IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Laying Out and Opening of a Private Road, over property located in Granville Township, Mifflin County	:	
Petition of Charles M. Colony, Individually, and Ferguson Valley Hardwoods, Charles M. Colony, Dorothy L. Colony, and Eric E. Eminheiser, t/d/b/a Hawkwing Partnership, a Pennsylvania Partnership Doris W. Hann	:	
	:	No. 520 C.D. 2010
Appeal of: Doberman Group, Inc.	:	Argued: June 21, 2010

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: October 21, 2010

Doberman Group, Inc. (Appellant) appeals from an order of the Court of Common Pleas of Mifflin County (common pleas court) that overruled Appellant's objections to the Board of View's determination to grant a private road to Hawkwing Partnership (Hawkwing), a partnership consisting of Charles M. Colony (Colony) and Ferguson Valley Hardwoods (Ferguson Valley), (collectively, Appellees) and also overruled Appellant's objections to the method the Board of View adopted to determine damages in the amount of $14,016.19.[1]

[1] The Honorable Timothy S. Searer, President Judge (President Judge Searer), overruled Appellant's objections to the Board of View's grant of a private road to Appellees. By order dated May 13, 2008, President Judge Searer recused himself and appointed the Honorable Stewart L. Kurtz (Judge Kurtz) to hear arguments on Appellant's and Appellees' objections to
(Footnote continued on next page…)

I. Petition To Appoint A Board Of View.

On July 18, 2001, Appellees requested the appointment of a Board of View to lay out a private road and alleged:

> 3. Respondent Doris W. Hann . . . is the record owner of a parcel of land in Granville Township . . . .
>
> 4. Petitioners' [Appellees'] property is land-locked, and Petitioners [Appellees] have neither a private nor public access road to Petitioners' [Appellees'] tract of land.
>
> 5. Petitioners [Appellees] have an existing private easement over land adjacent to Petitioners' [Appellees'] land that connects Petitioners' [Appellees'] land to Respondent's land.
>
> 6. An existing public road leads out from the opposite side of Respondent's property.
>
> 7. The shortest and most practical route from Petitioner's [sic] [Appellees'] land to a public road is across Respondent's land between the place where the private easement ends and the public road leads out . . . . (emphasis added).
>
> 8. The opening of a private road across Respondents' [sic] land for use by Petitioner [sic] [Appellees] is necessary for Petitioner [sic] [Appellees] to have access to its land from a public road.
>
> **WHEREFORE**, Petitioner [sic] [Appellees] respectfully requests that this Honorable Court appoint three viewers to lay out a private road leading from Petitioner's [sic] [Appellees'] real property . . . and to assess the damages,

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(continued…)

the Board of View's determination of damages. Judge Kurtz overruled Appellant's and Appellees' objections.

> if any, to which any party may be entitled. (emphasis added).

Petition to Appoint Board of View to Lay Out a Private Road, July 18, 2001, Paragraphs 3-8 at 2; Certified Record (C.R.) at C-3.

On August 20, 2001, Hann responded and alleged:

> 4. . . . Respondent [Hann] believes Petitioner's [Appellees'] property is not land locked to the West. Further, if it is now land locked, at one point in time while owned by Petitioners [Appellees] or their successors in interest, it is believed the parcel did have access to a public road from the West. (emphasis added).
> . . . .
> 7. . . . By way of further answer, it appears a more direct route from Hawkwing's [Appellees'] property through the Glenn Stumpff property and along the edge of Respondent's [Hann's] property is a less intrusive route and less damaging than a road cutting through the middle of Respondent's [Hann's] property.
>
> 8. . . . Upon information and belief, Petitioner [Appellees] has access to a public road other than through the requested private road. (emphasis added).

Respondent's Answer To Petition To Appoint Board Of View And To Lay Out A Private Road, August 20, 2001, Paragraphs 4 and 7-8 at 2; C.R.

At a September 26, 2001, hearing, Colony testified that '[o]nce you get to the Hann property, the public road would end . . . [n]ow it certainly would appear that the township thinks the road goes further . . . [b]ut I doubt that you're going to find any documentation that the township formally adopted the road past this point." Hearing Transcript, September 26, 2001, (H.T. 9/26/01) at 29; Reproduced Record (R.R.) at 11a. Colony stated that "John Hoyt would be the

current Stumpff property, and [John] Filson would be the Hann property." H.T. 9/26/01 at 30; R.R. at 11a. Colony contacted the Brown Estate and "[t]hey offered to give us a temporary right-of-way for $40,000, including the right of first refusal on the ground, and hunting rights, and whatever else . . . [s]o they essentially own our ground and give us a temporary right-of-way . . . ." H.T. 9/26/01 at 57; R.R. at 18a. With regard to a right-of-way across Vogt and Snyder, Colony stated that "Vogt wants something . . . Snyder wants something . . . [t]hey don't agree where their respective properties are, which . . . has to be resolved before we can even get far enough to talk with them about such a right-of-way." H.T. 9/26/01 at 59; R.R. at 18a.

James M. Cowan (Cowan), a private consultant, testified that he is aware of the easement that traverses from the Brown property through the eastern portion of Appellant's property. H.T. 9/26/01 at 67-68; R.R. at 20a. Cowan stated that the road located on the Brown property "is definitely a better road [than] the one on the Snyder property." H.T. 9/26/01 at 69; R.R. at 21a. Cowan concluded that it is possible to put a road across the Hann property. H.T. 9/26/01 at 72; R.R. at 21a.

II. Petition To Additional Respondents To Appoint A Board Of View To Lay Out A Private Road.

On October 4, 2001, following the hearing, Appellees filed a petition and alleged:

> **Count I**
>
> 4. Petitioner[s] [sic] [Appellees] filed the original action in this matter to open a private road across lands described above of Respondent Doris Hann as the shortest and most practical route to Petitioner's [sic] [Appellees'] property . . . .

5. A Board of View was convened on September 26, 2001 to access Petitioner's [sic] [Appellees'] request to open a private road on Respondent Doris Hann's property.

6. The Board of View determined that two other private roads already exist leading to the closest public road from Petitioner's [sic] [Appellees'] land, and although it is Petitioner's [sic] [Appellees'] assertion these roads are longer, less direct routes, the Board believes these roads should be considered for access to Petitioner's [sic] [Appellees'] land. (emphasis added).

7. The first of these private roads lies across lands of Additional Respondents C. David Vogt, Jr., Sheri A. Bickhart, and Todd D. Vogt, as Trustees under the Carl D. Vogt Residuary trust, and Raymond M. Snyder, and leads from Petitioners' [Appellees'] land to the public road. (emphasis added).

. . . .

10. The second of these private roads lies across lands of Doberman Group, Inc., [Appellant] and Elizabeth S. Brown, and Richard S. Brown, Jr., Timothy H. Brown, Tyler M. Brown and Barton T. Brown, and leads from Petitioner's [sic] [Appellees'] land to the public road. (emphasis added).

. . . .

Count II

16. As there is a controversy as to whether an easement leads from the public road all the way to Respondent Doris Hann's property, four Additional Respondents must be added to ensure an easement across their property if a route through Respondent Doris Hann's property is granted to be open for Petitioner's [sic] [Appellees'] access to its property. (emphasis added).

17. The first parcel of land through which use of an easement is desired is owned by Additional Respondents William D. Bowen, Jr. and Sara J. Bowen . . . .

18. The second parcel of land through which use of an easement is desired is owned by Additional Respondents Kathryn M. Miller and John E. Miller, Sr. . . . .

19. Petitioner[s] [sic] [Appellees] believes [sic] it [sic] already has [sic] an easement through the next two parcels of land owned by Robert K. Stitt and William M. Steele and E. Jeanne Steele . . . . (emphasis added).

20. Additional Respondent Robert K. Stitt . . . is the record owner of a parcel of land . . . .

21. Additional Respondents William M. Steele and E. Jeanne Steele . . . are the record owners of a parcel of land . . . .

Conclusion

. . . .
23. Petitioner's [sic] [Appellees'] property is land-locked, and Petitioner[s] [sic] [Appellees] has neither a private nor public access road to Petitioner's [sic] [Appellees'] track of land. (emphasis added).

24. The shortest and most practical route from Petitioner's [sic] [Appellees'] land to a public road is across Respondent Doris Hann's land, as stated in the original complaint. Alternatively another route would be 1) across the private road that crosses the land of Additional Respondents' C. David Vogt, Jr., Sheri A. Bickhart, and Todd D. Vogt, as Trustee under the Carl D. Vogt Residuary Trust, and land of Raymond M. Snyder; or alternatively 2) across the private road that crosses the land of Additional Respondents' Doberman Group, Inc., [Appellant] and the land of Elizabeth S. Brown and the land of Elizabeth S. Brown, and the land of Richard S. Brown, Jr., and Timothy H. Brown, Tyler M. Brown and Barton T. Brown . . . . (emphasis added).

25. The opening of the private road across either Respondent's land or the use of a private road from either set of Additional Respondents' land for use by Petitioner[s] [sic] [Appellees] is necessary for Petitioner[s] [sic] [Appellees] to have access to its land from a public road.

> **Wherefore**, Petitioner[s] [sic] [Appellees] respectfully requests that this Honorable Court appoint three viewers . . . .

Petition To Additional Respondents To Appoint A Board Of View To Lay Out A Private Road, October 4, 2001, Paragraphs 4-7, 10, 16-21, and 23-25 at 2-6; C.R.

On January 30, 2003, Raymond Snyder (Snyder) answered and alleged:

> **Count I**
>
> 7. . . . It is admitted for purposes of description that Petitioners [Appellees] make reference to a private road lying across lands of Respondent Snyder; however, it is denied that a private road exists over lands of Respondent Snyder which leads from Petitioner's [sic] [Appellees'] land to the public road. <u>On the contrary, no agreement for such private right-of-way exists and no right-of-way has been created by any available theory or by any applicable facts, the existence of such being specifically denied</u>. (emphasis added).
>
> . . . .
>
> **Conclusion**
>
> 24. . . . <u>It is denied that any practical route for the construction of an access private road exists across lands of Respondent Snyder, but in fact, the shortest and most practical route for such access way lies across lands of other parties or individuals</u>. (emphasis added).

Answer To Petition To Additional Respondents To Appoint A Board Of View To Lay Out A Private Road, January 30, 2003, Paragraphs 7 and 24 at 2 and 4; C.R.

III. Report Of The Board Of View.

> The Board of View made the following pertinent findings of fact:
>
> 5. The Board of Viewers made a View of the three (3) proposed roads with that View taking place on November 18, 2002. A Roster of those attending the November 18, 2002 Property View was filed with this Honorable Court on December 18, 2002.

. . . .
9. In attendance at the aforesaid Hearing were Mark J. Remy, Esquire, Attorney for Petitioner[s] [sic] [Appellees], Steven L Grose, Esquire, Attorney for Doris W. Hann, Donald Zagurskie, Esquire, Attorney for Raymond M. Snyder, Terry J. Williams, Esquire, Attorney for C. David Vogt, Barton T. Brown, one of the four owners of a property owned by Richard S. Brown, Jr., Timothy H. Brown, Tyler M. Brown and Barton T. Brown, and Members of the Family of William Steele and Robert K. Stitt.

. . . .
11. Petitioner[s] [sic], Hawkwing Partnership, [Appellees] is [are] the owner of certain real estate located in Granville Township, Mifflin County, PA . . . identified as the Plan of the Hawkwing Partnership [Appellees] Property, as prepared by Charles Maynard Colony . . . dated March 14, 2002.

12. Petitioner[s] [sic] [Appellees] presented the testimony of Charles Colony.

13. Mr. Colony testified that the aforesaid real estate . . . was owned by the Hawkwing Partnership [Appellees] and had no access to a public road or private right-of-way, which would permit access to a public road.

14. Colony further testified that the Hawkwing Partnership [Appellees] needed road access.

15. Colony testified that the preference was for use of a current road, which traverses the property of Brown and the Doberman's [Appellant's] . . . property, and that it did not prefer the use of a road which traversed the property of Snyder and Vogt, since the road was in poor condition and would need substantial rerouting, and, did not prefer to build a road over the properties of Hann, Stitt and Steele where, at the present, no such road existed. (emphasis added).

16. Colony further testified that it would be the preference of Hawkwing [Appellees] that any private

road granted to it has a width of twenty-five (25') foot as a right-of-way. (emphasis added).

. . . .

18. Mr. Vogt testified that the road traversing the properties of Snyder and Vogt crossed two (2) creeks . . . which had to be forded, and that both of the creeks, which would be traversed by the road and periods of high water, would interfere with the ability to travel the road . . . .

19. Barton T. Brown, both on behalf of himself and on behalf of his Brothers . . . testified that he and his Brothers were owners of the property which adjoined the public road, adjoined the property of . . . Doberman [Appellant] . . . and presently had a right-of-way traversing the property, which had been granted to . . . Doberman [Appellant] . . . in a Right-of-Way Agreement and Grant of First Refusal dated April 8, 1996. (emphasis added).

20. Mr. Brown testified that the Agreement called for a twenty (20') foot right-of-way over the Brown property to the property of Doberman [Appellant].

21. He [Brown] testified that he, and on behalf of his Brothers, had no objection to Hawkwing [Appellees] being granted the right to use this right-of-way, as long as the use was restricted to the twenty (20') foot width, as set forth in the April 8, 1996 Right-of-Way Agreement by and between the Browns and Doberman [Appellant] . . . . (emphasis added).

Report of Board of View, May 13, 2003, Findings of Fact (F.F.) Nos. 5, 9, 11-16 and 16-21 at 2-3. The Board of View concluded:

27. The Board accepts and incorporates herein the Plan of the Hawkwing Partnership Property [Appellees], the April 8, 1996 Right-of-Way Agreement and Grant of Right of First Refusal . . . . (emphasis added).

28. Based upon the aforesaid, the Board of View determined that the most appropriate private road, which should be granted to Hawkwing Partnership [Appellees],

> is the road identified as that running over the properties of Brown and Doberman [Appellant] . . . based on the following considerations:
>
> **a**. The road is already in existence and is traversable by vehicle;
>
> **b**. The alternative of the Snyder/Vogt road has problems with overflowing water, is essentially undeveloped in many points, and has a grade which would make use highly restrictive;
>
> **c**. The proposed road over the property of Hann, Stitt and Steele does not exist and while possibly the shortest route, would require substantial excavation and expense. (emphasis added).
>
> 29. The Board adopts the standards for the road as set forth in the Right-of-Way Agreement and Grant of Right of First Refusal dated April 8, 1996, and restricts the width of the Right-of-Way to not exceed twenty feet (20') feet in width, including any drainage ditches or tiles. . . .

Board of View's Report, Conclusions of Law (C.L.) Nos. 27, 28(a-c), and 29; C.R.

VI. Appellant's Objections To Report Of The Board Of View.

On May 30, 2003, Appellant objected to the report of the Board of View and asserted:

> 8. The report of Board of Viewers fails to establish compliance with the provisions of 36 P.S. § 2502, which requires that the Viewers must endeavor to procure releases from any affected landowners and the case law thereunder establishes that any affected landowners must be given personal notice of any proposed view.
>
> 9. Doberman [Appellant] did not receive any personal notice of any proposed view nor did they participate in

> any proposed view of any proposed sights [sic] for the private road.
>
> . . . .
>
> 11. A Board of View appointed pursuant to the Private Road Act is not permitted to place a road somewhere completely different from the general location where it was requested by Hawkwing [Appellees]. Hawkwing [Appellees] specifically requested placement of the road over Hann [sic] and the Board abused its discretion by selecting two (2) alternative routes for consideration. (emphasis added).
>
> . . . .
>
> 13. Neither Hawkwing Partnership [Appellees] nor the Board of View saw to Lawful service of original process on Doberman [Appellant] for the reasons set forth hereinabove and hence neither the Court nor the Board of View has personal jurisdiction over Doberman [Appellant].
>
> . . . .
>
> 15. Mifflin County, Bessie Reynolds, and Mary Means Jamison all have ownership interests in Hawkwing Partnership's [Appellees'] land for which access is being sought herein and none of said individuals and legal entities have been joined as parties hereto. (emphasis added).
>
> 16. Inasmuch as Hawkwing Partnership's [Appellees'] co-owners in land for which access is being sought have not appeared and are not represented in the present proceedings, Hawkwing Partnership [Appellees] is [are] not lawfully entitled to prosecute a private road action without said co-owners [sic] joinder. Absent such joinder, both your Honorable Court and the Board of Viewers are without jurisdiction to proceed on Hawkwing Partnership's [Appellees'] Petition to open a private road in this matter.

Doberman Group, Inc.'s Objections To Report Of Board Of Viewers, May 30, 2003, Paragraphs 8-9, 11, 13, and 15-16 at 2-3; C.R.

Appellees answered Appellant's objections:

> 3. . . . On October 26, 2001, the Juniata County Sheriff's Office . . . served the Doberman Group, Inc. [Appellant] with original process in this action by handing a copy to Carol Dobozynski, the person for the time being in charge of the regular place of business . . . which constitutes service of original process on the Doberman Group, Inc., [Appellant] under Pa. R.C.P. 424 . . . . (emphasis added).
> . . . .
> 7. . . . The statute cited by Doberman [Appellant] . . . **36 P.S. § 2501**, applies to public roads only, and is not applicable to an action to lay out and open a private road. (emphasis added).
>
> 8. . . . The statute cited by Doberman [Appellant] . . . **36 P.S. § 2502** applies to public roads only, and is not applicable to an action to lay out and open a private road. (emphasis added).
>
> 9. . . . Doberman [Appellant] . . . was served with original process as outlined in Paragraph 3, above. At the commencement of the View on November 18, 2002 . . . Walter Dobozynski . . . contacted him [Chairman Bierbach] by telephone prior to the date of the View and lodged objections to the View. Counsel for Doberman [Appellant] . . . also contacted Chairman Bierbach before the View and objected to the proceedings, but did not file any written objections for more than six months. (emphasis added).
> . . . .
> 18. Petitioners [Appellees] ask that this Court schedule a hearing on the Objections to the Board of View and this Answer.

Answer To Doberman Group, Inc's Objection To Report Of Board Of Viewers And Motion For Hearing, September 3, 2003, Paragraphs 3, 7-9, and 18 at 1-3; C.R.

At a November 18, 2003, hearing Randall E. Zimmerman, attorney for Appellant, offered the testimony of Joseph Dobozynski, part owner of Appellant's company, if called to testify:

> Your Honor, Mr. [Joseph] Dobozynski would testify as to the ownership of Doberman Group [Appellant] at the time. When this suit was started, there were three shareholders, Henry Ober, Clarence Kaufmann, and himself.
>
> He would testify that the registered address of the corporation is RR 1, Box 132 A, Mifflintown. That property is physically located in Fayette Township, Juniata County, Pennsylvania. (emphasis added).
>
> He would testify that at the time he resided at RR 1, Box 420, Mifflin Town, which is in Fermanaugh Township. (emphasis added).
>
> He would testify that his wife has never had any relationship . . . [either as] . . . [e]mployee, agent, servant, manager, [and] clerk. No relationship with Doberman Group, Inc. [Appellant].
>
> He would testify that all relevant times . . . there has never been any business conducted at RR 1, Box 420, Mifflintown . . . .
>
> As to the service, that would be his testimony, Judge. I also said that he would also testify that he was in the vicinity of the proposed road, as it traverses Doberman's [Appellant's] property, immediately before November 20, 2002 and he saw no posted notices of the view that was to occur on November 20, 2002.
> He would testify that in general the location of the road that was initially sought by Hawkwing [Appellees] through Mrs. Hann, that that site is approximately five miles from the location of Doberman's [Appellant's] land and the site of the road ultimately, I guess you would say, directed to be opened by the Board of View . . . .

Hearing Transcript, November 18, 2003, (H.T. 11/18/03) at 8-10; R.R. at 30a-32a.

On cross-examination, Dobozynski acknowledged that his previous attorney certified that the business address of Appellant was Box 420. H.T. 11/18/03 at 16; R.R. at 38a.

Joseph Lembaugh (Lembaugh), Deputy Sheriff, testified that he served Appellant at RR1, Box 420 and that a person at that address accepted service. H.T. 11/18/03 at 22-23; R.R. at 44a-45a. On cross-examination, Lembaugh acknowledged that the address for Appellant contained in the file was RR 1, Box 132A. H.T. 11/18/03 at 24; R.R. at 46a. Lembaugh was unable to explain why he served the notice at the RR1, Box 420 address. H.T. 11/18/03 at 24; R.R. at 46a.

The common pleas court per President Judge Searer[2] denied Appellant's objections and concluded:

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[2] Additionally, President Judge Searer addressed the issue of notice which was not raised before this Court on appeal:

> The first contention is that Doberman [Appellant] conducted no business at the Box 420 address. This allegation appears to be false as it is contradicted by the objections filed by Doberman [Appellants] which provide, "Doberman Group Inc. . . . is a Pennsylvania corporation having its regular place of business at RD 1, Box 420, Fermanagh Township, Juniata, Pennsylvania . . . . (emphasis added).The next argument . . . is that the recipient of the Amended Complaint, Carol Dobozynski, was not a party authorized to receive such service . . . . This court finds the specific phrasing [Carol Dobozynski, wife for Joe Dobozynski] indicative of Mrs. Dobozynski accepting service on behalf of her

(Footnote continued on next page…)

> Doberman [Appellant] alleges several procedural problems with this service that could render the service defective.
>
> . . . .
>
> . . . Doberman [Appellant] alleges that Ms. Jamison and Ms. Reynolds were indispensable parties at the time of commencement of this action. Assuming *arguendo* these parties were necessary parties, this court has ruled in a separate case that Ms. Jamison and Ms. Reynolds have no interest in the property in question. (Order dated May 14, 2002, in Mifflin County Civil Action No. 463 of 2002) . . . . (emphasis added).
>
> . . . .
>
> . . . In the instant case, we find Doberman Group [Appellant] participated in the view at least to the extent of inquiring about the proceedings on at least two separate occasions. If the lack of notice could be cured by mere presence at the view in the 1890's, we find that Doberman Group's [Appellant's] contact with the Chairman of the Board sufficient to overcome the otherwise defective notice in 2001 . . . .
>
> . . . Under 36 Pa. C.S.A. § 1785, the Board of Viewers has the discretion to place the route wherever it deems necessary so long as it takes into consideration the factors set forth at § 1785 . . . .

Common Pleas Court's (President Judge Searer's) Order and Decree at 2.[3]

V. Whether The Board Of View And The Common Pleas Court (Judge Searer) Lacked Jurisdiction To Proceed With The Private Road Hearing Due To The Failure To Join Indispensable Parties?

(continued…)

> husband who is a partner in the operation of Doberman Group [Appellant] . . . . (emphasis added).

Common Pleas Court's (President Judge Searer's) Order and Decree, July 1, 2004, at 2-4

[3] This Court notes the common pleas court per President Judge Searer ordered Mifflin County to "be joined as a named respondent in this case." Common Pleas Court Order and Decree at 3.

Initially, Appellant contends[4] that Timothy H. Brown, Bessie Reynolds, Mary Jamison, and their heirs had a legally recognizable interest in the placement of the private road and were indispensable parties.

In Church of Lord Jesus Christ v. Shelton, 740 A.2d 751 (Pa. Cmwlth. 1999), this Court revisited the criteria necessary to establish whether a party is indispensable as enunciated by our Pennsylvania Supreme Court:

> 1. Do absent parties have a right or interest related to the claim?
>
> 2. If so, what is the nature of that right or interest?
>
> 3. Is that right or interest essential to the merits of the issue?
>
> 4. Can justice be afforded without violating due process rights of absent parties?

Id. at 756, quoting Mechanicsburg Area School District v. Kline, 494 Pa. 476, 481, 431 A.2d 953, 956 (1981). An indispensable party is "one whose rights are so connected with the claims of the litigants that no relief can be granted without infringing upon those rights." Biernacki v. Redevelopment Authority of the City of Wilkes-Barre, 379 A.2d 1366, 1368 (Pa. Cmwlth. 1977).

Last, "if all necessary and indispensable parties are not parties to an action in equity, the court is powerless to grant relief." Church of Lord Jesus

[4] "Appellate review of a [common pleas court's] decision regarding a Board of View's opening 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, Bucks County, 645 A.2d 313, 316 n.3 (Pa. Cmwlth.), appeal denied, 539 Pa. 698, 653 A.2d 1235 (1994).

Christ, 740 A.2d at 756, quoting Houston v. Campanini, 464 Pa. 147, 150, 364 A.2d 258, 259 (1975). "An order of the court rendered in the absence of an indispensable party is null and void." Id. at 756.

First, Appellant asserts that Timothy H. Brown was absent during the proceedings and because of his ownership interest in the real estate in question he was an indispensable party.

A review of the record reveals that on May 30, 2002, Appellees petitioned[5] the common pleas court (President Judge Searer) to accept a method of

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[5] Specifically, Appellees asserted:

> 1. The Sheriff attempted to make personal service to Timothy H. Brown at 99 Brown Farm Lane, Lewistown, PA, as Timothy H. Brown is listed on the deed as one of the owners of that property as a tenant in common with Richard S. Brown, Jr., Tyler M. Brown and Barton T. Brown . . . .
>
> 2. The Sheriff was told by owner-in-possession of the property, Barton T. Brown (brother of Timothy H. Brown) that Timothy H. Brown is currently residing in Indonesia and cannot be reached . . . . (emphasis added).
>
> 3. Petitioners sent interrogatories to the owners of the property and to Timothy H. Brown's mother, Elizabeth S. Brown, requesting information on the whereabouts of Timothy H. Brown. Only Elizabeth S. Brown and Barton T. Brown responded to the interrogatories. Their response showing an address for Timothy H. Brown in Indonesia . . . . (emphasis added).
>
> 4. On April 24, 2002, Petitioners sent by airmail a true and correct copy of the Complaint to Timothy H. Brown at his address in Indonesia. There is no system to direct that a return receipt be signed and returned from Indonesia. A copy of the receipt from the post office showing purchase of postage is attached as Exhibit D. (emphasis added).

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service on Timothy H. Brown because he no longer resided at 99 Brown Farm Lane, Lewistown, PA, but was domiciled in the nation of Indonesia. Appellees asserted that Indonesia lacked a postal system that directed a registered receipt be signed and returned to the sender. See Petition for Court to Accept Method of Service for Respondent Timothy H. Brown, Paragraph 4 at 2-3; C.R. However, Appellees attached a copy of a receipt from the Lewistown Post Office that indicated a copy of the Complaint was mailed to Timothy H, Brown in Indonesia. See Petition, Exhibit D at 1; C.R.

In any event, whether service was properly made upon Timothy H. Brown is of no consequence. Barton H. Brown resides at 99 Brown Farm Lane. Barton H. Brown is the brother of Timothy H. Brown. Barton H. Brown and his other brothers agreed to the grant of a right-of-way to Appellees across their property as long as the intended use was restricted to twenty feet. See Board of Viewer's F.F. No. 21 at 3. Based upon Appellees' attempt to serve Timothy H. Brown and Barton T. Brown's agreement to the laying out of the private road, Timothy H. Brown is not considered an indispensable party, and, in any event, this

(continued…)

> 5. The remaining tenant-in-common owners of the property, Richard S. Brown, Jr., Tyler M. Brown and Barton T. Brown, have all been served in this matter . . . .
> 6. Of the four owners, only Barton T. Brown resides on the property and Petitioners believe that he and the other tenants in common who have been served can adequately represent the interest of Timothy H. Brown. (emphasis added).

Petition For Court To Accept Method Of Service For Respondent Timothy H. Brown, May 30, 2002, Paragraphs 1-6 at 2-3; C.R.

Court finds no error in the common pleas court's (President Judge Searer's) conclusion that Barton T. Brown, who resides on the property and the other tenants in common adequately represented the interest of Timothy H. Brown.

Next, Appellant contends that Bessie Reynolds and Mary Jamison and/or their heirs were indispensable parties. Specifically, Appellant states in its brief:

> Colony [Appellees] obtained a default judgment against Reynolds and Jamison in the quiet title action . . . .
>
> However, the trial court's May 14, 2002, Order in the quiet title action was not the conclusion of the matter. Harriet Clark, an heir of Reynolds, filed a Motion to Intervene in the 1996 litigation which had not been concluded because the issue of damages was, and is, still pending in that action. After Ms. Clark filed a Petition to Open the Default Judgment, the Court held a hearing on October 27, 2006. (emphasis added).
>
> On July 16, 2007, the trial court issued its Opinion and Order granting the Petition to Open the Default Judgment. A copy of this Order is attached to this brief as Appendix "F".
>
> On December 14, 2009, the trial court, by and through Judge Stewart Kurtz, issued an additional Order vacating the judgment by default entered on May 14, 2002. The May 2002 Order had been the order used by the trial court to dismiss the indispensable party argument raised by Doberman [Appellant].
>
> Doberman [Appellant] is respectfully requesting the Superior [Commonwealth] Court to take judicial notice of the Orders attached hereto as Appendix "F" and "G". (emphasis added).

Brief of Appellant, Doberman Group, Inc. at 16.

This Court must reject Appellant's argument that Bessie Reynolds and Mary Jamison were indispensable parties. First, Appendix "F" and Appendix "G" were not attached to Appellant's Brief. The last Appendix attached to Appellant's Brief was "D".

More importantly, Pa. R.A.P. 1921 provides that "[t]he original papers and exhibits filed in the lower court, hard copies of legal papers filed with the prothonotary by means of electronic filing, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the lower court shall constitute the record on appeal in all cases." "Only the facts that appear in this record may be considered by a court." Commonwealth v. Young, 456 Pa. 102, 115, 317 A.2d 258, 264 (1974). '"An appellate court cannot consider anything which is not part of the record in the case.'" Id. at 115, 317 A.2d at 264 quoting McCaffrey v. Pittsburgh Athletic Association, 448 Pa. 151, 162, 293 A.2d 51, 57 (1972).

Therefore, this Court accepts the common pleas court's (President Judge Searer's) conclusion that the May 14, 2002, order by another common pleas judge determined that Jamison and Reynolds had no interest in the property.

VI. Whether The Board Committed An Error Of Law When It Granted A Private Road In A Different Location Than The One Requested By Appellees?

Next, Appellant contends that the Board of View was precluded from considering an alternative private road rather than the private road Appellees originally requested. Specifically, Appellant suggests that Appellees requested a private road across the land of Doris Hann, which the Board of View failed to

consider, before it determined that the location of the private road should be placed across Appellant's property.

The statutory basis for a request to open a private road is found in Section 11 of the "Private Road Act" (Act)[6], 36 P.S. § 2731[7], which provides:

> 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 or leaseholds to a highway or place of necessary public resort, or to any private way leading to a highway . . . direct a view to be had of the place where such road is requested and a report thereof to be made . . . . (emphasis added).

In Holtzman v. Etzweiler, 760 A.2d 1195 (Pa. Cmwlth. 2000), this Court referred to our Pennsylvania Superior Court's astute observation:

> The location of the road is wholly within the province of the viewers. Viewers go upon the premises of a proposed road and observe all the physical aspects of the land and are far better to select a location than any judges sitting in the courthouse. The statute gives the viewers power to locate the road. (emphasis added).

Holtzman, 760 A.2d at 1197, quoting In re Private Road in Nescopeck Township, 422 A.2d 199, 202 (Pa. Super. 1980). In Holtzman, this Court noted that "[t]he Board must consider four factors when determining the site for a private road: the

[6] Act of June 13, 1836, P.L. 551, as amended.

[7] "Although proceedings under the Private Road Act are in the nature of eminent domain proceedings, the provisions of the Eminent Domain Code [26 Pa. C.S. §§ 101-1106] do not apply to the opening of a private road." In re Interest of Robert W. Forrester, 773 A.2d 219, 222 (Pa. Cmwlth. 2001).

shortest distance, best ground, least injury to private parties, and desire of the petitioners." (emphasis added). Id. at 1197.

Here, the Board of View determined the most appropriate route for the private road was across the Browns' and Appellant's properties because the road already existed and could be traversed by a vehicle. See Board of Viewer's C.L. 28.a. at 4. The Board of View rejected the two alternative proposed routes which run across the Snyder/Vogt property and Hann, Stitt, and Steele property because overflowing water and sloping grade required substantial excavation and expense. See Board's C.L. No. 28.b. and c. at 4.

This Court concludes that the Board of View did not abuse its discretion and chose the best route for the road which would run over the Brown's and Appellant's properties.

VII. The Hearing On Damages Associated With The Laying Out Of A Private Road.

At a March 6, 2006, hearing, Harold Kauffman (Kauffman), an appraiser, testified as follows:

> There are basically three approaches to appraisal theory. One is what is called the sales comparison approach where we compare it to other properties of similar types that have sold relatively recently in the subject's market. The other one is an income approach where we would compare the potential rental of the property and then we have to compare what a typical investor would be willing to pay, what the relationship is called the capitalization rate . . . The third approach, that is the cost approach where we would look at the price of raw land, sales

> comparison approach, and any improvements or buildings and then take off depreciation.
>
> The cost approach, I think was pretty obvious to rule out because there are no buildings or large improvement type of things on this property. The income approach was not used, because purchasers of these kinds of property are usually owner used.
> . . . .
> I want to make sure and clarify the term "income approach" would mean the potential to get rent from the property, not the income that could be earned by some kind of operations or products off of that property.
> . . . .
> So the only one that seemed applicable in this case was sales comparison approach, which means I then proceeded to search through the records of Mifflin County . . . I think we went back four years for wooded tracts. (emphasis added).

Hearing Transcript, March 6, 2006, (H.T. 3/6/06) at 27-28; R.R. at 107a-08a.

Kauffman continued that "[w]e did consider the fact that our subject would only be taking a right of way, but we felt that probably economically it would, in effect, deprive the owner of the same economic rights as what a fee simple would do." H.T. 3/6/06 at 31; R.R. at 111a. Kauffman concluded that the amount of condemnation damages would be in the amount of $1,600.00 and that effective date for the appraisal was August 20, 2005. H.T. 3/6/06 at 35; R.R. at 115a.

Colony, a surveyor, testified that "[t]he primary purpose [of the survey] is to depict the location of the road, which is the subject for discussion, of the private road leading from Nullan Drive, east from Nullan Drive, through the Brown property, up the mountain to the [Clarence N. and not Harold, the

appraiser,] Kauffman Property." H.T. 3/6/06 at 80; R.R. at 160a. On cross-examination, Colony stated that he paid the Brown family between $20,000.00 and $30,000.00 for the right-of-way across their property. H.T. 3/6/06 at 85-86; R.R. at 164a-65a.

Last, Clarence N. Kauffman (Clarence) testified that he is a fifty percent shareholder in Appellant's company. H.T. 3/6/06 at 95; R.R. at 175a. Clarence stated that the survey failed to show another property owner and as a result the right-of-way that runs across Appellant's property was "actually . . . smaller." H.T. 3/6/06 at 103; R.R. at 183a.

The Board of View made the following pertinent findings of fact and conclusions of law concerning damages:

> 4. Harold R. Kauffman testified that the only approach, which he believed was applicable to this situation, was the sales comparison approach.
> . . . .
> 7. Harold L. Kaufmann testified that the highest and best use of the subject land would be vacant woodland, either for timber or recreation.
>
> 8. Harold R. Kaufmann testified that the Derry Township Zoning for this property was "forest zoning".
>
> 9. Harold R. Kaufmann testified that there was [sic] no public facilities, water, sewer or any kind of off-site utilities that would be feasible to bring to the site.
>
> 10. Harold R. Kaufmann testified that the property in question had approximately 185 acres.
> . . . .
> 12. Harold L. Kaufmann performed an appraisal . . . and that he had calculated the value of the property . . . at a

value of $1,000.00 per acre, making the total gross value of the property, before the taking, at $185,000.00. (emphasis added).

13. Harold R. Kaufmann then testified that he then took the length of the twenty (20') foot wide right of way, which he calculated at 3,558.07 feet, multiplied by a width of 20, he pulls a volume of 71,161.4 square feet, which translates to 1.634 acres. (emphasis added).

. . . .

15. As a result of the aforesaid calculations, Harold R. Kauffman expressed the opinion that the amount of property taken, based on a volume of 1.634 acres, times the $1,000.00 per acre sales comparison value, meant that the remainder property had been diminished in value $1,634.00, leaving a remainder value of $183,400.00

. . . .

23. Clarence N. Kauffman testified that Doberman [Appellant] invested $60,000.00 in improving that right of way.

. . . .

Conclusions of Law

36. The testimony of both Charles Colony and Clarence N. Kaufmann established that the right of way over the property of Brown established that the right of way over the property of Brown, as purchased by Doberman Group, Inc. [Appellant] and by Petitioner Hawkwing [Appellees], amounted to a purchase price of $25,000.00.

37. Based upon Petitioner's [Appellees'] Exhibit 1, the right of way over the property of Brown, et al. runs a distance of 5,357.91 feet. (emphasis added).

38. Dividing that amount by the purchase price of $25,000.00, shows that the price per foot comes to $4.67. (emphasis added).

39. Multiplying the price per foot times the length of the right of way over the Doberman Group [Appellant], to wit, 3,558.07 feet, calculates to $16,616.19.

> 40. Utilizing the comparison prices of comparable right of ways, the value of the right of way over Doberman [Appellant], as defined by the value of the right of way over the adjoining property of Brown, should properly be $16,616.19. (emphasis added).
>
> 41. Since the time of the original action, Doberman Group [Appellant] has received income from his right of way from third party sources, which total $600.00 per year, or for a total of $1,800.00.
> . . . .
> 44. Subtracting the amount of $1,800.00 from $16,616.19 indicates a taking in the amount of $14,016.19. (emphasis added).

Board of View's Decision, February 4, 2008, F.F. Nos. 4, 7-10, 12-13, 15, and 23, C.L. Nos. 36-41 and 44 at 1-5.

On February 26, 2008, Appellant objected to the Report of the Board of View and asserted that it was not provided with a survey of the proposed private road prior to the March 6, 2006, hearing; that the Board of View proceeded with the hearing without Board of View member Wertz whose absence was not due to sickness; and that the Board of View failed to consider Appellant's cost of improvements over Brown's and Appellant's property when it determined damages. Doberman Group, Inc.'s Objections To Report Of Board Of Viewers Concerning The Issue Of Damages, February 26, 2008, Paragraphs 1, 3, and 6 at 1, and 5-6; C.R.

The common pleas court per Judge Kurtz denied Appellant's objections and concluded that "the rights of anyone not a party will not be impaired in any manner by the entry of final decree . . . the fact that Doberman [Appellant] may not have receive [sic] the survey in advance of the hearing

provides no basis for relief" and the fact that only two members of the Board of View heard the matter was of no consequence. Opinion of the Common Pleas Court (Judge Kurtz), November 25, 2008, at 8-11.

VIII. Whether The Board Of View And The Common Pleas Court Per Judge Kurtz Erred As To The Award Of Damages?

Before this Court, Appellant contends: 1) that Appellees failed to provide the appraiser's survey prior to the hearing on the issue of damages and that as a result Appellant was prejudiced; 2) that the member of the Board of View who did not attend the hearing should have been precluded from participating in the Board of View's decision because he was unable to observe the credibility or demeanor of the witnesses; and 3) that the Board of View committed an error of law with regard to the calculation of damages.[8]

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[8] Appellant raises for the first time an additional argument before this Court that Appellees' appraiser "did not review the Zoning Ordinance in detail to determine whether it would be feasible to build on the property . . . [which] would create a different best use and a higher value. Instead, the appraiser only used a general investigation relating to the feasibility of other uses." Brief of Appellant, Doberman Group, Inc. at 23. Although Appellant pursued this line of questioning at the hearing on damages, it failed to raise this argument before the common pleas court (Judge Kurtz). Specifically, Appellant raised the following objections:

> 7. The Boards [sic] report is deficient inasmuch as it does not address the following issues:
> (a) No report sets forth who or what is allowed to use the private road awarded over Doberman's [Appellant's] lands and for what purpose;
> (b) All reports of the Board fail to set forth whether or not Petitioners [Appellees] are allowed to sell/assign their right of use over Doberman [Appellant] as established in these proceedings;
> (c) Despite Doberman's [Appellant's] admitted improvements to the entire road as found by the Board the Board fails to delineate the maintenance obligation of the prospective users of the road in their report;

(Footnote continued on next page…)

These issues were raised and argued before the common pleas court and ably disposed of in the cogent opinion of the Honorable Stewart L. Kurtz where Judge Kurtz concluded: 1) that Appellant "had more information available to it concerning the road" and therefore it was of no consequence Appellant did not receive the survey prior to the hearing; 2) that only a majority of the Board of View was needed to render a decision; and 3) that the Board of View's calculation of damages was appropriate. See Opinion of the Common Pleas Court (Judge Kurtz) at 8-10, and 13. Therefore, this Court shall affirm on the basis of that opinion concerning damages.[9] In Re: Laying Out And Opening Of A Private Road Over Property Located In Granville Township, Mifflin County Petition Of Charles M. Colony And Ferguson Valley Hardwoods And Eric E. Eminhizer t/d/b/a Hartwing Partnership, (No. 01-1246) filed November 25, 2008.[10]

(continued…)

> (d) The Boards [sic] reports fail to identify who specifically is permitted to use the road awarded and for what purpose they are permitted to use the road awarded.

Doberman Group, Inc.'s Objections to Report of Board of Viewers Concerning the Issue of Damages, Paragraph 7(a-d) at 6.

In fact, the common pleas court (Judge Kurtz) listed these arguments verbatim in his opinion and addressed them. See Opinion of the Common Pleas Court (Judge Kurtz) at 10.

Pa. R.A.P. 302(a) provides that "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal." Therefore, this Court will not address this issue.

[9] On September 5, 2008, Appellees filed Exceptions To Report Of Board Of Viewers Concerning The Issue Of Damages. The common pleas court (Judge Kurtz) denied the exceptions and Appellees did not file a cross-appeal in the present matter. Therefore, this Court need not address those exceptions.

[10] The common pleas court (Judge Kurtz) further ordered that "Counsel for Petitioner [Appellees] is directed to submit a final Decree for entry as a judgment in this cause." On October 1, 2009, the common pleas court entered the final decree.

Accordingly, this Court affirms.

_____

BERNARD L. McGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Laying Out and Opening of a Private Road, over property located in Granville Township, Mifflin County	:	
Petition of Charles M. Colony, Individually, and Ferguson Valley Hardwoods, Charles M. Colony, Dorothy L. Colony, and Eric E. Eminheiser, t/d/b/a Hawkwing Partnership, a Pennsylvania Partnership Doris W. Hann	:	
	:	No. 520 C.D. 2010
Appeal of: Doberman Group, Inc.	:	

O R D E R

AND NOW, this 21st day of October, 2010, the order of Court of Common Pleas of Mifflin County in the above-captioned matter is affirmed.

_____

BERNARD L. McGINLEY, Judge