

IN THE COURT OF COMMON PLEAS OF
 LYCOMING COUNTY, PENNSYLVANIA
 CIVIL ACTION – LAW

FRANCES L. BARNARD,

PLAINTIFF

vs.

GEORGE and MARILYN
 BIDELSPACHER, GREGORY and
 KAREN BROWN, and WILLIAM and
 BRENDA ULRICH,

DEFENDANTS:

OPINION

DOCKET NO.: 07-00733

FILED
 LYCOMING COUNTY
 2011 JUL 26 A 10:33
 WILLIAM J. BURN
 CLERK OF COURT

SAYLOR, J.

The present case originated as an action to quiet title filed by Plaintiff to legally establish access to her property over what is known as “Bidlespacher Road.” The parties to this action own tracts of land in a forested area of Lycoming County, with the surveys, deeds and chains of title referring to private “mountain roads” and “woods” roads. Plaintiff has improved her property substantially since the initial purchase of one parcel of 41 acres from Minnie Straw in October of 1964, and the subsequent acquisition of adjoining tracts in 1965 and 1991. Bidlespacher Road runs mainly through the premises owned by Defendants George and Marilyn Bidlespacher, as well as a short portion that goes along the boundary of property owned by Defendants Gregory and Karen Brown, which was acquired from Defendants George and Marilyn Bidlespacher.¹

As the pleadings progressed, Plaintiff sought to establish access to her property under a number of theories, including easement by implication, necessity and

¹ It is noteworthy that upon transfer of an 11.19 acre parcel from the Bidlespacher Defendants to the Brown Defendants in November of 2000, that deed includes an express easement over Bidlespacher Road in favor of the other Bidlespacher tracts.

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prescription. The Second Amended Complaint also added a count seeking condemnation of a private right-of-way pursuant to 36 P.S. §2731 et seq. (also known as the “Private Road Act”).² Following a hearing on Plaintiff’s request for a preliminary injunction, the Honorable Nancy L. Butts entered an Opinion and Order, filed December 12, 2007, denying Plaintiff’s request for a preliminary injunction, and finding that Plaintiff could not establish any form of easement over the road in question, and any claim of “necessity” was defeated by possible use of another lane known as “Harbot Road.” Shortly thereafter, in January of 2008, upon Plaintiff’s motion, a Board of Viewers was appointed with respect to Plaintiff’s private condemnation claim. In August of 2008, the Board of Viewers issued a preliminary report (damages were not yet determined), indicating that Plaintiff did not have an express grant of a right-of-way over what is known as “Harbot Road.”³ The Board of Viewers further found that Bidlespacher Road was the only practical and viable means of access for Plaintiff to reach her property. Defendants’ exceptions to this report of the Board of Viewers were denied, and Defendants attempted to appeal this denial to the Commonwealth Court in May of 2010.⁴ On July 14, 2010, the Commonwealth Court quashed that appeal as untimely.

Following the recusal of the Lycoming County bench, the case was transferred to the undersigned in August of 2010 to determine an outstanding motion relating to expert

² The relevant counts of the Second Amended Complaint are as follows:

- Count 1—easement by implication
- Count 2—easement by necessity
- Count 3—prescriptive easement
- Count 5—condemnation of private right-of-way

³ In the Order and Opinion of December 12, 2007, Judge Butts had found that Plaintiff enjoyed an express easement over Harbot Road, and this easement defeated any claim of easement by necessity. Subsequently, the Board of Viewers in its report dated August 7, 2008, found that Plaintiff did not enjoy an express easement over this road, and further the road would require extensive work to be suitable for use, and even then would be impassable in the winter and would present a great safety risk due to the incline and terrain.

⁴ William and Brenda Ulrich have not actively participated in any of the proceedings before the undersigned, and thus any reference herein to “Defendants” is exclusive of the Ulrichs.

testimony. In January of 2011, this Court was presented with Defendants' Petition for an Emergency Stay of the proceedings as to damages by the previously appointed Board of Viewers predicated upon a recent ruling of the Pennsylvania Supreme Court in the case of *In re: Opening a Private Road ex rel. O'Reilly*, 5 A.3d 246 (Pa. 2010). This decision called into question the constitutionality of the Private Road Act, *supra*. A temporary stay was granted by this Court in light of the possible ramifications of the *O'Reilly* decision on the pending action, and the parties were permitted an opportunity to submit motions with respect to all remaining legal issues. On February 8, 2011, Defendants filed a "Motion to Dismiss the Private Road Action"⁵, and on February 17, 2011, Plaintiff filed a "Counter-Motion for a Hearing on Public Purposes" as well as a "Motion for Completion of Testimony on Barnard Claim of Easement as of Right." In considering these motions, this Court heard testimony on these issues as well as oral argument from counsel on all outstanding issues in the case.

I

Turning initially to the private condemnation claim, which was initiated and for which a Board of Viewers was appointed well before the undersigned became involved in the case, this Court finds that based on the recent decision of *In re: Opening a Private Road ex rel. O'Reilly, supra*, Count V of the Second Amended Complaint must be dismissed and the Board of Viewers disbanded. In *O'Reilly*, the Supreme Court recently re-examined the constitutionality of the Private Road Act. While the Private Road Act

⁵ The title of this filing is a misnomer, as there is only one pending action with multiple counts, one of which is a claim for a private condemnation pursuant to the Private Road Act.

was not expressly deemed unconstitutional *in toto*, its validity in private cases such as the case at bar was severely called into question.⁶ As noted by the majority in *O'Reilly*:

The Constitutions of the United State and Pennsylvania mandate that private property can only be taken to serve a public purpose. *See supra* note 5; *accord* 26 Pa.C.S. § 102. This Court has maintained that, to satisfy this obligation, the public must be the primary and paramount beneficiary of the taking. *See Lands of Stone*, 595 Pa. at 617, 939 A.2d at 337. *O'Reilly* at 258.

Thus, the Court made clear that for an action under the Private Road Act to pass constitutional muster, “the public must be the primary and paramount beneficiary of the taking.” *Id.* In the case at bar, Plaintiff was unable to establish that the public would benefit in any way from the taking. Indeed, the only purpose of Plaintiff’s desired use of Bidlespacher Road is for access to her property for herself, her family and invited guests.⁷

II

Plaintiff also requested that this Court review the claims for an easement in the event the private condemnation claim was dismissed. Upon careful review, this Court finds that Plaintiff has established an easement by implication, more specifically, an easement implied by reservation. While an easement by implication can be found by implied necessity, this is not the only way in which such an easement can arise. As

⁶ Procedurally, the Court in *O'Reilly* remanded the matter to the Commonwealth Court for a determination of whether the public was the primary and paramount beneficiary of the proposed taking. The Supreme Court noted that it could not determine from the record before it whether the beneficiary of the taking was the public, but the fact that the property had become landlocked due to the exercise of the state’s eminent domain power to construct an interstate highway was compelling and should be further explored on remand.

The Commonwealth Court, on remand, further remanded the case to the trial court to make the requisite factual findings. In so doing, the Commonwealth Court noted: “In reversing, our Supreme Court did not hold the PRA [Private Road Act] to be facially unconstitutional, but rather clarified the “public purpose” standard and remanded for further consideration of the pertinent facts under this standard.” *In re: Opening a Private Road ex rel. O'Reilly*, ___ A.3d ___, 2011 WL 1709846 (Pa.Cmwltth.) at page 2.

⁷ It was argued by Plaintiff that the public purpose aspect was the need for access by emergency personnel, but this is not a sufficient basis in this Court’s view.

succinctly summarized by the Superior Court in *Daddona v. Thorpe*, 749 A.2d 475, 481

(Pa.Super. 2000):

In a footnote, our Supreme Court in *Burns* [*Burns Manufacturing v. Boehm*, 356 A.2d 763 (Pa. 1976)] noted that easements by implied reservation are to be distinguished from easements that are implied on the grounds of necessity. A right of way by necessity may be implied when after severance from adjoining property, a piece of land is without access to a public highway. However, such an easement can arise only upon a showing of reasonable necessity, and is not dependent upon a prior use of the land in an open, continuous, and permanent manner. Contrarily, easements by implied reservation are based upon 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 the necessity for the use. (internal citations omitted).

See also Burns Manufacturing v. Boehm, 356 A.2d 763, 767 (Pa. 1976):

It has long been held in this Commonwealth that although the language of a granting clause does not contain an express reservation of an easement in favor of the grantor, such an interest may be reserved by implication, and this is so notwithstanding that the easement is not essential for the beneficial use of the property.

The facts in the case at bar support a finding of an easement implied by reservation to use Bidlespacher Road to access Plaintiff's property. As noted by the Supreme Court in *Burns*, *supra*, “[e]asements by implied reservation...are 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.” *Burns* at 767. The Superior Court in *Daddona*, *supra* at 481, further elaborated: “In deciding whether an easement has been created by implication, the Pennsylvania courts have used two different tests, the traditional test and the Restatement test.” With respect to what has been deemed the “traditional test,” the *Daddona* court summarized the elements as follows:

Three things are regarded as essential to create an easement by implication on the severance of the unity of ownership in an estate; first, a separation of title; second,

that, before the separation takes place, the use which gives rise to the easement, shall have been so long continued, and so obvious or manifest, as to show that it was meant to be permanent; and third, that the easement shall be necessary to the beneficial enjoyment of the land granted or retained. To these three, another essential element is sometimes added, -that the servitude shall be continuous and self-acting, as distinguished from discontinuous and used only from time to time. *Daddona* at 481 (internal citations omitted).

The separation of title has been demonstrated by the chains of title, which indicate all of the lands in question had been owned in the 19th century by Joseph Harbot, who owned a total of 754 acres in this forested area, and he later transferred parcels of his property in a piecemeal fashion. The use of Bidlespacher Road has been long continued, as evidenced by the fact that it is a well-defined road and the only practical means of access to a number of properties in the area, thus meeting the requirement that it be “permanent.”⁸ The road is shown on a recorded map in 1887 as providing access to the property. Additionally, the Board of Viewers, in their report, noted: “It appeared as though this road was well compacted, well graded and that it had been in use for many years. The testimony at hearing established that this had been the historic access road to the subject Barnard parcel for in excess of fifty years.”

With respect to the requirement that the easement be “necessary”, this has been addressed by the Superior Court in a footnote in *Mann-Hoff v. Boyer*, 604 A.2d 703,708 (Pa.Super. 1992):

We recognize that the language quoted above from the *Burns* opinion does not require that the proponent of an easement by implication show that the claimed easement was “necessary”. This appears to conflict with other statements of the traditional test and with the Restatement test, both of which include necessity of the easement to the beneficial enjoyment of the property as a crucial factor in the

⁸ See also Powell on Real Property §34.08[2][c] (1996): “The requirement that the quasi-easement must have been “permanent” or “continuous” simply means that the use involved shall not have been occasional, accidental or temporary. This means the use shall have been of such a character to enable the claimant to rely reasonably upon the continuance of such use... It is submitted that...any well-defined route should be held to satisfy the “permanent” or “continuous” prerequisite for implication.”

analysis. One recent case has attempted to resolve this disparity. In *Hann v. Saylor*, 386 Pa.Super. 248, 562 A.2d 891 (1989), the court noted that those formulations of the traditional test that do require a showing of necessity do not mean to require a showing of “absolute necessity,” but rather require only that the claimed easement be shown to be convenient or beneficial to the dominant estate.

The use of Bidlespacher Road in the present case to serve the Barnard tract clearly meets this requirement. Thus, reviewing the matter under the traditional test, Plaintiff has established an easement by implication. Turning next to the Restatement test, Pennsylvania courts have also considered the Restatement of Property, §476 instructive in determining whether an easement by implication exists. The Restatement lists eight factors to consider when making such a determination:

- (a) whether the claimant is the conveyor or the conveyee,
- (b) the terms of the conveyance,
- (c) the consideration given for it,
- (d) whether the claim is made against a simultaneous conveyance,
- (e) the extent of necessity of the easement to the claimant,
- (f) whether reciprocal benefits result to the conveyor and the conveyee,
- (g) the manner on which the land was used prior to its conveyance, and
- (h) the extent to which the manner of prior use was or might have been known to the parties.

Restatement of Property, §476. *See also Mann-Hoff* at 706-707; *Thomas v. Deliere*, 359 A.2d 398, 399-400 (Pa.Super. 1976).

Of significance to this Court is the extensive prior use of Bidlespacher Road to access this property. Plaintiff presented the testimony of Laura Michael, who visited her grandmother, Minnie Straw, when she owned the property, prior to Plaintiff's acquisition. Ms. Michael stated that she visited her grandmother frequently at that property from the time she was seven years old (1940) until Ms. Straw transferred her property to Plaintiff in 1964. Ms. Michael stated the last time she had been to the property was in 1999, and noted with the improvements performed by Plaintiff, it “looked like a whole new house.” Most significantly, Ms. Michael testified that she and her family always used

Bidlespacher Road to access the property, and she was unaware of any other way to get to the house. Plaintiff's daughter also testified that she visited the property frequently when she was a child, often during weekends and summers, solely using Bidlespacher Road to access the premises.

As recently as 1997, the Supreme Court, in *Bucciarelli v. DeLisa*, 691 A.2d 446, 448 (Pa. 1997), noted the importance of a finding of prior use, as discussed in comment j to the Restatement of Property, §476:

The importance of this finding is that it is one of several factors to consider in determining whether an implied easement was created: The effect of the prior use as a circumstance in implying, upon a severance of possession by conveyance, an easement results from an inference as to the intention of the parties. To draw such an inference the prior use must have been known to the parties at the time of the conveyance, or, at least, have been within the possibility of their knowledge at that time. Each party to a conveyance is bound not merely to what he intended, but also to what he might reasonably have foreseen the other party to the conveyance expected. Parties to a conveyance may, therefore, be assumed to intend the continuance of uses known to them which are in considerable degree necessary to the continued usefulness of the land. Also they will be assumed to know and to contemplate the continuance of reasonably necessary uses which have so altered the premises as to make them apparent upon reasonably prudent investigation....

After careful examination of the evidence and facts presented, as well as a balancing of all of the factors set forth in the Restatement, this Court finds that the significant prior use of Bidlespacher Road to access the property also supports a finding of an easement by implication.⁹

⁹ In view of the finding of an easement by implication, it is not necessary for this Court to examine Plaintiff's argument with respect to an easement by estoppel, necessity or prescription. However, it is worth noting that the estoppel arguments raised by Plaintiff are also persuasive. Even prior to Plaintiff's ownership, the property has been accessed via Bidlespacher Road. Plaintiff and her family have relied on Bidlespacher Road for access. To now deny that access, and to force Plaintiff and her family to traverse a dangerous and unstable alternate route would be a significant hardship and detrimental to Plaintiff's right to use and enjoy the property.

Of additional significance is the fact that Plaintiff's deed to one of her adjoining tracts, acquired in November of 1965, actually has Bidlespacher Road as its boundary (referred to as an unnamed road). As stated by the Pennsylvania Supreme Court in *McAndrews v. Spencer*, 290 A.2d 258, 259 (Pa. 1972): "where descriptions in a deed refer to a driveway as a boundary, which is not a highway or dedicated to the public use, the grantee does not take title in fee to the center of it but by implication acquires an easement or right of way over the lands." Relying on this precedent, the Superior Court in 1992 noted: "The correct articulation of the law... is that where a non-public roadway is referred to as a boundary, the easement exists over the entire length and width of the roadway." *King v. Rock*, 610 A.2d 48, 50 (Pa.Super. 1992). The fact that Bidlespacher Road is a boundary road further supports a finding of an easement for Plaintiff's beneficial use to access such tract.

Defendants argued that this Court is bound under the "coordinate jurisdiction rule" by the determination made by Judge Butts in the December 12, 2007 Order and Opinion finding that Plaintiff failed to establish an easement by implication, necessity or prescription to support the injunction request. The coordinate jurisdiction rule provides "that judges sitting in the same court and in the same case should not overrule the decisions of each other." *Cossell v. Cornish*, 797 A.2d 981, 982 (Pa.Super. 2002). However, as noted by the Pennsylvania Supreme Court in *Riccio v. American Republic Ins. Co.*, 705 A.2d 422, 425 (Pa. 1997):

When determining whether the coordinate jurisdiction rule applies, the court is not guided by whether an opinion was issued in support of the initial ruling. *Goldey v. Trustees of the Univ. of Pennsylvania*, 544 Pa. 150, 155, 675 A.2d 264, 267 (1996). Instead, this Court looks to where the rulings occurred in the context of the procedural posture of the case.

Further, the Supreme Court noted, in a discussion of the coordinate jurisdiction rule in the case of *Commonwealth v. Starr*, 664 A.2d 1326, 1332 (Pa. 1995) the following:

Departure from either of these principles [law of the case doctrine and coordinate jurisdiction rule] is allowed only in exceptional circumstances such as where there has been an intervening change in the controlling law, a substantial change in the facts or evidence giving rise to the dispute in the matter, or where the prior holding was clearly erroneous and would create a manifest injustice if followed.

At the outset it must be noted that the undersigned has had the benefit of a complete record, the Board of Viewers report and additional evidence presented at the hearing on April 7, 2011. The specific portion of Judge Butts' December 12, 2007 Order and Opinion at issue in relation to the injunction request is as follows:

Plaintiff has failed to establish an easement by implication over Defendants' property. According to the Pennsylvania Supreme Court, "[a]n easement by implication arises after it is clear that a particular division of property was created by a common grantor and, without specifying that an easement over one of the estates was granted, by implication the use of the parcel would not be possible without the existence of the easement." *Kao v. Haldeman*, 556 Pa. 279, 282 (1999)(quoting *Sentz v. Crabbs*, 630 A.2d 894, 895(1993)). Further, "an easement by necessity is extinguished when the necessity from which it resulted ceases to exist." *Phillippi v. Knotter*, 748 A.2d 757, 762 (Pa. Super. Ct. 2000)(quoting *Possessky v. Diem*, 655 A.2d 1004, 1010 (Pa. Super. 1995)). Plaintiff can establish an easement by implication upon purchase of Tax Parcel No. 14-269-111; however, the Plaintiff's subsequent purchase of Tax Parcel No. 14-269-113, provides access to Plaintiff's property via the express easement over Harbot Road. Therefore, as the Plaintiff has access to her property through Harbot Road, the necessity of using Bidlespacher road ceases.

In contrast, an easement by implied reservation has been determined by the undersigned to exist in favor of Plaintiff with respect to Bidlespacher Road. A finding of such an easement is not dependent on "necessity" and thus the undersigned differs with Judge Butts, and finds that the easement by implication did not terminate upon the

subsequent purchase of land by Plaintiff that was also served by Harbot Road.¹⁰ The Board of Viewers also determined that Harbot Road was not a viable means of access. This Court accepts such a finding as the members of the Board actually walked the terrain of the road.¹¹ Finally, the conclusion by Judge Butts was not made in the context of a final resolution of the case, but on the limited basis of whether the evidence presented at the October 19, 2007 hearing supported an injunction at that time.

Accordingly, based upon the foregoing, the following Order is hereby entered.

¹⁰ At the hearing before Judge Butts, the testimony focused primarily on the theory of an easement by prescription. Also, it was noted by Plaintiff at that time that she was proceeding on alternate theories, i.e. easement or a private condemnation.

¹¹ The Board of Viewers noted in its report: "The Ringler/Harbot Road became increasingly steep and narrow, being reduced to a walking path along the edge of a ravine falling off to the south. Climbing Ringler/Harbot Road was difficult and it is to be noted that many of the parties and some counsel elected not to complete its severe incline. Approximately half way up it was reduced to less than a car width with a steep inclined embankment to the left with a ravine falling off to the right. To make this a passable road would require significant cutting into the embankment, with significant consideration for piping and erosion control measures, as well as some type of safety barrier on the ravine side in an attempt to crease some safety for passage, particularly when ice covered in the winter."

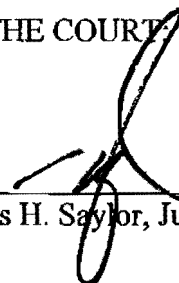
IN THE COURT OF COMMON PLEAS OF
 LYCOMING COUNTY, PENNSYLVANIA
 CIVIL ACTION – LAW

FRANCES L. BARNARD,	:	
	PLAINTIFF :	
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vs.	:	
	:	
GEORGE and MARILYN	:	
BIDELSPACHER, GREGORY and	:	
KAREN BROWN, and WILLIAM and	:	
BRENDA ULRICH,	:	
	DEFENDANTS:	

ORDER

AND NOW, this 22nd day of July, 2011, it is hereby ORDERED and DECREED that Plaintiff's Count V (condemnation of a private right-of-way) is hereby DISMISSED. Plaintiff's Count I (easement by implication) is hereby GRANTED, and Plaintiff, her family and invited guests enjoy an easement by implication over Bidlespacher Road to access her property from Trout Run Mountain Road. All other parties are specifically ENJOINED from taking any action to interfere with the use and enjoyment of this easement over Bidlespacher Road. Each party is hereby DIRECTED to submit proposals directly to the undersigned as to the future maintenance of Bidlespacher Road in relation to their respective interests within sixty (60) days from the date of this Order.

BY THE COURT



 Charles H. Saylor, Judge

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Court - *Judge Saylor*