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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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DANIEL E. O'LEARY and JULIA A. O'LEARY,	)	Appeal from the Circuit Court of Kane County.
	)	
Plaintiffs/Counterdefendants	)	
-Appellants,	)	
	)	
v.	)	No. 09-CH-248
	)	
PATRICK B. CLARKE and ALLISON A. CLARKE,	)	Honorable
	)	David R. Akemann,
Defendants/Counterplaintiffs-Appellees.)	)	Judge, Presiding.

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JUSTICE SCHOSTOK delivered the judgment of the court.  
Presiding Justice Burke and Justice Birkett concurred in the judgment.

**ORDER**

¶ 1 *Held:* Counterplaintiffs had standing to pursue injunction regarding encroachments in the public roadway abutting their property, but trial court erred in granting them a preliminary mandatory injunction that changed the *status quo* and granted the ultimate relief requested in the underlying counts.

¶ 2 This lawsuit concerns a dispute between two sets of East Dundee neighbors, the defendants/counterplaintiffs, Patrick and Allison Clarke, and the plaintiffs/counterdefendants, Daniel and Julia O'Leary. The garages belonging to the Clarkes and the O'Learys are accessible only by an unpaved portion of a platted road (Lake Shore Drive) and an easement that terminates at their garages. The circuit court of Kane County granted the Clarkes' motion for a preliminary

injunction and entered orders requiring the O’Learys to engage in substantial landscaping in order to remove certain obstacles and encroachments lying within the boundaries of Lake Shore Drive and the easement. The O’Learys appealed. Because the trial court’s injunction orders improperly served to change rather than preserve the *status quo* pending the final resolution on the merits, we reverse and remand for further proceedings.

¶ 3

### BACKGROUND

¶ 4 Although the O’Learys live at 422 Lake Shore Drive and the address of the Clarkes is 455 Roslyn Road, they are next-door neighbors. Both properties are located on a slope. Roslyn Road runs along the top of the slope, and the Clarkes’ front door faces it. The paved portion of Lake Shore Drive runs along the foot of the slope. Where the paved portion of Lake Shore Drive ends, an unpaved portion continues. This unpaved portion empties into a 30-foot-wide easement that terminates at private areas near the parties’ garages. The Clarkes’ garage is located behind their home and (like the O’Learys’ garage) is accessible only via the unpaved portion of Lake Shore Drive and the driveway easement.

¶ 5 The unpaved portion of Lake Shore Drive was platted as a 30-foot-wide, two-lane road when the area was first subdivided in 1928, and has existed in the same state—as a platted, unimproved road—since then. The easement was memorialized in a 1976 plat of reciprocal easement, and consists of an arc 108 feet long and 30 feet wide. Half of the easement (a 15-foot width all along the easement) is on the Clarkes’ property and the other half is on the O’Learys’ property. The purpose of the express easement was “for ingress, egress and public utilities.”

¶ 6 The Clarkes and O’Learys both bought their respective properties in 2001. The parties dispute the condition of Lake Shore Drive and the easement at that point in time and thereafter. The Clarkes assert that the entire driveway was relatively flat and wide enough for two cars to pass each other easily while moving, and that the parties and their guests were able to make a

180-degree turn at the end of the easement abutting their garages. Now, however, they contend that the driveway is sloped and its integrity has been compromised by runoff from a portion of the easement that was raised by the O’Learys, and it is too narrow and uneven to allow a turnaround or for two cars to safely pass each other while moving. The Clarkes also assert that the driveway has been narrowed to the point that a hook-and-ladder firetruck could not reach their home in the event of a fire. The O’Learys assert that the driveway is in essentially the same condition now as in 2001 and that it is wide enough to permit passage of firetrucks and other emergency vehicles. They concede that they have altered “their” side of Lake Shore Drive and the easement over the course of several years by: continuing their front steps into the area dedicated to the platted roadway; placing a lamppost, retaining wall, dirt fill, plantings, and boulders within that area; elevating the portion of the easement in front of their new garage and placing pavers in that portion of the easement; and planting a tree and extending a retaining wall into the easement. However, they argue that the area of the platted roadway occupied by their alterations was unnavigable hillside even prior to their alterations, and they deny that their alterations narrowed or restricted the reasonable use of the driveway for ingress and egress. It is undisputed that the O’Learys did not obtain permits from the Village for any of the alterations.

¶ 7 This suit was filed in June 2009, when the O’Learys were building a new, additional garage on their property and making changes to the easement area in front of the new garage. Although the O’Learys initially filed the suit (alleging various acts of harassment by the Clarkes), their claims were ultimately dismissed, and the sole claims remaining in the lawsuit are those brought by the Clarkes. As alleged in the current (second amended) complaint, those claims include: a request for injunctive relief regarding the encroachments on the easement (count I); a request for injunctive relief regarding the elevation change and obstructions of the area in front of the new garage (count II); and claims that the O’Learys have violated East

Dundee ordinances through their encroachments along Lake Shore Drive and their construction of their new garage (counts III and IV, both of which also seek injunctive relief requiring the removal of the offending items).<sup>1</sup>

¶ 8 In June 2012, three years after this suit was filed, the Clarkes filed a motion for a preliminary injunction. The initial motion alleged that Daniel O’Leary (who was the president of the Village of East Dundee from 2007 to 2009, and was later reelected to that post in 2013) had petitioned to vacate a portion of Lake Shore Drive so that the O’Learys’ encroachments onto the platted roadway could remain, and had in other ways conspired with members of the Village board of trustees and the police chief to misuse the Village’s public powers for the private benefit of the O’Learys and to the detriment of the Clarkes. The Clarkes requested that the trial court prevent the O’Learys from proceeding on the petition for vacation until the lawsuit was resolved, and that it restrain the Village trustees and police chief from harassing them.

¶ 9 In January 2013, the Clarkes filed an amended motion for preliminary injunction. Although many of the allegations were the same, the relief requested no longer related to the threatened petition for vacation or any conduct by Village trustees or employees. Instead, the amended motion sought a “preliminary injunction” compelling the O’Learys to remove all “obstructions, plantings, shrubs, trees, grass, boulders and other obstacles” from the easement and the platted roadway of Lake Shore Drive, and to “restore the street’s grade and pitch to its original condition and lower the street’s elevation” by up to two feet. After briefing, extensive

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<sup>1</sup> On March 20, 2014, the trial court granted the Clarkes leave to add the Village as a defendant and add three counts against the Village to their complaint. Although this order is one of the orders being appealed herein, the Village is not a party to this appeal and its joinder (and the claims against it) are not before us now.

testimony on the motion was heard over the course of four days, beginning on August 20, 2013.

The parties then submitted detailed written closing arguments.

¶ 10 On October 21, 2013, the trial court issued a 10-page order granting a preliminary injunction. It began by noting that the Clarkes sought a preliminary injunction “restoring the complete width of the roadway area and the easement area,” including the removal of encroachments and the regrading of the entire driveway. The trial court then described the evidence it had heard, including the facts set forth above. The trial court also found that, although Lake Shore Drive was platted as a two-lane, 28- or 30-foot wide road, it had been reduced to one lane in actual width. It found that no boulders had existed within the platted roadway before the O’Learys arrived. It recited various Village ordinances relating to encroachments and obstructions of streets. It then found that all four of the elements required for a preliminary injunction were met. The injunction entered by the trial court required the O’Learys to: remove all “obstructions, structures or things that they have placed or caused to be placed” within the platted width of Lake Shore Drive; regrade Lake Shore Drive “to accepted engineering standards for roadway pitch, grade and drainage, texture and content”; remove obstructions from the easement, including the block boundary wall (near the new garage), the spruce tree and boulders;<sup>2</sup> regrade the easement area compatibly with the platted roadway; refrain from placing any new items into the platted roadway unless they first received permits from the Village; and refrain from placing any new items into the platted roadway easement “that would prohibit the free movement of vehicular traffic \*\*\* across the entire width and

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<sup>2</sup> It appears from our review of the record on appeal that the O’Learys removed the encroaching portion of the block boundary wall, spruce tree and boulders. Thus, this aspect of the injunction has been complied with and does not appear to be at issue on appeal.

length of the easement.” The trial court ordered that the Clarkes were not required to post a bond against the possibility that lesser relief would ultimately be ordered when the case was finally resolved.

¶ 11 The O’Learys filed a motion seeking reconsideration of the grant of the preliminary injunction as well as clarification of the precise requirements with which they were to comply. Thereafter, the trial court entered an amended order with additional details regarding the work the O’Learys were to perform. The O’Learys then filed this appeal from the trial court’s orders of October 21, 2013 (granting the preliminary injunction), February 6, 2014 (denying the motion for reconsideration), March 6, 2014 (clarifying the requirements of the preliminary injunction), and March 20, 2014 (denying the O’Learys’ motion to stay enforcement of the injunction). (The O’Learys also filed in this court a motion to stay the injunction pending appeal, which we granted.)

¶ 12 ANALYSIS

¶ 13 On appeal, the O’Learys raise a variety of arguments against the trial court’s actions in granting the injunction. However, as we find certain arguments dispositive, we address only two.

¶ 14 We begin with the threshold issue of standing. The O’Learys argue that the Clarkes lack standing to sue regarding the O’Learys’ encroachments lying within the platted roadway of Lake Shore Drive, because it is a public street. They point to the rule that a private property owner cannot sue over encroachments in a public street unless the owner has suffered a special injury, distinct in kind from the injury sustained by the general public. *Guttery v. Glenn*, 201 Ill. 275, 290-91 (1903). However, the requirement of a special injury is met where the street in question provides the access to the plaintiff’s property. *Field v. Barling*, 149 Ill. 556, 568 (1894) (the purchasers of lots along a dedicated street acquire “the right to have the street kept open and

maintained as a street”; accordingly, owners of property accessed by an alley had standing to sue to enjoin Marshall Field from constructing a passageway that would enclose the space above the alley). As the sole access to the Clarkes’ garage is along Lake Shore Drive, the Clarkes have standing to sue over encroachments in that roadway. *Id.*

¶ 15 The O’Learys argue that the Clarkes’ access to their garage must be completely blocked before the Clarkes could meet the requirement of a special injury, but they cite no authority for this proposition and we are not aware of any. To the contrary, the rule is that abutting property owners are entitled to the use of the full width and length of the street, as well as the air and light over it. *Id.* at 571. In *Field*, the plaintiff property owners were in no danger of losing access to their property along the alley at issue—the defendant’s proposed breezeway was to be constructed 18 feet above the surface of the alley (*id.* at 564)—yet the supreme court still found that they had standing to object to the construction of the breezeway (*id.* at 568). Similarly, in *Greenlee Foundry Co. v. Borin Art Products Corp.*, 379 Ill. 494 (1942), the defendants proposed to build a rail track along one side of a street, leaving room for continued use of the street for traffic. Despite the fact that access was not totally impeded, the supreme court found that construction of the track would violate the rights of the owners of property abutting the street. *Id.* at 498.

¶ 16 The O’Learys contend that not all property owners whose property abuts the street in question have standing to object to the obstruction of the street, citing *Guttery*. There, the supreme court found that the plaintiff owner did not suffer the necessary special injury despite the fact that his property abutted the street that was to be vacated to form a public square. *Id.* at 291. However, this was because his lot was not adjacent to the vacated portion of the street (it was three blocks away); the vacated portion of the street was unimproved and had never been used as a street; and thus the vacating of the street injured the plaintiff only in the same manner

as the general public. *Id.* at 292. The holding of *Guttery* depended on its facts and is inapplicable here, where the sole access to the Clarkes' garage is by way of Lake Shore Drive. Thus, the Clarkes have standing to object to the O'Learys' encroachments into the platted roadway of Lake Shore Drive.

¶ 17 We next turn to the main issue at hand, whether the trial court properly granted the preliminary injunction. A preliminary injunction may be granted when the movant shows four elements: a clearly ascertained right in need of protection; irreparable harm unless the injunction is issued; no adequate remedy at law for the threatened harm; and a likelihood of eventual success on the merits. *Beahringer v. Page*, 204 Ill. 2d 363, 379 (2003). We review the grant or denial of a preliminary injunction for abuse of discretion. *Franz v. Calaco Development Corp.*, 322 Ill. App. 3d 941, 946 (2001).

¶ 18 A preliminary injunction serves a different purpose than a permanent injunction. The objective of a preliminary injunction is “not to determine controverted rights, controverted facts, or the merits of a case.” *Franz*, 322 Ill. App. 3d at 946. Rather, “[t]he purpose of a preliminary injunction is to preserve the *status quo* pending a decision on the merits of a cause.” *Beahringer*, 204 Ill. 2d at 379. Accordingly, a preliminary injunction is designed to be more limited in scope than a permanent injunction, not to grant the same relief that could be obtained after a full hearing on the merits. *Shodeen v. Chicago Title & Trust Co.*, 162 Ill. App. 3d 667, 674-75 (1987). A preliminary injunction is “an extraordinary remedy which should apply only in situations where an extreme emergency exists and serious harm would result if the injunction were not issued.” *Beahringer*, 204 Ill. 2d at 379.

¶ 19 The bar is even higher when the preliminary injunction sought is mandatory—that is, it would require the enjoined party to take affirmative actions to bring about the desired state of affairs—rather than restrictive (preventing the enjoined party from taking certain actions).

“Courts do not favor mandatory preliminary injunctions \*\*\*. [C]ourts view the need to impose mandatory injunctions with a fair amount of skepticism, especially in those cases when the court is required to make this drastic use of its authority preliminarily.” *Shodeen*, 162 Ill. App. 3d at 673.

¶ 20 In this case, the trial court issued a mandatory preliminary injunction that granted the Clarkes essentially all of the injunctive relief sought in their claims against the O’Learys (with the exception of relief relating to the O’Learys’ new garage). Although it did so after conducting a lengthy hearing on the merits of the Clarkes’ claims, this was not proper in the context of a request for a preliminary injunction. Rather, as stated above, the purpose of a preliminary injunction is simply to preserve the *status quo*: to prevent future harm, not to remedy past injury. If the trial court was ready to rule on the merits of the Clarkes’ claims, it was obliged to inform the parties that it proposed to proceed on a permanent injunction before it could issue such relief. See *Lily of the Valley Spiritual Church v. Sims*, 169 Ill. App. 3d 624, 628-29 (1988) (at hearing on preliminary injunction, “the trial court should not decide the merits of the case”; enjoined party’s due process rights were violated where stated purpose of hearing was preliminary injunction but trial court issued permanent injunction granting ultimate relief requested).

¶ 21 Further, the mandatory preliminary injunction issued by the trial court had the effect of changing the *status quo* rather than preserving it. As we have observed, “*status quo* is uniformly defined as the last, actual, peaceable, uncontested status preceding the controversy,” although “[i]n practice *status quo* has been the subject of countless, often inconsistent, interpretations.” *Electronic Design & Manufacturing Inc. v. Konopka*, 272 Ill. App. 3d 410, 415 n.2 (1995). Here, the trial court made no findings about when the O’Learys placed various objects on the platted portion of Lake Shore Drive or when the navigable portion of the driveway was narrowed to its present dimensions. However, photographic exhibits submitted by the Clarkes show

boulders and stone retaining walls already existing within the platted roadway in 2009. Further, according to the Clarkes' brief, Allison Clarke and one of their neighbors testified that the O'Learys began to extend their front yard into the platted roadway "shortly after" they moved in in 2001. Thus, although we would hesitate to refer to relations between the O'Learys and the Clarkes as "peaceable" or "uncontested," it is clear that the "last, actual" status when this lawsuit was filed was a partially obstructed driveway.

¶ 22 As noted above, to justify a mandatory injunction requiring extensive relandscaping and regrading of the driveway at a preliminary stage, the Clarkes would have to show that "an extreme emergency exists and serious harm would result if the injunction were not issued." *Behringer*, 204 Ill. 2d at 379. The sole finding by the trial court relevant to this standard is that the Clarkes' "access to fire protection and emergency personnel has been placed in jeopardy." The trial court did not find that access by emergency and fire vehicles was actually impeded, however. Moreover, the factual basis for any finding of imminent danger is substantially undermined by the fact that, although the platted roadway had been narrowed by the O'Learys beginning in 2001, the Clarkes did not file suit until 2009 and did not seek a preliminary injunction until three years after that. Even then, the only immediate threat of harm alleged in their original motion related to threatened political actions by the Village. Those allegations were absent from their amended motion, which alleged no other emergency conditions or imminent harm. (The strongest allegation along these lines in the amended motion was that it was "dubious" whether firetrucks could access the parties' properties along the driveway.) The Clarkes' contention that access by emergency or fire vehicles is "dubious" is belied by their failure to promptly seek a preliminary injunction or a temporary restraining order at the outset of the case. We find no basis in the record for the contention that access by emergency vehicles was obstructed in such a manner as to justify the wholesale relief issued by the trial court. "A

preliminary injunction \*\*\* is not proper where it tends to change the *status quo* of the parties rather than preserve it.” *In re Marriage of Schwartz*, 131 Ill. App. 3d 351, 354 (1985); see also *Konopka*, 272 Ill. App. 3d at 415 (at the preliminary injunction stage, “courts are prohibited from issuing an order that alters the *status quo*”).

¶ 23

#### CONCLUSION

¶ 24 Regardless of the O’Learys’ actions in encroaching upon the easement and Lake Shore Drive, the relief granted by the trial court exceeded the proper scope of a preliminary injunction. However, neither by our comments nor by our ruling do we intend to express any opinion as to the merits of the case. We therefore vacate the preliminary injunction issued by the circuit court of Kane County and remand the cause for further proceedings.

¶ 25 Vacated and remanded.