Washington and Lee Law Review

Volume 38 | Issue 2 Article 17

Spring 3-1-1981

XI. Property

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Comparative Hardship Doctrine Applied in Easement Action

The doctrine of comparative hardship is applied in equity when a landowner seeks an injunction to remove an encroachment upon a property right by an adjoining landowner.[1] To apply the doctrine, an equity court must first find that the encroachment was by "innocent mistake"[2] and that the encroachment results in only "slight interference."[3] If the encroachment is both innocent and slight, the court will then balance the benefit of an injunction to the plaintiff against the inconvenience and damage which the injunction would cause to the defendant.[4] Although the plaintiff's rights have been violated, the court may decline to order the removal of the encroachment if the costs to the defendant outweigh the benefits to the plaintiff.[5] The plaintiff then could seek only the remedy of monetary damages at law.[6] In *Griffin v. Red Run Lodge, Inc.*,[7]

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[1] Maryland's doctrine of comparative hardship is generally known in other jurisdictions as "relative hardship." *Compare* Dundalk Holding Co. v. Easter, 215 Md. 549, ____, 137 A.2d 667, 670 *cert. denied*, 358 U.S. 821 (1958) *with* RESTATEMENT OF PROPERTY § 563 (1944). *See* note 8 *infra*.

Equity jurisdiction arises when the aggrieved party has no adequate remedy at law and relief is available in equity. *See* 27 AM. JUR. 2d *Equity* § 5 (1969). An injunction is an equitable remedy whose purpose is to preserve the status quo or restore the conditions which existed prior to the encroachment by control of the defendant's acts. *See* 42 AM. JUR. 2D *Injunctions* §2 (1969). When a property right has been encroached upon, the owner may seek injunctive relief to restore the full rights of the owner. *See* Dundalk Holding Co. v. Easter, 215 Md. 549, ____, 137 A.2d 667, 670 (1958); RESTATEMENT OF PROPERTY § 528, comment e (1944).

[2] *See* Dundalk Holding Co. v. Easter, 215 Md. 549, ____, 137 A.2d 667, 670 (1958) (defendant's good faith reliance on measurements of reputable surveyor held to be innocent mistake); Peters v. Archambault, 361 Mass. 91, ____, 278 N.E.2d 729, 731 (1972). Although Maryland requires an innocent mistake by the defendant, other states require that the intrusion be "not willful" for the doctrine of comparative hardship to apply. *See* Hasselbring v. Koepke, 263 Mich. 466, ____, 248 N.W. 869, 872 (1933) (obstruction cannot be "malicious"); Moyerman v. Glanzberg, 391 Pa. 387, 391, 138 A.2d 681, 685 (1958) (encroachment cannot be made "deliberately and wilfully"); Mary Jane Stevens Co. v. First Nat'l Bldg. Co., 89 Utah 456, ____, 57 P.2d 1099, 1126 (1936) (intrusion cannot be "willful or hostile"). The terms "innocent" and "not willful" have different connotations and different effects on the burden of proof. *See* text accompanying notes 23-28 *infra*.

[3] *See* Easter v. Dundalk Holding Co., 199 Md. 303, 305, 86 A.2d 404, 405 (1952) (building which encroached on property by one foot held slight interference); Peters v. Archambault, 361 Mass. 91, ____, 278 N.E.2d 729, 731 (1972) (house which encroached upon nine percent of plaintiff's lot was not slight interference).

[4] *See* Dundalk Holding Co. v. Easter, 215 Md. 549, ____, 137 A.2d 667, 671 (1958). In *Dundalk Holding Co.* the Maryland Court of Appeals found that the defendant's encroachment by one foot onto the plaintiff's land was both an innocent mistake and slight interference. *Id.* The court denied injunctive relief because the $100,000 cost of moving the defendant's building outweighed the plaintiff's potential benefit of $100, the value of one foot of frontal property. *Id.* at ____, 137 A.2d at 669.

[5] *Id.* at ____, 137 A.2d at 671.

[6] *Id.* at ____, 137 A.2d at 670.

[7] 610 F.2d 1198 (4th Cir. 1979).

the Fourth Circuit considered the proper allocation of the burden of proof to establish innocent mistake in the blocking of an easement of ingress and egress under Maryland law.[8] The Fourth Circuit held that in order for Maryland's equitable doctrine of comparative hardship to bar injunctive relief, the defendant must prove his innocent mistake.[9] The Fourth Circuit also reviewed the federal jurisdictional amount requirement and held that the plaintiff's good faith claim, although disproved at trial, satisifed the jurisdictional amount in a diversity action.[10]

The Griffins purchased their vacation home in 1965.[11] The deed was properly recorded and specifically included an easement of ingress and egress over an existing road.[12] The Griffins and their neighbors used the road continuously.[13] In 1972, Red Run purchased the land over which the easement ran in order to build a recreation area. As part of its development plan, Red Run destroyed the road and constructed tennis courts on the right of way. Red Run provided alternate roads to serve the traffic that had used the original right of way.[14] The Griffins claimed that they were never consulted by the defendant prior to the destruction of the road, nor did they agree to a relocation of their existing easement.[15]

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[8] *Griffin* was a diversity action. *Id.* at 1199. In a diversity action, a federal court must apply the substantive law of the forum state. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 73 (1938). Since the Griffin's property was located in Maryland, the Fourth Circuit applied Maryland law. 610 F.2d at 1200. Like the doctrine of relative hardship used by other states, Maryland's comparative hardship doctrine involves a cost-benefit balancing of an injunction if the court finds an encroachment to be both an innocent mistake and a slight interference. *See* Amabile v. Winkles, 276 Md. 234, 241, 347 A.2d 212, 217 (1975); Columbia Hills Corp. v. Mercantile-Safe Deposit & Trust Co., 231 Md. 379, ____, 190 A.2d 635, 638 (1963); Hanley v. Stulman, 216 Md. 461, ____, 141 A.2d 167, 172 (1958); Dundalk Holding Co. v. Easter, 215 Md. 549, ____, 137 A.2d 667, 670 (1958); Lichtenberg v. Sachs, 213 Md. 147, ____, 131 A.2d 264, 266 (1957); Easter v. Dundalk Holding Co., 199 Md. 303, ____, 86 A.2d 404, 405 (1952).

[9] 610 F.2d at 1202.

[10] *Id.* at 1204-05. In order to establish jurisdiction in a diversity action, federal law provides that the amount in controversy must exceed $10,000, exclusive of interest and costs. 28 U.S.C. § 1332(a) (1976).

[11] 610 F.2d at 1200. Originally, the plaintiff-appellant Mary Griffin was joined by her husband in bringing the action for injunctive relief and damages. After the death of her husband, Griffin filed a suggestion of death. Since Griffin was executrix of her husband's estate, the trial court substituted her as party plaintiff. Brief for Appellee at 2, Griffin v. Red Run Lodge, Inc., 610 F.2d 1198 (4th Cir. 1979). Plaintiff brought the suit individually and as executrix of her husband's estate. 610 F.2d at 1199.

[12] 610 F.2d at 1200. The right-of-way provisions of the deed provide:

> [A]ll rights of the parties of the first part to use in perpetuity as a means of outlet from and as an access to said lots, the existing roads leading therefrom in a Northwesterly and Southwesterly direction to the roads [sic] intersection with the County Road that leads to U.S. Route 219 and the Deep Creek Dam.

Brief for Appellant at 2, Griffin v. Red Run Lodge, Inc., 610 F.2d 1198 (4th Cir. 1979).

[13] 610 F.2d at 1200.

[14] *Id.*

[15] *Id.* The plaintiffs used their property as a vacation home. The Griffins first learned of the destruction of their right of way when they went on vacation and found the defendant's tennis courts instead of the road. Brief for Appellant at 3.

At trial, Red Run did not dispute that it had infringed upon the rights of the plaintiff.[16] Asserting that the plaintiff could not prove the Red Run's act constituted a willful interference with the plaintiff's rights, Red Run relied on the doctrine of comparative hardship to oppose the granting of an injunction.[17] Red Run claimed that its acts were not willful because it had relied on an attorney's advice obtained prior to the destruction of the easement.[18] The defendant further claimed that actual damages to the residents were minimal since the development project actually benefitted the neighborhood by replacing an unsightly road with alternate roads and a recreation area.[19] Finding that the plaintiff had not shown intentional and willful invasion by Red Run of the plaintiff's right of way, the district court denied equitable relief.[20] The district court also granted Red Run's motion to dismiss because actual damages proved did not amount to a sum in excess of $10,000 to satisfy the jurisdictional requirement[21] and plaintiff had not established a basis for punitive damages.[22]

On appeal, the Fourth Circuit reversed the lower court and held that the district judge had incorrectly required the plaintiff to prove that the defendant's violation of the easement was willful.[23] Under Maryland's doctrine of comparative hardship, the Fourth Circuit determined that the burden lies on the defendant to prove that its actions resulted from an innocent mistake.[24] The court further held that proof of innocent mistake is not the same as proof of nonwillfulness.[25] The *Griffin* court recognized that innocent mistake is a higher standard of proof than nonwillfulness.[26] In order to prove innocent mistake, Red Run must prove that it either had no notice of the Griffins' rights, or if it had notice, made a good faith error which resulted in only a slight interference with the plaintiff's rights.[27] Since the district court required the incorrect party to prove the incorrect standard, the Fourth Circuit vacated and remanded the case.[28]

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[16] 610 F.2d at 1200.

[17] *Id.*

[18] *Id.*

[19] *Id.* Plaintiff and local residents allege that the new road provided by the defendant was narrow, impassable in winter snow, and longer than the original right of way. Brief for Appellant at 10-11.

[20] 610 F.2d at 1200.

[21] *Id.*; *see* text accompanying notes 47-55 *infra.*

[22] 610 F.2d at 1200.

[23] *Id.*

[24] *Id.* at 1202.

[25] *Id.* The Fourth Circuit found that "nonwillfulness" and "innocence" do not have precisely the same connotation. Nonwillfulness is a negative term which places the burden of proof on the easement holder as required by the district court. The Fourth Circuit decided to require the proof of a positive innocent mistake by the defendant. *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.* at 1203.

Maryland law requires that for the doctrine of comparative hardship to apply, the encroachment must be the result of an innocent mistake.[29] Without a showing by the defendant of his good faith reliance on incorrect advice,[30] an encroachment is not an innocent mistake where the defendant had actual[31] or constructive[32] notice of the easement. On remand, Red Run will have difficulty proving that an innocent mistake occurred. The defendant had actual notice of the plaintiff's easement because of the obvious use of the road by the plaintiff and her neighbors.[33] Since the deed was recorded, the defendant also had constructive notice under Maryland law.[34] A finding of constructive or actual notice directly relates to the success of the defendant's argument that the encroachment was an innocent mistake due to reliance upon its attorney's advice. The Fourth Circuit stated that Red Run must prove that all relevant facts were fully disclosed to the attorney.[35] At trial,

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[29] *See* note 8 *supra.*

[30] *See* Dundalk Holding Co. v. Easter, 215 Md. 549, ____, 137 A.2d 667, 671 (1958). In *Dundalk*, the Maryland Court of Appeals found that the defendant had made an innocent mistake because the defendant relied in good faith upon the measurements of a reputable surveyor which were later proved to be incorrect. *Id.*

[31] *See* Columbia Hills Corp. v. Mercantile-Safe Deposit & Trust Co., 231 Md. 379, ____, 190 A.2d 635, 637 (1963); Hanley v. Stulman, 216 Md. 461, ____, 141 A.2d 167, 171 (1958); Lichtenberg v. Sachs, 213 Md. 147, ____, 131 A.2d 264, 266 (1957). In *Columbia Hills*, the defendant blocked the entrance to the plaintiff's driveway with a curb and a stone monument. 231 Md. at ____, 190 A.2d at 637. The Maryland Court of Appeals held that even though the plaintiff's deed containing the easement provision was unrecorded, the obvious physical circumstances gave the defendant actual notice. *Id.* Since the defendant had actual notice, there was no innocent mistake, and the court could not apply the doctrine of comparative hardship. *Id.* In *Hanley*, the president of the defendant corporation was advised in writing of the existence of the easement, a road. 216 Md. at ____, 141 A.2d at 171. The president stated that he would take his chances and obliterated the road. *Id.* The Court of Appeals found no innocent mistake, and therefore, no application of comparative hardship. *Id.* In *Lichtenberg v. Sachs*, the defendant ignored a prior injunction ordering him not to block the easement, a road. 213 Md. at ____, 131 A.2d at 266. Since the injunction gave actual notice to the defendant of the plaintiff's easement, the Court of Appeals found no innocent mistake by the defendant when he built a house directly on the road. *Id.*

[32] *See* Amabile v. Winkles, 276 Md. 234, 241, 347 A.2d 212, 215 (1975). In *Amabile*, the plaintiff's right of way was recorded by deed, but the exact physical path of the easement was unclear. *Id.* Plaintiff had graded and improved what he thought was the easement when the defendant began constructing an apartment building on the same area. *Id.* The Court of Appeals held that the terms of the easement in the recorded deed should have put the defendant on notice of the easement and at least prompted the defendant to investigate before continuing construction. *Id.*

[33] *See* 610 F.2d at 1204.

[34] *See* MD. REAL PROP. CODE ANN. § 3-101 (1974). Constructive notice of deed provisions exists even if the easement is not disclosed in the deed. *Id.* The deed to the Griffins included express provisions for the easement and was duly recorded. 610 F.2d at 1200.

[35] 610 F.2d at 1203. *See* United States v. McLennan, 563 F.2d 943, 946 (9th Cir. 1977). In order for advice of counsel to be a defense, the defendant must apprise his attorney of all the facts, and counsel must specifically advise the course of conduct taken by the defendant *Id.*

however, Red Run offered no proof of full disclosure to its attorney.[36] If the defendant did not mention its awareness of the easement to the attorney, the defendant cannot rely upon the attorney's advice to indicate that the encroachment was an innocent mistake.[37]

If the defendant succeeds in proving that the encroachment was an innocent mistake, the defendant must then prove that the interference with the easement holder is slight and leaves the enjoyment of the easement essentially unimpaired.[38] The Fourth Circuit held that the substitution of a new road which is as good or better than the easement does not satisfy the slight interference requirement since the tennis courts completely destroyed the easement.[39] By destroying the road, Red Run attempted to take the plaintiff's rights in the property.[40] Maryland courts have held that equity cannot compel the owner of land to surrender his property to another person who lacks the power of eminent domain.[41] To compel the surrender would allow an unconstitutional taking of property by a private person for a private gain.[42]

In light of the facts available from the record, the Fourth Circuit's opinion in *Griffin* leaves little doubt that the doctrine of comparative hardship cannot bar an injunctive remedy in this case. Comparative hardship is a bar available only to a defendant who can first prove that

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[36] 610 F.2d at 1203-04.

[37] *Id.* at 1203. Red Run simply asked its attorney whether it was legal to build a new road on the property. *Id.* Counsel advised the defendant to proceed. *Id.* The Fourth Circuit stated that the defendant had the right to construct as many roads on its property as it wished as long as the construction did not interfere with the plainitff's rights. *Id.* The court observed that to approve the construction of one road is not to condone the destruction of another. *Id.* The Fourth Circuit found that it was nearly impossible that any attorney would have condoned the destruction of the road if Red Run had fully informed its counsel. *Id.* at 1204. The *Griffin* court refused to permit a lawyer to confer a positive benefit on a client by giving incorrect advice. *Id.* at 1204 n.4.

[38] *See* Dundalk Holding Co. v. Easter, 215 Md. 549, 556, 137 A.2d 667, 671 (1958). The defendant's building in *Dundalk* was only one foot over the boundary line. *Id.* at ____, 137 A.2d at 668. The defendant alleged that the encroachment was a slight interference with the plaintiff's rights and that the plaintiff's property had actually appreciated in value due to the location of defendant's building. *Id.* at ____, 137 A.2d at 669.

[39] 610 F.2d at 1203. An easement holder has a property right, however insignificant, to which he alone is entitled. *Id.*

[40] *See* Easter v. Dundalk Holding Co., 199 Md. 303, 307, 86 A.2d 404, 406 (1952).

[41] *See* Lichtenberg v. Sachs, 213 Md. 147, 152, 131 A.2d 264, 266-67 (1957); Easter v. Dundalk Holding Co., 199 Md. 303, 307, 86 A.2d 404, 406 (1952).

[42] *See* Columbia Hills Corp. v. Merchantile-Safe Deposit & Trust Co., 231 Md. 379, 382, 190 A.2d 635, 638 (1963). The Maryland Constitution provides that no one shall be deprived of his property without due process of law. MD. CONST. of 1867, art. 23, Declaration of Rights. *See also* U.S. CONST. amend. V, XIV. An encroachment upon an easement is a taking of a property right without due process. *See* Columbia Hills Corp. v. Mercantile-Safe Deposit & Trust Co., 231 Md. 379, 382, 190 A.2d 635, 638 (1963). Equity cannot justify such an intentional taking. *See* Lichtenberg v. Sachs, 213 Md. 147, 152, 131 A.2d 264, 266-67 (1957).

his encroachment was an innocent mistake and resulted only in a slight interference.[43] As a result of Red Run's actual and constructive notice of the easement, Red Run will be able to prove that its encroachment was an innocent mistake only if Red Run proves that it made a full disclosure to its attorney.[44] Even if the mistake is found to be innocent, the total destruction of the easement surpasses the slight interference standard established by case law.[45]

After reversing the trial court's decision on the issue of injunctive relief, the Fourth Circuit considered the trial court's dismissal of the suit as a result of the plaintiff's failure to prove that damages exceeded $10,000.[46] The Fourth Circuit held that the district court had committed plain and prejudicial error by dismissing the suit.[47] The Fourth Circuit reasoned that the good faith claim of the plaintiff determines the amount in controversy.[48] The court must determine to a "legal certainty" that the plaintiff's claim was not made in good faith in order to justify dismissal.[49] A legal certainty, however, need not be absolute. A probability at the time of the pleading that the damages will exceed the jurisdictional amount will satisfy the good faith requirement.[50] The Fourth Circuit recognized that a plaintiff may aggregate his claims against an opposing party to satisfy the requirement for the jurisdictional amount.[51] Once claims have been properly aggregated and original jurisdiction has attached, dismissal of one claim does not remove the other claims from the court's original diversity jurisdiction.[52] The Fourth Circuit found that in *Griffin* the amount in controversy could reasonably exceed $10,000.[53]

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[43] *See* text accompanying notes 1-6 *supra.*

[44] *See* text accompanying notes 29-37 *supra.*

[45] *See* text accompanying notes 38-42 *supra.*

[46] 610 F.2d at 1204; *see* note 10 *supra.*

[47] 610 F.2d at 1204. An erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it affirmatively appears from the whole record that the ruling was not prejudicial. *See* McCandless v. United States, 298 U.S. 342, 347-48 (1936).

[48] 610 F.2d at 1204-05.

[49] *See* Horton v. Liberty Mut. Ins. Co., 367 U.S. 348, 353 (1961) (amount in controversy must be determined from complaint itself); St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-89 (1938) (sum claimed by plaintiff controls determination of jurisdictional amount if claim is made in good faith).

[50] *See* Friedman v. International Ass'n of Machinists, 220 F.2d 808, 810 (D.C. Cir.) *cert. denied,* 350 U.S. 824 (1955).

[51] 610 F.2d at 1204-05; *see* Lynch v. Porter, 446 F.2d 225, 228 (8th Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972); Stone v. Stone, 405 F.2d 94, 96 (4th Cir. 1968). A party may join in the same action as many claims as he has against an opposing party. FED. R. CIV. P. 18(a). A plaintiff may aggregate these claims to satisfy the monetary amount for federal jurisdiction. *See* Stone v. Stone, 405 F.2d 94, 96 (4th Cir. 1968); 1 J. MOORE, FEDERAL PRACTICE ¶ 0.97, at 882-84 (2d ed. 1964).

[52] 610 F.2d at 1204. *See* Lynch v. Porter, 446 F.2d 225, 228 (8th Cir. 1971); Stone v. Stone, 405 F.2d 94, 96 (4th Cir. 1968).

[53] 610 F.2d at 1205. Although the matter of federal jurisdiction is a federal question, the federal courts must look to state law to determine the nature and extent of the right to be enforced. *See* Horton v. Liberty Mut. Ins. Co., 367 U.S. 348, 351 (1961); note 8 *supra.* Therefore, the Fourth Circuit considered Maryland substantive law to determine the extent

Due to the extensive expense which Red Run would incur in restoring the plaintiff's right of way if the plaintiff prevailed,[54] the court found that the plaintiff's claim satisfied the jurisdictional amount even without including the claim for punitive damages.[55]

The Fourth Circuit's decision in *Griffin v. Red Run Lodge, Inc.* is sound. The district court judge clearly committed reversible error on the issues of the plaintiff's burden of proof and jurisdictional amount. *Griffin* clarifies Maryland case law by emphasizing that a court must first find an innocent mistake and a slight interference by the defendant before the equitable doctrine of comparative hardship will apply. By placing the burden of proof of innocent mistake on the defendant, the Fourth Circuit has merely placed the burden on the party who is attempting to bar the equitable remedy. The court's discussion in *Griffin* of the federal jurisdiction amount requirement is a straightforward review of established federal law. *Griffin* will make the law of comparative hardship easier for courts and litigants to understand in an action for injunctive relief from an encroachment upon an easement.

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of the remedies available to a plaintiff suing for an encroachment upon his easement. 610 F.2d at 1205-06. In an action for the loss of property rights, the damages which may be recovered include the cost of restoration of the property right, damages for loss of personal enjoyment and use, the value of the use of the property during the time necessary to return the use of the property right, and difference in market value before and after the violation of the easement. *See* Superior Constr. Co. v. Elmo, 204 Md. 1, ____, 102 A.2d 739, 743-44 (1954).

[54] 610 F.2d at 1205-06.

[55] The Fourth Circuit did not consider whether Griffin could recover punitive damages in a Maryland equity court. *Id.* In Maryland, equity cannot award punitive damages. *See* Prucha v. Weiss, 233 Md. 479, ____, 197 A.2d 253, 255-56, *cert. denied*, 377 U.S. 992 (1964); Superior Constr. Co. v. Elmo, 204 Md. 1, 14, 104 A.2d 581, 586-87 (1954). The plaintiff would be unjustly enriched if awarded punitive damages since equity attempts only to return the parties to their positions before the encroachment. *See* Funger v. Mayor of Somerset, 244 Md. 141, ____, 223 A.2d 168, 173 (1966). A plaintiff may include a prayer for general relief, however, that would make damages available as a legal remedy. *See* Superior Constr. Corp. v. Elmo, 204 Md. 1, ____, 104 A.2d 581, 584 (1954). The plaintiff has the further burden of proving fraud, malice, evil intent, or oppression to be awarded punitive damages. *See* Empire Realty Co. v. Fleisher, 269 Md. 278, 288, 305 A.2d 144, 150 (1973). The defendant's act must be unlawful and of a criminal or wanton nature. *Id.* at 288, 305 A.2d at 150. *See also* Associates Discount Corp. v. Hillary, 262 Md. 570, 582, 278 A.2d 592, 598 (1971) (although wanton conduct of defendant may be actual malice, plaintiff still must prove evil motive or intent); GAI Audio of N.Y., Inc. v. Columbia Broadcasting Sys., Inc., 27 Md. App. 172, 203-04, 340 A.2d 736, 754-55 (1975) (plaintiff must prove not only wanton and intentional act but also evil motive influenced by hate). Courts may also allow punitive damages where there has been gross fraud or a violation of trust or confidence. *See* Empire Realty Co. v. Fleisher, 269 Md. 278, 289, 305 A.2d 144, 149-50 (1973). Although Griffin made a general prayer for relief, 610 F.2d at 1205 n.5(a), the court is not likely to grant punitive damages in addition to a grant of injunctive relief. On remand, the court may view granting of both prayers as unjust enrichment. *See* Funger v. Mayor of Somerset, 244 Md. 141, ____, 223 A.2d 168, 173 (1966).