's Property. The line of trees along the south side of the road on the Defendant's Property only exist between the Perpendicular Fence (which extends from the northeastern corner of the building on Lot 3A to the South Fence) and the western boundary of the Defendant's Property. West of Central Road for approximately one-half of the length of Defendant's Property, there are no mature trees between the gravel roadway and the South Fence, and only the South Fence separates the northern twenty feet of the Easement from the southern forty feet of the Easement. (See App. 403, 406, 410, 411, 416.)

A similar issue existed in *Pizzarelle*, as referenced in footnote 6 of the Court's opinion. 259 Va. at 526, 532, 526 S.E.2d at 263, 266. In *Pizzarelle*, a "north fence" was "situated approximately one foot inside the northern border of the easement…along the northern boundary of all the

parties' lots." *Id.* at 532, 526 S.E.2d at 266. The plaintiffs in *Pizzarelle* did not request removal of the north fence, just as the Plaintiffs in the case at bar did not request removal of the stand of trees. The Plaintiffs are not required to seek elimination of every obstacle or thing existing within the bounds of the Easement to be entitled to injunctive relief compelling the removal of barriers that prevent their use of a significant portion of the Easement. The existence of the stand of trees does not change the fact that the Plaintiffs are denied the free use and enjoyment of a significant useable portion of the Easement due to the obstructions at issue. At worst, considering the purpose of the Easement, the stand of trees is nothing more than a natural median existing between two parallel travel ways for ingress and egress, one travel way being north of the stand of trees (the gravel roadway), and the other being south of the stand of trees (the approximately 40 feet of the Easement's width currently south of the South Fence).

Consistent with this Court's ruling in *Pizzarelle*, we ask that this Court find that the trial court's denial of injunctive relief was plainly wrong, that the portion of the Final Decree denying injunctive relief be reversed, and that this case be remanded for entry of a Final Decree awarding the Plaintiffs an injunction directing the Defendant to remove and/or relocate the Fence,

storm water management basin filled with rip-rap, newly planted trees and bushes, and other obstructions within the Easement.

B. THE OBSTRUCTED PORTION OF THE EASEMENT MAKES THE EASEMENT AS A WHOLE LESS USEFUL TO THE PLAINTIFFS.

The Court's ruling in *Pizzarelle* indicates it is not necessary that the Plaintiffs show that the obstructed portion of the Easement makes the Easement as a whole less useful. Nevertheless, the evidence in this case shows, among other things, that the gravel roadway itself is insufficient for providing certain necessary vehicles with clear and unobstructed access to the McWhirt Property. (App. 173-175.)

The facts in the instant case are more compelling than those in *Pizzarelle.* In that case, this Court indicated that the easement was less useful merely because the fence blocked a small portion of the easement, despite the fact that vehicular traffic on the paved roadway was not affected by the obstructions. *Id.* at 531, 526 S.E.2d at 265-66. In the present case, a much larger portion of the Easement has been obstructed. More importantly, however, the only access to the McWhirt Property is by and through the Easement from Central Road or from Lee Drive (through the National Battlefield Park). The National Park prohibits commercial vehicles on Lee Drive. Therefore, the only lawful access to the McWhirt Property for

commercial vehicles is through the Easement via Central Road. (App. 172-176.) The commercial truck that must access the McWhirt Property to empty the septic tank is too big to use the unobstructed portion of the Easement from Central Road. (App. 173-174.) Therefore, the trial court's ruling precludes the ability of the septic truck from lawfully accessing the McWhirt Property, making the Easement far less "useful" and likely making the McWhirt Property far less valuable. (App. 176-177.)

The Fence tightly borders the gravel roadway and tree line, making it impossible for the Plaintiffs to utilize any portion of the Easement over the Defendant's Property other than the gravel roadway. Approximately 40 feet of the 60-foot wide Easement is on the south side of the tree line and South Fence. This portion of the Easement is generally flat terrain, with a gradual slope and without mature trees, which can and should be open to the Plaintiffs, and their guests and invitees, for ingress and egress. (App. 231, 243, 254-258.) In addition to the specific problems that the obstructions pose for the McWhirt Property, the existence of the Fence and other obstructions make the Easement less useful and less convenient for all of the Plaintiffs' properties.

There can be no doubt from a reading of the transcript and the Opinion Letter, that the trial court employed a balancing of the equities and

failed to give the necessary and proper weight to the significance of the obstructions and the manner in which those obstructions make the Easement less useful to the Plaintiffs. Whether the Court applies the strict standard utilized in *Pizzarelle*, or balances the equities and considers the reasonableness of the encroachment, the result should be the same and the Plaintiffs should be granted mandatory injunctive relief.

C. THE DEFENDANT SHOULD NOT BE PERMITTED TO TAKE AND ASSUME CONTROL OF THE EASEMENT FOR ITS OWN USE TO THE DETRIMENT OF THE PLAINTIFFS.

The application of the trial court's ruling deprives the Plaintiffs of the beneficial use of approximately 40 feet of the 60-foot wide Easement across the Defendant's Property. The trial court's ruling authorizes and permits the Defendant's actions, which obstruct and interfere with the Easement, to result in an unjust and inequitable taking of the Plaintiffs' easement rights. The Defendant's appropriation and use of the burdened portion of the Easement stands to eliminate the Plaintiffs' right to utilize a significant portion of the Easement for ingress and egress. Similar to the lower court in *Pizzarelle*, the trial court forced "a de facto modification" of the Easement upon the Plaintiffs. *Id.* at 528, 526 S.E.2d at 264. The obstructions preclude all practical and intended uses of approximately two-thirds of the Easement.

As in *Pizzarelle*, the evidence with regard to the location of the Fence reflects the intent of the Defendant "to adversely use part of the easement for a purpose other than ingress and egress." *Id.* at 530, 526 S.E.2d at 265. "[I]njunctive relief is available when an easement is being used for a purpose other than that originally granted. Otherwise, a new and different use of an express easement could be established by prescription." *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). In the present case, the Defendant made no suggestion that the Easement was modified by prescription. Denial of injunctive relief to the Plaintiffs under these circumstances would permit a taking of a portion of the Easement by the Defendant, thereby rewarding the Defendant for its interference with the Plaintiffs' deeded property rights. In *Nishanian*, the concurring opinion by Justice Whiting, with whom Justice Hassell joined, states:

> The erection of a permanent structure within the limits of the easement would be an act adverse to the easement *granted*, even though it did not interfere with the easement *used. See generally Estojak v. Mazsa*, 522 Pa. 353, 362-63, 562 A.2d 271, 275 (1989); *Piper v. Mowris*, 466 Pa. 89, 98-99, 351 A.2d 635, 640 (1976). And, if such an act continued for the statutory period, the Sirohis would acquire a right to keep the gates within the easement and, thus, diminish the easement to that extent. 1 F. Ribble, Minor on Real Property § 109.3, at 148-49 (2d ed. 1928).

> Accordingly, an injunction would lie to prevent the continuing encroachment upon the easement rights reserved by the grantor for itself and the other property owners in the subdivision, and to prevent the Sirohis' adverse use from ripening into a property right.

Id. at 344, 414 S.E.2d at 608-9.

Irreparable harm has been made and threatened upon the Plaintiffs. The encroachments have closed and restricted a portion of the Easement making a significant portion of the Easement unusable and impassible by the Plaintiffs. The existence of the obstructions on the Defendant's Property is incompatible with the Easement, and the injunctive relief sought by the Plaintiffs would prevent the appropriation, adverse use, and elimination of a significant portion of the Plaintiffs' easement rights. The Defendant had actual notice of the existence of the Easement when it purchased its property, and knew it could not construct permanent improvements in the Easement. (App. 250-251, 254.)

The Plaintiffs do not have an adequate remedy at law because (a) the limitation of their easement rights constitutes a taking of a unique property right, and (b) a taking of the Plaintiffs' interest in the Easement cannot be adequately remedied by money damages. The obstructions limit the potential uses and viability of the Plaintiffs' properties, particularly with respect to the McWhirt Property. (App. 176-177.)

D. THE DEFENDANT ONLY OPPOSED THE NATURE AND EXISTENCE OF THE EASEMENT, AND FAILED TO PRODUCE EVIDENCE TO SHOW WHY INJUNCTIVE RELIEF SHOULD NOT BE GRANTED.

The principles governing the Plaintiffs' request for injunctive relief in this case were stated by this Court in *Pizzarelle* and seemed clear to the parties at trial. Upon establishing the Easement, the Plaintiffs' right to the injunctive relief sought was absolute. All but conceding this point, the Defendant did not produce any evidence to show why injunctive relief should not be granted in this instance.

The Opinion Letter issued by the trial court (attached to and made part of the Final Decree) states "it would be a useless and unduly burdensome act to compel the defendants to remove all man-made objects within the easement area, and the court declines to do so." (App. 431.) There was no evidence produced to show the cost, inconvenience, or burden to the Defendant for removing and/or relocating the obstructions. The trial court's ruling permits the Defendant to appropriate and eliminate a significant portion of the Easement without proving abandonment, without showing an adverse use for the requisite period, and without a showing of any specific evidence of the burden (financial or otherwise) the Defendant would sustain if compelled to remove the obstructions. This ruling, and the justification for it, entirely disregards this Court's ruling in *Pizzarrelle*.

Further, it would not be “useless” to compel the removal of obstructions that prevent the full and free use of the approximately 40-foot width of the Easement that is blocked and rendered impassable by the Fence and other man-made objects. The Plaintiffs have been deprived of all practical and intended uses of a significant portion of the Easement.

Of course, the proper decision in each case turns on the particular facts of that case. Considering the application of the principles stated in *Pizzarelle* to the facts of this case, there is no basis upon which *Pizzarelle* can be justifiably distinguished. Therefore, the Plaintiffs in the case at bar similarly are entitled to injunctive relief. *Pizzarelle* stands for the proposition that when a significant portion of an easement for ingress and egress is obstructed, it is not within the discretion of the trial court to deny mandatory injunctive relief compelling the removal of those obstructions. 259 Va. at 531, 526 S.E.2d at 266. The trial court should not analyze the reasonableness of the encroachment and the remedy prayed for, should not question whether the easement was rendered less useful, and should not otherwise engage in a balancing of the equities. *Id.*

CONCLUSION

As in *Pizzarelle*, the obstructions in and to the Easement are a material encroachment on the Plaintiffs' rights, a significant portion of the Easement would be rendered unusable for ingress and egress if injunctive relief is denied, and denial of the requested relief would allow the Defendant to appropriate the burdened portion of the Easement and reduce the Easement from its original dedicated width. *Id.*

For the foregoing reasons the Plaintiffs are entitled to mandatory injunctive relief compelling the Defendant's removal of the obstructions to and within the Easement. The trial court's ruling denying such injunctive relief was plainly wrong and should not be allowed to stand.

The Plaintiffs pray that the Final Decree entered by the Circuit Court of the City of Fredericksburg be reversed in part and the case remanded 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 the obstructions (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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By _____
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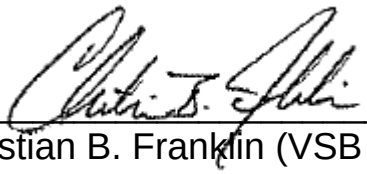
CERTIFICATE

Pursuant to Rule 5:27 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 Brief of Appellants and Appendix, plus an electronic version of each on a CD, were hand filed in the Clerk's Office for the Supreme Court of Virginia on this 26th day of June, 2009. On that same date, three (3) copies of the same Brief and Appendix 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 26th day of June, 2009.



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