IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

MARK E. FACEY, CHARLES H. MESSNER and MARY MESSNER, Plaintiffs	:	
v.	:	NO. 00-01,452
RUDOLPH F. BRANNAKA, HAROLD E. BRANNAKA, and CHARLES S. BRANNAKA, Defendants	:	

Issued on October 19, 2000

OPINION and ORDER

The plaintiffs in this case have asked the court to issue a preliminary injunction ordering the defendants to refrain from locking a gate which is located on the defendants' property, at the intersection of Old Township Road and Roaring Branch Road in McIntyre Township, Lycoming County. By locking this gate, the defendants have prevented the plaintiffs from using a portion of Old Township Road to which the plaintiffs claim an easement. The defendants took this un-neighborly action toward their neighbors after negotiations for the sale of the land containing the disputed road fell through.

The primary issue in dispute is whether the plaintiffs will suffer irreparable harm if the gate remains locked until a final hearing on the merits of their action to quiet title is held. The answer to that question requires a comparison of the disputed road with an alternative route available to access the plaintiffs' land from the north.

The parties have vastly different opinions as to the comparative danger of those two roads, each side characterizing one as perfectly fine and the other as highly hazardous. Since two dimensional photos and videotapes did not clarify the issue, the

court found it necessary to venture outside its cloistered courtroom one brilliant fall day, prepared to risk life and limb in order to personally view and assess the condition of these two roads.

Finding of Facts

In 1966, plaintiffs Charles and Mary Messner purchased 245 acres in Roaring Branch from Clifford and Carrie Messner. (Lycoming County Deed Book 323, page 1073). They maintain a cabin and recreation area on the property, which is used by their family and various youth groups. In 1994, plaintiff Mark Facey purchased 90.18 acres of land to the east of the Messner property. (Lycoming County Deed Book 626 page 312.) Mr. Facey purchased the property from Martin Messner, who brought it from his father in 1962. Mr. Facey built a 5000 square foot vacation home and a 2500 square foot storage building on the property. Although none of his 1200 employees work there, Mr. Facey uses it as the corporate offices for Liberty Business Information, Inc., a corporation owned by him. Mr. Facey spends most of his time in Connecticut, but travels to this property regularly with his family.

The defendants, Rudolph, Harold, and Charles Brannaka, are brothers who acquired their property from their mother upon her death in 1978. The property is located to the south of both the Messner and Facey properties, and includes Old Township Road,[1] which leads to the Messner and Facey properties from Roaring Branch Road.

[1] Although there was some dispute over the proper name of this road as it winds north toward Route 414, for clarification purposes we will use the name "Old Township Road" to refer to that section of the road up to and including the bridge over Roaring Branch Creek. The section north of that point will be referred to as "Old Salt Spring

See Plaintiff's Exhibit #3.

Old Township Road was once a public road. It was vacated on February 25, 1952. The court order vacating the road states that "the two bridges on the road should be left in place and the road be left open for private use, persons using the road at their own risk." Plaintiffs' Exhibit #6.

The plaintiffs and their predecessors in title freely and frequently used Old Township Road to access their properties until September 2000, when the Brannakas locked the gate at the entrance. None of the plaintiffs or their predecessors in title ever asked the Brannakas for permission to use the road, and the Brannakas did not tell any of these individuals they needed to obtain permission. The Brannakas never actively tried to prevent any of the plaintiffs or their predecessors from using Old Township Road before September 2000, even though the Brannakas were aware that all of these individuals traveled on the road to get to their properties.

Before Martin Messner sold the property to Mr. Facey he asked the Brannakas to execute a written right of way agreement, which they refused to do. At the time, Mr. Messner made it clear to the Brannakas that he did not need a written agreement but felt it would be prudent to have one on record. The Brannakas never told him that neither he nor future owners could use the road.

At some point in the early 1960's the Brannakas placed a cable with a lock across the entrance to Old Township Road. The Brannakas also posted "No Trespassing" signs on the land on either side of the road, but no signs were placed on the road itself until

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Road."

recently. Neither Mr. Facey nor the families of Martin Messner and Charles Messner were ever impeded by the cable, because a car could easily drive under it and some vehicles could drive over it. None of these individuals ever believed the cable was installed to prevent them from using the road. Rather, they assumed, as Harold Brannaka testified, that the purpose of the cable was to keep outsiders off the road. The Brannakas never gave a key to the lock on the cable to any of these individuals. Charles and Mary Messner were given a key by Glen Raker, who leased a cabin on their land at one point. Mr. Raker received a key from the Brannakas.

Mr. Facey eventually installed a gate at the entrance to the road, with permission from the Brannakas, to further discourage outsiders from using the road. The gate was never locked, however, until recently.

As Harold Brannaka testified, he and his brothers locked the gate in order to give Mr. Facey an "incentive" to purchase the land upon which Old Township Road was located. Although the proposed sale had broken down in November 1999, the Brannakas grew very eager to jump start the negotiations after Charles Brannaka found himself in dire need of ready cash.

DISCUSSION

The purpose of a preliminary injunction is to preserve the status quo and avoid irreparable injury or gross injustice that might occur before the merits of the case can be heard and determined. Soja v. Factoryville Sportsmans Club, 522 A.2d 1129 (Pa. Super. 1987). Because a preliminary injunction is an extraordinary remedy, a trial court

may issue a preliminary injunction only when the moving party has established the following elements: (1) the relief is necessary to thwart immediate and irreparable harm which could not be remedied by damages; (2) greater injury will result from refusing to grant the injunction than by granting it; (3) the injunction will restore the parties to their status as it existed prior to the alleged wrongful conduct; (4) the injunction is reasonably suited to abate the allegedly wrongful activity; and (5) the moving party must demonstrate a clear right to relief. Fischer v. Dept. of Public Welfare, 497 Pa. 267, 271, 439 A.2d 1172, 1174 (1982). Elements (3) and (4) have been met, as the testimony clearly showed that the gate was only recently locked, and because ordering the defendants to refrain from locking it would obviously eliminate the problem.

A. The Road Not Taken: Harmful or Harmless?

The first two elements necessary to obtain an injunction require the court to compare the condition of Old Township Road to Old Salt Spring Road. This analysis is key to the case because the defendants contend the plaintiffs will not suffer irreparable injury from the locked gate since they can use Old Salt Spring Road as an alternative route to their properties. They claim Old Salt Spring Road is safer and easier than Old Township Road.

The testimony on this issue was so contradictory that it was difficult to believe the parties were talking about the same road. Martin Messner, whom the court found credible, began the hearing by testifying about the "bridge out" area of Old Salt Spring Road, located just beyond the northern border of Mr. Facey's property. He explained

that there are two problems with this area. First, because the bridge has washed out one must actually drive across the creek, and at certain times of the year the water is too high to do so in many types of vehicles. When shown a recent photo of the area depicting minimal water, Mr. Messner explained that this is the low water season, and the condition depicted in the photo is "as good as it gets." Secondly, Mr. Messner testified that to the immediate north of the "bridge out" point there is a steep bank which presents a serious problem for a two-wheel drive vehicle, particularly when driving up the bank after slowing down to get across the water. Moreover, this area requires maintenance after a rain to make it passable at all. Mr. Facey agreed with this testimony, stating that when the water is high, he cannot cross the creek and that he has gotten stuck in the area even when traveling in a four-wheel drive vehicle.

The Brannakas downplayed the water level and the steepness of the bank, contending that a two-wheel drive vehicle can go across the water comfortably and that the bank is not difficult to climb. They introduced recent photos to prove their point, but Harold Brannaka admitted that this is the low water season.

The court's own inspection of this area, conducted after a night of moderate rainfall, revealed a fair amount of water which did not hinder the van in which we were traveling but would have reached up to or above the frame of many cars. The bank was fairly steep, and might well cause trouble for a two-wheel drive vehicle, especially in muddy, slippery, or icy conditions.

The plaintiffs' primary concern, however, is with the southern part of Old Salt Spring Road, soon after crossing Roaring Branch Creek. Mr. Facey testified that this

area is extremely hazardous because of a sharp turn that is difficult to maneuver on this narrow, shoulderless road. On one side of the road is a mountainside; on the other is the creek. Those unfortunate cars that do not make the turn will end up falling thirty feet down into the water. Mr. Facey is highly reluctant to travel this portion of Salt Spring Road, especially with his young children aboard. He also believes an ambulance or other emergency vehicle would not be able to make it or would refuse to travel the road, although he admitted it might be possible if the right conditions existed. He maintained that a great deal of the time the area was so dangerous as to render it essentially impassable. Charles Messner agreed with Mr. Facey's characterization of the area, stating that one cannot normally travel Salt Spring Road in a regular car.

The Brannakas ridiculed the plaintiffs' fears and poo-poohed the danger. They also presented a video which depicted this portion of Old Salt Spring Road to be relatively tame.[2]

The court's own inspection of this area exposed exaggerations on both sides. While not quite as life-threatening as Mr. Facey characterized it, the road was far from as safe and easy as the picture painted by the Brannakas brothers. The road is steep and rocky, but of greatest concern is a lack of leeway to negotiate the turn: there is no shoulder, no embankment, and no buttressing trees to prevent a vehicle from falling into the creek. The court could certainly understand why Mr. Facey would be reluctant to travel this area frequently or in bad weather. Moreover, the continuation of the road north of this particular area is also problematic–narrow, full of potholes and puddles, rocky, and

[2] This video was taken by a professional, astride an All Terrain Vehicle.

at times fairly steep.

The Brannakas attempted in vain to convince the court that Old Township Road was actually more dangerous than Old Salt Spring Road. While Old Township Road is certainly no parkway, and indeed the drop-offs are actually much deeper than those on Old Salt Spring Road, Old Township Road does not present nearly the degree of danger because it is banked in parts, better maintained, appears to accumulate less water, and is less hazardous due to the trees lining the road, which would buttress a vehicle and probably prevent a plunge into the creek.

Additionally, taking Old Salt Spring Road south in order to reach the plaintiffs' properties would require them to make a longer trip. The site view revealed that the distance from the northern point of Old Salt Spring Road to the bridge over Roaring Branch creek is 1.3 miles, while Old Township Road from Roaring Branch Road to the same point is about one half mile. Old Township Road is also faster because it is better maintained and not as dangerous. Additionally, once a vehicle reaches the "bridge out" area, it is several more miles on a mediocre Township Road to Route 414, and then 5 more miles to Route 15.

The Brannakas also contend that the bridge over Roaring Branch Creek, which the plaintiffs must cross when traveling the Old Township Road route, is old, decrepit, and unsafe. After viewing this bridge and considering the testimony, this court did not find that argument very convincing. Similarly, we don't blame the plaintiff for refusing to consider using a route to his property following the power lines, which is steep and merely a path–not a road.

It is true that individuals used Old Salt Spring Road in the past to haul farm equipment and other necessities. However, we believe Charles Messner's testimony that the road was in a better condition in the past, and it is possible that Old Township Road was in a poorer condition. After all, the testimony showed that Old Township Road has received a good deal of maintenance, while Old Salt Spring Road apparently has not.

We suspect that despite their protestations, the Brannakas themselves realize the problems with Old Salt Spring Road. Otherwise, why would they believe that shutting off Old Township Road would drive Mr. Facey back to the bargaining table?

Turning to the first element of a preliminary injunction, that the plaintiff show it is necessary to thwart immediate and irreparable harm that cannot be remedied by damages, we find that the plaintiffs have established such harm. If the gate continues to be locked they will be forced to take the alternative route into their properties, which is more dangerous and longer. Such harm is irreparable because the plaintiffs cannot be adequately compensated for this loss with money. Matters concerning real estate have traditionally been considered to involve irreparable harm because it is impossible to put a dollar value on a person's use of his own property. No amount of money could adequately compensate these plaintiffs if the locked gate causes them to miss spending even one of these glorious autumn afternoons on their beautiful properties up in what is truly God's country.

Moreover, forcing the plaintiffs to use Old Salt Spring Road would require them to maintain a much longer and more problematic road, which would cause them considerable more time, effort, and money. This task would be especially burdensome in

the winter, when the road must be plowed.

And finally, the court is inclined to believe that emergency vehicles such as ambulances and fire trucks might have a hard time making the trip to the plaintiffs' properties if forced to use Old Salt Spring Road, especially if the weather conditions render the "bridge out" area particularly difficult to traverse. Mr. Facey also testified that his insurance company has informed him his coverage could be affected if he is no longer able to use Old Township Road. Mr. Facey could certainly be financially compensated for any rise in premiums. However, cold hard cash could never compensate him for the loss of personal possessions, business information, or a loved one's life if emergency vehicles are unable to reach his property in a crisis. For these reasons, we find that the plaintiffs will suffer irreparable harm if the injunction is not issued.

The defendants, on the other hand, will suffer little or no harm if they are ordered to keep the gate open pending a trial on the merits of the case. After all, up until a couple of weeks ago the gate had not been locked and they apparently had no reason to lock it now other than in the hope of motivating Mr. Facey to undergo an attitude adjustment. The Brannakas contend they are concerned about liability should someone become injured by the bridge over Roaring Branch Creek, but that concern will be alleviated by the "hold harmless" clause which the plaintiffs have agreed to execute, and which the court has incorporated in the order following this opinion.

B. <u>Clear Right to Relief</u>

The only element remaining to be discussed is whether the plaintiffs have

demonstrated they have a clear right to relief. In this regard, the plaintiffs do not have to prove the merits of the underlying claim; they need only show that substantial legal questions must be resolved to determine the rights of the parties. Fischer v. Dept. of Public Welfare, 497 Pa. 267, 439 A.2d 1172 (1982).

The underlying claim is an action to quiet title. The plaintiffs are asking the court to declare that they have an easement in Old Township Road from Roaring Branch Road to their properties, and to enjoin the defendants from blocking it. The plaintiffs assert they have acquired an easement by prescription and by the retention of private rights to a vacated public road. While we may not decide these claims on the merits at this time, the evidence presented thus far indicates that it is highly likely the plaintiffs will win at trial. At the very least, there are certainly substantial legal questions that must be resolved.

1. Easement by Prescription

The plaintiffs have accurately cited the applicable law in their brief. A prescriptive easement is created by adverse, open, notorious, and continuous and uninterrupted use of the property in question for a period of 21 years. Newell Rod and Gun Club, Inc., v. Bauer, 597 A.2d 667, 670 (Pa. Super. 1991). A landowner may "tack" the period of use by his predecessor in title onto his own period to establish the 21 years. Matakitis v. Woodmansee, 446 Pa. Super. 433, 667 A.2d 228 (1995). The testimony of Martin Messner, Charles Messner, and Mr. Facey, all of whom the court found credible, established that all the plaintiffs and/or their predecessors in title have used Old Township Road in the manner necessary to acquire a prescriptive easement.

Unless the defendants intend to introduce new evidence at the hearing on the merits, it would be futile for them to argue that the plaintiffs have failed to establish any of these elements, with the possible exception of "hostile" possession. Their primary chance of prevailing lies in arguing that the plaintiffs and their predecessors used the road with permission from the Brannakas. This contention, however, will not win the day for the defendants unless they change their testimony, for Harold Brannaka testified that they never gave permission to Martin Messner or Charles Messner, nor to Mr. Facey, although they knew that all of these individuals were using the road. The fact that the Brannakas may have given permission to others, such as Glen Raker and the individual who built Mr. Facey's property, is immaterial.[3] Moreover, permission cannot be proven by showing the landowner's indulgence, mere silence, or failure to object. Kaufer v. Beccan's, 584 A.2d 357, 359 (Pa. Super. 1991).

The defendants' last shot would be to claim that any easement which formerly existed was extinguished because of the locked cable the Brannakas installed over the entrance of Old Township Road in the early sixties. To establish extinguishment by adverse possession, one must prove the same elements necessary to acquire property by adverse possession. The defendants will almost certainly fail in any attempt to do this, for the testimony showed that the cable was entirely ineffective in preventing the plaintiffs and their predecessors from traveling on the road and Harold Brannaka in fact admitted that its purpose was to keep out strangers, rather than adjoining landowners. Therefore, the Brannaka's action was not hostile, or adverse. Moreover, the Brannakas admitted they

[3] The permission given to the builder, however, could form the basis for an easement by estoppel, if the evidence shows that Mr. Facey relied on that permission.

knew the plaintiffs and their predecessors were using the road, yet did nothing about it, which adds more weight to the plaintiffs' claim that their use was hostile.

In their brief the defendants claim no prescriptive easement can be acquired over the land because it is "uninclosed woodlands." See 68 P.S. § 411. This argument must be dismissed as the land in this case is clearly not the sort envisioned by the statute. After all, the road in question, which intersects a state road, was once a public road, maintained by McIntyre Township. The purpose of the statue is to prohibit adverse possession on areas in which it is very difficult to discover adverse users, and that is far from the case here. In fact, Harold Brannaka can see vehicles traveling on Old Township Road from his home. Moreover, the defendants offered no evidence that the area is or was unenclosed woodlands.

2. <u>Vacation of Public Road</u>

The law in this area is clear. As stated in 36 P.S. § 2781, when viewers appointed by the court find and report that there is no necessity for a public road but recommend the route remain a private road, the court has the authority to enter a decree stating that the route of the abandoned public road shall become a private road, "for the use and benefit of the owners of land through or along which it passes, to be maintained and used as private roads are now maintained and used under existing laws." Such a decree was issued in 1952 in regard to Old Township Road. The decree states that "the road should be vacated as a public road but that the two bridges on the road should be left in place and the road be left open for private use, persons using the road doing so at

their own risk." Plaintiffs' exhibit #6.

The defendants have argued in their brief that 36 P.S. §2781 should be interpreted to mean that each landowner acquires the right to use only that portion of the road bordering on his or her property. We cannot accept that argument, as it would render the statue virtually meaningless. Permitting landowners to use only chunks of a road would provide little benefit to those owners.

It is possible the defendants will argue that even if an easement was created by the decree, it was extinguished after the cable with the lock was placed at the entrance for 21 years. However, it is likely this argument will fail, for the reasons that have been discussed above.

C. A Flatlander's Folly

This case has raised several legal issues, which have been duly discussed. However, this court cannot resist the temptation to strip away the legal mumbo jumbo and speculate that at the bottom of this dispute lies a clash of cultures.

The Brannaka family has lived on the land (and off the land) for as long as anyone can remember. The Brannakas have grown roots as deep as the trees that line Old Township Road. In short, they have established a kind of seniority that arises only in such rural areas, which causes bristling when newcomers do not accord them proper deference and respect. Mr. Facey had two strikes against him in his relationship with the Brannakas: he was not only a newcomer, but a flatlander from Connecticut, to boot.

The evidence presented to this court establishes that the Brannaka brothers

probably had no right to block the entrance to Old Township Road, and we cannot condone that conduct. However, the court caught a glimpse of what lies at the bottom of their ire when Harold Brannaka related a comment Mr. Facey made to him when negotiations over the sale of the land broke off: "I have more attorneys than you have relatives, and you will die broke."

Not only is this statement likely untrue,[4] but it was also unwise. If Mr. Facey did make this statement–and he presented no evidence contesting it–he planted a time bomb of alienation and hostility that eventually exploded and caused him to employ one of his fleet of lawyers. While it is impossible to know whether more civil behavior would have saved him the time and expense of this suit, Mr. Facey should take note that in the country, a little civility is often better than civil litigation.

[4] No matter how wealthy Mr. Facey is, it is possible that the Brannakas' kinfolk outnumber his lawyers.

O R D E R

AND NOW, this _____ day of October, 2000, the plaintiffs' Motion for Preliminary Injunction is granted and it is ordered that the defendants and their heirs, assigns, and successors in title are enjoined from interfering with or obstructing the plaintiffs and their heirs, assigns, and successors in title from using Old Township Road from S.R. 1010 to gain access to their properties until further order of court.

The court finds that no bond is necessary so long as the plaintiffs execute, within five days of the date of this order, a "hold harmless" document releasing the defendants from any liability arising out of the condition of the bridge existing on their land over Roaring Branch Creek.

BY THE COURT,

Clinton W. Smith, P.J.

cc: Dana Stuchell Jacques, Esq.
Hon. Clinton W. Smith
Robin Read, Esq.
Steven Sholder, Esq.
Gary Weber, Esq., Lycoming Reporter