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ARIZONA COURT OF APPEALS

DIVISION ONE

GERALD FREEMAN and JANICE FREEMAN, husband and wife,

Plaintiffs/Appellants

v.

TOWN OF CAVE CREEK, a municipal corporation of the State of Arizona; and CAHAVA SPRINGS CORP, a corporation of the State of Minnesota; AND DONALD SORCHYCH and SHARI JO SORCHYCH, husband and wife,

Defendants/Appellees.

Court of Appeals
Division One

No. 1 CA-CV 15-0749

Maricopa County
Superior Court
No. CV2012-092643

APPELLANTS' REPLY BRIEF TO TOWN OF CAVE CREEK AND CAHAVA SPRINGS

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REBUTTAL ARGUMENT

I. The Trial Court Made Three Rulings Without Legal Analysis

1. The trial court ruled that "to the extent that plaintiff is seeking a permanent injunction against the Town that prevents the building of ***any*** trail that may run parallel or over plaintiffs easement, IT IS ORDERED denying that request." *See minute entry, filed 5/18/15 (emphasis added) (ME 5/18/15).*
2. The trial court ruled that "to the extent the plaintiff is asking for an injunction against defendant Morningstar, Cahava Springs or Donald Sorchych, IT IS ORDERED denying that request." *See ME 5/18/15.*
3. The trial court ruled that "plaintiff has established that if the trail is built…, it will no doubt lead to an unreasonable interference with the use of his roadway over the easement granted to him." "IT IS ORDERED granting plaintiff a permanent injunction against the Town.…" *See ME 5/18/15.*

This new, trial-court-created Arizona law in essence, sanctions the grant (by a servient tenement) to a non-land owner, public entity, of the right to use a dominant tenements' easement; essentially by inviting the general public to use said easement at-will, 24 hours per day and 7 days a week.

II. The Trial Court Abused Its Discretion.

The issue heard by the court below was whether or not a servient tenement could grant an easement to a public entity over and across a pre-existing deeded private easement. By denying Freemans' Complaint/Application for Declaratory Judgment ("Complaint"), count one, the trial court said "Yes." This is not a circumstance where a servient tenement was seeking to grant an easement to another private party. Freemans requested in their complaint, a determination "… whether or not Defendant Cahava and/or Defendants Sorchych may give permission to third parties, such as the Town and the public, to use the Freemans' exclusive easement." See Complaint, Count I, ¶ 2, p. 7.

Presently there is nothing stopping Cahava and/or TOCC from creating a public equestrian trail on or over any part of the Freemans' roadway easement. There is no existing Arizona law which would prohibit it; there is no injunction which would prohibit it; there simply is no prohibition against Cahava from doing anything they please with Freemans' roadway easement. Indeed there is nothing stopping Cahava from granting an easement to Town on or over Freemans' roadway easement. Only Defendant Town is (partially) enjoined from *constructing* an equestrian trail and only then to the extent they follow the trail court's minimum requirements when constructing that trail.

Arizona appellate law is silent on this point; therefore, Freemans seek a ruling from this Court of Appeals that a servient tenement may not grant a non-land owner

public entity the right to use the dominant tenements easement, no matter how small that use may be.

Neither TOCC nor Cahava directly address the issue of whether Cahava may grant a third-party public entity, who intends to invite the general public to use the trail, the right to use the dominant tenements easement. Instead TOCC and Cahava both argue that the intended trail will not unreasonably interfere with Freemans' use. The Town argues that Freemans, for the first time, have raised this issue on appeal and as such have waived the same. Such an assertion is false. In their Answer, Cahava denied that Freemans have an "exclusive easement" over Cahava's property and that they lacked knowledge to form a belief as to whether there exists a real and justiciable controversy between Cahava and Freemans. Cahava also denied that Freemans have any recognizable "interest" in preventing the use of Cahava's property or any part thereof "for any purpose." (RI, p.5, ¶¶ 3, 4). In their Complaint Freemans asserted that Cahava *does not have* a right to grant third parties such permission and in its Answer, Cahava stated that it *does have* the right to grant permission; consequently a justiciable controversy exists between the parties.

The issue remained throughout the case. Cahava acknowledged the remaining issue when they said, during their written closing argument, "the Freemans maintain that no trail can ever be established on Cahava's property, no matter what. Until that threshold issue is resolved in this case, there has been no need for detailed

engineering plans." (RI108, p. 4 ll. 18-20). Cahava also noted that "the Freemans expressly asked for a "blanket" order prohibiting *any* crossings of the existing road.…" (RI108, p. 4 ll. 20-21)(emphasis in original).

When the trial court denied the declaratory judgment count, it implicitly ruled that Cahava has the legal right to grant an easement over Freemans' easement to a third party public entity; thus, the only inquiry was that of "unreasonable interference." Instead the trial court should have ruled that the express terms of the 1969 Easement do not allow the servient tenement (Cahava) to place any improvements on the Freemans' 1969 Easement. *DND Nefson v. Gallaria Partners*, 745 P.2d 206 (Az.App.1987)(the law is clear that an easement appurtenant to a parcel of land may not be used to benefit another parcel of land to which the easement is not appurtenant).

The trial court ruled that Town may build a trail so long as Town uses the court's enumerated "minimum requirements." With all due respect, Freemans did not request that the trial court enumerate "minimum requirements" which would take an otherwise unreasonable interference and, apparently, make it a reasonable interference. Telling evidence of the trial court's abuse of discretion is demonstrated by the judge's statement at the conclusion of the trial:

> None of us, including Mr. Freeman, lives on this planet alone. We've got to share it. And at some point in time, it's not unreasonable to expect the

> Freeman's to have to share that area with other folks that have the right to be there. (Tr. 541, ll. 6-10)

"Other folks that have a right to be there," rings loud the abuse of discretion visited upon the Freemans by the trial court. And in so doing, the trial court tacitly ruled that a servient tenement *may grant* a non-land owner public entity the right to use a dominant tenement's easement. Apparently, the trial Court believed the public has a right to be there.

III. Any Partial Obstruction of the Freemans' Easement is an Impermissible Obstruction of the Entire Easement

TOCC argues that Freemans' citation to *Squaw Peak* does not support Freemans' position. This argument is wrong. The trial court granted TOCC the right to cross Freemans' roadway easement in at least two places in a perpendicular manner with a four foot and up to six foot wide foot-bed for the trail. A four foot wide foot-bed made across the Freeman's roadway easement, in any number of places, is a permanent obstruction over the entire easement.

> Thus, in *Squaw Peak*, we held that the servient estate owner was not entitled to install curbs across a seven-foot strip of an express access easement forty feet in width because it would obstruct the right-of-way for ingress and egress over the entire easement. *149 Ariz. at 413, 719 P.2d at 299* ("The servient owner has no right to place permanent obstructions in the described easement area that would prevent the dominant tenement owner from free passing over any part of the easement . . . ." (quoting *Hoff v. Scott, 453 So. 2d 224, 226 (Fla. App. 1984))).*

Hunt v. Richardson, 163 P.3d 1064, 1071 (App. 2007).

Cahava wants to rename the issue as "whether the intersection of two trails - each one fully passable - involves the creation of a "permanent physical obstruction." Cahava uses quotation marks around the phrase "permanent physical obstruction," apparently in reference to the case of *Squaw Peak*. Cahava then accuses Freemans of merely using that phrase because it appears in that case. "They use the word "perpendicular" for the sole reason that it appears in the *Squaw Peak* opinion." *See Cahava's Answering Brief, p. 12*. However, TOCC states in their opening brief at page 5 "the non-motorized trail will only make two perpendicular crossings of the easement; both crossings will be in areas that are flat and wide-open, with no site restrictions." And indeed the entire trial was replete with testimony and diagrams about the trail crossing Freemans' roadway easement perpendicularly in two places. Cahava conflates the concept that city streets are far busier than recreational desert trails with the actual issue of whether a servient tenement has the legal ability to grant a public entity a use over a private roadway easement.

Case law supports Freemans' position:

"The grant of a right to use a piece of property includes 'the last inch as well as the first inch' and a fence or obstruction placed upon it by the servient tenement is an invasion of the dominant tenements rights." *Miller v. Kirkpatrick*, 833 A.2d 536 (Md. App. 2003)(citing: *Bump v. Sanner*, 37 Md. 621 (Md. App. 1873). The findings of

Squaw Peak Community Covenant Church v. Anozira Development Inc., 719 P.2d 296 (Az. App. 1986) are consistent with the Maryland court.

> The law appears to be settled that where the width, length and location of an easement for ingress and egress have been expressly set forth in the instrument the easement is specific and definite. The expressed terms of the grant or reservation are controlling in such case and consideration of what may be necessary or reasonable to a present use of the dominant estate are not controlling. If, however, the width, length and location of an easement for ingress and egress are not fixed by the terms of the grant or reservation the dominant estate is ordinarily entitled to a way of such width, length and location as is sufficient to afford necessary or reasonable ingress and egress.

Squaw Peak citing *Aladdin Petroleum Corp. v. Gold Crown Properties, 221 Kan. 579, 584, 561 P.2d 818, 822 (1977),*

Squaw Peak had an easement for ingress and egress 40 feet in width lying 20 feet on either side of a center- line but only "used" 28 feet of paved road within the 40 feet, approximately in the middle; with plants and berms on remaining 12 feet. The issue decided was whether the servient tenement could encroach upon those 12 feet. The answer was no.

IV. <u>The Language Of The Freeman's Deeded Easement Is Not Ambiguous; Therefore, Cahava May Not Place Permanent Obstructions In The Roadway</u>

On June 21, 1971 Lloyd and Alice Daggett sold to Clyde and Francis Barker the northwest quarter of section 17, T6N, R4E, "together with an easement for ingress and egress in those certain agreements specifically described in Docket 7870, pages

605, 607 and 610.…" *See Maricopa County recorder Docket number 19710719_DK T_8827_142_3*. The document described in Docket 7870 is the first iteration of the easement at issue. The pertinent language is contained in a deed from Lloyd and Alice Daggett to Cecil V. Ramsey and reads in pertinent part: "reserving unto the grantor, his heirs or assigns, an easement for existing roadway as it exists on October 2, 1969, across the above described property." That easement was created October 2, 1969 and is found at Maricopa County recorder Docket number 19691114_DK T_7870_605. The Freemans take through the Barker line and Cahava takes through the Ramsey line. Thus in 1969 Daggett's successfully reserved an easement unto themselves and their assigns and passed that easement on to Clyde and Francis Barker in 1971.

The easement is as specific as that in the easement found in *Squaw Peak*. The difference in the Squaw Peak easement is that the language uses the term "40 feet" to describe on a piece of paper the width of the easement, and then delineates 20 feet on either side of the centerline, and then describes the geographic location of the centerline using surveyor verbiage. To ascertain the specific location of the roadway on the earth, the parties would be required to hire a surveyor to plot the location of the centerline and then measure 20 feet from either side of that centerline. If the surveyor gets it wrong, the road will be improperly located. The Freemans' easement is likewise as ascertainable by determining the dimensions of the roadway as it

existed on October 2, 1969. No surveyor can get it wrong because the road already exists. As for the dimensions, they also already exist. In other words, the roadway was already created on the earth and the parties would not be required to hire a surveyor because the road, together with its dimensions, was already in existence. There is a definite point in time for the measurements of the roadway to be compared against - October 2, 1969. In some respects the road could be 30 feet wide and in some respects the road could be 8 feet wide, but in either event the easement is quite specific. Owners of the property are allowed ingress and egress over the specific roadway as it existed on a specific date - which is the same as stating that it is a 40 foot wide easement, with 20 feet on either side of a centerline.

The *Squaw Peak* court found the language of the deed to be unambiguous and left for another day the question of whether a grant or reservation of a right-of-way "over" a particular area would be ambiguous. Freemans' unambiguous easement grants them "an easement for existing roadway as it exists on October 2, 1969."

It is clear from the wording of the deed that the whole road as it existed was set aside for ingress and egress. As such

> The servient owner has no right to place permanent obstructions in the described easement area that would prevent the dominant tenement owner from free passing over *any part* of the easement . . . . Considerations about what may be reasonably necessary for the dominant tenement owner's use or needs is not appropriate or relevant in this case. (Emphasis in original.)

Squaw Peak, citing: *Hoff v. Scott*, 453 So.2d 224, 225-6 (Fla.App.1984)

Compare the language found in *Andersen v. Edwards*, 625 P.2d 282 (Alaska 1981). The Supreme Court of Alaska held that the language the State used in reserving the easement for "itself, its successors and assigns a 100 foot right-of-way along the section line" was ambiguous as to whether it referred "to the width of the way or is merely descriptive of the property over which the grantee may have such a way as may be reasonably necessary." In Anderson, the actual roadway was 25 feet in width. Compare also *Barton's Motel, Inc. v. Saymore Trophy Co*., 306 A.2d 774 (N.H 1973). The Supreme Court of New Hampshire held that the "grant of 'a right to pass and re-pass on foot or by vehicle in common with others… along a strip of land fifty feet (50') in width' fixed the outward limits wherein the right of way was to be exercised, but is ambiguous as to whether the use of the whole 50-foot width was granted for this purpose."

Compare also *Hyland v. Fonda*, 129 A.2d 899 (N.J.App.Div.1957). The Superior Court of New Jersey, Appellate Division, in 1957, had occasion to rule about the language "reserving… the right of ingress and egress for roadway purposes along a strip 25 feet in width along the entire northerly boundary for roadway purposes.…" The actual roadway at the time the lawsuit was from 9 to 11 feet wide. The *Hyland* court noted that the language reservation "does not specifically describe the intended roadway as 25 feet in width; it provides a "right of ingress and egress for

roadway purposes along a strip 25 feet in width." Next, contrast that language with the definite language of Freemans' deeded easement: "an easement for existing roadway as it exists on October 2, 1969," remembering TOCC *agrees* "the plain language of the warranty deed creating the easement is unambiguous." *See* TOCC*'s Answering Brief, p. 13*

Idaho has recognized the rule that a permanent structure is per se unreasonable if it diminishes an easement with definite location and dimensions. *Johnson v. Highway 101 Invs., LLC*, 319 P.3d 485 (Id. 2014) (A majority of our sister states recognize a caveat to the general rule of reasonableness: a permanent structure is *per se* unreasonable if it diminishes an easement with definite location and dimensions. citing with approval, among other cases; *Squaw Peak Cmty. Covenant Church of Phoenix v. Anozira Dev., Inc., 149 Ariz. 409, 719 P.2d 295, 299 (Ariz. Ct. App. 1986)*.

This Court must, in the first instance, as a matter of law, determine if the language of the deed is unambiguous or ambiguous. *Hunt v. Richardson*, 163 P.3d 1064 (App. 2007). Freemans urge that, given the fact that both Freemans and TOCC agree that the language of the deed is unambiguous; this Court should also so find.

V. Did The Trial Court Imposed Minimum Requirements make the Trail a Reasonable Interference with Freemans Roadway Easement?

If this Court concludes that the plain terms of Freemans' easement do not bar the proposed improvement (that is, finding that the language is ambiguous) then this

Court must determine whether the trial court order properly found the intended trail was an unreasonable interference unless certain conditions, as imposed by the trial court were followed.

Cahava by its granting permission to TOCC to create the equestrian trail effectively removes this matter from an analysis of a violation of the Takings Clause; however, the actions of Cahava and TOCC, if allowed to stand, is tantamount to taking of Freemans' property without just compensation. Cahava, which is owned by local developers who develop thousands of acres in and around the Town of Cave Creek and which collaborates with the Town of Cave Creek in donating lands for open use, has essentially given TOCC *carte blanche* for creation of an equestrian trail on Cahava's property. We know it was *carte blanche* because TOCC has introduced at least seven iterations of its proposed trail location. Cahava has stated that it will not participate in the creation, cost or upkeep of any trail. Cahava will simply give permission (i.e. grant an easement) to TOCC for the trail. Such position was driven home by the testimony of Cahava principal, Mark Stapp, when he was questioned by Freemans' attorney at trial.

Q. Do you have any intention to voluntarily construct a trail?

A. No.

***

Q. So, no, you would not voluntarily participate in the costs of the trail?

A. Correct.

Q. Is Cahava willing to voluntarily deed an easement for a trail?

A. If requested by the Town.

(Tr. p. 261, ll. 1 – 3; 12 – 14; 15 – 17).

TOCC's first iteration of its proposed trail, was to simply overlay (that is lay right on top of) Freemans' roadway from Old Stage Road all the way through Cave Creek wash. Such location was the impetus in the Freemans' filing suit and obtaining a temporary restraining order. Thereafter, TOCC modified its location several times and during the deposition of Freemans' expert, James Lemon, P.E., R.L.S., intended to only overlay Freemans' roadway easement for approximately 200 feet beginning at Old Stage Road whereupon it would meander through Cahava's property and then cross Freemans' roadway again near Cave Creek Wash. TOCC again changed the proposed location of the trail at the time of trial to run parallel to the roadway and then cross the roadway perpendicularly near the beginning of the easement at Old Stage Road and then cross again perpendicularly near Cave Creek wash. The two perpendicular crossings are what the trial court ruled upon in its order.

Squaw Peak informs that: "The servient owner has no right to place permanent obstructions in the described easement area that would prevent the dominant tenement owner from free passing over *any part* of the easement…." TOCC maintains "… that the trail will not 'change the road whatsoever,' and that the roadway will continue to look 'exactly' as it looks today." *See* TOCC*'s Opening*

Brief at p. 14 (citing testimony of Town's expert trail builder). If that is true, then the trail users will have no indication that they should travel in a perpendicular direction across the Freemans' roadway easement; users will instead use the Freemans' roadway easement as feared by the Freemans and noted by the trial court.

> … Based on the "human factors" component of Exhibit 39, plaintiff has raised a reasonable concern that the users will end up on his roadway if the trail is not constructed to meet the needs and expectations of the trail users. This is true notwithstanding the construction and engineering feasibility of the trail construction. As the Court understands it, a "primitive trail" will simply invite users onto plaintiff's roadway easement if and when it becomes unusable for the intended equestrian use.… **This trail must be built to accommodate horse riders at all times with no less than 4 to 6 feet of usable trail space adequately maintained by the town.**

See ME 5/18/15, p. 3 (emphasis added). Thus, to accommodate horseback riders, there *must* be some sort of a permanent physical marking of the trail when it crosses Freemans' roadway easement, twice – which is a change/obstruction to the physical road.

So let's talk about "permanent physical obstruction." TOCC and Cahava both make much of the fact that a perpendicular crossing is minimal square footage. Cahava believes that the "intersection of two passable trails" is not a "permanent physical obstruction." Of course, this case is about a trail and a road, not two trails and not two roads. And yes, it is a distinction that matters, as much as the distinction between a horse and a car. Cahava, in their Brief at page 17, footnote 3, shares with us the dimensions of a sand volleyball court, ostensibly for the reason that the

intended creation of one in the *Leabo* case was large in comparison to the size of the beach. Juxtapose the size of the sand volleyball court with the perpendicular crossings of Freemans' roadway easement; apparently, according to Cahava, size matters. Our United States Supreme Court indicates that size *does not matter* when referring to a violation of the Takings Clause. (Appellant uses this line of argument as persuasive authority only)

In *Loretto v. Teleprompter Manhattan Catv Corp*., 458 U.S. 419; 102 S. Ct. 3164; 73 L. Ed. 2d 868 (1982), the US Supreme Court considered whether an installed cable, slightly less than one-half inch in diameter and approximately 30 feet in length, together with two large silver boxes affixed to the masonry of a building, were a permanent physical occupation of the owners' property and thus a constitutionally impermissible taking. In 1973 the state of New York enacted a law which provided that a landlord may not interfere with the installation of cable television facilities on his property or premises and may not demand payment for the same in excess of that allowed by the regulatory authority which was one dollar. In ruling that the statute was a taking the Court stated:

> "We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve. Our constitutional history confirms the rule, recent cases do not question it, and the purposes of the *Takings Clause* compel its retention." *Loretto,* 458 U.S. at 426.

In this case, the trial court has mandated that any trail to be built must be a minimum four feet in width. In order to demark a trail where it is to cross the eight foot wide Freemans' roadway easement there must be a permanent physical marker to let the trail users know that they are to stay on the trail. Thus the two combined perpendicular crossings will be at least four feet wide and combined will cover approximately 16 linear feet of roadway equaling 32 sq. ft., far larger than the TV cables in *Loretto*. It is easy to see that these crossings will be "large" enough, under *Loretto*, that if TOCC had proceeded under its eminent domain statute it would have been required to file a lawsuit, prove the taking was for public benefit, establish the value of the taken property, and then pay just compensation for the taking. Cahava attempts to allow TOCC to get for free what law requires it pay for.

Both TOCC and Cahava cite this Court to the Indiana case of *Drees Co. v. Thompson*, 868 N.E. 2nd 32, (In.2007) as a "similar case." *Drees* is easily distinguishable. In *Drees*, the servient tenement's land completely surrounded the dominant tenement. The servient tenement desired to develop his land from 29 vacant acres into 50 residential lots and in developing the lots, would still provide for ingress and egress for the dominant tenement. The court ruled because of the use of the term "non-exclusive" in the easement grant language that the grantor reserved the right to convey subsequent easements in the same lands to others. See *Drees*, 868 N.E. 2nd at 40. First, the case is distinguishable because the extension of the intended use of the

easement was to future contiguous landowners. The Court then set up and knocked down each alleged source of interference, "seeking to determine whether the condition materially impairs or unreasonably interferes with the easement right granted: to come and go over the designated strip of land to access the landlocked parcel." *Id.* Further, in *Drees*, the servient tenement complied with all zoning and planning ordinances in preparing his land to subdivide into 50 separate parcels. In this case, the servient tenement, Cahava, owns vacant land. The servient tenement has no intention of participating in the creation, payment or upkeep of an equestrian trail. In this case, the servient tenement simply intends to gift an easement to a public entity, the Town of Cave Creek, which will then invite the public at large, to use the easement.

Both TOCC and Cahava attempt to distinguish *Leabo v. Leninski*, 438 A.2d 1153 (CT. 1981). These arguments are not persuasive. In *Leabo*, plaintiffs were the dominant tenements and defendant was the servient tenement. Defendant intended to open the beach to public use and plaintiff brought an action maintaining that defendant caused material interference with their easement rights. Plaintiffs prevailed at trial and on appeal. Cahava maintains that *Leabo* does not favor the Freemans because it was the objecting owners who prevailed at trial. Cahava is wrong as the objecting owners were the dominant estate owners; thus, placing Freemans in the same position as the prevailing parties in *Leabo*. In *Leabo* the court first had to

determine if the easement grants were in gross or appurtenant. The trial court determined, and the Supreme Court agreed, that the easements were appurtenant. The trial court went on to find that the actions of the servient tenement in opening the beach to the public constituted an irreparable injury and that the dominant tenements were entitled to injunctive relief. In upholding the trial court's grant of injunction, the Supreme Court reiterated many facts found by the trial court:

1. "The record reveals that there was ample evidence to show that the plaintiffs were disturbed or obstructed in the exercise of their right to use their beach easements." *Leabo,* 438 A.2d at 1156.
2. "The contention that the impact of the public using the beach was minimal is contradicted by the defendant's own testimony." *Id.*
    a. "He admitted stating that "thousands have come" to the beach since he opened it"; *Id.*
    b. "that "we had more than 500 people last year after the high school prom"; that "busloads of kids . . . pulled up one day . . . used the beach"; *Id.*
    c. "that if there was not enough parking, he was going to "shuttle the people from downtown Guilford" to the beach"; *Id.*
    d. "that he had purchased the Walden Hill Road piece to provide "parking for 2000 bikes and 200 cars" for people using the beach"; *Id.*
    e. "that his efforts to make the beach public were so successful that he boasted the beach is "open. Everybody knows. No signs are needed anymore, everybody just comes down there and uses it." *Id.*

This case became comment e to section 4.9 of the Restatement. "The facts of illustration 10 are drawn from *Leabo v. Leninski, 182 Conn. 611, 438 A.2d 1153 (1981)."* See: Reporter's Notes, *Creation of additional servitudes, Comment e*.

> **Comment to Restat 3d of Prop: Servitudes, § 4.9 provides:**
>
> *e. Creation of additional servitudes*. Under the rule stated in this section, the holder of the servient estate may create additional servitudes in land burdened by a servitude if the additional servitudes do not unreasonably interfere with the enjoyment of the prior servitude holders.
>
> **Illustrations:**
>
> O, the developer of a 10-lot subdivision near a lake, retained title to Blackacre, a lot fronting on the lake which included a beach. O granted an appurtenant easement for use of Blackacre for recreational purposes in the deeds conveying each of the 10 lots in the subdivision. Twenty years later, a successor in title to Blackacre granted an easement to the owner of Whiteacre, property outside the subdivision, for recreational purposes. Whiteacre is used as a campground and draws hundreds of visitors during the summer. In the absence of other facts or circumstances, **the owner of Blackacre was not entitled to create the additional easement rights because the likely increased use will unreasonably interfere with enjoyment of the previously created easements** (emphasis added).

Just like the defendant (Leninski) in the Leabo case, TOCC has great plans to use the Freemans' private easement to connect the Cave Creek Regional Park and the Spur Cross Ranch Conservation Park (Tr. p. 448, l. 25 – p. 449, l. 11). The Maricopa County Regional Trail connects all the way to the Lake Pleasant area. TOCC's plan is that the TOCC trail system will ultimately connect to the huge, Maricopa County Regional Park Trail System (Tr. p. 449, l. 15 – 23). Trial testimony also revealed that

the trail on Spur Cross Road is very active with bicyclists, hikers, and horseback riders as it leads to the Town of Cave Creek or Spur Cross. Further, that the Morningstar area is just waiting for an easement to connect to the west side, and that lots of people on the west side want to come to Cave Creek on a trail such as the one proposed by TOCC (Tr. 527, l. 13 – 20). Furthermore, there are two guide businesses and horse rental ranches in the area, which rent horses to riders who would also use the trail, resulting in even more traffic on the easement (Tr. 520, l. 8- p. 531, l. 11). And just like the court in *Leabo* and the Restatement 3d Property, this Court of Appeals should grant a permanent injunction against Cahava and TOCC.

In *Kao v. Haldeman*, 556 Pa. 279, 728 A.2d 345 (Pa. 1999), the Pennsylvania Supreme Court held that the easement owners were entitled to obtain injunctive relief to prevent their neighbor from trespassing on their private roadway easement. The neighbor who was using the roadway was not the servient owner, but was a third party who was using the private roadway, as a matter of preference, not necessity. Town, a third party, intends to allow the public to use the roadway, as a matter of preference. Town's protestations notwithstanding, the rules of *Kao* are instructive.

CONCLUSION

In this case the trial court denied a permanent injunction against TOCC and or Cahava which would prohibit *any* crossing of Freemans' roadway easement. This Court of Appeals is limited to considering whether the trial court abused its discretion

in that specific instance. *Squaw Peak*, citing: *Financial Associates Inc. v. Hub Properties, Inc., 143 Ariz. 543, 545, 694 P.2d 831, 833 (App.1984)*.

The trial court clearly found unreasonable interference when it entered a permanent injunction against TOCC; however, the trial court improperly considered and imposed factors upon TOCC and the Freemans, which the trial court believed would make the unreasonable interference acceptable. Such a decision was an abuse of discretion. TOCC did not cross appeal.

The *Squaw Peak* court found "… as a matter of law that permanent curbing running perpendicular across an easement is an obstruction of that easement," *Squaw Peak, supra,* at 300. Similarly, two permanent trail crossings are an obstruction of the Freemans' roadway easement.

Freemans respectfully request that this Court:

1. Reverse the trial court and remand the case with instructions for the trial court to enter judgment in favor of Freemans regarding the declaratory judgment count. The instruction should indicate that the clear language of the deeded easement is for the roadway as it existed on October 2, 1969, and therefore no improvement by the servient tenement may be made to the roadway; and thus, a permanent injunction against Cahava, and its successors and assigns should be granted;

2. Alternatively Freemans request this Court overturn the trial court and rule that a servient tenement may not give a public entity permission to cross over the deeded roadway easement because the public crossing of the private roadway easement would be *per se* unreasonable interference; and rule that a permanent injunction against Cahava and its successors and assigns should be granted, and further, that this court overrule the trial court and rule that because the topography of the proposed trail is such that TOCC cannot comply with its own design guidelines, that any trail which does not meet those guidelines would be unreasonable interference and may not be built, thus, a permanent injunction against Cahava and its successors and assigns should be granted.
3. Freemans respectfully request that this Court reverse the trial court and grant attorney's fees to Freemans' for their prosecution of this case in the trial court. This Court has held that litigation over interference with a recorded easement arises out of contract and thus falls within the scope of A.R.S. §12-341.01(A). See *Squaw Peak, supra*.
4. Finally Freemans respectfully request that pursuant to ARCP 21 (A), this Court grant them an award of attorneys' fees and costs on appeal pursuant to A.R.S. §12-341.01 (A). *See Squaw Peak, supra*.

Respectfully submitted this 21st day of April, 2016.

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