GREG H. WINTERS,	**:**	**IN THE COURT OF COMMON PLEAS OF**
Plaintiff	**:**	**LYCOMING COUNTY, PENNSYLVANIA**
	:	
vs.	**:**	**NO. 05-01,384**
	:	
BRUCE M. PLATUSICH and	**:**	**CIVIL ACTION**
CATHERINE E. PLATUSICH,	**:**	**PRELIMINARY INJUNCTION**
Defendants	**:**	**ADJUDICATION AND ORDER**

Date: December 20, 2005

OPINION and ORDER

Plaintiff, Greg H. Winters (hereafter "Winters"), seeks a Preliminary Injunction which would prohibit Defendants, Bruce M. Platusich and his wife, Catherine E. Platusich (hereafter "Platusich"), from erecting a chain or other barrier across a roadway which crosses Platusich's residential lot and leads to a residential lot owned by Winters. Evidentiary hearings were held on September 21, 2005 and September 22, 2005, at which the following facts were established, many of which were not disputed.

Winters is the owner of a house and parcel of ground he acquired in 2004 from Vanemon in Cummings Township, Lycoming County, in the village of Waterville. The tract of land is identified and referenced as Lycoming County Tax Assessment Tax Parcel #09-001-304. Winters' former wife had acquired the property in 1995. Thereafter her sister and Winters became co-owners through to the year 2000 when it was sold by them to Vanemon. An exact description of the lot is not readily ascertainable from Winters' deed because it is described as consisting of a larger tract with various exceptions. The tax parcel map however, Plaintiff's Exhibit No. 21, was acknowledged to be accurate in showing that the property is basically rectangular in shape and is bounded on the west by a roadway, being the road in question. It has a frontage along that road of approximately 280 feet. The roadway is

sometimes referred to by the name of Lightening Bug Lane (hereinafter so referenced). Winters' lot is bounded on the north by a right-of-way of Penn Central railroad, having a frontage there-on of 190 feet.

Platusich's property (referenced on the tax map as parcel #310) is separated from Winters' property by the Penn Central right-of-way. It is bounded on the south by the railroad right-of-way and on the north by the public highway, PA State Route 44. According to the tax map, Platusich's lot is 7/10 of an acre. The deed to Platusich (Plaintiff's Exhibit No. 12) describes a ½ acre lot with a frontage on the public road (Route 44) of 93 feet, a depth on the east side of 194 feet; a width along the railroad right-of-way of 146 feet; and, a depth along Little Pine Creek (on the west) of 172 feet). Lightening Bug Lane bisects the Platusich property from north to south, running south from Route 44 to the Winters' lot a distance of approximately 170 feet. West of Lightening Bug Lane there is a narrow strip of vacant land that separates Lightening Bug Lane from Little Pine Creek. The Platusich house is east of Lightening Bug Lane.

Platusich acquired his property in August 2002, by a deed from Laura D. Shopteau, Lycoming County Book 4287, page 112. The Platusich deed excepts and reserves an existing private right-of-way from Route 44 to Pine Creek ". . . to those owners of lots to whom the Grantor, as well as her predecessors in title have previously allowed use of the same." Plaintiff's Exhibit No.12. This exception was created by the prior deed in Platusich's chain of title which was dated September 9, 1999 being a deed from Esther A. Myers to Shopteau (Plaintiff's Exhibit No. 14). The chain of title indicates Esther Myers and her deceased husband had owned this one-half acre lot from 1945 and other Myers family members had

owned the lot since at least 1922.

Lightening Bug Lane intersects Route 44 in front of the Platusich home at substantially less than a right angle (30°-45° approximately). From Route 44 it proceeds westerly a short distance (approximately 20 feet) and then curves left in a southerly direction toward Winters, at virtually a right angle approach to the railroad right-of-way, descending in grade. Near the bottom of this descent Platusich has erected two posts, one on each side of Lightening Bug Lane, and chained off the roadway with a pad-locked chain. From that point, Lightening Bug Lane runs southerly as it passes under the Penn Central railroad right-of-way bridge going towards the Winters' lot and properties owned by others. Lightening Bug Lane consists of a limestone type roadway, 8 to 10 feet in width, as it crosses Platusich's property. In some areas the roadway is all stone and in other areas it appears to be two stoned tire tracks with grass growing in the center. See Defendant's Exhibits 25, 31, 32, 33, and 34. The chain across Lightening Bug Lane erected by Platusich is at a point approximately 65 feet from PA Route 44, at a point where the roadway makes a bend to the left as it progresses southerly from Route 44 angling more directly south towards Winters. This point also appears to be near the bottom of an incline which slopes downward from Route 44. It is also just south of the bridge abutment which was constructed in the 1980's and apparently caused the need for the roadway to bend at that location in order to intersect with Route 44, to avoid the bridge abutment.

From the depiction of the photographs admitted into evidence (particularly Defendant's Exhibit No 29-34) the roadway incline is approximately 5°, near the bottom of the slope and increases to perhaps 8° or more, north of the chain. As it approaches Route 44 at the top, the roadway appears to flatten out for perhaps 20 feet before it actually enters onto Route 44.

Stopping on the slope in snowy or icy weather in the location of the chain presents difficulties both in stopping as well as starting again. To ascend this grade when driving from Winters' property to Route 44 in the wintertime a vehicle needs to achieve and maintain momentum which varies according to conditions.

The angled approach of Lightening Bug Lane to Route 44 was created in the 1980's when the Pennsylvania Department of Transportation built a new bridge over Little Pine Creek. This construction realigned the road from being a perpendicular intersection with Route 44 to the angled intersection in order to allow construction of a bridge abutment. This new intersection of Lightening Bug Lane with Route 44 is depicted both in a survey done on behalf of Platusich by Hilling Land Surveying, Plaintiff's Exhibit No. 20, in 2004, and also in the Pennsylvania Department of Transportation deed of April 12, 1984 as referenced in Lycoming County deed book 1075 at page 41, Plaintiff's Exhibit No. 13. A map showing the existence of the driveway is recorded at deed book 1075 page 43. The map appears to have a date of August 16, 1983 as a date of approval of the plan by Penn Dot. Prior to this change, the intersection of Lightening Bug Lane and Route 44 was a typical T-intersection.

Platusich asserts that the roadway is shifting slightly to the south and west compared to the way it would have been in 1984 when the Commonwealth of Pennsylvania condemned part of the Platusich property, then owned by Esther Myers, in order to rebuild the Route 44 bridge over Little Pine Creek. Comparing the condemnation map, Plaintiff's Exhibit No. 13, specifically map book page 43, to the current survey drawing by Mr. Hilling, Plaintiff's Exhibit No. 20, suggests this movement to the east would be minimal at best. As suggested by the surveyor, Mr. Hilling, (hired by Defendant Platusich) the driveway may in fact have been

moved in the 1980's when the bridge wall abutment was built. It very well may be that over a course of time the driveway that now exist has moved a foot or so onto the Platusich yard area. In comparing the Hilling survey to Defendant's exhibits depicting the driveway, particularly Exhibit No. 31, the court finds it would be almost impossible to shift the driveway further to the west, that is farther away from the Platusich home. Therefore, the roadway remains virtually as realigned in 1983. Platusich now has many large stones and other plantings in place that would seem to prohibit any further movement away from the actual intended location. Platusich asserts that his yard and roses are being damaged by Winters running over them with his car. There was no demonstrative proof of this in the photographs supplied by the Defendant. In fact the photographs would support the contrary assertion by Winters that his use of the easement is not damaging any of the terrain owned by Platusich.

Testimony presented by Winters and three other witnesses established that Lightening Bug Lane provided access to farmland, cabins or homes on the Winters' lot and other properties south and west of Winters for a substantial period of time going back to at least the 1920's when a presently 86-year-old man, John Brown, was in grade school. Mr. Brown said he and others regarded it as a public road. The testimony offered on behalf of Winters also established that when Platusich acquired ownership of his land, in 2002, the right-of-way was in its present location. Winters currently rents out the home on his lot. By traversing Lightening Bug Lane directly north from the residence on his property it is approximately 100 yards to Route 44, the nearest public road. He can also access a public road known as Second Street (T-684, see Plaintiff's Exhibit 21) by going in the opposite direction on Lightening Bug Lane crossing several other properties and then - as the Court understands it - crossing another

property where he resides (over a right-of-way that is a subject of another lawsuit). The distance to Second Street is approximately 300 yards. In times of high water, the access by traveling south on Lightening Bug Lane to Second Street is not passable. Such times of high water occur with relatively slight flooding conditions common to heavy rainfalls which have recently occurred.

Mr. Bruce M. Platusich testified for Platusich. He testified that in his personal research he found a railroad right-of-way map dated June 30, 1917 (Defendant's Exhibit No. 1), which showed no indication of there being a roadway nor railroad crossing in the vicinity of where the Lightening Bug Lane easement is physically located. The uncontradicted testimony, however, indicates that where Lightening Bug Lane crosses the railroad right-of-way the railroad is elevated above the roadway on a bridge, which crosses Little Pine Creek, creating an underpass through which the easement in question passes. The map presented by Platusich shows the railroad bridge abutment in its present location, east of Lightening Bug Lane. The map does not establish that the Lightening Bug Lane roadway did not exist in 1917.

Platusich acknowledges that the private roadway was visible and open upon the ground at the time they acquired ownership of their property. From time to time it is alleged by Winters that Platusich has taken various steps to interfere with his use of Lightening Bug Lane from Route 44 to his property. It is also acknowledged that recently Winters' access was denied by Platusich placing a chain across the easement area and affixing the chain to a post by means of a pad lock. As a result of this last action, Winters instituted this lawsuit and has requested a preliminary injunction be issued which would prohibit Platusich from maintaining the chain gate until such time as the issues involved in his right to use Lightening Bug Lane can

be finally resolved.

DISCUSSION

Lightening Bug Lane does provide a means of access to the Winters' lot. It does cross the Platusich lot. What is in dispute is whether or not Winters has a valid legal interest in this right-of-way and if he does, can Platusich chain it off?

In determining whether or not to issue a preliminary injunction, the standards that apply are clear. They consist of the following:

"A petitioner seeking a preliminary injunction must establish every one of the following prerequisites; if the petitioner fails to establish any one of them, there is no need to address the others." ***Kessler v. Broder***, 851 A2d 944.947 (Pa. Super. 2004). A party seeking a preliminary injunction must show:

(1) that an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages;

(2) that the greater injury would result from refusing an injunction than from granting it, and, concomitantly, that the issuance of an injunction will not substantially harm other interested parties in the proceedings:

(3) that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct;

(4) that the activity sought to be restrained is actionable, that the right to relief is clear, and that the wrong is manifest, or, in other words, the party must show that he is likely to prevail on the merits;

(5) that the preliminary injunction is reasonable suited to abate the offending activity; and

(6) that the preliminary injunction will not adversely affect the public interest.

It is a fact of life that there have been and are many disputes between the owners of right-of-ways and owners of the lands crossed by right-of-ways under the circumstances and

facts similar to this case. Pennsylvania courts for a long time and at often times have been called upon to resolve such disputes involving the landowner's erection of a gate across a right-of-way. As a result, the legal principles which apply to this case are clear and well established. Our Superior Court has stated:

> It is well settled that the owner of a dominant estate has free and full use of the entire easement granted, and neither party may unreasonably interfere with the other's use. . . The subsequent purchaser of land, who has notice of an existing easement, takes land subject to that easement. . . .

Kushner v. Butler County Airport Authority, 764 A.2d 600, 603 (Pa. Super. 2000) (citations omitted). Pennsylvania courts have also often ruled on the specific issue before us, the right of the landowner to erect a gate-or chain, bar or other restriction-across a right-of-way and concluded:

> The erection of a gate should not be restrained unless it is an unreasonable interference with an easement, or completely denies the rights of the user. ***Taylor v. Heffner***, 359 Pa. 157, 164, 58 A.2d 450, 454 (1948). Gates or moveable bars, if not an unreasonable obstruction to the use of [an easement], are not an unlawful abridgment of the right of passage under easement. ***Haig Corporation v. Thomas S. Gassner Co.,*** 163 Pa. Super 611, 615, 63 A.2d 433, 435 (1949).

Matakitis v. Woodman, 667 A.2d 228, 232-33 (Pa. Super. 1995).

Although these governing principles found in ***Kushner*** and ***Matakitis*** can be easily stated, the application of these principles to a particular fact situation is not easily accomplished. In many cases, including the one now before us for disposition, each party often argues the same principles as enunciated in ***Kushner*** and ***Matakitis*** support their respective positions. In order to resolve this inconsistency this court has examined the prior Pennsylvania case law from which these principles evolved. That examination establishes the correct application of a

specific principle has been controlled by the peculiar factual circumstances of a given case. Therefore, an analysis of the facts of the cases from which the "black letter" principles developed provides guidance for the determination of the present dispute. Doing so takes us back to the 19th century.

The Pennsylvania Supreme Court, in 1873, overturned a trial court's directed verdict entered in favor of the landowner (defendant/owner of the servient estate) who had erected a gate across Plaintiff's passageway, stating:

> Whether the gate in this case amounted to a wrongful obstruction was, therefore, a question of fact for the jury. If it was not a practical hindrance, and, under the circumstances, an unreasonable obstruction to the plaintiff's use of the passageway, then it was not a wrongful or illegal obstruction for which an action will lie.

Connery v. Brooke, 73 Pa. 80, 84 (1873).

The passageway involved a lane, which led from the property of the plaintiff to the Bustleton and Somerton Turnpike. When the right-of-way was created in 1858 the gate in question did exist across the passageway where the lane intersected the Turnpike. It continued to exist there until the lawsuit was instituted in 1869. The grant of the right of the passageway included the terms, "the free use, right and privilege of a passageway." The Supreme Court rejected the contention that these words could only mean that there would be no obstruction whatsoever and that a gate hung across the way was always wrongful. Instead it recognized the general rule that the words creating an easement were to be understood in their ordinary and natural sense and in "accord with the intention of the parties." ***Id.*** at 83. To ascertain their intention the court must look at the circumstances existing at the time the easement was created. ***Ibid.*** The Court indicated the existence of the gate at the time the right-of-way was created

would be considered as evidence of the parties intent. The court further found that "free access" in the circumstances would prevent an unreasonable obstruction but not one that "amounts practically to little or no inconvenience". ***Id.*** at 84. Finally, ***Connery*** commented that even if the gate might be enjoined its forced removal by the owner of the right-of-way could constitute a trespass. ***Id.*** at 85.

Unlike ***Connery,*** we do not have any words which initially created the Lightening Bug Lane easement. When first used however it provided access to cabins and houses on the tract Winters' lot was derived from and other properties beyond Winters. It was also regarded by some as a public road. The reservation in Platusich's deed, however, refers to it as a private right-of-way. It is clear that public or private, Lightening Bug Lane was intended to be an access road for Winters' property and under ***Connery*** we must determine if this gate is an unreasonable obstruction to the right of access. In our case, there is no evidence that the easement was ever gated from the time it came into existence until Platusich erected his chain in recent years. This factor alone is not determinative that the chain gate is unreasonable.

The right of a property owner to erect a gate across a right-of-way, regardless that a gate did not exist when the easement was created was upheld in ***Hartman v. Fick***, 31 A. 342 (Pa. 1895), relying upon ***Connery,*** *supra*. The servient property owner conceded that his land was subject to a right-of-way that had been in existence and ungated for 11 years. The lands involved were adjoining farms. The right-of-way had originally been created through unenclosed woodland. Subsequently, the servient property owner cleared the land for cultivation. In order to keep neighbors' cattle out of his cultivated fields, the servient property owner then enclosed the fields by erecting fences across the right-of-way, with ordinary

swinging gates where the road entered the fields. In those circumstances the Supreme Court stated:

> The land remained the property of the plaintiff (servient owner) and he had a right to use it for any purpose that did not interfere with the easement. To do this it might be necessary under some circumstances to enclose the way with the field over which it passes, and if this is done with a reasonable regard to the convenience to the owner of the easement, it affords him no just ground of complaint (emphasis added).

Id., at 343.

Necessity for a gate barrier was also the controlling factor when the Superior Court applied ***Hartman***, *supra* and ***Connery,*** *supra* in ***Kohler v. Smith,*** 3 Pa. Super. 176 (1896). The Superior Court upheld the lower court's directed verdict allowing a landowner to erect a gate across a 132-foot lane right-of-way which crossed his land. Based upon the evidence presented in the court below, the Superior Court stated:

> There was apparent necessity by the owner of the servient tenement (defendant)...to use bars at the entrance to this so-called lane, through and over which the plaintiff claimed the right to pass, so as to restrain his cattle whenever necessary…(T)he defendant and those under whom he claimed used the bars whenever it became necessary for him to do so for his own convenience and protection. The present defendant erected a swinging gate at the point at which the posts and bars had been previously erected and maintained (emphasis added).

Id., at 178. The Superior Court acknowledged there was some evidence that plaintiff, the owner of the right-of-way, was inconvenienced by having to open the gate and in this regard stated:

> [B]ut his explanation shows that it is only the usual and necessary inconvenience, which was caused by descending from his wagon, opening the gate, driving through, and closing it again. This we think, under all the authorities, cannot be considered in any sense as an unreasonable obstruction nor hindrance to the free use of the way by the owner of the easement.

Ibid.

The Superior Court in upholding the directed verdict also recognized as did ***Hartman***, *supra*, and ***Connery***, *supra*, that whether the gate would amount to wrongful obstruction is normally a question of fact for the jury. In doing so, the Superior Court accepted the reasoning of the trial court which stated: the owner of ground subject to a passageway can make any use of the ground that is consistent with the enjoyment of the right-of-way by the other party; a servient owner has a perfect right to put up swinging gates, provided they are not an unreasonable obstruction to enjoyment of the right-of-way by those who are entitled to use it. ***Id.*** at 179. The Superior Court also cited the treatise, Washburn's American Law of Easement and Servitude, 3rd Edition 1873, page 264, which said,

> It seems to be now settled that, if the landowner is not restrained by the terms of the grant of a right-of-way across his lands for agricultural purposes, he may maintain fences across such way, if provided with suitable bars or gates for the convenience of the owner of the way. He is not obliged to leave it as an open way or to provide swinging gates, if a reasonably convenient mode of passage is furnished.

Ibid The Superior Court found this statement to be consistent with Pennsylvania law as stated in the ***Hartman*** and ***Connery*** decisions.

The ***Hartman*** and ***Kohler*** cases provide guidance in this case. The type of easement over Platusich's property is similar to both cases. The length is similar to ***Kohler.*** As in ***Hartman*** there was no gate when the right-of-way came into existence and it has been used without any gate for nearly 80 years. The inconvenience to Winters' in stopping and opening the gate may be but the normal inconvenience except, possibly, for the difficulty of stopping and starting in adverse weather conditions similar to the facts found significant in ***Kohler***. In contrast to the

servient property owners in ***Hartman*** and ***Kohler,*** however, Platusich cannot point to a necessity, convenience, or danger that would be addressed by his gate. Nor in our case is any change in the circumstances concerning the use of either property from the time the easement was created, except that the approach to Route 44 has been shifted so that it runs in front of rather than to the side of Platusich's home. The question then becomes whether there exists an apparent necessity under these circumstances for Platusich to erect his chain gate and if so, is it done with reasonable regard to Winters' travels on the roadway.

While it is true Platusich is within his right to use the servient property in any way that does not interfere with the easement of the right-of-way, the chain gate does nothing to enhance his use of his property. We conclude that on the evidence presented there is no reasonable necessity for the Platusich gate under the rationale of ***Connery, Hartman,*** and ***Kohler.*** The easement location change, which occurred in 1984, did not soon after necessitate the erection of a gate. This is strong evidence that the slight easement relocation does not support the finding of any necessity to erect the gate.

It appears that if the test of a reasonable necessity for a gate would be met by the landowner, the court should then determine if the gate itself was a reasonable restriction or an unreasonable obstruction to the right-of-way owner. In ***Helwig v. Miller,*** 47 Pa. Super. 171, (1911), the Superior Court permitted the erection of a gate which was, "an ordinary swinging gate, opening either way, easily operated, and not an unreasonable obstruction to the free use by the defendant by his private right-of-way." ***Id.***, at 174. The landowner in ***Helwig*** had erected the gate in order to prevent his livestock from wandering onto an adjacent public road. ***Helwig*** stated the cited authorities established a firm doctrine that a gate over the right-of-way was

permitted because the owner of ground subject to a right-of-way could use the ground as the owner chose, so long as he did not interfere with the proper and reasonable use of a right-of-way by those entitled to use it. 47 Pa. Super. At 175.

The right-of-way in ***Helwig*** was not just used by its owner to reach a highway but also was used by those who would visit the lands of the owner of the right-of-way for the purpose of business or pleasure. The ***Helwig*** court, however, specifically rejected the right-of-way's owner's contention that ***Hartman v. Fick****, supra,* ***Connery v. Brooke,*** *supra* and ***Kohler v. Smith,*** *supra.* were distinguishable because in those cases it appeared the right-of-way was only used by its owner. ***Helwig*** concluded that persons who lawfully used the right-of-way could have no greater right than the owner of the right-of-way for their necessary and reasonable enjoyment of it.

Platusich's chain certainly is an ordinary chain. It can be easily let down and then re-hooked. Winters contends, however, the chain is a hardship on his tenants and those providing services to his property. Applying ***Helwig***, it makes no difference if Platusich's chain interferes with Winters tenants or those who visit the property for business purposes such as oil delivery. If the chain is an appropriate restriction to Winters it is to them also. The inconvenience to Winters and others is in the stopping of their vehicle and getting in and out two times in order to make use of the right-of-way. This stopping and restarting becomes more restrictive when the roadway is covered by ice or snow. Traction on the inclined part of Lightening Bug Lane is affected at those times, both in stopping and in "getting a running start to go up the hill" to Route 44.

Winters asserts that the record is now sufficient to permit a ruling that these stopping and starting problems coupled with the language in Platusich's deed subjecting Platusich's property to a right-of-way would make any gate an unreasonable restriction on Winters' rights. This Court believes the determination as to the chain being an unreasonable restriction can be left to the ultimate trier of the facts since Pennsylvania case law does not support an absolute finding that Winters' contention is correct.

In 1921, the Superior Court again upheld the erection of a swinging gate across a right-of-way of a lane, which had been reserved over a 70-acre farm, "upon severance of an adjoining parcel as always had been used" by the prior owner. ***Zeigler v. Hoffman*** 78 Pa. Super. 115, 116 (1921). This language is similar to the reservation appearing in Platusich's deed which excepted "an existing private right-of-way . . . (which) . . .the Grantor and her predecessors in title, have previously allowed use of same"(Plaintiff's Exhibit No. 12). The way in which the right-of-way came into existence did not appear to be of consequence in ***Zeigler***, however, as in sustaining the trial court's holding that the erection of the gate across the right-of-way was necessary to keep the cattle of the servient landowner in the pasture field, the court stated:

> It would be unreasonable to require the owner of the 70-acre farm to fence off the way across his farm from east to west, or in the alternative, take the risk of damage to his property by cattle straying either from appellant's (owner of the right-of-way) farm or from the public road, or perhaps risk the escape of his own cattle, when such consequences may easily be prevented by the construction of proper gates at suitable places.
>
> What is reasonable varies with the circumstances; the character of the land, or of the way, or of the use of the easement may affect the determination of what is reasonable; but it is a question of fact to be determined when alleged interference arises. (emphasis supplied)

Id., at 119, (citing ***Ellis v. Academy of Music,*** 120 Pa. 608, 622 (1888); ***Helwig,*** *supra.;* ***Kohler****, supra.).* The consequences prevented by erection of the gate in ***Zeigler*** were damages to crops or escape of cattle from the farm which the road crosses. The damages were not those arising from the use of the right-of-way.

In many ways the chain gate of Platusich is a nuisance to Winters. In ***Ellis*** *supra****,*** cited by ***Zeigler****,* the Pennsylvania Supreme Court found that a gate closing an alleyway was a nuisance and upheld an award of damages for maintaining a nuisance. The ***Ellis*** court held that a gate may or may not be an obstruction depending upon circumstances, which in that case properly had been left to the jury to decide. ***Id.***, at 628. ***Ellis*** distinguished ***Connery****, supra,* on the basis that the gate in ***Connery*** existed at the time that the grant of the right-of-way was made.

The holdings in ***Ellis*** and ***Zeigler*** and their precedents cited herein certainly support a conclusion that Winters has suffered an actionable, enjoinable wrong, that the right to relief is clear and that Winters is likely to prevail on the merits. At this stage of the litigation between Winters and Platusich the issue as to whether the chain gate is a nuisance is not ripe for final determination. That also must be left to the ultimate trier of fact, if indeed it becomes an issue as the case proceeds to final resoluntion. Although ***Ellis*** recognizes under those facts a right to compensatory damages for a nuisance, a nuisance may also be restrained by injunction. See ***Taylor v Sauer,*** 40 Pa. Super. 229 (1909).

Again, based on ***Ellis*** and ***Zeigler*** it appears the initial and often controlling inquiry is to determine if the gate is of consequence or benefit to the land which is crossed by the right-of-way. Platusich asserts he needs the gate to protect his shrubbery which grows next to the right-of-way and to prevent the noise and dust which result from Winters driving on Lightening Bug

Lane. This type of "damages" or harmful results are not remediated by the Platusich gate. The gate may create more noise as vehicles start and stop or, more dust as vehicles accelerate from a standing stop to gain sufficient momentum to go up the hill or brake to a stop going down. The chain offers the shrubbery no protection. Platusich's gate will not stop Winters vehicle from damaging the shrubbery (if in fact he has done so) for when Winters opens the gate and drives through his course of travel on Lightening Bug Lane will be the same as if he had not stopped and opened the gate.

It is clear that Winters' real intent in erecting the chain gate and locking it is an effort to deny Winters' rights to the use of Lightening Bug Lane because stopping Winters use of the road is the only way to avoid the harm Platusich seeks to avoid. The court believes this action by Platusich entitled Winters to a preliminary injunction. Platusich's property does not suffer any similar consequence or damage to that discussed in ***Zeigler*** nor the cases ***Zeigler*** relies on from the mere existence and use of Lightening Bug Lane. Contrary to the factual situation in ***Zeigler***, Platusich's gate does not prevent any adverse consequence to Platusich but does place a burden on Winters use of Lightening Bug Lane. Regardless we find on the evidence presented thus far in this case that the Platusich chain is a deprivation of access to Winters' residence which can not be adequately compensated by damages particularly when locked.

Platusich's counsel in argument represented that if the court would not enjoin the chain gate, Platusich would provide a key to Winters, thereby making the gate a reasonable restriction. A key alone will not make an unreasonable restriction of the right-of-way into a reasonable one. The Supreme Court (continuing to rely on ***Hartman***, *supra*, and ***Zeigler***, *supra)* in ***Taylor v. Heffner,*** 359 Pa. 157; 58 A.2d 450 (1948), held that gates which were kept locked or closed

across an easement at times it was being used as an access road to the easement owners business was an unreasonable interference with the easement, regardless that the landowner gave the easement owner a key. ***Taylor*** then recognized that although the land owner had a right to use his property the use must be exercised in a manner consistent with the easement and not interfere with the proper and reasonable use of the right-of-way but stated:

> The erection of a fence and gates by Appellants (the landowners) can not be restrained. That right can not, however, be exercised as here where it is sought to completely deny the right of the user. In the circumstances of this case, we hold that the erection of the gates, which are kept locked or closed during the time when the appellants (owners of the right-of-way) are using the road, does constitute an unreasonable interference with the easement. Appellee's (landowners) contention that a key was given to appellant's predecessors in title we deem immaterial in view of the complete denial of any rights in appellants as regards the use of the road in question. (emphasis added)

Id., at 454.

As discussed above, it appears clear to this court that Platusich's primary reason for chaining of Lightening Bug Lane is to absolutely prohibit Winters from making use of that road to access his property, or, in the words of ***Taylor***, "to completely deny the right of user." ***Ibid.*** This cannot be sanctioned. Platusich's chain would be in place at anytime Winters-or his tenants- would be using Lightening Bug Lane. ***Taylor*** makes it clear that whether or not the chain is locked is not dispositive. It is true that in Taylor use of the right-of-way by a commercial establishment may have been on a more frequent basis than Winters or his tenants, however, the use by Winters and his tenants is on a daily basis – several times a day in fact. Although it must be recognized that to the extent Winters earns rental income from the property it a "commercial" use to him, Winters use of such a frequency as to be indistinguishable from

Taylor on the basis that it is a residential use rather than a commercial one. Therefore, even if Platusich would give Winters a key, or would keep the gate unlocked, Winters right to an injunction would not automatically be defeated.

The Superior Court, however, distinguished ***Taylor***, in the case of ***Haig Corp. v. Thomas S. Gassner Company, Inc.***, 63 A.2d 433, 435 (Pa. Super. 1949), when it determined that, "under the circumstances of this case, a locked gate is not an unreasonable interference with plaintiffs' right to the use of the alley in question." In ***Haig,*** the property subject to the right-of-way was a commercial building used for the manufacturing of furniture. The right-of-way was an alley which provided access from a main street in Philadelphia to three lots over which it traversed, including that of the defendant landowner. The landowner had erected a metal-padlocked gate to protect his establishment from fire, theft and nuisance committed by trespassers. The gate similarly benefited the other lots of the easement owners. The gate was closed when not in use and locked from 5:30 p.m. to 8:00 a.m. daily and over weekends when the manufacturing plant was not in operation. The property owner had offered to furnish the adjoining right-of-way owners or their tenants and other authorized persons with keys to the lock.

Haig recognizing the necessity of the gate to protect the landowners' property from the threat of mischief, vandalism, robbery and fire, permitted the locked gate to remain in place quoting, ***Nichols v. Cornet Band***, ***(No. 1)*** 52 Pa. Super. 145, 151, (1912), as follows:

> Because the alleyway is subject to the free and unobstructed use by the owners or tenants of the…lots, the law does not, under all circumstances, require that it should be absolutely thrown open to be used by everybody and thus probably become a place which could easily be converted into a nuisance for all concerned. If for the protection of their common rights, one or more of the parties, should erect across the opening a swinging gate that would permit the free entrance or exit of vehicles and that would be so

> constructed as to be easily operated, we are not prepared to say that such a gate would be an obstruction to the legal right of anyone of the lot owners. (emphasis added)

63 A.2d at 435.

Haig also cited ***Helwig v Miller***, 47 Pa. Super. 171 (Pa. Super.1911) for the proposition that a landowner could erect a "proper swinging gate" across a private right-of-way, "at the public road for the protection of his property". ***Ibid.*** In doing so and also relying on ***Connery v Brooke***, supra, it is clear the court in ***Haig*** found the gate was not an unreasonable interference with the use of the right-of-way because of the benefits it conferred – to both the landowner's property and the properties of the easement owners.

In reaching its decision, the ***Haig*** court specifically distinguished ***Taylor v Heffner***, supra, on the basis that the landowner in ***Taylor*** sought to completely deny the rights of the easement owners. ***Haig***, supra, at 433. The ***Haig*** court also took note that the owners of the right of passage had not used or attempted to use it for a prolonged period of time, specifically between 1931, the time that the alleyway was first gated, and the time of suit (1946).

Platusich's gate does not serve to protect their property from threat of mischief, vandalism, robbery or fire as did the gate in ***Haig***. Instead, the gate is an attempt to block Winters lawful use of the right-of-way. The non-use by the right-of-way owners in ***Haig*** is in sharp contrast to the frequent use of Lightening Bug Lane by Winters. The long un-gated use of Lightening Bug Lane from at least the 1920's until now is also persuasive that the gate serves no useful purpose since no other changes in the lands affected exist. The change which has occurred is in the personalities of the owners. Therefore, ***Haig*** does not sustain Platusich's

position that he can maintain a locked gate across Lightening Bug Lane by providing a key to Winters.

The protection or benefit of a gate to the landowner continues to be the determining factor in recent cases. The Pennsylvania Superior Court ruled in ***Matakitis v. Woodmansee***, 667 A.2d 228 (Pa. Super. 1995), that a gate erected across a 15-foot wide right-of-way utilized by motor vehicles, which crossed and served four residential/recreational properties near a lake, could not be restrained under the doctrines recognized in ***Taylor***, *supra* and ***Haig***, *supra*. In ***Matakitis,*** the keys to the gate in question had been provided to those who had the right to use the right-of-way. A user of the right-of-way, who had been given a key, was not satisfied with that and unilaterally removed the gate. The court's ruling in ***Matakitis*** found the gate afforded protection to all four parties who had the benefit of the right-of-way. Therefore, the court required the gate to be restored by the party who had removed it finding that there was a minimal inconvenience caused by the locked gate. ***Id.*** at 233.

Platusich asserts the ease of operation of this chain gate makes its erection under ***Matakitis*** appropriate because it poses minimal inconvenience to Winters. In making this argument Platusich ignores the protection the ***Matakitis*** gate offered to all and also the relatively infrequent use made of the right-of-way by the recreational-seasonal home-right-of-way owners. Both of these factors are in contrast with Platusich's gate on Lightening Bug Lane.

Even when protection of the landowner's property is clearly achieved by a gate, the type of gate and its manner of operation must not prevent reasonable use and ease of access by users of the right-of-way, ***Kushner v. Butler County Airport Auth.,*** *supra* at 604. The Superior Court in ***Kushner*** directed that an airport authority, as a property owner who had erected a gate across

a right-of-way used by airplanes, was required to make the gate automated and wide enough for airplanes to pass through. In reaching that conclusion, the court rejected the utilization of a manual gate because it required two men to operate it and airplanes using it had to be turned off and on while the gate was opened and closed. The court specified:

> While operation of the manual gate may be viewed as a mere inconvenience to some adjacent property owners, it represents a complete denial of access to others since some of the pilots were women who were physically incapable of opening the manual gate. Moreover, a pilot operating his plane alone may also be denied reasonable use of this easement by the manual gate…
>
> (G)iven the fact that affirmative action by the Authority has obstructed the easement…it is required to render the gate useable for all easement holders. Specifically the Authority must provide unobstructed ease of access to the easement for all easement holders. (emphasis added)

764 A.2d at 604. The ***Kushner*** court determined that the manual gate, which could not be operated by a single pilot, was a substantial interference with the easement that effectively prevented the use of the easement. ***Id.,*** at 604-05.

Applying ***Kushner*** to the Platusich gate Winters and all who use the easement under him must have an ease of access free of any unreasonable obstructions. At trial, the gate of Platusich may very well be determined to an unreasonable obstruction to Winters or his tenants in several foreseeable circumstances. These may include that to operate the gate users will be required to leave the vehicle in inclement weather, subjecting clothing and footwear to become soiled, or uncomfortably wet. Also users may encounter difficulty in stopping and starting while on or just about to enter the inclined portion of Lightening Bug Lane when it is icy or snow covered in order to operate the gate to make use of his residential property on any given day. Winters, his tenants, their guests, the people who provide services to the home may have occasion to travel

Lightening Bug Lane to the Winters' property. A particular user may have a physical impairment which makes the gate more difficult for that user than it is for those without a limitation. Winter's right-of-way over Lightening Bug Lane must be available to all of the travelers, day or night, at any time of year. There does not appear to be any distinction that can be drawn as to time of day or time of year. At nighttime or inclement weather, the unchaining as well as unlocking then locking/latching the gate becomes an obstruction rather than merely an inconvenience to all these travelers. This could amount to a substantial interference in the eyes of the ultimate trier of fact with the easement rights of Winters.

In summation the analysis applied by the foregoing cases discloses that many factors are to be considered in determining whether or not a gate can be erected across a right-of-way, including:

1. The protection or benefit gained by the landowner who erects the gate across the right-of-way.
2. The inconvenience and obstruction the gate causes to the users of the easement.
3. The parties intent as determined by:
    a. The words and terms used in creating the easement,
    b. The character and use of the land and the easement at the time the easement was created,
    c. The length of time the use was made unchallenged and when and to what extent changes were made.
4. The ease of use of the gate.

5. The extent of use of the right-of-way that has been made by those entitled to use it.

6. The practicality of keys being provided if the gate is to be locked and the times that the gate is to be locked.

In applying those principles of law to the facts thus far presented in this case, it is clear to the Court that the Winters gate does constitute an actionable, unreasonable obstruction of Lightening Bug Lane. Primarily this is because the Platusich chain gate does not effectively afford his property any protection or convenience, but at the same time prevents Winters and his tenants from the normal use of their easement, in the manner it has been used for over 80 years. This has often been the controlling fact in determining if a gate is a reasonable and permissible obstruction to a right of passage.

Under the standards related to a preliminary injunction, it becomes apparent to this Court the facts and law applicable to this case warrant that the preliminary injunction should be granted, as they meet the enumerated criteria set forth at the beginning of this discussion.

1. The injunction is necessary to prevent immediate irreparable harm that can not be adequately compensated by damages because it interferes with the access that Winters uses for going to his residential property. Lightening Bug Lane is the primary means of access to Winters' property. The alternate access is not always useable. There is no evidence that their alternate route is legally available to Winters. Although Winters owns the last property that the alternate access crosses, there is not any evidence that he has conveyed any right to himself as owner of the dominant tenant involved in this case to have that right of access to the public road apply to the lot in question. The testimony about the alternate route is insufficient for this

Court to reach a conclusion that the harm caused by the gate is not immediate. Access to properties is a significant property right. It is something that can not be measured as to its value in dollars. The interference imposed by Winters locked chain gate constitutes an immediate irreparable harm to the right of access over the easement.

2. Greater injury would result from refusing the injunction than from granting it. The injunction will not substantially harm other interested parties in the proceedings. The access claimed by Winters is over a well defined gravel roadway. It is a typical rural driveway. The harm to Winters in denying access is that Winters and his tenants are prevented from the normal and typical access to his property, which may be his only legal and at all times available access as referenced above. The harm to Platusich is that vehicles will continue to drive over this roadway which was visible and apparent upon the ground at the time he bought the property and which has been used continuously by Winters and others up until the time the chain was erected. Thus there is little, if any, additional detriment to Platusich. Essentially, there are no other parties in the proceeding except that maybe that at some point in the future others that have the asserted right to use the easement over Platusich may join in the action. Such joinder is certainly speculative at this point. Nevertheless it would appear that the chain of Platusich would cause harm to other users as opposed to any benefit.

3. The injunction will restore the status quo. Removing Platusich's chain gate will restore the parties to the status quo that has existed until this year since Platusich bought the property in 2002 and before that for almost 80 years.

4. The claim of Winters is actionable, that is, Winters is likely to prevail on the merits. This is because the gate offers no benefit to Platusich's property.

5. The preliminary injunction is reasonable. Removal of the chain will prevent Platusich from interfering with Winters' rights to use Lightening Bug Lane. It can be removed at little or no expense.

6. There is no public interest that will be adversely affected by the injunction. To the extent other members of the public, or at least other lot owners south and west of Winters have the right to use Lightening Bug Lane as referenced in Platusich's deed, the public interest may be advanced by the chain's removal.

ORDER

Platusich is hereby enjoined from obstructing Lightening Bug Lane. Platusich shall remove the chain gate erected by them across Lightening Bug Lane, upon Winters posting a bond in the amount of $500.00 to guarantee payment of any damages Platusich may suffer from Winters or those claiming under him because of their use of Lightening Bug Lane.

BY THE COURT,

William S. Kieser, Judge

cc: Joseph R. Musto, Esquire
Malcolm Mussina, Esquire
Judges
Christian J. Kalaus, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)