

63572-7

63572-7

857326

Court of Appeals No. 63572-7-1

ROGELIO H.A. RUVALCABA and ELAINE H. RUVALCABA, husband
and wife,

Appellants,

v.

KWANG HO BAEK and LYUNG SOOK BAEK, husband and wife, and
ARNE S. IJPMA and SIEW LOON, husband and wife, and JOHN A.
DYER and PAULINE T. DYER, husband and wife; and STEPHEN
KLEPPER and KAREN KLEPPER, husband and wife, and STEVEN J.
DAY and CATHERINE L. DAY, husband and wife, and LIVINGSTON
ENTERPRISES, LLC, an Alabama limited liability company, KAREN M.
OMODT, a single woman, MATTHEW GOLDEN and JANE
BORKOWSKI, husband and wife, and CARL E. JOHNSON and PHYLLIS
JOHNSON, husband and wife, and WILLIAM V. KITCHIN and CHERYL
L. KITCHIN, husband and wife,

Respondents.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
HON. JEFFREY M. RAMSDELL

"DAY GROUP" RESPONDENTS' BRIEF

Jackson Schmidt
Pepple Johnson Cantu & Schmidt PLLC
1501 Western Avenue, Suite 600
Seattle, WA 98101
206.625.1711 / 206.625.1627 Fax

FILED
2009 NOV 18 AM 11:35
CLERK OF APPELLATIONS
STATE OF WASHINGTON

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY OF ARGUMENT..... 1

II. COUNTERSTATEMENT OF FACTS 3

 A. The Chains of Title 3

 B. Appellants Landlock Their Parcel 4

 C. Geotechnical Reports..... 7

 1. January 6, 2005 Report..... 7

 2. August 11, 2006 Report..... 7

 3. December 24, 2008 Report 8

 4. January 29, 2009 Report..... 9

 D. Procedural History..... 10

 E. Clouds on Title..... 13

III. STATEMENT OF ISSUES 14

IV. LEGAL AUTHORITY AND ARGUMENT..... 15

 A. The Ruvalcabas are Not Entitled to Condemn Their Neighbors'
 Properties to Gain Access to Their Own..... 15

 1. Statutory Condemnation by Way of Necessity Cannot be
 Brought if the Claimant Knowingly, Willingly, and Deliberately
 Landlocked the Property..... 15

 2. Ruvalcabas Have Reasonable Alternative Access 19

 B. Ruvalcabas Mischaracterize McFadden Feasibility 20

C. Appellants Mischaracterize the Economics	24
D. Ruvalcabas Cannot Bring Statutory Private Condemnation Claim if They Have an Implied Easement by Necessity	27
E. The Ruvalcabas' Statutory Claim is Barred by the Statute of Limitations.....	34
F. Denying the Ruvalcabas Private Condemnation Claim Does Not Lead to Absurd Result.....	43
G. The Ruvalcabas are Liable for the Respondents' Attorneys' Fees	44
VI. CONCLUSION	45

TABLE OF AUTHORITIES

Cases

Anderson v. Anderson, 59 Hawaii 575, 590, 585 P.2d 938 (1978)..... 40
Beeson v. Phillipps, 41 Wn. App. 183, 7y02 P.2d 1244 (1985) .. 23, 33, 36
Childers v. Quartz Creek Land Co., 946 P.2d 534, 536 (1997),
citing CRS 38-41-101(1)..... 37,38
Davidson v. State, 116 Wn.2d 13, 26-27, 802 P2d 1374
(1991) 40, 41, 42
Dreger v. Sullivan, 46 Wn.2d 36, 39-40, 278 P.2d 647 (1955) ... 29, 32, 33
English Realty Co. v Meyer 228 La 423, 82 So 2d 698 (1955)... 17, 18, 19
Graff v. Scanlan, 673 A.2d 1028, (Pa. 1996)..... 18, 19
Haslund v. City of Seattle, 86 Wn.2d 607, 619, 547 P.2d 1221 (1976)... 36
Hayden v. Port Townsend, 93 Wn.2d 870, 874-75,
613 P.2d 1164 (1980) 40
Hellberg v. Coffin Sheep Co., 66 Wn.2d 664, 667-68,
404 P.2d 770 (1965) 30
Hinchman v. Kelley, 54 F. 63 (9th Cir. 1893)..... 40
Kittinger v. Boeing, 21 Wn. App. 484, 486-87, 585 P.2d 812 (1978) 37
Olivo v. Rassmussen, 48 Wn. App. 318, 320, 738 P.2d 333
(1987) 18, 19
Roberts v. Smith, 41 Wn. App. 861, 863-64, 707
P.2d 143 (1985) 28, 29
U.S. Oil & Refining Co. v. State Dep't of Ecology, 96 Wn.2d 85, 91,
633 P.2d 1329 (1981) 35
Watters v. Doud, 92 Wn.2d 317, 321, 596 P.2d 280 (1979)..... 37

Statutes

RCW 4.16.020 35
RCW 4.16.040 35
RCW 4.16.130 35
RCW 8.24.010 27, 35, 36
RCW 8.24.030 44
Seattle Municipal Code (SMC 23.53.025(B) & (C) 9, 25, 32

Other Authorities

10 A.L.R.4th 447..... 17
26 Am. Jur.2d. "Eminent Domain", § 28 at p. 461 (2nd Ed. 2004)..... 33
W. Stoebeck and D. Whitman, The Law of Property § 8.5
(3rd ed. 2000) 30
W. Stoebeck and J. Weaver 17 Washington Practice Real Estate:
Property Law § 2.5 "Easements Implied from Necessity" at p. 96
(2nd ed. 2004).....33

"DAY GROUP" RESPONDENTS' BRIEF

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents KWANG HO BAEK and LYUNG SOOK BAEK, husband and wife; ARNE S. IJPMA and SIEW LOON, husband and wife; JOHN A. DYER and PAULINE T. DYER, husband and wife; STEVEN J. DAY and CATHERINE L. DAY, husband and wife; LIVINGSTON ENTERPRISES, LLC, an Alabama limited liability company; KAREN M. OMODT, a single woman; MATTHEW GOLDEN and JANE BORKOWSKI, husband and wife; and CARL E. JOHNSON and PHYLLIS JOHNSON, husband and wife ("Day Group Respondents") ask that the Ruvalcaba's appeal be denied and the judgment of the trial court dismissing their action and awarding these Respondents their attorneys' fees and costs be affirmed.

The Ruvalcabas, Appellants herein, purchased the subject parcel of land in 1965, and at that time it abutted and gave them access to 42nd Avenue NE. Thereafter the Ruvalcabas, by a conveyance recorded March 9, 1972, sold off the portion abutting and giving access to 42nd Avenue NE (the "Severed Parcel"). Prior to selling the Severed Parcel, however, Appellants failed to procure an effective easement for ingress or egress to the parcel they retained; thus, the sale of the Severed Parcel

resulted in the Ruvalcaba's landlocking the parcel that they retained (the "Landlocked Parcel").

This is the second action the Ruvalcabas have filed against their neighbors to procure access to the Landlocked Parcel. In the first action, filed on March 3, 2006, the Ruvalcabas sued a series of adjoining and non-adjoining property owners to the north, but not the owners of the Severed Parcel, to get access over the driveway they use for access to their parcels from NE 135th Street. The relative locations of the Appellants' Landlocked Parcel, the Severed Parcel, NE 135th Street, 42nd Avenue NE, and the various Respondents' parcels are illustrated in exhibits submitted below.¹ The trial court dismissed that action and, as discussed more fully below, an appeal followed, and the decision there affirmed the trial court's dismissal of the claim for an implied easement over their neighbors' properties but permitted the Ruvalcabas to file a new action for private condemnation, conditioned on them first litigating the issue of the existence of an implied easement by necessity over the Severed Parcel. That appellate opinion is part of the record in this appeal.²

¹ CP 244-46 (Exhibit A to the Declaration of Counsel submitted in support of the Day Group Defendants' Motion for Summary Judgment).

²CP 283-88 (Ruvalcaba v. Baek, et al., LEXIS 2526 (Div. I., 2007), at Exh. C to Schmidt Dec.)

In this second lawsuit, the Ruvalcabas alleged a single cause of action against the Day Group -- asking this Court to use the private condemnation statute to condemn access over the Respondents' properties. The defendants herein prevailed on summary judgment,³ demonstrating that the Ruvalcabas' claim should be dismissed because the law does not give the Appellants the right to condemn property that is landlocked if 1) if they have alternative access, and 2) they knowingly and intentionally cause the problem themselves. Moreover, the Ruvalcabas' claim is time-barred. Their claim arose on March 9, 1972, when they landlocked their parcel, and so it is barred by the statute of limitations and the doctrine of laches.

For these reasons, the Respondents request that this appeal be dismissed and that the Judgment entered by the trial court below be affirmed.

II. COUNTERSTATEMENT OF FACTS

A. The Chains of Title.

The Ruvalcabas' two parcels, the Landlocked Parcel and the Severed Parcel, were sold to them under a real estate contract dated

³ CP 579-80 (Judgment)

July 23, 1965.⁴ The parcels were sold to them by the Department of Veterans Affairs, apparently as the result of the VA Administration having foreclosed on a prior owner who had financed the property through a VA loan. The Veteran's Administration came into title on March 23, 1965.⁵

The Ruvalcabas paid off the contract on the Landlocked portion and took legal title to that parcel under a Special Warranty Deed dated February 18, 1971 and recorded on March 1, 1971.⁶ At that point, the Ruvalcabas held legal and equitable title in the Landlocked Parcel and equitable title in the Severed Parcel (since the contract on that parcel had not yet been paid off).

B. Appellants Landlock Their Parcel.

By a deed dated June 21, 1971 and recorded on March 9, 1972, the Ruvalcabas conveyed the Severed Parcel to Melvin and Arlene Desermeaux without reserving an easement across it, thereby landlocking the parcel they retained.⁷

⁴ The contract was not recorded, but it is referenced in subsequent conveyances of those parcels. See CP 250-52; 253-77 (Declaration of Counsel at Exhibit B, tabs 9 and 14 (hereafter Exh. B referenced as "Chain of Title").

⁵ CP 264-65 (Chain of Title at tab 7).

⁶ CP 266 (Chain of Title at tab 8).

⁷CP 267 (Chain of Title at tab 9).

Between July 23, 1965 and June 21, 1971, the Ruvalcabas were in title and in possession of both properties' title and could have imposed an easement on the Severed Parcel benefiting the Landlocked Parcel and providing for ingress, egress, and utilities. The Ruvalcabas failed to do so. They waited thirty-five years to try to remedy the problem, until March 3, 2006, when they filed a prior action claiming they had an implied easement by necessity over all of the Day Group Defendants' properties. As discussed below, that action was dismissed.

As will be seen, the law also will not give the Ruvalcabas a remedy in this case. That does not, however, mean they are without one. Just because the law will not permit the Ruvalcabas to take property rights from their neighbors under judicial compulsion in this case, that does not mean that they cannot do what most people do when they want to acquire property rights -- buy them. The Ruvalcabas repeatedly assert that the landlocking renders their property permanently useless, but the Ruvalcabas' property abuts a number of other parcels that could provide access to public rights-of-way. One, located at 13221 42nd Avenue NE was for sale prior to and at the time the parties' summary judgment motions were heard in this case, and Appellants' own engineering expert has provided a feasibility study indicating that access over that parcel is

reasonably feasible (hereafter the "Access Parcel").⁸ The Ruvalcabas could have purchased the Access Parcel, imposed an easement for access, and then re-sold the parcel. There are other similarly situated parcels that the Ruvalcabas either had the opportunity to purchase for purposes of imposing an easement over the years, or, in the case of the Severed Parcel, actually owed and could have imposed an easement over, but they have failed to do so.

Their failure to purchase and impose an easement on the Access Parcel, which was for sale during the pendency of this action in the trial court, is remarkable given the admonition they received from the Court of Appeals that buying an easement was the preferred option in this case. In discussing the costs associated with filing this private condemnation action, The Court of Appeals said:

[T]he dollars behind these expenses are likely better spent by the Ruvalcabas to negotiate the purchase of easements needed to gain access, something they would be required to do in a private condemnation in any event. Only if they fail to reach mutual agreement on a purchase of a way of access should they consider a private condemnation action.⁹

⁸ CP 279-82 (Schmidt Dec. at Exh. C is a real estate flyer for the sale of the Access Parcel. The parcel was shown on the Windermere web site as still being available on the market as of April 8, 2009. Also attached is a listing from the internet showing the price has been reduced from \$595,000 to \$495,000.)

⁹ CP 283-88 (Ruvalcaba v. Baek, et al., LEXIS 2526 (Div. I., 2007), at Exh. C to Schmidt Dec).

It is the Day Group Defendants' information and belief that the Ruvalcabas never even made an offer on the Access Parcel, either before or since filing this action.

C. Geotechnical Reports.

Because the Ruvalcabas' argument relies in part on certain alleged conclusions reached by their Geotechnical expert, Mr. Bo McFadden, while ignoring other important conclusions he has reached, it is important to outline the reports and their import here.

1. January 6, 2005 Report.

This report merely concludes that the Landlocked parcel is suitable for building at least a single residence.¹⁰

2. August 11, 2006 Report.

This report is a study of whether access could be had through the Severed Parcel assuming no improvements existed on the property.¹¹ The study concludes that access could have been obtained from 42nd Avenue NE before the Ruvalcabas sold the Severed Parcel. McFadden points out that such an access could reach what he had identified as the buildable portion of the lot in his January 6, 2005 report, and that the

¹⁰ CP 214-29.

¹¹ CP 415-19.

access would involve some steep grades and retaining walls. In subsequent reports he similarly notes that an access road from any point, be it from below on 42nd Avenue NE or from above through the Day Group's existing road/driveway connecting to NE 135th Street, also involve "grades that are steeper than practical for vehicle access" and steeper than is generally permitted by the Seattle City Code, "[h]owever, provisions in the Seattle Municipal Code allow the Director to approve steeper driveways."¹²

3. December 24, 2008 Report.

At the Day Group's urging, the Ruvalcabas had McFadden study the feasibility of a road through the Access Parcel then on the market. In his report, McFadden concluded that a road through the Access Parcel "can be completed from a geotechnical perspective."¹³ It would involve the same steep slope issues identified in the August 11, 2006 study of the Severed Parcel, adjoining to the south. He estimates the cost of the road to be \$220,000.

¹² Compare the language of the August 11, 2006 report (a road through the Severed Parcel) at p. 2 (CP 416) with the December 24, 2008 report (a road through the Access Parcel) at p. 3 (CP 423) with the January 29, 2009 report (two possible roads through the Day Group properties at p. 2 (CP 430). Each of these four options involves grades "steeper than practical for vehicle access" with grades of between 35 and 40 percent in the steepest portions.

¹³ CP 230-36.

4. January 29, 2009 Report.

The Ruvalcabas asked McFadden to study access through the Day Group properties and he identified two possible routes, options "A & B." Both involve the exact same steep slope issues as the two routes studied from down below on 42nd Avenue NE.¹⁴ McFadden concluded that the cost of either option would be approximately \$17,500; however, because access through the Day Group properties would involve adding another residence to be served by the existing driveway, the entire drive would have to be updated to meet the requirements of Seattle Municipal Code (SMC 23.53.025(B) & (C)), which improvements could cost in excess of \$1 million.¹⁵ A road installed through either the Severed Parcel or the Access Parcel would not have to meet the onerous requirements of Seattle Municipal Code (SMC 23.53.025(B) & (C)) because it would be serving fewer than four residences.

Taken together, the McFadden reports indicate that access from 42nd Avenue N. E. is 1) feasible and 2) significantly less expensive than access through the Day Group properties. Accordingly, the Ruvalcabas'

¹⁴ CP 237-39 (report); CP 119 (map of options).

¹⁵ CP207-39 at 209 (Johnson Declaration). McFadden's comparison of the costs between the options through the Day Group properties and the Severed Parcel and Access parcel also does not include the costs of the easements needed to use the Day Group properties. CP 209-10.

persistent attempt to gain access through the Day Group properties defies reason.

D. Procedural History.

In the first action filed by the Ruvalcabas, their Complaint alleged a single cause of action -- asking the Court to quiet title in them to a claimed "implied easement by necessity" across the various properties of the members of the Respondents.¹⁶ The Respondents filed a summary judgment in that action asking the trial court to dismiss the Ruvalcabas' claim because the law does not recognize an easement by necessity over any land except the parcel they severed, and the Ruvalcabas' claim was based entirely on getting an easement over the lands that were never part of the Ruvalcabas' parcels.¹⁷

After filing their response to the defendants' motion for summary judgment, the Ruvalcabas filed a motion to amend their complaint to add additional parties whose properties, in conjunction with the defendants' properties, would actually reach a public thoroughfare, since there was no combination of defendants' parcels that actually reached a public thoroughfare. They also sought to amend to add a statutory claim for

¹⁶ CP 283-88 at 285 (Ruvalcaba v. Baek, et al., LEXIS 2526 (Div. I., 2007), at Exh. C to Schmidt Dec.)

¹⁷ CP 283-88 at 286 (Ruvalcaba v. Baek, et al., LEXIS 2526 (Div. I., 2007), at Exh. C to Schmidt Dec.)

private condemnation by way of necessity.¹⁸ The trial court, however, granted the Respondents' summary judgment and denied the Ruvalcabas' motion to amend.¹⁹ An appeal followed and the decision there affirming the trial court's dismissal of the claim for an implied easement over the Respondents' property but permitting Appellants to file a new action for private condemnation, conditioned on them first litigating the issue of the existence of an implied easement by necessity over the Severed Parcel:

But before they file a private condemnation action, the Ruvalcabas must first seek a Declaratory Judgment determining that access through the property severed from their once-owned parcel is unreasonable.²⁰

The Court of Appeals also indicated, elsewhere and somewhat inconsistently, that the issue of an implied easement could be litigated within the context of this action for private condemnation. Referencing the Ruvalcabas' assertion in the prior action, which the Ruvalcabas made without a foundation in fact or expert opinion, that access through the Severed Parcel is not reasonable or feasible, the Court, at paragraph 13, said:

¹⁸ CP 283-88 at 286 (Ruvalcaba v. Baek, et al., LEXIS 2526 (Div. I., 2007), at Exh. C to Schmidt Dec.)

¹⁹ CP 283-88 at 286 (Ruvalcaba v. Baek, et al., LEXIS 2526 (Div. I., 2007), at Exh. C to Schmidt Dec.)

²⁰ CP 283-88 at 287 (Ruvalcaba v. Baek, et al., LEXIS 2526 (Div. I., 2007), at Exh. C to Schmidt Dec.)

The Ruvalcaba's argument that an easement of necessity through the severed parcel is not reasonable or economically feasible due to the topography is misplaced. Even with appropriate supporting geological and engineering reports the Ruvalcaba's argument that this easement is unreasonable does not automatically render it so. The determination whether access is "reasonable" necessarily has to be adjudicated through declaratory judgment, or averred and proved in conjunction with a private condemnation action, before any way of necessity is granted to benefit the landlocked property through properties *other* than the severed parcel.²¹

In both of these passages, one indicating it must be litigated before this action could be filed, and another indicating that it could be litigated within this action, the Court of Appeals held that before the Ruvalcabas can seek to condemn the properties of the Day Group Defendants, they have to litigate the issue of whether there is reasonable access through the Severed Parcel. In other words, they can't condemn the properties of strangers unless they come forward and make a record proving that they did not already have access through an implied easement by way of necessity through the Severed Parcel. Curiously, the Ruvalcabas filed this second action without even naming the owners of the Severed Parcel and therefore without making a claim against them for a declaratory judgment as the Court of Appeals had instructed. The Day Group had to file a motion, which the trial court granted, requiring the

²¹ CP 283-88 at 287 (Ruvalcaba v. Baek, et al., LEXIS 2526 (Div. I., 2007), at Exh. C to Schmidt Dec.)

Ruvalcabras to name the owners of the Severed Parcel as necessary parties.²²

It is the Day Group's strong contention that access over the Severed Parcel is reasonable and feasible, or certainly was at the time the Ruvalcabras sold the Severed Parcel. However, it is also the Day Group's belief and argument that the Ruvalcabras, through negligence, inaction, and unreasonable refusal to take advantage of alternative routes of access, may have lost their claims to such access due to waiver, laches, adverse possession, abandonment, and the applicable statutes of limitations. These additional failures to take reasonable action, however, do not justify permitting the Ruvalcabras to condemn their neighbors' properties any more than does their initial failure to reserve an easement before landlocking their parcel.

E. Clouds on Title.

One of the unfortunate consequences of the current recession is that lenders have become exceedingly cautious at the very time that interest rates have fallen to unprecedented lows. Thus, while this is a perfect time for many mortgagors to refinance, the banks are reluctant to close a loan if there is any hint of a problem with the property. One of the former Respondents herein recently tried to refinance and was informed by her

²² CP 78 (motion); CP 113 (order).

lender that the Ruvalcaba's lawsuit was a cloud on title and that they would not close as long as this case remains pending.²³ Obviously, the lawsuit makes it difficult, if not impossible, for any of the Respondents to sell their properties between the reluctance of lenders to finance sales where title is clouded and the reluctance of buyers to purchase properties threatened with condemnation. It is no response for the Ruvalcabas to say the matter will be resolved, if they prevail, by getting the access they seek since, should they prevail, there is nothing in the statute that requires them to proceed with the road improvements in any particular time frame, if ever. Thus, this lawsuit has essentially made the Respondents' properties unmarketable.

III. STATEMENT OF ISSUES

A. Can the Ruvalcabas take their neighbors' properties through condemnation if:

1. they knowingly and willingly sold the adjoining parcel that provided the only access they had to the public roadway;
2. they have reasonable alternative access available but have failed to act to procure it;
3. they have an existing implied easement of necessity, and have had numerous opportunities to procure other access, all of which they have failed to act upon; and

²³ CP 241 (Schmidt Dec. at ¶ 6.)

4. they have waited to file an action for private condemnation for more than thirty-five years from the time they sold the property that created the landlocking situation?

B. Are the Respondents entitled to an award of attorneys' fees and costs on this appeal?

IV. LEGAL AUTHORITY AND ARGUMENT

A. **The Ruvalcabas are Not Entitled to Condemn Their Neighbors' Properties to Gain Access to Their Own.**

1. Statutory Condemnation by Way of Necessity Cannot be Brought if the Claimant Knowingly, Willingly, and Deliberately Landlocked the Property.

The Ruvalcabas go on at great length about the public policy ramifications of landlocked parcels and how the law disfavors them. The Ruvalcabas, however, are also surely incorrect when they argue that the public policy disfavoring landlocked parcels requires the court to permit private condemnation whenever landlocking occurs. While the public policy behind the private condemnation statutes is indeed to prevent land from being rendered useless, that remedy is not intended to be and should not be available to parties who knowingly and voluntarily render their land useless by landlocking their own properties or who have reasonable alternative access. The better policy is to preclude such

parties from exercising the remedy of condemnation so as not to encourage them to landlock their parcels in order to procure what they regard as more convenient access across the land of their neighbors.

Dr. Ruvalcaba admits that he knowingly, willingly, and deliberately landlocked his property: "At the time, I decided to convey this property without reserving an ingress and egress easement."²⁴ Clearly the Ruvalcabas displayed an astonishing lack of judgment in selling off the Severed Parcel before securing some other means of ingress and egress to their property. Knowingly and deliberately landlocking one's property can only be described as an act of foolishness. The law does not, and cannot, exist for the purpose of granting petitioners remedies for their own foolishness. Washington courts are busy enough fashioning remedies for parties injured by others' negligence; these courts should not and cannot be in the business of fashioning remedies for parties injured by their own negligence, and particularly when such parties seek to take the properties of innocent neighbors as recompense for their own negligence. Accordingly, this court should affirm the dismissal of the Ruvalcabas' attempt to take, by condemnation, the lands of their remote neighbors in order to remedy the predicament the Ruvalcabas created by selling off the Severed Parcel.

²⁴ CP 386-89 at 387 (Ruvalcaba Dec. at ¶ 10.)

There is no case in Washington wholly on point. However, in a Louisiana case involving a statute permitting condemnation of a way over neighboring lands when a landowner's estate was enclosed and had no access to a public way, the court denied a way over neighboring land to a company which, just as the Ruvalcabas did, had land fronting on a public way but which had conveyed this land to various purchasers.²⁵ The landowner company was not entitled to claim passage over the neighbors' property as the situation respecting access was wholly created by its own act. Such circumstances, the court said, even if actual enclavement resulted, did not warrant the application of the private condemnation statute, as the property's enclosure was not a direct consequence of the location of the land but of the act of the party seeking relief.²⁶

This Court should similarly hold that an owner who knowingly, deliberately, and willingly landlocks his or her property cannot show the "necessity" required for the private condemnation by way of necessity. If the owner had ownership of a parcel granting access but willingly, and not under compulsion, severs it, that owner should not be then free to take the property of innocent neighbors in order to procure an alternative form

²⁵ English Realty Co. v Meyer 228 La. 423, 432-33, 82 So. 2d 698 (1955).

²⁶ English Realty, 228 La. At 433; see also 10 A.L.R.4th 447, § 7 "Way of necessity over another's land, where a means of access does exist, but is claimed to be inadequate, inconvenient, difficult, or costly."

of access. A Pennsylvania court has confronted the same issue presented by the English Realty case and found that where the landowner had "voluntarily created the landlock of their own property" this deliberate act could not be the basis for finding the "necessity" required by the Pennsylvania private condemnation act.²⁷

While this issue is one of first impression in Washington, the Washington Court has come very close to deciding the issue. In a case where the landowner voluntarily created the landlock in settlement of an eminent domain action brought by the State, the neighbors, whose property was to be condemned for the way of necessity, claimed that the voluntary landlocking could not entitle the landowner to condemn another's property.²⁸ While the Washington court disagreed in that case and held that the landlocked party was entitled to condemn a statutory way of necessity, the basis for that decision was that the pending litigation and the settlement was really something less than voluntary, having been compelled by the threat of total condemnation.²⁹ This is entirely consistent with English Realty and its progeny.

²⁷ Graff v. Scanlan, 673 A.2d 1028, 1032, 673 A.2d 1028 (Pa. 1996).

²⁸ Olivo v. Rasmussen, 48 Wn. App. 318, 320, 738 P.2d 333 (1987).

²⁹ Olivo, 48 Wn. App. at 322.

The English Realty decision was subsequently limited to its facts and distinguished from cases wherein the landowner's landlock resulted from selling parcels of its land to an expropriating authority pursuant to negotiations made in contemplation of condemnation proceedings. In such cases, the owner's landlock was not truly voluntary and, therefore, the landowner should "not be punished for its cooperation" with the condemning authority.³⁰

If the landowner in the Olivo case had acted as had the Ruvalcabas and deliberately, knowingly, and willingly created the landlock without the threat of condemnation or the need to settle a condemnation action, there would have been no basis for distinguishing English Realty, and the condemnation would not have been permitted. Similarly, it should not be permitted here.

2. Ruvalcabas Have Reasonable Alternative Access.

The Ruvalcabas badly misstate the record regarding what they knew and believed about the property back when they created this problem, and also what their engineer has told them about it since. They claim that back in 1971 that development of the property was "physically

³⁰ Graff, 673 A.2d at 1034.

and economically impracticable."³¹ There is nothing in the record that shows that Dr. Ruvalcaba did any sort of research or had any sort of study done upon which he could base this alleged belief. In fact, what he actually says, without reference to any foundation for the statement, is that because of the steep slope he believed that "it would have been both financially costly and physically difficult for me to create an easement, let along [sic] build a road. . ." ³² Just because Dr. Ruvalcaba claims to have believed, without any foundation in any expert opinion or analysis, that an access road would be costly is not the same as saying it would not provide reasonable access. The fact is that once the Ruvalcabas did hire an expert to study the properties, that expert concluded that the Ruvalcabas could indeed gain access to the entirety of their parcel from 42nd Avenue NE (where the Severed Parcel was located).³³

B. Ruvalcabas Mischaracterize McFadden Feasibility.

For reasons known only to them, the Ruvalcabas want only to take access from above and to the north, from NE 135th Street through the Day Group Defendants' properties. The August 11, 2006 McFadden report

³¹ Appellants' Brief at p. 4, citing CP 387-88; see also Appellants' Brief at pp. 17-18 where they claim to have believed they had no "reasonable access," citing CP 387-88.

³² CP 386-89 (Ruvalcaba Dec. at ¶ 11).

³³ CP 415-19 (Severed Parcel Access Feasibility Study); CP 230-36 (Access Parcel Access Feasibility Study).

proves that the Ruvalcabas had access from down the slope and to the east from 42nd Avenue NE, through the Severed Parcel, at the time they severed the parcel. At the time the underlying summary judgment in this case was pending, there was also a parcel fronting on 42nd Avenue NE (directly next door to and to the north of the "Severed Parcel") that would provide perfect access should the Ruvalcabas purchase it. The Ruvalcabas insist, however, unreasonably and in direct contradiction to the known facts, that the only reasonable access to their property is from above, through the Day Group properties.

The Ruvalcabas wrongly, and in direct contradiction to what the McFadden reports actually say, claim that their Geotechnical Engineer, Mr. McFadden has concluded that access from 42nd Avenue NE is "impracticable."³⁴ They cite language from McFadden's 2005 and 2008 reports stating that the grades between 42nd Avenue NE and the buildable areas of the Landlocked Parcel "are significantly steeper than practical" for vehicles. They cite McFadden's language noting that grades would be from 20% to 40% in various places and that the Seattle code requires grades to be 20% or less. Appellants are hiding the ball. In pointing out that

³⁴ Appellants' Brief at p. 4 – 6 (Actually, they claim that McFadden, after studying the issue, "reached the same conclusion" that the Ruvalcabas had reached, without studying the issue, thirty-five years hence regarding development of the property being "impractical.")

language, they entirely fail, however, also to point out to the court the language from the 2008 report where McFadden specifically states that an access road from 42nd Avenue NE "can be completed from a geotechnical perspective."³⁵ In addition, they fail to disclose that McFadden also notes that the exact steep slope issue presented by access from below on 42nd Avenue NE that allegedly renders access from that route to be "impracticable" (a word not found in any of McFadden's reports, by the way) is also presented if the access were to come from above connecting to NE 135th Street. In reference to this purported \$17,150.00 "Option A" from the Respondents' properties above, which is the Ruvacabas' apparent preferred option, McFadden says:

Option A requires construction of an access road extending from the existing access driveway to the Baek property south about 70 feet to the Ruvalcaba property. Based on the grades shown on the available plans and maps, it would appear that the access road would slope down to the south from the edge of the existing driveway at about 30 to 40 percent to the Ruvalcaba property.³⁶

Thus, in both instances, either from 42nd Avenue NE from below or coming from above through the Respondents' properties, McFadden noted that

³⁵ CP 232 (Johnson Dec. at Exh. D, p. 3 (First sentence after CONCLUSION heading)).

³⁶ CP 238 (Johnson Dec. at Exh. E, p. 2).

road grades will be steeper than the Seattle City Code requires.³⁷ Appellants have also failed to point out to the court when arguing that a route to 42nd Avenue NE is "impracticable" because of these steep grades, that McFadden expressly notes that the steep slopes do not preclude development: "However, provisions in the Seattle Municipal Code allow the Director to approve steeper driveways."³⁸

In short, McFadden not only does not conclude that access to 42nd Avenue NE is "impracticable" because of steep slopes, he concludes precisely the opposite: "We conclude that construction of an access road from 42nd Avenue NE can be completed from a geotechnical perspective."³⁹ If he were to conclude that access from 42nd Avenue NE is "impractical" because of steep slopes, then, too, is the access from above through the Day Group properties, since McFadden states that that access poses precisely the same steep slope problem.⁴⁰

³⁷ CP 232 (Johnson Dec. at Exh. D, p. 3; CP 238); (Johnson Dec. at Exh. E, p. 2).

³⁸ CP 232 Johnson Dec. at Exh. D, p. 3; CP 238 (Johnson Dec. at Exh. E, p. 2).

³⁹ CP 232 (Johnson Dec. at Exh. D, p. 3 (First sentence after CONCLUSION heading)).

⁴⁰ This point also establishes why the Ruvalcabas' reliance on Beeson v. Phillipps, 41 Wn. App. 183, 702 P.2d 1244 (1985) is misplaced. In Beeson, the upper portion of the property could not be reasonably accessed through the lower portion, and the upper portion contained the "useable portion" of the property. Beeson, 41 Wn. App. At

C. Appellants Mischaracterize the Economics.

Appellants also argue that in assessing feasibility, the Court must consider the relative cost of alternative routes.⁴¹ In furtherance of this argument, and in another sleight of hand, Appellants claim that Mr. McFadden establishes that the route from 42nd Avenue NE through the Access Parcel⁴² is "prohibitively expensive", citing his estimate that that route costs "\$220,000" while the route through the Respondents' properties would cost "at most, \$17,150."⁴³ Appellants completely ignore the fact that Respondents' expert, Mr. Johnson, stated in his report, in reference to Mr. McFadden's conclusion that access through the Respondents' properties under either of McFadden's proposed routes from above ("Options A & B") would cost "at most, \$17,150" that:

186. In this case, McFadden locates the useable, *i.e.*, the buildable portion, in the middle of the property. *See* CP 214 (January 6, 2005 report). As noted above, he concludes that the buildable portion can be reached either from below (CP 415 (August 11, 2006 report); CP 230 (December 24, 2008 report)), or from above (CP 237 (January 29, 2009 report)). As shown above, the economic considerations indicate access from below is the less expensive option.

⁴¹ Appellants' Brief at pp. 17-18.

⁴² Appellants' argument that the Severed Parcel is also "impracticable" because of steep slopes fails for the same reason the argument that access through the Access Parcel was too steep—because it is not true. The steep slopes complained of are both above 42nd Avenue NE, well up on Ruvalcaba's property. As Johnson noted in his Declaration at ¶6 (CP 209), the grades down below on the Kitchen's property and the Access Parcel are similar. If McFadden finds the access parcel is geotechnically feasible, then so too was the Severed Parcel at the time of severance.

⁴³ Appellants' Brief at p. 17.

There is a glaring omission in this report — under the Seattle Municipal Code (SMC 23.53.025(B) & (C)), if the Ruvalcaba's were to build one or more residences on their landlocked parcel, they would be required to improve the Respondents' existing 10' road to code standards since the road would be serving more than three and up to ten residences.⁴⁴

Mr. Johnson went on to list the extensive code requirements that would have to be met, including widening the road, retaining walls, storm water drainage, and fire, health, and safety requirements, if the Ruvalcabas were to use the Respondents' existing road. Johnson concluded that those improvements "could cost in excess of \$1 million dollars" in construction costs and that because of the costs of bringing the road from above up to code, in his ". . . opinion . . ." it would cost far more to obtain access through the Respondents' properties than to obtain it through the Access Parcel."⁴⁵

The most important point here is that Appellants offer nothing from Mr. McFadden that contradicts Mr. Johnson on these additional costs. In fact, McFadden notes, in reference to options A & B from above that:

[I]n addition to the geotechnical issues addressed in this letter, other pertinent issues that need to be resolved, such as setbacks from the existing residence and property lines, the width and allowable grade of the access drive

⁴⁴ CP 208-09 (Johnson Dec. at ¶ 5).

⁴⁵ CP 209 (Johnson Dec. at ¶ 5).

that were highlighted in our earlier letter, apply to considerations of Options A and B as well.⁴⁶

In short, Appellants point at the \$17,150 figure as the comparative cost figure for the access from above, but that figure fails to include all these big ticket items that even McFadden seems to acknowledge (e.g., "setbacks" and road width) and that Johnson concludes could cost \$1 million dollars. Accordingly, Johnson's ultimate opinion is uncontradicted and is, therefore, an established material fact before this court. As a matter of law, this court must find that as between the two access routes, to 42nd Avenue NE versus upgrading the Day Groups' driveway connecting to NE 135th Street, the 42nd Avenue NE access is the more economically feasible option.

The Ruvalcabas admit that they are not entitled to condemn the Respondents' property if they already have "a feasible alternative."⁴⁷ They admit that even where the way a party seeks to condemn may be "more convenient" than an alternative, the law will not permit condemnation of that more convenient way unless "there is no other

⁴⁶ CP 232 (Johnson Dec. at Exh. D, p. 3).

⁴⁷ CP 362 (Appellants' Summary Judgment Brief at p. 15, citing Sorenson v. Czinger, 70 Wn. App. 270, 276, 852 P.2d 1124 (1993)).

passable way or the expense would be prohibitive."⁴⁸ As noted above, it is incontrovertible in the record before this court that 1) the Access Parcel is feasible, as established by Mr. McFadden's report and by Mr. Johnson's testimony, and 2) that ". . . it would cost far more to obtain access through the Respondents' properties than to obtain it through the Access Parcel."⁴⁹

The Ruvalcabas had a geotechnically feasible and cost-effective alternative to condemning the Respondents' properties throughout the pendency of this action below. Accordingly the trial court was right to dismiss their condemnation claim, as a matter of law, since they had a reasonable and feasible alternative.

D. Ruvalcabas Cannot Bring Statutory Private Condemnation Claim if They Have an Implied Easement by Necessity.

Under RCW 8.24.010, the statute permitting private condemnation of a way of necessity, the claimant thereunder must show "reasonable necessity." It is not possible to show reasonable necessity if one already

⁴⁸ CP 362 (Appellants' Summary Judgment Brief at p. 15, citing State v. Superior Court of Kitsap County, 107 Wash. 228, 237-38, 181 P. 689 (1919)).

⁴⁹ CP 209 (Johnson Dec. a ¶ 5).

has an implied easement of necessity over the parcel that was severed.⁵⁰ In the Roberts case, the Roberts', as Appellants, argued that they were entitled to condemn a statutory way of necessity because their parcel was landlocked. The Smiths, as Respondents, pointed to the existence of a possible implied easement by necessity and argued that if such existed, then the Roberts could not possibly have the "reasonable necessity" required in order to condemn a private way of necessity elsewhere. The court agreed with the Smiths:

The plaintiff has the burden to show reasonable necessity under the circumstances of the case. Appellants assert that they have shown necessity by introducing evidence that the 15-acre parcel is landlocked and that it would no longer be landlocked if they could use the existing recorded easement for access. When Respondents introduced evidence of the existence of an implied easement, Appellants argued that Respondents should have been required to prove this fact before the Roberts' showing of necessity was adequately rebutted.

Appellants' argument, however, assumes that the evidence of implied easement, which was presented by Respondents, raises a new issue of fact. However, the issue of implied easement was integrally related to the question of whether there was necessity to pass over Respondents' land. Respondents specifically raised the issue of implied easement to deny the claim of necessity, not to raise an unrelated or collateral issue. Because it is the Appellants who are charged with proving necessity, the

⁵⁰ Roberts v. Smith, 41 Wn. App. 861, 863-64, 707 P.2d 143 (1985).

burden of proof includes proof that no implied easement exists over grantor's property.⁵¹

Here, as the Roberts case shows, the Ruvalcabas clearly have the burden of proof of showing no implied easement of necessity exists over the Severed Parcel. In fact, implicit in the opinion from this court after the dismissal of the Ruvalcabas' initial lawsuit was the requirement that the Ruvalcabas make a record on remand, through a declaratory judgment action, as to why there was no such implied easement of necessity at the time they created the Landlocked Parcel. The courts' concern seemed to be that if the Ruvalcabas did not actually have reasonable access through the Severed Parcel at the time they sold it, they might not have actually created the landlocking by severing it.

However, as the McFadden reports show, the Ruvalcabas indisputably did have reasonable access over the severed parcel at the time they severed it: "construction of an access road from 42nd Ave. NE can be completed from a geotechnical perspective."⁵² Accordingly, the facts show that the Ruvalcabas met the elements of an implied easement

⁵¹ Roberts, 41 Wn. App. at 863-64(citations omitted); See, also Dreger v. Sullivan, 46 Wn.2d 36, 39-40, 278 P.2d 647 (1955).

⁵² CP 232 (Johnson Dec. at Exh. D, p. 3 (First sentence after CONCLUSION heading)).

by necessity over the Severed Parcel at the time they created the Landlocked Parcel.

The elements for an "implied easement by necessity" are as follows:

- (1) a landowner conveys part of his land and (2) retains part, usually an adjoining parcel; and (3) after the severance of the parcels, it is "necessary" to pass over one of them to reach a public street or road from the other."⁵³

The Ruvalcabas indisputably meet elements of the claim (the Ruvalcabas conveyed one parcel, the Severed Parcel, and retained another, the Landlocked Parcel). Their action landlocking their retained parcel created the third element -- the need to pass over the severed parcel to reach the road. It is incontrovertible that all of the elements of the claim existed at the moment the Ruvalcabas landlocked themselves. Respondents assert that at the time of the severance, the Ruvalcabas created a valid, subsisting easement by necessity.⁵⁴

The Kitchins, the owners of the severed parcel, will no doubt argue that the fact that their predecessors built a garage right where the

⁵³ See Hellberg v. Coffin Sheep Co., 66 Wn.2d 664, 667-68, 404 P.2d 770 (1965); W. Stoebuck and D. Whitman, The Law of Property § 8.5 (3rd ed. 2000).

⁵⁴ The accompanying Declaration of Larry Johnson, Respondents' engineering expert, establishes that 1) he agrees with Appellants' expert, Mr. McFadden, that access over the Access Parcel is reasonable and feasible and 2) that the topography of the Severed Parcel is similar in slope, being contiguous to the Access Parcel, and therefore it also provides reasonable access. CP 209 (Johnson Dec. at ¶ 6).

implied easement would pass to the road means that the Ruvalcabas have waived their right to such an easement.⁵⁵ They will also argue abandonment and adverse possession. Moreover, they will point to Respondents' own arguments that the Appellants' case is barred by the statute of limitations and by the doctrine of laches, and point out that if the claim is barred as to Respondents, it must, by necessity, also be barred as to the existence of an implied easement by necessity against them.

If it is the case that the Appellants' claim for an implied easement against the Kitchin's (the Severed Parcel) is barred by any or all of these doctrines, that is only further evidence of the Ruvalcabas having created, and then exacerbated, the very problem they seek to use the private condemnation statute to solve, and therefore the negligent or intentional loss of an implied easement does not permit them to take through condemnation the property of their neighbors.

Taking property from one party and giving it to another, as does the private condemnation statute, involves infringing on the constitutional right of property ownership, "which should not be lightly regarded or

⁵⁵ Respondents do not concede that the existence of the garage is a waiver. The Ruvalcabas could easily have that garage removed and have the road installed, while a new and better garage could be constructed behind the Kitchin's property or on the Ruvalcaba property, and both the Kitchins and the Ruvalcabas could use the easement for access to the Ruvalcaba property and the Kitchin's garage.

swept away merely to serve convenience and advantage."⁵⁶ Lest there be any doubt that the Ruvalcabas' claimed way of necessity involves taking substantial and material property rights of the Respondents, any new easement over their properties must meet Seattle Fire Code Access standards.⁵⁷ The Ruvalcabas' access road, largely across the Respondents' existing access road, would have to meet the SMC fire code requirements of five to ten dwelling units and thus would not only increase the traffic burden on the existing driveway, but also require its width to be widened its entire length by an additional 8 feet, as well as meet the paving, hydrant, turn-around, and other requirements of the fire code (all of which will cost a fortune). The Appellants, in conducting a feasibility of access through the Respondents' properties, entirely ignore

⁵⁶ Dreger, 46 Wn.2d at 38.

⁵⁷ SMC 23.53.025(B) & (C) provides as follows:

B. Vehicle Access Easements Serving at Least Three (3) but Fewer Than Five (5) Single-Family Dwelling Units.

1. Easement width shall be a minimum of twenty (20) feet;
2. The easement shall provide a hard-surfaced roadway at least twenty (20) feet wide;
3. No maximum easement length shall be set. If the easement is over six hundred (600) feet long, a fire hydrant may be required by the Director;
4. A turnaround shall be provided unless the easement extends from street to street;
5. Curbcut width from the easement to the street shall be the minimum necessary for safety and access.

C. Vehicle Access Easements Serving at Least Five (5) but Fewer Than Ten (10) Single-Family Dwelling Units, or at Least Three (3) but Fewer than Ten (10) Multifamily Units.

1. Easement width, surfaced width, length, turn around and curbcut width shall be as required in subsection B;

and fail to account for the legal requirement of bringing the road up to code.⁵⁸

The Ruvalcabas will argue to this Court that, ignoring the costs of meeting the fire code, it will still be more convenient and less expensive to use the Respondents' properties for access than to build a road through the Access Parcel. However, a private way of necessity will not be condemned merely because "mere convenience and expense" makes it more practicable than building the road over an alternative access.⁵⁹ Accordingly, the private condemnation statute should be strictly construed and used only as a last resort.⁶⁰ The Ruvalcabas had, throughout the pendency of the case below, reasonable alternative access through the Access Parcel. Apart from the doctrines discussed above regarding not permitting the condemnation statute to be used to solve a self-created problem, the Ruvalcabas' failure to avail themselves of the remedy of

⁵⁸ CP 208-09 (Johnson Dec. at ¶ 5).

⁵⁹ Dreger, 46 Wn.2d at 39; see also, 26 Am. Jur.2d. "Eminent Domain", § 28 at p. 461 (2nd Ed. 2004), citing Ex Parte Carter, 772 So.2d 1117, 1119 (Ala. 2000) (Private Condemnation statute "is not a favored statute").

⁶⁰ Beeson v. Phillips, 41 Wn. App. 183, 186, 702 P.2d 1244 (1985) (Because the statute permits a landowner to take property from another individual without any showing of public necessity, it must be strictly construed.); See also W. Stoebuck and J. Weaver 17 Washington Practice Real Estate: Property Law § 2.5 "Easements Implied from Necessity" at p. 96 (2nd ed. 2004) (The "private condemnation statute is a remedy of last resort, a fall back for a landowner who has no other reasonable means of access.").

purchasing the Access Parcel is a complete failure to mitigate their claims herein, which should serve as a bar to these claims. The Ruvalcabas should have solved their problem by buying the Access Parcel and imposing an easement before re-selling.

E. **The Ruvalcabas' Statutory Claim is Barred by the Statute of Limitations.**

In his declaration submitted in his prior lawsuit, Mr. Ruvalcaba admits 1) he sold the Severed Parcel in 1971 knowing full well that he had not reserved an easement over it for ingress and egress;⁶¹ 2) that he then pursued attempts to get access easements from neighbors for the next twenty years;⁶² and 3) that he subsequently failed to procure sufficient easements to provide ingress and egress and has known that fact since 1991 when certain Respondents refused to grant him an easement.⁶³ These facts establish that the Ruvalcabas' claim herein is time-barred.

Under the Washington scheme for the limitation of actions, most actions have been given a designated limitations period by the

⁶¹ CP 387-88 (Declaration of Regelio Ruvalcaba at ¶¶ 10 & 13 (hereafter referenced as the "Ruvalcaba Dec.")).

⁶² CP 388 (Ruvalcaba Dec. at ¶¶ 13 – 17).

⁶³ CP 388 (Ruvalcaba Dec. at ¶¶ 16 – 17).

legislature.⁶⁴ In order to ensure that all actions have an applicable limitations period unless otherwise specified or exempted (e.g., the criminal murder statute), the legislature has enacted a "catch-all" statute for actions not otherwise legislatively assigned a limitations period: "An action for relief not hereinbefore provided for, shall be commenced within two years after the cause of action shall have accrued."⁶⁵

There is no express statute of limitations applicable to RCW 8.24.010. There is no Washington statute or case indicating that private condemnations are somehow exempt from limitation periods. Accordingly, the two-year catch-all statute must apply.

To determine when the statute of limitations begins to run, the court looks to when the plaintiff first had a claim: "Generally, the statute of limitations begins to run from the time an action accrues. A cause of action accrues when a party has a right to apply to a court for relief."⁶⁶ In

⁶⁴ See, e.g., RCW 4.16.040 (six years for "the use and occupation of real estate"); RCW 4.16.020 (ten-year period for adverse possession or prescriptive easements).

⁶⁵RCW 4.16.130.

⁶⁶ J.S. Oil & Refining Co. v. State Dep't of Ecology, 96 Wn.2d 85, 91, 633 P.2d 1329 (1981).

general terms, the right to apply to a court for relief requires each element of the action be susceptible of proof."⁶⁷

RCW 8.24.010, the private condemnation statute, provides in relevant part:

An owner, . . . of land which is so situate with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity . . . may condemn and take lands of such other sufficient in area for the construction and maintenance of such private way of necessity, . . .

Because the statute permits a landowner to take property from another individual without any showing of public necessity, it must be strictly construed.⁶⁸ The elements of this claim are simply 1) a parcel situated without sufficient access to 2) permit proper use and enjoyment of the property. RCW 8.24.010.

By Mr. Ruvalcabas' own admission, he knew all of the elements of this statutory claim, *i.e.*, the claim fully accrued at the time he sold the Severed Parcel in June, 1971.⁶⁹ Since the date of that sale, the Ruvalcabas have had no legal access to their property, which can only be accessed by trespassing over adjoining parcels. Hence, the Ruvalcabas

⁶⁷ Haslund v. City of Seattle, 86 Wn.2d 607, 619, 547 P.2d 1221 (1976).

⁶⁸ Beeson, 41 Wn. App. at 186.

⁶⁹ CP 387-88 (Ruvalcaba Dec. at ¶ 10 – 17).

have known full well every element of their claim for private condemnation since June, 1971.

If a claim is not brought within the specified period, the claim is not enforceable in a judicial proceeding.⁷⁰ The policy behind these statutes is first to instill a measure of certainty and finality in one's affairs by eliminating the fears and burdens of litigation after the expiration of the statutory period and second to avoid stale and spurious claims brought well after the principals have disappeared and memories have faded.⁷¹ The Respondents herein are entitled to return to the repose they enjoyed before this action was commenced and not to be burdened by this or further litigation asserted against them by the Ruvalcabas. The Respondents are badly prejudiced by having to defend against claims arising more than thirty-five years ago. Most of the Respondents were not in ownership then, and even if they were, cannot recall who said what to whom. It would be impossible to find third parties who could contradict or corroborate the Ruvalcabas allegations. The claim is time-barred.

This Court should not follow the Quartz Creek opinion that will be cited by Appellants for the proposition that there is no statute of limitations in a private condemnation. Quartz Creek is inapplicable to this case

⁷⁰ Watters v. Doud, 92 Wn.2d 317, 321, 596 P.2d 280 (1979).

⁷¹ Kittinger v. Boeing, 21 Wn. App. 484, 486-87, 585 P.2d 812 (1978).

because it arises from the specific language of a peculiar Colorado statute stating that any action "to enforce or establish any interest of or to real property" must be commenced within eighteen years of accrual.⁷² Washington has no counterpart statute with similar wording.

Moreover, the Quartz Creek case relies for its holding on the idea that it would be "absurd" to leave a parcel landlocked "in perpetuity if the initial owner of such parcel does not bring condemnation within the statutory period."⁷³ There is no such danger of a perpetual landlocking in this case. There are eight other parcels touching the Landlocked Parcel; all of which provide potential access. The Ruvalcabas had a remedy available throughout the pendency of this action in the trial court when they could have purchased the Access Parcel, imposed upon it an easement, and then re-sold it. Other similar opportunities have come and gone over time, each time one of those parcels went on the market in the last 35 years, and they will continue to come and go.

Private ways of necessity involve a delegation of the States' constitutional power of condemnation to private individuals. That does not mean, however that the States' immunity from statutes of limitations,

⁷² Childers v. Quartz Creek Land Co., 946 P.2d 534, 536 (1997), citing CRS 38-41-101(1).

⁷³ Childers, 946 P.2d 534, 536..

such as adverse possession, accompanies this power. States are immune from statutes of limitation because they generally are the largest landowners in their jurisdictions. They generally do not have administrators, employees, or officers resident on state lands on a daily basis the way a land owner is and in position to detect and resolve adverse possession claims before the statute runs. Property owners like the Ruvalcabas, however, are as well situated to deal with an adverse possession or other property claims within the applicable limitations period as are any other property owners. There is no reason why the legislature would delegate to private individuals the State's immunity along with the power of private condemnation since unlike the State, private property owners are perfectly well situated to monitor their properties. Moreover, to do so would only encourage a lack of due diligence and create uncertainty for all concerned. There is no justifiable reason why the residents in the neighborhood at issue here should have uncertainty about the Ruvalcabas' access and be subject to suit thirty-five years after the fact. This claim is time-barred.

Even if the Ruvalcabas' claim were not time barred, if the private condemnation statute were somehow exempt from a limitations period (and there is no such exemption anywhere in that or any other

Washington statute), their claim must be barred by the doctrine of laches.

That doctrine provides:

Laches is an equitable defense based on estoppel. A defendant asserting the doctrine of laches must affirmatively establish: (1) knowledge by plaintiff of facts constituting a cause of action or a reasonable opportunity to discover such facts; (2) unreasonable delay by plaintiff in commencing an action; and (3) damage to defendant resulting from the delay in bringing the action.⁷⁴

Here the lapse of time has prejudiced all the Respondents. If the garage on the Severed Parcel did not exist at the time of the severance, and then was subsequently built, the delay allowed a structure to potentially interfere with the implied easement, to the Respondents' prejudice. We do not know, however, when the garage was built because the Respondents either have no recollection of the property status at the time of severance or were not property owners at the time. As noted above, memories have faded and contemporary witnesses are gone. The doctrine of laches commonly recognizes the unavoidable loss of defense evidence as establishing material prejudice.⁷⁵

In Davidson v. State, a Washington case, the property owners' allegation of arbitrary and fraudulent disregard of the line of navigability

⁷⁴ Hayden v. Port Townsend, 93 Wn.2d 870, 874-75, 613 P.2d 1164 (1980).

⁷⁵ Hinchman v. Kelley, 54 F. 63 (9th Cir. 1893); Anderson v. Anderson, 59 Hawaii 575, 590, 585 P.2d 938 (1978).

was barred by the doctrine of laches because they were charged with knowledge of public laws affecting their property, and the 62-year delay in challenging the harbor line deprived the state of substantial evidence.⁷⁶ Here the Ruvalcavas do not have to be "charged" with knowledge of having landlocked their parcel since Dr. Ruvalcaba admits having done so. The 35-year delay has deprived all Respondents of substantial evidence of the Severed Parcel as well as the opportunities that have existed over time as to all the other contiguous properties that have come and gone off the market and which also would have provided alternative access.

Moreover, most of these Respondents purchased their properties after 1971. Had the Ruvalcabas acted promptly to deal with this issue they would have had, at the least, notice of the issue before purchasing their properties and could have evaluated their purchases, or adjusted their purchase prices accordingly. (This is especially true of the Kitchens, owners of the Severed Parcel, who purchased relatively recently.) The Ruvalcabas' unreasonable delay deprived them of these opportunities, to

⁷⁶ Davidson v. State, 116 Wn.2d 13, 26-27, 802 P2d 1374 (1991).

their prejudice. Davidson is clear authority that this claim is barred by the doctrine of laches.⁷⁷

The Ruvalcabas will also argue, as they do in relation to the statute of limitations, that the public policy against landlocked parcels outweighs the need to impose the doctrine of laches, and for the same reasons they were wrong about that, as argued above, in the statute of limitations context, they are wrong in the context of the laches doctrine.

They also argue that no evidence has been lost and so the Respondents cannot show prejudice. They are also wrong about that. The Desmereaux have been lost, and even if they could be found, would they be able to recollect what conversations Dr. Ruvalcaba had with them about his "decision" not to impose an easement? Did he tell them he might come back for an easement if he could not find further access? Did he forever waive any claim to an implied easement? We will never know because after this passage of years, they can't be found. Similarly, we cannot tell from the chain of title when the improvements on the Severed Parcel were constructed, which is relevant to the Kitchin's waiver and waste arguments. While there may be ways to uncover such information, it will be difficult and tricky to do so this many years after the fact. Similarly, even if the Respondents compile the sales history of all eight

⁷⁷ Davidson, 116 Wn.2d at 26-27.

parcels over the last 35 years, how can they find the percipient witnesses to the sales to inquire about conversations with the Ruvalcabas about easements or sales, about their willingness to sell their properties or to sell easements to the Ruvalcabas had they been asked to, and the like? Who knows who else had relevant knowledge of Ruvalcabas' activities, intent, and conversations regarding these issues thirty-five years ago? All we know is that the Respondents have lost all access to such evidence as a result of the Ruvalcabas' inaction, which should result in their claims being barred by the laches doctrine.

F. Denying the Ruvalcabas Private Condemnation Claim Does Not Lead to Absurd Result.

The Ruvalcabas state at several junctures that if they are not permitted to condemn the Day Groups' properties their landlocked Parcel will be useless "in perpetuity." The statement is unsupported in fact or reason. As demonstrated above, there is, and has always been a solution to the Ruvalcabas' problem that does not involve the use of the statutory power of private condemnation — they can buy an easement. Once a reasonable owner of the parcel does so, it will no longer be landlocked.

The Ruvalcabas also argue that if the trial court here is affirmed, the holding presents grave issues as to whether subsequent purchasers

would be affected. The initial response to such arguments should be that this court only decides the cases before it, not future cases. Moreover, as a practical matter, no such case will ever arise. If the Ruvalcabas lose this case and try to do an end-run around the resulting opinion by deeding the property to a confederate or to kin, surely the court will hold that any "purchaser" who is at less than arm's-length will be bound by the Ruvalcabas' actions and any resulting opinion from this court. Any bona fide, arm's-length, purchaser will purchase the property if and only if the Ruvalcabas have solved the problem by purchasing an easement or they have sold it at such a price that permits the new buyer to purchase such an easement. If the Ruvalcabas have to sell the property at a price that reflects the need to procure an easement, that is only fair since they caused the problem.

G. The Ruvalcabas are Liable for the Respondents' Attorneys' Fees.

The Private Condemnation Statute provides that parties seeking to condemn the property of their neighbors are required to pay the neighbors' attorney fees, costs, and expert fees for the privilege of doing so — win, lose, or draw.⁷⁸ The Day Group respondents should be so

⁷⁸ RCW 8.24.030.

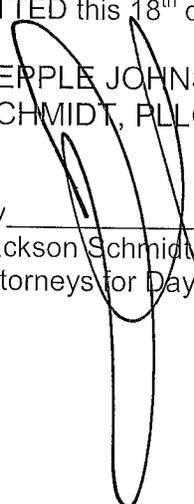
awarded such fees and costs incurred in this appeal. This court should also affirm the award of the fees and costs awarded in the trial court.

VI. CONCLUSION

This case exists solely because of the Appellants' failure, sometime prior to June 21, 1971, to give themselves access to the Landlocked Parcel. They are seeking, in this action, to make their mistake the Respondents' problem. For that reason alone, the trial court's dismissal of the Ruvalcabas claim for private condemnation should be affirmed.

RESPECTFULLY SUBMITTED this 18th day of November, 2009.

PEOPLE JOHNSON CANTU &
SCHMIDT, PLLC,

By  _____
Jackson Schmidt, WSBA No. 16848
Attorneys for Day Group Respondents

CERTIFICATE OF SERVICE

I, Dawn Anderson, declare that I am employed by the law firm of Pepple Johnson Cantu & Schmidt PLLC, 1501 Western Avenue, Suite 600, Seattle, King County, Washington; that I am over 18 years of age and not a party to this action.

I certify under penalty of perjury under the laws of the State of Washington that on this date I served a true and correct copy of the foregoing document on the following attorneys of record in the above-referenced action by the method indicated below:

Pierre E. Acebedo
ACEBEDO & JOHNSON, LLC
1011 East Main, Suite 456
Puyallup, WA 98372
253.445.4936 / 253.445.9529 Fax
Attorneys for Plaintiffs/Appellants

- Messenger
- Facsimile
- U.S. Mail
- Overnight Courier
- Email

Timothy J. Graham
HANSON BAKER LUDLOW
DRUMHELLER P.S.
2229 – 112th Avenue NE, Suite 200
Bellevue, WA 98004-2936
425.454.3374 / 425.454.0087 fax
tgraham@hansonbaker.com
Attorneys for Defendants Kitchin

- Messenger
- Facsimile
- U.S. Mail
- Overnight Courier
- Email

G. Lee Raaen
ATTORNEY AT LAW
PO Box 31698
Seattle, WA 98103-1698
206.682.9580 / 206.632.1193 Fax
lee@lraaen.com
Co-Counsel for Defendant Omodt

- Messenger
- Facsimile
- U.S. Mail
- Overnight Courier
- Email

Dated this 18 day of November, 2009.


Dawn Anderson

FOREIGN JURISDICTION CASES

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 NOV 18 AM 11:35

Foreign Jurisdiction Cases

<u>Anderson v. Anderson</u>	1
No. 6028	
Supreme Court of Hawaii	
59 Haw. 575; 585 P.2d 938; 1978 Haw. LEXIS 224	
<u>English Realty Company v. Meyer, et al.</u>	2
No. 42032	
Supreme Court of Louisiana	
228 La. 423; 82 So.2d 698; 1955 La. LEXIS 1377	
<u>Graff v. Scanlan, et al.</u>	3
No. 3205 C.D. 1994	
Commonwealth Court of Pennsylvania	
673 A.2d 1028; 1996 Pa. Commw. LEXIS 110	

FOCUS™ Terms

Search Within Original Results (1 - 1)

 Advanced...Service: Get by LEXSEE®
Citation: 59 Hawaii 57559 Haw. 575, *, 585 P.2d 938, **;
1978 Haw. LEXIS 224, ***

ROBERT GREGG ANDERSON, Plaintiff, Cross-Defendant-Appellant, v. ANNE ANDERSON, Defendant, Cross-Plaintiff-Appellee

No. 6028

Supreme Court of Hawaii

59 Haw. 575; 585 P.2d 938; 1978 Haw. LEXIS 224

October 17, 1978

PRIOR HISTORY: [***1] Appeal from Family Court, First Circuit; Honorable Katsugo Miho, Judge.**DISPOSITION:** Affirmed.**CASE SUMMARY****PROCEDURAL POSTURE:** Appellant ex-husband sought review of the decision of the Family Court, First Circuit (Hawaii), which ordered the ex-husband to pay to appellee ex-wife half of the net proceeds of a sale of stock together with reasonable attorney's fees.**OVERVIEW:** The court affirmed the trial court's judgment and held that the trial court's construction of the divorce decree was a reasonable one. The court determined that the trial court properly exercised its equitable powers in determining that the ex-husband owed the ex-wife half of the net proceeds of the sale of the stock. The court further held that the trial court did not err when it determined that the ex-wife was not barred by the doctrines of waiver, estoppel, or laches to have asserted her claim to the proceeds. There was no evidence that the ex-wife had knowledge, either actual or constructive, that any of the stocks sold by the ex-husband belonged to her. There also was no evidence that the ex-husband was induced to rely on any alleged misrepresentations made by the ex-wife, to his detriment. Finally, the court determined that under the circumstances the ex-wife's delay in asserting her rights did not constitute long acquiescent nor was it inexcusable and therefore the doctrine of laches did not apply.**OUTCOME:** The court affirmed the judgment of the trial court that ordered the ex-husband to pay to the ex-wife one half of the net proceeds from the sale of stock and also to pay reasonable attorney's fees.**CORE TERMS:** stock, shares of stock, dividend, decree, divorce decree, acquiescence, certificate, estoppel, divorce, laches, out-of-option, net proceeds, in-option, relinquishment, equitable, estopped, conclusion of law, undivided, state of things, stocks sold, used to pay, construing, asserting, ownership, belonged, equitable estoppel, interest payments, tax advisors, transferred, collateral**LEXISNEXIS® HEADNOTES** **Hide**[Civil Procedure > Judgments > Preclusion & Effect of Judgments > General Overview](#)[Family Law > Marital Termination & Spousal Support > General Overview](#)**HN1** In construing the terms of a divorce decree, the determinative factor is the intent of the court as gathered from the decree and other evidence. A judgment or decree like any other written instrument is to be construed reasonably and as a whole, and effect must be given not only to that which is expressed, but also to that which is unavoidably and necessarily implied in the judgment or decree. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)[Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview](#)**HN2** Waiver is generally defined as an intentional relinquishment of a known right, a voluntary relinquishment of some rights, and the relinquishment or refusal to use a right. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)[Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview](#)[Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > Property Distribution > General Overview](#)**HN3** Waiver can take place only by the intention of the party and such an intention must be clearly made to appear. [More Like This Headnote](#)[Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview](#)**HN4** Where one by his words, or conduct, willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his previous position, the former is precluded from averring against the latter a different state of things, as existing at the same time. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)[Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview](#)

[Estate, Gift & Trust Law > Trusts > General Overview](#)

[Real Property Law > Trusts > Holding Trusts](#)

HN5 Quasi-estoppel is a species of equitable estoppel which has its basis in election, waiver, acquiescence, or even acceptance of benefits and which precludes a party from asserting to another's disadvantage, a right inconsistent with a position previously taken by him. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > Laches](#)

HN6 The equitable doctrine of laches applies where long acquiescence in the assertion of adverse rights has occurred, or when, during inexcusable delay, the evidence has become obscured and, under the circumstances of the case, it is too late to ascertain the merits of the controversy. In order to invoke the doctrine of laches, if predicated on an allegation of acquiescence, the acquiescence must be based on a showing of express or implied knowledge on the part of the one to be estopped. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

HEADNOTES / SYLLABUS

[Hide](#)

HEADNOTES

DIVORCE -- judgments -- construction.

In construing the terms of a divorce decree, the determinative factor is the intent of the court as gathered from the decree and other evidence.

DIVORCE -- judgments -- construction.

A judgment or decree like any other written instrument is to be construed reasonably and as a whole, and effect must be given not only to that which is expressed, but also that which is unavoidably and necessarily implied in the judgment or decree.

WAIVER -- defined.

Waiver is generally defined as an "intentional relinquishment of a known right," a "voluntary relinquishment of some rights," and "the relinquishment or refusal to use a right."

WAIVER -- elements -- intent.

Mere silence by the appellee as to her claim cannot be construed to constitute a release thereof. Waiver can take place only by the intention of the party and such an intention must be clearly made to appear.

ESTOPPEL -- equitable estoppel -- nature and elements.

Where one by his words, or conduct, wilfully causes another to believe the existence of a certain *****2** state of things, and induced him to act on that belief so as to alter his previous position, the former is precluded from averring against the latter a different state of things, as existing at the same time.

ESTOPPEL -- equitable estoppel -- nature and elements -- knowledge.

Before one may be charged with knowledge, it must appear that he possesses full knowledge of all the material particulars and circumstances and was fully apprised of the effect of the acts ratified and of his legal rights in the matter.

ESTOPPEL -- equitable estoppel -- grounds -- acquiescence.

Quasi estoppel is a species of equitable estoppel which has its basis in election, waiver, acquiescence, or even acceptance of benefits and which precluded a party from asserting to another's disadvantage, a right inconsistent with a position previously taken by him.

EQUITY -- laches -- grounds -- acquiescence.

The equitable doctrine of laches applies where long acquiescence in the assertion of adverse rights has occurred, or when during inexcusable delay, the evidence has become obscured and, under the circumstances of the case, it is too late to ascertain the merits of the controversy.

EQUITY ***3** -- laches -- grounds -- acquiescence.**

In order to invoke the doctrine of laches, if predicated on an allegation of acquiescence, the acquiescence must be based on a showing of express or implied knowledge on the part of the one to be estopped.

COUNSEL: A. William Barlow for plaintiff, cross-defendant, appellant.

A. Peter Howell for defendant, cross-plaintiff, appellee.

JUDGES: Richardson, C.J., Kobayashi, Ogata, Menor and Kidwell, JJ. Opinion of the Court by Kobayashi, J. Dissenting Opinion by Kidwell, J.

OPINION BY: KOBAYASHI

OPINION

[*576] **[**940]** This is an appeal taken by appellant, Robert Gregg Anderson, former husband of appellee, Anne Anderson, from the Findings of Fact and Conclusions of Law, an Order on order to show cause issued pursuant to the Findings of Fact and Conclusions of Law (Order), and an order denying appellant's motion to reopen the proceedings or set aside the Findings of Fact and Conclusions of Law and Order issued by the trial court.

The Order, issued subsequent to a show cause hearing, required appellant to pay appellee one-half of the net proceeds from the sale of 3,187 shares of Amfac stock together **[*577]** with interest thereon from **[***4]** April 19, 1972 to August 30, 1974, less the dividends overpaid to appellee on her share of such stocks. Appellee was ordered to use the proceeds to pay to the Bank of Hawaii \$ 56,250.00 to liquidate the balance due on outstanding loan No. A5295. Appellant was further ordered to pay to appellee all interest which appellee would have paid on the balance of the loan, less any dividends received from and after August 30, 1974. In total, the net sum of \$ 67,731.77, together with reasonable attorney's fees, was to be paid by appellant to appellee.

We affirm.

ISSUES

1. Whether or not the court erred in construing paragraph 5 of the divorce decree as granting to appellee an undivided one-half interest in each share of Amfac stock held in the legal name of appellant.
2. Whether the court erred in finding that appellee was not barred by the doctrines of waiver, estoppel, and laches to assert a claim to one-half the net proceeds of the 3,187 shares of stock sold by appellant in April, 1972.

STATEMENT OF THE CASE

Appellee and appellant were divorced on March 21, 1972. At the time of the divorce, **[**941]** 18,375 shares of Amfac stock were being held by appellant in his sole **[***5]** name. In paragraph 5 of the divorce decree and as part of the division of property of the parties, Judge Herman T. Lum of the family court of the first circuit (hereinafter referred to as the divorce court), made the following disposition of the 18,375 shares of stock:

Plaintiff [appellant herein] shall continue to hold these 18,375 shares of Amfac stock in his name but as trustee for defendant as to 3,938 shares of that portion of such stock which is no longer considered option stock and as to **[*578]** 5,250 shares of that portion of such stock which is still option stock, until the same can be transferred and delivered to defendant free and clear of the notes due to Bank of Hawaii, and, as to the 5,250 shares, past the holding period for option stock, which transfer and delivery shall be accomplished in cooperation with defendant and with her consent and approval, provided that plaintiff shall not be required to remain as such trustee for a longer period than five (5) years beginning and after March 1, 1972.

As between the parties, the stock held by plaintiff as trustee for defendant shall be subject to the payment of one-half of the notes due to Bank of Hawaii and the **[***6]** balance of the stock in plaintiff's name shall be subject to the payment of one-half of the notes due to Bank of Hawaii, and each shall hold the other harmless from any liability for amounts they are required to pay in excess of \$ 141,000.00 individual liability, and plaintiff need not transfer or deliver any of the stock held by him as trustee for defendant unless and until he has been relieved of and from liability for a proportionate amount of the amount due to Bank of Hawaii.

Until such time as the defendant shall receive in toto either the 9,188 shares of stock or the proceeds of the sale of any portion or all of said stock, all dividends payable on said stock shall be the property of plaintiff and defendant in proportion to the number of shares held by or for the ultimate benefit of each. All dividend payment shall be used to pay the interest payments as and when they become due. It is contemplated that the interest payments will exceed the dividend payments and plaintiff will notify defendant of excess interest payments over dividends received. If defendant shall not reimburse plaintiff of this excess amount due within thirty (30) days, then plaintiff may withhold said **[***7]** amounts from defendant's alimony payments.

Should any tax be imposed by either federal or state governments because of the allocation to defendant of 9,188 shares of Amfac stock, this tax shall be the sole responsibility and liability of defendant, she holding **[*579]** plaintiff harmless for any such taxes imposed because of this allocation. ¹

FOOTNOTES

¹ The language of paragraph 5 was drafted jointly by the two tax advisors, one representing appellee's interests, and one representing appellant's. It was incorporated into the divorce decree by the trial court.

On March 1, 1973, appellee filed an order to show cause to compel appellant to transfer 3,938 shares of out-of-option stock to her pursuant to the terms of the divorce decree. The record does not indicate any action was taken on this order to show cause.

Appellee filed a second order to show cause on March 14, 1974, to compel appellant to pay to appellee half of the net proceeds of the sale of stock "on or about April 19, 1972" together with reasonable **[***8]** attorney's fees. ²

FOOTNOTES

² The March 14, 1974, order to show cause evidenced appellee's belief that the stocks sold by appellant in April, 1972, were part

of the 5,250 shares of stock delivered to appellant by appellee prior to April 17, 1972.

On August 30, 1974, the Honorable Katsugo Miho, District Family Court Judge of the first circuit (hereinafter referred to as the trial court), held a show cause hearing, and pursuant thereto, filed the following Conclusions of Law:

1. Upon the entry of the Decree of Divorce on March 21, 1972, Plaintiff-Husband **[**942]** became a trustee of 9,188 shares of Amfac stock for the benefit of Defendant-Wife, to be held by him in accordance with the terms of the Decree of Divorce.
2. At the same time, each share certificate representing shares of stock in Amfac, Inc. which was registered in the name of Plaintiff-Husband, immediately became impressed with a trust in favor of Defendant-Wife of an undivided one-half interest therein, the Defendant-Wife having the beneficial **[***9]** ownership thereof, with the legal title being vested in Plaintiff-Husband.
3. As such trustee, Plaintiff-Husband had a fiduciary duty to earmark or segregate the shares so held by him in trust for Defendant-Wife. **[*580]**
4. Having failed to earmark or segregate any of the 9,188 shares held by him in trust for Defendant-Wife, the proceeds of the 3,187 shares sold by him on April 18, 1972, became impressed with a trust in favor of Defendant-Wife to the extent of one-half thereof, and Plaintiff-Husband owes Defendant-Wife the sum of \$ 59,940.37, being fifty percent of \$ 119,880.74 representing the net proceeds of the sale of 3,187 shares of Amfac stock together with interest paid by Defendant-Wife on the \$ 56,250 balance on the Bank of Hawaii loan A 5295 from April 19, 1972 to the date of the hearing on this Order to Show Cause on August 30, 1974, in the sum of \$ 10,325.04 for a total of \$ 70,265.41. From this sum should be deducted a credit for dividends overpaid on the 3,187 shares in the sum of \$ 2,533.64 through August 30, 1974, leaving a net sum owed her of \$ 67,731.77. In addition, Plaintiff-Husband will continue to owe Defendant-Wife the amount of interest she pays **[***10]** on said Loan A 5295 from and after August 30, 1974, until the date of his payment of the foregoing sum of \$ 67,731.77 less a credit for any dividends on 3,187 shares that may be hereafter overpaid until such payment as aforesaid.
-
6. Defendant-Wife is not barred by the doctrines of estoppel, laches or waiver in accepting dividends on 9,188 shares to the date of the Entry of an Order on Order to Show Cause.

At the hearing, the Judge orally dismissed the March 1, 1973, order to show cause.

STATEMENT OF FACTS

Of the 18,375 shares of stock, 12,250 shares were purchased by appellant, as an executive employee of Amfac, **[*581]** Inc., as part of a stock option plan. Appellant exercised the option as follows:

Q-3	No. of shares	Total Option Price
Exercised 2-5-69	3,500 shares	\$ 68,750.00
Exercised 2-23-71	3,500 shares	68,775.00
Q-4		
Exercised 2-4-69	1,750 shares	43,750.00
Exercised 2-23-71	3,500 shares	87,500.00

The stock purchases were financed through two unsecured loans from the Bank of Hawaii (Bank): a loan for \$ 112,500, dated 2-5-69 (No. A5295), and a second loan for \$ 170,000, dated 2-23-71, for a total indebtedness **[***11]** of \$ 282,500. Both appellee and appellant were jointly and severally liable for payment of the two loans. Although the stocks were ineligible to be pledged as collateral for the loans at the time of purchase,³ it was informally agreed between the Bank and the parties that the stocks would eventually be sold and the proceeds used to repay the loans. The remaining 6,125 shares of stock were acquired by appellant as a result of a 50% stock dividend issued on June 15, 1971, on the 12,250 shares.

FOOTNOTES

³ The deposition taken of Wilson P. Cannon, Jr., President of Bank of Hawaii, indicates that this was due to Regulation Q of the Federal Reserve Board's rules and regulations.

The trust arrangement of the 18,375 shares of stock was made by the divorce court to avoid adverse tax consequences which the parties believed would result from an outright transfer of legal title to 9,188 shares to appellee. The tax advisors consulted by both parties agreed that if appellant were to transfer or sell any of the **[**943]** **[***12]** shares of stock within three years of the date the options were exercised, any gain on the transfer or sale would be taxed according to ordinary income rates. If the stocks were held for a period in excess of three **[*582]** years from the date of the exercise of the option, any gain would be taxed at the more favorable capital gain rates.⁴

FOOTNOTES

⁴ In evidence before the trial court was a telegram sent to Mr. Barlow, counsel for appellant, from Richard Griffith, tax advisor to appellant. The telegram cited section 425-C of the Internal Revenue Code as the section pertaining to tax treatment of option stocks which were transferred prior to expiration of the three year period pursuant to a property settlement or court order.

At the time the divorce decree was entered, 5,250 shares of stock were eligible for capital gain treatment (hereinafter referred to as out-of-option stock). Since the 6,125 shares of dividend stock were subject to the same option provisions on which they were based, the trial court determined [***13] that 2,625 shares of the dividend stock were also eligible for capital gain treatment, making a total of 7,875 shares of out-of-option stock. The remainder of the 10,500 shares of stock (hereinafter referred to as in-option stock) would not be eligible for capital gain treatment until February 23, 1974.

Some time after the entry of the decree but prior to April 17, 1972, appellee had two certificates of stock, HU6190 for 1,750 shares of stock, and HU6191 for 3,500 shares delivered to appellant's secretary, ⁵ along with 1971 income tax form to be signed by appellant. Although the tax forms were returned to appellee shortly thereafter, appellee received no word of [**583] the stock certificates. ⁶ The record shows that on April 17, 1972, appellant cancelled a certificate for 6,125 shares of Amfac stock and had three new certificates issued: one for 800 shares for sale to Amfac, Inc.; one for 2,387 shares for sale on the open market through E. F. Hutton & Company, Inc.; and one for 2,938 shares in the name of appellant. ⁷ Appellant received a total of \$ 119,880.74 for the sale of 3,187 shares of stock to Amfac, Inc., and others through E. F. Hutton & Company, Inc. Appellant [***14] used part of the proceeds of the sale to repay his share of loan No. A5295 to the Bank. The record does not show what appellant did with the balance of the proceeds from the sale. ⁸ In a memo dated May 3, 1972, counsel for appellant notified appellee's counsel of the sale of 3,187 shares of stock. ⁹ Appellee was also made aware of the sale. ¹⁰

FOOTNOTES

⁵ A letter dated April 17, 1972, was sent to and received by Mr. Barlow, counsel for appellant, from Samuel P. King, counsel for appellee. The letter stated as follows:

As previously discussed, certificates number HU 6191 for 3,500 shares and number HU 6190 for 1,750 shares of the Common Stock of AMFAC, INC., both dated February 5, 1969, and both issued to and standing in the name of Robert Gregg Anderson, were delivered to Mr. Anderson's secretary for his signature and subsequent delivery to Bank of Hawaii in pledge as security for certain indebtedness to Bank of Hawaii.

It is understood that Anne Anderson has a beneficial interest in one-half of each certificate, as set forth in the divorce decree, and that this beneficial interest will be turned into actual ownership when, as and if she is able to make the necessary arrangements and makes written demand for such transfer or transfers.

[***15]

⁶ The certificates had been kept in a safe deposit box held in the joint names of the parties at the Bank, but shortly after the entry of the divorce decree, appellee had placed the safe deposit box in her sole name. The record shows that the remaining 7,000 shares of in-option stock have remained in appellee's possession in the safe deposit box until the present time.

⁷ Testimony of Collin Blakely, Vice-President and Corporate Trust Officer for Bishop Trust Co.

⁸ When asked what he did with the proceeds of the sale, appellant replied in his interrogatory: "Not applicable, per counsel."

⁹ The memo stated as follows:

Your letter of April 17, 1972 is acknowledged.

.....

Incidentally, I thought you should be advised that Gregg sold 3,187 shares of Amfac stock and paid off his half of the \$ 112,500.

¹⁰ At the show cause hearing on August 30, 1974, Mr. King testified that he notified appellee of the sale of 3,187 shares of stock by appellant.

The appellee made several attempts to have her share of the out-of-option stocks [**944] transferred to the Bank [***16] as collateral for her half of loan No. A5295 due. ¹¹ She was unsuccessful. [**584] On July 27, 1973, stock certificates HU6190 and HU6191 were cancelled by appellant and two new certificates issued: one for 3,938 shares in the name of appellee, and one for 1,312 shares in the name of appellant.

FOOTNOTES

¹¹ Appellee wrote the following letter, dated May 22, 1972, and addressed to Judge Herman T. Lum, the judge who had issued the divorce decree of the parties:

Dear Judge Lum:

In compliance with the Decree referred to, I have not been able to have my separate property, the 3,938 shares of Amfac stock delivered to Mr. Cannon at the Bank of Hawaii for collateral on my half of the original loan.

It is my desire to sell and pay off this note of \$ 56,250.00 as soon as possible, but apparently I am not able to do so without asking the Court's assistance.

Would you please advise me as to what I am to do?

In a letter to Mr. W. P. Cannon Jr., President of Bank of Hawaii, appellee made the following request:

Since Gregg has paid off his half of the first loan, (loan No. A5295) will you, please, request him to send you, properly signed, the 3,938 1/2 shares of Amfac stock, held by him in trust for me, for the purpose of collateralizing my note of \$ 56,250.00.

*****17] OPINION**

1. WHETHER OR NOT THE COURT ERRED IN CONSTRUING PARAGRAPH 5 OF THE DIVORCE DECREE AS GRANTING TO APPELLEE AN UNDIVIDED ONE-HALF INTEREST IN EACH SHARE OF AMFAC STOCK HELD IN THE LEGAL NAME OF APPELLANT.

Appellant's primary contention is that the trial court erred in concluding that the trust arrangement of paragraph 5 of the divorce decree was an active trust, imposing on appellant the duties of a fiduciary. Appellant contends that the intent of the trial court was to create a "mere passive, custodial relationship whereby appellant was merely to hold legal title to 9,188 shares of stock for appellee" until the three-year hold period for the option stock had expired. We affirm the result reached by the trial court, although on different grounds.

HN1 In construing the terms of a divorce decree, the determinative factor is the intent of the court as gathered from the decree and other evidence. Bowman v. Bennett, 250 N.W.2d 47, 50 (Iowa 1977); Hill v. Hill, 3 Wash. App. 783, 477 P.2d 931 (1970). A judgment or decree like any other written instrument is to be construed reasonably and as a whole, Smith v. Smith, 56 Haw. 295, 301, 535 P.2d 1109, 1114 (1975), *****18]** and effect must be given not only to that which is expressed, but *****585]** also to that which is unavoidably and necessarily implied in the judgment or decree. Pope v. Pope, 7 Ill.App.3d 935, 289 N.E.2d 9 (1972).

The primary intent of the divorce court issuing the divorce decree, as evidenced from the language of the decree and other evidence, was to divide the 18,375 shares of Amfac stock equally between the parties, and, at the same time, avoid an outright transfer of legal title to 9,188 shares to appellee because of the tax consequences of transferring stock while the stocks retained their "option" characterization. Further, of the said stocks, 7,875 shares which were out-of-option were to be divided equally between the parties as were the 10,500 shares of in-option stocks. Other than the court's intent to make an equal distribution of the stocks, it is not clear whether the court intended that each share of stock be impressed with a trust in favor of appellee of an undivided one-half interest therein, or that the shares be segregated and earmarked by appellant into two separate groups of 9,188 shares each. What is clear and the trial court so found is that the appellee, *****19]** after the entry of the decree of divorce on March 21, 1972, delivered to the appellant 5,250 shares of out-of-option stock with the express request that he endorse the same in order that the appellee could "give the shares to the Bank as collateral for the loan or to sell the shares and pay off the loan." Instead of doing so, the appellant retained the shares, sold 3,187 shares of Amfac stock, paid off his share of the \$ 112,500.00 loan, and retained the rest of the *****945]** proceeds from the sale. The total proceeds was \$ 119,880.74, and his share of the loan was \$ 56,250.00. The net effect of this transaction was that none of the proceeds of the sale went for the benefit of the appellee despite the fact that one-half of all the Amfac stock belonged to her.

We are of the opinion that the trial court's construction of paragraph 5 of the divorce decree was a reasonable one and one which effectuates the divorce court's primary intent. All the stocks were issued in the name of appellant, and all the powers incident to legal ownership accrued to appellant, such as the right to receive the dividends and to sell or transfer the stocks at will. In light of this and in light of the *****20]** fact that *****586]** appellee's share and appellant's share of the stocks were so commingled at the time of the decree as to make it impossible for the trial court, in retrospect, after the appellant had already sold 3,187 shares of the stock, to determine whether such stock belonged to appellant or appellee, we think that the trial court properly exercised its equitable powers in reaching conclusion of law number 1. It logically follows, that since half of each share of the 3,187 shares of stock rightfully belonged to appellee, half of the net proceeds of the sale of such stock also can be claimed by appellee. ¹²

FOOTNOTES

¹² We find it unnecessary to determine, for purposes of resolving this issue whether the divorce court intended to create a "passive" or an "active" trust. It is sufficient that the trial court's construction of the decree carries out the intent of the divorce court relative to the disposition of the 18,375 shares of stock. Hence, we express no opinion as to the correctness of conclusions of law numbers 2 and 3.

*****21]** II. WHETHER THE COURT ERRED IN FINDING THAT APPELLEE WAS NOT BARRED BY THE DOCTRINES OF WAIVER, ESTOPPEL AND LACHES TO ASSERT A CLAIM TO ONE-HALF THE NET PROCEEDS OF THE 3,187 SHARES OF STOCK SOLD BY APPELLANT IN APRIL, 1972.

Appellant contends that appellee's conduct of: (1) accepting the dividends on 9,188 shares of stock from March 21, 1972, through February 23, 1975; (2) remaining silent as to her claim to one-half the proceeds of the sale of stock for approximately two years from the time she had actual knowledge of appellant's sale of the stock until the time she filed an order to show cause to compel appellant to transfer one-half of the net proceeds of the sale of 3,187 shares of stock; and (3) requesting the transfer of 3,938 shares of stock on March 1, 1973, and accepting 3,938 shares in July, 1973, constitutes a waiver of appellee's right to claim the proceeds of the sale and justifies application of the doctrine of estoppel to appellee's claim.

A. Waiver

HN2 Waiver is generally defined as an "intentional relinquishment of a known right," a "voluntary relinquishment of *****587]** some rights," and "the relinquishment or refusal to use a right." State *****22]** Savings & Loan v. Kauaian Development Company, 50 Haw. 540, 557, 445 P.2d 109, 121 (1968); Robinson v. McWayne, 35 Haw. 689, 719 (1940).

There is no dispute that appellee knew that appellant had sold 3,187 shares of Amfac stock in April, 1972. However, there is no evidence that appellee had knowledge, either actual or constructive, that any of the stocks sold belonged to her. Mere silence by the appellee as to her claim cannot be construed to constitute a release thereof. ^{HN3}Waiver can take place only by the intention of the party and such an intention must be clearly made to appear. *Robinson v. McWayne, supra, at 724*. Appellee's acceptance of the dividends on 9,188 shares of stock does not clearly evidence an intention to waive appellee's right to claim that the stocks sold were as much her property as appellant's. The divorce decree required that all dividends received be used to pay the interest accruing on the Bank loan No. A5295. Merely because appellee permitted whatever dividends properly due her to be remitted to the Bank, it cannot be inferred that appellee intentionally waived **[**946]** her claim. Appellant never informed appellee which shares of stock were **[**23]** being sold. Since appellant had possession of all of the out-of-option stocks at the time, as well as a portion of the in-option stocks, appellee could not have known which certificates were being cancelled to effect the sale.

Appellee's request for transfer of 3,938 shares of out-of-option stock on March 1, 1973, and her acceptance of the certificate for 3,938 shares was also done without knowledge that 3,187 shares of stocks sold by appellee were commingled property. Appellant's claim of waiver is without merit.

B. Estoppel

The doctrine of equitable estoppel is stated in *Molokai Ranch, Ltd. v. Morris*, 36 Haw. 219, 223 (1942), is as follows:

The rule of law is clear that ^{HN4}where one by his words, or conduct, wilfully causes another to believe the existence of a certain state of things, and induced him to act on that **[*588]** belief so as to alter his previous position, the former is precluded from averring against the latter a different state of things, as existing at the same time.

Appellant contends appellee misrepresented to him that she did not know the whereabouts of 7,000 shares of in-option stocks, thereby preventing him from earmarking or **[**24]** segregating her share of the stocks. Therefore, appellant argues, appellee should be estopped from claiming a loss occasioned by appellant's failure to earmark or segregate her separate shares of stock. Since we did not find that appellant had a duty to earmark the stocks, this argument is no longer relevant. However, assuming, for purposes of argument that appellee intentionally or negligently deceived appellant into thinking that the stock certificates representing the 7,000 shares of in-option stocks were lost or not in her possession, there is no evidence that appellant was induced to rely on the alleged misrepresentation to his detriment. Presumably, none of the 7,000 shares of stock were eligible to be sold or transferred. Furthermore, there is no evidence that appellant requested appellee to deliver the stocks to him so that he could effect a separation of the stocks into equal portions.

The record fails to show how appellant relied on appellee's acceptance of the dividends on 9,188 shares of stock or by her delay in asserting her claim to half the net proceeds of the sale to his detriment. Appellant's liability on the loan ceased as of April, 1972, when he repaid the **[**25]** Bank for his share of the loan, whereas appellee has continued to pay interest on her share up to the present. Appellant has not claimed any detriment arising out of the fact that the dividends were used to pay appellee's half of the interest payments. Furthermore, appellant has refused to disclose what he has done with the proceeds of the April, 1972, sale of the stocks which was not used to pay the loan.

Appellant asserts that if appellee had asserted her claim to half the net proceeds promptly instead of delaying for two years, he could have sold additional stock to pay off the portion of his bank loan which he intended to pay off while the stock was still selling at \$ 38.00 per share. However, there is no evidence on the record to support such an assertion. There **[*589]** is no evidence of how many additional shares would have been sold or which loan would have been repaid. There is no evidence that appellant was justified in relying on the conduct of appellee as an acceptance of his claim to ownership of the 3,187 shares of stock sold. We cannot say that the conduct of appellee was "so inconsistent with the purpose of [appellee] to stand on [her] rights as to leave **[**26]** no opportunity for a reasonable inference to the contrary." *Robinson v. McWayne, supra at 734*.

As mentioned in the section of this opinion on waiver, appellee had no knowledge that the stocks sold were commingled property. As we said in *Robinson v. McWayne, supra at 734*: "Before [one] may be charged with knowledge it must appear that he possesses full knowledge of all the material particulars and circumstances and was fully apprised of the effect of the acts ratified and of his legal rights in the matter." There is no evidence that appellee **[**947]** was fully apprised of her rights in the matter.

Appellant cites the case of *Hartmann v. Bertelmann*, 39 Haw. 619 (1952), for the proposition that appellee's conduct evidenced an acquiescence in and consent to appellant's claim that all the 3,187 shares of stock sold were his separate property. The doctrine applied in that case was that of quasiestoppel.

As defined in the case of *Hartmann v. Bertelmann, supra at 628*, ^{HN5}quasi-estoppel is "a species of equitable estoppel which has its basis in election, waiver, acquiescence, or even acceptance of benefits and which precludes a party from asserting to another's disadvantage, **[**27]** a right inconsistent with a position previously taken by him." In that case, the court held that the beneficiaries of a testamentary trust were estopped from claiming damages to the trust allegedly caused by the trustee's failure to sell certain real property "within a reasonable time" as provided for by the will of the testator. The court found that the beneficiaries had contributed to the delay in the sale of the real property by their insistence that the property be sold for a price in excess of the price recommended by the trustee and the prices offered by potential purchasers.

[*590] We can find nothing in the record which would lend support to a finding that appellee's conduct was so inconsistent with her present claim that, in equity, appellee should be estopped to make such a claim.

C. Laches

Appellants contend that the doctrine of laches is applicable. We disagree.

HNG The equitable doctrine of laches applies where "long acquiescence in the assertion of adverse rights has occurred", *Ishida v. Naumu*, 34 Haw. 363, 373 (1937), or when, "during inexcusable delay, the evidence has become obscured and, under the circumstances of the case, it is too late to *****28** ascertain the merits of the controversy." *Poka v. Holi*, 44 Haw. 464, 475, 357 P.2d 100 (1960); *Brown v. Bishop Trust Co.*, 44 Haw. 385, 355 P.2d 179 (1960). In order to invoke the doctrine of laches, if predicated on an allegation of acquiescence, the acquiescence must be based on a showing of express or implied knowledge on the part of the one to be estopped. *Dalton v. City & County of Honolulu*, 51 Haw. 400, 407, n. 4, 462 P.2d 199, 204 n. 4 (1969).

There is no evidence, in this case, that appellee knew or had reason to know that the stocks sold by appellant were partially hers. Under the circumstances, we do not think that appellee's delay in asserting her rights constituted "long acquiescence", nor was it "inexcusable."

We find that the evidence of waiver, estoppel, and laches insufficient to support appellant's claim.

Affirmed.

DISSENT BY: KIDWELL

DISSENT

DISSENTING OPINION BY KIDWELL, J.

The majority opinion may well achieve an equitable result in this case, but the interpretation of the decree by which this *****591** result is achieved is one in which regretfully I cannot concur. The decree said expressly that the trust res consisted of 3,938 shares of out-of-option *****29** stock and 5,250 shares of in-option stock. This part of the decree was drafted jointly by the parties' tax advisors, who presumably would have said that the trust was composed of an undivided one-half interest in 18,375 shares if that had been intended. In my opinion, the decree clearly expressed the intent that the trust be composed of the specified number of unallocated shares of the two classes of stock. Appellant was not by the decree deprived of control and disposition of the shares which were not in the trust.

The correspondence quoted in footnote 11 of the majority opinion may reflect an improper withholding by appellant from appellee of out-of-option shares held in the trust, which she desired to sell to liquidate her share of the bank loan. If appellee's *****948** rights were infringed by such withholding, the proper course is to determine and assess appellee's damages. But the circumstances described in the majority opinion do not support the conclusion that appellant disposed of appellee's property or is required to account to appellee for the proceeds of the sale of any shares.

I would reverse and remand this case for further proceedings to determine what liability, *****30** if any, was incurred by appellant as trustee of unallocated whole shares of stock held for appellee's benefit.

Service: Get by LEXSEE@

Citation: 59 Hawaii 575

View: Full

Date/Time: Tuesday, November 17, 2009 - 5:51 PM EST

* Signal Legend:

-  - Warning: Negative treatment is indicated
-  - Questioned: Validity questioned by citing refs
-  - Caution: Possible negative treatment
-  - Positive treatment is indicated
-  - Citing Refs. With Analysis Available
-  - Citation information available

* Click on any *Shepard's* signal to *Shepardize* that case.

[My Lexis™](#) | [Search](#) | [Research Tasks](#) | [Get a Document](#) | [Shepard's®](#) | [Alerts](#) | [Total Litigator](#) | [Transactional Advisor](#) | [Counsel Selector](#)
[History](#) | [Delivery Manager](#) | [Dossier](#) | [Switch Client](#) | [Preferences](#) | [Sign Out](#) | [Help](#)



[About LexisNexis](#) | [Terms & Conditions](#) | [Contact Us](#)
 Copyright © 2009 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.

Service: Get by LEXSEE®
Citation: 228 la 423

228 La. 423, *; 82 So. 2d 698, **;
1955 La. LEXIS 1377, ***

ENGLISH REALTY COMPANY, Inc. v. Mrs. Helene Rabe MEYER et al.

No. 42032

Supreme Court of Louisiana

228 La. 423; 82 So. 2d 698; 1955 La. LEXIS 1377

June 30, 1955

SUBSEQUENT HISTORY: [***1] Rehearing Denied October 4, 1955.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant property owners appealed the judgment of the district court (Louisiana) that granted plaintiff common carrier's petition for a right-of-way across the property owners' land.

OVERVIEW: A common carrier filed suit against property owners to obtain a right of passage across their land. The property owners asserted an exception of no cause of action, which the district court overruled. Following trial, the district court granted the carrier a servitude across the front of the property owners' land and required that the carrier pay damages to the property owners, pave the right-of-way, and keep the right-of-way open for public use. The property owners appealed. In reversing, the court concluded that the right-of-way was improperly granted by the district court. Such servitudes were proper where a land was enclosed, and the property at issue was not enclosed but, rather, fronted a public road. The property owners' exception of no cause of action was well founded. The property at issue bordered on a public road, and its enclosure was not a direct consequence of its location but of an act of the carrier itself. Where the carrier's own actions resulted in its enclosure, it was not entitled to a right-of-way across the land of another.

OUTCOME: The exception of no cause of action was sustained, the district court's judgment was reversed, and the carrier's suit was dismissed.

CORE TERMS: public road, railroad, highway, servitude, enclosed, front, right of passage, neighbor, right-of-way, feet, cause of action, abutting, adjoining, entrance, overpass, frontage, street, water course, tramroad, freight, founded, surrounded, acreage, tract, truck, acres, easement, nearest, ingress, egress

LEXISNEXIS® HEADNOTES

 **Hide**

[Governments](#) > [Public Improvements](#) > [Bridges & Roads](#)

[Real Property Law](#) > [Limited Use Rights](#) > [Easements](#) > [General Overview](#)

HN1 La. Civ. Code Ann. art. 699 provides that the owner whose estate is enclosed and who has no way to a public road, a railroad, a tramroad, or a water course may claim the right of passage on the estate of his neighbor or neighbors to the nearest public road, railroad, tramroad, or water course and shall have the right to construct a road, railroad, or tramway according to circumstances and as the exigencies of the case may require over the land of his neighbor or neighbors for the purpose of getting the products of his said enclosed land to such public road, railroad, tramroad, or water course or for the cultivation of his estate, but he shall be bound to indemnify his neighbor or neighbors in proportion to the damage he may occasion. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Real Property Law](#) > [Limited Use Rights](#) > [Easements](#) > [General Overview](#)

HN2 Enclosed estates are lands shut off from access to public roads and the like by reason of their being entirely surrounded by other lands. This is made clear by La. Civ. Code Ann. art. 700, which provides for the manner in which the right of passage is to be located. La. Civ. Code Ann. art. 700 states that the owner of the estate, which is surrounded by other lands, and La. Civ. Code Ann. art. 702 declares that a passage must be furnished to the owner of the land surrounded by other lands. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Real Property Law](#) > [Limited Use Rights](#) > [Easements](#) > [Public Easements](#)

HN3 Generally speaking, an abutting landowner on a public highway has a special right of easement and user in the public road for access purposes, and this is a property right of easement that cannot be damaged or taken from him without due compensation. However, an owner is not entitled, as against the public, to access to his land at all points in the boundary between it and the highway, although entire access cannot be cut off. If he has free and convenient access to his property and his means of ingress and egress are not substantially interfered with by the public, he has no cause of complaint. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

COUNSEL: Simon Herold, Dimick & Hamilton, Shreveport, for defendants-appellants.

Cook, Clark, Egan, Yancey & King, Shreveport, for plaintiff-appellee.

John Gallagher, Shreveport, for defendant-appellee.

JUDGES: McCaleb, Justice.

OPINION BY: McCALEB

OPINION

[*425] [*698] Plaintiff, a holding company for a common carrier known as Red Ball Freight Lines, instituted this suit under Article 699 of the Civil Code to obtain a right of passage across certain land, located in the city of Shreveport, owned in indivision by defendants, S. L. Meyer, J. M. Meyer, Mrs. Helene R. Meyer and C. E. Meyer, Jr. The salient facts upon which the cause of action is founded are as follows:

In December of 1950, plaintiff bought for \$ 120,000 an 18-acre tract lying immediately **[*426]** southwest of the right-of-way of the Allen-Dalzell-Linwood **[*699]** Overpass. This property is bordered on the west by the Texas & Pacific Railroad, which runs in a northerly direction turning east, and fronts on Linwood Avenue, which likewise runs in a northerly direction and then curves west passing over the Texas & Pacific Railroad. Prior to 1953, plaintiff sold to various persons **[**2]** parts of the 18 acres of land, retaining only 4.94 acres situated at the extreme north end of the original 18-acre tract. This acreage forms a triangle, bounded by the railroad right-of-way on one side and the Linwood Avenue approach to the viaduct on the other, and abuts on the south a four-acre tract which plaintiffs sold to defendants ¹ for \$ 32,000 on July 26, 1952.

FOOTNOTES

¹ Charlton E. Meyer, one of the original purchasers, died in 1953 and the defendants, Mrs. Helene R. Meyer and C. E. Meyer, Jr., are his successors.

Plaintiff's land has 700 front feet on Linwood Avenue, most of which is below the level of the ramp leading over the viaduct. However, there are approximately 43 front feet at the southern end of the property which are virtually on the same ground level as the adjacent highway.

In its petition, plaintiff sets forth that its property is enclosed and that it has no access to a public road, the nearest public road being Linwood Avenue. It is averred that the only practical way to reach Linwood **[**3]** Avenue is over and through defendants' property and that the governing authorities of the City of Shreveport have decreed that it may not enter Linwood **[*427]** Avenue at any point north of the center line of Dalzell Street (which connects perpendicularly with Linwood Avenue at a point approximately 200 feet south of the division line between plaintiff's and defendants' land). The prayer was for judgment granting a right of passage 30 feet wide (coupled with the right to build and pave a road over same) across the front of defendants' property bordering on Linwood Avenue ² and, in the alternative, for some other right of passage to be fixed by the court. It was stated in the petition that the granting of the servitude would not damage defendants' property but, if it be found otherwise, then the damages should be fixed and assessed by the court.

FOOTNOTES

² Plaintiff intends to have Red Ball Motor Freight Lines operate a truck terminal on the premises. This enterprise will require a spacious entrance and exit to accommodate the large trucks engaged in freight hauling.

[4]** Defendants pleaded that plaintiff does not state a cause of action because its land was not enclosed as adequate frontage was available to it for access along Linwood Avenue, on the east, and along the railroad right-of-way on the west of its property and, furthermore, that it had not been prevented by any legally constituted authority from making an entrance into its property from Linwood Avenue. Before this exception was heard, plaintiff amended its petition and joined the City of Shreveport as a party defendant so that the city might be bound by any decision of the court with respect to its denial to plaintiff of the right **[*428]** of access to and use of Linwood Avenue from its property.

Defendants thereupon filed an exception of misjoinder of parties, an exception of prematurity and another exception of no cause of action. These exceptions were overruled and the City of Shreveport answered, stating that it would not allow plaintiff to enter Linwood Avenue at any point north of the center line of Dalzell Street. Defendants then answered, denying plaintiff's right to a servitude across their property and alternatively seeking \$ 40,000 as damages in the event the right of **[**5]** passage was granted.

Following a hearing on the issues thus formed by the pleadings, the trial judge granted plaintiff a servitude 30 feet wide across the front of defendants' property parallel to and adjoining Linwood Avenue and extending from the north boundary of the property to the south line of the intersection of Dalzell Street, subject to the conditions (1) that plaintiff pay defendants damages in the sum of \$ 1,699.47, (2) that plaintiff pave the right-of-way and (3) that said right-of-way be kept open for the use of the public. All of the Meyers **[**700]** have appealed and the City of Shreveport, assuming the position of defendant-appellee, requests that the judgment be affirmed.

[*429] We address our immediate attention to the exception of no cause of action filed by defendants.

Article 699 of the Civil Code, upon which plaintiff's action is founded, is the first article of Section 5 of Chapter 3 of Title IV, which pertains to Predial Servitudes. Chapter 3 treats of the servitudes which are imposed by law and Section 5 thereof is specially devoted to the servitude of passage and of way. Article 699, as amended by Act 197 of 1916, provides:

HN1 "The owner whose [***6] estate is enclosed, and who has no way to a public road, a railroad, a tramroad or a water course may claim the right of passage on the estate of his neighbor or neighbors to the nearest public road, railroad, tramroad or water course and shall have the right to construct a road, railroad or tramway according to circumstances and as the exigencies of the case may acquire [require], over the land of his neighbor or neighbors for the purpose of getting the products of his said enclosed land to such public road, railroad, tramroad or water course, or for the cultivation of his estate, but he shall be bound to indemnify his neighbor or neighbors in proportion to the damage he may occasion." (Italics ours.)

Under their exception of no cause of action, defendants contend that the quoted Article is inapplicable to the case at bar for the reason, among others, that plaintiff's [***430] land is not enclosed, as it fronts on a public road, Linwood Avenue, and is bordered on the other side by a railroad right-of-way.

The point appears to be well taken, for, even if it be assumed that defendants are incorrect in their position that the abutment of the land to the railroad property [***7] renders the codal article irrelevant to the case, it is difficult to perceive how the property can be adjudged to be "inclosed" when it fronts on Linwood Avenue, a public road. *HN2* Enclosed estates, as envisioned by the Articles of the Code embraced in Section 5 of Chapter 3 of the Title "Predial Servitudes", means lands shut off from access to public roads and the like by reason of their being entirely surrounded by other lands. This is made clear by Article 700, which provides for the manner in which the right of passage is to be located. It states "The owner of the estate, which is surrounded by other lands, * * *" and Article 702 declares that "A passage must be furnished to the owner of the land surrounded by other lands * * *." Thus, lands abutting a public road cannot be regarded as being within the purview of Article 699.

Counsel for plaintiff profess that the codal article can nonetheless be utilized in this case because the City of Shreveport has designated Linwood Avenue as part of an expressway or as a limited access highway and has denied plaintiff access thereto from [***431] its property. It is further contended that, since most of the abutting frontage of 700 feet [***8] comprises a ramp or a gradual embankment leading to the overpass and since the remaining 43 feet of the frontage, level with the street, is so near to the elevated portion that use of that frontage for ingress and egress of the Red Ball trucks would create a serious traffic hazard, the refusal of the city to grant plaintiff access to the public road is entirely justified and makes necessary the application of Article 699, as the land is enclosed for all intents and purposes.

These postulations are not impressive. First of all, they would apparently disregard the well-settled jurisprudence that neither the State nor its political subdivisions has the legal right to deny an abutting property owner all access to the adjoining highway.

In State ex rel. Gebelin v. Department of Highways, 200 La. 409, 8 So.2d 71, 75, this court had before it a suit by the owners of land contiguous to the Jefferson Highway to compel the Department of Highways to grant them access from their land to the [***701] highway. The lower court had ordered that six places of entrance be provided on the north side and four places on the south side and it was asserted, inter alia, on appeal that the Department [***9] of Highways had the right to refuse all access to the adjoining property. But this contention was rejected, the court citing as its authority the pronouncements [***432] of the Supreme Court of the United States and the courts of last resort of many States, and quoting approvingly the rule of law as stated in the case of Genazzi v. Marin County, 88 Cal.App. 545, 263 P. 825, 826, thus:

HN3 "Generally speaking, an abutting landowner on a public highway has a special right of easement and user in the public road for access purposes, and this is a property right of easement which cannot be damaged or taken from him without due compensation. But an owner is not entitled, as against the public, to access to his land at all points in the boundary between it and the highway, although entire access cannot be cut off. If he has free and convenient access to his property, and his means of ingress and egress are not substantially interfered with by the public, he has no cause of complaint." (Italics ours.)

The foregoing demonstrates, we believe, the unsuitability of Article 699 in any case wherein the land alleged to be enclosed borders on a public road. In such matters, the abutting [***10] proprietor has his remedy against the public authority and its refusal to accede to a demand for access, even if justified, does not warrant the invocation of Article 699 of the Code on the theory that such denial of access creates an enclosure and that, therefore, the adjoining land must be burdened with a servitude in [***433] order that passage to the same public road may be assured.

In the case at bar, the record indicates that the purchase of the original 18 acres of land by plaintiff in 1950 was subsequent to the erection of the overpass and the embankment leading to it on Linwood Avenue. When it held that acreage, plaintiff had unhampered access to the public road as it is to be presumed that the City of Shreveport would have accorded it suitable entrance and exits to and from its property even though Linwood Avenue is a limited access facility. However, if plaintiff, by reason of the various property sales it has made, now finds itself in the position of holding acreage fronting that part of the overpass approach to which the City of Shreveport might be justified in refusing to grant it access from its property, it is nevertheless not entitled to claim passage over defendants' [***11] property as the situation respecting access of which it now complains was wholly created by its own act. Such circumstances, even if actual enclavement results, do not warrant the application of Article 699 of the Code as the property still borders on a public road and its enclosure is not a direct consequence of the location of the land but of the act of the party seeking the relief.

It is our opinion that the exception of no cause of action is well founded and it is now sustained.

The judgment appealed from is reversed and plaintiff's suit is dismissed at its costs.

Service: Get by LEXSEE®

Citation: 228 La 423

View: Full

Date/Time: Tuesday, November 17, 2009 - 5:52 PM EST

* Signal Legend:

-  - Warning: Negative treatment is indicated
-  - Questioned: Validity questioned by citing refs
-  - Caution: Possible negative treatment
-  - Positive treatment is indicated
-  - Citing Refs. With Analysis Available
-  - Citation Information available

* Click on any *Shepard's* signal to *Shepardize*® that case.

[My Lexis™](#) | [Search](#) | [Research Tasks](#) | [Get a Document](#) | [Shepard's®](#) | [Alerts](#) | [Total Litigator](#) | [Transactional Advisor](#) | [Counsel Selector](#)
[History](#) | [Delivery Manager](#) | [Dossier](#) | [Switch Client](#) | [Preferences](#) | [Sign Out](#) | [Help](#)



LexisNexis®

[About LexisNexis](#) | [Terms & Conditions](#) | [Contact Us](#)

Copyright © 2009 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.

Service: Get by LEXSEE®
Citation: 673 A.2d 1028

673 A.2d 1028, *; 1996 Pa. Commw. LEXIS 110, **

ELMER C. GRAFF & CECILIA A. GRAFF v. BERNARD M. SCANLAN & SUSAN A. SCANLAN, his wife, AND JOHN D. NORMAN & ELAINE J. NORMAN, his wife, Appellants

No. 3205 C.D. 1994

COMMONWEALTH COURT OF PENNSYLVANIA

673 A.2d 1028; 1996 Pa. Commw. LEXIS 110

October 16, 1995, Argued
March 22, 1996, Decided
March 22, 1996, FILED

PRIOR HISTORY: [**1] APPEALED From No. 91-11497. Common Pleas Court of the county of Chester. Judge SHENKIN.

DISPOSITION: Order reversed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant adjacent landowners sought review of a decision from the Common Pleas Court of Chester County (Pennsylvania), that confirmed a report of a Board of View finding that a private road across portions of appellants property should be opened. Appellants asserted that appellee property owners had an existing easement over another lot and therefore, appellees' request was not a strict necessity.

OVERVIEW: Appellant adjacent landowners sought review of the decision that appellee property owners' lot was not landlocked because of an easement giving access across another lot in the subdivision. Appellees' had originally owned appellants lots and upon selling the lots, appellees failed to reserve an easement across the property to gain access to a public drive. Appellees filed for equitable relief in the trial court which denied appellees' request, finding appellees' had neither an express or implied easement over appellants' property. Appellants filed a second suit requesting a board of view to determine the necessity of a private roadway, pursuant to the Private Road Act, 36 P.S. § 2731, from appellees property through appellants property to the public drive. The board of view found a necessity and ordered the roadway to be opened. Appellants sought review of the decision and the trial court affirmed. Appellants asserted that appellees' land was not landlocked and appellees did not qualify for an easement by necessity. The court reversed, finding that because appellees had created the situation of their landlocked status, that could not be the basis of a finding of strict necessity.

OUTCOME: The court reversed the judgment of the trial court affirming the board of views' order to open a roadway from appellees property owners' property across appellant adjoining landowners' property to a public drive. The court held that because appellees had created this situation, appellees could not claim strict necessity and any inconvenience caused appellees in using an existing easement over another lot were not factors.

CORE TERMS: easement, private road, landlocked, landowner, public road, landlock, implied easement, neighbor, viewers', severance, township, alleyway, highway, parcel, self-created, conveyance, purchaser, adjacent, conveyed, roadway, tract, unity, appendices, variance, private right, own property, right-of-way, condemning, strictest, railroad

LEXISNEXIS® HEADNOTES

Hide

[Real Property Law](#) > [Limited Use Rights](#) > [Easements](#) > [General Overview](#)
HN1 See 36 P.S. § 2731.

[Real Property Law](#) > [Limited Use Rights](#) > [Easements](#) > [General Overview](#)
HN2 See 36 P.S. § 2732.

[Civil Procedure](#) > [Eminent Domain Proceedings](#) > [General Overview](#)
[Real Property Law](#) > [Eminent Domain Proceedings](#) > [Constitutional Limits & Rights](#) > [Public Use](#)
[Transportation Law](#) > [Bridges & Roads](#) > [Private Roads](#)
HN3 The Private Road Act, 36 P.S. § 2731, is in the nature of eminent domain and, therefore, must be strictly construed. The taking of property for private use is an assumption that is prima facie unconstitutional, and can only be justified by the strictest necessity. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Real Property Law](#) > [Limited Use Rights](#) > [Easements](#) > [Creation](#) > [Easement by Implication](#)
[Real Property Law](#) > [Limited Use Rights](#) > [Easements](#) > [Creation](#) > [Easement by Necessity](#)

HN4 An easement by necessity may be implied when after severance from adjoining property a piece of land is without access to a public highway. In order to establish a way of necessity, three elements must be proven: (1) the titles to the alleged dominant and servient properties must have been held by one person, (2) this unity of title must have been severed by a

conveyance of one of the tracts, (3) the easement must be necessary in order for the owner of the dominant tenement to use his land, with the necessity existing both at the time of the severance of title and at the time of the exercise of the easement. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Real Property Law](#) > [Limited Use Rights](#) > [Easements](#) > [Continuous & Discontinuous Easements](#)

[Real Property Law](#) > [Limited Use Rights](#) > [Easements](#) > [Creation](#) > [Easement by Necessity](#)

[Real Property Law](#) > [Limited Use Rights](#) > [Easements](#) > [Public Easements](#)

HN5 An easement by necessity arises upon a showing that there was a conveyance of a part of a tract of land in such a manner that the part conveyed or the part retained is denied access to a public road. Conversely, an implied easement from a prior use is based on the theory that continuous use of a permanent right-of-way gives rise to the implication that the parties intended that such use would continue, notwithstanding the absence of necessity for the use. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Real Property Law](#) > [Limited Use Rights](#) > [Easements](#) > [Creation](#) > [Easement by Implication](#)

[Real Property Law](#) > [Limited Use Rights](#) > [Easements](#) > [Creation](#) > [Easement by Necessity](#)

HN6 A grantee is entitled to an easement over the lands of his grantor where the property conveyed to him is so situated that access to it from the highway cannot be had except by passing over the other land of the grantor. Similarly, a grantor is entitled to an implied easement by necessity when he grants away his exterior land thereby leaving his remaining land without an outlet. An easement implied on the grounds of necessity is always of strict necessity, it never exists as a mere matter of convenience. Further, an easement by necessity does not exist when an owner can get to his own property through his own land, and the necessity must not be created by the party claiming the easement. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Real Property Law](#) > [Limited Use Rights](#) > [Easements](#) > [General Overview](#)

HN7 The Private Road Act, [36 P.S. § 2731](#), does not require an absolute necessity, such as being completely landlocked. However, the mere inconvenience in the use of an existing road or easement is not enough. The existing road or easement must be of a limited privilege or extremely difficult and burdensome in its use to warrant the appropriation of another more convenient course. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

COUNSEL: ATTORNEYS: Timothy F. Hennessey, for Appellant.

ATTORNEYS: Leo H. Eschbach, for Appellee.

JUDGES: BEFORE: HONORABLE JOSEPH T. DOYLE, Judge, HONORABLE DORIS A. SMITH, Judge, HONORABLE SILVESTRI SILVESTRI, Senior Judge. DISSENTING OPINION BY SENIOR JUDGE SILVESTRI.

OPINION BY: JOSEPH T. DOYLE

OPINION

[*1029] OPINION BY JUDGE DOYLE

FILED: March 22, 1996

Bernard and Susan Scanlan and John and Elaine Norman appeal from an order of the Court of Common Pleas of Chester County confirming a report of a Board of View finding that a private road across portions of their properties should be opened.

The underlying facts, presenting an issue of first impression for the Court, are as follows. In 1974, Elmer and Cecilia Graff purchased a forty-two acre tract of land in East Coventry Township. In 1978, the Graffs filed a subdivision plan with the Township seeking to subdivide the upper portion of the tract into nine lots known as the Bruce's Hill subdivision (Bruce Hill). Lots 1 through 8 of Bruce Hill had access to Schoolhouse Road, a public roadway which bordered the westerly side [**2] of the subdivision. Lot 9 was adjacent to lots 6 and 8 and did not have direct access to any public road.

Abutting Bruce Hill to the northeast was another subdivision known as Fox Gate Farm in which the Scanlans owned lot 7 and the Normans owned lot 10. The Scanlans' lot 7 abutted the easterly side and the Normans' [*1030] lot 10 abutted the southerly side of the Graffs' lot nine 9 in Bruce Hill. Both the Scanlans' and the Normans' lots had access to Fox Gate Drive, a public road whose terminus in Fox Gate Farm was a cul de sac.¹

FOOTNOTES

¹ The subdivision plans for Fox Gate Farm and Bruce Hill are attached as appendices.

On May 15, 1978, at the Township meeting regarding Bruce Hill, the Board of Supervisors required the Graffs to obtain a Declaration of Easement from the Scanlans and the Normans in order to access Fox Gate Drive from lot 9 of Bruce Hill. No such declaration of easement was ever obtained by the Graffs. However, the Graffs subsequently approached the Scanlans and obtained from them a combination agreement [**3] of sale and an option for the Scanlans to purchase lot 9 of Bruce Hill. On June 19, 1978, the Board of Supervisors required the Graffs to revise the Bruce Hill plan to show that lot 9 could not be sold separately from the Scanlans' lot 7 of Fox Gate Farm. (Notes of Testimony (N.T.) at 36-37; Reproduced Record (R.R.) at 40a-41a.) On June 28, 1978, a notation reflecting this requirement was added to the Bruce Hill plan.² On July 3, 1978, the Board of Supervisors approved the Bruce Hill plan, including the notation requiring the conveyance of lot 9 to the Scanlans thereby connecting lot 9 to the Scanlans' property. (Minutes of the Board of Supervisors of East Coventry Township, July 3, 1978; R.R. at 56a.)

FOOTNOTES

2 The notation on the approved plan states:

"Note: Lot #9 shall be conveyed to Bernard M. & Susan Scanlon [sic] and shall not be sold seperately [sic] from the adjoining Scanlon land."

(Bruce Hill Subdivision Plan; R.R. at 61a.)

Between the time the Graffs laid out Bruce Hill in April of **[**4]** 1978 and sometime in 1984, the Graffs sold lots 1 through 7, but the one-year option to purchase lot 9 was never exercised by the Scanlans.

In July, 1984, the Graffs offered to purchase from the Scanlans a right-of-way across the Scanlans' property. When the Scanlans did not accept the offer, the Graffs filed an action in equity in August, 1984, in the Court of Common Pleas of Chester County alleging that they had an easement by express grant or, in the alternative, by implication across the Scanlans' and the Normans' property. Prior to the conclusion of this litigation, in July, 1985, the Graffs sold lot 8 of Bruce Hill. (Stipulation of Counsel at 2; R.R. at 70a.) The Graffs did not expressly reserve any right of access across lot 8 in favor of lot 9. (N.T. at 38; R.R. at 42a.) Accordingly, as of July, 1985, lot 9 had no direct access to a public road.

By order dated January 23, 1986, the Court of Common Pleas found that the Graffs had neither an express easement nor an implied easement over the Scanlans' and the Normans' properties in Fox Gate Farm, and denied the equitable relief.

On December 9, 1991, the Graffs filed a second suit with the Court of Common Pleas of Chester County, **[**5]** this time pursuant to Section 11 of the Private Road Act³ in which the Graffs asked for a rule to show cause why a Board of View should not be appointed to determine the necessity of a private roadway from lot 9 in Bruce Hill through portions of both the Scanlans' and the Normans' properties in Fox Gate Farm in order to gain access to Fox Gate Drive. The Graffs' petition alleged that lot 9 of Bruce Hill was landlocked and, therefore, a private road over the Scanlans' and the Normans' properties was necessary. The petition also requested that upon a finding of necessity for such a road, that the opening of the same be directed. On December 9, 1991, the same day that the Graffs' petition was presented, the trial court issued the requested rule to show cause. On January 2, 1992, the Scanlans and the Normans filed an Answer, asserting first, that lot 9 has access to a public **[*1031]** road via an implied easement over lot 8 of Bruce Hill, and second, that the Graffs created their own predicament, *i.e.*, landlocked their own property, and, therefore, no remedy is available under the Act. Essentially, the Answer of the Scanlans and the Normans said that the Graffs painted themselves into a corner **[**6]** without a door.

FOOTNOTES

3 Act of June 13, 1836, P.L. 551, *as amended*, 36 P.S. § 2731. ^{HN1}Section 11 of the Act provides in pertinent part:

The several courts of quarter session shall, in open court as aforesaid, upon the petition of one or more persons . . . for a road from their respective lands or leaseholds to a highway or place of necessary public resort, . . . direct a view to be had of the place where such a road is requested, and a report thereof to be made, in the same manner as directed by the said act of thirteenth June, one thousand eight hundred and thirty-six.

36 P.S. § 2731.

The trial court, on January 4, 1993, entered an order appointing Viewers and directing that a view be conducted and a report issued. Following a view held on October 7, 1993, the Viewers issued a report wherein they made the following relevant findings of fact:

(a) That the premises of the Petitioner described as Lot #9, Bruce's Hill, are indeed at this time landlocked, and a necessity for a 25-foot wide **[**7]** private road for access thereto is found to exist. The Board offers no comment as to how the necessity came to exist, opining that such is the business of the courts and outside the purview of the Board, despite the interesting testimony presented on this issue.

(b) That the most appropriate location for such a private road giving access to Petitioners' said premises is over the premises of both Respondents, parallel to and on the property line between their respective lots, and extending twelve and one half feet in breadth on each of the lots of the Respondents. The center line of the 25 foot-right-of-way to be the lot line dividing the premises of the respondents and the terminus thereof to be on the cul de sac of Fox Drive at the point where the said lot line intersects the same.

(Report of Board of View at 2-3; R.R. at 22a-23a.)

On November 24, 1993, the Scanlans and the Normans appealed the Viewers' report to the trial court which, by order dated November 16, 1994, confirmed the report and directed that a private road be opened as set forth therein. The trial court specifically concluded that although the Graffs did create the landlock of lot 9, such self-creation **[**8]** did not defeat their petition for a private road under the Act. The trial court also concluded that no easement by implication existed over lot 8 of Bruce Hill which would have precluded a finding of necessity for a private road over the properties of the Scanlans and the Normans. This appeal followed.

On appeal, the Scanlans and the Normans again argue that first, lot 9 of Bruce Hill is not landlocked because it is accessible to Schoolhouse road by virtue of an easement implied by operation of law over lot 8 in that subdivision and, second, the Graffs are precluded from obtaining an easement for a private road pursuant to the Act because they created their own hardship.

^{HN2}Section 12 of the Act provides:

If it shall appear by the report of viewers to the court directing the view, *that such road is necessary*, the said court shall

direct what breadth the road so reported shall be opened, and the proceedings in such cases shall be entered on record, as before directed, and thenceforth such road shall be deemed and taken to be a lawful private road.

36 P.S. § 2732 (emphasis added).

In reviewing the applicable principles concerning the Act, we find that ^{HN3}the Act [**9] is in the nature of eminent domain and, therefore, must be strictly construed. *Application of Little*, 180 Pa. Super. 555, 119 A.2d 587 (1956). "The word necessity, the key to this entire Act must likewise be given a strict interpretation." *Id.* at 559, 119 A.2d at 589. As such, our courts from early in the history of the Act have construed it as requiring the "strictest necessity." *Id.*; see *In re Road in PlumCreek Township*, 110 Pa. 544, 548, 1 A. 431, 433 (1885) ("The taking of property for private use is an assumption that is *prima facie* unconstitutional, and can only be justified by the strictest necessity."). Otherwise, a board of viewers generally has broad authority under the Act to determine whether a private road is necessary. *In re Laying Out a Private Road, Appeal of Zealfla*, 405 Pa. Super. 298, 592 A.2d 343 (1991).

The Scanlans and the Normans challenge the necessity of the private road in question. We will first address the issue of whether the Graffs have an easement implied by necessity over lot 8 of Bruce Hill and, also, whether the existence of such an easement precludes [**1032] the finding of necessity under the Act for a private road over [**10] the Scanlans' and the Normans' properties.

^{HN4}An easement by necessity may be implied when "after severance from adjoining property a piece of land is without access to a public highway." *Burns Manufacturing Co. v. Boehm*, 467 Pa. 307, 314 n.4, 356 A.2d 763, 767 n.4 (1976) (quoting *Soltis v. Miller*, 444 Pa. 357, 359, 282 A.2d 369, 370 (1971); see also *Bodman v. Bodman*, 456 Pa. 412, 321 A.2d 910, 912 (1974)).⁴ In order to establish a way of necessity, three elements must be proven:

FOOTNOTES

⁴ Implied easements on the grounds of necessity must be distinguished from implied easements from a prior use (also referred to as easements by implied reservation). The two types of easements are often confused by both litigants and the courts because both easements require unity of ownership and subsequent severance. See generally 11 Am. Jur. Proof of Facts 3d 601, *Way of Necessity*. ^{HN5}An easement by necessity arises upon a showing that there was a conveyance of a part of a tract of land in such a manner that the part conveyed or the part retained is denied access to a public road. Conversely, an implied easement from a prior use "[is] based on the theory that continuous use of a permanent right-of-way gives rise to the implication that the parties intended that such use would continue, notwithstanding the absence of necessity for the use." *Boehm*, 467 Pa. at 314 n.4, 356 A.2d at 767 n.4.

[**11]

1. The titles to the alleged dominant and servient properties must have been held by one person.
2. This unity of title must have been severed by a conveyance of one of the tracts.
3. The easement must be necessary in order for the owner of the dominant tenement to use his land, with the necessity existing both at the time of the severance of title and at the time of the exercise of the easement.

11 Am. Jur. Proof of Facts 3d 601, *Way of Necessity* § 3.

Such an easement may be implied in favor of the grantor or grantee of the land. ^{HN6}A grantee is entitled to an easement over the lands of his grantor where the property conveyed to him is "so situated that access to it from the highway cannot be had except by passing over the other land of the grantor." *Commonwealth v. Burford*, 225 Pa. 93, 98, 73 A. 1064, 1066 (1909). Similarly, a grantor is entitled to an implied easement by necessity when he grants away his exterior land thereby leaving his remaining land without an outlet. *Ogden v. Grove*, 38 Pa. 487 (1861).

An easement implied on the grounds of necessity is always of *strict necessity*; ⁵ it never exists as a mere matter of [**12] of convenience. *Possessky v. Diem*, 440 Pa. Super. 387, 655 A.2d 1004 (1995). Further, an easement by necessity does not exist when an owner can get to his own property through his own land, and the necessity must not be created by the party claiming the easement. *Ogden*.⁶

FOOTNOTES

⁵ With respect to the *scope* of an implied easement by necessity, the Pennsylvania courts utilize a *reasonable necessity* standard, *i.e.*, the scope of the easement may be enlarged from its original use in order to meet "the reasonable needs . . . of the dominant estate for such an . . . easement, and to vary with the necessity, in so far as may be consistent with the full reasonable enjoyment of the servient tenement." *Soltis*, 444 Pa. at 360, 282 A.2d at 371 (quoting Tiffany, *Real Property* 345 (3d ed. 1939)). For example, an easement by necessity originally implied for the use of a horse and buggy may later be expanded in order to accommodate an automobile, as long as the expanded use does not unduly infringe on the use and enjoyment of the servient land.

⁶ An analysis of the facts of *Ogden* is instructive on this point. *Ogden* involved two adjacent landowners, Ogden and Grove, who took title to their respective properties from a common owner. Ogden owned lot 3 while Grove owned lots 1 and 2. Prior to severance of the three parcels, the common owner had built two multistory stores covering the entire street frontage of lot 3 thereby depriving the other structures (two warehouses and one stable) on that same lot access to a public road. In order to make full use of lot 3 the common owner used a paved alleyway which ran between lot 3 and lot 2 as a means of ingress and egress to the landlocked structures. After the common owner conveyed lot 3 to Ogden and lots 1 and 2 to Grove, Ogden continued to use the paved alleyway to access the three landlocked structures on lot 3. Shortly after severance, Grove brought suit against Ogden to prevent Ogden from continuing to use the paved alleyway, asserting that the alleyway was wholly situated on lot 2 and that Ogden had no right to its use. In response, Ogden argued that he had a right of way from necessity over the alleyway, asserting that the necessity for the use of the alleyway arose at the time of severance of lots 2 and 3. The Court found that Ogden was not

entitled to an easement by necessity over the alleyway because *the necessity was created by Ogden's predecessor in title, the common owner, when the two stores were built over the only existing street frontage of lot 3* and therefore, the necessity was self-created. The Court further stated that Ogden could get to the public road *through* the two stores notwithstanding the fact that Ogden would have to *destroy* the stores to do so.

[13] [*1033]** In the instant case, the evidence of record establishes that: (1) there was a unity of title between lot 8 and lot 9 of Bruce Hill; (2) the unity was subsequently severed when the Graffs sold lot 8; (3) an easement is necessary in order for the Graffs to use lot 9 as it is undisputed that lot 9 is landlocked without such an easement; and (4) the necessity existed both at the time of the sale of lot 8 (severance of unity of title between the lots) and at the time the instant litigation was commenced.

Accordingly, although the Graffs failed to expressly reserve an easement, we hold that an easement implied by necessity arose at the time they sold lot 8.

We recognize that *HN7* the "Act does not require an absolute necessity, such as being completely landlocked." *Little, 180 Pa. Super. at 559, 119 A.2d at 589*. Accordingly, the fact that the Graffs have an easement over lot 8, alone, does not defeat their right to proceed under the Act. However, "the mere inconvenience in the use of an existing road [or easement] is not enough. . . . The existing road [or easement] must be of a limited privilege . . . or 'extremely difficult and burdensome' in its use . . . to warrant **[**14]** the appropriation of another more convenient course." *Id.*

FOOTNOTES

⁷ For example, in *In re Laying Out a Private Road, 405 Pa. Super. 298, 592 A.2d 343 (1991)*, the Superior Court held that an "irrevocable license" to an existing right of way does not negate a Board of View's finding of necessity for a private road because the license does not necessarily run with the land. Also, in *Kraft's Petition, 33 Lanc. Rev. 386 (C.P. Pa. 1916)*, the Court of Common Pleas of Lancaster County held that an express easement which is limited to haying time and the single purpose of cutting and removing hay does not negate the Board of View's finding of necessity for a private road.

Therefore, in determining whether a private road was of "strictest necessity" over the property of the Scanlans and the Normans, the Board of View should have considered the fact that the Graffs had an implied easement by necessity over lot 8⁸ and should have also considered any legal or physical obstacles which precluded the Graffs from **[**15]** utilizing such an easement.⁹ The failure of the Board to do so constituted error as a matter of law.

FOOTNOTES

⁸ See *In re Petition of Geary, 40 Northumb. L.J. 50, 54 (C.P. Pa. 1968)* ("The existence of a private road does not prohibit the petition for a Board of view for another private road . . . but . . . this fact must be considered by the Board of Viewers with all pertinent factors in their determination of the necessity of the private road.")

⁹ The record indicates that the Graffs may have been prevented from exercising their right to an implied easement by necessity over lot 8 due to zoning violation(s). Mr. Graff testified as follows:

[Graff]: I petitioned the township to get a variance to get into lot 9 down through Mr. Dougherty's property.

THE COURT: Mr. Dougherty's?

[Graff]: Is the man who currently owns number 8. And the township would not allow me.

THE COURT: What kind of variance were you requesting, a variance with respect to the width of the necessary access?

[Graff]: Just the access to get in.

THE COURT: All right. In other words, you are saying that coming across lot number 8 would have violated zoning. You had asked for a variance from that requirement and were denied.

[Graff]: Yes sir.

(N.T. at 15-16; R.R. at 27a-28a.)

The substance of the alleged zoning violation(s) as well as the reason the zoning hearing board denied the Graffs' application for a variance is noticeably lacking in the record of the present appeal.

[16]** Nonetheless, we will not remand the case for this determination, because, even if the Graffs established a severe physical or legal limitation on their right to the implied easement over lot 8 of Bruce Hill and, therefore, the Board of View again determines that the Graffs are landlocked, the Graffs' petition under the Act must still fail because we hold that landowners who *voluntarily* create their own hardship are precluded from condemning a private road over the land of others pursuant to the provisions of the Act. In the instant case, it is uncontroverted that the Graffs systematically conveyed lots 1 **[*1034]** through 8 of Bruce Hill and failed to reserve an express easement over any of those lots, thereby depriving lot 9 of access to a public road. Accordingly, they are not entitled under the Act to a private road over the land of others.

The issue of whether a self-created landlock defeats a finding of necessity under the Act is one of first impression in Pennsylvania. Although our extensive survey of Pennsylvania case law reveals no authority directly on point, we find persuasive the analysis of the Louisiana Supreme Court in a factually similar case. In *English Realty Co. v. Meyer, 228 La. 423, 82 So. 2d 698 (La. 1955)*, a landowner sought to condemn a right-of-way over his neighbor's property pursuant to Article 699 of the Louisiana Civil Code¹⁰

which is substantively similar to our Pennsylvania Act. In 1950, the landowner had owned an eighteen-acre tract of land which he subsequently divided and sold, retaining only a five-acre parcel. The retained parcel was effectively landlocked because, although the parcel had a seven hundred foot frontage on Linwood Avenue, a public road, the City of Shreveport had refused to allow the landowner to enter Linwood Avenue from its property. Significantly, the city's refusal occurred *prior* to the landowner's conveyances which resulted in its landlock. The Louisiana Supreme Court reversed the trial court decision to grant the corporate landowner a right-of-way under the Code and held that a landowner who, by its own actions, deprives its estate of access to a public road, is not entitled to proceed under Article 699 of the Louisiana Civil Code. In this regard, the Louisiana Supreme Court stated:

FOOTNOTES

¹⁰ Article 699 of the Louisiana Civil Code provides:

The owner whose estate is enclosed, and who has no way to a public road, a railroad, a tramroad or a water course may claim the right of passage on the estate of his neighbor or neighbors to the nearest public road, railroad, tramroad or water course and shall have the right to construct a road, railroad or tramway according to circumstances and as the exigencies of the case may [require], over the land of his neighbor or neighbors for the purpose of getting the products of his said enclosed land to such public road, railroad, tramroad or water course, or for the cultivation of his estate, but he shall be bound to indemnify his neighbor or neighbors in proportion to the damage he may occasion.

La. Civ. Code art. 699 (emphasis added).

[18]**

If plaintiff, by reason of the various property sales it has made, now finds itself in the position of holding acreage fronting that part of the overpass approach to which the City of Shreveport might be justified in refusing to grant it access from its property, it is nevertheless not entitled to claim passage over defendants' property as the situation respecting access of which it now complains was wholly created by its own act. Such circumstances, even if actual encroachment results, do not warrant the application of Article 699 of the Code as . . . its enclosure is not a direct consequence of the location of the land but of the act of the party seeking the relief.

Id. at 701 (emphasis added).

The *English Realty* decision was subsequently limited to its facts and distinguished from cases wherein the landowner's landlock resulted from selling parcels of its land to an expropriating authority pursuant to negotiations made in contemplation of condemnation proceedings. In such cases, the owner's landlock was not truly voluntary and, therefore, the landowner should "not be punished for its cooperation" with the condemning authority. *Lafayette Airport* **[**19]** *Commission v. Roy*, 265 So. 2d 459, 465 (La. Ct. App. 1972), cert. denied, 266 So. 2d 444 (La. 1972), cert. denied, 411 U.S. 916, 36 L. Ed. 2d 307, 93 S. Ct. 1543 (1973).

Thus, the Louisiana courts only preclude a landlocked owner from condemning a private right of way over the land of its neighbor where the landowner originally had access to a public road and subsequently, and *voluntarily*, subdivided and sold parcels of its land so as to create a landlock of the land the owner retained. ¹¹ We particularly observe **[*1035]** that in *English Realty*, as in the instant appeal, the original owner could have established access to a public road either by planning the subdivision in a different manner or by express reservation of an easement before selling off all other lots in the subdivision.

FOOTNOTES

¹¹ In contrast to the private condemnation statutes in both Louisiana and Pennsylvania which require "strictest necessity," the private road statute in Georgia provides that a private road is available to a landowner who does not have a "reasonable means of access, ingress, and egress." *Kellett v. Salter*, 244 Ga. 601, 261 S.E.2d 597 (Ga. 1979) (quoting Ga. Code Ann. § 83-101(b)). As such, the fact that a landowner creates his own landlock does not, alone, preclude the owner from condemning a private road under the Georgia statute. Rather, the Georgia courts will consider whether the landowner ever had a *reasonable* means of access through the lots he has sold. For example, in *Kellett*, the Georgia Supreme Court held that the landowner was entitled to condemn a private road over the land of his neighbor, even though the landowner could have expressly reserved an easement over adjacent lots he had previously owned and sold, because a road over these lots would have cost \$ 47,800, which was twice as much as the value of the land the owner retained.

[20]** In the instant case, the Graffs proceeded with the sale of lot 8 to Dougherty with full knowledge that the Scanlans and the Normans in Fox Gate Farm refused to grant the Graffs an easement in favor of lot 9 of Bruce Hill, that those owners could not be legally compelled to grant such an easement (on the grounds of express grant or implication), that the Township required the Graffs to either obtain such an easement or convey lot 9 to the Scanlans, and that the Graffs *could have* reserved an easement over the lots in Bruce Hill prior to the conveyance of those lots. ¹² As such, the Graffs, like the landowner in *English Realty*, *voluntarily* created the landlock of their own property. Accordingly, we hold that the Graffs' self-created landlock of lot 9 of Bruce Hill cannot be the basis of a finding of "strict necessity" under the Act.

FOOTNOTES

¹² The Graffs' actions in voluntarily *creating* their hardship are distinguishable from cases wherein the landowner *purchases* property with the *knowledge* that it is landlocked. In such a case, the purchaser's *knowledge* does not preclude a finding of "strict necessity" by the Board of View. See, e.g., *In re Private Road in Monroeville Borough*, 204 Pa. Super. 552, 205 A.2d 885 (1965).

[21]** Order reversed.

JOSEPH T. DOYLE, Judge

ORDER

NOW, March 22, 1996, the order of the Court of Common Pleas of Chester County in the above-captioned matter is hereby reversed.

[*1036] APPENDIX

[SEE APPENDIX IN ORIGINAL]

[*1037] APPENDIX

[SEE APPENDIX IN ORIGINAL]

DISSENT BY: SILVESTRI SILVESTRI

DISSENT

[*1038] DISSENTING OPINION BY SENIOR JUDGE SILVESTRI

Filed: March 22, 1996

Because I disagree with the majority's conclusion that a landowner's self-created landlock defeats a finding of necessity under the Private Road Act (Act),¹ I dissent.

FOOTNOTES

¹ Act of June 13, 1836, P.L. 551, as amended, 36 P.S. §§ 2731-2891.

Initially, it is noted that a board of viewers has broad authority under Section 11 of the Act, 36 P.S. § 2731, to determine the necessity of a private roadway. *In re Laying Out, Opening a Private Road, Appeal of Zeafra*, 405 Pa. Super. 298, 592 A.2d 343 (1991). In reviewing the viewers' decision, a trial court may confirm the report, or reject it, direct a view. *Id.* Appellate review is limited to ascertaining the validity of the court's jurisdiction, the regularity of the proceedings, questions of law, whether there has been an abuse of discretion. *In re Private Road in Greene Township*, [*221] 343 Pa. Super. 304, 494 A.2d 859 (1985). There is nothing in the Act or in the cases of this Commonwealth which limits a party who has caused their property to become landlocked from obtaining a private roadway through a neighboring property to gain access to a public road. In *In re Petition for a Private Road in Roeville Borough*, 204 Pa. Super. 552, 555, 205 A.2d 885, 886 (1964), the court rejected an argument that a landowner who purchased property knowing it to be landlocked should be prevented from utilizing the Act for a private right of way through adjacent property. The court in rejecting this argument pointed out the absurdity which would result if such an argument were successful. The court stated:

We have failed to find in the road acts any indication of legislative intention to distinguish between persons who acquire land with knowledge, persons who acquire land without knowledge of its landlocked condition. That land is landlocked would come to the attention of all purchasers by an inspection of the property or by an examination of the public records. *If appellant's contention were tenable, it would mean that only those property owners whose access [*23] to a public road was shut off either by a sale of part of their property or by some public improvement, the latter of which occurred in the present case, should have the benefit of the acts.*

As in *Roeville Borough*, here too, an absurd situation results if, as the majority concludes, persons whose property becomes landlocked through their own actions are prevented from seeking relief under the Act. Would such a limitation apply to all subsequent purchasers of the property thereby making the property, essentially, unusable? Clearly not, as the foregoing case demonstrates that one who purchases landlocked property with the knowledge of its landlocked condition is not prevented from obtaining a private right of way over lands of another. The majority, in footnote 12, acknowledges the *Roeville Borough* line of cases, but distinguishes between landowners who purchase landlocked property with the knowledge of its landlocked condition, those who own property, create a landlock on their property. However, to make a distinction between a subsequent purchaser, a present owner who creates the landlock does not serve the purposes of the Act, as such a distinction focuses entirely [*24] upon the individual bringing the action. This is inconsistent with the case of *Waddell's Appeal*, 84 Pa. 90 (1877), wherein the Supreme Court pointed out that the rights of the individuals involved in the proceedings to open a private road are not the exclusive consideration to be given. In *Waddell*, the court noted the following:

The right of the legislature to establish private roads over the land of one man for the benefit of another, for the purpose of access to highways or places of necessary public resort, or even to private ways leading to highways, has never been seriously doubted in Pennsylvania.... It is the connection of these private ways with public highways, or with places of necessary public resort, together with the implied right or license of the public to use them, at least in going to, from the premises of the person laying them out, *quite as much, if not more, as the consideration of purely individual rights*, that have won for [*1039] these acts judicial recognition of constitutionality.

Waddell, 84 Pa. at 93-94. Accordingly, the fact that a resulting landlock is "self-created" should not preclude a landowner from gaining a private right of [*25] way through an adjacent property owners' land in order to access a public roadway; to hold otherwise, as the majority does, is illogical, absurd, purely punitive since subsequent purchasers with knowledge of the landlocked situation can obtain relief under the Act. Based upon the foregoing, I would conclude, within our narrow scope of review, that the trial court's confirmation of the Viewers' report was proper.

SILVESTRI SILVESTRI, Senior Judge

Service: Get by LEXSEE®
Citation: 673 A.2d 1028
View: Full
Date/Time: Tuesday, November 17, 2009 - 5:55 PM EST

* Signal Legend:

-  - Warning: Negative treatment is indicated
-  - Questioned: Validity questioned by citing refs
-  - Caution: Possible negative treatment
-  - Positive treatment is indicated
-  - Citing Refs. With Analysis Available
-  - Citation information available

* Click on any *Shepard's* signal to *Shepardize*® that case.

[My Lexis™](#) | [Search](#) | [Research Tasks](#) | [Get a Document](#) | [Shepard's®](#) | [Alerts](#) | [Total Litigator](#) | [Transactional Advisor](#) | [Counsel Selector](#)
[History](#) | [Delivery Manager](#) | [Dossier](#) | [Switch Client](#) | [Preferences](#) | [Sign Out](#) | [Help](#)



LexisNexis

[About LexisNexis](#) | [Terms & Conditions](#) | [Contact Us](#)
Copyright © 2009 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.