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OCT 19 2009

No. 63572-7-1

COURT OF APPEALS DIVISION 1
OF THE STATE OF WASHINGTON

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; 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

**BRIEF OF APPELLANT ROGELIO H.A. RUVALCABA and ELAINE H.
RUVALCABA**

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I. INTRODUCTION

COMES NOW Appellants Rogelio and Elaine Ruvalcaba (“Ruvalcabas”), by and through their attorneys of record **ACEBEDO & JOHNSON, LLC.**, and Pierre E. Acebedo and Ryen L. Godwin, and request that this Court **REVERSE** the trial court’s Order dismissing Respondents, Kwang Ho Baek, et al. (“Day Group”) and the trial court’s Order awarding Respondents Kitchins (“Kitchins”) attorney’s fees and costs, and **REMAND** this case for trial for the reasons stated below:

II. ASSIGNMENTS OF ERROR

1. The trial court erred by granting the Day Group’s Motion for Summary Judgment because the Ruvalcabas’ landlocked property is entitled to a trial for a private way by necessity.
2. The trial court abused its discretion by granting the Kitchins’ attorney’s fees and costs against the Ruvalcabas because (a) the Kitchins waived those fees by failing to file an Answer, (b) they failed to request attorney’s fees in their Motion for Summary Judgment, and (c) the Ruvalcabas are not responsible for their inclusion in this lawsuit.

III. STATEMENT OF CASE

Property History

On or about July 23, 1965, Appellants' Rogelio H. Ruvalcaba and Elaine H. Ruvalcaba purchased property now located at 13201 42nd Avenue NE, Seattle, WA by virtue of a real estate contract. (CP 376-377). At that time, the parcel was one contiguous lot which bordered on 42nd Avenue NE at the eastern portion of their property. This purchase was the result of a foreclosure sale made by the Department of Veterans Affairs.

Id.

Subsequently, on or about February 18, 1971, the Ruvalcabas paid off the real estate contract on the property and took title to it under a Special Warranty Deed. (CP 379-380). The deed was recorded on March 1, 1971. Id.

On June 21, 1971 the Ruvalcabas conveyed the eastern portion of their property to Melvin and Arlene Desmereaux (hereinafter "Desmereaux").¹ The deed was recorded on March 9, 1972. (CP 382-384). When the eastern portion of the property was divided and sold to the Desmereaux's, the Ruvalcabas did not believe that they were *permanently* landlocking their property. (CP 386-389). A private roadway extended from the Ruvalcaba property north to NE 135th

¹ The Desmereaux property is now owned by the Kitchens. (CP 138).
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Avenue. (CP 388) Furthermore, because of the steep slope the Ruvalcabas believed that it was physically and economically impracticable to construct a roadway for ingress and egress down towards the Desmereaux property. Id. As a result, the most logical solution was to negotiate separate easements for ingress and egress with their neighbors to the north. Id.

Geohagen Easement

On June 4, 1971, Henry R. Geoghegan granted the Ruvalcabas an access easement across the West 10 feet of the south 65 feet of Lot 4. (CP 391-393). The language states, in pertinent part:

An easement for ingress, egress and utilities over the west 10 feet of the south 65 feet of Lot 4, Block 1 Cedar Park No. 3, according to plat thereof recorded in volume 19 of plats, page 27, records of King County, Washington. (CP 391)

On that same day, Henry R. Geoghegan further granted “an easement for ingress and egress over the west 10 feet of the north 30 feet of said lot 4.” Id.

Thacker Easement

That same year, William C. Thacker granted the Ruvalcabas an easement for ingress and egress along the western ten feet of their property, which is Lot 3, Block 1, Cedar Park No. 3. (CP 395).

An easement for ingress, egress and utilities over; That portion of Lot 3, Block 1, Cedar Park No. 3, according to plat thereof, recorded in Volume 29 of Plats, Page 27 described as follows: Beginning at a point on the West line of said Lot 3, distant South 1 degree 17' 00" West 20.28 feet from the Northwest corner thereof; thence South 1 degree 17' 00" West 114.75 feet; thence East 10.00 feet; thence North degree 17' 00" East to a point which bears South 79 degrees 06' 08" East from the point of beginning; thence North 79 degrees 06' 08" West to the point of beginning.

(CP 395). Neither easement grants access to the property.

Property Description

The property at issue “is located on the eastern edge of a broad upland plateau that is bordered on the east by steep slopes extending down to the level of Lake Washington.” (CP 400). Since the property is so steep, the Ruvalcabas believed, in 1971, that access to the eastern portion of the property from the remaining lot would have been physically and economically impractical. (CP 387-388).

In 2005, the Ruvalcabas learned that the property at issue can be developed, so long as a feasible access route was obtained. (CP 402). The Ruvalcabas obtained a preliminary site evaluation from GeoEngineers Inc. concluding that, “[b]ased on our review of available information, site

reconnaissance and hand explorations, we conclude that the site is feasible for construction of a residence.” (CP 402).

However, in reviewing the access issue through the Desmereaux property, Mr. Bo McFadden, the Principal Geotechnical Engineer, at GeoEngineers reached the same conclusion that the Ruvalcabas had reached some thirty five years early:

We conclude that construction of an access road from 42nd Avenue Northeast to the central portion of the site that has been identified as suitable for residential construction would require grades that are significantly steeper than practical for vehicle access, and construction of significant retaining structures to support both cut and fill slopes where the access road crosses steep side-hill sections. The City of Seattle requires driveway grades to be less than 20 percent (Seattle Municipal Code Chapter 23.54.030, Section D, Paragraph 4). Based on the site grades, it would appear that an access road would slope up at about 20 to 25 percent from 42nd Avenue Northeast to the east property line, and at about 30 to 40 percent from the east property to the central portion of the site. (CP 416)

Based on our site observations and review of the existing site topographical plans, however, it appears that 10 to 15 foot tall retaining walls would be necessary along the lower east end of the access road where it leaves 42nd Avenue Northeast. Retaining walls 6 to 10 feet tall would likely be necessary in the east portion of the site

where the access road enters the property and begins a side-hill section up to the potential building area. These walls would be expensive to construct and construction would be challenging on the steep slopes. The presence of loose soil that was encountered in our explorations would pose a risk of slope instability during construction that could require more expensive retaining wall construction techniques (drilled soldier piles and timber lagging) in the area of taller walls.

(CP 416-417).

Therefore, the report submitted by the geotechnical engineers merely substantiated what the Ruvalcabas had foreseen back when they purchased the property in 1971. As a result, the Ruvalcabas looked north to NE 135th Avenue as the likely access route to the property. This public street lies at the end of a gentle sloped private road which runs perpendicular to NE 135th Avenue and roughly parallel to the western boundary of the Ruvalcaba property. (CP 213). The Day Group Defendants border and hold interests in the private road. (see generally CP119). Commencing March 5, 1991, the Ruvalcabas tried to negotiate an additional easement with the neighbors to the north. (CP 387). However, they were unsuccessful.

On December 24, 2008 Bo McFadden conducted another feasibility study regarding access to the Ruvalcaba parcel by 42nd Ave

NE. (CP 421-427). The study analyzed construction through an adjacent parcel, 13221 42nd Avenue NE, Seattle WA, it concluded:

[T]he access drive would require grades that are significantly steeper than practical for vehicle access, and construction of significant retaining structures to support both cut and fill slopes where the access road crosses the steep side-hill sections. . . . [T]hese retaining walls would likely be expensive to construct and construction would be challenging on the steep slope.

(CP 423). Again, Mr. McFadden explained to the Ruvalcabas that constructing a road from 42nd Ave NE was impracticable.

Regarding access along the existing roadway, GeoEngineers again conducted a site assessment regarding two routes to NE 135th Avenue.

The report outlines two alternative routes, as follows:

Option A involves extending the existing driveway access to the Baek property south along or near the boundary between the Baek and the Ijpma/Loon properties south for a distance of about 70 feet. Option B involves upgrading the existing driveway access to the Ijpma/Loon property that runs south along the western edge of the Ijpma/Loon property near the northwest corner of the Ruvalcaba. The existing driveway extends a few feet south of the Ruvalcaba north property line.

(CP 429). Option A is estimated to cost "\$17,150.00" while Option B is estimated to have nominal additional cost. (CP 430-431). According to Appellants Brief

the expert opinion of Bo McFadden, the only practical and feasible route is along the existing easement and driveway to NE 135th Avenue.

Procedural History

Plaintiffs' Complaint for Private Condemnation and Declaratory Judgment was filed by Rogelio and Elaine Ruvalcaba on July 14, 2008. (CP 28 - 67). The initial Complaint included all the current partys except for the Kitchins, owners of the 'Severed Parcel' or former Desmereaux parcel.² (CP 28-67).

On September 5, 2008, the "Day Group" moved the trial court to Compel joinder of the Kitchins as necessary parties. (CP 78). Relying on Ruvalcaba v. Kwang Ho Baek et al., the Day Group argued that Division 1 required the Kitchins inclusion in this suit, to determine whether access through the Severed Parcel is unreasonable. (CP 81); 140 Wn.App. 1021, 2007 WL 2411691 (unreported Div. 1 2007). The Ruvalcabas adamantly opposed Defendants' Motion, arguing instead that the inclusion of Defendants Kitchins is unnecessary to determine whether access through the Severed Parcel is unreasonable. (CP 91). Following arguments on the

² Defendants Kleppers, listed on Plaintiff's original and Amended Complaint, were subsequently dismissed without prejudice by agreement of the parties. (CP 172-175). They were not included in Defendants Motion for Summary Judgment and they are not currently parties to this Appeal.

Motion, the trial court ordered the Ruvalcabas to amend their Complaint to include the Kitchins. (CP 113-114).

On April 9, 2009, the Day Group filed a Motion for Summary Judgment, arguing primarily, that by voluntarily landlocking a parcel, one can not meet the element of ‘reasonable necessity’ for private condemnation. the Ruvalcabas opposed, arguing that such a rule is not, and should not, be the law in this state. The Kitchins’ joined in the Day Group’s Motion for Summary Judgment, primarily arguing that any rights the Ruvalcabas may have had in the Severed Parcel are extinguished by a variety of theories. (CP 442-448). The Ruvalcaba’s did not oppose this portion of their motion. (CP 451-455).

The motions were granted. The trial court concluded that by voluntarily landlocking their property, the Ruvalcabas could not meet the element of ‘reasonable necessity’ to sustain their private condemnation claim. (CP 506). Regarding the Kitchins, the trial court concluded that “the Kitchins were brought into this suit as necessary parties to plaintiffs’ claims for Declaratory Judgment . . .” and any rights held by the Ruvalcabas in the ‘Severed Parcel’ are “extinguished . . . by application of the Doctrines of Estoppel and Adverse Possession[.]” (CP 528-531). This appeal followed.

IV. ISSUES PRESENTED ON APPEAL

- A. Can a property owner be deprived of a Constitutional and Statutory private way by necessity because they voluntarily land locked their property?
- B. Whether the trial court abused its discretion by awarding Defendant Kitchins' attorney's fees and costs against the Ruvalcabas?

V. ARGUMENT

A. THE RUVALCABAS ARE ENTITLED TO A PRIVATE WAY BY NECESSITY UNDER THE CONSTITUTION AND WASHINGTON STATUTES.

The facts of this case present an issue of first impression regarding the application of a statutory private condemnation action pursuant to RCW § 8.24.010, *et seq.* The question presented is whether property may be rendered useless merely by being voluntarily landlocked.

The trial court, on Summary Judgment stated, “one cannot create, by one’s own action of land locking one’s property, the “reasonable necessity” that is an element of the plaintiffs’ case in a private condemnation of a way by necessity. . . .” (CP 473). This holding is a misapplication of RCW § 8.24, and the Washington Const. art. 1, s. 16

because it undermines the overriding public policy to prevent landlocked property from being rendered useless.

1. The scope of review on a grant of Summary Judgment is *de novo*.

The appellate court reviews the trial court's grant of Summary Judgment *de novo*; "the reviewing court engages in the same inquiry as the trial court and views the facts and the reasonable inference from those facts in the light most favourable to the non-moving party." Michak v. Transnation Title Ins. Co., 148 Wn.2d 788, 794, 64 P.3d 22 (2003). This case seeks review on a grant of Summary Judgment. As a result, the *de novo* standard applies here.

2. Private Condemnation effectuates the overriding public policy against rendering landlocked property useless.

Pursuant to the trial court's decision, private condemnation, expressly reserved by the Constitution is not available to the Ruvalcabas. The trial courts holding does not give due regard to the fact that the Washington Constitution expressly reserves, for private citizens, a private way of necessity, in order to prevent landlocked property from being rendered useless.

"Private property shall not be taken for private use, except for private ways of necessity" Const. Art. 1, s. 16. This express provision, reserves for private citizens the power of eminent domain. See Appellants Brief

generally State ex rel. Mountain Timber Co. v. Superior Court of Cowlitz County et al., 77 Wash. 585, 137 P. 994 (1914).

To this end, in 1895, the Legislature expressly codified the right of Washington citizens to use eminent domain to access landlocked property.

In 1895, the statute provided, in part,

The Owner or owners of any lands, which do not abut on any high way, or which are so situated that it is necessary to cross the lands of other s to obtain a reasonable way to any public highway, may obtain the location and establishment of a road between his or their said lands and the highway

Laws of 1895, ch. 92, § 1. The original text is limited to title owners of land and those lands that do not abut a highway.

By 1940, the Legislature removed these limitations to broaden a private citizen's power of eminent domain. The statute provided, "[a]n owner or one entitled to the beneficial use, 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" Rem.Rev.Stat. § 936-1 (1940). Amending the substantive text of the statute, at least, permits the inference of a legislative intent to broaden a citizen's power of eminent domain.

In its current form, RCW § 8.24 remains to be a broad grant of eminent domain power to private citizens.

[a]n owner or one entitled to the beneficial use, of land which is so situate with respect to the land of another that it is necessary for the 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 . . . [t]he term ‘private way of necessity,’ as used in this chapter, shall mean and include a right-of-way on, across, over or through the land of another for means of ingress and egress . . .

RCW § 8.24.010.

The statute reserves, in private citizens, the right to condemn private property for private use. The constitution and statute say nothing about the condition of the property, or the limitations regarding the application of the statute. However, the trial court in this case determined that constitutional and state statutory rights do not apply to those landowners who have in some way landlocked their property.

The effect of the trial court’s decision renders the Ruvalcaba property useless. Landlocked property is greatly discouraged in Washington. See Const. Art. 1, s. 16, RCW § 8.24.010, State ex rel. Mountain Timber Co. v. Superior Court of Cowlitz County et al., 77 Wash. 585, 137 P. 994 (1914), Hellberg v. Coffin Sheep Co., 66 Wn.2d Appellants Brief

664, 404 P.2d 770 (1965). It is in the interest of the public welfare to fully utilize the resources of this state. See Mountain Timber Co., 77 Wash. at 588-89. Indeed, to hold otherwise would render property, natural resources, and the public benefits of both, useless. In Cirelli v. Ent, 885 S.2d 423, 430, 29 Fla. L. Weekly, D22350 (5th Cir. 2004) the court elaborates on the public policy reasons behind condemnation.

Useful land becomes more scarce in proportion to population increase, and the problem in this state becomes greater as tourism, commerce and the need for housing and agricultural goods grow. By its application to shut-off lands to be used for housing, agriculture, timber production and stockraising, the statute is designed to fill these needs. There is then a clear public purpose in providing means of access to such lands so that they might be utilized in the enumerated ways.

It is no secret that Washington struggles with population growth and urban sprawl issues. Rendering title unmarketable and forever sealing valuable resources of the state, does not serve the public or private interest expressed in Washington Const. art. 1, s. 16 and RCW § 8.24.

In practicality, the only benefit the Ruvalcabas' landlocked parcel provides in suburban Seattle is a quiet reprieve from the noise and development of the surrounding city for the Ruvalcabas' neighbors.

Neighbors who vehemently oppose the access the Ruvalcabas seek.

3. The trial court's reliance on English Realty And Graff is in error and leads to absurd results.

The trial court held that by voluntarily landlocking their property, the Ruvalcabas can not satisfy the element of "reasonable necessity" under RCW § 8.24.010, (CP 535). As a result of this ruling, the Ruvalcabas and any subsequent purchaser can not obtain access to the property under RCW § 8.24. The oversight in this ruling lies in its outcome and application; i.e. the Ruvalcabas property is now landlocked in perpetuity.

a. English Realty Company, Inc. v. Meyer

The trial court's decision relied on English Realty Company, Inc. v. Meyer, 228 La. 423, 82 So.2d 698 (1955)³, (CP 535). The facts of that case are quite unique and include a property seeking access that affronted a public road, unlike the Ruvalcabas property.

There, Plaintiff owned an 18 acre tract of land, which Plaintiff subdivided numerous times. See id. at 425-26. Plaintiff retained a triangular parcel abutting a partially elevated public road, a railroad easement. See id. at 426.

Plaintiff sought access from the elevated public road, but the local government authority denied access to Plaintiff's triangular property because it would create a safety hazard. See id. at fn. 2 at 431. Plaintiff

³ English Realty is rarely followed and limited to its particular facts. See Rockholt v. Keaty, 256 La. 629, 639, 237 So.2d 663 (1970).
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subsequently requested a thirty foot wide road easement across Defendant's land allowing large trucks to access Plaintiff's parcel from the abutting public road. See id.

The court dismissed Plaintiffs claim on two grounds. First, the property was not "enclosed" as envisioned by the private condemnation statute because it abutted a public road. See id. at 432-33. Second, Plaintiff's "situation respecting access of which it now complains was wholly created by its own act." See id.

The facts in this case are completely different than those of the present case. In English Realty, the court could not apply the statute to the property because of its application to specific lands: "Predial Servitudes, means lands shut off from access to public roads and the like by reason of their being entirely surrounded by other lands." Id. at 430. The property at issue in English Realty was bordered on one side by a public road. As a result, the court could not apply the statute, "[i]f 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." Id. at 432.

In the present case, the Ruvalcabas property is not bordered by a roadway that allowed them access to a public road, nor does the Washington Constitution and statutory law require such a limited

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application of the law. In fact, in 1940 the Legislature broadened the private citizen's power of eminent domain, allowing for "[a]n owner or one entitled to the beneficial use, 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. Rem.Rev. Stat. § 936-1 (1940).

It is also important to note that in English Realty, the court believed that the plaintiff had an alternative means to obtain access to the public road. "[T]he abutting proprietor has his remedy against the public authority and its refusal to accede to a demand for access...." Id. at 432. The Ruvalcabas do not have another option.

The second reason the court denied access in English Realty was because Plaintiff owned 18 acres of land "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...." Id. at 433. Plaintiff in English Realty could have simply determined the best access point along the roadway and had easy access to a road. This is the reason that the court determined that the property was voluntarily landlocked.

The trial court erred when it applied the same logic to the present case. In the present case, the Ruvalcabas believed (and engineers confirm) that

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the only reasonable access to the upper portion of their property was at NE 135th. Rogelio Ruvalcaba's declaration specifically stated that "there is a steep slope which separates both my property and the desmereaux property. It would have been both financially costly and physically difficult for me to create an easement, let along (sic) build a road. . . ." CP (387-88).

The court in Hartley v. State, 103 Wn.2d 768, 774, 698 P.2d 77 (1985) quoting from CR 56 (c), determined that summary judgment is only appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The declaration from Rogelio Ruvalcaba and from GeoEngineers confirming the slope and instability issues should have defeated the Summary Judgment standard and allowed this case to proceed to trial.

b. Beeson v. Philipps

The trial courts application of English Realty to the Ruvalcabas property is also inconsistent with prior rulings of this court (Court of Appeals, Division 1). In Beeson v. Philipps, 41 Wn.App 183, 702 P.2d 1244 (1985), the petitioners property was not accessible because it was "bounded on the north, east and southeast sides by a steep bluff, side with

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a average slope close to 60 degrees, that is between 125 and 175 feet high.” Id. at 184.

After considering the cost and feasibility of constructing an access road up to the site the trial court found:

(1) that the Beesons had satisfactorily shown a reasonable necessity for top of the bluff access to the usable portion of their property; (2) that ‘proper use and enjoyment’ of their property requires vehicular and utility access to the upper portion; (3) that the road constructed up the bluff to the top of the property would not provide adequate or practical access; (4) that the cost of constructing a road up the bluff would be prohibitive and not economically feasible for the Beesons; (5) that the reasonable necessity exists for access to the upper portion for the Beeson property

Id. at 186.

Beeson is factually similar to the case at bar. Access to NE 135th Street is reasonably necessary since the Ruvalcabas’ property is landlocked without it.

The geo-technical engineering report and geo-technical survey show that the road from 42nd Avenue Northeast to the upper property would require an access road that would slope “about 20-25 percent from 42nd Avenue Northeast to the east property line, and at about 30 to 40 percent

from the east property to the central portion of the site.” (CP 112-14, 116-20).

As a result, the only appreciable means of accessing the Rvalcaba property would be to obtain a series of easements to the north in order to connect their property to NE 135th Street. This is exactly what the Ruvalcabas tried to do. The trial court failed to properly evaluate the Ruvalcabas issues. Instead made a blanket determination that those who voluntarily landlock their property should be punished and have their property landlocked in perpetuity.

c. Graff v. Scanlan

In addition to English Realty, the trial court relied on Graff v. Scanlan. 673 A.2d 1028 (1994)⁴, (CP 535). In that case, a developer owned a 42 acre tract of land, which was later subdivided into nine (9) lots. Because of the way the property was subdivided lot 9 did not have access to a public road. Id. at 1030. Plaintiffs subsequent attempts to obtain access were unsuccessful. Id.

In the end, Plaintiff petitioned for private condemnation under the Pennsylvania private condemnation statute. On these facts the court held that 1) Plaintiff’s landlocked property was accessible by an implied

⁴ Graff is also strictly limited to its particular facts. See Reber v. Tschudy, 824 A.2d 378, 386 fn. 11 (2003).
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easement over the land of lot 8; and 2) 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.” Id. at 1033-34.

Again the facts in this case are dissimilar to the present case. There was no issue of slopes and/or instability in Graff. “[A]n 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.” Id. at 1032. The whole point of the present case is that there was no “reasonable” access through the property the Ruvalcabas originally sold to the Desmereaux’s. The Ruvalcabas did not create the steep and instable slope that divided the property they once owned.

To simply assert, without taking into account the facts and circumstances of each case, the trial court denies the Ruvalcabas their constitutional right to access. The Washington Constitution does have a bright line that denies all properties that have been voluntarily landlocked, instead, RCW § 8.24 provides for a private way of necessity for the purposes of ingress and egress.

d. Subsequent Purchaser Issues

After a court denies relief to a landlocked parcel, the question becomes what happens to subsequent purchasers? To address this problem, the court in Graff distinguished a line of cases holding that the purchase of landlocked property with the *knowledge* that it is landlocked does not negate the reasonable necessity for private condemnation. Graff, 673 A.2d at 1035 fn. 12.

The court in In re Private Road in Monroeville Borough, Allegheny County, 204 Pa.Super. 552, 205 A.2d 885 (1964), addressed the issue of a subsequent purchaser's knowledge. Plaintiffs purchased land with the *knowledge* that it was landlocked. The court held that *knowledge* was not dispositive to Plaintiff's case.⁵ Indeed, if the knowledge of the property's condition limited the right to seek relief, only those parcels which were "shut off either by a sale of part of their property or by some public improvement" Id. at 556. Limiting this statute to use by such a small group would rarely benefit the public welfare by making full use of the land and resources within a state.

It is not in the interest of society, its resources, and private landowners to landlock property in perpetuity. Therefore, subsequent purchasers of landlocked property must be permitted to use the statute.

⁵ A Georgia case follows a similar analysis, holding *knowledge* does not negate necessity as defined by the statute. See Pierce v. Wise, 282 Ga.App. 709, 712, 639 S.E.2d 348 (2006).

See Hellberg v. Coffin Sheep Co., 66 Wn.2d 664, 666-67, 404 P.2d 770 (1965) (discussing the public policy against rendering landlocked property useless). As such, this court will eventually be required to confront the same question as In re Private Road in Monroeville Borough. The question presented then is, why Washington law should make that distinction at all, when in fact, the result will eventually be access by private condemnation.

The next step for any voluntarily landlocked property owner will be to transfer their property to another person. At that point, the subsequent purchaser will file the same petition for a private way by necessity. Indeed, nothing has changed, the land remains landlocked, there is no route of ingress or egress, and the body of law and policy in this state expressly provides a remedy. See Const. Art. 1, s. 16, RCW § 8.24.010, State ex rel. Mountain Timber Co. v. Superior Court of Cowlitz County et al., 77 Wash. 585, 137 P. 944 (1914), Hellberg v. Coffin Sheep Co., 66 Wn.2d 664, 404 P.2d 770 (1965).

Potential condemnees will be forced to confront the issues presented by the previous owner, by and through their attorneys, according to geotechnical experts, and at the expense of judicial efficiency. In fact, the very notion that the same case could easily be re-litigated undermines the doctrines of finality, *res judicata*, and collateral estoppel.

In fact, this situation is similar to the facts of Kennedy v. Martin, 115 Wn.App. 866, 868, 63 P.3d 866 (2003) (Division 2). In Kennedy, plaintiff's parents subdivided a tract of land in Clallam County, creating two parcels. See id. at 868. As a result of their voluntary actions, the eastern parcel was landlocked. Later, Plaintiff acquired the eastern landlocked parcel by gift from his mother. See id.

Although not specifically addressed by Division two, the trial court must have ruled that the elements of RCW § 8.24.010 were met because the property was landlocked, and a private way by necessity was reasonably necessary for access. If this Court affirms the opinion of the trial court, subsequent transfers will surely be a standard prerequisite to most private condemnation cases. In the end, what greater public policy does this bright line rule serve? Although the judges of Pennsylvania, Georgia, and Louisiana accurately weigh the private and public policies at stake in their state, they are not applying the policies of Washington.

The Ruvalcabas sincerely thought that they could negotiate easements with their neighbours. (CP 388). In addition, they believed access to the upper portion of the property was too expensive from 42nd Ave NE. (CP 388) Regardless, the Ruvalcabas are now landlocked. This Court may dismiss this action, at which point the Ruvalcabas can freely

transfer their property to a subsequent purchaser, a purchaser who will likely re-file this petition to a desirable residential parcel.

However, rather than creating an illogical distinction between ones knowledge and ones actions; this Court, must remand this case for a fair trial.

4. Evil-Doer Scenario Presented by the Trial Court Should Not Automatically be Applied to the Ruvalcabas on Summary Judgment.

In evaluating the aforementioned cases and the applicability of the voluntary landlock issues in the present case, the trial court created an “evil-doing” developer scenario. Indeed, if an “evil-doing” developer landlocks property with the intent of using the private condemnation statute, then the developer’s actions may be sufficiently egregious to formulate some punishment.

The “evil-doing” developer hypothetical goes as follows: Developer “D” purchases a tract of land. “D” then subdivides the tract into four (4) contiguous lots 1, 2, 3, and 4. Lots 1, 2, and 3 abut a public road, to the north. Lot 4 is adjacent and south of lots 2 and 3, and it does not abut the public road. Rather than reducing the value of one lot by reserving an easement over “D’s” lots; “D” sells lots 1, 2, and 3 without retaining access to lot 4. Lot 4 is now landlocked. Instead, at the time of

sale, “D” intends to access lot 4 across two adjacent lots, lot A south of Lot 4 and lot B east of lot 4. Lots A and B abut a public road.

Private condemnation can be summarized as follows: The statute, RCW § 8.24, does not require absolute necessity; rather, it requires reasonable necessity based on the facts and circumstances of each case. See Brown v. McAnally, 97 Wn.2d 360, 367; 644 P.2d 1153 (1982). In fact, the burden rests with the condemnor to prove “reasonable necessity for a private way of necessity, including the absence of a feasible alternative.” Sorenson v. Czinger, 70 Wn.App. 270, 276; 852 P.2d 1124 (1993).

“[T]he word ‘necessity,’ as used in the statute, ‘does **not** mean an *absolute* and *unconditional* necessity, as determined by physical causes, but a *reasonable* necessity, under the circumstances of the particular case, dependent upon the practicability of another route, considered in connection with the relative cost to one and probable injury to the other.’” [EMPHASIS ADDED] Samish River Boom Co. v. Union Boom Co., 32 Wash. 586, 601; 73 P. 670 (1903) (citations omitted).

In addition, the allegation that the Ruvalcaba’s case brings to light the policy concerns presented by the “evil-doing” developer is a stretch at best, and certainly is not viewing the facts in light most favorable to the

nonmoving party. See Balise v. Underwood, 62 Wn.2d 195, 199, 381 P.2d 966 (1963).

The uncontested facts, on which the trial court ruled are as follows: “[P]laintiffs knowingly and voluntarily sold off by deed dated June 21, 1971 and recorded on March 9, 1972, what has been designated as the “Severed Parcel” herein thereby landlocking the remainder of their property at issue in this case.” (CP 479-80). The evidence supporting the above finding of fact is from the Declaration of Rogelio Ruvalcaba, which states:

Shortly after obtaining both legal and equitable title to the property, on June 21, 1971 I conveyed the eastern portion of my property to Melvin and Arlene Desmereaux. . . . At the time, I decided to convey this property without reserving an ingress and egress easement. This is because there is a steep slope which separates both my property and the desmereaux property. It would have been both financially costly and physically difficult for me to create an easement, let along (sic) build a road. . . .

(CP 387-88)

However, the trial court did properly evaluate the reason that Rogelio Ruvalcava landlocked his property, specifically the steep slopes. The trial court also improperly evaluated the supporting information from the

Principal Geotechnical Engineer, at GeoEngineers who reached the same conclusion about the instability issues and steep slopes:

We conclude that construction of an access road from 42nd Avenue Northeast to the central portion of the site that has been identified as suitable for residential construction would require grades that are significantly steeper than practical for vehicle access, and construction of significant retaining structures to support both cut and fill slopes where the access road crosses steep side-hill sections. The City of Seattle requires driveway grades to be less than 20 percent (Seattle Municipal Code Chapter 23.54.030, Section D, Paragraph 4). Based on the site grades, it would appear that an access road would slope up at about 20 to 25 percent from 42nd Avenue Northeast to the east property line, and at about 30 to 40 percent from the east property to the central portion of the site. (CP 416)

These walls would be expensive to construct and construction would be challenging on the steep slopes. The presence of loose soil that was encountered in our explorations would pose a risk of slope instability during construction that could require more expensive retaining wall construction techniques (drilled soldier piles and timber lagging) in the area of taller walls.

(CP 416-17)

Nothing in these facts suggests that the Ruvalcabas intended to landlock their property with the intent to ultimately use RCW § 8.24 to

obtain access. In fact, they spent the next thirty (30) years attempting to obtain easements. At one point, Rogelio Ruvalcaba believed he had access to the property by already securing several easements. See (CP 388, para. 14). As a result, the Ruvalcabas should not be categorized and punished as an “evil doer”

The question whether a landowner should be punished for landlocking their property is not new to the Washington Appellate Court. In 1987 Division two was presented with the questions whether a landowner should be punished for landlocking his own property. See Olivio v. Rasmussen, 48 Wn.App. 318, 738 P.2d 333 (1987).

In Olivio, Plaintiff was compelled to landlock property as part of a settlement to an eminent domain proceeding. See id. at 320. Division 2, balanced the public policy to prevent landlocked properties in this state against Plaintiff’s culpability and determined that Plaintiff should not be punished for choosing the “lesser of two evils[.]” Id. at 322.

Division One is now presented with a similar balance. The facts, viewed in light most favorable to the Ruvalcaba’s, are not egregious enough to defeat the public policy being served by private condemnation, nor are they so outrageous to deprive them of their constitutional remedy.

Further, the facts presented here should not shock the conscious of the judiciary as to decree that this land shall be landlocked, unmarketable,

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and worthless forever. This is a case that must be remanded for a trial on the merits, as there were clearly genuine issues of material fact regarding the Ruvalcaba's knowledge, intent, and alleged bad faith conduct.

B. THE TRIAL COURT ABUSED ITS DISCRETION BY AWARDING DEFENDANTS' KITCHINS ATTORNEY'S FEES AND COSTS AGAINST THE RUVALCABAS.

1. The Abuse of Discretion standard of review applies to a trial court's award of attorney's fees and costs.

The ordinary standard of review on an attorney's fees award applies here. A trial court award of attorney's fees and costs may be overturned if the award was an abuse of the trial court's discretion. See Noble v. Safe harbour Family Preservation Trust, No. 80873-2 slip op. at 8 (Wn. Sup. Ct. September 24, 2009). An abuse of discretion is defined as "manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons. Untenable reasons include errors of law." Id.

2. Defendants Kitchins waived their right to attorney's fees and costs.

a. The trial court abused its discretion by awarding attorney's fees to a party dismissed from this lawsuit under a theory of estoppel and adverse possession.

In this case, the order of the trial court states, "The Kitchins were brought into this suit as necessary parties to plaintiffs' claims for Declaratory Judgment . . . [and] the Doctrines of Estoppel and Adverse

Possession . . . serve to bar their claims against the Kitchins. . .” (CP 484, 486). The trial court’s Order is a result of Defendants Motion, which relies on adverse possession and estoppel theories to argue that any rights the Ruvalcabas had in the Severed Parcel are extinguished. In fact, Plaintiff’s did not oppose Defendants on these issues. (CP 451-455).

Furthermore, Plaintiffs were not given any actual notice that Defendants Kitchens intended to request attorney’s fees. Surely, the Ruvalcabas could have settled their dispute with the Kitchins since their dismissal was not opposed, without ever incurring unnecessary attorney’s fees. As a result, the court erred in awarding Defendants Kitchens their attorney’s fees and costs.

- b. The trial court abused its discretion by awarding attorney’s fees to a party who failed to request them in their Answer.

In Beckman v. Spokane Transit Authority, the Washington Supreme Court concluded that notice is required for purposes of the attorney’s fees provision in RCW § 4.84.280; to this end, the statute governing the settlement offer letter is therefore sufficient notice. 107 Wn.2d 785, 790, 733 P.2d 960 (1987). Notice of attorney’s fees serves the purpose of persuading litigants to settle claims less than \$10,000.00. Similarly, the attorney’s fees provision here must be pled to put people on

notice of a potential condemnees intent to request fees, and alternatively settle the dispute.

The reasoning of the Washington Court of Appeals for Division two and Division three are persuasive in this case. Both Courts have required “actual notice” whether plead or otherwise to obtain attorney’s fees under RCW § 4.84.250. See P.U.D. District No. 1 of Grays Harbor v. Crea, 88 Wn.App. 390, 394, 945 P.2d 722 (Division 2, 1997). See also Last Chance Riding Stable, Inc. v. Stephens, 66 Wn.App. 710, 832 P.2d 1353 (Division 3, 1992).

The Kitchins’ failed to request attorney’s fees at any time prior to their Order Granting Defendants’ Motion for Attorney’s Fees. (CP 456-461, 552).⁶ The reason for requesting attorney’s fees in an Answer, Motion or any other pleading is so that the opposing party is on notice of the issues involved. In In re Estate of Tosh, the Court of Appeals, Division 1, held that a notice under RCW § 4.84.250 was not required because the statute itself provides sufficient notice when a party pleads damages less than the statutory amount. In re Estate of Tosh, 83 Wn.App. 158, 165, 920 P.2d 1230 (Division 1, 1996). All three Court of Appeals and the Washington Supreme Court agree, that some notice is required for

⁶ Defendants Kitchins only submitted their Answer on June 16, 2009 after Plaintiffs objected to the award of attorney’s fees. (CP 549-552).
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an award of attorney's fees under a statute. To this end, statutes awarding attorney's fees comport with the common law rule that some notice be given before the award. See Crea, 88 Wn.App. at 393-95; See also Lay v. Hass, 112 Wn.App. 818, 824, 51 P.3d 130 (Division 2, 2002).

- c. The trial court abused its discretion by awarding attorney's fees to a party that was never a potential condemnee under the statute.

Defendants Kitchins were not included in this lawsuit for purposes of RCW § 8.24; as such, the statute does not provide any notice to the Ruvalcabas of the Kitchins' intent to request attorney's fees. As the trial courts' order correctly points out, the Kitchins were ordered to be included in this lawsuit for purposes of a Declaratory Judgment. (CP 113-14).

Indeed, if the Kitchin's requested their attorney's fees in either an Answer or Motion before the trial court, Plaintiff's could have addressed the issue prior to the trial court's award. Plaintiffs were unfairly prejudiced by not being apprised of Defendants' Kitchins intention to do so. In addition to prejudice to the Ruvalcabas, notions of waiver saturate the Kitchins failure to request attorney's fees at any time.

Accordingly, it was an error of law, to award attorney's fees without ever being pled in the Kitchins Answer, requested in the Kitchins Motion, or discussed at any other time before the Order was presented.

3. In the Alternative Defendants Kwang Ho Baek et. al joined Defendants Kitchins in this suit and are responsible for Defendants' Kitchins attorney's fees.

The Day Group Defendants are responsible for the Kitchins attorney's fees because they were the ones who elected to join the Kitchins as necessary parties despite the Ruvalcaba's objections to the same. The statute states in part, "[i]n any action brought under the provisions of this Chapter for the condemnation of land for a private way of necessity, reasonable attorneys' fees and expert witness costs may be allowed by the court to reimburse the condemnee." RCW § 8.24.030.

The Washington Supreme Court recently gave guidance to appellate courts dealing with attorney's fees issues in this statute. See Nobel v. Safe Harbor Family Preservation, No. 80873-2 slip op. (Wn. Sup. Ct. September 24, 2009). The Court gave great weight to the reasoning found in Sorenson v. Czinger and Kennedy v. Martin, in holding that "the trial court may exercise its discretion and require an alternative condemnee to pay an alternative condemnee's attorney's fees under certain circumstances, namely when they join the alternative condemnee as a third party." Id. at 15. In this regard, it was the Day Group that chose to include the Kitchins in this lawsuit, not the Ruvalcabas.

The Court continues by noting that a parties choice may not include those deemed to be necessary and indispensable parties under CR Appellants Brief

19. See id. at 15 fn. 8. Although ordered to be included as necessary parties to this action, the law is quite clear “[f]ailure to join the owner of property over which a proposed alternative route would pass does not absolutely preclude consideration if the evidence shows it is otherwise feasible.” Sorenson v. Czinger, 70 Wn.App. 270, 276, 852 P.2d 1124 (1993), and Noble v. Safe Harbor, No. 80873-2 slip op. at 16 (Wn. Sup. Ct. September 24, 2009).

The Day Group relied on this Court’s prior decision in Ruvalcaba v. Kwang Ho Baek, et al. to argue that the Kitchins are required. (CP 78-82). Clearly understanding the Ruvalcaba’s burden, this Court did not require the Kitchins’ to be joined, rather this Court required the Ruvalcabas to “seek a Declaratory Judgment determining that access through the property severed from their once-owned parcel is unreasonable.” Ruvalcaba v. Baek, et al., 140 Wn.App. 1021, 2007 WL 2411691 (unreported Div. 1 2007). Because joinder was unnecessary to litigate the issue of whether alternative access was unreasonable, the Day Group chose to include the Kitchins in this action and is now responsible for the Kitchins’ attorney’s fees and costs.

Moreover, the Ruvalcabas requested, in their Complaint, that the court award a Declaratory Judgment, concluding that “[i]ngress and/or

egress over the lower portion of the property which was originally owned by Plaintiffs Ruvalcaba remains unreasonable” (CP 146).

Accordingly, the trial court’s Order dismissing the Kitchins accomplishes the requested relief; any implied easement which may have arose at the time the Kitchins’ lot was created is “extinguished” by the doctrines of “Estoppel and Adverse Possession[.]” The Ruvalcabas are the prevailing party on that issue.

As such, it was an error of law not to follow the reasoning of Noble, Kennedy, and Czinger and hold Defendants Kwang Ho Baek et al. responsible for the Kitchins attorney’s fees and costs.

C. THE RUVALCABAS ARE ENTITLED TO THEIR COSTS FOR BRINGING THIS APPEAL.

RAP 14.1 states, “[t]he appellate court determines costs in all cases after the filing of a decision terminating review” The party whom “substantially prevails” may be awarded costs by the appellate court. Accordingly, the Ruvalcabas request their costs as defined by RAP 14.3, if the Appellate Court determines them to be the substantially prevailing party.

VI. CONCLUSION

The Ruvalcabas case must be REMANDED for a trial on the merits because it is in the public interest to prevent landlocked property

from being rendered useless. In addition, the trial court abused its discretion by awarding the Kitchins' attorney's fees and costs against the Ruvalcabas.

DATED this 19th day of October, 2009.

ACEBEDO & JOHNSON, LLC.



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2004 Fla. App. LEXIS 15352,*;885 So. 2d 423;
29 Fla. L. Weekly D 2350

EMILIO CIRELLI, JEAN L. BENSON, ETC., ET AL., Appellants, v. HILDA MCDONALD ENT, T. MURRAY MCDONALD, ET AL., Appellees.

Case No. 5D03-1493

COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

885 So. 2d 423; 2004 Fla. App. LEXIS 15352; 29 Fla. L. Weekly D 2350

October 18, 2004, Opinion Filed

SUBSEQUENT HISTORY:

[*1] Released for Publication November 4, 2004.

PRIOR HISTORY:

Appeal from the Circuit Court for Volusia County, William D. Palmer, Acting Circuit Judge. John W. Watson, III, Judge.

DISPOSITION:

Reversed and remanded.

COUNSEL: Stephen P. Sapienza, Bunnell, for Appellants.

Kim C. Booker of Booker & Associates, P.A., Orange City, for Appellees Kennedy.

Michael S. Orfinger of Smith, Hood, Perkins, Loucks, Stout & Orfinger, P.A., Daytona Beach, for

Appellees McDonald.

Mil... & Ponder, P.A., Daytona Beach, for Appellees Ava & Rufus, Inc. ... Homeowners Association, Inc.

Ri... P.A., Port Orange, for Appellees Cochran.

No... s.

JUDGES: SAWAYA, C.J. SHARP, W. and TORPY, JJ., concur.

OPINION BY: SAWAYA

OPINION

SAWAYA, C.J.

Appellants appeal from two partial summary final judgments—one in favor of the McDonalds and the other in favor of Ava & Rufus, Inc., Whispering Creek Subdivision Homeowners Association, Inc., the Kennedys, and the Cochranes. n1 Appellants, owners of landlocked property west of Port Orange, sued the adjoining property owners to establish [*2] a statutory way of necessity as defined in section 704.01(2), Florida Statutes, and lost when the trial court concluded that the Marketable Record Titles to Real Property Act (MRTA), Chapter 712, precluded their action. n2

----- Footnotes -----1

The McDonalds' motion for summary judgment was heard before the remaining appellees' motion was heard. Subsequently, a different trial judge entered summary judgment in favor of the remaining appellees. It should be noted that several parties named in the Second Amended Complaint, i.e., Volusia County, the St. Johns River Water Management District, and the Wheelers were not named in either partial final summary judgment. 2

There are two "ways of necessity" recognized in section 704.01: the common law way of necessity described in section 704.01(1), otherwise known as the "implied grant of way of necessity," and the statutory way of necessity described in section 704.01(2). The statutory way of necessity is available only to landowners who do not qualify for a common law way of necessity. Boyd v. Walker, 776 So. 2d 370 (Fla. 5th DCA 2001). Appellants do not attempt to assert a common law way of necessity and do not appear to qualify for one.

----- End Footnotes-----

[*3] The issue we must resolve is whether MRTA applies to statutory ways of necessity under section 704.01(2), Florida Statutes (2002). We do not believe that the decision in H & F Land, Inc. v. Panama City-Bay County Airport & Industrial District, 736 So. 2d 1167 (Fla. 1999), which held that MRTA applies to common law ways of necessity, resolves the issue. We conclude that MRTA does not apply to statutory ways of necessity, and to explain why we have come to this conclusion, we will discuss in the following order 1) the factual and procedural background of the instant case; 2) the decision in *H & F Land* and the differences between statutory and common law

ways of necessity; 3) the public policy underlying the establishment of a statutory way of necessity; and 4) the requirements necessary to establish a statutory way of necessity under section 704.01(2), which clearly indicate that a statutory way of necessity is not the sort of claim MRTA is intended to extinguish.

Factual And Procedural Background

The McDonalds own the property to the east (Parcel A), south (Parcel B), and west (Parcel C) of Appellants' property. It appears to [*4] have been established below that the McDonalds also previously owned the property to the north of Appellants' property, but sold that land in the 1990's to Ava & Rufus, Inc., which developed that land into the Whispering Creek subdivision and sold lots to the Cochranes, the Kennedys, and others.

In their Second Amended Complaint, Appellants sought access to State Road 415 (Tomoka Farms Road) to the east of their landlocked property either by going directly across the McDonalds' property to the east or, alternatively, by crossing north over land in the Whispering Creek subdivision to access the subdivision roads, which lead to State Road 415.

In response to the complaint, the McDonalds filed the affidavit of William Akers, III, a thirty-year real estate attorney. Akers reviewed the complaint and the title search report relating to the McDonalds' property, explained how Parcels A, B, and C were deraigned, and concluded that the McDonalds or their predecessors had owned their property more than thirty years as of the time of the conveyance of the property to Appellants and that nowhere in the title to the McDonalds' property was there a recordation of any notice of the assertion of [*5] a statutory way of necessity or any other interest by any predecessors in interest of Appellants' land.

Based on Akers' affidavit and the deeds, the McDonalds moved for summary judgment, arguing that MRTA applied and precluded Appellants' action against the McDonalds' property. Under section 712.02, Florida Statutes, "when a person or his predecessors in title has been vested with any estate in land of record for 30 years or more, he shall have a marketable record title to such estate free and clear of all claims with the exceptions set forth in section 712.03." Holland v. Hattaway, 438 So. 2d 456, 463 (Fla. 5th DCA 1983). Specifically, section 712.02, "Marketable record title; suspension of applicability," states:

Any person having the legal capacity to own land in this state, who, alone or together with her or his predecessors in title, has been vested with any estate in land of record for 30 years or more, shall have a marketable record title to such estate in said land, which shall be free and clear of all claims except the matters set forth as exceptions to marketability in s. 712.03. A person shall have a marketable record title when [*6] the public records disclosed a record title transaction affecting the title to the land which has been of record for not less than 30 years purporting to create such estate either in:

(1) The person claiming such estate; or

(2) Some other person from whom, by one or more title transactions, such estate has passed to the person claiming such estate, with nothing appearing of record, in either case, purporting to divest such claimant of the estate claimed.

The McDonalds explained that Appellants took title to the landlocked property on October 24, 2000. The McDonalds then asserted the root of title to their own three parcels. The root of title, defined as "the last title transaction to have been recorded at least 30 years prior to the time when marketability is being determined," section 712.01(2), Florida Statutes, to the McDonalds' Parcel A was March 22, 1950; to Parcel B was April 28, 1944; and to Parcel C was April 28, 1944. Under MRTA, then, the McDonalds had marketable record title unless a statutory exception to MRTA, as provided in section 712.03, applied.

It is undisputed that no notice, pursuant to section 712.03(2), Florida Statutes [*7] (2002), was filed by Appellants or any of their predecessors in title at any time. In fact, Appellants adopted Akers' affidavit and deeds, stipulated that their land had been landlocked since 1916 (the original grant out of the state), agreed that there was no dispute about the root of title to the McDonalds' property, and expressly disavowed any claim of any exception under MRTA. Appellants' entire argument centers on their contention that MRTA is simply inapplicable to statutory ways of necessity. They acknowledge that *H & F Land* contains the statement that "we . . . hold that statutory or common law ways of necessity are subject to the provisions of the Marketable Record Titles to Real Property Act ('MRTA')." H & F Land, 736 So. 2d at 1170. They contend, however, that this was essentially dicta in that the remainder of the opinion addresses solely common law ways of necessity, which was the issue presented by the facts in that case.

We agree with Appellants that the reference to statutory ways of necessity in the opinion in H & F Land is dicta and therefore not binding precedent on this court. We will next proceed to discuss the decision in *H & F Land* [*8] and explain why we have come to that conclusion and why that decision is not applicable to the instant case.

H & F Land, Inc. v. Panama City-Bay County Airport & Industrial District

In *H & F Land*, the supreme court stated, "For the reasons that follow, we answer the certified question in the affirmative and hold that statutory or common law ways of necessity are subject to the provisions of the Marketable Record Titles to Real Property Act ('MRTA')." Id. at 1170. However, we believe that the reference to statutory ways of necessity is dicta for the following reasons: the certified question concerned only common law ways of necessity; the only issue raised by the parties concerned common law ways of necessity; the facts and legal analysis discussed in the opinion concerned only common law ways of necessity; and beyond the reference in the quoted sentence, statutory ways of necessity are never mentioned anywhere else in the opinion. Accordingly, the inclusion of statutory ways of necessity in the quoted statement is unnecessary to the resolution of the issue before the court and is therefore dicta and not controlling judicial precedent. The holding in [*9] H & F Land is inapplicable to the instant case because of the distinct differences between common law and statutory ways of necessity.

A common law way of necessity rests upon a legal fiction created to prevent property from being landlocked. This was explained by the court in Stein v. Darby, 126 So. 2d 313 (Fla. 2d DCA), cert. denied, 134 So. 2d 232 (Fla. 1961):

The common law implication of the way of necessity contemplated a common source of title between the dominant and servient tenements and is predicated on the theory that when one

deeds to another a parcel of land which is cut off by other lands of the grantor or by lands of strangers from all access to public thoroughfares, the grantee is entitled to an easement of ingress and egress over the lands retained by his grantor. The way is said to arise from the presumed intention of the parties. The theory of the common law easement of a way of necessity appears to emanate from the rule that he who grants a thing to someone else is understood to grant that without which the thing could not be or exist. Id. at 317 (footnotes omitted). Hence, a common law way [*10] of necessity provided for in section 704.01(1) "arises when one grants a parcel of land surrounded by his other land, or when the grantee has no access to it except over grantor's other land or land of a stranger." Reyes v. Perez, 284 So. 2d 493, 495-96 (Fla. 4th DCA 1973) (quoting 2 *Thompson on Real Property* § 362, pp. 413-15 (1961)). Therefore, because a common law way of necessity may arise prior to the root of title, a right to such an interest may be extinguished by MRTA. *See H & F Land*.

Because a common law way of necessity required a common source of title between the dominant and servient parcels, it became obvious that this requirement could not be met in all instances and many parcels of property would remain landlocked. Therefore, the Legislature enacted section 704.01(2) to provide relief in those instances where a common law way of necessity could not be obtained. A statutory way of necessity does not require a common source of title and is dependant upon the existence of numerous factors that are not necessary to the creation of a common law way of necessity. Moreover, public policy rather than legal fiction is the basic foundation for statutory [*11] ways of necessity under section 704.01(2).

Accordingly, we conclude that the decision in H & F Land is inapplicable to the instant case. We will next discuss the public policy upon which statutory ways of necessity are founded to explain our conclusion that MRTA does not apply to extinguish statutory ways of necessity created under section 704.01(2).

Public Policy

The Legislature's provision for statutory ways of necessity is rooted in public policy. Section 704.01(2), Florida Statutes (2002), provides in pertinent part:

STATUTORY WAY OF NECESSITY EXCLUSIVE OF COMMON-LAW RIGHT.-Based on public policy, convenience, and necessity, a statutory way of necessity exclusive of any common-law right exists when any land or portion thereof outside any municipality which is being used or desired to be used for a dwelling or dwellings or for agricultural or for timber raising or cutting or stockraising purposes shall be shut off or hemmed in by lands, fencing, or other improvements of other persons so that no practicable route of egress or ingress shall be available therefrom to the nearest practicable public or private road.

Unlike the common law [*12] way of necessity codified in section 704.01(1), Florida Statutes (2002), section 704.01(2) makes provision for the owner of the servient property to be compensated for the statutory way of necessity established across his or her property. This was not the case with the predecessor to section 704.01(2), and the courts therefore held the former version of the statute constitutionally invalid because it allowed the taking of private property without just compensation. *See Stein*. The statute was subsequently amended to include the requirement that the owner of the servient property be fairly compensated for a statutory way of

necessity, and this cleared the way for the court's constitutional approval of the amended statute now found in section 704.01(2). The discussion of the constitutional issues raised in the decisions that analyzed the amended version of section 704.01(2) is significant because it explains that the courts considered the establishment of a statutory way of necessity to be based on public policy and the need to fulfill a public purpose rather than a legal fiction similar to that which underpins a common law way of necessity.

In *Stein* [*13] , the court analyzed the amended version of section 704.01(2) to determine whether it violated the provisions of the Florida and federal constitutions that prohibited private property from being taken unless for a public purpose and for just compensation. n3 The court held that "[a] careful analysis of the statute compels the conclusion that the result contemplated thereby serves a public purpose as distinguished from a public benefit; that it provides a lawful means by which to accomplish full utilization of the state's natural resources, their development in the ordinary channels of commerce and industry." Stein, 126 So. 2d at 316. The court explained that in order to accomplish this public purpose, the Legislature, in enacting section 704.01(2), provided for eminent domain proceedings that allowed the landlocked property owner the right to acquire a way of necessity over the servient property for just compensation:

----- Footnotes -----3

Specifically, the defendant argued that the "statute violates Section 1, Declaration of Rights, F.S.A., and Section 29, Article XVI, of the Florida Constitution, F.S.A." Stein, 126 So. 2d at 315. As Justice Sundberg noted in his dissent in Deseret Ranches of Florida, Inc. v. Bowman, 349 So. 2d 155 (Fla. 1977):

Article X, Section 6(a), is a brief restatement of Article XVI, Section 29, and the Declaration of Rights, Section 12, Florida Constitution of 1885. See commentary to Article X, Section 6, 26A Florida Statutes Ann. 479. The conditions of both the former and current constitutional mandates are the same. No private property shall be taken "except (i) for a public purpose (ii) and with full compensation therefor paid to each owner." Id. at 157. Therefore, when the court in *Deseret Ranches* approved the reasoning in *Stein*, it did so by evaluating the pertinent constitutional provisions of the Florida Constitution of 1968, which have remained unchanged.

----- End Footnotes-----

[*14] Chapter 704, F.S.A. is devoted entirely to the subject of ways of necessity. A casual reading produces the inescapable conclusion that the legislature was not only cognizant of the common law rule governing the subject, which it specifically preserved, but also set about to implement the common law rule with a statutory proceeding in eminent domain by which to attain the desired public purpose in those situations where a common law way of necessity is not available.

....

F.S. Chapter 704, F.S.A. contemplates that a proceeding in eminent domain may be maintained for condemnation of an easement of necessity. As an incident to such proceedings the trial court unquestionably has the power, before submitting the cause to a jury for the purpose of awarding compensation, to require the production of such evidence as will enable it to determine whether the right of condemnation exists under the particular circumstances, and if

so, the extent, location and other incidents of the easement essential to the function of the jury, or to the court where no jury is requested, in making the award of compensation. Id. at 317, 321 (emphases added).

In *Deseret Ranches* [*15], the court was confronted with an attempt by the plaintiff in the trial proceedings to acquire a statutory way of necessity pursuant to section 704.01(2). Specifically, the court addressed the issue whether the statute is unconstitutional because it violates article X, section 6(a) of the Florida Constitution, which provides in pertinent part that "no private property shall be taken except for a public purpose and with full compensation therefor paid to each owner . . ." In holding the statute constitutional, the court stated:

The argument is that in contravention of the foregoing provision no purpose which is predominantly public is served by the taking of easements through operation of the statute. Although it is conceded that the statute provides a public benefit, it is argued that the benefit is incidental to a purpose which is predominantly private, that purpose being to provide a private land owner with conventional access to the outside world.

In 1961, before the adoption of the Florida Constitution of 1968, there was advanced in *Stein v. Darby* a similar argument against the statute, cast in terms of unconstitutionality under both the Florida Constitution of 1885 and [*16] the Fourteenth Amendment to the United States Constitution. After an excellent review of the common law history of the doctrine of ways of necessity, the Court concluded that the doctrine is grounded in the public policy against the loss of the use of landlocked property. As to the statutes' provision for ways of necessity, *Stein* stated,

" . . . we find no logic in the argument that the statute in question, which aids to render the earth from which all sustenance flows available to the uses of man, is unconstitutional as serving something other than a public purpose." 126 So. 2d at 320.

Appellant contends that the intervening adoption of the 1968 Florida Constitution, including Article X, Section 6(a) and its "public purpose" requirement, mandates a different result from that reached in *Stein* and, Article X, Section 6(a) aside, that *Stein* was wrongly decided.

We agree with the reasoning in *Stein* and hold the statute constitutional under the present Constitution. The inverse of appellant's contention is true: the statute's purpose is predominantly public and the benefit to the private landholder is incidental to the public purpose. Deseret Ranches, 349 So. 2d at 156 [*17] (footnote omitted). The court then explained the theoretical moorings of the public policy in which a statutory way of necessity is rooted:

Sensible utilization of land continues to be one of our most important goals. We take notice that Florida grows in population at one of the fastest rates of any state in the nation. Useful land becomes more scarce in proportion to population increase, and the problem in this state becomes greater as tourism, commerce and the need for housing and agricultural goods grow. By its application to shut-off lands to be used for housing, agriculture, timber production and stockraising, the statute is designed to fill these needs. There is then a clear public purpose in providing means of access to such lands so that they might be utilized in the enumerated ways. Id. at 156-57.

Hence, section 704.01(2) serves the legitimate public purpose of allowing access to landlocked

property so that it may be transformed from useless and unproductive land into valuable and productive property that provides a residence to the owner or produces valuable raw materials such as timber or agricultural products. Moreover, turning fallow land [*18] into productive property promotes development and, as courts in other jurisdictions have observed, increases tax revenues. n4 It is beyond any doubt that there is a vital public purpose served in granting access to individual property owners to the road and highway system of the county or state so that the property may be utilized and developed as a resource for the common good, whether residential, agricultural or otherwise. Failing to grant access to landlocked property that the owner needs or desires to use for the purposes stated in the statute may leave the landlocked owner at the mercy of the adjoining landowners who will then have the final say whether access will be granted. Unless these adjoining landowners are fair-minded individuals who will not request exorbitant compensation or simply deny access over their property, the property may be condemned to being forever landlocked and useless. This would be very bad public policy because it would do nothing to promote any beneficial public purpose and it is just what the Legislature intended to prevent when it enacted section 704.01(2).

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Marinclin v. Urling, 262 F. Supp. 733 (W.D. Pa.), aff'd, 384 F.2d 872 (3d Cir. 1967); Pratt v. Allen, 116 Misc. 2d 244, 455 N.Y.S.2d 904 (N.Y. Sup. Ct. 1982). In *Marinclin*, the court gave further reasons why granting access to landlocked property promotes the public purpose:

In addition, the use of a road laid out as a way of necessity could very well be deemed a public use since it is for the public benefit that every citizen should have the means of discharging his public duties, such as voting or attending court as a juror or witness, and because it affords higher assessments upon the landlocked property for municipal tax purposes. Also, it is in the public interest that police, firemen, and representatives of other public health, welfare and municipal agencies have access to the dwelling. Marinclin, 262 F. Supp. at 736.

----- End Footnotes-----

[*19] The emphasis on public policy as the basis for the constitutional validity of the amended version of section 704.01(2) clearly reveals that the Legislature never intended that MRTA, whose foundational underpinning is the extinguishment of old and stale claims that adversely affect the marketability of title to the subject property, apply to extinguish the right to seek a statutory way of necessity. To hold otherwise would subvert the salutary public purpose section 704.01(2) was intended to promote.

Moreover, as will be discussed in the following section, analysis of the requirements necessary to establish a statutory way of necessity clearly indicates that such a claim is not the sort of claim MRTA is intended to extinguish. This argument is buttressed by the fact that the courts in Stein and Deseret Ranches reasoned that statutory ways of necessity are analogous to eminent domain proceedings.

The Requirements Necessary To Establish A Statutory Way Of Necessity

Clearly Indicate That It Is Not The Sort Of Claim MRTA Is Intended To Extinguish

When the provisions of MRTA and the purpose for its enactment are considered in light of the requirements necessary [*20] to establish a statutory way of necessity, it becomes obvious that MRTA was never intended to extinguish such a claim. The Legislature clearly expressed that MRTA should be liberally construed and applied "to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record title as described in s. 712.02 subject only to such limitations as appear in s. 712.03." § 712.10, Fla. Stat. (2002). In ITT Rayonier, Inc. v. Wadsworth, 346 So. 2d 1004 (Fla. 1977), the court explained how the expressed purpose of MRTA is effectuated:

First, it gives to a person marketable title when public records disclose a title transaction, of record for at least thirty years, which purports to create the estate either in that person or in someone else from whom the estate has passed to that person. Second, subject to six exceptions, it extinguishes all interests in the estate which predate the "root of title." Id. at 1008-09 (footnotes omitted). Section 712.04, Florida Statutes, provides in pertinent part:

Subject to the matters stated in s. 712.03, [*21] such marketable record title shall be free and clear of all estates, interests, claims, or charges whatsoever, the existence of which depends upon any act, title transaction, event or omission that occurred prior to the effective date of the root of title. § 712.04, Fla. Stat. (2002) (emphasis added). Hence, the Legislature has clearly stated its intent that MRTA only extinguish interests in real property that existed prior to the root of title. The root of title is defined as "any title transaction purporting to create or transfer the estate claimed by any person and which is the last title transaction to have been recorded at least thirty years prior to the time when the marketability is being determined." § 712.01(2), Fla. Stat. (2002).

The courts that have interpreted and applied section 712.04 have consistently held, in accordance with the expressed legislative intent, that MRTA only applies to interests or claims that existed prior to the root of title. In Conservatory-City of Refuge, Inc. v. Kinney, 514 So. 2d 377 (Fla. 2d DCA 1987), for example, the court held:

The MRTA extinguishes "all [*22] estates, interests, claims or charges whatsoever, the existence of which depends upon any act, title transaction, event or omission that occurred prior to the effective date of the root of title." § 712.04, Fla. Stat. (1985). [emphasis added][.] . . . The deed the trial court found to be the root of title was recorded in 1956. Only interests in existence prior to 1956 could be extinguished by the MRTA. Id. at 378; see also Holland v. Hattaway, 438 So. 2d 456, 466 (Fla. 5th DCA 1983).

Pursuant to section 704.01(2), a statutory way of necessity comes into existence when the following are established: 1) the claimant's property is landlocked by property belonging to others; n5 2) there is no practicable route of ingress or egress to the nearest public or private road; n6 3) there is no right to a common law way of necessity under section 704.01(1) because there is no unity of title between the dominant (landlocked) and servient (adjoining) tracts; n7 4) the landlocked property is situated outside a municipality; n8 5) the landlocked property is being used or the owner desires to use the property as a dwelling [*23] or for agricultural, timber raising or cutting, or stockraising purposes; n9 and 6) the statutory way of necessity sought over the adjoining parcel is the "nearest practicable route" of access. n10 Section 704.01(2) further provides that when these factors come into existence, "a statutory way of necessity exclusive of any common-law right exists . . ." § 704.01(2), Fla. Stat. (2003) (emphasis added). In other words, a statutory way of

necessity comes into existence when these factors coalesce. §§ 704.01(2), .04, Fla. Stat. (2002); Parham v. Reddick, 537 So. 2d 132 (Fla. 1st DCA 1988); Sapp v. General Dev. Corp., 472 So. 2d 544 (Fla. 2d DCA 1985). If the owner of the servient property does not agree that a statutory way of necessity exists over his or her property or refuses to allow the landlocked owner to use it, the appropriate recourse available to either party is to seek a judicial determination of the existence of the claimed statutory way of necessity and the amount of compensation the landlocked owner owes for its use. § 704.04, Fla. Stat. (2002); *Parham*; *Sapp*. Once the way [*24] of necessity is established, either through agreement or judicial decree, the owner of the servient property may not arbitrarily block the use of the statutory way of necessity. *Parham*; *Sapp*. If the easement is awarded by the court and the amount of compensation is judicially determined, "the easement shall date from the time the award is paid." § 704.04, Fla. Stat. (2002).

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Faison v. Smith, 510 So. 2d 928 (Fla. 5th DCA 1987); see also Bell v. Cox, 642 So. 2d 1381 (Fla. 5th DCA 1994), review denied, 654 So. 2d 918 (Fla. 1995).6

Faison; see also *Bell*.7

Boyd v. Walker, 776 So. 2d 370, 370 (Fla. 5th DCA 2001) ("A landowner who has a common-law way of necessity under section 704.01(1) is ineligible for a statutory way of necessity under section 704.01(2)." (citing Reyes v. Perez, 284 So. 2d 493 (Fla. 4th DCA 1973)); Hancock v. Tipton, 732 So. 2d 369, 373 (Fla. 2d DCA 1999) ("To establish a statutory way of necessity, the owner of the landlocked parcel must show that the property is not served by a common law easement." (citing Bell, 642 So. 2d at 1384) ("Cox presented evidence and the record supports a finding that no common-law easement existed. There was no unity of title between the dominant and servient estate.")). [*25] 8

Blue Water Corp. v. Hechavarria, 516 So. 2d 17 (Fla. 3d DCA 1987).9

Blue Water; Hunt v. Smith, 137 So. 2d 232, 233-34 (Fla. 2d DCA 1962) ("Thus, it may be seen from the language of the statute that the statutory way of necessity exists only when the lands are being used or desired to be used for the purposes specified in the statute."). 10

§ 704.01(2), Fla. Stat. (2002); see also Hoffman v. Laffitte, 564 So. 2d 170 (Fla. 1st DCA 1990).

-----End Footnotes-----

We believe that the right to a statutory way of necessity is a present right that comes into existence when the necessary factors exist. Therefore, because it is a present right, it is not a right, claim, or interest that would predate the root of title to the servient parcel of property and thereby be extinguishable by MRTA. In *H & F Land*, the court stated that the provisions of MRTA are intended to accomplish the objective of "stabilizing property law by clearing old defects from land titles, limiting the period of record search, and clearly defining marketability [*26] by extinguishing old interests of record not specifically claimed or reserved." Id. at 1171. In City of Miami v. St. Joe Paper Co., 364 So. 2d 439 (Fla. 1978), the court said that "the Marketable Record Title Act is a comprehensive plan for reform in conveyancing procedures. It is a curative act in that it may

operate to correct certain defects which have arisen in the execution of instruments in the chain of title." Id. at 442. The court quoted one treatise's description of the nature of MRTA as follows:

The chief purpose of the act is to extinguish **stale claims and ancient defects** against the title to real property, and, accordingly, limit the period of search. . . . The act also goes beyond a curative act. Curative legislation only corrects certain minor or technical defects through the passage of time, whereas under the Marketable Record Title Act, most defects or clouds on title **beyond the period of 30 years** are removed and the purchaser is made secure in his transaction. Id. at 443 (quoting Catsman, *The Marketable Record Title Act and Uniform Title Standards*, § 6.2, in *III Florida Real Property* [*27] *Practice* (1965)) (emphases added). In these and many other decisions, n11 the Florida courts have clearly held that MRTA applies to old, stale and ancient claims or interests that predate the root of title, not to present interests or claims such as a statutory way of necessity.

-----Footnotes-----11

See, e.g., Holland v. Hattaway, 438 So. 2d 456, 466 (Fla. 5th DCA 1983) ("It has been said that the chief purpose of MRTA is to extinguish stale claims and ancient defects against *the* title to real property and accordingly, limit the period of title searches.") (footnote omitted); Travick v. Parker, 436 So. 2d 957, 958 (Fla. 5th DCA 1983) ("MRTA 'operates to correct defects in title by creating a marketable record title when the public records disclose a record title transaction affecting the title to the land which has been of record for not less than thirty years.'") (quoting Allen v. St. Petersburg Bank & Trust Co., 383 So. 2d 1171 (Fla. 2d DCA 1980)).

-----End Footnotes-----

Moreover, the [*28] factors necessary to establish a statutory way of necessity have nothing to do with the title to the landlocked or servient property; rather, they come into existence through myriad circumstances brought about by any number of reasons, and it is often difficult to predict when these factors will occur. In some instances, when they do occur, circumstances may change that may alter or vitiate one or more of the factors, thus affecting the entitlement to a statutory way of necessity over a particular tract of servient property. In other words, these factors have nothing to do with a title-based claim to a right of access that can generally be determined by a search or examination of the title to the affected property and because there is no fixed time when the factors may come into existence, it may be impossible for the owners of the landlocked and servient parcels to know when an entitlement to a statutory way of necessity may come into existence. It then becomes difficult or impossible to know when the time limitation provided in MRTA will begin to run.

Appellants argue that a statutory way of necessity is analogous to eminent domain proceedings where the state is allowed, based [*29] on need and public policy, to take private property for just compensation at any time. While there are distinct differences between the sovereign's right to exercise its eminent domain powers and the right of a private citizen to acquire a statutory way of necessity over another's property, the latter is clearly analogous to the former. What is more important is the fact that the courts in Stein and Deseret Ranches have made the analogy. We also note that courts in other jurisdictions hold, based on the provisions of the pertinent statutory provisions dealing with ways of necessity, that obtaining a way of necessity over another's property is a form of eminent domain premised on public policy. n12 The analogy is significant because

eminent domain is a present right that the sovereign may exercise without time constraints imposed by a statute of limitations. Therefore, it is a claim or right that cannot predate the root of title to the property subject to the proceedings and it may not be extinguished by time limitations. These are the characteristics of proceedings to establish a statutory way of necessity under section 704.01(2). Because the analogous right to acquire property [*30] by eminent domain proceedings cannot be extinguished by MRTA, the right to acquire access to landlocked property via section 704.01(2) should likewise not be extinguished by MRTA.

-----Footnotes-----12

Ex parte Cater, 772 So. 2d 1117 (Ala. 2000); Tobias v. Dailey, 196 Ariz. 418, 998 P.2d 1091 (Ariz. Ct. App. 2000); Bear Creek Dev. Corp. v. Genesee Found., 919 P.2d 948, 951 (Colo. Ct. App. 1996) (applying Colorado's state constitution, art. II, section 14, which provides that "private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity . . ."); Moore v. Dooley, 240 Ga. 472, 241 S.E.2d 232 (Ga. 1978); MacCaskill v. Ebbert, 112 Idaho 1115, 739 P.2d 414 (Idaho Ct. App. 1987); Pritchard v. Scott, 254 N.C. 277, 118 S.E.2d 890 (N.C. 1961); Blankenship v. Bone, 1974 OK CIV APP 54, 530 P.2d 578 (Okla. Ct. App. 1974); Hellberg v. Coffin Sheep Co., 66 Wn.2d 664, 404 P.2d 770 (Wash. 1965); Kennedy v. Martin, 115 Wn. App. 866, 63 P.3d 866 (Wash. Ct. App. 2003); Coronado Oil Co. v. Grieves, 603 P.2d 406 (Wyo. 1979). Some courts in other jurisdictions also hold that defenses such as laches and statute of limitations do not apply to preclude a landlocked landowner from obtaining a way of necessity based on public policy preventing property from being landlocked in perpetuity. See Childers v. Quartz Creek Land Co., 946 P.2d 534 (Colo. App. Ct. 1997), cert. denied, 525 U.S. 1104, 142 L. Ed. 2d 771 (1999).

-----End Footnotes-----

[*31] Conclusion

For the reasons discussed, we conclude that the decision in H & F Land does not apply to the instant case. We also conclude that MRTA is not applicable to statutory ways of necessity. Therefore, we reverse the judgments under review and remand for further proceedings. We express conflict with the decision in Blanton v. City of Pinellas Park, 854 So. 2d 729 (Fla. 2d DCA 2003), review granted, 870 So. 2d 820 (Fla. 2004). n13 We also certify to the Florida Supreme Court, as a matter of great public importance, the same question certified in Blanton:

-----Footnotes-----13

In Blanton, the Second District Court affirmed a trial court's finding that a plaintiff's claim to a statutory way of necessity was time-barred in light of the holding in H & F Land. The court noted the fact that H & F Land stemmed from a claim of a common law way of necessity and the fact that the supreme court's reference to statutory ways of necessity appears only in the stated holding and, because of those facts, certified the question whether MRTA operates "to extinguish an otherwise valid claim of a statutory way of necessity when such claim was not timely asserted under the provisions of that Act?" Blanton, 854 So. 2d at 731.

-----End Footnotes-----

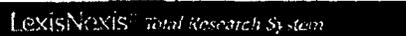
[*32] DOES THE MARKETABLE RECORD TITLES TO REAL PROPERTY ACT, CHAPTER

712, FLORIDA STATUTES, OPERATE TO EXTINGUISH AN OTHERWISE VALID CLAIM OF A STATUTORY WAY OF NECESSITY WHEN SUCH CLAIM WAS NOT TIMELY ASSERTED UNDER THE PROVISIONS OF THAT ACT?

REVERSED and REMANDED.

SHARP, W. and TORPY, JJ., concur.

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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

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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:

HN12 "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 *Stato 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 [***32] 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.

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Commonwealth Court of Pennsylvania.
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.

Argued Oct. 16, 1995.

Decided March 22, 1996.

Landowners appealed from order of the Court of Common Pleas, Chester County, 91-11497, Shenkin, J., finding that private road across portions of their properties should be opened for benefit of a landlocked landowner. On an issue of first impression, the Commonwealth Court, No. 3205 C.D. 1994, Doyle, J., held that self-created landlock defeated finding of necessity under Private Road Act.

Reversed.

Silvestri, Senior Judge, dissented with separate opinion.

West Headnotes

[1] Private Roads 2(1)

311k2(1) Most Cited Cases

Private Road Act is in nature of eminent domain and therefore must be strictly construed. 36 P.S. §§ 2731-2891.

[2] Easements 18(2)

141k18(2) Most Cited Cases

"Easement by necessity" may be implied when after severance from adjoining property a piece of land is without access to public highway.

[3] Easements 17(1)

141k17(1) Most Cited Cases

[3] Easements 18(2)

141k18(2) Most Cited Cases

"Easement by necessity" arises upon showing that

there was conveyance of part of tract of land in such manner that part conveyed or part retained is denied access to public road; conversely, "implied easement from prior use" is based on theory that continuous use of permanent right-of-way gives rise to implication that parties intended that such use would continue, notwithstanding absence of necessity for use.

[4] Easements 18(1)

141k18(1) Most Cited Cases

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

[5] Easements 18(2)

141k18(2) Most Cited Cases

Grantee is entitled to easement by necessity over lands of his grantor where property conveyed to him is so situated that access to it from highway cannot be had except by passing over other land of grantor; similarly, grantor is entitled to implied easement by necessity when he grants away his exterior land thereby leaving remaining land without outlet.

[6] Easements 18(1)

141k18(1) Most Cited Cases

Easement implied on grounds of necessity is always of strict necessity; it never exists as mere matter of convenience.

[7] Easements 44(1)

141k44(1) Most Cited Cases

With respect to scope of implied easement by necessity, reasonable necessity standard is utilized; scope of easement may be enlarged from its original use in order to meet reasonable needs of dominant es-

tate for such easement, and to vary with necessity, insofar as may be consistent with full reasonable enjoyment of servient tenement.

[8] Easements ⚡18(1)

141k18(1) Most Cited Cases

[8] Easements ⚡18(3)

141k18(3) Most Cited Cases

"Easement by necessity" does not exist when owner can get to his own property through his own land, and necessity must not be created by party claiming easement.

[9] Easements ⚡18(2)

141k18(2) Most Cited Cases

Easement implied by necessity in favor of landlocked lot arose at time adjoining lot was sold where there was unity of title between two lots, adjoining lot had access to public road, and necessity of access to public road existed both at time of sale of adjoining lot and at time litigation was commenced.

[10] Private Roads ⚡2(1)

311k2(1) Most Cited Cases

Fact that landowners had easement by necessity over one lot, alone, did not defeat their right to seek condemnation of other land under Private Road Act; however, easement must have been of limited privilege or extremely difficult and burdensome in its use to have warranted appropriation of another more convenient course. 36 P.S. §§ 2731-2891.

[11] Private Roads ⚡2(1)

311k2(1) Most Cited Cases

Landowners who voluntarily create a landlock are precluded from condemning private road over land of others pursuant to Private Road Act. 36 P.S. §§ 2731-2891.

[12] Private Roads ⚡2(1)

311k2(1) Most Cited Cases

Landowner's self-created landlock defeated finding of necessity under Private Road Act, and thus precluded condemnation of private roadway over land of two adjacent landowners, where landowner cre-

ated subdivision, adjacent landowners were part of different subdivision, and landowner sold lot in his subdivision which abutted the landlocked parcel knowing that the adjacent landowners would not grant him easement, that those owners could not be legally compelled to grant easement, that the township required him to either obtain easement or convey lot to one of two landowners pursuant to agreement, and that he could have reserved easement over one of lots in his subdivision prior to conveyance of those lots. 36 P.S. §§ 2731-2891.

[13] Private Roads ⚡2(1)

311k2(1) Most Cited Cases

Purchaser's knowledge that parcel is landlocked does not preclude finding of strict necessity under Private Road Act. 36 P.S. §§ 2731-2891.

*1029 Timothy F. Hennessey, for appellants.

Leo H. Eschbach, for appellees.

Before DOYLE and SMITH, JJ., and SILVESTRI, Senior Judge.

DOYLE, Judge.

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 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. [FN1]

FN1. 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 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. [FN2] 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.)

FN2. The notation on the approved plan states:

"Note: Lot # 9 shall be conveyed to Bernard M. & Susan Scanlon [sic] and shall not be sold separately [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 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, this time pursuant to Section 11 of the Private Road Act [FN3] 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 without a door.

FN3. Act of June 13, 1836, P.L. 551, *as amended*, 36 P.S. § 2731. 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 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 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.

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).

[1] In reviewing the applicable principles concerning the Act, we find that the Act is in the nature of eminent domain and, therefore, must be strictly construed. *Application of Little*, 180 Pa. Superior Ct. 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 Plum Creek Township*, 110 Pa. 544, 548, 1 A. 431, 433 (1885) ("[T]he 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 Zeafra*, 405 Pa.Superior Ct. 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 the Scanlans' and the Normans' properties.

[2][3][4] 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)). [FN4] In order to establish a way of necessity, three elements must be proven:

FN4. 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*. 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.

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.

[5] Such an easement may be implied in favor of the grantor or grantee of the land. 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).

[6][7][8] An easement implied on the grounds of necessity is always of *strict necessity*; [FN5] it never exists as a mere matter of convenience. *Possessky v. Diem*, 440 Pa.Superior Ct. 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*. [FN6]

FN5. 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 a[n] ... 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.

FN6. 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.

***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.

[9] 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.

[10] We recognize that the "Act does not require an absolute necessity, such as being completely landlocked." *Little*, 180 Pa.Superior Ct. 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 [FN7] ... or 'extremely difficult and burdensome' in its use ... to warrant the appropriation of another more convenient course." *Id.*

FN7. For example, in *In re Laying Out a Private Road*, 405 Pa.Superior Ct. 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 8 [FN8] and should have also considered any legal or physical obstacles which precluded the Graffs from utilizing such an easement. [FN9] The failure of the Board to do so constituted error as a matter of law.

FN8. See *In re Petition of Geary*, 40 Northumb.L.J. 50, 54 (C.P.Pa.1968) ("[T]he 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.")

FN9. 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.

[11] 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 (1955), a landowner

sought to condemn a right-of-way over his neighbor's property pursuant to Article 699 of the Louisiana Civil Code [FN10] 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:

FN10. 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).

[I]f plaintiff, by reason of the various property sales it has made, now finds itself in the posi-

tion 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 enclavement 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. 82 So.2d 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 Commission v. Roy*, 265 So.2d 459, 465 (La.Ct.App.1972), *writ refused*, 262 La. 1160, 266 So.2d 444 (La.1972), *cert. denied*, 411 U.S. 916, 93 S.Ct. 1543, 36 L.Ed.2d 307 (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. [FN11] 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.

FN11. 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 (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.

[12][13] 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 of the lots in Bruce Hill prior to the conveyance of those lots. [FN12] 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.

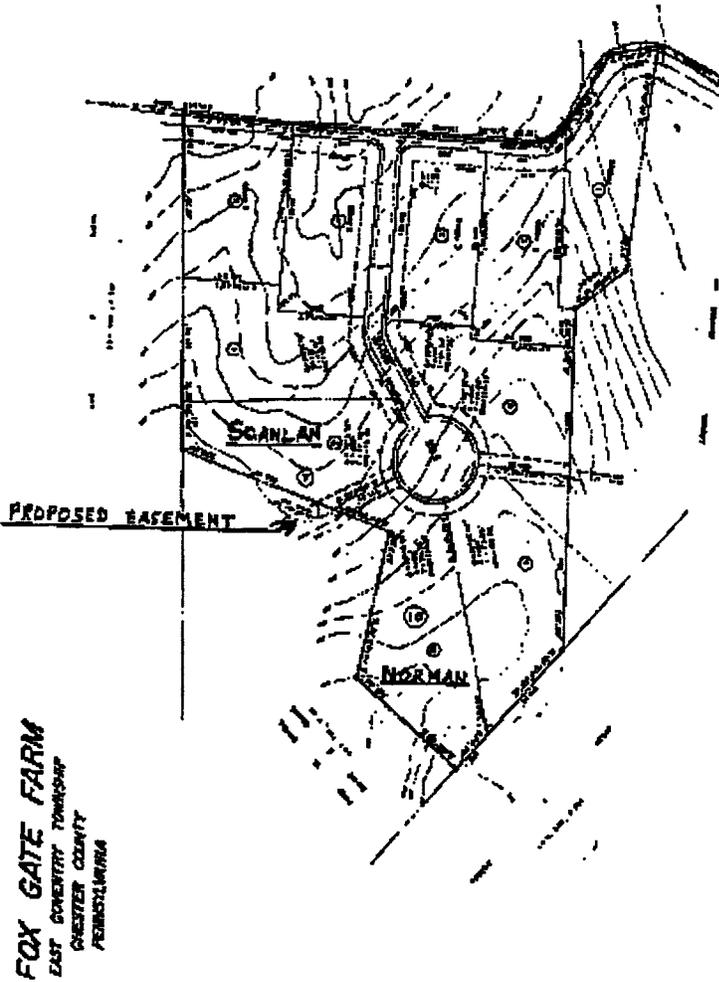
FN12. The Graffs' actions in voluntarily *creating* their hardship are distinguishable from cases wherein the landowner *purchases* property with the *knowledge* that it is landlocked. In such a case, the purchaser's *knowledge* does not preclude a finding of "strict necessity" by the Board of View. *See, e.g., In re Private Road in Monroeville Borough*, 204 Pa.Superior Ct. 552, 205 A.2d 885 (1965).

Order reversed.

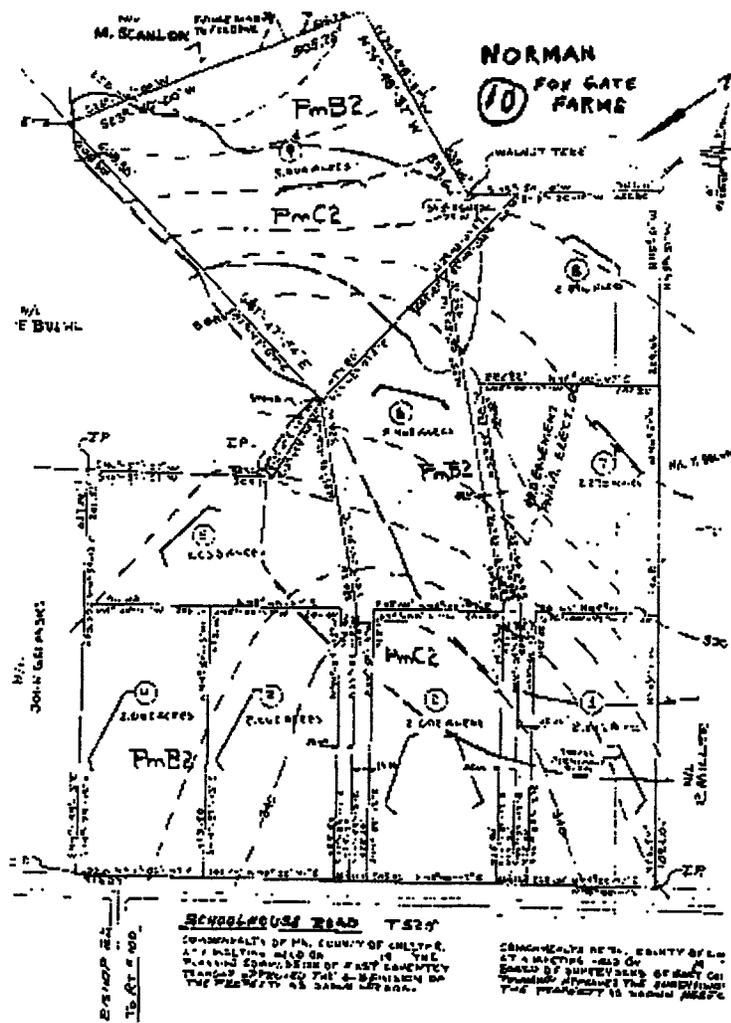
ORDER

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



*1037



*1038 SILVESTRI, Senior Judge, dissenting.

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), [FN1] I dissent.

FN1. 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 and Opening a Private Road, Appeal of Zeafla*, 405 Pa.Superior Ct. 298, 592 A.2d 343 (1991). In reviewing the viewers' de-

cision, a trial court may confirm the report, or reject it and 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 and whether there has been an abuse of discretion. *In re Private Road in Greene Township*, 343 Pa.Superior Ct. 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 Monroeville Borough*, 204 Pa.Superior Ct. 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:

[W]e have failed to find in the road acts any indication of legislative intention to distinguish between persons who acquire land with knowledge and 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 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 *Monroeville 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 *Monroeville Borough* line of cases, but distinguishes between landowners who purchase landlocked property with the knowledge of its landlocked condition and those who own property and create a landlock on their property. However, to make a distinction between a subsequent purchaser and a present owner who creates the landlock does not serve the purposes of the Act, as such a distinction focuses entirely 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.... [I]t 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 and 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 way through an adjacent property owners' land in order to access a public roadway; to hold otherwise, as the majority does, is illogical, absurd and 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.

673 A.2d 1028

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Superior Court of Pennsylvania.
 In re Petition for a PRIVATE ROAD IN MONROE-
 EVILLE BOROUGH, ALLEGHENY COUNTY,
 Pennsylvania.
 Appeal of John MARINCLIN and Goldie Marin-
 clin, His Wife.
 Dec. 16, 1964.
 Application for Allocatur Denied March 3, 1965.

Proceeding for establishment of private road. The Court of Quarter Sessions, Allegheny County, No. 9, January Sessions, 1964, Road Docket, William F. Cercone, J., confirmed report of board of viewers which established 14-foot private road from plaintiffs' landlocked property over defendants' property to public road and affixed damages, and defendants appealed. The Superior Court, No. 138, April Term, 1964 Montgomery, J., held that review by court of findings of board of viewers on exceptions thereto is limited to confirmation of report of viewers or rejection of it and direction of review and court of quarter sessions may not afford jury trial to determine damages or necessity.

Affirmed.

West Headnotes

[1] Private Roads 311 ↪2(4)

311 Private Roads

311k2 Establishment

311k2(4) k. Commissioners, Viewers, Jurors, Surveyors, and Other Like Officers. Most Cited Cases

Statutory duty of board of viewers to find whether private road is necessary need not be included in preliminary order appointing board. 36 P.S. §§ 1785, 1831.

[2] Private Roads 311 ↪2(1)

311 Private Roads

311k2 Establishment

311k2(1) k. In General. Most Cited Cases

Fact that owner of property requesting private road knew his property was landlocked at time of purchase did not preclude right to petition for private access road. 36 P.S. §§ 1785, 1831.

[3] Private Roads 311 ↪2(5)

311 Private Roads

311k2 Establishment

311k2(5) k. Judgment, Order, or Decree, and Review. Most Cited Cases

Statute providing for appeal to common pleas with provisions for jury trial whenever any report of viewers, appointed by any court of quarter sessions to assess damages for opening, widening or changing of grade in any street, road or highway shall be confirmed by quarter sessions applies, by virtue of other provisions, to private road cases. 26 P.S. § 61; 36 P.S. §§ 2731, 2736; 53 P.S. § 1679.

[4] Private Roads 311 ↪2(5)

311 Private Roads

311k2 Establishment

311k2(5) k. Judgment, Order, or Decree, and Review. Most Cited Cases

Right to appeal to court of common pleas on question of damages awarded in private road cases is not an exclusive remedy but is concurrent with right to file exceptions to quarter sessions court proceeding. 26 P.S. § 61; 53 P.S. § 1679.

[5] Private Roads 311 ↪2(4)

311 Private Roads

311k2 Establishment

311k2(4) k. Commissioners, Viewers, Jurors,

Surveyors, and Other Like Officers. Most Cited Cases

Viewers appointed by court under road laws constitute an independent tribunal set up by law. 36 P.S. §§ 1785, 1831, 2731.

[6] Private Roads 311 ↪2(5)

311 Private Roads

311k2 Establishment

311k2(5) k. Judgment, Order, or Decree, and Review. Most Cited Cases

Although findings of board of viewers are subject to review and may be set aside, their authority should not be infringed on by substitution of the judgment of the court on exceptions for that of the viewers. 36 P.S. §§ 1785, 1831, 2731.

[7] Private Roads 311 ↪2(5)

311 Private Roads

311k2 Establishment

311k2(5) k. Judgment, Order, or Decree, and Review. Most Cited Cases

Review by court of findings of board of viewers on exceptions is limited to confirmation of report of viewers or rejection of it and direction of review, and court of quarter sessions may not afford jury trial to determine damages or necessity. 36 P.S. §§ 1785, 1831, 2731, 2736.

*554 **885 Leonard M. Mendelson, Edward C. Leckey, Pittsburgh, for appellants.

Ralph S. Sapp, Alvin J. Porsche, Pittsburgh, for appellee.

*553 Before ERVIN, Acting P. J., and WRIGHT, WOODSIDE, WATKINS, MONTGOMERY and FLOOD, JJ.

MONTGOMERY, Judge.

This appeal by John Marinclin and Goldie Marinclin, his wife, is from an order**886 confirming the report of a board of viewers, which established a fourteen-foot private road across appellants' property to give to petitioner Mae G. Urling access to a public road from her adjoining property. The proceeding was based on the Act of June 13, 1836, P.L. 551, § 11, as amended, 36 P.S. § 2731.

[1] Appellants first question the sufficiency of the

preliminary order appointing the board of viewers because it did not specifically direct that board to make a finding of necessity. Section 11 of said Act of 1836, as amended, provides that the Court of Quarter Sessions shall 'direct a view to be had of the place where such road is requested, and a report thereof to be made, in the same manner as is directed by the said act of thirteenth June, one thousand eight hundred and thirty-six.' Sections 2 and 3 of said act enumerate the duties of the board of viewers as follows:

'2. The persons appointed as aforesaid, shall view such ground, and if they shall agree that there is occasion for a road, they shall proceed to lay out the same, having respect to the shortest distance, and the best ground for a road, and in such manner as shall do the least injury to private property, and also be, as far as practicable, agreeable to the desire of the petitioners.

'3. The viewers as aforesaid, shall make report at the next term of the said court, and in the said report shall state particularly: first, who of them were present at the view; second, whether they were *555 severally sworn or affirmed; third whether the road desired be necessary for a public or private road; they shall also annex and return to the court a plot or draft thereof, stating the courses and distances, and noting briefly the improvements through which it may pass, and whenever practicable, the viewers shall lay out the said roads at an elevation not exceeding five degrees, except at the crossing of ravines and streams, where by moderate filling and bridging, the declination of the road may be preserved within that limit.' (Emphasis supplied) 36 P.S. §§ 1785, 1831.

Thus, the duty to find whether the desired road is necessary is imposed on the board by the statute. Since it follows that to impose that duty on the board by court order would be unnecessary, we find appellants' first contention to be without merit.

[2] Appellants next question the right of a person to use the act aforesaid if they have acquired their

~~land with knowledge of the fact that it is 'landlocked,'~~ without access to a public road. We have failed to find in the road acts any indication of legislative intention to distinguish between persons who acquire land with knowledge and 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 appellants' contention were tenable, it would mean that only those property owners whose access 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. The statutes do not indicate that limited construction. The rights of the individual involved in these proceedings are not the exclusive consideration. 'On the contrary, it is the connection of these private ways with public highways, or with places of *556 necessary public resort, together with the implied right or license of the public to use them, at least in going to and 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 these acts judicial recognition of constitutionality.' Waddell's Appeal, 84 Pa. 90, 93-94 (1877). A similar objection was considered by this Court in Stewart's Private Road, 38 Pa.Super. 339 (1909). Therein, a field was purchased with knowledge that its **887 access to a public road was limited by a right of way granted in the deed. Nevertheless, the purchaser was permitted to utilize the Act of June 13, 1836, aforesaid, and the Act of April 4, 1901, P.L. 65, No. 32, § 1, amending it, to secure a private road.

[3][4] Appellants' third and fourth objections may be considered together since they each assert a right to a jury trial to determine (a) damages and (b) necessity. Insofar as damages are concerned, appellants have filed an appeal in the Court of Common Pleas of Allegheny County at No. 3408 July Term, 1963. No right of appeal is to be found in the Act of June 13, 1836. It provides in § 16, 36 P.S. § 2736,

'The damages sustained by the owners of the land through which any private road may pass shall be estimated in the manner provided in the case of a public road, and shall be paid by the persons, * * * at whose request the road was granted or laid out: Provided, That no such road shall be opened before the damages shall be fully paid.' In Durnall's Road, 32 Pa. 383 (1859), this section was interpreted to mean the law as to procedure in the case of public roads as it existed at the time of the proceeding and not as it existed under the Act of June 13, 1836; the damages were reviewed in that case under a certiorari to the Quarter Sessions Court, to which the petition for a private road had been presented. Thereafter, in *557 1874^{FN1} and in 1891^{FN2} the Legislature provided for appeals to the common pleas courts, with provisions for a jury trial, 'Whenever any report of viewers, appointed by any court of quarter sessions to assess damages for the opening, widening or change of grade for any street, road or highway, shall be confirmed by the court of quarter sessions * * *.' In Vernon Park, Philadelphia's Appeal, 163 Pa. 70, 29 A. 972 (1894), this act was construed to apply whenever a statute provided that the procedure used in street cases should be used in other similar proceedings. It was a quarter sessions court proceeding to establish a park in that case. We believe the same construction should be adopted in the present case of a private road. Such an appeal is not an exclusive remedy but is concurrent with appellants' right to file exceptions to the quarter sessions court proceeding. Bowers v. Braddock Borough, 172 Pa. 596, 33 A. 759 (1896). The present Borough Code in its provision relating to the opening of streets provides a similar procedure, which includes the right of appeal and trial by jury, although it transfers the proceedings to the courts of common pleas. Act of May 4, 1927, P.L. 519, Art. XV, § 1503, as amended, 53 P.S. § 46503.

FN1. Act of June 13, 1874, P.L. 283, § 1, 26 P.S. § 61.

FN2. Act of May 27, 1891, P.L. 116, No. 102, § 1, 53 P.S. § 1679.

[5][6][7] The right of a jury trial to determine the necessity for a private road is not given by the statutes. We note that appellants did not assert that right until the reargument of their exceptions to the report of the viewers. In *Little Appeal*, 180 Pa.Super. 555, 558, 119 A.2d 587, 589 (1956), we said, 'The Act provides for this Board to determine the necessity of the road, Sections 2, 11, 12 of the Act, 36 P.S. §§ 1785, 2731, 2732, and ordinarily this is a factual matter to be determined by actually viewing the premises and if necessary, by holding hearings.' We said *558 also, 'Appellate review of these matters is solely to ascertain the validity of the court's jurisdiction, the regularity of the proceedings, questions of law, and whether there has been an abuse of discretion. We cannot look beyond the record (the record here contains no testimony) or consider questions of fact.' Viewers appointed by the court under the road laws constitute an independent tribunal set up by the law. Although their findings are subject to review and may be set aside, their authority should not be infringed on by the substitution of the judgment of the court for that of the viewers. The review by the court is limited **888 to confirmation of the report of the viewers or rejection of it and the direction of a review. *Complanter Township Road (No. 1)*, 26 Pa.Super. 20 (1904); *In re: Private Road in West Providence*, 101 Pa.Super. 9 (1930). The lower court dismissed the exceptions to the report and confirmed it. We conclude that there was no error in its action. The proceedings were regular and there was no abuse of discretion apparent.

Appellants do not allege violation of any constitutional rights. Article 1, § 6, of the Pennsylvania Constitution of 1874, P.S. provides, 'Trial by jury shall be as heretofore, and the right thereof remain inviolate'; but appellants do not attempt to show the existence of such right prior to the adoption of the Constitution. Article 16, § 8, providing for a jury trial 'on the demand of either party' in the determination of damages in cases of condemnation of private property was not violated, as previously discussed herein.

Appellants' last objection relates to the court's failure to determine the question of necessity. This has been discussed in the previous paragraphs. It was for the board to determine that fact.

We find no merit in this appeal. The order of the lower court is affirmed.

RHODES, P. J., absent.
PA.Super. 1965

In re Private Road in Monroeville Borough, Allegheny County
204 Pa.Super. 552, 205 A.2d 885

END OF DOCUMENT

H

Court of Appeals of Georgia.

PIERCE

v.

WISE et al.

No. A06A1154.

Nov. 9, 2006.

Reconsideration Denied Dec. 5, 2006.

Certiorari Denied April 24, 2007.

Background: Landowner brought petition seeking condemnation of a private way of necessity over adjacent property owners' lands, and also sought damages based on various theories, including intentional infliction of emotional distress. The Superior Court, Forsyth County, David L. Dickinson, J., denied the parties' cross-motions for summary judgment and, after a jury trial, granted adjacent property owners' motion for directed verdict on the emotional distress claim and entered judgment on jury verdict against landowner on his petition for condemnation. Landowner appealed.

Holdings: The Court of Appeals, Phipps, J., held that:

- (1) landowner was entitled to condemnation of a private way of necessity to provide ingress and egress to his property, and
- (2) evidence was insufficient to support landowner's claim of intentional infliction of emotional distress.

Affirmed in part, and reversed in part.

West Headnotes

[1] Easements 141  **18(6)**

141 Easements

141I Creation, Existence, and Termination

141k15 Implication

141k18 Ways of Necessity

141k18(6) k. Access by Waterway.

Most Cited Cases

Landowner was entitled to condemnation of a private way of necessity over adjacent property owners' properties to provide landowner ingress and egress to his property, which, although accessible by water, provided no reasonable means of vehicular access; landowner did not create the lack of access himself, there was no other, less convenient, means of gaining access to the property, and the adjacent property owners would not be inconvenienced by the condemnation. West's Ga.Code Ann. § 44-9-40(b).

[2] Damages 115  **57.25(1)**

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)2 Mental Suffering and Emotional Distress

115k57.19 Intentional or Reckless Infliction of Emotional Distress; Outrage

115k57.25 Particular Cases

115k57.25(1) k. In General.

Most Cited Cases

Damages 115  **57.39**

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)2 Mental Suffering and Emotional Distress

115k57.36 Injury to Property or Property Rights

115k57.39 k. Other Particular

Cases. Most Cited Cases

Evidence was insufficient to support landowner's claim of intentional infliction of severe emotional distress against adjacent property owner, in

landowner's action seeking condemnation of a private way of necessity over property owner's land, even though property owner uttered a racial epithet in referring to landowner, swore out trespass warrants against landowner, and allegedly vandalized landowner's property; there was no evidence that the trespass warrants were malicious, the identity of the vandal was not certain, and landowner had not sought professional help for his alleged distress beyond one visit to psychologist.

****349** Greer, Klosik, Daugherty, Swank & McCune, Frank J. Klosik, Jr., Alina A. Krivitsky, Atlanta, for appellants.

Charles D. Joyner, Buford, for appellees.

PHIPPS, Judge.

***709** Claiming that he lacks any other reasonable means of access to his property, Larry Pierce filed a petition in the Superior Court of Forsyth County for condemnation of a private way of necessity over the adjacent lands of John Kenneth Wise and Hopeful, LLC. Pierce also sought damages on various theories, including intentional infliction of emotional distress. After the trial court denied the parties' cross-motions for summary judgment on the issue of Pierce's necessity for the private way, the case proceeded to a jury trial. After the court granted Wise's motion for directed verdict on Pierce's claim of intentional infliction of emotional distress, the jury found that Pierce has a means of access to his property. Accordingly, the trial court entered judgment in favor of Wise and Hopeful on Pierce's petition. Pierce appeals. For reasons that follow, we affirm the grant of Wise's motion for directed verdict on Pierce's tort claim but reverse the entry of judgment against Pierce on his petition for condemnation of a private way of necessity.

Pierce owns a triangular 0.40-acre parcel of property located in Lot 31 of Lawson Manor Subdivision. He bought the property for ***710** \$10,000 in 2000. The adjacent Lots 30 and 32 are owned by Wise and Hopeful, respectively. According to

Pierce, the tip of his triangular parcel touches the adjacent public roadway, Lawson Drive, at a point so narrow that it does not permit him to access the roadway without traversing either Wise's property on the one side or Hopeful's property on the other. According to Pierce, the base of the triangle gives him approximately "100 foot coverage of waterfront on Lake Lanier."

Following his purchase, the United States Army Corps of Engineers allowed Pierce to build a boat dock in Lake Lanier, thereby giving Pierce access to his property via the waterway. In addition, Wise orally gave Pierce permission to cross over Wise's Lot 30 to gain access to Pierce's Lot 31 via Lawson Drive. Subsequently, however, Wise and Hopeful sent Pierce letters instructing him to cease and desist from gaining access to his property from Lawson Drive over their properties.

Evidence was presented showing that Pierce currently accesses his property by land by parking at the end of Lawson Drive and walking about 650 to 700 feet along the shore of Lake Lanier through Army Corps of Engineers property down a path that is between four and ten feet wide depending on the height of the lake water. As a member of the public, Pierce may use this pathway and remove minor landscaping insofar as that obstructs his ability to traverse the pathway by foot. But he cannot construct improvements to the pathway to provide vehicular access.

Evidence sought to be admitted by Pierce showed that Wise's ex-wife's mother acquired ownership of Lots 30, 31, and 32 in 1986; that she had the property surveyed in 1993; and that Lot 30 (which had been a rectangular lot with adequate access to Lawson Drive) became a triangular-shaped lot with no usable road frontage only as a result of an error in the survey. Hopeful, through its owner Newt Anderson, subsequently acquired Lot 32 as a real estate investment in ****350** foreclosure proceedings. After purchasing the property, Anderson discovered that Lot 32 included property that he thought would have been in Lot 31. Wise acquired Lot 30 from his

ex-wife. For over 25 years, he had used the property as a lake house and then as his primary residence.

[1] 1. Pierce first contends that the trial court erred in denying his pretrial motion for partial summary judgment, as well as his motion for directed verdict at the conclusion of the presentation of evidence at trial, on the question of necessity for the private way.

OCGA § 44-9-40(b) permits any person or corporation who owns real estate in this state to file a petition in the superior court of the county having jurisdiction praying for a judgment condemning an easement of access, ingress, and egress over and across the property of another. To prove the necessity of such a private way, *711 OCGA § 44-9-40(b) requires the petitioner or condemnor to show he has no other reasonable means of access to his property, i.e., that he is landlocked.^{FN1} OCGA § 44-9-40(b) additionally authorizes the court to find that the condemnation and declaration of necessity constitute an abuse of discretion and to enjoin the proceeding based on a finding that the exercise of such right of condemnation by the condemnor is “otherwise unreasonable.”^{FN2}

FN1. *Intl. Paper Realty Corp. v. Miller*, 255 Ga. 676, 677, 341 S.E.2d 445 (1986).

FN2. *Mersac, Inc. v. Nat. Hills Condo. Assn.*, 267 Ga. 493, 494(1), 480 S.E.2d 16 (1997); see *Blount v. Chambers*, 257 Ga.App. 663, 572 S.E.2d 32 (2002).

Intl. Paper Realty Corp. v. Miller^{FN3} addressed the issue of whether, under the statute, navigable waters alone may afford a person “reasonable” access to his property. *Miller* held that in this day and age, a navigable stream is seldom considered a reasonable way to travel to and from one’s property. Accordingly, *Miller* decided to treat property to which there is no access other than by navigable waterway as property to which there is presumptively no reasonable means of access for purposes of proving

necessity under OCGA § 44-9-40(b).

FN3. *Supra*.

Thus where the condemnor establishes that the only access to his property is by way of navigable waters, he has established a prima facie case that he has no reasonable means of access under OCGA § 44-9-40(b). The burden then shifts to the condemnee to go forward with the evidence and demonstrate that access to the navigable waters constitutes a reasonable means of access under the peculiar circumstances of the case.^{FN4}

FN4. 255 Ga. at 677-678, 341 S.E.2d 445.

Mersac, Inc. v. Nat. Hills Condo. Assn.^{FN5} held that where a property owner landlocks himself voluntarily or as a result of negligence in selling off surrounding property and failing to reserve an easement, condemnation of a private way of necessity over lands of another may be found to be “otherwise unreasonable” under OCGA § 44-9-40(b). *Blount v. Chambers*^{FN6} found declaration of a private way unreasonable where the petitioners had other, albeit more inconvenient, means of access to their property and condemnation of the private way would have greatly inconvenienced the condemnees.

FN5. *Supra*.

FN6. *Supra*.

Clearly, Pierce has no vehicular access to his property; his pedestrian access by land either is extremely cumbersome and inconvenient via the Lake Lanier shoreline or is limited to no more than *712 a two-foot gap between his lot and one of the adjacent lots along Lawson Drive; and his only remaining access is by the navigable waters of Lake Lanier. Unlike the petitioner in *Mersac*, Pierce did not landlock himself either voluntarily or negligently by failing to reserve an easement. Property owners’ “actions in voluntarily creating their hardship are distinguishable from cases [such as this] wherein the landowner purchases property with knowledge

~~that it is landlocked. In such a case, the purchaser's knowledge does not preclude a finding of 'strict necessity,' ..."~~^{FN7} **351 The law of this state gives a property owner the right to condemn an easement over his neighbors' property if he needs that land as a means of ingress and egress to his property and if condemnation of the easement would not unreasonably inconvenience them. Unquestionably, Pierce needs the easement to provide vehicular access to his property. And, unlike in *Blount*, no undue inconvenience to the condemnees appears. In fact, evidence proffered by Pierce shows that all three lots were previously rectangularly shaped, but became irregularly reconfigured so as to deny his tract adequate access to Lawson Drive only as a result of a surveying error. Grant of the private way would simply restore his property's prior access. The trial court thus erred in denying Pierce's motions for partial summary judgment and directed verdict.

FN7. *Graff v. Scanlan*, 673 A.2d 1028, 1035, n. 12 (Pa.Comm. Ct. 1996) (citation omitted).

[2] 2. Pierce also contends that the trial court erred in granting Wise's motion for directed verdict on his claim of intentional infliction of emotional distress.

The evidence showed an acrimonious relationship between Pierce and Wise. Wise initially allowed Pierce to drive across his property but then revoked his permission and tried to buy Pierce's property for the \$10,000 Pierce had paid. Pierce claims that, as a result of his refusal to sell the property, Wise embarked on a harassment campaign against him which included swearing out trespassing warrants against him and vandalizing his property. Pierce also presented evidence that during heated arguments between the two of them in the presence of a law enforcement officer Wise had taunted Pierce with racial epithets. A vile and obscene writing was also burned into the grass on Pierce's property, and his boat dock was vandalized. According to Pierce, the foregoing events caused him to become extremely depressed and seek psychological counsel-

ing.

"To prevail on a claim for intentional infliction of emotional distress, [Pierce] must demonstrate the following: (a) the conduct giving rise to the claim was intentional or reckless, (b) the conduct *713 was extreme and outrageous, (c) the conduct caused the emotional distress, and (d) the emotional distress was severe."^{FN8}

FN8. *Ashman v. Marshall's of MA*, 244 Ga.App. 228, 229(1), 535 S.E.2d 265 (2000) (footnote omitted).

Actionable conduct does not include insults, threats, indignities, annoyances, petty oppressions, or other vicissitudes of daily living but must go beyond all reasonable bounds of decency so as to be regarded as atrocious and utterly intolerable in a civilized community. Factors include the existence of a relationship in which one person has control over another, the actor's awareness of the victim's particular susceptibility, and the severity of the resultant harm.^{FN9}

FN9. *Id.* at 229-230, 535 S.E.2d 265 (footnotes omitted).

Whether a claim rises to the requisite level of outrageousness and egregiousness to sustain a claim for intentional infliction of emotional distress is a question of law. If the evidence shows that reasonable persons might find the presence of extreme and outrageous conduct and resulting severe emotional distress, the jury then must find the facts and make its own determination.^{FN10}

FN10. *Yarbray v. Southern Bell Tel. etc., Co.*, 261 Ga. 703, 706(2), 409 S.E.2d 835 (1991) (citations omitted).

The trial court did not err in finding Pierce's claim of intentional infliction of emotional distress unsustainable as a matter of law. Pierce presented insufficient evidence to support findings either that Wise's swearing out of trespassing warrants against him

had been malicious or that Wise had been the one who had vandalized his property or written the obscenity. There is evidence that on one occasion Wise had uttered a vituperative racial epithet in referring to Pierce. Under the circumstances, and in the context made, however, it cannot be said that the natural result of utterance of the words was the causation of mental suffering so serious as to give rise to a claim for intentional infliction of emotional distress.^{FN11} And notwithstanding **352 Pierce's claim of severe emotional distress, he testified that he had not sought any professional treatment except for one visit to a psychologist; his testimony was unclear whether his emotional state had adversely impacted his ability to work or had motivated him to work; and he gave further testimony to the effect that, although he had lost about 20 pounds, he was happy about the weight loss. Taking *714 all of these factors into consideration, the trial court did not err in granting Wise's motion for directed verdict on Pierce's claim of intentional infliction of emotional distress.

FN11. Compare *Tuggle v. Wilson*, 248 Ga. 335, 337(2), 282 S.E.2d 110 (1981) (where Mr. Tuggle made obscene comments to Mrs. Wilson over the telephone).

3. Pierce's remaining claims of error are moot.

Judgment affirmed in part and reversed in part.

RUFFIN, C.J., and SMITH, P.J., concur.

Ga.App.,2006.

Pierce v. Wise

282 Ga.App. 709, 639 S.E.2d 348

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Commonwealth Court of Pennsylvania.

Caroline J. REBER

v.

Henry M. TSCHUDY and Edna R. Tschudy, his
wife, John B. Slipp and Erma E.Slipp, his wife, and Bank of Pennsylvania, Execut-
or of the Estate of Lloyd L.

Cramp,

Appeal of Henry M. TSCHUDY and Edna R.

Tschudy.

Argued March 31, 2003.

Decided May 15, 2003.

Neighbors sought judicial review of a decision by board of view allowing landowner to widen private road over neighbors' land. The Court of Common Pleas, Berks County, No. 98-13682, Stallone, J., affirmed, and neighbors appealed. The Commonwealth Court, No. 2397 C.D. 2002, Friedman, J., held that: (1) widening road was not barred by res judicata, collateral estoppel, or waiver; (2) owner did not create unsafe condition of road; and (3) board of view acted within its discretion in allowing widening.

Affirmed.

KELLY, Senior Judge, concurs in the result only.

West Headnotes

[1] Private Roads ¶2(5)

311k2(5) Most Cited Cases

Appellate review of a trial court's decision regarding a board of view's opening of a private road is limited to ascertaining the validity of the court's jurisdiction, the regularity of the proceedings, questions of law, and whether there has been an abuse of discretion.

[2] Judgment ¶747(.5)

228k747(.5) Most Cited Cases

Landowner's petition for appointment of board of

view for widening private road on neighbor's property was not barred by previous petition to establish road, under doctrines of res judicata, collateral estoppel, or waiver; in prior action, landowner had no opportunity to litigate necessity for wider road under changed circumstances.

[3] Judgment ¶540

228k540 Most Cited Cases

For res judicata to apply to bar an action, there must be: (1) identity of issues, (2) identity of causes of action, (3) identity of persons and parties to the action, and (4) identity of the quality or the capacity of parties suing or sued.

[4] Judgment ¶713(1)

228k713(1) Most Cited Cases

"Collateral estoppel," or issue preclusion, is a doctrine which prevents re-litigation of an issue in a later action, despite the fact that it is based on a cause of action different from the one previously litigated.

[5] Judgment ¶634

228k634 Most Cited Cases

The doctrine of collateral estoppel applies when: (1) the issue decided in the prior case is identical to the one presented in the later case, (2) there was a final judgment on the merits, (3) the party against whom the doctrine is asserted was a party, or in privity with a party, in the prior case, and had a full and fair opportunity to litigate the issue in question, and (4) the determination in the prior proceeding was essential to the judgment.

[6] Private Roads ¶3

311k3 Most Cited Cases

Landowner who established private road over neighbors' property did not cause unsafe condition of road due to flooding, and thus, owner was entitled to widen road; hardship was caused by design flaw, not improper maintenance, and owner still needed access to public highway.

[7] Private Roads 3

311k3 Most Cited Cases

Board of view did not abuse its discretion approving widening of landowner's private road across neighbors' property, although neighbors proposed alternative plan; location of road was entirely in the control of board. 36 P.S. § 1785.

[8] Private Roads 2(4)

311k2(4) Most Cited Cases

In laying out a private road under private roads act, the location of the road is entirely within the discretion of the board of view. 36 P.S. § 1785.

***379** Christopher J. Hartman, Reading, for appellant.

Walter M. Diener, Jr., Wyomissing, for appellee.

Before: PELLEGRINI, Judge, FRIEDMAN, Judge, and KELLEY, Senior Judge.

OPINION BY Judge FRIEDMAN.

Henry M. Tschudy and Edna R. Tschudy, his wife, (together, the Tschudys) appeal from an order of the Court of Common Pleas of Berks County (trial court) confirming the report and supplemental report of a board of view that granted Caroline Reber's (Reber) request to widen an existing private road across the Tschudys' property from fourteen feet to twenty-five feet and denying the Tschudys' exceptions to the reports.

Reber owns a thirteen-acre tract of undeveloped land located in Robeson Township. On August 18, 1980, Reber filed a Petition for Appointment of a Private Road Board of View (First Petition) pursuant to section 11 of the Act of June 13, 1836, P.L. 551, *as amended* (Act), [FN1] 36 P.S. § 2731, seeking appointment of a board of view to determine the necessity of laying out a private road that would allow her ingress to and egress from her landlocked property onto Pennsylvania State Highway Route 82. The private road would cross over the lands of four owners, including the Tschudys. [FN2] On July 27, 1981, following a view of the premises and

hearings on the ***380** matter, the board of view issued a written report finding that a private road was necessary and that its width should be fourteen feet, as recommended by a professional surveyor. The board of view's report was confirmed nisi on the same date, and, after resolution of several legal issues, the trial court entered final judgment on the award of just compensation to the affected property owners on July 17, 1989.

FN1. That section of the Act provides, in relevant part:

The several courts of quarter sessions shall, in open court as aforesaid, upon the petition of one or more persons ... for a road from their respective lands ... to a highway ... direct a view to be had of the place where such road is requested, and a report thereof to be made....

36 P.S. § 2731.

FN2. The private road also crossed over lands then owned by Joseph and Lottie Detorre, Clara Wolfe and John and Erma Slipp. The land owned by the Detorres is now owned by the Tschudys, and the land owned by Wolfe is now owned by the Bank of Pennsylvania as executor of the estate of Lloyd Cramp. None of the other affected landowners oppose Rebers' widening of the private road, and they are not parties to this appeal.

In 1990, Reber began construction of a dirt road by excavating through stakes placed by a surveyor; at the road's steepest grade, Reber also installed two drainage pipes to retard stormwater flow. Since then, Reber has used this road to access her still unimproved property, and on two occasions, the road was used by logging trucks that were timbering Reber's property. However, over time, the roadway has eroded and become deeply rutted along its entire length of 1,680 feet, making it unusable by conventional automobile. [FN3]

FN3. Although four-wheel drive vehicles

can navigate the road, it is not without risk to the vehicle's undercarriage and suspension. Moreover, the narrow width of the road prevents vehicles from passing on the road.

On December 22, 1998, Reber filed a second Petition for Appointment of a Private Road Board of View (Second Petition) under section 11 of the Act, 36 P.S. § 2731; this time Reber sought appointment of another board of view to determine the necessity of widening the existing private road from fourteen feet to twenty-five feet, which is the maximum width allowable under the Act. *See* section 5 of the Act, 36 P.S. § 1901. Reber claimed that the widening is necessary because stormwater has caused ruts and gullies in the road making it unsafe for travel. In accordance with the recommendations of her engineer, Reber proposed adding five and one half feet on each side of the existing road to allow for the installation of swales, additional pipes and/or storm drains, and for the regrading of banks to remedy the problem and make the road usable. The Tschudys objected to Reber's Second Petition.

Relying on *In re Private Road of Brubaker v. Ruhl*, 23 Pa.Cmwlth. 418, 352 A.2d 566 (1976), the trial court determined as a threshold issue that it had jurisdiction under the Act to appoint a board of view for the Second Petition, even though that board of view would be considering the necessity of *widening* an existing private road, as opposed to *opening* a new private road. After establishing that it had authority to do so, the trial court appointed a board of view and directed the board to conduct a view of the property, hold appropriate hearings and file a written report on whether the proposed widening of the road was necessary to achieve the objectives sought by Reber. [FN4]

FN4. The trial court appointed the board of view on December 29, 1998. On January 25, 1999, the Tschudys filed preliminary objections to the Second Petition and sought to vacate the order appointing a board of view. On February 8, 1999, the

trial court overruled the preliminary objections, but it granted the motion to vacate the order and issued a separate order for the Tschudys to show cause why Reber's Second Petition should not be granted. On December 20, 1999, following the parties' submission of depositions and briefs, the trial court again granted the Second Petition and appointed the board of view. On April 24, 2000, this court denied the Tschudys' request to appeal the trial court's December 20, 1999, order.

***381** Based on its site view and the evidence adduced at the hearings, the board of view issued its report, dated August 23, 2001, and found, *inter alia*: (1) the entire length of the fourteen-foot private road from Reber's property to Route 82 was extremely dangerous because of its surface conditions and, thus, was not adequate; (2) the road's present width must be expanded to twenty-five feet so that erosion can be controlled through the installation of additional drainage pipes and/or storm drains and through the construction and modification of swales and banks; and (3) Reber's objectives cannot be achieved by paving alone and, instead, require performance of all or part of the foregoing findings. Accordingly, based upon absolute necessity, the board of view granted Reber's request to widen the fourteen-foot roadway to twenty-five feet. (*See* Tschudys' brief at Appendix "B.")

On September 21, 2001, the Tschudys filed exceptions to the report, and, after argument, the trial court remanded the case back to the board of view to give the board an opportunity to review the hearing transcripts and reconsider the necessity of widening the road. Following that review, the board of view issued its supplemental report, dated July 13, 2002, in which the board further found, *inter alia*: (1) it is not possible to successfully maintain the existing fourteen-foot road due to steep side slopes on both sides of the road within the first 200 feet and due to varying grades throughout the remaining 1400 feet; (2) the road's present width will

not accommodate correction of the existing physical limitations; (3) the plan proposed by the Tschudys' expert witness is not a satisfactory solution to the problems that presently exist; and (4) it is absolutely necessary to provide areas for the passing of vehicles and emergency vehicles, which can be accomplished only by widening the right-of-way to twenty-five feet. Accordingly, the board of view reaffirmed its prior findings and conclusions. (See Tschudys' brief at Appendix "C.")

[1] The Tschudys resubmitted their exceptions to the board of view's report and supplemental report, and further argument was held. On September 26, 2002, the trial court issued its decree nisi denying the Tschudys' exceptions and confirming absolutely the report and supplemental report of the board of view. The Tschudys now appeal to this court. [FN5]

FN5. Appellate review of a trial court's decision regarding a board of view's opening of a private road is limited to ascertaining the validity of the court's jurisdiction, the regularity of the proceedings, questions of law and whether there has been an abuse of discretion. *In re Private Road in East Rockhill Township*, 165 Pa.Cmwlt. 240, 645 A.2d 313 (1994), *appeal denied*, 539 Pa. 698, 653 A.2d 1235 (1994).

Jurisdiction

[2] Initially, the Tschudys argue that the trial court lacked subject matter jurisdiction over Reber's Second Petition. The Tschudys reason that the issues of the location and dimensions of the private road were specifically raised, fully litigated and finally adjudicated in connection with the parties' litigation on the road's opening under the Act, as a result of which Reber obtained permission to open a fourteen-foot wide private road connecting her property with Route 82. Therefore, the Tschudys contend that Reber's subsequent action to widen the road is barred under the doctrines of res judicata, collateral estoppel and waiver.

[3] As to res judicata, the Tschudys maintain that it

is of no relevance or distinction that the Second Petition seeks relief under the Act to widen, as opposed to open, the road. The Tschudys remind us *382 that, as in the First Petition, Reber's Second Petition relies on section 11 of the Act to afford access to her land through properties owned by the Tschudys. Because the parties in the present action are the same or in privity with those parties subject to the prior litigation, and because the capacity of the parties in both actions is identical, the Tschudys assert that all of the requisite elements of res judicata have been met. [FN6]

FN6. For res judicata to apply to bar an action, there must be a concurrence of four conditions: (1) identity of issues; (2) identity of causes of action; (3) identity of persons and parties to the action; and (4) identity of the quality or the capacity of parties suing or sued. *Ham v. Sulek*, 422 Pa.Super. 615, 620 A.2d 5 (1993).

[4][5] Similarly, the Tschudys contend that collateral estoppel bars Reber's action under the Second Petition. The Tschudys maintain that because the issue of the width of the private road was fully litigated and finally decided in the 1980 action on the First Petition, Reber cannot re-litigate the parameters of that existing road in a second action. [FN7]

FN7. Collateral estoppel, or issue preclusion, is a doctrine which prevents re-litigation of an issue in a later action, despite the fact that it is based on a cause of action different from the one previously litigated. The doctrine applies when: (1) the issue decided in the prior case is identical to the one presented in the later case; (2) there was a final judgment on the merits; (3) the party against whom the doctrine is asserted was a party, or in privity with a party, in the prior case and had a full and fair opportunity to litigate the issue in question; and (4) the determination in the prior proceeding was essential to the judgment. *Consolidation Coal Co. v.*

Workers' Compensation Appeal Board (Dues), 726 A.2d 435 (Pa.Cmwlt.1999).

The Tschudys also maintain that the doctrine of waiver applies here. The Tschudys note that Reber could have sought a twenty-five foot wide road in the First Petition but, instead, requested a fourteen-foot wide road, which is exactly what she received. The Tschudys argue that because Reber accepted that decision without filing any appeal and, in fact, subsequently installed the fourteen-foot wide road without ever challenging the sufficiency of that width, Reber has waived any right to revisit the issue and now claim the need for a twenty-five foot wide road.

In fact, the Tschudys contend that there is no such need and that the existing fourteen-foot wide road still is adequate as a matter of law. The Tschudys point out that, while Reber may have future plans for her property, the property currently remains undeveloped, and, as recently as 2000, the property could be accessed by vehicles with four-wheel drive. Relying on *Application of Little*, 180 Pa.Super. 555, 119 A.2d 587 (1956), for the proposition that the necessity for a private road must be determined on the basis of *present*, rather than contemplated, use of property, the Tschudys claim that, under circumstances as they now exist, Reber cannot establish the *present* need for a wider road.

Contrary to the Tschudys' claim, there is a relevant distinction between the First Petition, in which Reber seeks to *open* a private road under the Act, and the Second Petition, through which she seeks to *widen* the road previously opened. The determination of necessity involves the consideration of different factors in each case. Indeed, the engineering and safety issues addressed in the Second Petition arose only after the original fourteen-foot wide road was constructed and made the need for a wider road evident. In the prior action, Reber had no opportunity to litigate the need for a twenty-five foot road under these changed circumstances, and *383 the original board of view did not adjudicate, or even consider, that question. Therefore, Reber's action is

not barred by *res judicata*, collateral estoppel or the doctrine of waiver. See *Stoneback v. Zoning Hearing Board of Upper Saucon Township*, 699 A.2d 824 (Pa.Cmwlt.1997), *appeal denied*, 552 Pa. 698, 716 A.2d 1250 (1998) (stating that *res judicata* and collateral estoppel will not bar a subsequent zoning application where there has been a substantial change in the condition or circumstances of the land itself after the initial zoning application was denied).

Moreover, *Application of Little* does not defeat Reber's Second Petition. In that case, the board of view found that the landowner seeking to open a private road already had a sufficient and convenient road for the present use of her land, and this finding was not challenged. Instead, the landowner sought to appropriate another's land for an additional road that would provide more direct access to the highway and make it more convenient to proceed with plans for commercial development of the property. By contrast, Reber does not allege that the present road merely is less convenient to use than it might be, and she does not seek to add a second, alternative route even though a road suited to her needs already exists. Rather, Reber finds herself effectively landlocked again because her only road is not suitable or safe in its present condition to afford her with ingress to and egress from her land. Reber, therefore, seeks to widen the existing road, hoping to use the extra width to install features that will make that road usable once more. See *Lobdell v. Leichtenberger*, 442 Pa.Super. 21, 658 A.2d 399 (1995) (stating that, while mere inconvenience in the use of an existing road is not enough, a road of limited privilege, that is extremely difficult and burdensome in its use, warrants the appropriation of another more convenient course.)

Alternatively, the Tschudys assert that the plain language of the Act precluded the trial court from assuming subject matter jurisdiction over Reber's Second Petition. According to the Tschudys, application of the Act is limited to *opening* a private road where none previously existed so that there

might be ingress to and egress from landlocked parcels. The Tschudys argue that the Act simply does not confer any authority on a trial court to appoint a board of view to *widen* a private road previously created by invocation of the Act. Thus, the Tschudys reason that, having utilized the Act to open a private road connecting her property to a public roadway, Reber cannot return and use the same section of the Act to alter that road so that it is more to her liking. Moreover, the Tschudys reject the trial court's determination that *Brubaker* offers support for Reber's position that the trial court has jurisdiction under the Act to appoint a board of view to consider the necessity of widening an existing private road. Again, we disagree with the Tschudys' argument.

Although the language of section 11 of the Act, 36 P.S. § 2731, does not mention the right to widen an existing private road, [FN8] there is nothing in the Act that precludes such action, and it only makes sense to allow it. In fact, although the Tschudys argue that Reber cannot petition to widen an existing road, they appear to ignore the fact that, by alleging that the present road was eroded to the point that its continued use was difficult and dangerous, Reber has made allegations sufficient *384 to warrant appointment of a board of view to determine the necessity of opening an entirely new private road. *See Lobdell; Application of Little*. As Reber points out, if she were forced to pursue this remedy, it likely would result in more damage to the Tschudys' property than simply widening the existing road.

FN8. We note, however, that in the listing of cross references for the Act, there is reference to section 1 of the Act of May 3, 1855, P.L. 422, 36 P.S. § 1989, which provides authority for the alteration or change of partly opened roads, including private roads.

Further, a trial court's authority under the Act to appoint a board of view to widen an existing private road arguably was recognized by implication in *Brubaker*, a case which dealt with, and granted, a

petition to widen a private road previously opened under the Act. The Tschudys correctly point out that there are important factual distinctions between *Brubaker* and the present case; nevertheless, we see no real reason why *Brubaker* cannot be used as additional support for the trial court to accept jurisdiction here, particularly where there is no contrary authority. [FN9]

FN9. In *Brubaker*, a private road, leading from a farm to a public road, had been established in 1841; although the order was silent as to the width of the private road, it was constructed with a width of thirteen feet. In 1970, 129 years later, the current owners of the farm petitioned for appointment of a board of view; alleging that the road was too narrow to accommodate modern vehicles and farm machinery, they sought to widen the road to twenty-five feet. After being appointed, the board filed a report concluding that the present width of the road was inadequate for modern farm machinery usage and recommended the proposed expansion. The common pleas court confirmed that report, and, following an appeal by the owners of a parcel abutting the private road, this court affirmed.

The Tschudys contend that the trial court's reliance on *Brubaker* is not warranted because, in the present case, Reber herself specifically requested, and received, a fourteen-foot wide road only twenty-one years earlier. Moreover, the modern trend in the last twelve years since the road was opened has been to produce smaller, not larger, vehicles. Finally, the Tschudys correctly note that the issue of whether a private road could be widened after it was opened was never raised or considered in *Brubaker*. Notwithstanding these distinctions, *Brubaker* arguably could be interpreted broadly to allow for altering an existing private road that, over time, has

proved unable to effectively provide ingress to and egress from the landlocked property it purports to serve. In fact, in *Brubaker*, we cite to section 8 of the Act of May 8, 1950 P.L. 713, *as amended*, 36 P.S. § 1988, which specifically grants courts the power to widen public roads, and we apply that section to the widening of a private road. *Brubaker*, 352 A.2d at 567 n. 2.

Self-created hardship

[6] Assuming that Reber could overcome these jurisdictional bars to her case, the Tschudys next argue that the trial court erred in confirming the board of view's determination that the poor condition of the existing private road was due to its inadequate width, thereby necessitating the widening of the road to twenty-five feet. The Tschudys contend that the source of any difficulty with the road actually lay with Reber herself. The Tschudys maintain that Reber created her own hardship, beginning with the flawed design and construction of the original fourteen-foot wide road and continuing with her failure to undertake reasonable maintenance of that road. [FN10] The Tschudys analogize this *385 case to *Graff v. Scanlan*, 673 A.2d 1028 (Pa.Cmwlth.1996), in which this court held that a self-created landlock defeated a finding of strict necessity under the Act, and the Tschudys assert that, because Reber never did anything to prevent or mitigate her problems with the road, she should not now be permitted to remedy her own failings by increasing the width of the road at another's expense. Although we understand the Tschudys' frustration, we cannot accept their position.

FN10. Section 15 of the Act requires that all private roads shall be opened, fenced and kept in repair by and at the expense of the person or persons at whose request they were granted and laid out. 36 P.S. § 2735. The Tschudys contend that Reber failed to consult with a professional engineer or seek the advice of an expert con-

cerning erosion control or water runoff before beginning road construction; instead, she simply allowed an excavator to dig up the property within the stakes set by the surveyor. Further, the Tschudys assert that Reber's only attempt at maintenance was to install gravel which, once it washed away, was not replaced; in fact, Reber made no effort to regrade or pave the road surface even after deep ruts developed when heavy logging equipment used the road.

In dealing with this argument, the trial court considered the holding in *Graff* and acknowledged the role Reber's poor maintenance played in creating the problems with the existing road. However, the trial court focused on the fact that, whatever the cause, there was no question that the condition of the road made it extremely dangerous and virtually impassable for its entire length, thereby failing to satisfy the very reason for its existence, i.e., necessity. The trial court then reasoned as follows.

In considering the testimony of the engineers, it appears that the primary cause of the problem was poor design and construction when the private road was first created. While it does appear that Reber did not endeavor to maintain the road, she, nevertheless, would have been fighting a losing battle because the lack of the existence of swales, properly sloped banks, and sufficient piping would have resulted in the storm water runoff and erosion overcoming her maintenance efforts. The road, when constructed in 1990, should have included these important design features to prevent the road from becoming impassable.

The fact that the cause was due to faulty design and construction, not maintenance, means that Reber did not create the necessity to widen the roadway. That necessity always existed, and Reber simply did not sufficiently address the problem in 1990, or for that matter, when she first petitioned the Board of Viewers, for she apparently should have, at that time, requested a roadway wider than fourteen feet (14'). The expansion she

seeks simply addresses the necessity as it always existed.

(Trial ct. op. at 19-20.)

In other words, in spite of any failings on Reber's part, the trial court did not think it appropriate to leave Reber completely unable to access her property merely because she asked for something less than adequate to do the job when she first sought that access. We approve and adopt this analysis of the issue. Moreover, in spite of the Tschudys' attempt to analogize *Graff*, we believe that it defeats the purposes of the Act to extend *Graff* to the present situation so as to keep Reber completely landlocked and render her property useless to her. [FN11] As Senior Judge Silvestri *386 said in his dissent in *Graff*, "to hold otherwise ... is illogical, absurd and purely punitive since subsequent purchasers with knowledge of the landlocked situation can obtain relief under the Act." *Id.* at 1039.

FN11. In *Graff*, we considered whether a self-created landlock defeats a finding of necessity under the Act as an issue of first impression. In that case, the landowner of nine lots systematically conveyed lots 1-8, all of which had access to a public roadway. Because he sold the lots without reserving an express easement over any of them, he deprived lot 9 of any access to a public road, a situation *wholly* created by his own *voluntary* act. Importantly, the court recognized that, because lot 9 could not be used otherwise, an easement by necessity arose at the time lot 8 was sold. However, in addition, the landowner sought to open a private road under the Act. This the court would not allow, holding 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.**" *Id.* at 1033 (emphasis in original). As support for the decision, the

court cited a Louisiana case, which subsequently was limited to its facts. "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." *Id.* at 1034 (emphasis in original). Although *Graff* repeated these facts, the case now before us does not, and, like the case upon which *Graff* relied, we believe that *Graff* should be limited to its facts.

Alternative plan

[7] Finally, the Tschudys argue that the trial court abused its discretion in confirming the board of view's reports because, contrary to the board of view's determination, it was not absolutely necessary to widen the existing roadway to twenty-five feet along its entire length in order to address drainage, erosion and safety issues. The Tschudys claim that their expert presented a plan addressing all of Reber's concerns and offering a solution to those problems with a less invasive impact on the Tschudys. [FN12] They point to section 2 of the Act, 36 P.S. § 1785, which requires a board of view to consider the following in laying out a private road: (1) the shortest distance; (2) the best ground; (3) *the manner that would do the least injury to private property*; and (4) as far as practicable, agreeable to the desire of the petitioners.

FN12. The Tschudys suggest that the board of view could have granted easements only in areas where absolutely necessary to resolve the slope stabilization and drainage problems, without letting Reber expand the previously adjudicated easement by eleven feet along the entire road. As to safety concerns, the Tschudys' plan also calls for one strategically placed pull off area so that vehicles could pass each other. The

Tschudys seem to say that these easements should be granted under the Eminent Domain Code (Code). However, although proceedings under the Act are in the nature of eminent domain proceedings, the provisions of the Code do not apply to the opening of a private road, and a board of view may not grant expansion of a private road easement under the Code, as proposed by the Tschudys. *See In re Forrester*, 773 A.2d 219 (Pa.Cmwlt.2001).

[8] Understandably, the Tschudys focus on the third of these considerations; however, it is only one of four that a board of view must take into account. In laying out a private road under the Act, the location of the road is entirely within the discretion of the board of view. *Holtzman v. Etzweiler*, 760 A.2d 1195 (Pa.Cmwlt.2000), and this court should not disturb the board's decision absent a manifest abuse of discretion. *In re Forrester*, 773 A.2d 219 (Pa.Cmwlt.2001). Here, the board of view viewed the properties in question and held the appropriate hearings. The board considered both of the plans presented and made findings supported by competent evidence to justify its choice of plan. [FN13] We see no abuse of discretion by the board of view in accepting the plan of Reber's engineer, which proposes a uniform width of twenty-five feet for the entire road, over *387 that of the Tschudys' engineer, which also increases the road's width but utilizes varying boundaries and, at points, involves using land beyond twenty-five feet. *See In re Laying Out and Opening a Private Road*, 405 Pa.Super. 298, 592 A.2d 343 (1991) (holding that necessity for a private road exists where a parcel is landlocked, notwithstanding objections from affected landowner that a particular route was not necessary, and, in fact, a different route was more appropriate).

FN13. The parties presented expert testimony in support of their respective positions. Reber presented Alexander O. Jay, a registered surveyor, and James McCarthy,

P.E., while the Tschudys presented the testimony of William Witman, P.E. The board of view summarized the evidence presented by each expert and relied on the opinions expressed by Jay and McCarthy that an increase in the width of the private road to twenty-five feet was absolutely necessary to best carry out the objective of eliminating the problems they observed. (*See Report of Board of View*, August 23, 2001, ¶¶ 10b, 11c, Tschudys' brief, Appendix "B" at 4-5.) On the other hand, the board of view determined that Witman's proposal was not a satisfactory solution to Reber's problems. (*See Supplemental Report of Board of View*, July 23, 2002, ¶ 2, Tschudys' brief, Appendix "C" at 3.)

For the foregoing reasons, we affirm.

Senior Judge KELLEY concurs in the result only.

ORDER

AND NOW, this 15th day of May, 2003, the order of the Court of Common Pleas of Berks County, dated September 26, 2002, is hereby affirmed.

824 A.2d 378

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(Cite as: 226 So.2d 76)

H

Court of Appeal of Louisiana, First Circuit.
Joseph F. ROCKHOLT et al., Plaintiffs-Appellants,
v.
Thomas S. KEATY, Defendant-Appellee.
No. 7732.

July 2, 1969.
Rehearing Denied Sept. 2, 1969.

Action by landowners seeking right of passage over land of adjoining landowner under statute permitting owner whose estate is enclosed to claim right of passage on estate of his neighbor. The 19th Judicial District Court, Parish of East Baton Rouge, Fred A. Blanche, Jr., J., dismissed the suit, and appeal was taken. The Court of Appeal, Marcus, J., held that property which fronted on a limited access highway was not an 'enclosed' estate within statute permitting owner whose estate is enclosed to claim right of passage on estate of his neighbor.

Affirmed.

Landry, J., dissented from refusal to grant rehearing.

West Headnotes

[1] Private Roads 311 ⚡2(1)

311 Private Roads
311k2 Establishment
311k2(1) k. In General. Most Cited Cases
Property which fronted on a limited access highway was not an "enclosed" estate within statute permitting owner whose estate is enclosed to claim right of passage on estate of his neighbor. LSA-C.C. art. 699.

[2] Highways 200 ⚡85

200 Highways
200V Title to Fee and Rights of Abutting Own-

ers

200k85 k. Right of Access. Most Cited Cases

Private Roads 311 ⚡2(1)

311 Private Roads
311k2 Establishment
311k2(1) k. In General. Most Cited Cases

A public authority has no legal right to deny an abutting property owner all access to adjoining highway without due compensation; however, in event the public authority refuses to accede to a demand for access, the remedy of the abutting property owner is against the public authority and not against the adjoining property owner under statute permitting owner whose estate is enclosed to claim right of passage on estate of his neighbor. LSA-C.C. art. 699.

*76 Breazeale, Sachse & Wilson, by Robert P. Breazeale and James E. Touns, Baton Rouge, for appellants.

Davidson, Meaux, Onebane & Donohoe, by John G. Torian II, Lafayette, for appellee.

Before LANDRY, SARTAIN and MARCUS, JJ.

MARCUS, Judge.

This is an action in which plaintiffs Joseph F. Rockholt, John I. McCain and *77 Charles F. Duchain have sought a right of passage over the land of the defendant under Article 699 et seq., of the Civil Code. The plaintiffs originally owned a tract of land in East Baton Rouge Parish containing 35.521 acres. However, the State Highway Department expropriated a 300 foot strip, consisting of 7.211 acres, across plaintiffs' property leaving a northern portion of 17.954 acres and a southern portion of 10.308 acres. The northern portion is the tract of land involved in this litigation. It is trapezoidal in shape and is surrounded on the west by the lands of the defendant and Keaty Place Subdivision, on the north by the lands of Drusilla Place

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Subdivision, on the east by property belonging to Coastal Rentals Corporation and on the south by the right-of-way for Interstate 12. By judgment dated February 2, 1965 in the matter of State of Louisiana, Through the Department of Highways v. Joseph F. Rockholt, et al., No. 93,840 Nineteenth Judicial District Court, Parish of East Baton Rouge, plaintiffs herein were awarded \$92,816 for the property expropriated, damages to the remainder, and engineering fees.

Subsequently, plaintiffs filed this suit under Article 699 of the Civil Code claiming a servitude of passage over the land of the defendant. Since the highway which bisected plaintiffs' property is a non-access interstate highway and since there are no public roads touching the northern portion of plaintiffs' property, it is alleged that the action of the Highway Department caused plaintiffs' property to become 'landlocked' thereby entitling them to relief under the provisions of the aforementioned Civil Code Article. By this suit they seek a 50 foot servitude across the corner of defendant's property bordering on the right-of-way for Interstate 12 to other property owned by the plaintiffs from which an outlet may be secured to Drusilla Drive.

An exception of no cause of action together with a motion for summary judgment was filed by defendant. The motion for summary judgment was based upon the following grounds: (1) The property of the plaintiffs is not an 'enclosed' estate within the meaning of Article 699 of the Civil Code. (2) Alternatively, plaintiffs would only be entitled to a servitude of passage to the nearest public road which is not across the land of defendant. (3) Further alternatively, plaintiffs have no plans, proposals, or immediate use for their property and, therefore, have shown no necessity for the servitude sought. (4) In the further alternative, plaintiffs have already been fully compensated by the Department of Highways for damages caused by the loss of the right to ingress and egress and, as such, have no claim against the defendant. The exception of no cause of action was based upon the first ground re-

lied on in defendant's motion for summary judgment i.e. that plaintiffs' property is bordered by a public road and, therefore, the plaintiffs are not entitled to a right of passage under R.C.C. Article 699.

The court below rendered judgment sustaining the exception of no cause of action and granting the motion for summary judgment and dismissing the plaintiffs' suit. From this judgment, the plaintiffs have perfected this appeal.

In his written reasons for judgment, the trial judge found the case of English Realty Company v. Meyer, 228 La. 423, 82 So.2d 698 (1955) was 'on all fours with the present case' and concluded that Article 699 does not apply where property is bordered by a public road even where the public road is a limited access highway. He further concluded that in such a case the remedy of the landowner is against the public authority (Highway Department) and not against the adjacent landowner. He stated further that in this case the plaintiffs had their remedy against the Highway Department and that his court was the same trial forum in the expropriation suit where plaintiffs were awarded damages for their loss of ingress and egress from the property involved in this litigation.

*78 Accordingly, the first issue that this Court must determine is the applicability of Article 699 to the facts of this case. If it is decided that this Article does not apply, the alternative arguments of defendant are of no moment.

Article 699 of the 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 acquire (require), over the land of his neighbor or neighbors for the purpose of

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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. As amended Acts 1916, No. 197.'

The English Realty case relied upon by the trial judge involved a similar type suit to obtain a right of passage under Article 699. In that case the plaintiff originally owned an 18 acre tract of land in the City of Shreveport which bordered the Linwood Overpass. Plaintiff then sold off various parts of this land, retaining only about a 5 acre tract which formed a triangle bounded by the railroad right-of-way on one side and the Linwood Avenue approach to the viaduct on the other, and on the south by lands which plaintiff had previously sold to defendants. Plaintiff's land fronted 700 feet on Linwood Avenue, most of which was below the level of the ramp leading over the viaduct with 43 front feet which was on the same level as the adjacent highway. Plaintiff contended that its property was landlocked as the City of Shreveport would not allow it access into Linwood Avenue and accordingly that it was entitled to a right of passage over defendant's property to the nearest public road. Defendants filed an exception of no cause of action which was overruled by the trial court. The case was ultimately tried on the merits and the trial judge granted plaintiff a servitude across the front of defendants' property and assessed damages against plaintiff for the value of this right of passage. The Supreme Court reversed the trial court by sustaining the exception of no cause of action originally filed by defendants. In discussing the applicability of Article 699, the Court stated:

'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 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. Enclosed estates, as

envisoned 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.' (Page 700).

The City of Shreveport had designed Linwood Avenue as part of an expressway or as a limited access highway and had denied plaintiff access thereto from its property. Plaintiff contended that since the refusal of the city to grant plaintiff access to the public road was entirely justified under the circumstances, Article 699 should apply as its land was enclosed for all intents and purposes. The Supreme Court rejected *79 this argument by holding that neither the State nor its political subdivision has the legal right to deny an abutting property owner all access to the adjoining highway without due compensation. In this connection the Court went on to say:

'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 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 order that passage to the same public road may be assured.' (Page 701).

Plaintiffs in the case at bar argue against the English Realty case in the following respects. First, they contend that by our affirming the results of the district court, the State will have to pay the full

value of the remainder of a tract which has been severed and left enclosed as a result of an expropriation for a non-access interstate highway. They claim that this will follow since normally there will be little or no use to which property can be put which does not have means of ingress and egress thereto. Secondly, plaintiffs contend that since this case involves an interstate highway, they have no remedy against the public authorities for a right of access to the abutting highway under LSA-R.S. 48:301 et seq., and 23 U.S.C.A. s 111. Thirdly, it is contended that the damages awarded to the plaintiffs in the expropriation suit were inadequate and did not fully compensate them if they are without a right to seek a servitude of passage across the land of the defendant under Article 699. Further, it is argued that the fact that plaintiffs were awarded damages in the expropriation suit is immaterial to the right vel non of an enclosed property owner to a servitude of passage under Article 699. It is further contended that the facts in the English Realty case reveal that the plaintiff caused its property to become enclaved through its own acts whereas in the present case the enclosure did not result as a consequence of the voluntary acts of the parties seeking relief but was a direct result of the expropriation of the right-of-way for Interstate 12. Finally, denying landlocked owners the right to secure an exit from their enclosed property to a public way would result in the creation of unproductive pockets of land. This situation would tend to keep land out of commerce which is contrary to public policy.

[1][2] Arguments set forth by able counsel for plaintiffs could only have merit if we were to interpret Article 699 of the Civil Code differently than the Supreme Court did in the English Realty case. It is our opinion that the issues in that case are similar to and determinative of the issues in this case. We feel that the Supreme Court clearly held that property which fronts on a public road is not an 'enclosed' estate within the meaning of Article 699. Furthermore, a public authority has no legal right to deny an abutting property owner all access to the

adjoining highway without due compensation. However, in the event the public authority refuses to accede to a demand for access, the remedy of the abutting property owner is against the public authority and not against the adjoining property owner under Article 699. It should be observed that plaintiffs in this case had their remedy against the public authority (Highway Department) in the expropriation suit wherein damages were awarded for the loss of ingress and egress to their property. The adequacy of that award addresses itself to those proceedings and should not be a basis for relief sought herein. The issues here are determined by the law as set forth in Article 699 of the Civil Code as interpreted by the Supreme Court in English Realty Company v. Meyer, supra.

*80 For the foregoing reasons, we conclude that Article 699 does not apply in this case. Accordingly we affirm the judgment of the trial court in sustaining the exception of no cause of action and granting the motion for summary judgment. Costs of this appeal are assessed against plaintiffs-appellants.

Affirmed.

LANDRY, Judge (dissenting from refusal to grant rehearing).

Further consideration of the pivotal issue posed in this case leads me to conclude we erred in holding English Realty Co. v. Meyer, 228 La. 423, 82 So.2d 698, dispositive of the question of the applicability of La.C.C. Article 699 in this cause.

I so conclude first because I find Meyer easily distinguishable from the case at bar. Therefore, I do not consider it controlling.

In Meyer, the 'landlocking' or 'isolation' resulted from the owner's voluntary action. In addition, his property fronted on a railroad. There the property owner alienated portions of his property leaving himself a parcel of land bounded on one side by a railroad and on the other by a street to which municipal authorities would not permit access. In the case at bar, the 'landlocking' resulted from a con-

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demnation procedure. The expropriating authority here concerned divided appellants' estate into two parcels. The tract in question fronts on a Federal Interstate limited access highway to which appellant has been denied means of ingress and egress.

As I interpret Meyer, the Supreme Court there indicated the sole relief available to the owner was an action to compel the City of Shreveport to grant him access to Linwood Avenue. The Court further noted certain jurisprudence as authority for the proposition that an abutting property owner could not be denied all access to a public highway. See *State ex rel. Gebelin v. Department of Highways*, 200 La. 409, 8 So.2d 71, 75.

So far as I can determine the jurisprudence represented by *Gebelin*, *supra*, antedates the advent of Interstate Federal Aid limited access highway systems. It is common knowledge that the federal government has undertaken prime responsibility for such projects as part of the national defense system. It is equally well known that the nature of such projects demands that ingress thereto and egress therefrom be severely limited and restricted. That this is so is graphically attested by the many miles of fencing observable along the rights-of-way of such projects. These barriers, as well as other readily notable structures, are unquestionably designed to restrict access to projects of this nature so as to insure the speedy, smooth and uninterrupted flow of vehicular traffic thereon. In my view, it is highly questionable whether every property owner has the unqualified right to some access to such projects. To literally enforce such a right of access would defeat the very purpose of such projects by destroying their limited access character.

In Meyer the Supreme Court interpreted LaC.C. Article 699 strictly and literally. The court held that since the article limits its application to 'The owner of the estate, which is surrounded by other lands * * *' and companion Article 702 declares 'a passage must be furnished to the owner of the land Surrounded by other lands * * *.' (emphasis supplied), the two statutes together indicate an intent to make

their terms applicable only when property is surrounded on all sides by other lands.

In my judgment, and with all due respect to the Supreme Court, Meyer appears to conflict with *Mercer v. Daws*, La.App., 186 So. 877, and *Martini v. Cowart*, La.App., 23 So.2d 655, which held Article 699 is not to be so strictly construed as to permit no deviation from its literal terms under any and all circumstances.

Moreover, it appears that in the early case of *Littlejohn v. Cox*, 15 La. Ann. 67, the purpose of Article 699 was said to be *81 more general than its stated intent to enable the landlocked owner to get the produce of his land to a public road. In *Littlejohn*, the intent of Article 699 was stated to be to permit an owner to enjoy the use of his property in the manner he deems most profitable.

I believe the rationale of *Littlejohn* to be more logical. Especially do I consider it more compatible with and adaptable to the complexity of our present society.

The framers of our Civil Code evidently intended to provide a means whereby usable property could be put to productive use. The use envisioned was not only that which might benefit the owner but the public as well.

I can think of no legal or moral justification for condemnation of usable property to total unproductivity by application of a legal technicality. I do not think that such was the intent of the framers of Article 699. I believe the key to the statute's intent lies in the phrase 'who has no way to a public road * * *', meaning 'no access' or 'no ingress or egress.'

It is common knowledge that we are living in a period of change which is accelerating with increasing rapidity. In my judgment, the pertinent statutes must be interpreted in the light of present day practicalities.

When our Code was written, land was in surplus

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supply. It is safe to state land is a commodity unlikely to be produced again in quantity. It is common knowledge that present astronomical population growth will, in the foreseeable future, require full utilization of every available acre. In my view, present and future public interest in adequate housing space and food supply impels both a legislative and judicial policy insuring the maximum use and development of all available land.

I dissent from the refusal to grant a rehearing in this matter.

La.App., 1969.
Rockholt v. Keaty
226 So.2d 76

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H

Supreme Court of Louisiana.
Joseph F. ROCKHOLT et al.

v.

Thomas S. KEATY.
No. 50157.

June 29, 1970.

Rehearing Denied July 30, 1970.

Action by property owners seeking right of passage over land of adjoining landowner under statute permitting owner of enclosed estate to claim right of passage on estate of his neighbor. The 19th Judicial District Court, Parish of East Baton Rouge, Fred A. Blanche, Jr., J., dismissed suit, and appeal was taken. The Court of Appeal affirmed, 226 So.2d 76. On landowners' writ of certiorari, the Supreme Court, Barham, J., held that portion of property left without public access by reason of superior power of state to expropriate property and to build non-access highways along and through full parcel was 'enclosed' within statute allowing owner of enclosed property who has no public access to claim right of passage on estate of his neighbor to nearest public access because of expropriation and construction of nonaccess public freeway through subject property but that where passage sought by landowners was not to public road but to other land of property owners on which there was no public road, and there were shorter, more direct, and more feasible routes of passage to public roads, landowners were not entitled to right of passage over estate of their neighbor to landowners' other land.

Affirmed.

Hamiter, J., did not participate.

West Headnotes

[1] Private Roads 311 ↪2(1)

311 Private Roads

311k2 Establishment

311k2(1) k. In General. Most Cited Cases

Portion of property left without public access by reason of superior power of state to expropriate property and to build nonaccess highway along and through full parcel was "enclosed" within statute allowing owner of enclosed property who has no public access to claim right of passage on estate of his neighbor to nearest public access because of expropriation and construction of nonaccess public freeway through subject property. LSA-R.S. 48:301 et seq.; LSA-C.C. art. 699.

[2] Private Roads 311 ↪2(1)

311 Private Roads

311k2 Establishment

311k2(1) k. In General. Most Cited Cases

Where passage sought by landowners whose property became completely enclosed due to construction of limited access freeway across property was not to public road but to other land of property owners on which there was no public road and there were shorter, more direct, and more feasible routes of passage to public roads, landowners were not entitled to right of passage over estate of their neighbor to landowners' other land. LSA-C.C. art. 700. *631 **664 Breazeale, Sachse & Wilson, Robert P. Breazeale, James E. Toups, Jr., Baton Rouge, for plaintiffs-appellants.

Davidson, Meaux, Onebane & Donohoe, John G. Torian, II, Lafayette, for defendant-appellee.

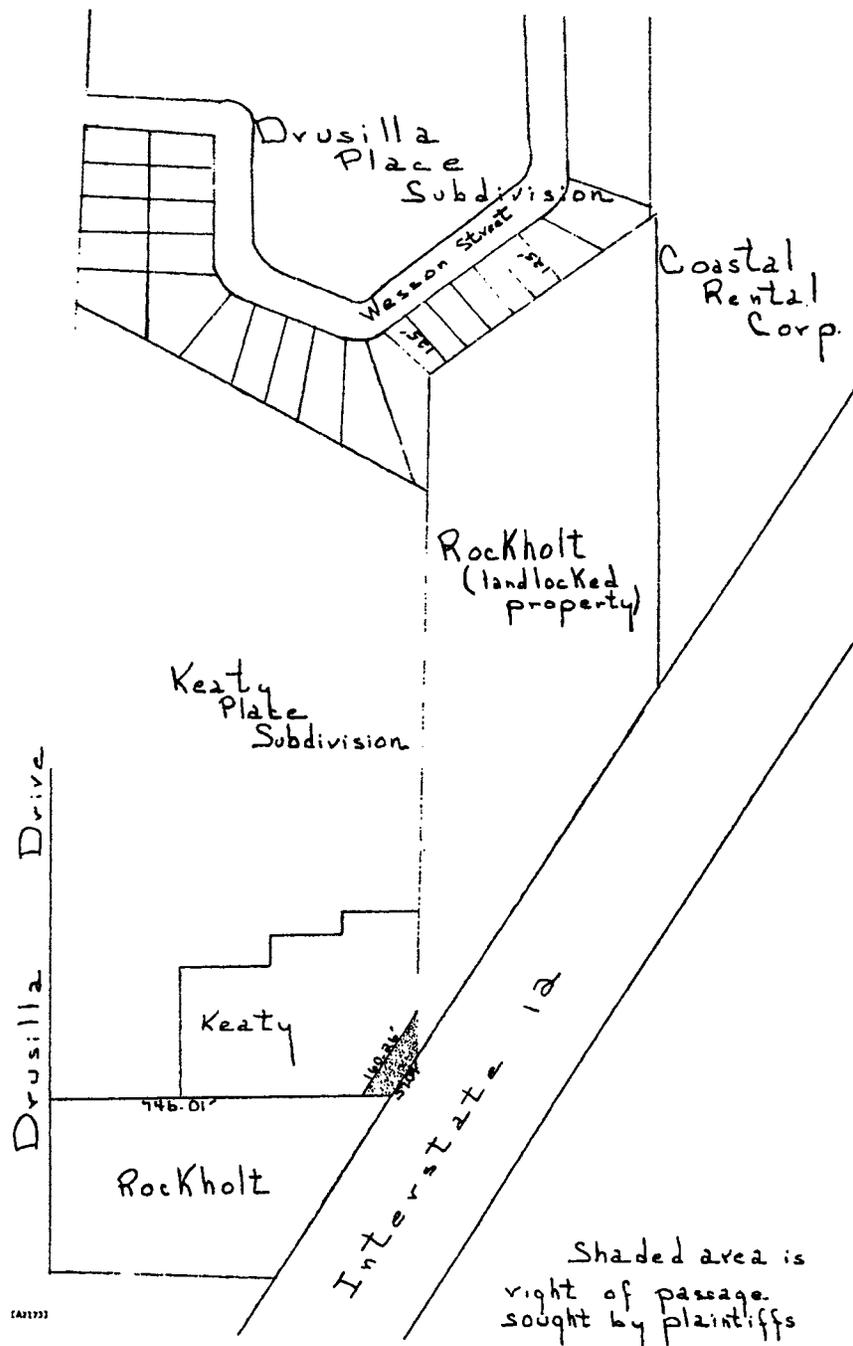
BARHAM, Justice.

In this suit plaintiffs seek a right of passage over the defendant's property for their land which became landlocked as a result of an expropriation for Interstate 12 in East Baton Rouge Parish by the State of Louisiana through the Department of Highways. The plaintiffs originally owned a 35.521-acre tract, but after the expropriation*632 in full ownership of a 300-foot strip through the tract, their prop-

erty was left in two separated segments, a southern portion of 10.308 acres and a northern portion of 17.954 acres. It is the northern portion of the property which is involved in this litigation. This tract, trapezoidal in shape, is surrounded on the west by the lands of the defendant and by Keaty Place Subdivision, on the north by Drusilla Place Subdivision, on the east by the land of Coastal Rentals Corporation, and on the south by the state highway, In-

terstate 12. (See map which is our composite, not drawn to scale, of maps contained in the transcript.)

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*635 Relying upon Civil Code Articles 699 et seq., the plaintiffs alleged that their property was enclosed, and that they were entitled to a right of passage over the estate of their neighbor, the defendant Thomas S. Keaty, to the nearest public road. In

their petition they recognized that Interstate 12 is the public road nearest to their property, **666 but because it was a controlled-access highway, part of the National System of Interstate and Defense Highways, access to it had been denied in accordance with state and federal law. The right of pas-

sage sought is approximately 50 feet in width and crosses defendant's land at the corner bordering Interstate 12. This passage would give access not upon a public road but only to other property of plaintiffs at a point about 746 feet from Drusilla Drive, a public road. At the time of the filing of this suit there was no road on this other property to Drusilla Drive. However, this route is urged by plaintiffs to be the 'shortest legally permissible and feasible passage to a public road' when cost, convenience, and practicality are considered.

The exception of no cause of action and the motion for summary judgment filed by defendant were sustained by the district court, and plaintiffs' suit was dismissed. *636 On appeal taken by the plaintiffs the Court of Appeal affirmed the judgment of the district court. 226 So.2d 76. Both courts held that Article 699 of the Code is not applicable. They concluded that property is not 'enclosed' within the meaning of the article when that property borders a highway, even though the highway is access-controlled and allows neither ingress nor egress. Both courts cited and relied upon the case of English Realty Company, Inc., v. Meyer, 228 La. 423, 82 So.2d 698 (1955). [FN1]

FN1. The district court held, additionally, that the motion for summary judgment was justified since it was shown that a shorter route (or routes) to a public road existed and that under the codal and jurisprudential authorities this route must be taken except in unusual circumstances which were not shown to exist in this case. The Court of Appeal, finding merit to the argument that Article 699 had no application in this case, refrained from any discussion of this contention. This position has been urged, also, before this court.

Article 699 of our Civil Code granting private rights of way for roads of necessity (for authority, see Louisiana Constitution, Article 3, Section 37) reads:

'Two 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 acquire (require), over the land of his neighbor or neighbors for the purpose of getting the products of his said enclosed*637 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.' (Emphasis supplied.)

This article and its predecessors in our earlier Codes are based upon Code Napoleon Article 682. In 1881, however, the French article was amended to allow a right of passage also to the owner of an estate whose way to the public road was insufficient for the exploitation of his land. Planiol makes the following comment about the 1881 amendment:

'In order to solve certain difficulties created by the original draft of the law, the 1881 law made these two rulings: (1) An estate must be deemed to be enclosed, not only when it has no issue upon the public road, but if it has merely an insufficient issue * * *. (2) The exploitation of the heritage of which the old law spoke must be deemed to apply to industrial exploitation as well as agricultural exploitation. These two solutions were however generally accepted before 1881.' 1 Pt. 2 Planiol, *Traite E le mentaire de Droit Civil* (Transl.La.State Law Institute, 1959), s 2920.

Planiol's comment is important for recognizing that the granting of the right of *638 passage to enclosed estates for insufficient ingress and egress, as well as for no ingress and egress, was allowed prior to the **667 1881 amendment-that is, under the parent article of our Article 699. See 2 Fuzier-Herman, *Code Civil Annote* (1936), annotation under Article 682, pp. 208-209, cases Nos. 68, 71, 72, 79, 81, and 82.[FN2]

FN2. The general exploitation or use of the land was also anticipated under the original French article. We, too, have liberally construed the manner of use of an estate which requires passage. *Littlejohn v. Cox*, 15 La. Ann. 67 (1860).

Article 699 of our Civil Code has also been amended, but for a different purpose. In 1916 the article was changed to include right of passage for lack of access to railroads, tramroads, or watercourses and the right to build a railroad or tramroad as well as a road. The amendment also added: '* * * according to circumstances and as the exigencies of the case may acquire (require).' The purpose of this amendment was to allow construction of the proper facility needed in a particular case according to the circumstances and the exigencies of the case.

It is apparent that the French under their provision for passage from enclosed estates have from the beginning decided each case under its particular circumstances and have refused to reach for absolute legal pronouncements which would effect a restricted application of the law. We cannot be blind to the great change in the nature of land in our country and the needs of the people in regard to land since *639 the adoption of our original provision. The open country and estates then in existence have rapidly disappeared, and the problems of access to estates for full utilization of them have become more complex. Additionally, estates surrounding enclosed lands may by the very nature and method of their development pose problems in affording access to the enclosed lands not foreseen or contemplated by the adopters of the Code article. The situation which brings this case to our attention—that is, the development of public roads, freeways, and expressways which necessarily deny access to abutting property owners—is of recent vintage.

Although the *English Realty Company* case said that the State had no right to deny abutting property owners access to a highway, it is now legislatively well settled that the State or its political subdivisions may deny such property owners access to cer-

tain public roads. See La.R.S. 48:301 et seq.; 23 U.S.C. 111. We also distinguish that case from the matter before us. The *English Realty* case cannot extend beyond the holding applicable to its particular facts. There the plaintiff purchased property after the building of an overpass and with knowledge of the limited accessibility afforded a portion of his property because of the highway construction. He *640 then sold off various parcels of land until the remaining portion did not have adequate ingress and egress for a trucking business. The court in the *English Realty* case refused to let the plaintiff benefit from Article 699, holding that the enclosure was '* * * not a direct consequence of the location of the land but of the act of the party seeking the relief'.

[1] In the instant case plaintiffs' property is enclosed by reason of the superior power of the State to expropriate property and to build non-access highways along and through the property of individuals. Our interpretation of Article 699 leads us to the conclusion that plaintiffs' property has become 'enclosed' within the contemplation of the article because of expropriation and the construction of a non-access public road.

The argument is made that the compensation paid by the Highway Department in the expropriation suit[FN3] fully compensated plaintiffs for their loss of ingress and **668 egress, and that they should not be entitled to invoke Article 699. The loss of access was noted by the court in the expropriation suit, and some compensation for it was included in the amount awarded. Although we are not able to determine whether the award was for full compensation as though the parcel was totally landlocked forever, *641 such a determination is not necessary. We are of the opinion that public policy would dictate that such land as is here involved, located in a desirable and strategic area, should not be taken out of use and commerce.

FN3. *State of Louisiana through the Department of Highways v. Joseph F. Rockholt et al.*, Docket No. 93840, Nineteenth

Judicial District Court, Parish of East Baton Rouge (1963).

While Article 699 has been generally accepted as designed to benefit the landowner so he could produce profit for himself and obtain full utility of his land, it must now be deemed also to offer protection of public interest. As land becomes less available, more necessary for public habitation, use, and support, it would run contrary to public policy to encourage landlocking of such a valuable asset and forever removing it from commerce and from public as well as private benefit.

We have found enclosure as required by Article 699, and we must now determine whether the particular relief for passage sought by these plaintiffs is granted by law. The nature of the passage is governed '* * * according to circumstances and as the exigencies of the case may acquire (require)'. The right of passage granted is to 'the nearest public road', subject to indemnification for damages occasioned to the neighbor or neighbors. Article 700 provides:

'The owner of the estate, which is surrounded by other lands, has no right to exact the right of passage from Which of his neighbors he chooses.

*642 'The passage shall be generally taken on the side where the distance is the shortest from the inclosed estate to the public road.

'Nevertheless, it shall be fixed in the place the least injurious to the person on whose estate the passage is granted.' (Emphasis supplied.)

[2] The passage sought by the plaintiffs here is not to a public road but to other land of the plaintiffs on which there is no public road. The record reflects that there are numerous points of abutment where passage to a public road may be obtained, the shortest being a distance of approximately 125 feet. Plaintiffs contend that these latter properties are subject to building restrictions which would negate the possibility of obtaining passage across them,

and that therefore the route here sought is the 'legally' shortest and most feasible. We are not impressed with this contention. These restrictions alone would not be controlling of a landowner's right to obtain passage from enclosed land across neighboring property. We find (1) that plaintiffs do not seek passage to a public road as required by the Code and (2) that there are shorter, more direct, and more feasible routes of passage to public roads.

Under the express language of Civil Code Article 700 plaintiffs are not entitled to the relief sought against this defendant. The plaintiffs' right in regard to passage over the property of other abutting landowners*643 is not before us and must await adjudication in a suit to which these others are parties.

The judgments of the Court of Appeal and the district court are affirmed, but for the above stated reasons.

HAMITER, J., did not participate.

HAMLIN, J., is of the opinion a rehearing should be granted.

LA 1970.

Rockholt v. Keaty

256 La. 629, 237 So.2d 663

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**COURT OF APPEALS DIVISION 1
OF THE STATE OF WASHINGTON**

**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 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,**

Respondents.

Court of Appeals No. 63572-7-1

DECLARATION OF SERVICE

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**COMES NOW, Shayna E. Sterling, and declares under penalty of perjury of
the laws of the State of Washington that the following is true and correct:**

Declaration of Service

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I am over the age of majority and not a party interested in the above-entitled action and am competent to be a witness therein.

That on October 19, 2009, I delivered personally a true and correct copy of the Appellate Brief to the following at their respective addresses:

Timothy Graham
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Attached as Exhibit 1, please find the conformed front page with both firms received stamps dated October 19, 2009.

Dated this 22 day of October, 2009.


Shayna Sterling

Declaration of Service

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CANTU & SCHMIDT, PLLC

HANSON BAKEN LUDLOW DRUMHELLER P.S.

No. 63572-7-1

**COURT OF APPEALS DIVISION 1
OF THE STATE OF WASHINGTON**

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. JPMA and SIEW LOON, husband and wife, and JOHN A. DYER and PAULINE T. DYER, husband and wife; 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

BRIEF OF APPELLANT ROGELIO H.A. RUVALCABA and ELAINE H. RUVALCABA

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RE: Ruvalcaba v. Baek, et al. Court of Appeals No. 63572-7-1

MESSAGE: Attached please find the Declaration of Service for the Appellant Brief served on opposing counsel.

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