IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CHAD A. NIEMELA, Appellant, v. STATE FOREST BOARD of the STATE OF WASHINGTON; GERALD M. DEBRIAE and LINDA K. DEBRIAE, Trustees of the Gerald M. and Linda K. DeBriae Revocable Living Trust dated August 20, 1991; RUSSELL REID and BERTHA E. REID, husband and wife, and GILBERT REID and EVA REID, husband and wife; SHANNA VANVESSEN a/k/a SHANNA VANVESSEM, as her separate estate; ROSEMARY C. MOGUSH, as her separate estate; and DOUGLAS J. MACH and BETTE D. MACH, husband and wife, Respondents.	No. 40812-1-II UNPUBLISHED OPINION

Armstrong, P.J. — The Cooper Family Trust, Robert Cooper, and Virginia Cooper (collectively "the Coopers") filed a quiet title action against the State, seeking to establish their right to use a road that crosses state forest land to access their property. The trial court granted summary judgment in favor of the State. The Coopers subsequently sold their property to Chad Niemela, and the trial court substituted Niemela as the plaintiff in this proceeding. Niemela appeals the trial court's summary judgment order, arguing that there are genuine issues of material fact regarding whether the Coopers had (1) an easement implied from prior use, (2) an easement implied from necessity, (3) a common law right of access, or (4) a right based on a common law dedication. We affirm the trial court's summary judgment order.

FACTS

Niemela's property is located in a rural area of Wahkiakum County. The western adjoining property is state forest land. The Bradley Logging Company owned both properties from 1908 until 1918, when it sold the property Niemela now owns. The State acquired its property in 1938. The Coopers acquired their property in 1992 or 1997,[1] and sold it to Niemela in June 2010.

Beaver Creek County Road runs to the north of and parallel to both properties. The record does not show whether any part of Niemela's property adjoins the road. Schraum County Road runs from Beaver Creek County Road across several individually-owned properties, the state forest land, and then ends at Niemela's property. The county vacated and abandoned most of Schraum County Road on September 2, 1958, and now maintains only a short segment of the road near the intersection with Beaver Creek County Road.

The Coopers had always used Schraum County Road to access their property. In February 2009, the Coopers researched the title to their property and learned that they had no recorded legal access and their property was legally landlocked. The Coopers filed a quiet title action against the State,[2] seeking to establish their right to use Schraum County Road to access their property.

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[1] Robert Cooper stated in a declaration that his family purchased the property in 1997. A title report states that the Coopers acquired the property in 1992.

[2] The Coopers filed their complaint against the State Forest Board, which is the entity listed on the deed for the state forest land. The State Forest Board was consolidated into the Department of Natural Resources in 1957. The Coopers also included as co-defendants the individual landowners whose property the Schraum County Road crosses.

The State moved for summary judgment, arguing that the Coopers could not establish a right to use the disputed road. The State noted that the Coopers could apply for an easement from the Department of Natural Resources, but the Department would require them to bring the road up to forest practice standards and to maintain the road as a condition of granting the easement. The Coopers opposed the State's motion, arguing that there were genuine issues of material fact regarding whether they had an easement implied from prior use, an easement implied from necessity, a common law right of access, or a right based on a common law dedication. The trial court granted the State's summary judgment motion and awarded the State $200 in attorney fees.

ANALYSIS

I. Standard of Review

Niemela reasserts the arguments the Coopers raised below: that genuine issues of material fact exist regarding whether the Coopers had (1) an easement implied from prior use, (2) an easement implied from necessity, (3) a common law right of access, or (4) a right based on a common law dedication. We review summary judgment orders de novo. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). We will affirm an order granting summary judgment if, when viewing the evidence in the light most favorable to the nonmoving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Ranger*, 164 Wn.2d at 552.

Summary judgment is subject to a burden-shifting scheme. *Ranger*, 164 Wn.2d at 552. The moving party bears the initial burden of showing the absence of genuine issues of material

fact. *Pac. Nw. Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 350, 144 P.3d 276 (2006). The moving party may meet this initial burden by pointing out to the trial court that no evidence supports the nonmoving party's claim. *Pac. Nw. Shooting Park*, 158 Wn.2d at 350; *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989). The burden then shifts to the nonmoving party to present admissible evidence supporting its claim or demonstrating the existence of a genuine issue of material fact. *Pac. Nw. Shooting Park*, 158 Wn.2d at 351; *Young*, 112 Wn.2d at 225. If the nonmoving party fails to present such evidence, the trial court will grant the summary judgment motion. *Young*, 112 Wn.2d at 225.

Here, the State moved for summary judgment on the basis that the Coopers could not produce sufficient evidence to support their claim of a right to use Schraum County Road to access their property. The burden then shifted to the Coopers to present admissible evidence supporting their claim or demonstrating the existence of a genuine issue of material fact. *See Pac. Nw. Shooting Park*, 158 Wn.2d at 350-51. Thus, we evaluate the evidence the Coopers submitted to the trial court to determine whether they presented sufficient evidence to support their legal theories and overcome summary judgment.

II. Easement Implied From Prior Use

Implied easements are based on the parties' intent, which is shown by the facts and circumstances surrounding the conveyance. *Roberts v. Smith*, 41 Wn. App. 861, 864, 707 P.2d 143 (1985) (citing *Evich v. Kovacevich*, 33 Wn.2d 151, 204 P.2d 839 (1949)). Intent to create an easement is implied from prior use where: (1) a common parcel is divided into two parcels of property; (2) prior to severance, there was an apparent and continuous use of a "quasi easement"

for the benefit of one parcel, but to the detriment of the other; and (3) after severance, continued use of the easement is reasonably necessary. *Landberg v. Carlson*, 108 Wn. App. 749, 757, 33 P.3d 406 (2001) (citing *Hellberg v. Coffin Sheep Co.*, 66 Wn.2d 664, 668, 404 P.2d 770 (1965)). A "quasi easement" exists where one portion of a common parcel has been burdened for the benefit of another portion, and the burden would be considered a legal easement if the two portions were owned by separate individuals. *McPhaden v. Scott*, 95 Wn. App. 431, 437 n.3, 975 P.2d 1033 (1999) (citing *Adams v. Cullen*, 44 Wn.2d 502, 504, 268 P.2d 451 (1954)). "The test of necessity is whether the party claiming the right can, at reasonable cost, on his own estate, and without trespassing on his neighbors, create a substitute." *Bays v. Haven*, 55 Wn. App. 324, 329, 777 P.2d 562 (1989) (citing *Adams*, 44 Wn.2d at 506).

The first element is not in dispute: the properties here were both part of a parcel owned by the Bradley Logging Company from 1908 to 1918. The parties dispute whether the Coopers presented sufficient evidence to establish the second and third elements: that before 1918, there was an apparent and continuous use of Schraum County Road and that, after severance, continued used of the road was reasonably necessary.

At trial, the Coopers submitted county maps from 1920, 1932, and 1938, which show the existence of roads in the vicinity of their property. The Coopers also submitted a declaration from Peter Ringen, the Public Works Director and County Engineer for Wahkiakum County, stating that he had reviewed the maps, that the Coopers' property was connected to the county road by Schraum County Road, and that the connecting portion of Schraum County Road was vacated in 1958. The Coopers also submitted the Bradley Logging Company's 1908 deed, which references

an unnamed logging road located in the vicinity of the Coopers' property.

The maps and deed do not establish that the particular road in dispute here, Schraum County Road, actually existed in 1918 when the Bradley Logging Company severed its common parcel of land. Even assuming, as Niemela argues, that these documents establish a reasonable inference that the disputed road existed in 1918, there is still no evidence as to the use of the road before severance or the necessity of continuing to use the road to access what is now Niemela's property after severance. There is no evidence regarding the history of the properties to the north, east, and south of Niemela's property, and no evidence establishing that constructing an alternate access road across those properties would not have been feasible. Absent some evidence of an apparent and continuous prior use and the absence of reasonable alternatives at the time of severance, Niemela cannot establish that the Bradley Logging Company created an easement implied from prior use when it severed his property from the common parcel in 1918. *See Landberg*, 108 Wn. App. at 757; *Bays*, 55 Wn. App. at 329.

III. Easement Implied From Necessity

Intent to create an easement is implied from necessity where (1) a grantor conveys part of a common parcel, (2) retains part of the parcel, and (3) after severance, it is necessary to pass over the grantor's land to reach a public street or road. *Visser v. Craig*, 139 Wn. App. 152, 158-59, 159 P.3d 453 (2007) (citing *Hellberg*, 66 Wn.2d at 667-68). Necessity must exist at the time the common parcel is severed. *Visser*, 139 Wn. App. at 159 (citing *Granite Beach Holdings, LLC v. Dep't of Nat'l Res.*, 103 Wn. App. 186, 196, 11 P.3d 847 (2000)). For the reasons we discussed above, the Coopers' evidence does not establish that it was necessary to use Schraum

County Road to access their property in 1918 when it was severed from the common parcel.

IV. Common Law Right of Access

Niemela relies on *Howell v. King County*, 16 Wn.2d 557, 134 P.2d 80 (1943), to argue that his property retained a private easement over Schraum County Road after Wahkiakum County vacated the road in 1958. In *Howell*, a property owner appealed a county order vacating part of a platted street adjacent to her property. *Howell*, 16 Wn.2d at 557-58. The *Howell* court affirmed the vacation order, but it held that the complaining owner's property retained a private right of ingress and egress over the vacated street. *Howell*, 16 Wn.2d at 559. In *Capitol Hill Methodist Church of Seattle v. City of Seattle*, 52 Wn.2d 359, 369, 324 P.2d 1113 (1958), our Supreme Court characterized *Howell* and the cases it relies on as holding:

> that parties who purchase property from a common grantor, in reference to a recorded plat, acquire a private easement for the purpose of access over the streets and alleys abutting their property, and/or over the streets and alleys that are reasonably necessary for ingress and egress to their property.

See also Humphrey v. Jenks, 61 Wn.2d 565, 567, 379 P.2d 366 (1963). Here, there is no evidence showing that Niemela's predecessors in interest purchased the property with reference to and reliance on a map or plat depicting Schraum County Road as a dedicated public road. Accordingly, *Howell* does not apply.

Niemela also argues that if the State is allowed to bar his access to Schraum County Road, he is entitled to just compensation for the taking of his right of access. It has long been the rule in Washington that:

> The owner of property abutting upon a public thoroughfare has a right to free and convenient access thereto. This right of ingress and egress attaches to the land. It is a property right, as complete as ownership of the land itself.
>
> On numerous occasions, this court has held that the abutting property

owner is entitled to just compensation if this right is taken or damaged.

Walker v. State, 48 Wn.2d 587, 589-90, 295 P.2d 328 (1956); *see also London v. City of Seattle*, 93 Wn.2d 657, 660-61, 611 P.2d 781 (1980); *Keiffer v. King County*, 89 Wn.2d 369, 372, 572 P.2d 408 (1977); *McMoran v. State*, 55 Wn.2d 37, 40, 345 P.2d 598 (1959); *West v. Keith*, 154 Wash. 682, 692, 283 P. 198 (1929); *Fry v. O'Leary*, 141 Wash. 465, 469-70, 252 P. 111 (1927). Vacation of a public street can result in a compensable loss of access for abutting property owners even though the road is not physically blocked. *Fry*, 141 Wash. at 469-70; *see also London*, 93 Wn.2d at 661-63; 17 William B. Stoebuck & John W. Weaver, Washington Practice: Real Estate: Property Law § 9.11, at 586-87 (2d ed. 2004). The property owner's loss is complete on the date that the vacation order becomes effective. *London*, 93 Wn.2d at 664; *Fry*, 141 Wash. at 473-74.

Here, it is undisputed that Schraum County Road was once a public street and that Wahkiakum County vacated and abandoned most of the road on September 2, 1958, thereby eliminating access to Niemela's property from a public road. The loss of access was complete on that date. *See London*, 93 Wn.2d at 664; *Fry*, 141 Wash. at 473-74. Thus, Niemela's predecessors in interest likely had a valid claim for compensation against Wahkiakum County. But even assuming that Niemela can still assert that claim over 50 years after the taking, he seeks compensation from the wrong party. The State did not vacate Schraum County Road and, accordingly, is not liable for the loss of access.

V. Dedication

Finally, a common law dedication arises where there is "(1) an intention on the part of the owner to devote his land, or an easement in it, to a public use, followed by some act or acts

clearly and unmistakably evidencing such intention; and (2) an acceptance by the public." *City of Spokane v. Catholic Bishop of Spokane*, 33 Wn.2d 496, 502-03, 206 P.2d 277 (1949). The owner's intention must be "'clear, manifest, and unequivocal, whether by written instrument or by some act or declaration of the owner manifesting his clear intent to devote the property to public use.'" *Catholic Bishop of Spokane*, 33 Wn.2d at 503 (quoting *Corning v. Aldo*, 195 Wash. 570, 55 P.2d 1093 (1936)). The dedication must also be for the use of the general public: "'The essence of dedication is that it shall be for the use of the public at large, that is, the general, unorganized public, and not for one person or a limited number of persons, or for the exclusive use of restricted groups of individuals.'" *Knudsen v. Patton*, 26 Wn. App. 134, 141-42, 611 P.2d 1354 (1980) (quoting 23 Am. Jur. 2d *Dedication* § 5 (1965)).

Niemela argues that the State manifested a clear intent to dedicate Schraum County Road for public use by failing to dismantle the road or otherwise prevent people from using it, and that the public accepted the dedication by continuing to use the road. The State argues that failure to close the road does not constitute an affirmative act expressing a clear and unmistakable intent to devote the road to public use. We agree. *See Catholic Bishop of Spokane*, 33 Wn.2d at 502-03. Additionally, a single family's use of the road to access their private property is insufficient to show a dedicated *public* use or that the *public* accepted the alleged dedication. *See Knudsen*, 26 Wn. App. at 141-42.

As Division One of this court observed in *Granite Beach*, 103 Wn. App. at 207, "the record shows that the appellants were aware that access to their property was problematic when they purchased it . . . . [and] are properly left with the property rights that existed at the time the

property was acquired." Similarly, Niemela was aware that access was problematic when he purchased the Coopers' property and is now properly left with the rights that existed at the time he acquired the property.

Accordingly, we hold that the Coopers did not meet their burden of submitting sufficient evidence to the trial court to support their claims and affirm the trial court's summary judgment order. *See Pac. Nw. Shooting Park*, 158 Wn.2d at 350-51; *Young*, 112 Wn.2d at 225.

VI. Attorney Fees

We grant the State's request for statutory attorney fees and costs under RCW 4.84.080 and RAP 18.1.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, P.J.

We concur:

Van Deren, J.

Johanson, J.