

VIRGINIA: IN THE CIRCUIT COURT OF ALBEMARLE COUNTY

JOHN H. BIRDSALL,

HARRY BURN,

REYNOLDS COWLES,

LANDON HILLIARD,

KIWI HILLIARD,

JOHN G. MACFARLANE, III

DUDLEY MACFARLANE,

and

JACK SANFORD, JR.

Plaintiffs

v.

Case No. CL17000001-00

FOXFIELD RACING ASSOCIATION, INC.

and

THOMAS J. DICK,

**DEFENDANTS DEMURRER TO PLAINTIFFS REQUEST FOR TEMPORARY
INJUNCTION**

Defendants Foxfield Racing Association and Thomas J. Dick the sole member of the Board of Directors of Foxfield Racing Association, by counsel, demur to the Plaintiffs request for a Temporary Injunction which is a part of the Complaint filed herein and say that the pleadings contained in the Complaint and Grounds for Temporary Injunction are not sufficient in law in that those pleadings fail to state facts upon which the relief demanded can be granted and in support of this demurrer they assert the following grounds:

1. The Complaint does not meet the requirements of Rule 1:4(d) of the Supreme Court of Virginia in that it fails to state facts which support an action for a Temporary Injunction.

2. The allegations in each numbered paragraph of the complaint which address issues relevant to this Courts consideration of whether to issue a Temporary Injunction are primarily conclusions of law rather than recitations of facts.

3. Paragraph 45 of the Complaint alleges that the sale of the Foxfield Property "...would irreparably harm Plaintiffs and other beneficiaries of the trust created by Mrs. Tejada through the Will." The notion that the plaintiffs would be irreparably harmed is a conclusion and no facts are set out which describe any harm to the Plaintiffs. Similarly the recitation that a trust was created through the Will is a conclusion of law and not a fact.

4. Paragraph 59 of the Complaint recites that "the beneficiaries of the trust are suffering and will continue to suffer irreparable harm." Again this is a conclusion of law and no facts are alleged which demonstrate any damage to the plaintiffs. Presumably the

Plaintiffs are asking this Court to assume that the alleged breach of the alleged trustees duties alluded to within the Complaint results in an automatic harm to the plaintiffs and that the alleged harm is irreparable but no facts are alleged which demonstrate damage.

5. Paragraph 61 provides that "Plaintiffs are likely to succeed on the merits" and this is simply a conclusion. No facts are alleged from which this Court could conclude that there is a likelihood that Plaintiffs will succeed on the merits.

6. Paragraph 63 again recites the conclusion that the Plaintiffs will suffer irreparable harm but the court is left to infer that the harm will in fact result if a temporary injunction does not issue. This conclusion is not supported by an allegation of fact.

7. Paragraph 64 "Little or no harm will be suffered by Defendants if the Court grants the injunctive relief sought by the plaintiffs" is also a conclusion and not a single fact is alleged in either the Grounds For temporary Injunction or the earlier paragraphs within the main body of the Complaint from which the Court could reach the conclusion that no harm will be suffered by Defendants.

8. Paragraph 65 "The balance of harm and balance of equities both tip decidedly in Plaintiffs favor." This language does not allege any fact from which the Court could attempt to balance equities and perhaps reach this conclusion. No specific harm to the Defendants has been identified and the Court is only provided conclusory statements about breach of duties (a conclusion) inconsistent with governing documents of the trust (see paragraph 57), when there are in fact no such documents because there is no trust.

9. Paragraph 66 is also a conclusion of law unsupported by factual allegations.

10. Paragraph 67 is a conclusion of law.

The Virginia Supreme Court recognizes that a Complaint must allege facts from which the court can draw its own conclusions and that recitations of conclusions of law are not sufficient to survive a challenge by demurrer.

“In order to survive demurrer, we have held that a complaint must allege sufficient facts to constitute a foundation in law for judgment sought, and not merely conclusions of law. To survive a challenge by demurrer, a pleading must be made with sufficient definiteness to enable the court to find the existence of a legal basis for its judgment.”

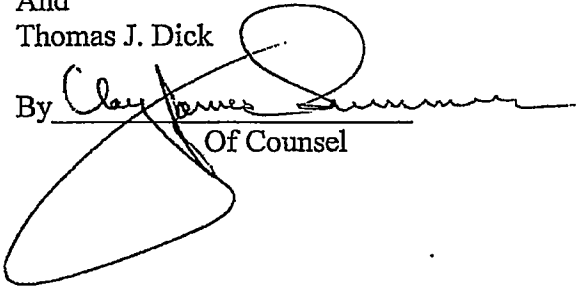
Dunn, McCormack & MacPherson v. Gerald Connoly, 281 Va. 553, 558, 708 S.E. 2d 867 (2011)

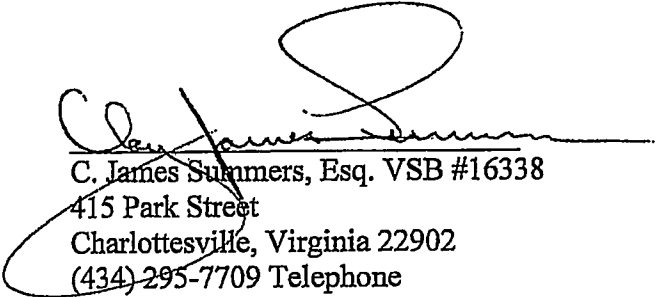
The U.S. Supreme in *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 129 S.Ct. 365, which was decided after the *Blackwelder* decision cited by the plaintiffs in their Complaint, raised the bar for the use of temporary injunctions. In an opinion authored by Justice Roberts, the Court elevated the standard required for obtaining a preliminary injunction citing language from *Mazurek v. Armstrong*, 520 U. S. 968, 972, 117 S. Ct. 1865 (1997) . “ Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief. “

Before a Virginia court makes a decision to award a temporary injunction there must be factual allegations which support the relief requested and now post *Winter* a **clear showing** that Plaintiff is entitled to the relief. The heightened requirement of a clear showing required by the U. S. Supreme Court which is now the standard in Virginia

enhances the need for fact based allegations from which the courts can find that clear showings have been made and Plaintiffs pleadings requesting temporary Injunctive relief are inadequate to provide the court with facts necessary for a decision on this important matter.

Foxfield Racing Association
And
Thomas J. Dick

By 
Of Counsel


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And Foxfield Racing Association

CERTIFICATE

I hereby certify that I sent by first class mail postage prepaid a true copy of the foregoing Demurrer this 19th day of January 2017 to:

William H. Hurd
Ashley L. Taylor
Stephen C. Piepgrass
TROUTMAN SANDERS LLP
P.O. Box 1122
Richmond, Virginia 23218-1122


C. James Summers

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Defendants.

AFFIDAVIT

COMMONWEALTH OF VIRGINIA

CITY OF CHARLOTTESVILLE, to wit:

This day in the City of Charlottesville, Thomas J. Dick personally appeared before me, Andrea L. Phillips, a Notary Public of and for the City aforesaid in the State of Virginia, and made oath that he is a defendant in the above cause and that the following information is true and correct.

1. Thomas J. Dick is currently the only member of the Board of Directors of Foxfield Racing Association.
2. Thomas J. Dick, as the only member of the Board of Directors, does represent the non-stock corporation Foxfield Racing Association and he conducts all the business of the corporation through his agents and the employees of Foxfield Racing Association.
3. Foxfield Racing Association does not, at this time, have the approximately 179 acres of land located on Garth Road in Albemarle County which is known as Foxfield listed for sale with any real estate broker nor is any sale of this property eminent.
4. Foxfield Racing Association intends to conduct the 2017 Spring races at Foxfield as it has over the last 39 years.
5. Foxfield Racing Association does, at this time, have real estate located in Albemarle County consisting of approximately 5.6 acres and known as Lot 34, of

Franklin Subdivision listed for sale with Frank Hardy Sotheby's International Realty a real estate firm in Charlottesville, Virginia.

6. Foxfield Racing Association has decided to sell the 5.6 acre tract in order to generate funds to cover the ongoing operating costs and expenses of the corporation which will include the cost of the current litigation.

7. Foxfield Racing Association has, in the past, sold personal property, and equipment, and conveyed interests in the real property known as Foxfield on Garth Road to generate funds to cover operating expenses in furtherance of its corporate policies and has proceeded to do so with certain knowledge that it unconditionally owns all of its property in fee simple and that it may encumber and dispose of the personal and real property that it owns in order to advance its corporate purposes.

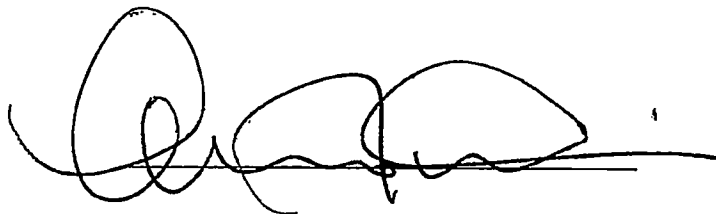
8. Foxfield Racing Association conveyed an open space easement which affected the tract of land known as Foxfield to Albemarle County Public Recreational Facilities Authority in February of 2015.

9. Foxfield Racing Association conveyed interests in the property known as Foxfield to Landon Hilliard, III and Mary Meyers Hilliard in a Deed of Boundary Settlement dated November 1, 2014.

10. Foxfield Racing Association is currently obtaining a Land Preservation tax Credit on a portion of the property known as Foxfield located on Garth Road in order to sell that credit to a prospective buyer and thereby generate funds to cover the corporations operating costs and expenses.

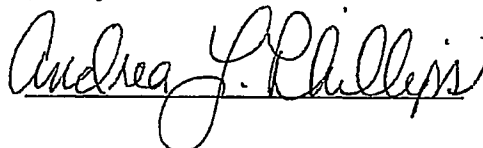
11. Foxfield Racing Association was set up by Mariann De Tejada as a non-stock corporation and it was operated as for profit corporation by Mariann De Tejada and has been operated for profit since her death during the entirety of its existence filing income tax returns each year as an ongoing and profit making concern.
12. The Foxfield Races are not conducted for charitable purposes.
13. Thomas J. Dick has been advised by the listing agent that marketing the 5.6 acre tract of land known as Lot 34 Franklin Subdivision will be hindered by the lawsuit which has been filed by the Plaintiffs.
14. The business interests of Foxfield Racing Association which have already been negatively impacted by the lawsuit filed by the Plaintiffs will be further impacted by the issuance of a Temporary Injunction prohibiting Foxfield Racing Association from disposing of any of its other assets.
15. Foxfield Racing Association generates income from the sales of tickets to the two races it holds each year and it needs access to monies over and above its ticket sales to cover its operating costs.
16. Foxfield Racing Association will negatively impacted because it cannot access its capital by selling properties to generate income for ongoing business expenses or access credit by placing liens on property to generate operating funds.
17. Failure to meet ongoing expenses because of the inability of Foxfield Racing Association to access credit and generate capital from the sale of its assets caused by the

issuance of a Temporary Injunction will affect the credit worthiness of the corporation and threatens its very existence.



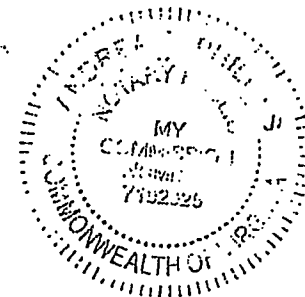
Thomas J. Dick

Subscribed and sworn to before me this 16th day of January 2017. In testimony whereof I have hereunto set my hand the day, month, and year aforesaid.



Notary Public

My commission expires: June 30, 2019

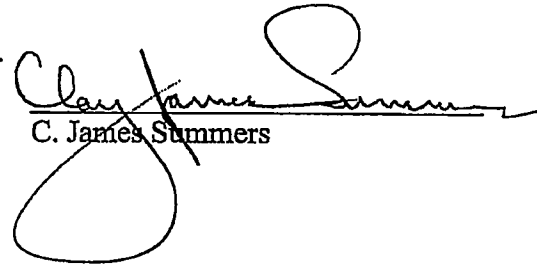


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Thomas J. Dick

CERTIFICATE

I hereby certify that I sent by first class mail postage prepaid a true copy of the foregoing Affidavit this day of January 2017 to:

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