Circuit Court for Charles County
Case No. 08-C-14-2271

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1797

September Term, 2015

LANCASTER NEIGHBORHOOD ASSOCIATION, INC.

v.

SOUTHERN MARYLAND ELECTRIC COOPERATIVE, INC.

Graeff,
Nazarian,
Leahy,

JJ.

Opinion by Leahy, J.
Dissenting Opinion by Nazarian, J.

Filed: August 4, 2017

The underlying case involves a dispute over the scope of an express utility easement granted in 1986. The developer of the Lancaster Neighborhood located in Charles County, Maryland, granted Southern Maryland Electric Cooperative, Inc. ("SMECO" or "Appellee") seven electric transmission easements during the 1980s to install an electrical transmission system and provide electricity to the Lancaster Neighborhood. In December 2013, SMECO replaced equipment in one of the easement areas in response to certain equipment failures, including a switch that now partially obstructs the view of the Lancaster Neighborhood marquee sign.

The Lancaster Neighborhood Association, Inc. ("LNA" or "Appellant") brought a declaratory judgment action against SMECO in the Circuit Court for Charles County, alleging that SMECO exceeded the scope of the easement when it installed the replacement switch and that the replacement switch substantially increased the burden on their property. LNA raised a new claim at the summary judgment hearing that the switch violated the Charles County Code. The circuit court granted summary judgment in favor of SMECO, finding that, as a matter of law, the replacement switch neither exceeded the scope of the easement nor substantially increased the burden to the servient estate. The circuit court, however, did not address the code violation.

Appellant presents two issues for our review:

> 1. "Did the Trial Court err in concluding as a matter of law that the language contained in the Right-of-Way Easement agreement was dispositive of the case without considering any other evidence in the record demonstrating substantial interference with the Appellant's ordinary and reasonable use of the servient property?"

> 2. "Were the limited and collateral findings of fact made by the Court at the conclusion of its Opinion clearly erroneous, since the Court referred to language involving 'replacement' and the issue of 'substantial increase' instead of 'substantial interference' with the servient landowner; and by also further failing to conclude that there was no genuine dispute as to any material fact on the record?"

We hold that the trial court decided correctly that the replacement switch was a permissible use within the express terms of the easement, but failed to apply properly the test to determine whether the replacement switch substantially increased the burden to the servient estate. We, therefore, reverse and remand this case to the trial court for further proceedings consistent with this opinion.

BACKGROUND

A. Factual Background

SMECO, a customer-owned electricity supplier, was formed in 1936 to provide electricity to customers in Calvert, Charles, St. Mary's, and Prince George's Counties. SMECO routinely obtains express easements from property owners, which are then recorded in the land records, in order to create, expand, and maintain its electrical distribution system.

Between July 21, 1982, and July 9, 1986, St. Charles Associates, the developer of a planned residential community which came to be known as the Lancaster Neighborhood, granted seven express easements in the Lancaster Neighborhood to SMECO to supply electricity to the Lancaster Neighborhood. St. Charles Associates granted these easements to SMECO on the following dates: one on July 21, 1982, one on October 27, 1983, four easements on July 23, 1984, and one on July 9, 1986. Each easement was memorialized

in a form contract titled the "Distribution Line Right-of-Way Easement" and recorded in the land records for Charles County. The Distribution Line Right-of-Way Easement dated July 9, 1986, granting an easement to SMECO at the entrance to the Lancaster Neighborhood at the intersection of Smallwood Drive and Lancaster Circle ("1986 Easement") is the subject of this appeal. The 1986 Easement provides:[1]

> [W]e, the undersigned Grantors, St. Charles Associates . . . do hereby grant unto Southern Maryland Electric Cooperative, Inc. . . . the right to enter upon the lands owned by the undersigned Grantors . . . situated in the 6th Election District of Charles County, State of Maryland, and being a tract of land consisting of approximately ____ acres, conveyed to these grantors by deed of Interstate Land Development Company, dated May 25, 1976, Rec. Book 454, folio 21 lying on the Smallwood Drive road leading from Route 301 to Middleton Road, adjoining lands of St. Charles and St. Charles, and *to place, construct, operate, repair, maintain, relocate and replace* from time to time thereon or thereunder and in, under and upon streets, roads or highways on or abutting said lands an underground or overhead electric distribution line or system, as staked by the Cooperative Engineer, *including poles and all necessary fixtures and appurtenances in connection therewith*, and to cut and trim trees and [shrubbery] thereon to the extent necessary at least ____ feet on each side of the feeder [illegible] line or system; and cut down, from time to time, all dead, weak, leaning or otherwise dangerous trees, which may strike the lines in falling. All facilities, fixtures and appurtenances erected hereunder shall remain the property of the Cooperative.
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> Special Agreements: Underground 750 MCM Feeders parallel with both sides of Smallwood Drive from Route 301 to Middleton Road. SMECO requires 25 foot row on North side and 20 foot South side of Smallwood Drive.

(Emphasis added).

SMECO installed a switch in the easement area sometime in 1986 to provide

[1] The other six easements contain the same language describing the purpose of the easements. The contracts differ only in two respects—the location of the easement and the "Special Agreements" sections.

electricity to the Lancaster Neighborhood.[2] Kenneth Capps, senior vice president of engineering and operations and chief operating officer for SMECO, explained in his affidavit that a switch is used to "regulate[] the distribution of electrical service[,]" and testified during his deposition that this particular switch was "used to branch off of a main feeder . . . into [the] Lancaster Neighborhood."

On or about December 13, 2013, SMECO replaced the original switch and its cement pad after "equipment failures[, which occurred on April 28, 2012, and August 5, 2012], the growth of the service area[,] and available technology upgrades." Although the switch replacement was of like-kind, the replacement switch is a different model and year of manufacture and has larger dimensions. SMECO also replaced the cement pad with a fiberglass pad.

Shortly after the replacement switch was installed, LNA members noticed that the switch obstructed the view of the Lancaster Neighborhood marquee sign. LNA's property manager, Megan Quinn Smith, contacted SMECO to express LNA's dissatisfaction with the placement of the switch and to inquire whether the switch was permanent.[3] The problem was the location and increased size of the replacement switch.

The parties dispute the variation in size and location. Neither party, however, took

[2] The briefing and record contain conflicting years as to when SMECO installed the original switch. SMECO's counsel confirmed at oral argument that the switch was installed in or around 1986.

[3] Alan Colvin, board member of LNA, testified during his deposition that the Lancaster Neighborhood marquee sign existed when he moved to the neighborhood in 1986. Mr. Colvin also testified that LNA upgraded the marquee sign in 2011 or 2012.

measurements of the original switch while it was installed. SMECO's position is that 1) the "[replacement] Switch was installed at the same precise location as the original switch;" 2) "the approximate size of the original Switch was a Width of 70.50" x Depth of 76.4" x Height of 44.5";" and 3) "the [replacement] Switch measurements are a Width of 70.50" x Depth of 76.4" x Height of 48.5"." LNA's position is "the prior switching device was a[t] knee level whereas the current switching devise is at shoulder level," and the replacement switch is "twice the height" of the original switch. There are two other factors that affect the height of the switch: 1) the foundation it rests on, called a pad; and 2) the grade of the ground. At the time of the hearing in the underlying case, SMECO did not have either of these measurements for the original switch.

In a letter to LNA's counsel dated April 14, 2014, SMECO's general counsel summarized two phone calls that took place on February 19, 2014, and March 11, 2014, between the parties, and reiterated "that SMECO was amenable to discussing a possible resolution of [LNA's] complaint about the replacement switch box blocking view to the Lancaster Neighborhood Association's sign." On May 1, 2014, LNA's counsel sent a letter in response demanding that SMECO remove or relocate the switch by May 16, 2014. SMECO then informed LNA that the location at issue was encumbered by easements granted to SMECO; the switch had been installed in the same location since the mid-1980s; and SMECO would not relocate the switch.

Mr. Capps explained in his affidavit that "SMECO investigated the potential of relocating the switch approximately five feet to the East of its installed location" but "[t]hat

due to the number of lines converging at the situs of the switch, it would be necessary for SMECO to cut, splice and extend multiple lines in order to relocate the switch," which would "create additional opportunities for that respective line to fail." SMECO determined that moving the switch five feet to the east was not a viable solution because "SMECO owes a duty to its customers, . . . includ[ing] those within the Lancaster Neighborhood, to minimize power outages[.]"

B. Procedural History

LNA filed the underlying complaint for declaratory relief in the Circuit Court for Charles County against SMECO on September 2, 2014. LNA alleged the replacement switch exceeded the scope of the easement and obstructed LNA's marquee sign. On October 17, 2014, SMECO filed a counter-complaint alleging that LNA breached the covenant of quiet enjoyment of SMECO's interest in the easement by filing the lawsuit. This case was scheduled for a two-day jury trial set to begin on December 8, 2015.

On December 17, 2014, at the beginning of the discovery period, SMECO filed a motion for summary judgment—almost one full year before the scheduled trial. SMECO argued that its current use was within the scope of the easement's express grant "to install, maintain and replace an electrical distribution line together with necessary fixtures and appurtenances," and that "such use does not place a substantially increased burden on the property of [LNA.]" In support of its motion, SMECO submitted the affidavit of Mr. Capps explaining SMECO's position:

> That multiple electrical distribution lines converge at the intersection of Lancaster Circle and Smallwood Drive (the 'Subject Location');

That the convergence of the foregoing distribution lines is administered by a piece of electrical distribution equipment known as a 'Switch';

That the Switch amongst other duties, regulates the distribution of electrical service amongst several different power loads allowing a higher capacity line to be tied to and allow distribution amongst several lower capacity distribution lines;

That the original Switch was installed at the subject location in approximately 1984;

That due to multiple reasons to include but not limited to: equipment failures, the growth of the service area and available technology upgrades, SMECO made the determination in the Fall of 2013 to replace the original switch at the Subject Location with a [replacement] Switch;

That the [replacement] switch at the Subject Location was installed in December 2013;

* * *

That the original Switch was installed upon a mounting pad but over the course of the last 30+ years, the prior mounting pad had settled below grade;

* * *

That the mounting pad is necessary to keep the switch above grade so as to allow SMECO to access the Switch cabinets in a safe and proper manner;

* * *

That SMECO investigated the potential of relocating the switch approximately five feet to the East of its installed location;

That due to the number of lines converging at the situs of the switch, it would be necessary for SMECO to cut, splice and extend multiple lines in order to relocate the switch;

That whenever you cut, splice and extend lines, you create additional opportunities for that respective line to fail; and

> That SMECO owes a duty to its customers, to include those within the Lancaster Neighborhood, to minimize power outages and as a result SMECO declined to risk the additional chance of line failure(s) which movement of the Switch would have created.

In opposition to SMECO's motion, LNA argued that the material facts in dispute precluded summary judgment, and submitted the counter-affidavit of Megan Quinn Smith to demonstrate the dispute:

> [Megan Quinn Smith] has read the Affidavit of . . . [Mr.] Capps, and disputes the measurements which the Defendant has taken of the device in its present location which admittedly involves the fact that the former device was *more than several inches lower than the present device* at the location due to settlement of the ground which was supporting the previous switching device. In addition, the ground was excavated in this area and photographs were taken of that process, so that the [sic] said Kenneth M. Capps, would not have information as to the prior ground level or the settlement which had occurred over a number of years prior to the [replacement] switching device being installed in December 2013. In addition the switching device is situated on a large pad several inches in height. Furthermore, based upon personal observations the measurements of the presently installed switching device are greater than the measurements of the prior device, since by admission of the Defendant and according to the Affidavit of [Mr.] Capps the prior switching device had settled over time.
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> * * *
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> The previous switching device did not obstruct the view of the marquee signage, and the present switching device unnecessarily obstructs both the entrance way and roadway vantage points of the marquee signage of [the] Lancaster Neighborhood. The marquee signage which was previously in a different position at the time of the installation of the switching device and the view of the marquee signage is now clearly and significantly obstructed by persons seeking entrance into the Lancaster Neighborhood.

LNA also argued, *inter alia*, that the express language of the easement did not grant SMECO the right to install structures other than utility poles and that SMECO's use was beyond "what is reasonable and what was contemplated by the parties" in the easement

contract.

The circuit court held a hearing on SMECO's motion for summary judgment on September 24, 2015. During this hearing, LNA introduced a new issue: that the height of the replacement switch violates the Charles County Code § 297-28, governing visibility at intersecting roads, which we discuss in detail *infra*. LNA did not include this claim in its complaint because the survey that revealed the code violation was completed in September 2015 shortly before the summary judgment hearing.

Ruling from the bench, the trial court granted the motion in favor of SMECO, finding as a matter of law 1) SMECO acted in the scope of the 1986 Easement and 2) the replacement switch did not substantially increase the burden on the servient land. The circuit court's summary judgment order only disposed of LNA's claims against SMECO; SMECO's counter-claim against LNA for breach of the covenant of quiet enjoyment remained. The circuit court did not rule on the Charles County Code violation and it admitted into evidence the survey of the easement demonstrating the violation of Charles County Code § 297-28 after it granted SMECO's motion for summary judgment.

On October 16, 2015, LNA filed a motion pursuant to Maryland Rule 2-602(b) requesting the circuit court to enter a final judgment as to the claims disposed of by the summary judgment order. On October 21, 2015, LNA filed a notice of appeal following the circuit court's grant of summary judgment in favor of SMECO and noted its pending motion before the circuit court. Although the circuit court denied LNA's motion on November 16, 2015, the circuit court's summary judgment order became a final judgment

when SMECO voluntarily dismissed its counter-complaint on December 7, 2015.[4] Accordingly, on December 17, 2015, LNA filed a second notice of appeal, appealing the circuit court's then-final judgment.

DISCUSSION

Before this Court, LNA contends the trial court improperly granted summary judgment because there were material facts in dispute, including whether the replacement switch's interference with LNA's use of its land was substantial, whether SMECO changed the location of the switch, and whether the Charles County Code was violated. According to LNA, the dispute over these material facts should have precluded the trial court from determining the scope of the easement and whether the replacement switch substantially increased the burden to LNA's property as a matter of law.

We review the trial court's grant of summary judgment to determine whether it was legally correct. *Laing v. Volkswagen of Am., Inc.*, 180 Md. App. 136, 152–53 (2008).

[4] We note that, in addition to its oral ruling granting summary judgment in favor of SMECO and related docket entry, the trial court did not issue a written declaratory judgment order defining the rights of the parties and then enter this order on the docket in writing. Maryland Rule 2-601(a) requires that "[e]ach judgment . . . be set forth on a separate document[.]" *See Secure Fin. Serv. Inc. v. Popular Leasing USA, Inc.*, 391 Md. 274, 280–81 (2006) (citation omitted) (explaining that when a trial court determines that a declaratory judgment is appropriate, the court must enter, in writing, "'a declaratory judgment . . . defining the rights and obligations of the parties or the status of the thing in controversy'"). Failure to do so, as here, however, is procedural error, not jurisdictional. *Balt. Cty. v. Balt. Cty. Fraternal Order of Police Lodge No. 4*, 439 Md. 547, 566 (2014). The Court of Appeals has held that the parties waive this issue where neither party objected to the absence of a separate document and the circuit court intended its ruling to be a final judgment. *See Suburban Hospital, Inc. v. Kirson*, 362 Md. 140, 156 (2000). As in *Kirson*, neither party identified this issue and all claims were adjudicated at the time LNA noted its appeal. *See id.* Therefore, we determine the issue was waived.

Maryland Rule 2-501(f) provides that the trial court "shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." A dispute over non-material facts "will not defeat an otherwise properly supported motion for summary judgment, but if there is evidence upon which the jury could reasonably find for the non-moving party or material facts in dispute, the grant of summary judgment is improper." *Okwa v. Harper*, 360 Md. 161, 177 (2000) (citation omitted).

Easements restrict the servient estate owner's use of their property. *Reid v. Washington Gas Light Co.*, 232 Md. 545, 548–49 (1963). The general rule is the dominant estate owner may not make an "alteration . . . [that] would increase such restriction except by mutual consent of both parties." *Id.* at 549. An alteration is said to increase the restriction when "the change is so substantial as to result in the creation and substitution of a different servitude from that which previously existed." *Id.* Maryland courts have consistently applied a two-part analysis to determine whether an alteration increases the previously-agreed-to restrictions on the servient estate property. *See, e.g.*, *Chevy Chase Land Co. v. United States*, 355 Md. 110, 152 (1999); *Washington Gas Light*, 232 Md. at 551; *W. Arlington Land Co. of Balt. Co. v. Flannery*, 115 Md. 274 (1911); *Baker v. Frick*, 45 Md. 337 (1876); *Everdell v. Carroll*, 25 Md. App. 458, 465–66 (1975); *Fedder v. Component Structures Corp.*, 23 Md. App. 375, 379, 381 (1974). In *Washington Gas Light*, the Court of Appeals conveyed a clear articulation of this two-part analysis. First,

we must determine whether the dominant estate owner has a right under the terms of the easement to make the alteration at issue. 232 Md. at 549. Second, if the dominant estate owner had such right, we determine whether "the exercise of the right place[d] a substantially increased burden on the servient estate." *Id.*

We hold that the trial court decided correctly, applying *Washington Gas Light*, that the replacement switch was a use permitted by the express easement. However, we must reverse the circuit court on two grounds. First, the circuit court incorrectly applied the second part of the test articulated in *Washington Gas Light*. Second, the trial court erred in granting summary judgment because there were material facts in dispute, including whether the replacement switch violated the Charles County Code.

I.

Scope of the Easement

Challenging the trial court's legal conclusion under part one of the *Washington Gas Light* test, LNA contends that SMECO's use of the easement was not permitted by the express terms of the easement because the easement does not permit structures other than poles at ground level.[5] Recognizing, perhaps, the weakness of this argument, LNA also contends that the easement did not permit SMECO to increase the size or change the

[5] Clearly, even if the easement did not permit a switch or anything else that was not a pole at ground level within the easement, the doctrines of waiver and prescriptive easement preclude LNA from making this argument. *Kirby v. Hook*, 347 Md. 380, 392 (1997) (listing the elements of obtaining a prescriptive easement). SMECO originally installed the switch in or around 1986—30 years ago—far exceeding the 20 year statute of limitations given to a land owner to challenge a prescriptive easement.

location of the switch. Additionally, LNA asserts that the trial court erred in relying solely on the language of the easement to determine SMECO's rights because case law dictates the survey "as staked by Cooperative Engineer" is the "operative document" to determine the parties' intent of the scope of the easement and this document was not provided during discovery. LNA argues that the location of the original switch is an issue of fact,[6] that the switch was not replaced with a like-kind switch because the replacement switch was larger, and that LNA's affidavits establish that the location of the replacement switch is different.

SMECO contends that the trial court correctly granted summary judgment because the express easement clearly and unambiguously granted SMECO the right to "maintain, repair, replace and relocate an underground or overhead electric distribution line or system and necessary fixtures and appurtenances within an easement area;" the switch is an appurtenance to the electrical distribution system; the original switch was replaced with a

[6] LNA bears the burden of proof and did not meet it on this point. *See Chesapeake & Potomac Telephone Co. of Maryland v. Hicks*, 25 Md. App. 503, 523 (1975) (citation omitted) ("The basic rule is that the burden of proof is on the party asserting the affirmative of the issue, as determined by the pleadings and the nature of the case."). LNA did not present evidence and the record does not contain evidence that the location of the switch was moved from the original 1986 location.

LNA also argues that the vault (smaller box located next to the switch) was not located within the easement area. First, LNA presented no evidence that the location of the vault was changed during the replacement of the switch in December 2013. Second, at oral argument in this appeal, SMECO's counsel confirmed that the vault was not changed during the December 2013 replacement. Therefore, even if the vault is located outside the easement area, the vault has existed in its current location for over 30 years and as such LNA is precluded from challenging it by waiver and prescriptive easement. *See Turner v. Bouchard*, 202 Md. App. 428, 441 (2011) ("To establish an easement by prescription a person must make an adverse, exclusive, and uninterrupted use of another's real property for twenty years.")

like-kind switch; and the replacement switch is located within the easement area. In response to LNA's assertion that the "as staked" survey is necessary to determine the intent of the parties, SMECO avers that the phrase "as staked by Cooperative engineer" refers to the location of the easement generally, not each and every pole, appurtenance, or fixture to be located within the easement area.

In *Washington Gas Light*, the petitioners owned a 17-acre plot subject to a 1930 utility easement. 232 Md. at 547. The utility easement granted Washington Gas Light's predecessor in interest "the right to lay, maintain, operate and remove a pipe line for the transmission of gas[.]" *Id.* at 548. The easement also granted Washington Gas Light the option, for 10 years from the date of the easement agreement, to lay additional pipes alongside the original pipe. *Id.* In 1957, Washington Gas Light replaced the original twelve-inch pipe with a sixteen-inch pipe to increase transmission capacity. *Id.* at 547–48. After the installation, the petitioners, claiming the easement did not permit Washington Gas Light to increase the pipe size, sought an injunction ordering Washington Gas Light to remove the sixteen-inch pipe. *Id.* at 546.

Applying the first prong of the analysis, the Court of Appeals examined the language of the easement grant to determine whether Washington Gas Light, under the terms of the easement, had the right to increase the pipe size. 232 Md. at 546–47. The Court looked to the language of the easement and concluded that reading the easement grant together with the option to lay an additional pipe "demonstrate[d] that the parties contemplated a future need for modifications of the original line." *Id.* at 550. But

Washington Gas Light did not exercise that option and the option had expired at the time Washington Gas Light replaced the pipeline. *Id.* The Court determined that "the expiration of the option meant that no more land could be burdened with additional lines in the absence of further negotiations and payment[.]" *Id.* However, Washington Gas Light "simply replaced a particular size pipe in the same existing *pipeline*[]" without burdening more land, and as a result the pipe replacement constituted a permissible "alteration of the *instrumentality* of the easement." *Id.* at 550–51 (emphasis in original).

In *Flannery*, the West Arlington Improvement Company ("Improvement Company") sold land containing a sewer pipe to West Arlington Land Company ("Land Company"). 115 Md. at 275–76. The Improvement Company retained title to a sewer pipe that serviced West Arlington and extended through the property. *Id.* It also reserved an easement over the land to maintain, repair, operate, and to enlarge the sewer pipe by means of a larger pipe or by the addition of another pipe line laid parallel if the capacity of the pipe became insufficient for future use. *Id.* at 276. The Improvement Company granted the Land Company the right to use the sewer pipes to provide a sanitary sewerage system to the houses that would be built on the property. *Id.* at 276–77. Eventually, the Improvement Company sold sewerage rights to other parties and one such party, Flannery, replaced the 15-inch sewer pipe with an 18-inch sewer pipe and created an open connection to provide sewer service to a suburban development east of West Arlington. *Id.* at 277.

Viewing Flannery's act as a trespass on its property, the Land Company filed suit for injunctive relief. *Id.* at 278. The Land Company alleged that the Improvement

Company's act of selling the rights, which resulted in Flannery replacing part of the original 15-inch pipe with an 18-inch pipe, and using the sewer pipe to carry sewer from a suburban development east of West Arlington increased the restriction to the Land Company's property in violation of the easement. 115 Md. at 278.

The Court reiterated the general rule that "because an easement is a restriction upon the rights of property of the owner of the servient estate, [] no alteration can be made by the owner of the dominant estate which would [] increase such restriction." *Id.* at 279. In determining whether Flannery's sewer pipe replacement was permissible, the Court interpreted the terms of the easement and then evaluated the Land Company's claims that such actions were irreparably harming its property. *Id.*

Reviewing the deed of the property, the Court determined that the Improvement Company retained legal title to the sewer pipe and reserved an easement over the land to repair the sewer pipe. *Id.* at 279–80. There was no doubt that the parties contemplated the potential future need to expand the sewer pipe at the time of the conveyance because the express terms of the easement allowed for the enlargement of the sewer pipe in anticipation of the need for increase in capacity in the future. *Id.* at 280.

Taking instruction from *Washington Gas Light* and *Flannery*, we must determine whether LNA granted SMECO the right to replace parts of the electrical transmission system in the 1986 Easement. *Washington Gas Light*, 232 Md. at 549; *Flannery*, 115 Md. at 279. "The interpretation of written instruments is a question of law for the court." *White v. Pines Cmty. Improvement Ass'n. Inc.*, 403 Md. 13, 31 (2008). Therefore, we review *de*

novo the trial court's legal conclusion regarding part one of the *Washington Gas Light* analysis.

Applying the rules of contract construction, we begin by reviewing the language of the grant to determine the scope of the easement. *See Chevy Chase Land*, 355 Md. at 143. "[W]hen the language of the contract is plain and unambiguous there is no room for construction, and a court must presume that the parties meant what they expressed." *White*, 403 Md. at 32 (citations omitted) (quoting *Garfink v. Cloisters at Charles, Inc.*, 392 Md. 374, 392–93 (2006)). "[T]he clear and unambiguous language of an agreement will not give [way] to what the parties thought that the agreement meant or intended it to mean." *Id.* "[A]ny doubtful language must be resolved in favor of the grantee [SMECO]." *Washington Gas Light*, 232 Md. at 549.

The 1986 Easement, in pertinent part, grants SMECO the right

> to place, construct, operate, *repair, maintain, relocate and replace from time to time thereon or thereunder* and in, under and upon streets, roads or highways on or abutting said lands an underground or overhead electric distribution line or system, as staked by the Cooperative Engineer, *including poles and all necessary fixtures and appurtenances in connection therewith*.

(Emphasis added). The plain language of the easement demonstrates that the parties contemplated that SMECO's maintenance of the electrical distribution system would require placing and replacing "fixtures or appurtenances" of the electrical distribution system. The 1986 Easement does not define appurtenance; however, it is generally defined as "[s]omething that belongs or is attached to something else." Appurtenance, Black's Law Dictionary 123 (10th ed. 2014). The evidence before the court established that the switch

fell within the definition of appurtenance because the switch was a necessary and "integral part of any distribution system." Therefore, the trial court correctly concluded that, as a matter of law, the easement permits the replacement or relocation of the switch, an "appurtenance[] in connection" with the electrical transmission line or system. Accordingly, we hold that the 1986 Easement permitted SMECO to replace (and relocate) the 1986 switch with a replacement switch in December 2013 within the easement area.

II.

Permissible Alterations to the Easement

Next, we consider whether the trial court erred in determining that SMECO's exercise of its right to replace the switch was a permissible alteration and did not "place a substantially increased burden on the servient estate [LNA's property]." *Washington Gas Light*, 232 Md. at 549. LNA, as the complaining party, had the burden to prove SMECO's use of the easement substantially increased the burden to the servient estate. *Hicks*, 25 Md. App. at 523. As the Court of Appeals noted in *Baker*, *supra*, the question of whether a particular use on an easement "interfered with the reasonable use of the right of way . . . [is] to be decided by the jury." 45 Md. at 343; *see also Everdell*, 25 Md. App. at 473 (citations omitted).

A. Obstruction to LNA Marquee Sign

LNA contends that the trial court's findings that there was no substantial interference with LNA's ordinary use of its property—referring to the height and location

of the replacement switch—was clearly erroneous.[7] LNA asserts that the trial court "never considered genuine disputed material facts as to how the Appellant was prevented from using the servient property or the change in location or the character of use[.]" Additionally, LNA argues that *Washington Gas Light* is not a factual precedent and, therefore, not dispositive as the trial court concluded because it involved an easement located below ground.

SMECO contends that the trial court's findings—that there was no substantial increase in burden and no unreasonable interference on the servient estate—were not clearly erroneous because the scope of the easement permitted switches to be located within the easement area and use of the easement was consistent with terms of the 1986 Easement.

Washington Gas Light and *Flannery* demonstrate the trial court's error and reinforce this Court's determination in the underlying case. Part two of the test instructs the trial court to determine whether "the exercise of the right place[d] a substantially increased burden on the servient estate." *Washington Gas Light*, 232 Md. at 549. In *Flannery*, the Court focused its analysis of the second part of the test entirely on the burden to the servient estate. It concluded that the Land Company's claim that its property would suffer

[7] LNA asserts that the trial court never addressed whether SMECO's use was a substantial interference because it continually referred to whether the replacement switch was a "substantial increase" on the burden to the servient property. The trial court's ruling used the same language of the two-part analysis articulated in *Washington Gas Light*. The Court of Appeals framed the inquiry as whether "the exercise of the right place a substantially increased burden on the servient estate." *Washington Gas Light*, 232 Md. at 549. We find no merit to this argument.

"irreparable damage" was "entirely too uncertain and indefinite" and the "mere allegation . . . that irreparable damage will ensue is not sufficient unless facts [are] stated which will satisfy the court that the apprehension is well founded." 115 Md. at 281. Accordingly, the Court affirmed the trial court's dismissal of the lawsuit. *Id.*

In *Washington Gas Light*, the court determined whether Washington Gas Light's "exercise of the right [to place additional pipe, larger in size] place[d] a substantially increased burden *on the servient estate.*" 232 Md. at 549 (emphasis added). Unconvinced by the petitioner's claim that "the extra four inches of space in the ground [that] the new pipe occupie[d] [wa]s a substantial burden," the Court held there was no substantial increase in burden to the property. *Id.* at 551. The Court reasoned, again focusing its analysis entirely on the burden to the servient estate, that the sixteen inch pipe was a safer medium for transmitting gas and the pipe was in the same location as the original. *Id.* The Court noted that "[i]t would be a different situation if the trench were much larger or if the pipe were sufficiently close to the surface to adversely affect its use by the servient property owners." *Id.*

Returning to the case before us, we conclude that the trial court incorrectly applied the second part of the *Washington Gas Light* test. The test instructs the trial court to determine whether "the exercise of the right place[d] a substantially increased burden on the servient estate." *Id*. at 549. The trial court was required to consider whether SMECO's use of the easement increased the burden to LNA's property. Instead, the trial court made the following determination:

> I also think it's a matter of law as to whether there's been this substantial increase on the subservient land. . . . There is a change in the dimensions apparently. But I think it's up to the court to determine if that's been a substantial increase. There's some blockage of the signage for the -- for the Plaintiff. However, . . . I think that's an issue for the court to decide whether there's been a substantial increase. **I think when you have to consider the need for the replacement. I also think that the notion of having to move the whole thing to one side to the east or to the west and having to move all the lines to accomplish that type of thing is not a viable option. So I don't find there's been any substantial increase in the burden on the servient property owner.** So I think as a matter of law [SMECO] is entitled to . . . have their motion granted and it's granted.

Clearly, the trial court considered primarily the inconvenience it would cause SMECO to move the replacement switch to accommodate LNA's use of its property. Nowhere in its ruling did the trial court evaluate the burden of the replacement to LNA's property. Therefore, we hold the trial court erred in its determination that SMECO's exercise of its right to install a replacement switch did not substantially increase the burden on LNA's property. *Washington Gas Light*, 232 Md. at 549.

B. Charles County Code § 297-28

LNA also contends that the replacement switch obstructs the view of oncoming traffic in violation of Charles County Code § 297-28 and that the trial court erred by not making a finding on this alleged violation. SMECO counters that the trial court did not err in declining to rule on the Code violation because LNA did not amend its complaint to include this claim and raised this claim for the first time at the summary judgment hearing. SMECO concedes that the height of the original switch exceeded 30 inches in contravention of the code, but points to Section 297-461 of the Code, which permits the continued existence of lawful structures that became non-conforming upon the adoption of

the regulation. Recognizing that the original switch may have been "grandfathered" under the code, LNA points out, in its reply, that the Charles County Code requires the Board of Appeals' to approve extensions or enlargements of "nonconforming situations," *i.e.*, the replacement switch.[8]

The Charles County Code restricts the height of structures located in the sight triangles at intersecting roads to ensure driver visibility and safety. The applicable provision states:

> [s]ight triangles shall be required and shall include the area on each street or road corner that is bounded by the line which connects the sight or "connecting" points located on each of the right-of-way lines of the intersecting street. The location of structures exceeding 30 inches in height that would obstruct the clear sight across the area of the sight triangle shall be prohibited, and a public right-of-entry shall be reserved for the purpose of removing any object or material that obstructs the clear sight. . . .

Charles County Code § 297-28. The Code further provides a private right of action to enforce compliance with the Code provisions. *See* Charles County Code § 297-4B. Specifically, the Code permits "the County Commissioners, the Zoning Officer or *any adjacent or neighboring property owner* may institute an injunction, mandamus, abatement or other appropriate action or proceedings to compel compliance with the provisions of this

[8] The installation of the original switch in 1986 predated the enactment of this zoning regulation on August 31, 1992. The record does not indicate whether the switch installed in 1986 was grandfathered under the code—likely because LNA discovered this code violation after the discovery deadline. Even if the switch had been grandfathered under the Code, LNA is correct that the regulations require Board of Appeals' approval to extend, enlarge, or make major repairs, renovations, or reconstruction of the non-conforming use. Charles County Code §§ 297-465 to -466. Whether SMECO received Board of Appeals approval to modify its nonconforming use is a material fact that was in dispute at the time the circuit court granted summary judgment.

chapter." *Id.* (Emphasis added).

We conclude that LNA raised what may be a valid claim in regard to the alleged code violation at the September 24, 2015 summary judgment hearing, *see* Charles County Code § 297-4B, and certainly established that there were material facts in dispute in respect to such a claim; however, the claim was not properly before the court for consideration (or before this Court on appeal) because LNA did not amend its complaint to include the claim, or request permission to do so at the hearing.[9]

In summary, we hold that the trial court erred in granting summary judgment as a matter of law because the court incorrectly applied part two of the test—whether SMECO's use substantially increased the burden on the servient estate—as articulated in *Washington Gas Light*.

JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.
COSTS TO BE PAID BY APPELLEE.

[9] With the trial set to begin on December 8, 2015 regarding SMECO's counter-claim, LNA was within its right to amend its complaint to add this Code violation claim without leave of the court after the September 24, 2015 summary judgment hearing. *See* Maryland Rule 2-341(a) ("A party may file an amendment to a pleading without leave of court . . . no later than 30 days before a scheduled trial date.").

Circuit Court for Charles County
Case No. 08-C-14-2271

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1797

September Term, 2015

LANCASTER NEIGHBORHOOD ASSOCIATION, INC.

v.

SOUTHERN MARYLAND ELECTRIC COOPERATIVE, INC.

Graeff,
Nazarian,
Leahy,

JJ.

Dissenting Opinion by Nazarian, J.

Filed: August 4, 2017

I agree with the majority that, as a matter of law, SMECO's rights under the easement permitted it to replace or relocate the switch, and I concur with the analytical framework the majority describes and applies. I respectfully disagree, though, with the majority's conclusion that the circuit court misapplied *Reid v. Washington Gas Light Co*., 232 Md. 545 (1963), in granting summary judgment for SMECO on LNA's easement claim. And although I agree with the majority that LNA never pled a violation of the Charles County Code, I also don't see how any potential violations of the Charles County Code created a genuine dispute of material fact that precludes summary judgment.

First, after concluding that SMECO had the right under the easement to replace or relocate the switch, the next question is whether the way in which SMECO exercised that right worked a substantial burden on LNA's property interests. The majority concludes that the circuit court erred by viewing this question only in terms of the relative burden on SMECO, and by failing to consider the replacement switch's burden on the servient estate. I don't read the court's oral ruling that way.

It's true that the court devoted a greater portion of its discussion to the amount of work that would be required to relocate the switch. But in addition to the fact that SMECO replaced the switch in the same place, and with the same footprint, as the old switch, the court also acknowledged that "[t]here is a change in the dimensions" of the switch and that the replacement switch produced "some blockage of the signage" before concluding that "I don't find there's been any substantial increase in the burden on the subservient property owner." Majority at 22. That, to me, was enough. Just as the Court of Appeals weighed

the safety benefits to the servient estate when it analyzed the burden of the larger gas pipeline in *Reid*, 232 Md. at 551, the circuit court's recognition of the cost and potential service reliability harms of relocating the switch and the marginal blockage of the sign accomplished the balancing *Reid* requires.

Second, I acknowledge that the Charles County Code creates a private right of action for violations of Code provisions, but I struggle to see how the possibility of Code violations could have created genuine issues of material fact on this record. There is no mention of Code violations in LNA's complaint, in its summary judgment memorandum or supporting affidavits, or in its Statement of Disputed Issues of Material Fact—the prospect surfaces for the first time, at least so far as the court was aware, on page 14 of the 24-page summary judgment hearing transcript, and only then as an oblique reference to a "zoning code issue" that, counsel said, emerged in LNA's survey of the site. Over the course of the next few pages, the "zoning code" is mentioned twice more in passing. That's it. The issue is all over LNA's appellate brief, but was nowhere to be found in the circuit court.

"[A] party opposing summary judgment must identify disputed material facts with particularity and offer evidence or testimony demonstrating the dispute," *Piney Orchard Community Ass'n, Inc. v. Piney Pad A, LLC*, 221 Md. App. 196, 219 (2015), and certainly can't defeat summary judgment by flinging new theories of disputed fact at the court in the waning moments of a motions hearing. I don't know whether a violation of the Code is evidence that the transformer burdens the Neighborhood's property rights—there was no

citation or affidavit or anything else before the circuit court purporting to prove that the new transformer even violates the Code. But assuming that it does, or at least might, LNA still bore the burden of connecting any Code violation to a burden on its rights under the easement, and it never once did so in the circuit court

The majority is reversing summary judgment here primarily because, it believes, the circuit court didn't consider the burden on LNA's property rights, and the ensuing remand would probably have opened the door to evidence or arguments about potential Code violations anyway. I disagree with that view of the case, but that decision compels reversal on its own. If I agreed with the majority on the burden analysis, I would have stopped there and not credited alleged Code violations as a potential source of disputed material facts. And to the extent that the majority opinion can be read to hold that a party can defeat summary judgment by raising new potential disputes of fact orally at a summary judgment hearing, it risks introducing a dangerous new procedural gambit to summary judgment practice, one that is inconsistent with the Maryland Rules.

With respect, I dissent.