No. 24-CV-0439(L), 24-CV-0444 & 24-CV-0480

In the
District of Columbia Court of Appeals

2135 NE, LLC, *et al.*,
Appellants/Cross-Appellees,

v.

DLY GEORGE'S WAREHOUSE, LLC,
Appellee/Cross-Appellant.

On Appeal from the 2019-CA-008177-B
In The District Of Columbia Superior Court, Civil Division,

REPLY BRIEF OF APPELLEE/CROSS-APPELLANT

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I. **Defendants Used the Right of Way In Violation of the WFJ Deed**.

Defendants' generic description on pages 3-4 of their Reply Brief of how Echostage uses the Right of Way for concerts ignores completely the fact that Echostage uses the Right of Way on a regular basis during the week for deliveries unrelated to concerts. When asked by Judge Williams whether the Right of Way is used at other times "outside of preparation for or the ending of a concert" Mr. Cronin answered that: "During the week, I'd say you're looking at a handful of deliveries, three or four maybe on weekdays." Tr. 148. Later on Mr. Cronin estimated that there are probably "eight to ten" deliveries during the week and that "standard weekly deliveries that go through the loading dock are probably about five, as far as vendors." Tr. 214.

Not only is Defendants' description misleading for ignoring all the other weekly deliveries and improper uses of the Right of Way it glosses over the critical time period between when Echostage has completed the process of bringing the boxes/bins into the 2135 Property and when it is time to load the boxes/bins back into the delivery trucks. Defendants' description of the "general scenario" of how Echostage uses the Right of Way on page 4 states in pertinent part as follows:

> "[a] truck full of multiple boxes/bins of equipment pulls up to the loading dock; the contents from the truck are moved into the interior of 2135 Queens Chapel Road ("2135 Queens Chapel"); the boxes/bins are unpacked inside; the empty boxes/bins are brought back into the truck; ***the process of unloading the boxes/bins and bringing the***

> ***empty boxes/bins into the truck sometimes takes several hours***; . . . [Emphasis added].

Omitted from this description is the period of time between unloading and reloading the delivery trucks. It also assumes that the delivery vehicle used to deliver the boxes/bins is always the same delivery truck that picks up the boxes/bins for which there was no evidence. The fundamental problem with this description is that the evidence at trial did not show that the unloading and re-loading of the delivery vehicles was one continuous uninterrupted process. Rather, the evidence showed that the delivery vehicles remained at the loading dock for hours at a time without anyone bringing empty boxes/bins from inside the 2135 Property back to the delivery vehicles.

It may take hours to unload the delivery vehicles – which is fine and does not constitute parking. It may take hours to re-load the delivery trucks - which is fine and does not constitute parking. But Judge Williams and Judge Rigsby both found based upon the evidence that vehicles remained at the loading dock for several hours after being unloaded without being loaded with empty boxes during this idle period. To leave the delivery vehicles on the Right of Way while the work takes place inside the 2135 Property constitutes parking as the term is commonly understood.

Echostage's statement that it "does not allow trucks to sit at the loading dock between unloading equipment (prior to a show) and later loading the equipment back on the truck (after a show)" is contrary to the evidence and refers only to that period

of time when a concert is actually taking place and not all the other numerous times when a concert is not taking place and vehicles are allowed to remain idle at the loading dock. Reply Brief at pg. 7. The evidence at the trial before Judge Williams showed delivery vehicles parked at the loading dock when a concert not was taking place, along with the parking for concerts during the (i) weekend of January 15, 2024, and (ii) the "parking [of] a U-Haul on the ROW for hours after loading was completed" from the hearing before Judge Rigsby. App'x at 66-67. If Defendants would only agree that whenever vehicles have completed their delivery the vehicles would be removed from the Right of Way (and not just when a concert was being performed), and would further agree that the WFJ Deed does not permit passenger vehicles to remain at the loading dock or for workers to congregate for extended periods of time on the Right of Way waiting for vehicles to arrive, there would have been no need for this appeal.

Defendants discuss only one "parking" event that occurred on January 15, 2024, claiming it is wrong to describe that event as involving "a vehicle sitting idle at the loading dock after equipment was unloaded." Reply Brief at pg. 8. However, none of Mr. Cronin's testimony described the delivery trucks as being actively accessed and used in one continuous process of unloading and loading. Moreover, attempting to dismiss the January 15, 2024, parking incident as an "anomaly" is simply an admission that this one parking event for a concert, which was but one of

many examples of vehicles remaining parked on the Right of Way when not involving a concert described during the evidentiary hearings, did violate the prohibition against parking. It is commonly understood that an anomaly is something that deviates from what is standard, normal, or expected or a "thing that is different from what is usual, or not in agreement with something else and therefore not satisfactory." https://dictionary.cambridge.org/us/dictionary/english/anomaly. There is no reason for Defendants to use that term unless they acknowledge that this parking event deviated from the permitted use.

In focusing on that one parking incident Defendants do not even mention the other documented examples of the improper use of the Right of Way summarized on pages 12-14 of DLY's Brief supported by reference to record cites to testimony and photographs introduced into evidence. Contrary to Defendant's assertion that it did not leave vehicles at the loading dock after the unloading process was completed, Echostage was found to have "park[ed] a U Haul on the ROW for hours after loading was completed" during a concert. (App'x at 66-67). Nor do the Defendants address Judge Williams' findings that the evidence showed vehicles remaining on the Right of Way for hours not being used (App'x at 93-94) or the similar factual findings by Judge Rigsby. See App'x at 66-67 ("Echostage or vendors parking vehicles for at least four to five hours".) The January 15, 2024, parking incident does not cure the decisive legal error in the decision by Judge Williams wherein the trial court

concluded that: "Any truck parked in the right-of-way was there for the limited purpose of and for as long as it took to unload and load the delivery truck." App'x 94-95. This pivotal factual conclusion was simply wrong. There was no evidence showing that the numerous examples of vehicles remaining idle on the Right of Way were involved in the active process of unloading and concurrently re-loading the delivery trucks as part of one continuous uninterrupted delivery process. Even Mr. Cronin's description of the large "loadout" that occurred on January 15, 2024, was devoid of any testimony by him that as soon as the boxes/bins were unloaded from the delivery trucks and unpacked that the empty boxes/bins were then loaded right back onto the delivery trucks as part of one continuous uninterrupted process.

Judge Williams simply disregarded the plain meaning of the word "park" and the prohibition against parking on the Right of Way and incorrectly authorized the inactive use of the loading dock. Defendants' lament that the Declaratory Judgment did not define the word "park" is unavailing since there is no need for a Court to define words that have a common and clear understanding and whose meaning can easily be confirmed by consulting any dictionary of the English language.

II. Defendants' Appeal Identifies No Relief This Court Can Grant.

Except for a brief mention in a footnote, Defendants' Opening Brief and Reply Brief do not identify the specific use of the Right of Way Defendants seek when they contend that Judge Rigsby "erred as a matter of law by failing to construe the

easement to provide for unimpeded access." See Defendants' Opening Brief at pg. 1; Issue No. 2 on appeal. Other than buried in a single footnote, Defendants do not explain what they mean by "unimpeded access" and what specific use of the Right of Way would be authorized under a different interpretation of the WFJ Deed allegedly supported by the extrinsic evidence regarding "the intent of the parties to the easement and surrounding circumstances," and in what manner was Judge Rigsby's Declaratory Judgment contrary to that extrinsic evidence. Id.; Issue No. 3 on appeal.

The only time Defendants disclose their ultimate objective is in footnote 4, page 3 of the Reply Brief, where Defendants write as follows:

> Had Judge Rigsby properly held that extrinsic evidence would be admissible to show the parties' intent in drafting the terms of the Right of Way, 2135 and Ekho Events ***submit that the Superior Court may have ultimately held that trucks may in fact park at the loading dock during a show***. [Emphasis Added]

Defendants criticize DLY for arguing that Defendants' position is that they should be allowed to park their delivery vehicles on the Right of Way until they were ready to load the delivery truck, repeatedly stating that is not Defendants' position. However, Defendants now admit (perhaps inadvertently) that this indeed is their desire and stated intention by prosecuting their appeal. Moreover, if that is not Defendants' desired interpretation of the WFJ Deed then why are the Defendants challenging the Declaratory Judgment which simply ruled that Defendants may not

park on the Right of Way? Defendants should at least have the candor to acknowledge that the only plausible reason for their challenge to the Declaratory Judgment is because they seek authorization to use the easement in a manner that would negate the plain meaning of the word park and the prohibition against parking.

However, a review of Defendants' motion for summary judgment and their opposition to DLY's motion for summary judgment demonstrates that Defendants did not seek an affirmative declaration that they had a right to park on the Right of Way. Rather, Defendants' relief in those cross-motions was focused on preventing DLY from engaging in specified activity that interfered with Defendants' use of the Right of Way.

First, Defendants do not address the dispositive point that whatever relief Defendants requested in their motion for summary judgment that was denied by the Declaratory Judgment is not properly before this Court since the denial of a motion for summary judgment is not an appealable issue. See DLY's Brief at pp. 43-44. Further, whatever relief Defendants sought in their motion for summary judgment was not raised again at the trial and as stated by Defendants they have not appealed the Final Decision and "are satisfied with the Final Decision." Reply Brief at pg. 2.[1]

[1] 2135 LLC did appeal the Final Decision in its Notice of Appeal filed on May 7, 2024, as correctly stated on page 7 of DLY's Response Brief, and Defendants are correct that DLY mistakenly stated that Echostage also appealed that Final Decision.

This means Defendants' appeal is limited to the issue of whether Judge Rigsby's Declaratory Judgment granting DLY's motion for summary judgment on Count I seeking declaratory relief that Defendants may not park on the easement was contrary to the evidence and the terms of the Right of Way. Defendants contend that the "extrinsic evidence concerning the intent of the language of the Right of Way" would have allowed Echostage "to utilize the Right of Way in ways beyond that which Echo Events currently uses the Right of Way, and beyond the ways Ekho Events has altered its use of the Right of Way to satisfy DLY's demands concerning the use of the Right of Way." Reply Brief at pages 2-3. However, beyond the passing reference in footnote No. 4 of Defendants' Reply Brief, Defendants do not articulate the specific ways they should be allowed to use the Right of Way based upon the cited extrinsic evidence which undefined usage conflicts with Judge Rigsby's Declaratory Judgment affirming that the Defendants' use of the Right of Way is restricted by the common understanding of the word "park" and the prohibition against parking on the Right of Way. Nor do they point to any relief requested in their motion for summary judgment seeking to alter the prohibition against parking.

The parol evidence summarized by the Defendants in their Reply Brief and Opening Brief does not alter the plain meaning of the word "park" and the prohibition against parking on the Right of Way. None of the parol evidence

summarized by Defendants references any oral agreement or course of conduct evidencing an agreement that the Defendants were allowed to leave delivery vehicles on the Right of Way when not being used, that passenger vans may remain on the Right of Way after delivering their passengers, and that workers may congregate on the Right of Way when there are no vehicles present on the Right of Way.

It is also wrong to state that "Judge declined to consider that parol evidence." Significantly, Defendants do not contend that Judge Rigsby excluded this parol evidence from the record based upon objections from DLY, nor could they make that contention. Had Defendants bothered to cite for the Court the transcript pages from the 3-day evidentiary hearing on their motion for a preliminary injunction referencing the parol evidence they would have been forced to acknowledge that all of the offered testimony was admitted into evidence by Judge Rigsby, many times over the objection of DLY. For example, Judge Rigsby specifically referenced the negotiations leading up to the execution of the Right of Way and the payment of $400,000 to secure that right in the Declaratory Judgment. Thus, Judge Rigsby did consider the parol evidence and simply ruled that none of the parol evidence modified or altered the common understanding of the word "park" and the mandate that the Defendants "shall not park on the Right of Way."

Although Defendants' self-serving summary describes the parol evidence as authorizing "unfettered access" to the Right of Way, similar to their use of the phrase

"unimpeded access," these broad and ill-defined phrases characterizing the parol evidence refer to Defendants' requested relief that DLY be enjoined from interfering with Defendants' use of the Right of Way and had nothing to do with the issue of whether Defendants could park on the Right of Way. In defense of their failure to cite references to the record in support of their characterization of the parol evidence, Defendants refer to "2135's February 11, 2022, Proposed Findings of Fact and Conclusions of Law" which was submitted in support of the Defendants' motion for a preliminary injunction. That motion was denied by Judge Rigsby based upon the finding "that 2135 has cited no instance where its access was blocked by an action of [DLY] or its permitted users to any consequential extent." App'x at 73. That decision was affirmed by this Court.

But since the only issue appealable by the Defendants was the grant of DLY's motion for summary judgment the ***only*** relevant evidence is Defendants' citation to "2135's December 1, 2023, Statement of Material Facts" submitted in opposition to DLY's motion for summary judgment. See Supp. at AA14-AA23. This Statement of Material Facts and the evidence cited therein is devoid of any testimony or evidence whatsoever that altered the plain meaning of the word park and the prohibition against parking on the Right of Way.[2] This parol evidence simply reflects

[2] It should not go unnoticed that the 5th bullet point of Defendants' six bullet points on pg. 19-20 of the Reply Brief allegedly summarizing the parol evidence incorrectly states that: "DLY unsuccessfully sought to extract from Defendants a fee for the use

the importance and need for Defendants to have access to and use of the Right of Way to operate its business – which is not a fact disputed in anyway by DLY. But those facts and circumstances surrounding the creation of the WFJ Deed and use of the Right of Way in no way transform the phrases "unfettered access" or "unimpeded access" into the right to park on the Right of Way thereby fundamentally negating the plain meaning of the word "park" and the prohibition against parking on the Right of Way.

Despite being circumspect as to the specific use of the Right of Way that was purportedly denied to them by the Declaratory Judgment, it is evident that Defendants' objective is to somehow eviscerate the plain meaning of the phrase "shall not park on the Right of Way" set forth in the WLJ Deed and alter the meaning of the word "park." This objective is exemplified in their incomprehensible interpretation of the phrase "or use of Right of Way for any purpose whatsoever." One need not engage in linguistic gymnastics to acknowledge that the servient estate may not unreasonably interfere with the use of the easement by the dominant estate

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of the Right of Way." This misleading characterization of the evidence is not supported by any of the evidence set forth in 2135's December 1, 2023, Statement of Material Facts or 2135's February 11, 2022, Proposed Findings of Fact and Conclusions of Law. Moreover, the evidence at the hearing on the preliminary injunction was that DLY had proposed as a business solution to allow Defendants to expand their use of the Right of Way in exchange for a reasonable fee as consideration for DLY surrendering additional property rights.

which Judge Rigsby made crystal clear in the Declaratory Judgment. See Declaratory Judgment at App'x 79 ("There is no basis for the Plaintiff to unreasonably interfere with Ekho's rights to the easement nor should the Court's ruling be construed as such.") As with the parol evidence, however, Defendants do not explain how their tortured interpretation of the English language alters or modifies the central issue on appeal which is that Defendants may not park vehicles on the Right of Way when not actively using the loading dock by either unloading vehicles or loading vehicles, and the evidence showed that Defendants had engaged in conduct violating this prohibition.

III. The Controversy Over the Use of The Right of Way Was Ripe for Adjudication.

Defendants' argument in their Reply Brief on this issue is strangely focused on discussing whether DLY's access to the Right of Way was impeded due to the Defendants' use of the Right of Way and whether DLY ever encountered that problem. Reply at pg. 12-13. That was not the controversy that was the predicate for the declaratory relief sought by DLY and granted by Judge Rigsby. The issue was whether Defendants could leave vehicles on the Right of Way when not being actively used at the loading dock and whether that violated the prohibition on parking. The very fact that Defendants admit that their objective in the litigation and efforts to overturn the Declaratory Judgment is to secure a ruling "that trucks may in fact park at the loading dock during a show" demonstrates quite clearly that there

was – and that there remains – a fundamental disagreement and controversy over how Defendants may use the Right of Way and how the prohibition on parking prohibits such use. Obviously, absent the Declaratory Judgment the Defendants would feel free to continue to park on the Right of Way under the guise of the ill-founded belief that they have the right to "unfettered access" and "unimpeded access" to the Right of Way free of the prohibition against parking.

There is clearly a controversy between two neighbors over the proper use of an easement, which dispute was ripe and appropriate for resolution through entry of the Declaratory Judgment. Not only should that Declaratory Judgment be affirmed, but a permanent injunction issued to compel Defendants' compliance with that decree in view of their strong desire and stated intention to "to utilize the Right of Way in ways beyond that which Echo Events currently uses the Right of Way, and beyond the ways Ekho Events has altered its use of the Right of Way to satisfy DLY's demands concerning the use of the Right of Way." Reply Brief at pages 2-3.

IV. Judge Williams Failed to Apply the Proper Test For a Permanent Injunction.

Judge Williams' error was in focusing on whether the threatened injury of DLY's property rights was "imminent" and "likely to occur." App'x at 92. Judge Williams concluded that a permanent "injunction should not be issued unless the threat of injury is imminent and well-founded" (App'x at 92); that "DLY has not shown that any injury is imminent" (App'x at 95); and DLY "presented no evidence

that any violation is likely to imminently occur in the future". (App'x at 96) The question was whether Defendants had been parking on the Right of Way and not whether that improper use was imminent. The Defendants' discussion of the remaining elements for a permanent injunction (adequate remedy at law, balance of hardship, and public interest) is predicated upon the proposition Judge Williams did not err in ruling that the Defendants had not parked on the Right of Way. For that reason, there is little point in responding to Defendants' arguments on these elements with the exception of the "balance of hardship" factor for the simple reason being that if there was no violation then the other elements of the test are irrelevant. But of course, there had been violations of the WFJ Deed and for the reasons stated in DLY's Brief Judge Williams' analysis of the other factors was in error.

With respect to the balance of hardship, Defendants spend some time citing Mr. Cronin's testimony in support of their position that the parking area behind the 2145 Property could not be used to park delivery vehicles. In addition to allowing Defendants access to the loading dock the other "sole purpose" of the Right of Way was to provide Defendants with "ingress and egress" over the 2145 Property for purposes of accessing the "rear of 2135 Queens Chapel Road, N.E., Washington, D.C." with vehicles. App'x at 100. Now, however, Defendants appear to be contending that they are unable to maneuver vehicles into the parking area behind the 2135 Property because the area is allegedly too small. This makes no sense and

his testimony was contrary to the testimony of Mr. Marx on this issue. In any event, this Court cannot resolve that factual dispute but the point is that Judge Williams made no mention of this disputed fact in the trial court's ruling when evaluating this factor and made no finding resolving this factual dispute, and thus failed to consider this evidence. Moreover, Judge Williams did not consider, nor do Defendants mention in their Reply Brief, that Defendants have a leased lot "around the block" for the specific purpose of parking delivery vehicles. Tr. 183 (the trucks "go around the block . . . we now lease a lot that they can park into over a couple blocks away.") Judge Williams erred by failing to consider that it would be preferable to require Defendants to use the lot they had specifically leased for parking their delivery vehicles, than allowing Defendants to infringe upon and violate DLY's property rights.

V. Conclusion.

Defendants will have an opportunity to file a Reply brief in response to this filing. It will be interesting to see whether Defendants will finally articulate for the Court the specific way they wish to use of the Right of Way for purposes of having "unfettered" or "unimpeded" access to the Right of Way and how the specific extrinsic evidence cited in 2135's December 1, 2023, Statement of Material Facts" submitted in opposition to DLY's motion for summary judgment altered or modified the plain meaning of the word park and the prohibition against parking on the Right

of Way. In providing the Court with that explanation it will be revealing to see whether Defendants are forced to concede that in fact what they seek is permission to allow delivery vehicles to remain at the Right of Way when not being used, that passenger vans may remain at the Right of Way after delivering their passengers, and that workers may congregate on the Right of Way when there are no vehicles present at the Right of Way. In doing so, Defendants will have conceded that there is a real and actual controversy between the parties ripe for adjudication by the Court.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 6th day of December, 2024, I filed the Reply Brief of Appellee/Cross-Appellant with the Clerk of the District of Columbia Court of Appeals. I further certify that the Reply Brief of Appellee/Cross-Appellant was served this 6th day of December, 2024, via the D.C. Court of Appeals E-filing system.

/s/ Bradshaw Rost
Bradshaw Rost