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,

BRIEF OF APPELLEE/CROSS-APPELLANT

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CORPORATE DISCLOSURE

Appellee/Appellant DLY George's Warehouse, LLC, is 100% owned by the Lucy Galich Marital Trust Properties, LLC ("LGMTP, LLC"). Helen ("Toni") Marx owns 99% and Peter Mark owns 1% of LGMPT, LLC.

These representations are made for purpose of recusal.

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I. STATEMENT OF JURISDICTION

This Court has jurisdiction to review the final decision of the trial court pursuant to D.C. Code §11-721(A)(1).

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the "WFJ Deed" (as defined below) unambiguously prohibits parking or temporary parking or otherwise on the "Right of Way" (as defined below).

2. Whether Judge Williams abused the trial court's discretion by applying the wrong legal standard in determining whether a permanent injunction (as opposed to a preliminary injunction) should be granted?

3. Whether Judge Williams' correct factual finding that vehicles had remained idle for several hours on the Right of Way after the equipment was unloaded and until the equipment was ready to be loaded back on the vehicles established that the prohibition on parking under the WFJ Deed was being violated and a permanent injunction should have been entered?

III. STATEMENT OF THE CASE

1. Introduction

The resolution of this property dispute between neighboring commercial businesses provides an opportunity for this Court to reaffirm and enforce an important principle of law that ensures that businesses and citizens in the District of Columbia respect each other's property rights. Specifically, in densely occupied

areas such as the District of Columbia it is vital that written instruments entered into between neighbors, which agreements allow one neighbor to use the property of the other neighbor in a specific and limited manner, be strictly enforced. Like the proverb from the poem "Mending Wall" by Robert Frost, "good fences make good neighbors." Similarly, faithful adherence to the terms of an easement, which in this case is a "Right of Way" (defined below), is essential in order that property owners can fully enjoy their property without having that property right infringed upon by a neighbor.

2. The Complaint and Counterclaim

Appellee/Appellant DLY George's Warehouse, LLC ("DLY") filed its Complaint for Declaratory Judgment and Injunctive Relief on December 12, 2019, naming as defendants the Appellant/Appellees 2135 NE, LLC ("2135 LLC") and Ekho Events, Inc. ("Echostage") (2135 LLC and Echostage are collectively referred to herein sometimes for ease of reference as the "Defendants"). App'x at 18.[1] DLY is the owner of the real property and improvements located at 2145 Queens Chapel Road, NE, Washington, DC (the "2145 Property"). 2135 LLC is the owner of the contiguous real property and improvements located at 2135 Queens Chapel Road,

[1] Citations to Defendants' Appendix are "App'x at __". Defendants did not seek DLY's input on the contents of the Appendix and therefore DLY is submitting a Supplement hereto of material that should have been included in the Appendix and citations thereto are referred to as "Supp at __".

NE, Washington, DC (the "2135 Property"). Echostage is the tenant at the 2135 Property.

The subject matter of the Complaint is a perpetual "Right of Way" (defined below) granted by the owner of the 2145 Property to the owner of the 2135 Property together with an easement over the loading dock located on the 2145 Property to be used by the owner of the 2135 Property as follows:

> For the ***sole purpose*** of accessing and using the loading dock and rear of 2135 Queens Chapel Road, N.E. Washington, D.C., situate on Lot 144, in Square 4258, for the benefit of the Grantee, its successors and or assigns. Grantee, or any permitted users of the Grantees, ***shall not park on the Right of Way,*** interfere with Grantor's or any other permitted user's use of the Right of Way, ***or use of the Right of Way for any other purpose whatsoever***. [Emphasis Added] App'x at 100.

Count I of DLY's Complaint sought a Declaratory Judgment that, *inter alia*, "neither Defendants nor any persons acting by or through them shall park on the Right of Way." App'x at 23. Count II sought entry of a Permanent Injunction to enjoin Defendants "from parking on the Right of Way." App'x. at 24.

2135 LLC filed an Answer and Counterclaim. Count I of the Counterclaim sought entry of a declaratory judgment interpreting the WFJ Deed but made no specific reference to an alleged right to park on the Right of Way. Count II alleged a claim for Private Nuisance based upon allegations that DLY had interfered with the ability of 2135 LLC to use the Right of Way. App'x at 46.

Echostage filed its Answer to the Complaint, along with a Cross Claim against 2135 LLC, but did not plead any counterclaim against DLY.

3. Motion for a Preliminary Injunction, Injunction Order and Appeal

On August 17, 2021, 2135 LLC filed a Motion for a Preliminary Injunction to enjoin DLY from interfering with its use of the Right of Way. An evidentiary hearing was held before the Honorable Robert R. Rigsby on December 6, 2021, January 18, 2022, and January 19, 2022. In that Motion, Defendants sought entry of an order permitting Defendants to take the following action on the Right of Way:

(a) swapping out dumpsters by placing a dumpster on property not covered by the easement;

(b) temporarily parking on or interfering with Plaintiff's use of the easement where such parking or interference is for the sole purpose of accessing the rear of the 2135 Property;

(c) replacing the lock on the gate so that the lock can be accessed from both sides of the gate; and

(d) enjoining Plaintiff from placing vehicles or materials on the easement which prevent access to the rear of the 2135 Property.

(App'x at 67.)

Judge Rigsby denied the Motion for a Preliminary Injunction by an Order issued on March 9, 2022 (the "Injunction Order"), ruling that Defendants' request to

"be permitted to temporarily park" on the Right of Way "is also unwarranted" and "such an interpretation has no basis in law or fact." App'x at 72-73.[2]

Defendants appealed the Injunction Order, and this Court affirmed the ruling by Judge Rigsby by order entered on June 21, 2023.

4. <u>The Cross-Motions for Summary Judgment and Declaratory Judgment</u>

On November 17, 2023, DLY filed a Motion for Summary Judgment and in support of that motion submitted the Findings of Fact set forth in the Injunction Order along with a Statement of Undisputed Facts. DLY requested entry of summary judgment on Count I and Count II of its Complaint. 2135 LLC filed its Motion for Summary Judgment on the same date which motion ***only*** requested that Count I of DLY's complaint be dismissed and did not seek any affirmative relief. Supp. at AA1. 2135 NE submitted its Statement of Material Facts in support of its Motion and in Opposition to DLY's Motion. Supp. at AA14.

By Order entered February 20, 2024 ("Declaratory Judgment"), Judge Rigsby granted DLY's Motion for Summary Judgment as to Count I and denied 2135 LLC's competing Motion for Summary Judgment, adopting the Court's "reasoning" set forth in the Injunction Order ruling that the WFJ Deed "is unambiguous" and holding

[2] Judge Rigsby also ruled that Defendants had no right to place dumpsters on the ROW, that the dispute over the lock on the gate had been resolved by the parties, and there was no evidence that DLY had blocked Defendants' access to the Right of Way. App'x at 73.

that "Defendant cannot rely on extrinsic evidence to show that the WFJ Deed should be interpreted to permit use of the ROW prohibited by its plain language." App'x at 78. Judge Rigsby ruled that:

> The WFJ Deed prohibits 2135 LLC and its permitted users of the Right of Way ***from parking (temporarily or otherwise) on the Right of Way***, interfering with DLY or any other of DLY's permitted user's use of the Right of Way, ***or using the Right of Way for any purpose whatsoever*** (other than ingress and egress for accessing and using the loading dock and rear of the 2135 Property). [Emphasis Added].

App'x at 82. Judge Rigsby concluded there were disputed issues of fact as to whether Defendants were continuing to violate these restrictions contained in the WFJ Deed and denied DLY's request for a permanent injunction under Count II of DLY's Complaint, thereby reserving that issue for trial. Judge Rigsby relied upon the affidavit of Matthew Cronin as creating a disputed issue of fact. App'x at 80.

5. <u>The Trial and Final Decision</u>

At the commencement of the trial on April 8, 2024, before the Honorable Yvonne Williams, the parties filed a Notice of Voluntary Dismissal and Related Relief, wherein *inter alia,* DLY and 2135 LLC dismissed their respective remaining claims against each other (i.e., Count II of DLY's complaint and Count II of 2135 LLC's counterclaim), leaving for trial the sole issue of whether a permanent injunction should be entered enjoining Echostage from parking (temporarily or otherwise) on the Right of Way. App'x at 83. 2135 LLC was therefore no longer a party in the proceeding and did not participate in the trial held on April 8, 2024.

The trial lasted one day. Mr. Peter Marx testified on behalf of DLY, and Mr. Mathew Cronin testified on behalf of Echostage. DLY introduced into evidence sixteen (16) exhibits. Echostage introduced one exhibit.

Judge Williams rendered the trial court's final decision from the bench on April 11, 2024 ("Final Decision") denying DLY's request for entry of a permanent injunction enjoining Echostage from continuing to park on the Right of Way. App'x. at 86.

6. <u>The Appeal</u>

2135 LLC filed its Notice of Appeal on May 7, 2024, challenging (i) the Injunction Order; (ii) the Declaratory Judgment; and (iii) Final Decision (Case #24-CV-0439). On May 8, 2024, DLY filed its Cross Appeal appealing only the Final Decision (Case #24-CV-0439). On May 21, 2024, Echostage filed its Notice of Appeal challenging only the Final Decision (Case #24-CV-0439). By Order entered June 10, 2024, all three appeals were consolidated.

It is peculiar that 2135 LLC and Echostage have appealed the Final Decision since Echostage prevailed below on its position that a permanent injunction should not be entered and that its use of the Right of Way did not violate the prohibition against parking. Further, 2135 LLC was not a party at the time of the trial, and thus has no standing to contest the Final Decision.

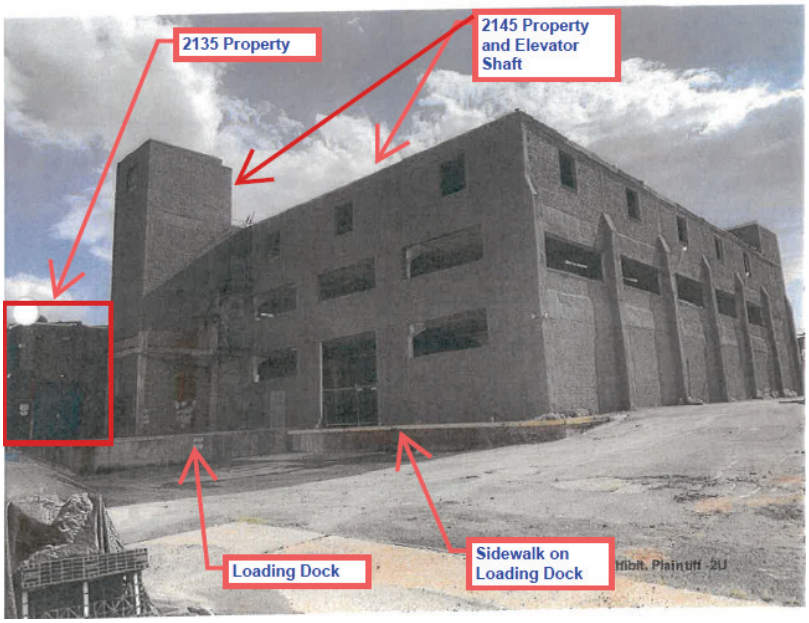
IV. STATEMENT OF FACTS

WFJ, LLC ("WFJ") owned both the 2145 Property and the 2135 Property until it sold the 2135 Property to 2135 LLC in 2010. The 2135 Property and 2145 Property are adjacent to each other. At the rear of the 2145 Property there is a loading dock located exclusively on the 2145 Property. The loading dock is contiguous to the building on the 2135 Property and serves both the 2135 Property and 2145 Property. App'x 60-67.

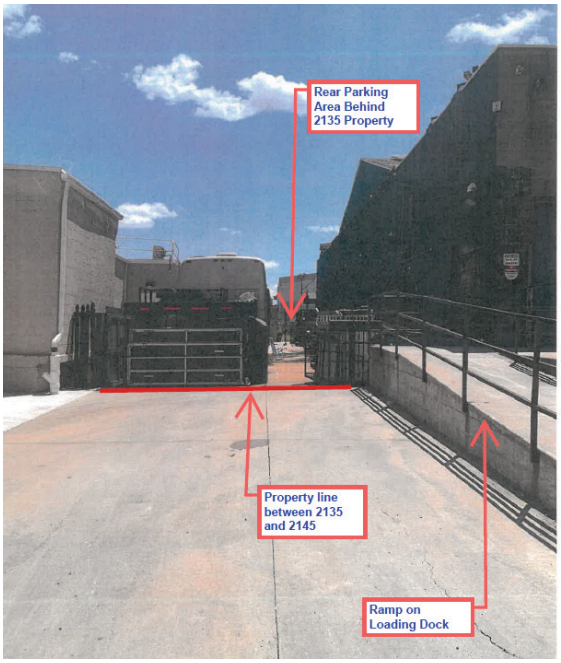
The building on the 2135 Property occupies the entire frontage on Queens Chapel Road, N.E., and there is no driveway on the 2135 Property for a vehicle to gain access to the rear of the 2135 Property and the loading dock on the 2145 Property. The only way for a vehicle to access the rear of the 2135 Property and the loading dock is by a driveway located exclusively on the 2145 Property on the northern side of the building on the 2145 Property between the 2145 Property and 2149 Queens Chapel Road (the "Driveway"). The Driveway extends to the back of the 2145 Property and turns right heading in an easterly direction where it ends at the property line separating the back property line of the 2145 Property from the property line of the 2135 Property. Id.

The rear of the 2135 Property has its own parking area with dimensions of approximately 135 ft by 16 feet. Supp. at AA64; 138. As described at trial, the 2135 Property "has a big piece of land back here" (Supp. at 63), which is a "paved parking lot" beyond the loading dock located on the 2145 Property. Supp. at AA64.

Below is a picture of the 2135 Property, 2145 Property, and the loading dock taken from the vantage point of standing behind the buildings. Supp. at AA280.



Below is a picture from the viewpoint of standing on the Driveway on the 2145 Property. Supp. at AA281. To the right is the ramp which is part of the loading dock. Straight ahead is the parking area located behind the 2135 Property, which has a bus parked in that area.

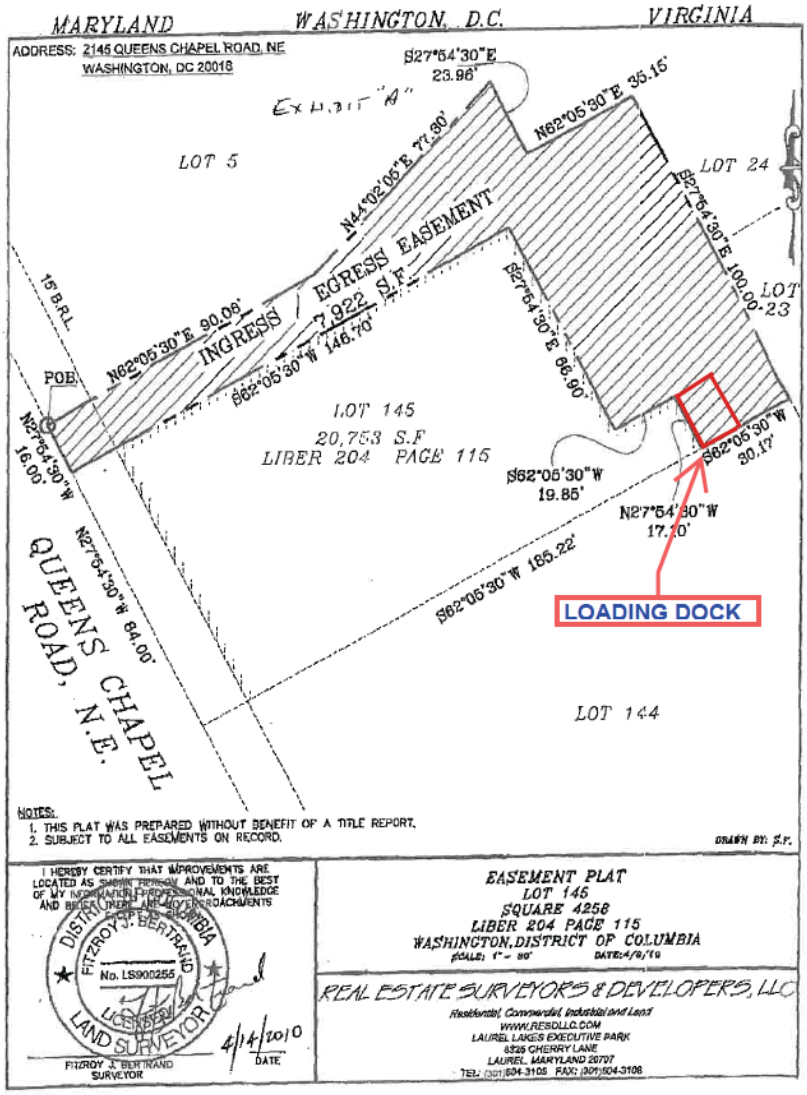


On the next page is a picture of the building on the 2145 Property and loading dock from the viewpoint of standing on the rear parking area of the 2135 Property. The dumpster in the picture is on the Right of Way and belongs to the Defendants. The 2135 Property is not visible, and is located to the left of where the picture ends. App'x at 38.

Since WFJ previously owned both the 2135 Property and 2145 Property, an easement to access and use the loading dock and rear area of 2135 Property was not needed.

By Deed dated April 10, 2010, ("WFJ Deed") 2135 LLC acquired the 2135 Property from WFJ. The WFJ Deed included the grant by WFJ (as Grantor) to 2135 LLC (as Grantee) of the Right of Way and an easement over the loading dock, as shown on the "Easement Plat" attached to the WFJ Deed as Ex. B, reproduced below. App'x at 29.

The red box has been added to the Easement Plat for ease of identifying the location of the loading dock as described by the trial judge. Supp. at AA48.



Nine years later, in September of 2019, DLY purchased the 2145 Property and assumed the rights and obligations as the Grantor under the WFJ Deed. Similarly, 2135 LLC had previously assumed the rights and obligations as the Grantee under the WFJ Deed when it acquired the 2135 Property. App'x at 60.

2135 LLC used the Right of Way to access its rear parking lot and to access and use the loading dock. In 2012, the 2135 Property was leased to Echostage by 2135 LLC. App'x at 61. Echostage uses the 2135 Property as a nighttime concert

venue. Echostage's vehicles, however, do not stay parked on the Right of Way during the concerts, and are moved "around the block to 24th Place down off" Queens Chapel Road where Echostage has leased a lot for the vehicles to park until the concert is over. Supp. at AA206. In addition to this leased lot, the rear parking lot on the 2135 Property has "sufficient room . . . for . . . passenger van[s] . . . to park wholly on the 2135 property and not any part of the right of way." Supp. at AA94-96; AA303. It is not uncommon for "other vehicles [to] traverse the right-of-way and go entirely into the rear of the 2135 property." Supp. at AA96. The rear parking lot on the 2135 Property is used for parking very large, full size long passenger buses back-to-back and front-to-front as depicted in the photograph marked as DLY trial. Supp. at AA100-101; AA303.

There was extensive unrebutted testimony at the hearing on the motion for a preliminary injunction and at the trial that before the concerts would start Echostage would regularly allow vehicles to remain "idle" on the Right of Way for many hours after the equipment had been unloaded from the vehicles. Judge Rigsby's Findings of Fact in the Injunction Order (which was accepted as part of the evidence at trial (Supp. at AA88-89), summarized numerous examples of vehicles remaining idle on the Right of Way after the unloading of equipment was completed and improperly using the loading dock for storage as follows:

> Mr. Marx testified to examples of conduct on the part of 2135 LLC and Echostage violative of the strictures of the WFJ Deed regarding

> use of the ROW, including Echostage or its vendors parking vehicles for at least four to five hours on the Right of Way on May 23, 2001 [sic][3], Hearing Tr. at 139-42 (Jan. 18, 2022), Pl. Ex. L; contractors of 2135 LLC staging cranes and lifts on the ROW and placing pallets of cinder blocks and other construction materials on the ROW on June 19, 2021, Hearing Tr. at 83-89 (Jan. 18, 2022), Pl. Ex. B; Echostage parking a U Haul on the ROW for hours after loading was completed, Hearing Tr. at 137-39 (Jan. 18, 2022), Pl. Ex. K; and Echostage's contractor using the 2145 Property to exchange dumpsters. Hearing Tr. at 130-33 (Jan. 18, 2022), Pl. Ex. I.

App'x at 66-67.

At trial, similar unrebutted testimony and photographs describing and depicting vehicles being allowed to remain idle on the Right of Way for extended periods of time when no active unloading or unloading was occurring were introduced into evidence without objection by Echostage as follows:

(i) The loading dock not being used for "for about five hours"; "it was parked" for "four-and-a-half hours" and the loading dock "was not being used. Supp. at AA79-80; AA282-289.

(ii) There was "[n]o activity, no use of the loading dock other than loitering. . . . They weren't using the loading dock."; "there was no use of the loading dock with regard to the truck." Supp. at AA83-84; AA290-298.

(iii) Passenger vans parked on the Right of Way from about 10:00 p.m. "until after midnight in the next day" remaining "for hours without use". Supp. at AA94-95; AA299; AA303;

(iv) Individuals waiting on the loading dock with no vehicles present and no loading or unloading activity taking place. Supp. at 83-84; AA293-296.

[3] The 2001 date was a typographical error, and the correct date was 2021.

(v) Leaving trash truck parked partially on the 2145 Property and partially on the parking lot belonging to the 2135 Property. Supp. at AA98-99; and

(vi) Truck parked "with no use of the loading dock for, you know, give or take another four hours." Supp. at AA103.

V. SUMMARY OF ARGUMENT

2135 LLC and its tenant Echostage maintain that the practice of allowing vehicles to remain idle on the Right of Way after the delivery of the equipment is completed and until the equipment is ready to be loaded back onto the vehicles does not violate the prohibition against parking on the Right of Way.[4] This interpretation is contrary to the explicit restrictions contained in the WFJ Deed that prohibit Echostage from using the Right of Way to "park" vehicles. The WFJ Deed unambiguously provides that the Right of Way is established "for the sole purpose of accessing and using the loading dock," but in using the Right of Way for that limited purpose the WFJ Deed mandates that Echostage "shall not park on the easement and right of way, or interfere with [DLY's] use of said easement and right of way, or use of said easement and right of way for any other purpose whatsoever."

[4] For ease of reference, the term "equipment" is being used herein to describe whatever items or material are being delivered and then removed from the building at the 2135 Property by use of the loading dock. Further, Defendants' violation of the WFJ Deed also includes the parking of passenger vehicles on the Right of Way transporting performers and personnel to the concert and waiting for hours on the Right of Way until the performers or personnel are ready to leave, along with workers waiting for extended periods of time on the loading dock for vehicles to arrive.

Simply stated, once the equipment is unloaded from the vehicles at the loading dock or the passengers have arrived, Echostage is required to remove the vehicles from the Right of Way and relocate the vehicles either to the rear parking lot on the 2135 Property located immediately adjacent to the loading dock, or to the leased lot nearby where the vehicles are sent during concert events, or some other location. Only when the equipment is ready to be removed from the 2135 Property or the passengers are ready to leave may the vehicles return to the Right of Way to load the equipment back onto the vehicles or retrieve the passengers and then leave the Right of Way.

The trial court erred by adopting Echostage's erroneous interpretation of the WFJ Deed by ruling that the WFJ Deed allowed Echostage to leave its vehicles parked and "idle" on the Right of Way from the moment when removal of the equipment from vehicles was completed until such time Echostage decides it is time to remove the equipment from the 2135 Property. The trial court, however, correctly found that the evidence at trial established without question that the vehicles remained "idle" on the Right of Way for many hours after the equipment had been fully unloaded from the vehicles and placed inside the building at the 2135 Property. Allowing the vehicles to remain idle for many hours on the Right of Way constitutes the parking that is expressly prohibited by the WFJ Deed. The trial court erred by not properly applying the ruling by Judge Rigsby that had correctly interpreted the

WFJ Deed to prohibit temporary parking on the Right of Way to these uncontested facts. In so doing, the trial court violated the law of the case doctrine that controlled the trial court's authority at trial. This evidence, once evaluated under the proper interpretation of the WFJ Deed, demonstrates that Echostage was violating the prohibition against parking set forth in the WFJ Deed.

The trial court erred in denying DLY's request for a permanent injunction by improperly applying the test for a preliminary injunction rather than the different four-part test for a permanent injunction. By the time of trial, DLY had already prevailed on the merits in establishing that Echostage was not allowed to park, temporarily or otherwise, on the Right of Way. Thus, the first part of the four-part test for a permanent injunction had been satisfied. The evidence established that DLY satisfied the remaining three parts of the test (i.e., inadequate remedy at law, balancing of hardships, and public interest). Judge Williams erred by ruling that (i) the ability to file another lawsuit for violating the Right of Way afforded DLY an adequate remedy at law and not applying the rule of law that interference with property rights is deemed irreparable injury; and (ii) the inconvenience of requiring Echostage to abide by its contractual obligations not to park on the Right of Way was more important than protecting DLY's property rights. Finally, the public interest (which Judge Williams did not even consider) favors enforcement of property rights.

Echostage's argument that Judge Rigsby failed to consider extrinsic evidence is misplaced. Judge Rigsby considered extrinsic evidence for purposes of determining whether the WJF Deed was ambiguous. Once that threshold determination that it was not ambiguous was made, Judge Rigsby was correct in not considering other extrinsic evidence that sought to alter, vary or contradict the unambiguous prohibition against parking on the Right of Way. Nor was any of the extrinsic evidence offered by Defendants excluded from the record and none of the extrinsic evidence altered the common usage of the word "park" and a reasonable understanding of the mandate that the "user shall not park" on the Right of Way.

Defendants' argument that Judge Rigsby erred by not ruling that Defendants had the right to unimpeded access to the Right of Way is without merit since there was no evidence that DLY was impeding Defendants' use of the Right of Way. Moreover, for purposes of their appeal Defendants only request that their Motion for Summary Judgment should be granted is superfluous since the only relief requested in that motion was that Judge Rigsby deny DLY's motion for summary judgment, and they did not request any other specific affirmative relief in that motion. More importantly, the denial of a motion for summary judgment is not subject to an appeal.

Finally, the dispositive issue of whether Defendants' use of the Right of Way violated the prohibition against parking was ripe for Declaratory Relief by way of a motion for summary judgment. Defendants' argument would have the Court adopt

an unprecedented rule of law that Declaratory Relief is not permitted unless a preliminary injunction is issued at the same time, thereby emasculating the very purpose of a declaratory judgment which is to avoid further controversy and a need to seek entry of a preliminary injunction.

In any event, that issue is irrelevant since a final contested trial was held which evidence established that DLY was entitled to a permanent injunction based upon the unambiguous provision of the WFJ Deed as applied to the evidence. So whether Judge Rigsby's Declaratory Judgment should have been entered in the absence of a concurrent entry of a preliminary injunction is irrelevant for this appeal since the relief sought by DLY at trial is the same relief it sought before Judge Rigsby.

VI. ARGUMENT

1. DLY Was Entitled to a Permanent Injunction.

(A) Judge Rigsby Correctly Interpreted the Right of Way under the WFJ Deed.

Judge Rigsby's Declaratory Judgment and interpretation of the WFJ Deed is reviewed *de novo*. See Caesar v. Westchester Corp., 280 A.3d 176, 184 (D.C. 2022) ("We review grants of summary judgment *de novo* and apply the same standard as the trial court."); Aziken v. D.C., 70 A.3d 213, 219 (D.C. 2013) ("Whether a contract is ambiguous is a legal question, which this court decides *de novo*.")

Judge Rigsby's Declaratory Judgment that the WFJ Deed was unambiguous and prohibited "parking (temporary or otherwise on the ROW" was correct. Judge Williams failed to apply Judge Rigsby's Declaratory Judgment to the evidence presented at the trial, and therefore erred in rendering the Final Decision and violated the law of the case doctrine.[5] For purposes of this appeal, however, whether Judge Rigsby's Declaratory Judgment was binding upon Judge Williams is somewhat academic since this Court has explained that "in an appeal to this court where views of the law expressed by a judge at one stage of proceedings differ from those of another at another stage, the important question is not whether there was a difference, but which view was right." Williams v. Paul, 945 A.2d 607, 611 (D.C. 2008). Thus, the threshold and dispositive issue for this appeal is whether this Court agrees with Judge Rigsby's Declaratory Judgment that the WFJ Deed is unambiguous and plainly prohibits parking, temporary or otherwise, on the Right of Way.

Defendants' interpretation would allow vehicles to remain parked on the Right of Way, not being used for active loading or unloading of equipment, from the time the equipment is first unloaded until Echostage decides it is time to have the equipment removed from the building at the 2135 Property and loaded back on the vehicles. Similarly, this interpretation would allow passenger vehicles to remain on

[5] See Bernal v. United States, 162 A.3d 128, 133 (D.C. 2017) ("The law-of-the-case doctrine states that "once the court has decided a point in a case, that point becomes and remains settled unless or until it is reversed or modified by a higher court.")

the Right of Way until the individuals to be transported are ready to leave the building, during which period of time the loading dock is not being used.

Such an interpretation improperly defines the prohibition on parking and the use of the Right of Way in accordance with the individual needs and subjective desires of Echostage, rather than the objective terms of the WFJ Deed, thereby rendering the restriction meaningless. The only interpretation that harmonizes the prohibition against parking with Defendants' limited right to use the Right of Way for "accessing and using the loading dock" and to access the rear of 2135 Property is that once the equipment is unloaded from the vehicle and placed inside the building (or the passengers have left the vehicle), the vehicles are required to leave the Right of Way until such time Echostage is ready to remove the equipment from the building or the passengers are ready to leave.

The grant of usage of the Right of Way for "the sole purpose of accessing and using the loading dock and rear of" the 2135 Property, curtailed by the added limitation that the Right of Way shall not be used for "any other purpose," plainly conveys the understanding that Echostage must be actively using the loading dock in order for the stoppage of vehicles on the easement to be permissible. The passive act of storing vehicles on the Right of Way when there is no active loading and unloading of equipment being performed is prohibited. The vehicles may only return to the loading dock when Echostage is ready to remove the equipment from the

building or the passengers are ready to leave. To allow Echostage's vehicles to remain on the Right of Way for whatever period of time they desire, idle and not in use, in between loading and unloading equipment from the vehicles or while the passengers are conducting their business within the building constitutes prohibited parking on the Right of Way.

2135 LLC's primary legal argument below implicitly recognized that its desire to be able to leave its vehicles on the Right of Way idle and not in use for extended periods of time was prohibited by the common understanding of what it means to "park" a vehicle. Specifically, Echostage persistently attempted to modify the prohibition on parking by arguing that it was allowed to "temporarily" park on the Right of Way. Judge Rigsby expressly addressed this flawed interpretation and ruled in his Declaratory Judgment that: "The WFJ Deed prohibits 2135 LLC and its permitted users of the Right of Way from parking (temporarily or otherwise) on the Right of Way . . ." App.x at 82. Had the Grantor and Grantee intended to allow Echostage to store its vehicles on the Right of Way until Echostage was ready to remove the equipment from the Building or until the passengers had completed their business there would have been no reason to add the express prohibition against parking on the Right of Way, or at a minimum, the blanket prohibition on parking would have been modified in some way to allow the vehicles to remain idle while

the equipment was being used at the premises even though the unloading had been completed and the passengers were inside the building conducting their business.

Moreover, even Defendants' course of conduct argument undermines its interpretation and validates Judge Rigsby's interpretation. In its summary of the evidence without any record cites, Defendants acknowledge that: "After the concert, anywhere from 12:00 a.m. to 4:00 a.m. depending on the pendency of the concert, ***the production delivery vehicles return, and the equipment is loaded.***" Brief at pg. 26. [Emphasis Added]. This is consistent with Mr. Cronin's testimony at trial that vehicles are moved to its leased lot during the concert events. Supp. at AA206. Thus, Defendants concede that they have the ability to remove their vehicles from the loading dock after unloading the equipment and only return when it is time to load the equipment back onto the vehicles.

Echostage's argument that Judge Rigsby failed to "consider the dispositive effect of the word 'other'" in the phrase "for any other purpose" is incomprehensible. Brief at 23. If the argument is intended to mean that the phrase somehow eliminates the plain language stating that parking is prohibited, then that interpretation distorts the English language into some sort of undecipherable foreign tongue. See Dyer v. Bilaal, 983 A.2d 349, 355 (D.C. 2009) ("A court must honor the intentions of the parties as reflected in the settled usage of the terms they accepted in the contract, ***and will not torture words to import ambiguity where there is none***." [Emphasis

added; quotation marks deleted].); Redmond v. State Farm Ins. Co., 728 A.2d 1202, 1206 (D.C. 1999) ("A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity." [quotation marks deleted].) Any argument that the phrase "any other purpose" must be construed to mean that Defendants are allowed to park on the Right of Way when not actively unloading or loading vehicles at the loading dock is hopelessly convoluted and rises to a new level of pain in torturing the English language to create an ambiguity where none exists.[6]

The concluding phrase "for any other purpose" simply reinforces and makes abundantly clear that the owner of the 2135 Property can only use the Right of Way for accessing and using the loading dock, or accessing the rear parking lot behind the 2135 Property and such access and use excludes and prohibits the use of the Right of Way for any other purpose, including but not limited to, allowing the vehicles to remain idle and not in use after the delivery is completed – i.e., the prohibited parking.

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[6] Defendants never expressly state that this is the conclusion they want this Court to reach based upon their bizarre interpretation of the operative sentence. Rather, after presenting this odd interpretation Defendants simply conclude that DLY's interest in the property it owns, as a servient estate, is subordinate to Defendants' right to use the Right of Way, as the dominant estate. That legal proposition, whether accurate or not, does nothing to resolve the central issue of whether parking on the Right of Way is prohibited. Whatever rights Defendants have to use the Right of Way are defined by the plain language of the WFJ Deed since the terms of the grant define to what extent DLY's property rights to the 2145 Property are subordinate to Defendants' rights under the WFJ Deed.

In the end, the decisive question is what would a reasonable person understand to be the commonly accepted meaning of the word "park" and the phrase "shall not park"? See *Plain meaning*, 11 Williston on Contracts § 32:3 (4th ed.) ("The plain, common, or normal meaning of language will be given to the words of a contract."); Kakaes v. George Washington Univ., 683 A.2d 128, 132 (D.C. 1996) ("Words in a contract are to be given their common meaning.")

"Parking" is defined as "leaving a vehicle in a particular place for a period of time."[7] A similar definition is that "Parking is the action of moving a vehicle into a place in a garage or by the side of the road where it can be left."[8] Finally, the Merriam-Webster dictionary defines park to include "to leave ***temporarily*** on a public way or in a parking lot or garage." [Emphasis Added][9] See 17A Am. Jur. 2d Contracts §350 ("Appellate courts often consult dictionaries in interpreting contracts to determine whether the ordinary meanings of the words used therein are plain and unambiguous, or conversely, have varying definitions in common parlance.")

When you park your vehicle you are no longer using the vehicle. You have left the vehicle to attend to whatever business or event you have used the vehicle to get to, and during your absence from the vehicle the vehicle is considered to be

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[7] See https://dictionary.cambridge.org/us/dictionary/english/parking.

[8] See https://www.collinsdictionary.com/us/dictionary/english/parking.

[9] See https://www.merriam-webster.com/dictionary/parking.

parked. When the vehicles are unloaded and equipment placed in the building, or the passengers leave the vehicles, the vehicles are idle on the Right of Way, and therefore are parked. The phrase "shall not park" means the vehicles are to be removed until needed.

(B) Judge Williams Erred by Applying the Wrong Legal Test for a Permanent Injunction.

Judge Williams erroneously applied the legal test for a "preliminary injunction" instead of the correct legal test for a "permanent injunction", which decision is reviewed under an abuse of discretion standard. See Herbin v. United States, 683 A.2d 437, 443 (D.C. 1996) ("Application of the incorrect legal test in disposing of a party's motion constitutes an abuse of discretion."); Oxendine v. Merrell Dow Pharms., Inc., 563 A.2d 330, 334 (D.C. 1989) (An "abuse [of discretion] exists if the trial court applies an incorrect standard of law.")

This Court has previously recognized the important distinction between a preliminary injunction and permanent injunction as follows:

> Finally, we affirm the trial court's issuance of a permanent injunction, although we correct an analytical mistake it made in so doing. Ms. Caesar is correct that the trial court committed an error by applying the legal test for the issuance of a preliminary injunction when it should have applied the test for the issuance of a permanent injunction. To receive a permanent injunction, a plaintiff must show:
>
> > (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff

> and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.
>
> eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391, 126 S.Ct. 1837, 164 L.Ed.2d 641 (2006). The test for the issuance of a preliminary injunction is similar, but instead of analyzing whether the plaintiff has an adequate remedy at law, the court assesses whether the plaintiff is likely to succeed on the merits of the case. Wieck v. Sterenbuch, 350 A.2d 384, 387 (D.C. 1976); see Ifill, 665 A.2d at 187-88. The likelihood-of-success-on-the-merits inquiry is unnecessary where, as here, the plaintiff has already succeeded on the merits and seeks permanent relief.

Caesar v. Westchester Corp., 280 A.3d 176, 192 (D.C. 2022); Ifill v. D.C., 665 A.2d 185, 188 (D.C. 1995) ("A permanent injunction, however, requires the trial court to find that "there is no adequate remedy at law, ... the balance of equities favors the moving party, and ... success on the merits has been demonstrated.")

Judge Williams incorrectly used the test for a preliminary injunction and disregarded the fact that DLY had already prevailed on the merits by securing a judicial declaration that the WFJ Deed prohibited parking, temporary or otherwise, on the Right of Way. As in Caesar, in the instant case Judge Williams should not have focused on whether the threat of irreparable harm to DLY was imminent or whether there was a likelihood-of-success-on the merits. DLY had already prevailed on the merits in securing a judicial determination that parking, whether temporary or not, on the Right of Way was prohibited. The only questions for trial were whether DLY had an adequate remedy at law in response to Echostage parking its vehicles

on the Right of Way, whether the balance of equities favored DLY, and the public interest.

Echostage led Judge Williams down this wrong path in its closing argument stating that the "injury complained of . . . has to be of such imminence that there's a clear and present need for equitable relief." Supp. at 247. As plainly revealed from a review of the transcript of the Final Decision, Judge Williams incorrectly focused on the question of "irreparable injury" and whether the threat of the injury is "imminent" as follows:

> Irreparable injury: In considering whether to issue an injunction, the most important inquiry is that concerning irreparable injury. A plaintiff attempting to establish irreparable harm thus faces a considerable burden and a very high bar. To clear this bar, the plaintiff must substantiate its claim that irreparable injury ***is likely to occur***. Bare allegations to that effect are of no value, and a court requires affirmative proof of ***likelihood and imminence***. In other words, an injunction should not be issued unless the threat of injury is imminent and well-founded. [Emphasis Added].

App'x at 92. It was legal error for Judge Williams to rely upon the threat of any imminent harm as being a requirement for issuance of a permanent injunction. DLY had already prevailed on the merits of the central claim when Judge Rigsby ruled in DLY's favor that the WFJ Deed prohibited Echostage from "parking (temporarily or otherwise) on the Right of Way." Thus, the only question was whether DLY had an adequate remedy at law, the balance of hardship, and the public interest in determining whether a permanent injunction should be issued.

(C) Judge Williams' Factual Findings Demonstrate that Defendants Had Violated the Restrictions in the WFJ Deed.

Judge Williams' ultimate legal conclusions based upon the Court's findings of fact are reviewed *de novo*. See C.R. Calderon Constr., Inc. v. Grunley Constr. Co., Inc., 257 A.3d 1046, 1051 (D.C. 2021) ("We review mixed questions of law and fact under our usual deferential standard of review for factual findings and apply de novo review to the ultimate legal conclusions based on those facts.")

The only factual issue at trial was whether Echostage had, in fact, been allowing vehicles to remain idle on the Right of Way, and thus violating the terms of the WFJ Deed. Judge Williams' factual findings as substantiated by the evidence conclusively established that Echostage had been engaged in such prohibited use of the Right of the Way.

As found by Judge Williams, the evidence demonstrated that Echostage had been allowing its vehicles to remain "idle" on the Right of Way on several occasions for four or more hours at a time. See App'x at 93-94; ("a truck loading and unloading and appearing to sit idle for some period of time this unloading and unloading period occurred"; App'x 94; ("there were sometimes where [a truck] appeared to be sitting idle.") Judge Williams dismissed the dispositive significance of these factual findings by erroneously concluding as follows:

> Neither of these specified events, however, represents a violation, from the Court's perspective, of the WFJ deed as each activity was consistent with and contemplated by what is meant by using the

> loading dock. 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.*** [Emphasis Added]

App'x 94-95. The italicized language from the Final Decision embodies the fundamental legal error in Judge Williams' ruling. Allowing the vehicles to remain idle on the Right of Way between the time after the equipment is unloaded and the time when the equipment is no longer needed at the building and is ready to be loaded back on the vehicles is exactly the kind of "temporary parking" specifically prohibited by the WFJ Deed as correctly ruled by Judge Rigsby.

Judge Williams improperly expanded Echostage's right to use the loading dock by concluding that the time interval between unloading the equipment at the loading dock and then loading the equipment back onto the vehicles – during which time the vehicles remain idle - does not constitute parking or temporary parking. Other than the statement that "each delivery has varying degrees of complexity, requiring varying length of time" (App'x at 91), Judge Williams offered no explanation as to why the idle time between unloading and loading is not deemed parking (temporary or otherwise). It is dispositive to note that there was no evidence, much less any contention, that the vehicles were being used in any manner once the equipment was unloaded from the vehicles and placed in the building.

It may be true that unloading and loading the equipment can be a complex process and take varying lengths of time. However, it matters not how long the

unloading process takes or whether it is complicated. Whether it is 30 minutes or 3 hours to unload the vehicle, that usage is permitted. Similarly, whether it takes 30 minutes or 3 hours to load the vehicles, that usage is permitted. What is not permitted, and what is specifically prohibited, is to allow the vehicles to remain idle and not in use between those two periods of time when the loading dock is not being actively used.

The evidence established that Echostage had allowed vehicles to remain idle at the loading dock for periods of time of four to five hours, which constitutes parking under any common understanding of what it means to park a vehicle. Moving on to the remaining elements of the legal test establishes that the permanent injunction should have been issued.

(D) Remedies At Law Are Inadequate to Compensate DLY For the Injury Caused by Echostage Violating the WFJ Deed.

Judge Williams incorrectly concluded that DLY had an adequate remedy at law. Specifically, Judge Williams ruled as follows:

> Regarding adequate remedy at law, no matter the stakes and no matter -- well -- the possibility that adequate compensatory or other corrective relief will be available at a later date in the ordinary course of litigation weighs heavily against a claim of irreparable harm. Plaintiff admits that they have an adequate remedy at law whether or not a permanent injunction is granted.
>
> Plaintiff argued that if no permanent injunction was issued and defendant improperly used the right-of-way, violating the terms of the WFJ deed, it would file a new case with the Court seeking another injunction or other equitable relief for damages.

> Also, plaintiff could technically file a motion to hold defendant in contempt in this case gave [sic] the declaratory judgement issued by Judge Rigsby. This plaintiff has not reached the high bar of proof for the extreme remedy of a permanent injunction.

App'x at 95-96. All of these reasons in support of the conclusion that DLY had an adequate remedy at law are incorrect.

First, DLY did not "admit" that it had an adequate remedy at law if the permanent injunction was not granted. Rather, in response to the direct question asked of DLY's counsel by Judge Williams whether DLY would have to file a new lawsuit if the Court denied the request for injunction DLY's counsel acknowledged that would be DLY's only option. Supp. at AA264-265. But DLY acknowledging that it would have no other option but to file another lawsuit if the Court denied the request for an injunction is fundamentally different from admitting that being forced to file another lawsuit due to the Court's erroneous ruling is an adequate remedy for a continuing violation of the WFJ Deed. Avoiding the need to file another lawsuit and incurring the expense and delay of another round of litigation is one of the very reasons why the issuance of a permanent injunction is warranted and required. A property owner should not be required to file successive lawsuits in a never-ending quest and perpetual battle to vindicate and protect its property rights. As argued by DLY's trial counsel, this case is no different from the numerous cases where Courts, including this one, have approved the issuance of a permanent injunction to stop

someone from trespassing in the future as argued by DLY during the trial. Supp. at AA187-188; AA255.

For example, in Caeser vs. Westchester, the defendant Caeser refused to vacate a guest room in the cooperative apartment complex she lived in, and only vacated after a preliminary injunction was entered requiring her to vacate. On appeal, this Court affirmed entry of the subsequent permanent injunction ruling as follows:

> On this latter point, Ms. Caesar proved herself quite committed to remaining in the guest room and did not vacate it until the trial court issued its injunction, despite her loss on summary judgment. Her breach of contract was persistent and ongoing, and we are not confident that in the absence of an injunction she would not take up residence in the guest room once again . . . . [citations omitted] Ms. Caesar's actions are not unlike a continuing trespass, a violation courts have often found it appropriate to enjoin permanently. See, e.g., Geoghegan, 281 F. Supp. at 117-18 (collecting cases); R.I. Turnpike & Bridge Auth. v. Cohen, 433 A.2d 179, 182 (R.I. 1981); Wheelock v. Noonan, 108 N.Y. 179, 15 N.E. 67, 68-70 (1888); Levisa Coal Co. v. Consolidation Coal Co., 276 Va. 44, 662 S.E.2d 44, 62 (2008); Water Works & Sewer Bd. of the City of Birmingham v. Inland Lake Invs., LLC, 31 So.3d 686, 693 (Ala. 2009); Evans v. Cote, 197 Vt. 523, 107 A.3d 911, 915 (2014). We therefore affirm the issuance of the injunction, this time under the correct standard.

Caesar v. Westchester Corp., 280 A.3d 176, 192–93 (D.C. 2022).

Judge Williams committed legal error in not considering and completely disregarding the established proposition of law that "it is well-settled that unauthorized interference with a real property interest constitutes irreparable harm as a matter of law, given that a piece of property is considered to be a unique commodity for which a monetary remedy for injury is an inherently inadequate

substitute." Shvartser v. Lekser, 308 F. Supp. 3d 260, 267 (D.D.C. 2018). This Court has held on numerous occasions that: "When land is the subject matter of the agreement, the legal remedy is assumed to be inadequate, since each parcel of land is unique; thus, equitable jurisdiction in this case is firmly established." Flack v. Laster, 417 A.2d 393, 400 (D.C. 1980).[10] In Simpson v. Lee, 499 A.2d 889, 896 (D.C. 1985) this Court affirmed the trial court's issuance of an injunction protecting the tenant's property rights in leased property holding that: "Although money damages are available, they would be difficult to assess precisely because each property tends to have unique characteristics.") See 42 Am. Jur. 2d Injunctions §54 ("An injunction is the appropriate remedy for enforcement of a real property right because the violation of a real property interest is deemed irreparable and the owner protected in the enjoyment of his or her property whether such be sentimental or pecuniary.")[11]

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[10] Indep. Mgmt. Co. v. Anderson & Summers, LLC, 874 A.2d 862 (D.C. 2005) (When land is the subject matter of the agreement, the legal remedy is assumed to be inadequate, and specific performance is available, since each parcel of land is unique.); Tauber v. Quan, 938 A.2d 724, 732 (D.C. 2007) (same); 1010 Potomac Assocs. v. Grocery Manufacturers of Am., Inc., 485 A.2d 199, 212 (D.C. 1984) (same) Coburn v. Heggestad, 817 A.2d 813, 823 (D.C. 2003) (same); Clay v. Faison, 583 A.2d 1388, 1391 (D.C. 1990) (same); Douglas v. Lyles, 841 A.2d 1, 4 (D.C. 2004) (same).

[11] Accord United Church of the Med. Ctr. v. Med. Ctr. Comm'n, 689 F.2d 693, 701 (7th Cir. 1982) ("It is settled beyond the need for citation, however, that a given piece of property is considered to be unique, and its loss is always an irreparable injury."); Norfolk S. Ry. Co. v. E.A. Breeden, Inc., 287 Va. 456, 464, 756 S.E.2d 420, 424–25 (2014) ("[A]n injunction is the appropriate remedy for enforcement of a real property right. . . . This is so because the violation of a real property interest is deemed

The instant case is exactly like a "continuing trespass." The evidence established that Echostage continued to engage in the prohibited "parking (temporary or otherwise) on the Right of Way" after issuance of Judge Rigsby's Declaratory Judgment. There was no testimony at trial that this prohibited conduct of parking would not continue should the trial court not enter the permanent injunction. The only reasonable conclusion from the evidence, and extensive course of conduct over the years by Echostage of using the Right of Way for parking, is that Echostage would continue to use the loading dock and Right of Way for purposes of operating its business in the same unauthorized manner.

(E) Judge Williams Improperly Evaluated the Balance of Hardship.

Judge Williams improperly elevated the inconvenience of requiring Echostage to move its vehicles as being more important than DLY's property rights to have its property used only in the manner which is expressly authorized under the granting

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irreparable."); 7-Eleven, Inc. v. Khan, 977 F. Supp. 2d 214, 234 (E.D.N.Y. 2013) ("As for the adequacy of potential remedies, it is well-settled that unauthorized interference with a real property interest constitutes irreparable harm as a matter of law, given that a piece of property is considered to be a unique commodity for which a monetary remedy for injury is an inherently inadequate substitute."); Dominion Energy Transmission, Inc. v. 0.11 Acres of Land, More or Less, in Doddridge Cnty., W. Virginia, 2019 WL 4781872, at *6 (N.D.W. Va. Sept. 30, 2019) ("Moreover, it is well-settled that unauthorized interference with a real property interest constitutes irreparable harm as a matter of law, given that a piece of property is considered a unique commodity for which a monetary remedy for injury is an inherently inadequate substitute."); 7-Eleven, Inc. v. Khan, 2015 WL 7194407, at *8 (D. Conn. Nov. 16, 2015) ("An unauthorized interference with a real property interest constitutes irreparable harm as a matter of law.")

instrument. Judge Williams inexplicably failed to consider that Echostage only had to move its vehicles to the parking area behind the 2135 Property just a few yards from the loading dock. Nor did Judge Williams consider the fact that Echostage could move its vehicles to the lot it leased for the purpose of removing vehicles from the Right of Way during concerts. There was no legitimate reason given why Echostage cannot relocate the vehicles to these convenient and easily accessible locations under the exclusive control of Echostage after the unloading process was completed.

Judge Williams' conclusion that it was more important to allow Echostage to violate the terms of the WFJ Deed by disregarding its contractual obligation not to park on the Right of Way than ensuring that DLY's property rights were protected and enforced is simply wrong. It is not correct to say that a party suffers a greater hardship simply because it is being forced to comply with its contractual obligations and whatever inconvenience the party might incur from having to perform under its contract is of greater importance than protecting the property rights of the other party who actually owns the property.

(F) The Public Interest Favored Entry of a Permanent Injunction.

Judge Williams did not address the public interest factor in the Final Decision. But Judge Rigsby did address that factor in the Declaratory Judgment in denying 2135 LLC's request for a preliminary injunction holding as follows: "The public

interest is clearly advanced by a legal system where individuals' property rights are governed by publicly available recorded deeds." App'x at 71. No more needs to be said on this factor except to reiterate the well settled common sense proposition that the public interest is served by requiring parties to adhere to the terms of their written agreements, especially concerning property rights and agreements that allow neighbors to invade and utilize their neighbor's property for a defined and limited purpose.

2. Judge Rigsby Did Not Err in Not Considering Extrinsic Evidence to Alter the Plain Meaning of the word "Park".

Defendants' argument at pg. 29 of their Brief that the "evidence of the circumstances surrounding the creation of the Easement, as well as performance pursuant to that Easement until 2019, precluded grant of partial summary judgment" is fundamentally flawed for two reasons. First, Echostage has failed to properly present to this Court the evidence in support of this contention. Secondly, and more importantly, Echostage's reliance upon case authority that requires the trial court to consider extrinsic evidence in interpretating a contract fails to grasp the fundamental and critical distinction between considering such extrinsic evidence in the first instance for purpose of only determining whether the contract is ambiguous. If it is determined that the contract is not ambiguous, the court is prohibited from considering any extrinsic evidence that alters or varies the unambiguous language of the contract. Judge Rigsby did consider the extrinsic evidence in determining

whether the WFJ Deed was ambiguous or not. Moreover, none of the extrinsic evidence summarized by Defendants in their Brief (without any corresponding record cite to the Appendix) suggests in any way that common usage of the word "park" was to be altered and given a different meaning under the WJF Deed so as to allow "temporary parking" on the Right of Way.

(A) Echostage Has Failed to Properly Present the Evidence In Support of its Position.

Defendants' discussion of the relevant extrinsic evidence appears in Section D, entitled "Statement of Facts," on pages 9 through 16 of their Brief. A further elaboration of the evidence is found on pages 25 to 27 in nine single spaced paragraphs. Both sections are devoid of specific citations to the record below (other than a single cite to brief testimony provided on December 6, 2021.) D.C. Ct. App. R 28(a)(7) requires that the statement of facts presented by Echostage contain "appropriate references in the record (see Rule 28(e))" and Rule 28(a)(10)(A) required that Defendants' argument contain citations to the "parts of the record on which the [Defendants] relies."

The failure of Echostage to include any citations in the record in support of the claim that Judge Rigsby did not consider extrinsic testimony altering the plain terms of the WFL Deed provides grounds for the Court not to consider this issue any further. See Kidd Int'l Home Care, Inc. v. Prince, 917 A.2d 1083, 1087–88 (D.C. 2007) (The Court is "not obliged to serve as an advocate for the appellee or required

to search the record for the purpose of sustaining the judgment of the trial court.") Defendants would be hard pressed to cite to the Court any instance where they offered extrinsic evidence to alter the meaning of the word "park" that was objected to and excluded from the record by Judge Rigsby.

(B) Judge Rigsby Properly Considered All the Evidence in Interpreting the WFJ Deed.

Echostage's assertion that Judge Rigsby failed to consider extrinsic evidence is simply wrong and fails to appreciate the critical distinction between the trial court considering extrinsic evidence for purposes of making the initial threshold determination of whether the written document is ambiguous or not, but once it is determined that the document is not ambiguous extrinsic evidence is not permitted to alter, vary or contradict the unambiguous terms of the written document. See Hershon v. Gibraltar Bldg. & Loan Ass'n, Inc., 864 F.2d 848, 852 (D.C. Cir. 1989) (explaining this two-step process of interpreting contracts and holding that "extrinsic evidence [must] reveal an ambiguity in the contract's language and prohibits the use of parol evidence to contradict the clear, ordinary meaning of the contract's words.") None of the evidence offered at the three day hearing on the preliminary injunction, in support of the cross motions for summary judgment, or at trial revealed any ambiguity in the mandate that the user "shall not park" on the Right of Way.

Moreover, when the language of a deed is clear, and the intent of a deed can be derived from the unambiguous language there is no need to look beyond the four corners of the instrument in order to interpret the deed. As explained by this Court:

> As with any dispute regarding a written contract, we look first to the plain language of the purportedly interest-creating document, id., ***and, if it is clear, that ends our inquiry***. See Found. for Pres. of Historic Georgetown v. Arnold, 651 A.2d 794, 796 (D.C. 1994) ("Deeds, like contracts, are construed in accordance with the intention of the parties insofar as it can be discerned from the text of the instrument. If a deed is unambiguous, the court's role is limited to applying the meaning of the words ...." (citations and internal quotation marks omitted)). If it is necessary to look beyond the plain language, we examine the "surrounding circumstances" of the document's execution. [Emphasis Added].

Bd. of Trustees Grand Lodge of Indep. Ord. of Odd Fellows of D.C. v. Carmine's DC, LLC, 225 A.3d 737, 743 (D.C. 2020); Found. for Pres. of Historic Georgetown v. Arnold, 651 A.2d 794, 796 (D.C. 1994) ("If a deed is unambiguous, the court's role is limited to applying the meaning of the words."). There was no need to look beyond the four corners of the WFJ Deed to understand what the phrase "shall not park" means.

However, Judge Rigsby did consider the circumstances surrounding the execution of the WFJ Deed as evidenced by the Findings of Fact that:

> 2135 LLC was represented by legal counsel in the negotiation and drafting of the easement (ROW), which 2135 LLC paid $400,000 to secure and memorialized previous practices. Hearing Tr. at 73-74 (Dec. 6, 2021). Toward the end of this negotiation, 2135 LLC insisted upon a change to the easement (ROW) language to include the sidewalk located on the loading dock. Id. at 31-32.

App'x at 65. Judge Rigsby considered the extrinsic evidence for the limited purpose of understanding when and how the WFJ Deed was created and how the Right of Way is used. In other words, Judge Rigsby did not read the WFJ Deed in a vacuum, divorced from understanding the relationships of the parties, their respective ownership in the properties, the configuration of the adjoining properties, and the need for the Right of Way.

Moreover, Defendants' summary of the evidence surrounding the creation of the WFJ Deed and the performance under the WFJ Deed offered at the hearing on Defendants' motion for a preliminary injunction, its motion for summary judgment, and at trial was admitted into evidence. Significantly, Defendants do not contend that they offered extrinsic evidence that was objected to and excluded from the record by either Judge Rigsby or Judge Williams.[12] There was nothing in the evidence submitted by Defendants that suggested in any way that the common understanding of the word "park" and the mandate "shall not park" on the Right of Waywas to have an uncommon and altered meaning under the WFJ Deed that was different from

[12] If Defendants had contended that evidence was improperly excluded from the record they would have been required to identify with specificity when this occurred. See D.C. Ct. App. R. 28(e), entitled "References to the Record," states that: "A party referring to evidence whose admissibility is in controversy must cite the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected."

the common usage and understanding of the word "park". Defendants' Brief does not articulate, nor could it, how this evidence demonstrated that the Grantor and Grantee intended that the word "park" and the mandate "shall not park" on the Right of Way would have a fundamentally different meaning from its common usage. Conspicuously absent from that summary of the evidence is the reference to any evidence that when the WFJ Deed was being negotiated WFJ and 2135 LLC understood and agreed that the phrase "shall not park" did not prohibit the right to "temporarily" park on the Right of Way for an indefinite period of time allowing the vehicles to remain idle and not in use.

Finally, even if Judge Rigsby erred, which he did not, the dispositive point is that at trial Echostage offered no evidence whatsoever regarding the extrinsic evidence surrounding the negotiation and creation of the WFJ Deed. Indeed, the only witness at trial for Echostage was its manager, who was not involved in the negotiation and creation of the WFJ Deed. 2135 LLC was not even present at the trial, having been dismissed from the case. No testimony or evidence was offered at the trial regarding any extrinsic evidence that could be properly considered in determining whether the common usage and understanding of the phrase "shall not park" was ambiguous or was to have an altered and fundamentally different meaning from its common usage.

Judge Rigsby heard and considered the testimony regarding the negotiation of the WFJ Deed, which included the request that the sidewalk portion of the loading dock be included within the Right of Way but contained no evidence whatsoever suggesting that the common usage and understanding of the word "park" was to be altered or modified to permit temporary parking to allow vehicles to remain idle and not in use on the Right of Way. Based upon those circumstances, Judge Rigsby correctly concluded that the WFJ Deed was unambiguous regarding the prohibition against parking, and therefore any extrinsic evidence offered by Defendants that attempted to vary, alter, or contradict the explicit prohibition against parking was not proper.

For purposes of the appeal, the dispositive point is that no evidence was offered at the trial regarding the negotiations of the WFJ Deed, or testimony from the individuals who negotiated the WFJ Deed. Thus, there was no evidence whatsoever that suggested the common usage of the term "park" and the phrase "shall not park" was intended to mean something other than what a reasonable person would understand the meaning of that word and phrase. Thus, whether Judge Rigsby was correct or not in granting DLY's request for Declaratory Relief interpreting the WFJ Deed is irrelevant for the disposition of this Appeal since Echostage offered no evidence at trial in support of a fundamentally different

understanding of that word and phrase, and 2135 LLC did not even participate in the trial.

3. Defendants' Brief Does Not Seek Any Relief That This Court May Grant.

It is difficult, if not impossible, to ascertain what specific relief Defendants are seeking in their Brief at pages 20 to 27. Defendants ask this Court to vacate Judge Rigsby's Declaratory Judgment and grant Defendants' Motion for Summary Judgment. Brief at pages 27; 30. However, Defendants' Motion for Summary Judgment, filed on November 17, 2023, does not articulate any relief being sought other than denial of DLY's Motion for Summary Judgment.[13] More importantly, the denial of a motion for summary judgment is not an issue that may be the subject of an appeal. See Kakaes v. George Washington Univ., 683 A.2d 128, 132 (D.C. 1996) "[A]ccording to the general rule applicable here, [the] denial of a motion for summary judgment is not reviewable on appeal, either during the trial ... or after trial." Hammond v. Weekes, 621 A.2d 838, 839 n. 1 (D.C.1993)".) Thus, Defendants'

[13] In its Brief at pg. 12, Defendants tell the Court (without any citations to the record) that: "From 2008 to 2012, before the Echostage lease was signed, 2135 LLC used the rear of the 2135 Property, including the alley, sidewalk, and loading dock, without interruption, 24 hours a day, seven days a week." There is nothing remarkable or legally significant about that statement since it is not disputed that Echostage has the right of such uninterrupted access to the loading dock under the WFJ Deed, provided it did not park on the Right of Way and used the Right of Way for the sole purpose of reaching the parking lot behind the 2135 Property and accessing and using the loading dock.

requested relief on page 30 of their Brief that this Court "grant Defendants' motion for summary judgment" is not properly before this Court.

Defendants' Brief complains that the Declaratory Judgment failed to vindicate their rights to "unimpeded access" to the Right of Way and loading dock. But what is completely missing from the Brief is any explanation of the alleged conduct by DLY that was erroneously authorized or otherwise approved by the Declaratory Judgment, which unspecified conduct allegedly impeded Echostage's use of the Right of Way and access to the loading dock. Indeed, Judge Rigsby was clear that the Declaratory Judgment provided DLY with no right "to unreasonably interfere with [Echostage's] rights to the easement nor should the Court's ruling be construed as such." App'x at 79.

The only way to make sense of this section of Defendants' Brief is to assume that when Defendants complain that the Declaratory Judgment did not grant them unimpeded access to the Right of Way what Defendants are really saying is that Judge Rigsby, and this Court, should interpret the WFJ Deed to grant Defendants the right to allow delivery vehicles to remain idle on the Right of Way when not actively using the loading dock. This leads us back to the central and only issue in the appeal—whether the WFJ Deed is properly construed to mean that Echostage is prohibited from parking, temporarily or otherwise, on the Right of Way, and that Echostage cannot allow its vehicles to remain idle on the Right of Way once their

delivery is completed or the passengers have arrived. Instead, Echostage is required to remove the vehicles from the Right of Way a few yards away to the rear parking lot of the 2135 Property, or to the lot it leases nearby for that purpose, or some other location, until there is a need to remove the equipment from the building or the passengers are ready to leave, at which time the vehicles can return to the Right of Way to use the loading dock.

4. The Interpretation of the WFJ Deed Was Ripe for Adjudication.

Defendants' argument that Judge Rigsby should not have entered Declaratory Relief interpreting the WFJ Deed to prohibit parking, temporary or otherwise, on the Right of Way because there was not sufficient evidence as to injuries that "do not appear immediate or concrete for purposes of summary judgment" is unavailing for several reasons. Brief at pg. 17.

Defendants' argument is made in complete disregard to this Court holding that a declaratory judgment may be entered without a corresponding "coercive decree" (i.e., an injunction). See McIntosh v. Washington, 395 A.2d 744, 748 (D.C. 1978) ("A declaratory judgment is one which determines and declares the rights of the parties without being immediately coupled with a coercive decree.") As held by this Court, "the Superior Court has authority to award declaratory judgments in cases within the jurisdiction of that court." Id. This Court has directed entry of a declaratory judgment even when no injunctive relief is warranted at the time. See Bd. of Trustees Grand Lodge of Indep. Ord. of Odd Fellows of D.C. v. Carmine's

DC, LLC, 225 A.3d 737, 747 (D.C. 2020) ("Jemal's/Carmine's concerns about enforcement of access to the easement are premature, as the only request for relief in this case was declaratory judgment establishing that an easement was, in fact, created. We hold now that it was; a declaratory judgment should have been entered in favor of the Odd Fellow.")

Clearly, the dispute over the interpretation of the WFJ Deed, and whether parking was allowed on the Right of Way, presented a real and substantial controversy admitting of specific relief through a decree of a conclusive character. See Keene Corp. v. Ins. Co. of N. Am., 667 F.2d 1034, 1040 (D.C. Cir. 1981) ("the question (of justiciability) in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.")

All the court decisions relied upon by Defendants involved government action and were based upon the legal principle that courts should avoid interfering in governmental administrative actions which has no applicability to the instant case.[14]

[14] See Loc. 36 Int'l Ass'n of Firefighters v. Rubin, 999 A.2d 891, 895–96 (D.C. 2010) ("Ripeness is a justiciability doctrine designed to prevent the courts . . . from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."); Richardson v. D.C. Redevelopment Land Agency, 453 A.2d 118, 121

The policy issues, constitutional principles, and separation of power concerns which caused those courts to decline exercising their equitable authority to prevent governmental action are not implicated in this case and have no precedential value in determining whether a court should exercise its equitable authority to issue a declaratory judgment resolving a contract dispute between businesses.

Echostage's argument amounts to the adoption of a bright line test that requires that the standards for granting a preliminary injunction, with its added emphasis and requirement of the need to avoid imminent irreparable injury, be satisfied as condition precedent in order to secure declaratory relief for purposes of resolving a dispute over a contract interpretation between private citizens. No such rule exists in the District of Columbia, nor do the cases cited by Echostage stand for that extraordinary proposition. To adopt such an unprecedented rule of law would materially curtail and limit the ability of citizens to secure declaratory relief from the Courts for the very purpose of hoping to avoid the need to secure injunctive

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(D.C. 1982) ("[A]ffirming the trial court's holding that this dispute was not a proper one for equitable intervention by the Superior Court in an agency action."); Hodgers-Durgin v. de la Vina, 199 F.3d 1037, 1042 (9th Cir. 1999) ("The Supreme Court has repeatedly cautioned that, absent a threat of immediate and irreparable harm, the federal courts should not enjoin a state to conduct its business in a particular way."); Hisp. Leadership Fund, Inc. v. Fed. Election Comm'n, 897 F. Supp. 2d 407, 423 (E.D. Va. 2012) ("[I]n order to establish standing for a pre-enforcement challenge to a regulation, it is enough to allege an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a regulation.")

relief. The primary salutary purpose of a declaratory judgment is to resolve the controversy in the hopes that once the disputed issue is settled by the Court the parties will abide by the terms of the declaratory judgment and there would be no need to seek injunctive relief in the future to enforce compliance with the declaratory judgment.

There have been and there will be continuing violations of the prohibition against parking on the Right of Way. The entry of Declaratory Relief was appropriate in that the controversy was ripe for adjudication as evidenced by the simple fact that the parties continue to disagree over the meaning of the word "park" and the phrase "shall not park", and how that prohibition dictates and defines how Defendants may use the Right of Way to access and use the loading dock.

VII. RELIEF REQUESTED

The prohibition on parking means that the Defendants must be actively accessing and using the loading dock in order not to be in violation of the terms of the WFJ Deed. DLY respectfully requests that this Court vacate the Final Decision and issue a permanent injunction enjoining Echostage from leaving vehicles on the Right of Way (i) until Echostage is ready to unload the equipment; (ii) after the equipment has been unloaded; and (iii) after the passengers have left the vehicles; and further enjoining Defendants from having the vehicles return to the loading dock until the equipment is ready to be loaded back onto the vehicles or the passengers

are ready to leave the 2135 Property; and further enjoining Defendants' personnel from remaining on the loading dock or Right of Way waiting for vehicles to arrive.

Defendants' request that their motion for summary judgment be granted is not an appealable issue and thus the relief requested in Defendants' Brief is not permissible. There is no other relief requested by Defendants which is discernable from their Brief. DLY's motion for summary judgment on Count I was properly entered, and therefore Defendants' motion for summary judgment which simply requested that DLY's motion be denied was properly denied.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 9th day of October, 2024, I filed the Brief of Appellee/Cross-Appellant and Appellee/Cross-Appellant's Supplement with the Clerk of the District of Columbia Court of Appeals. I further certify that the Brief of Appellee/Cross-Appellant and Appellee/Cross-Appellant's Supplement was served this 9th day of October, 2024, via the D.C. Court of Appeals E-filing system.

/s/ Bradshaw Rost
Bradshaw Rost