IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

DEAN S. LEHMAN, GENE S. LEHMAN, WILBERT F. LEHMAN, SR., and ROBERT J. LEHMAN, Plaintiffs,	:	NO. 18-1552
vs.	:	CIVIL ACTION - LAW
STEVEN and KIMBER SMITH and MICHAEL and DOROTHEA LEHMAN, Defendants.	:	*Post-Trial Motions*

AMENDED VERDICT, OPINION, & ORDER

AND NOW, following argument held December 2, 2020 on the *Post-Trial Motions Filed on Behalf of the Defendant's* and *Plaintiff's Post-Trial Motion*, the Court hereby issues the following ORDER.

The foregoing involves a property dispute between Plaintiffs, Dean S. Lehman, Gene S. Lehman, Wilbert F. Lehman, Sr., and Robert J. Lehman ("Plaintiffs"), and Defendants, Michael Lehman, Dorothea Lehman, Steven Smith, and Kimber Smith ("Defendants"). In 1987, Michael Lehman and his wife, Dorothea Lehman, purchased a property at Tax Parcel No. 25-247-117 ("the Lehman Farm"). In 1995, Plaintiffs and Michael Lehman, who are brothers, purchased Tax Parcel No. 25-247-116 ("the Busler Tract") from their mother. The Busler Tract is adjacent to the Lehman Farm.

The Lehman brothers' parents, Samuel Lehman and Mae Lehman, first obtained the Busler Tract in 1956. After obtaining the Busler Tract, the Lehman family regularly used an access road on bordering property ("the Winter Property"), now owned by David E. Winter and Norma M. Winter, for ingress to and egress from the Busler Tract. In the mid-1990s, the current owners of what is now the Winter Property asked the Lehmans to relocate this access road further from their house. In 1996, Dean Lehman, with the permission and assistance of Michael Lehman, relocated the access road. A portion of this relocated access road crosses the southern portion of the Lehman Farm. In 2018, Michael Lehman and Dorothea Lehman transferred full title to the Lehman Farm to Steven Smith and Kimber Smith. Around this time,

Michael Lehman made representations to Plaintiffs that he or his successors-in-interest could block the part of the access road crossing the Lehman Farm at any time.

Plaintiffs initiated this action in quiet title and assumpsit on October 23, 2018 by the filing of a Complaint. The Court held a civil non-jury trial on September 9, 2020. Following trial, on September 22, 2020, the Court entered a Verdict, Opinion, and Order in favor of Plaintiffs, finding that they had obtained an easement by estoppel over the disputed portion of the access road.

Defendants filed Post-Trial Motions on October 6, 2020, asking for reconsideration of this Court's Verdict, Opinion, and Order. Plaintiffs thereafter filed their own Post-Trial Motions on October 13, 2020. By Order dated October 21, 2020, this Court noted that both parties' Post-Trial Motions were untimely, as Defendants Post-Trial Motions were filed more than ten (10) days after this Court issued its Verdict, Opinion, and Order.[1] However, as Defendants' Post-Trial Motion identified certain typographical and factual errors in the Court's decision, the Court decided to vacate the Verdict, Opinion, and Order to correct those errors, and having done so, in the exercise of its discretion, would consider the Post-Verdict Motions of both parties.[2] These Motions are discussed *in seriatim* below.

A. Defendants' Post-Trial Motions

Defendants assert that the Court erred in finding an easement by estoppel in favor of Plaintiffs, and ask that this Court reconsider its prior holding. Defendants provide that in order to establish an easement by estoppel, a party must first demonstrate that there was a permissive use, and then detrimental reliance on that use based on the acts, representations, admissions, or omissions of the party owning

[1] *See* Pa.R.C.P. 227.1(c)(2) ("Post-trial motions shall be filed within ten days after notice of nonsuit or the filing of the decision in the case of a trial without jury."); Pa.R.C.P. 227.1(c) ("If a party has filed a timely post-trial motion, any other party may file a post-trial motion within ten days after the filing of the first post-trial motion.") (emphasis added).

[2] Having vacated its prior Verdict, Opinion, & Order, the Court notes that the parties' filings no longer qualify as Post-Verdict Motions. These Motions are functionally Post-Trial Briefs considered for the benefit of informing the Court's decision.

the servient property.[3] Defendants contend that while Michael Lehman inarguably gave permission to Dean Lehman to relocate the existing access road to an area partially crossing the southern portion of the Lehman Farm, the evidence was insufficient to establish that Plaintiffs suffered detrimental reliance based on this relocation.[4]

In its Verdict, Opinion, and Order of September 22, 2020, the Court found that Dean Lehman had established detrimental reliance in relocating the road based on his estimation of his out-of-pocket expenditures, totaling $3,912.50, a summation of which was entered as Plaintiffs' Exhibit 8.[5] These expenditures included Dean Lehman's rental of a dozer and purchase of gravel to lay down the road, and Dean Lehman's assessment of the value of his work had it been performed by a professional. The Court also found that Dean Lehman's labor in paving the road, which the Court found likely exceeded twenty-four hours of total work, constituted detrimental reliance. Finally, the Court found that Plaintiffs had established detrimental reliance by providing evidence that the Lehman family had a claim to prescriptive easement over the access road crossing near the Winter Property, which they surrendered in electing to relocate the access road.

Defendants first assert that the estimation of costs entered into evidence as Plaintiffs' Exhibit 8 violated the Best Evidence Rule, contending that Plaintiffs instead needed to provide the original receipts for Dean Lehman's expenditures. The Court finds that this issue has been waived by the failure of Defendants' counsel to object at

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[3] Post-Trial Motions Filed on Behalf of the Defendant's ¶ 1 (Oct. 6, 2020) ("Defendants' Post-Trial Motions") (citing *Zivari v. Willis*, 611 A.2d 293, 295 (Pa. Super. 1992) ("[E]quitable estoppel arises when one by his acts, representations, of admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts.")).

[4] An easement by estoppel, also known as an irrevocable license, "will arise when a landowner permits a use of property under circumstances suggesting that the permission will not be revoked, and the user changes his or her position in reasonable reliance on that permission. *Kapp v. Norfork Southern Railway Co.*, 350 F.Supp.2d 597, 611–12 (M.D. Pa. 2004) (citing *Morning Call, Inc. v. Bell Atlantic–Pa., Inc.*, 761 A.2d 139, 144 (Pa. Super. 2000)).

[5] The Court continues to rely on its prior Verdict, Opinion, & Order except where modified by this most recent Amended Verdict, Opinion, & Order.

trial when Plaintiffs' counsel moved for admission of Exhibit 8.[6] However, even absent waiver, the Best Evidence Rule likely would not have precluded entry of Plaintiff's Exhibit 8. Under Pa.R.E. 1002, which corresponds to the common law Best Evidence Rule, "[a]n original writing, recording, or photograph is required in order to prove its content unless these rules, other rules prescribed by the Supreme Court, or a statute provides otherwise." Under Pa.R.E. 1004(a), an original writing, recording, or photograph is not required when the original has been lost or destroyed, and not by the proponent acting in bad faith. It would not have been difficult for Plaintiffs to establish that the twenty-two year-old receipts had been lost or discarded.[7]

Defendants next contend that in considering the factors in favor of detrimental reliance, the Court erred in treating the $1,885 that Dean Lehman estimated as the value of his own labor as an expenditure. As Dean Lehman completed the paving of the access road himself rather than hiring workers, Defendants note that there were no out-of-pocket expenditures for labor. Defendants contend that, at most, the Court should have credited only $2,047.50 to expenditures, which would account for the amount Dean Lehman attests he spent on gravel and on renting a dozer.

Upon reconsideration, the Court ultimately agrees that it erred in treating Dean Lehman's unpaid labor as an expenditure. The $1,885 figure that Dean Lehman assessed as the commercial value of his work was relevant to the scope of Dean Lehman's labor, but was not an actual expenditure. However, the Court finds this error harmless. Even finding that Dean Lehman spent only $2,047.50 out-of-pocket in paving the road, this detrimental reliance, when considered in conjunction with the scope of Dean Lehman's twenty-four hours of labor, and Plaintiffs' decision to surrender their claim of prescriptive easement over the original access road in

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[6] *See e.g.*, *Craley v. Jet Equip. & Tools, Inc.*, 778 A.2d 701, 707 (Pa. Super. 2001) (affirming trial court's ruling that appellants had waived their objection to the purportedly prejudicial comments made by appellee's counsel during closing argument, as appellants' counsel had failed to timely object at trial and the issue was first raised in appellants' post-trial motions).

[7] *See Noble C. Quandel Co. v. Slough Flooring, Inc.*, 558 A.2d 99, 102 (Pa. Super. 1989) (citation omitted) ("The [Best Evidence Rule] requires a party who seeks to prove a writing for the purpose of establishing its terms to produce the writing unless the nonfeasability of production is satisfactorily established.") (emphasis added).

anticipation of their right to use the relocated access road, is sufficient to establish an easement by estoppel.

Defendants also contest the Court's finding that Plaintiffs suffered a detriment by surrendering a claim to a prescriptive easement to the access road passing by the Winter Property, noting that the Court failed to account for the fact that a portion of the original access road also crossed a portion of the Lehman Farm to reach the Busler Tract. While this is true, this fact alone does not contravene the Court's finding that Plaintiffs had a valid claim of prescriptive easement over this original access road. Plaintiffs presented evidence that they, and their parents before them, regularly, openly, and without express permission, used the right-of-way by the Winter Property to access the Busler tract dating back to 1956. The Court found that the Lehman family made "adverse, open, notorious, and continuous use" of this initial access road for an uninterrupted period of over twenty-one years to access the Busler Tract.[8] Like other easements appurtenant, prescriptive easements will travel with the property.[9] By the time Michael Lehman and Dorothea Lehman purchased the Lehman Farm in 1987, Mae Lehman would have already obtained a prescriptive easement over the original access road in favor of the Busler Tract, which she would have passed on to her sons when she sold them the Busler Tract.[10] The fact that the original access road also crossed over the Lehman Farm would therefore not impact the Court's calculus.

Defendants also identify a number of typographical errors in this Court's Verdict, Opinion, and Order. Specifically, Michael Lehman was misidentified several

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[8] *See Walley v. Iraca*, 520 A.2d 886, 890 (Pa. Super. 1987) (holding that once alleged holder of a prescriptive easement has met his or her burden of proof by showing use that there was adverse, open, notorious, and continuous use for an uninterrupted period of twenty-one years, the burden then shifts to the landowner to establish that the use was by a grant of permission).

[9] *See e.g.*, *Hash v. Sofinowski*, 487 A.2d 32, 33 (Pa. Super. 1985) (noting that appellees prescriptive easement over appellants' servient property was inherited from their predecessors in title).

[10] The Court notes that the doctrine of merger did not apply when Michael Lehman became titled owner of both the Lehman Farm and the Busler Tract, because for merger to occur, the title to the dominant and servient estates must be "co-extensive, equal in validity, quality and all other circumstances," and Michael Lehman co-owned the Busler Tract with his brothers. 25 Am. Jur.2 d Easements and Licenses § 108. Even if Michael Lehman were the sole owner of both properties, merger would not *per se* apply. *See Wedge v. Schrock*, 22 A.2d 305 (Pa. Super. 1941) (holding that when dominant and servient estates come into the same ownership, merger will not extinguish an easement when there is an intervening or outstanding interest or title held by some other person in the easement).

times as "Michael Smith." Kimber Smith was erroneously identified as the daughter of Michael Lehman and Dorothea Lehman, and Steven Smith as the son-in-law, while it is in fact Steven Smith who is the son, and Kimber Smith the daughter-in-law. While the Court will correct these errors by issuing this Amended Verdict, Opinion, and Order, these errors did not go to the substance of the Court's decision.

B. Plaintiffs' Post-Trial Motion

Plaintiffs within their Post-Trial Motion requests that this Court amend the verdict to include an award of attorney's fees. Plaintiffs submitted within their Complaint and at trial that Michael Lehman should be liable for attorneys' fees in this matter pursuant to a 1994 Real Estate Ownership Agreement ("Agreement") signed by the Lehman brothers in anticipation of obtaining legal title to the Busler Tract. Paragraph 2 of this Agreement contained an indemnification clause providing:

> Indemnity. Each party shall indemnify and hold harmless the other parties against all debts, liens, judgments or charges of any nature whatsoever accruing against the Premises by reason of any act or failure to act of the indemnifying party.[11]

Further, paragraph 8 reads:

> Management. All actions of the co-tenants with respect to the Premises shall be governed by a vote of the holders of a majority in interest in the Premises. In the event of a deadlock, the decision of Dean S. Lehman shall control.

In its Verdict, Opinion, and Order of September 22, 2020, the Court found that this indemnification clause should not be construed to apply to a dispute regarding a portion of roadway crossing a property entirely separate from the Busler Tract. The Court also found that relief would be denied because Michael Lehman no longer had a legal interest in the Lehman Farm at the time that he represented to Plaintiffs that he or his successors-in-interest could choose to block portions of the access road.

Plaintiffs maintain that this decision was in error on two bases. First, the 1995 deed to the Lehman brothers of the Busler tract, is a deed not only to the 62 acres of

land, but included "all. . .ways, rights, liberties, privileges, hereditaments and appurtenances whatsoever thereunto belonging."[12] Plaintiffs therefore argue any prescriptive easements servient to the Busler Tract were conveyed as a part of the property. Plaintiffs also argue that while Michael Lehman asserted that he or his successors-in-interest had a legal right to block portions of the access road only in 2018, Michael Lehman's assertion was based on the claim that in 1996 he had only granted Plaintiffs a revocable license to use the access road. Therefore, Michael Lehman's attempt in 1996 to reserve for himself an irrevocable license in use of the access road, without also conveying this same irrevocable license to Plaintiffs, was in contravention of the Agreement and occurred while Michael Lehman was still owner of the Lehman Farm.

Upon reconsideration, the Court finds these arguments persuasive, particularly Plaintiffs assertion that their prescriptive easement, as an appurtenance to the Busler Estate, would in a legal sense be attached to the dominant estate.[13] The Court therefore GRANTS Plaintiffs' request for legal fees. Plaintiffs shall be provided seven days from the date of this Amended Verdict, Opinion, & Order to file with the Court an itemization of the requested legal fees and costs. Upon the close of that seven day period, Defendants shall have seven days to file objections, if any, to Plaintiffs' itemization of fees and costs.

VERDICT

The Court hereby reinstates the Verdict contained in its Opinion, Verdict, & Order of September 22, 2020. The Court hereby modifies that Verdict to include a grant of Plaintiffs' Count V claim for Assumpsit. The Court shall amend this Verdict to include the amount of legal fees and costs to be paid following the fourteen day period for submission of an itemization and objections.

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[11] This 1994 Real Estate Ownership Agreement is Plaintiffs' Exhibit 4.
[12] The 1995 deed to the Busler Tract is Plaintiff's Exhibit 1.
[13] *See Lindenmuth v. Safe Harbor Water Power Corp.*, 163 A. 159, 161 (Pa. 1932) ("It is obvious that the easement, to be appurtenant, must be attached to the dominant estate, and it can become legally attached only by unity of title in the same person to both the dominant estate and the easement claimed.").

IT IS SO ORDERED this 4th day of February 2021.

BY THE COURT,

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Eric R. Linhardt, Judge

cc: Marc Drier, Esquire
Charles Rosamilia, Jr., Esquire
241 W Main Street, Lock Haven PA 17745
Gary Weber, Esq. / Lycoming Reporter