

No. 27PA08

FIFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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THOMAS G. POTTLE and wife, )  
MARY E. POTTLE; and SNUG )  
HARBOR SOUTH, LLC )

v )

CHARLES DAVID LINK and, )  
GENE WILLETS )

From New Hanover

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PETITION FOR DISCRETIONARY REVIEW  
UNDER G.S. 7A-31

(Filed 22 January 2008)

(Allowed 11 June 2008)

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SUPREME COURT OF  
NORTH CAROLINA

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FIFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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THOMAS G. POTTLE and wife, )  
MARY E. POTTLE; and SNUG )  
HARBOR SOUTH, LLC, )  
Plaintiffs Petitioners )

v. )

CHARLES DAVID LINK; and )  
GENE WILLETTS, )  
Defendants Respondents )

From New Hanover County

05-CVS-452

COA07-359

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**PLAINTIFFS' PETITION FOR DISCRETIONARY REVIEW**  
**UNDER N.C. GEN. STAT. § 7A-31**

\*\*\*\*\*

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Plaintiffs Petitioners Dr. Thomas G. Pottle and wife, Mary E. Pottle (collectively, the "Pottles"); and Snug Harbor South, LLC ("Snug Harbor") respectfully petition the Supreme Court of North Carolina to certify for discretionary review the unanimous published opinion of the North Carolina Court of Appeals, Pottle, et al. v. Link, et al., 2007 N.C. App. LEXIS 2557 (N.C. Ct. App. December 18, 2007), on the basis that:

1. This opinion conflicts with various decisions of this Court as follows:

a. Cases holding that the holder of an easement has the right to the full use and enjoyment of the easement and, therefore, the concomitant right to maintain the easement. Hensley v. Ramsey, 283 N.C. 714, 199 S.E.2d 1 (1973); Shingleton v. State, 260 N.C. 451, 133 S.E.2d 183 (1963); Carolina Power & Light Co. v. Bowman, 229 N.C. 682, 51 S.E.2d 191 (1949); Packard v. Smart, 224 N.C. 480, 31 S.E.2d 517 (1944).

b. Cases holding that mere lapse of time in asserting one's claim to an easement unaccompanied by acts and conduct inconsistent with one's rights does not constitute waiver or abandonment of the easement. Miller v. Teer, 220 N.C. 605, 18 S.E.2d 173 (1942).

c. Cases holding that easements may be extinguished by adverse use by the owner of the servient estate for the prescriptive period of 20 years. Hunter v. West, 172 N.C. 160, 90 S.E. 130 (1916).

d. Cases explaining the relationship between the 20-year adverse possession statute of limitations and the three-year statute of limitations for a continuing trespass to real property. Love v. Postal Tel.-Cable Co., 221

N.C. 469, 20 S.E.2d 337 (1942); Teeter v. Postal Tel.-Cable Co., 172 N.C. 783, 90 S.E. 941 (1916); Roberts v. Baldwin, 151 N.C. 407, 66 S.E. 346 (1909).

2. This opinion also adopts a new rule of law which provides that the owner of an easement must keep the entire width of the easement cleared at all times or be barred by the statute of limitations for injury to incorporeal hereditaments (N.C. Gen. Stat. § 1-50(a)(3)) from doing so if the trees, shrubs, or other obstructions were planted or placed by the owner of the underlying fee more than six years before a lawsuit is brought. In this case, Defendants physically prevented Plaintiffs from removing the trees and bushes from the easement area, and the only relief Plaintiffs sought was an injunction to prohibit Defendants from interfering with Plaintiffs' right to clear the easement area. This ruling conflicts with the plain meaning of the limitations period found in § 1-50(a)(3) of the North Carolina General Statutes, which applies a six-year statute of limitations to "an action . . . for injury to any incorporeal hereditament." (emphasis added). This six-year limitation should not have been applied to the instant case because Plaintiffs were not seeking damages for injury to the easement at issue, but were seeking an injunction prohibiting Defendants from interfering with Plaintiffs' right to clear the relevant easement of encroachments.

3. This opinion has significant local and statewide impact which extends beyond the parties to this lawsuit because the subject matter of the opinion involves easements which are of interest and involve many, if not most, real property owners across the state. Accordingly, the subject matter of this appeal has significant public interest and involves legal principles of major significance to the jurisprudence of this State.

As a result of this opinion, the law of easements as established by this Court has been rendered confusing and has left Plaintiffs with no remedy to remove the vegetation and other encroachments that are obstructing the entrance into their properties. In effect, this decision says that an owner of a servient estate subject to an easement can continue his obstructionist activities to prevent the owners of the dominant estate and the holders of the easement from exercising their right to the full use and enjoyment of and their right to maintain that easement, which rights have been known since "the memory of man runneth not to the contrary." North Carolina State Highway & Public Works Comm'n v. Black, 239 N.C. 198, 203, 79 S.E.2d 778, 783 (1954).

A copy of the Court of Appeals opinion is attached to this Petition.

If this Court allows this Petition, Plaintiffs will present the following questions for review:

1. WHETHER THE SIX-YEAR STATUTE OF LIMITATIONS IN N.C. GEN. STAT. § 1-50(a)(3) APPLIES TO PLAINTIFFS' ACTION SEEKING AN INJUNCTION PROHIBITING DEFENDANTS FROM INTERFERING WITH PLAINTIFFS' RIGHT TO CLEAR ENCROACHMENTS FROM PLAINTIFFS' EASEMENT.
2. WHETHER PLAINTIFFS ABANDONED THEIR RIGHTS IN AND TO THE EASEMENT.<sup>1</sup>

## **I. STATEMENT OF FACTS**

### **A. PROCEDURAL HISTORY**

On 8 February 2005, Plaintiffs filed a Complaint in the Superior Court of New Hanover County, North Carolina, against Defendant Charles Edward Link ("Link"). [R. pp. 3-9.] In their Complaint, Plaintiffs sought an injunction prohibiting Defendant Link from interfering with Plaintiffs' right to clear encroachments from Plaintiffs' Easement. [R. p. 5.] Defendant Link filed his Answer to Plaintiffs' Complaint on 13 April 2005, admitting that he had planted vegetation within the easement, but denying the remaining material allegations of the Complaint. [R. pp. 10-17.]

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<sup>1</sup> Counsel for Duke Energy Carolinas, LLC and Progress Energy Carolinas, Inc., two large utility companies that provide electricity to millions of customers in the Carolinas, have indicated that, should this Court grant this Petition, they will seek leave to file amicus curiae briefs in support of Plaintiffs' position.

On 8 September 2005, Plaintiffs filed an Amended Complaint, adding Defendant Gene Willetts ("Willetts") as a Defendant. [R. pp. 18-23.] Plaintiffs requested the Trial Court to enter a preliminary and permanent injunction prohibiting Defendants from obstructing or interfering with Plaintiffs' right to clear their 30-foot easement. [R. p. 21.]

Defendants Link and Willetts filed their Answers to the Amended Complaint on 29 November 2005 and 27 March 2006, respectively. [R. pp. 24-41.]

On 24 July 2006 and 26 July 2006, respectively, Plaintiffs and Defendants filed Motions for Summary Judgment under Rule 56 of the North Carolina Rules of Civil Procedure. [R. pp. 42-44, 64-66.] Following a hearing on these Motions, the Trial Court, by Order entered on 21 August 2006, granted Plaintiffs' Motion for Summary Judgment and denied Defendants' Motions for Summary Judgment and Dismissal. [R. pp. 89-91.]

Defendants filed and served their Notice of Appeal to the North Carolina Court of Appeals on 19 September 2006. [R. pp. 92-93.] On or about 23 August 2007, the parties were notified that the case would be decided without oral arguments. On or about 20 September 2007, Plaintiffs filed their

Memorandum of Additional Authorities pursuant to Rule 28(g) of the North Carolina Rules of Appellate Procedure.

On 18 December 2007, the Court of Appeals issued its decision wherein it reversed the decision of the Trial Court and remanded the case for entry of summary judgment for Defendants on all issues for which the six-year statute of limitations under § 1-50(a)(3) has expired, which does not include Defendants' installation of the fences in 2004 and 2005. Pottle v. Link, 2007 N.C. App. LEXIS 2557, at \*13.

#### **B. FACTUAL BACKGROUND**

At issue in this case are the rights associated with a particular driveway easement that provides access to residential real property in Cedar Island, North Carolina, and whether Plaintiffs, as holders of the easement, may remove encroachments into the easement. The Pottles own Tract 6 on Cedar Island [R. pp. 51, 83-88], and Plaintiff Snug Harbour owns Tract 4. [R. pp. 45, 83-88]. The Pottles purchased Tract 6 in or about 1998 [R. pp. 51, 55; Ex.-Tab 9], and Dr. Joseph M. James and his wife, Eleanor S. James, members of Plaintiff Snug Harbor, purchased Tract 4 in or about 1974 and conveyed it to Snug Harbour on or about 2 August 2001. [R. pp. 45, 46, 49; Ex.-Tab 19.] Dr. and Mrs. James reside in the house owned by Snug Harbor and located on Tract 4 of Cedar

Island. [R. pp. 45, 83-88.] They began construction of their residence in 2001. [R. p. 46.] Tracts 4 and 6 are adjoining properties on Cedar Island.

In addition to the lots, each deed for Tracts 4 and 6 conveys an easement, 30 feet in width, providing ingress to and egress from the public road to Plaintiffs' residences on Cedar Island ("Access Easement"). [R. pp. 45-46, 51, 58, 60; Ex.-Tabs 9-11.] The Access Easement provides Plaintiffs and other residents of Cedar Island with the only overland access to their homes. [R. pp. 46, 51.] The paved portion of the Access Easement is known as Cedar Island Road. [R. pp. 85-88.]

Defendant Link owns Tract 3 [R. pp. 19, 23, 25, 60, 83-88], and Defendant Willetts owns Tract 5 on Cedar Island. [R. pp. 19, 23, 60, 83-88.] These properties are adjacent to those of Plaintiffs and are the servient estates over which the Access Easement runs. [R. pp. 60, 85-88.]

In dispute are the rights of Plaintiffs, as owners of the dominant estates and holders of the Access Easement, to prevent encroachment of the Access Easement by certain vegetation planted by Defendant Link and by fences constructed by both Defendants. In or about the summer of 1994 and again in or about the fall of 1996, Defendant Link planted trees, shrubs, and other vegetation (the "Link Vegetation") along the edge of his property within the

Access Easement. Over the years, the Link Vegetation grew and was cultivated and maintained so that it now encroaches into the Access Easement and narrows the area of Cedar Island Road available to traversing vehicles, and specifically encroaches upon the entrances into Plaintiffs' lots. [Ex.-Tab 4, pp. 9-10.] In addition, Defendants Willetts and Link, in or about the summers of 2004 and 2005, respectively, erected fencing around the perimeter of their lots and within the Access Easement. [Ex.-Tab 5, p. 10.]

In or about 2001, it became apparent to Plaintiffs that the Link Vegetation had grown up and become a serious impediment to the entrances into their lots, as well as to travelers along Cedar Island Road. [R. pp. 46, 52.] Defendants' subsequent erection of fencing exacerbated the narrowing of Cedar Island Road, and further narrowed the portion of the Access Easement available for entry into Plaintiffs' lots. [R. pp. 46-47, 52.] It is this area of the Access Easement upon which Defendant Link has planted the Link Vegetation and upon which Defendants have erected the fencing (the "Encroachment Area") that is the subject of this dispute.

In or about 2001, when he began to landscape his property prior to the construction of his home, Dr. James personally asked Defendant Link to clear the Link Vegetation to the legally-defined 30-foot border of the Access

Easement [R. p. 46], and Dr. James and Dr. Pottle made several subsequent requests for removal of the Link Vegetation. [R. pp. 46, 52.] Link refused all requests. [R. pp. 46, 52.] In or about 2004, Dr. James engaged, at his own expense, a tree removal service to clear the Encroachment Area of the Link Vegetation. [R. p. 46.] Link physically intervened and prevented the contractors from clearing the Encroachment Area. [R. p. 46.] Dr. James and Dr. Pottle further requested that Defendants remove the fencing to the outside of the 30-foot border of the Access Easement. [R. pp. 46, 52.] Defendants likewise refused these requests. [R. pp. 46, 52.] As a result, Plaintiffs were forced to file the instant lawsuit to seek an injunction prohibiting Defendants from obstructing or interfering with Plaintiffs' right to clear the Encroachment Area. [R. pp. 5, 21.]

## **II. REASONS WHY CERTIFICATION SHOULD ISSUE**

Not only does the Court of Appeals opinion conflict with long-established decisions of this Court that proclaim that: (a) easement holders have the right to the full use and enjoyment of the easement and, thus, have the right to maintain the easement; (b) mere lapse of time in asserting one's claim to an easement unaccompanied by acts and conduct inconsistent with one's rights does not constitute waiver or abandonment of the easement; (c) easements may be

extinguished by 20 years of adverse use by the owner of the servient estate; and (d) the 20-year statute of limitations, not the three-year statute of limitations, applies to a claim for injunctive relief for a continuing trespass, but it also adopts a new rule of law which conflicts with the plain language of § 1-50(a)(3) which establishes a six-year statute of limitations for actions for "injury to incorporeal hereditaments." N.C. Gen. Stat. § 1-50(a)(3) (emphasis added).

**A. The Decision Of The Court Of Appeals Not Only Conflicts With Prior Decisions Of This Court, N.C. Gen. Stat. § 7A-31(c)(3), But Also Conflicts With The Plain Language Of N.C. Gen. Stat. § 1-50(a)(3) Which Applies A Six-Year Statute Of Limitations To Actions For Injury To Incorporeal Hereditaments.**

**1. The Decision Conflicts with this Court's Decisions that the Holder of an Easement Has the Right to the Full Use and Enjoyment of that Easement, along with the Related Right to Maintain the Easement.**

The decision of the Court of Appeals conflicts with well-established precedent from this Court as to the right of easement holders to the full use and enjoyment of their easement. See Hensley v. Ramsey, 283 N.C. 714, 199 S.E.2d 1 (1973) (when an easement is created by deed, the easement holder has the right to the full use and enjoyment of the easement notwithstanding that he has other means of access to his property); Shingleton v. State, 260 N.C. 451, 457, 133 S.E.2d 183, 187 (1963) (the possessor of an easement has all rights that are necessary to the reasonable and proper enjoyment of that easement); Hine v.

Blumenthal, 239 N.C. 537, 546, 80 S.E.2d 458, 465 (1954) (the grant of an easement conveys rights to the fair enjoyment of the easement); Carolina Power & Light Co. v. Bowman, 229 N.C. 682, 687-88, 51 S.E.2d 191, 195 (1949) (the servient land owner's use of currently unused easement land in a manner which could interfere with the easement holder's future use of the land for the approved purpose is an impairment of the easement); Packard v. Smart, 224 N.C. 480, 485, 31 S.E.2d 517, 520 (1944) (one who purchases land with notice that it is burdened with an existing easement "takes the estate subject to the easement, and will be restrained from doing any actions which will interfere with the benefit and enjoyment of the easement to the full extent to which the party having a right thereto . . . was entitled" (emphasis added)). It also conflicts with the plain language of § 1-50(a)(3) which applies a six-year statute of limitations to actions only for injury to incorporeal hereditaments.

In the instant case, Defendant Link planted the Link Vegetation in 1994 and 1996 which, after a few years of growth and cultivation, began to encroach into the Access Easement and to impede Plaintiffs' access into their properties. [R. pp. 46, 52.] When Plaintiffs attempted to remove the encroachment at their own expense through the use of an independent tree-cutting service, Defendant Link interfered and prevented the removal. [R. p. 46.] In 2004 and 2005,

Defendants constructed fencing in the Encroachment Area which also impeded access into Plaintiffs' properties. [Ex.-Tab 5, p. 10.] Defendants likewise refused to move their fencing out of the Encroachment Area. [R. pp. 46, 52.] When these self-help methods failed, Plaintiffs filed suit to enjoin Defendants from encroaching in the Encroachment Area and from interfering with Plaintiffs' removal of the encroachments. [R. pp. 3-9.]

The Trial Court agreed with Plaintiffs and ruled that they, as holders of the Access Easement, were "legally entitled to keep the Easements clear of encroachments, impediments and other obstructions." [R. p. 90.] Accordingly, the Trial Court enjoined Defendants from interfering with Plaintiffs' right to remove the encroachments. [R pp. 90-91.] However, the Court of Appeals disagreed. Notwithstanding that Plaintiffs sought only injunctive relief, it held that because the Access Easement was an incorporeal hereditament (see Winston Brick Mfg. Co. v. Hodgin, 190 N.C. 582, 584, 130 S.E. 330, 331 (1925) ("A

grant of a road is the grant of an easement, an incorporeal hereditament"))<sup>2</sup>, Plaintiffs' action was subject to the six-year statute of limitations found in N.C. Gen. Stat. § 1-50(a)(3), and Plaintiffs were barred from seeking removal of the Link Vegetation. Pottle v. Link, 2007 N.C. App. LEXIS 2557, \*11-\*12.

"The primary rule of statutory construction is that the intent of the legislature controls the interpretation of a statute. . . . The foremost task in statutory interpretation is 'to determine legislative intent while giving the language of the statute its natural and ordinary meaning unless the context requires otherwise.' Where the statutory language is clear and unambiguous, 'the Court does not engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language.'" Carolina Power & Light Co. v. City of Asheville, 358 N.C. 512, 518, 597 S.E.2d 717, 722 (2004) (citations omitted).

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<sup>2</sup> "Incorporeal hereditament" is an ill-defined term of little meaning to today's practitioner. See Patrick K. Hetrick and James B. McLaughlin, Jr., Webster's Real Estate Law in North Carolina § 15-1, n.1 (5th ed. 1999). While Black's Law Dictionary and Webster's Real Estate Law in North Carolina summarily conclude that an easement is an incorporeal hereditament (see Black's Law Dictionary 730 (7th ed. 1999); Webster's Real Estate Law, § 15-1), it can be argued that a dedicated or conveyed easement with definite boundaries and dimensions is not "incorporeal" and is, instead, a tangible, "corporeal" interest in land. That the Legislature intended for N.C. Gen. Stat. § 1-50(a)(3) to apply to easements of this nature is highly doubtful.

Section 1-50(a)(3) is clear and unambiguous. Its plain language states that the six-year statute of limitations applies only to actions for "injury to any incorporeal hereditament." N.C. Gen. Stat. § 1-50(a)(3) (emphasis added). Plaintiffs' action for injunctive relief is not an action for injury. Plaintiffs are not seeking damages for injury to the Access Easement; they are seeking merely an injunction prohibiting Defendants from interfering with their removal of the encroachments so that they can have the full use and enjoyment of the Access Easement and unimpeded access to their properties. Even the Court of Appeals has recognized this distinction in prior decisions. In a 1984 case in which this Court denied a petition for discretionary review, the Court of Appeals held that, where a house encroached onto property owned by the plaintiffs, the three-year statute of limitations in § 1-52(3) applied to the plaintiffs' claim for damages, but the 20-year statute of limitations in § 1-50(a)(3) applied to the plaintiffs' action to remove the encroachment. Bishop v. Reinhold, 66 N.C. App. 379, 384, 311 S.E.2d 298, 301, disc. review denied, 310 N.C. 743, 315 S.E.2d 700 (1984). Similarly, in a 1999 case involving a restrictive covenant that restricted the use of lots in a subdivision for residential purposes only, the Court of Appeals applied the six-year statute of limitations in § 1-50(a)(3) because "a *residential restrictive covenant* is at issue rather than an encroachment and/or

prescriptive easement." Karner v. Roy White Flowers, Inc., 134 N.C. App. 645, 650, 518 S.E.2d 563, 567 (1999), rev'd on other grounds, 351 N.C. 433, 527 S.E.2d 40 (2000) (emphasis added).

**2. The Decision Conflicts with this Court's Decision that Mere Lapse of Time in Asserting One's Claim to an Easement, Unaccompanied by Acts and Conduct Inconsistent with One's Rights, Does Not Constitute Waiver or Abandonment of the Easement.**

The decision of the Court of Appeals also conflicts with well-established precedent by this Court (and even precedent by the Court of Appeals<sup>3</sup>) that "mere lapse of time or other delay in asserting [one's] claim [to an easement,] unaccompanied by acts clearly inconsistent with [one's] rights, [does not] amount to a waiver or abandonment [of the easement]." Miller v. Teer, 220 N.C. 605, 612, 18 S.E.2d 173, 178 (1942).

The facts of the instant case establish that the Access Easement provides the only means of ingress to and egress from the public road to Plaintiffs' residences on Cedar Island. [R. pp. 45-46, 51, 58, 60; Ex.-Tabs 9-11.] Plaintiffs constructed homes on their lots and routinely use the Access Easement for

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<sup>3</sup> See also Yates v. Bradley, 2003 N.C. App. LEXIS 1683 (N.C. Ct. App. August 19, 2003) (unpublished); Skvarla v. Park, 62 N.C. App. 482, 487, 303 S.E.2d 354, 357 (1983); Ward v. Sunset Beach & Twin Lakes, Inc., 53 N.C. App. 59, 62, 279 S.E.2d 889, 892 (1981).

access to their homes. [R. pp. 46, 55.] There is no evidence that any of the Plaintiffs intended to abandon the Access Easement.

Yet, the consequence of the Court of Appeals' denial of summary judgment in favor of Plaintiffs – that is, holding that Plaintiffs have no right to clear or maintain the Encroachment Area of the Access Easement – is that Plaintiffs somehow abandoned it. This result directly conflicts with this Court's holding that mere lapse of time in asserting a claim to an easement, without the necessary intent to abandon the easement, does not constitute waiver or abandonment of the easement.

**3. The Decision Conflicts with this Court's Decisions that Easements May be Extinguished by Adverse Use by the Owner of the Servient Estate for the Prescriptive Period of 20 Years.**

The decision of the Court of Appeals likewise conflicts with this Court's holding that easements may be extinguished by adverse use by the owner of the servient estate for the prescriptive period of 20 years. Hunter v. West, 172 N.C. 160, 161, 90 S.E. 130, 131 (1916); State v. Suttle, 115 N.C. 784, 788, 20 S.E. 725, 726 (1894). See also Patrick K. Hetrick and James B. McLaughlin, Jr., Webster's Real Estate Law in North Carolina § 15-31 (5th ed. 1999); Restatement (Third) of Property (Servitudes) § 7.7 (2000); Powell on Real

Property § 34.21[1] (2005); 25 Am. Jur. 2d Easements & Licenses § 102 (2004); 25 A.L.R.2d 1265 (1952) ("Loss of private easement by nonuser or adverse possession").<sup>4</sup> As discussed above, as a result of the Court of Appeals' decision, Plaintiffs have lost their right to maintain the Access Easement in the face of continued obstruction by Defendants even though the Link Vegetation was not planted until 1994 and 1996. If Defendant Link allows the Link Vegetation to grow so that it fully obstructs access to Plaintiffs' lots and continues to obstruct Plaintiffs' efforts to clear the encroachments, then Plaintiffs will have lost their right to the entire Access Easement. In other words, Defendant Link has been granted "a permanent prescriptive easement to use the plaintiffs' land" without having been in possession for the prescriptive period of 20 years. "This the law will not do, as the defendant[] ha[s] not been in possession for 20 years." See Bishop v. Reinhold, 66 N.C. App. at 384, 311 S.E.2d at 301-02.

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<sup>4</sup> See also McFadyen v. Olive, 89 N.C. App. 545, 548, 366 S.E.2d 544, 546 (1988); Skvarla v. Park, 62 N.C. App. 482, 488, 303 S.E.2d 354, 358 (1983) (an easement may be extinguished by adverse use by the owner of the servient property for the 20-year prescriptive period).

The Court of Appeals bases its decision to apply the six-year statute of limitations in § 1-50(a)(3) on the fact that the case at bar involves an "incorporeal hereditament" (that is, an easement) rather than an encroachment on property held in fee. Pottle v. Link, 2007 N.C. App. LEXIS 2557, \*10-\*12. As explained above, easement interests may be extinguished by adverse use for the prescriptive period of 20 years. Likewise, fee simple interests also may be extinguished by adverse use for 20 years. See Dockery v. Hocutt, 357 N.C. 210, 217-18, 581 S.E.2d 431, 436 (2003); Scott v. Lewis, 246 N.C. 298, 302, 98 S.E.2d 294, 298 (1957). Thus, the attempted distinction by the Court of Appeals has no merit and results in the unintended consequences of being inconsistent and irreconcilable with not only this Court's precedent, but also general real estate law principles.

**4. The Decision Conflicts with this Court's Decisions that Recognize the Distinction Between the 20-Year Adverse Possession Statute of Limitations and the Three-Year Statute of Limitations for Continuing Trespass to Real Property.**

Not only does the decision of the Court of Appeals conflict with decisions of this Court involving easements, but it also conflicts with, and adversely affects, decisions of this Court involving continuing trespass, which decisions also distinguish between the applicability of the three-year statute of limitations and the 20-year adverse possession statute of limitations. This Court first made

the distinction in a 1909 case entitled Roberts v. Baldwin, 151 N.C. 407, 66 S.E. 346 (1909), wherein the defendant had diverted surface water from his lands onto the lands of the plaintiff by way of a ditch that the defendant had constructed. The plaintiff sought to recover annual damages for the loss of crops and also for permanent damages to his land. This Court held that "[u]ntil by acquiescence in such flooding for twenty years the presumption of the grant of an easement arises, an action will always lie. . . . Of course, however, the recovery in such action is limited to damages accruing within three years prior to suit brought." Id. at 409, 66 S.E. at 347. See also Teeter v. Postal Tel.-Cable Co., 172 N.C. 783, 90 S.E. 941 (1916); Love v. Postal Tel.-Cable Co., 221 N.C. 469, 20 S.E.2d 337 (1942) (relying on and quoting Teeter, *supra*). The Court of Appeals quoted Teeter in Williams v. South & South Rentals, Inc., 82 N.C. App. 378, 346 S.E.2d 665 (1986), a case where the defendant built an apartment building that encroached approximately one square foot on the plaintiff's land. The Court of Appeals determined that the action was one for a continuing trespass and, thus, the plaintiff's claim for damages was barred by the three-year statute of limitations of N.C. Gen. Stat. § 1-52(3). However, the plaintiff's claim for a mandatory injunction seeking removal of the encroachment was subject to

the 20-year statute of limitations for adverse possession. Id. at 382, 346 S.E.2d at 668.

**B. The Subject Matter Of This Appeal Has Significant Public Interest And Involves Legal Principles Of Major Significance To The Jurisprudence Of This State. N.C. Gen. Stat. §§ 7A-31(c)(1), (2).**

As discussed above, the decision of the Court of Appeals conflicts not only with decisions of this Court, but also with the plain language of § 1-50(a)(3) which applies a six-year statute of limitations to actions for **injury** to incorporeal hereditaments. As a result, holders of easements throughout the state are improperly restricted as to their full use and enjoyment of those easements. By extending the six-year statute of limitations applicable only to actions for **injury** to incorporeal hereditaments to actions for **injunctive relief** to prohibit interference with removal of encroachments, the Court of Appeals effectively is sending a message to easement holders that they must act immediately as soon as anyone places or plants trees, shrubs, bushes, or other vegetation within the easement. Vegetation initially may be only bothersome, but may, over time, become a serious impediment to the use of an easement as it grows and develops.

A prime example is the case at bar. Here, Defendant Link, the owner of the servient estate, planted the Link Vegetation in the Access Easement. At the

time of the planting, this Vegetation did not encroach into the Access Easement and did not create an obstacle for access into Plaintiffs' properties. The Link Vegetation did not become an encroachment until after seven or eight years of growth and cultivation by Defendant Link. However, by the Court of Appeals' new reading and application of the six-year statute of limitations of § 1-50(a)(3), Plaintiffs do not have the right to the full enjoyment of the Access Easement because they are not being permitted to remove the Vegetation by Defendants' obstructions and interference. The Vegetation must remain as it is, with the possibility that Defendant Link could allow it to grow to fully block Plaintiffs' access into their properties. Equity should not allow a good neighbor to be harmed by his own graciousness by waiting to object to the planting of vegetation until the vegetation becomes a serious impediment to access. This ruling flies in the face of this Court's holding that the holder of an easement has the right to the full use and enjoyment of the easement, along with the right to maintain it, and the Court of Appeals' own reasoning that:

To deny plaintiffs a right of action would be to allow the defendants a right of eminent domain as private persons (and without the payment of just compensation) or grant the defendant a permanent prescriptive easement to use the plaintiffs' land. This the law will not do, as the defendants have not been in possession for 20 years from 1973, the date the house was constructed.

Bishop v. Reinhold, 66 N.C. App. at 384, 311 S.E.2d at 301-02.

Various scenarios can be imagined which would be of great concern to easement holders across this state. Much of our state highway system, our electrical transmission systems, and our telephone lines and other utilities are within easement areas conveyed by private property owners or acquired by eminent domain. If the owner of the servient estate over which these easements run plants vegetation or places obstructions within the easement areas and they remain there for six years before a lawsuit is brought to remove them, this ruling by the Court of Appeals would prohibit the removal of these obstructions from the easement areas. Numerous other similar scenarios can be imagined that likely would pit neighbor against neighbor in a never-ending battle to protect their property rights. Accordingly, this case has significant local and statewide impact which extends beyond the current parties to this lawsuit, and this Court should grant Plaintiffs' Petition for Discretionary Review.

### **III. CONCLUSION**

The decision of the Court of Appeals conflicts with settled precedent established by this Court with regard to an easement holder's right to the full use and enjoyment of the easement, the abandonment and extinguishment of an easement, and with the plain language of N.C. Gen. Stat. § 1-50(a)(3) which applies a six-year statute of limitations to actions for **injury** to incorporeal

hereditaments. Plaintiffs respectfully request that this Court allow their Petition for Discretionary Review.

**IV. ISSUES TO BE BRIEFED**

- A. WHETHER THE SIX-YEAR STATUTE OF LIMITATIONS IN N.C. GEN. STAT. § 1-50(a)(3) APPLIES TO PLAINTIFFS' ACTION SEEKING AN INJUNCTION PROHIBITING DEFENDANTS FROM INTERFERING WITH PLAINTIFFS' RIGHT TO CLEAR ENCROACHMENTS FROM PLAINTIFFS' EASEMENT.
- B. WHETHER PLAINTIFFS ABANDONED THEIR RIGHTS IN AND TO THE EASEMENT.

Respectfully submitted, this the 22nd day of January, 2008.

WARD AND SMITH, P.A.

*Ryal W. Tayloe by Cheryl A. Martene*

Ryal W. Tayloe

N.C. State Bar I.D. No.: 010549

E-mail: rwt@wardandsmith.com

For the firm of

Ward and Smith, P.A.

University Corporate Center

127 Racine Drive

PO Box 7068

Wilmington, NC 28406-7068

Telephone: (910) 794-4800

Facsimile: (910) 794-4877

Attorneys for Plaintiffs Petitioners

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing  
PLAINTIFFS' PETITION FOR DISCRETIONARY REVIEW UNDER N.C.  
GEN. STAT. § 7A-31 by depositing a copy thereof in an envelope bearing  
sufficient postage in the United States mail addressed to the following persons at  
the following addresses which are the last addresses known to me:

G. Grady Richardson, Jr., Esq.  
Law Offices of G. Grady Richardson, Jr., P.C.  
1213 Culbreth Drive  
Wilmington, NC 28405

Sidney S. Eagles, Jr., Esq.  
Elizabeth Brooks Scherer, Esq.  
Smith Moore LLP  
PO Box 27525  
Raleigh, NC 27601

This the 22nd day of January, 2008.

*Ryal W. Tayloe by Cheryl A. Martene*  
Ryal W. Tayloe  
N.C. State Bar I.D. No.: 010549  
E-mail: rwt@wardandsmith.com  
For the firm of  
Ward and Smith, P.A.  
University Corporate Center  
127 Racine Drive  
Post Office Box 7068  
Wilmington, NC 28406-7068  
Telephone: (910) 794-4800  
Facsimile: (910) 794-4877  
Attorneys for Plaintiffs Petitioners