NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

GERARD CARIBARDI, Appellant v. JAMES J. SCIDA AND CHRISTINE SCIDA, HUSBAND AND WIFE, AND DONALD J. STAHLI AND TINA M. STAHLI, HUSBAND AND WIFE, Appellees	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 194 WDA 2013

Appeal from the Order December 21, 2012
In the Court of Common Pleas of Elk County
Civil Division at No(s): No. 2007-785

BEFORE: BOWES, WECHT, and STABILE, JJ.

MEMORANDUM BY BOWES, J.: **FILED APRIL 24, 2014**

Gerard Caribardi appeals from the equity court's determination that Appellees, James J. Scida, his wife Christine Scida, Donald J. Stahli, and his wife Tina M. Stahli, were legally entitled to utilize an existing express easement over Appellant's property known as Gizmo Drive. The equity court found that the Stahlis had an express easement over Gizmo Drive and that the Scidas enjoyed both a prescriptive easement and an implied easement over Gizmo Drive. We affirm.

Appellant instituted this equity action against Appellees seeking to prevent them from using a private roadway that is either thirty-three feet or thirty feet wide and is known as Gizmo Drive and asking for damages occasioned by Appellees' past use of the easement. The case proceeded to a

nonjury trial. The following facts are pertinent. Gizmo Drive traverses Appellant's property located in Wilcox, Elk County. The Scidas and the Stahlis own property to the north of Appellant's land, and they and their invitees use Gizmo Drive to access their land. Gizmo Drive provides the Stahlis their sole means of access to the nearest public road, which is a state highway. The Scidas have the ability to travel to the state highway over Freedom Road, which is a private road that they built over their property in 1986. Freedom Road is dangerous in the winter and not easy to navigate in the remaining seasons, and the Scidas continued to use Gizmo Drive after they constructed Freedom Road.

In the chain of title, the express right of way or easement that eventually became known as Gizmo Drive first appears in a May 19, 1925 deed from John A. Pearson, *et ux* to August A. Larson, *et ux*. In that deed, the Pearsons sold the Larsons part of a sixty-eight-acre parcel of land that Mr. Pearson purchased from McKean Chemical Company. When the Pearsons sold the Larsons a part of the larger tract, the Pearsons also deeded to the Larsons an express easement over the land retained by the Pearsons, as follows: "The grantors [the Pearsons] hereby agree that the grantees [the Larsons] shall have forever a right of way and the use of the private road leading from the State Highway to the property hereby conveyed[.]" Trial Exhibit B. As noted, this private road eventually became known as Gizmo Drive and a portion of Gizmo Drive dissects Appellant's

property. Gizmo Drive is outlined in the assessment map of Elk County, Pennsylvania. Trial Exhibit 1.

On March 26, 1942, John Pearson sold Howard C. Weirich the remaining property that he had purchased from McKean Chemical Company. The land sold by Mr. Pearson to Mr. Weirich excepted the plot previously conveyed to Mr. and Mrs. Larson on May 19, 1925. Trial Exhibit C. Thereafter, Howard C. Weirich purchased the Larsons' property and thus Howard Weirich became the sole owner of the entire parcel originally purchased by John A. Pearson from McKean Chemical. Trial Exhibit D (deed from Larsons to Howard Weirich).

By deed dated September 15, 1956, Howard, who was by then married, and his wife Esther conveyed a portion of the sixty-eight-acre property to Glenn W. Weirich and Glenn's wife Mary. In that deed, Howard and Esther also transferred to Glenn and Mary an express easement over their retained land, *i.e.*, the private roadway that was previously outlined in the grant from Pearson to Larson. ***See*** Trial Exhibit F (emphasis added) ("The Grantors hereby also grant and convey unto the said Grantees, their heirs and assigns, all their right, title and interest, of, in and to a right of way and **the use of the private road leading from the state highway to the property hereby conveyed**[.]"). On October 13, 1960, Howard and Esther enlarged the original lot conveyed to Glenn and Mary in the previous deed. In that instrument, Howard and Esther retained the right to use

Gizmo Drive and re-affirmed that Glenn and Mary also had the right to use that road, as follows:

> The Grantors, Howard C. Weirich and Ester E. Weirich, also convey to the said Grantees, their heirs and assigns, the full right, liberty, and privilege of the said private road with a thirty (30) foot right of way which forms the north boundary of the lot described above, as and for a passageway leading into and from the newly relocated section of U.S. Route 219, and free ingress, egress and regress into and along the same at all times hereafter, **in common with the said Howard C. Weirich and Esther E. Weirich, their heirs and assigns, owners, tenants and occupiers of the grounds bounding the same**.

Trial Exhibit G. On November 5, 1963, Esther, by then a widow, executed a corrective deed to Glenn and Mary, and that deed contains the identical language regarding the right of way as that contained in the October 13, 1960 deed.

On August 26, 1965, Mary A. Weirich, by then a widow, sold the land conveyed to her on November 5, 1963 to Rodger and Joyce Warmbrodt. The August 26, 1965 conveyance to the Warmbrodts included the express easement that Mary owned in her chain of title over Gizmo Drive:

> The grantor also conveys to the said grantees their heirs and assigns, the full right, liberty and privilege of the said private road with a thirty foot right of way, which forms the north boundary of the lot described above as and for a passageway leading into and from the newly re-located section of United States Route 219, and free ingress, egress and regress into and along the same at all time hereafter in common with the said Esther E. Weirich[.]

Trial Exhibit J. The Warmbrodts sold their land, together with their express easement over Gizmo Drive to James K. and Elizabeth M. Zilcoski. Trial

Exhibit K. The Zilcoskis, in turn, sold a portion of their property to the Stahlis. The December 12, 2002 deed to the Stahlis from the Zilcoskis provided:

> The Grantors, James K. and Elizabeth M. Zilcoski, also grant and convey to the said Grantees, Donald J. Stahli and Tina M. Stahli, their heirs and assigns, the full right, liberty, use and privilege of the said private road [which was one of the boundaries contained in the metes and bounds description of the property in the deed] with an approximate thirty foot wide right of way for a passageway leading into and from the re-located section of U.S. Route 219, and free ingress, egress and regress into and along the same at all times hereafter in common with the said Esther E. Weirich[.]"

Trial Exhibit S. Based on this chain of title, the equity court concluded that the Stahlis had an express easement over Gizmo Drive due to their purchase of land from the Zilcoskis.[1] The court made the following factual findings in this respect:

> 25. The Zilcoskis' right to use Gizmo Drive as granted in the Warmbrodt deed (Plaintiff's Exhibit K) specifically included reference to the Zilcoskis' heirs and assigns as well, such that the Zilcoskis had the ability to grant their heirs and assigns the right to use the road and did so in the December 12, 2002 deed to defendants Stahli (Plaintiff's Exhibit S).
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> 26. There is no question that James and Elizabeth Zilcoski have the right to use the roadway known as Gizmo Drive and the Zilcoskis granted defendants Stahli the right, liberty, use and privilege of the approximate 30-foot-wide private road in the December 12, 2002 deed (Plaintiff Exhibit S) in which the

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[1] Appellant admitted in his pretrial statement that the Zilcoskis had an express easement over Gizmo Drive.

> Zilcoskis conveyed the 9,465 square foot triangular parcel to defendants Stahli.
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> 27. Defendants Stahli have the same rights to use the 30-foot wide right-of-way that formed the north boundary of the Zilcoski lot (Plaintiff's Exhibit K) as the Zilcoskis, including as a passageway leading to and from the relocated section of S.R. 219.

Trial Court Opinion, 9/22/11, at 6.

Additionally, Appellant's land is described in his chain of title as subject to the easement in question. Specifically, in 1978, Esther Weirich conveyed the land now owned by Appellant to a member of the Zuroski family. The grant was subject to the right of way. Appellant bought his property from a Zuroski. Appellant's April 30, 1991 deed from Zuroski outlines that Appellant's land purchase was subject to an excepted and reserved "right-of-way as fully as the same was granted to Glenn W. Weirich, *et ux*, by Esther E. Weirich, widow, by Deed dated November 5, 1963[.]" Trial Exhibit X. As noted, the November 5, 1963 deed outlines the express easement owned by Glenn and Mary Weirich as well as by Howard and Esther Weirich.

The following facts are pertinent to the Scidas' right to use Gizmo Drive. In 1980, Esther E. Weirich sold the land that the Scidas eventually bought. Specifically, by deed dated March 3, 1980, Esther E. Weirich, who had remarried and was Esther E. Weis, and her husband Paul Weis sold 6.13 acres of land to Van B. and Kristen L. Weber. Trial Exhibit L. On January 10, 1985, the Scidas purchased the 6.13 acres of land from Van B. Weber *et ux*. The description of the property that they purchased included

the right of way in question as one of its boundaries, but the Webers, and, as their successors, the Scidas, were not granted the express right to use Gizmo Drive. Trial Exhibit M. The land over which Gizmo Road traveled already had been sold by Esther. The equity court acknowledged that the Scidas' chain of title did not include the right to use Gizmo Drive since the land containing the right of way was conveyed by Esther before she sold the Webers the land now owned by the Scidas and since the land conveyed to the Webers and then to the Scidas did not mention the express easement or grant those grantees the right to use it.

However, based upon evidence that the Scidas presented at trial, the equity court accepted the Scidas' position that they enjoyed an easement by prescription. The court specifically found that the Scidas had "continuously used Gizmo Drive as a means of access to their property since 1985, notwithstanding that their deed makes no specific reference to an easement or right-of-way over Gizmo Drive." Trial Court Opinion, 9/22/11, at 10. ***See also id***. at 6 ("Defendants Scida have no easement or right-of-way of record over Gizmo Drive, but have used that roadway continuously as a means of access since they acquired title to their property in 1985"). Alternatively, the equity court expressly decided that the Scidas had an easement by implication over Gizmo Drive. ***See id***.

The equity court therefore rendered a verdict in favor of Appellees, declined to order them from refraining to use Gizmo Drive, and refused to

award Appellant damages. After denial of his post-trial motion, Appellant filed the present appeal and raises the following arguments:

> 1. Whether the Trial Court erred in its determination that Defendants James J. and Christine Scida possess an easement by implication across the Plaintiff's property, as there was no unity of title at the time of the alleged creation of the implied easement and no other basis for the creation of an implied easement exists.
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> 2. Whether the Trial Court erred in its determination that Defendants Donald J. and Tina M. Stahli had obtained an easement across the Plaintiff's property via a conveyance from nonparty, James and Elizabeth Zilcoski, as the Zilcoskis had no authority or property rights sufficient to grant an easement across the Plaintiff's property.

Appellant's brief at 8.

Our standard of review is as follows:[2]

> When reviewing the findings of a court in equity, an appellate court's review "is limited to a determination of whether the chancellor committed an error of law or abused his discretion. A final decree in equity will not be disturbed unless it is unsupported by the evidence or demonstrably capricious." ***Kepple v. Fairman Drilling Co.***, 532 Pa. 304, 312, 615 A.2d 1298, 1302 (1992) (internal quotation marks omitted). Although facts found by the chancellor, when supported by

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[2] Appellant suggests that this action was one sounding in declaratory judgment and that we should apply the standard of review applicable in that situation. He avers that the court's adjudication rested solely on documentary evidence and that no credibility determinations were made. Nevertheless, this action expressly was brought as an equity lawsuit, and we must employ the standard of review applicable in that context. Moreover, the court did make a credibility determination insofar as it believed the Scidas' evidence, presented through Mr. Scida's testimony and that of one neighbor, that they had continuously used Gizmo Drive since they purchased their land in January 1985. Appellant's testimony was that he never saw the Scidas use that road.

> competent evidence in the record, are binding, no such deference is required for conclusions of law, which we review *de novo*. ***Id***.

T.W. Phillips Gas and Oil Co. v. Jedlicka, 42 A.3d 261, 267 (Pa. 2012).

In this case, we must separately analyze the easements in question since the Stahlis were held to have an express easement and the Scidas were determined to have an easement by implication and easement by prescription. Appellant first challenges the equity court's finding with respect to the Scidas. His argument is premised solely on the fact that there was no "unity of title" when the easement by implication arose. Appellant's brief at 13; ***id***. at 16 ("As noted above, an implied easement requires 'unity of ownership' at the time of creation of the easement. . . . As Esther (Weirich) Weis no longer owned the property on which Gizmo Drive was located [when she sold the Webers the land,] no easement by implication could have been formed."). Appellant relies upon ***Maioriello v. Arlotta***, 73 A.2d 374 (Pa. 1950) (easement by implication not created since there was no proof that both parcels of land at issue had a common grantor).

We have analyzed the legal construct of easements by implication in a considerably more recent decision, ***Phillippi v. Knotter***, 748 A.2d 757 (Pa.Super. 2000), than that of ***Maioriello***. In ***Phillippi***, we noted that an easement by implication "can be found to exist where the intent of the parties is demonstrated by the terms of the grant, the property's surroundings and any other *res gestae* of the transaction." ***Id***. at 761

(quoting ***Sentz v. Crabbs***, 630 A.2d 894, 895-896 (Pa.Super. 1993)). There are actually two separate tests employed by the courts to assess whether such an implied easement was created. ***Phillippi, supra***. We can use either the test contained in the Restatement of Property or what is labeled the traditional test. As outlined in ***Phillippi, supra*** at 761-62, our High Court has defined the traditional test as follows:

> 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 notwithstanding that the easement is not essential for the beneficial use of the property. The circumstances which will give rise to an impliedly reserved easement have been concisely put by Chief Justice Horace Stern speaking for the Court in ***Tosh v. Witts***, 381 Pa. 255, 113 A.2d 226 (1955):
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> > "Where an owner of land subjects part of it to an open, visible, permanent and continuous servitude or easement in favor of another part and then aliens either, the purchaser takes subject to the burden or the benefit as the case may be, and this irrespective of whether or not the easement constituted a necessary right of way." ***Tosh***, 113 A.2d at 228 (citations omitted).
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> ***Bucciarelli v. DeLisa***, 547 Pa. 431, 437-438, 691 A.2d 446, 448-449 (1997) (citations omitted). Our Supreme Court further stated:
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> > Easements 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.
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> ***Id.***, 691 A.2d at 449 (citation omitted).

Under the Restatement, we use "a balancing approach, designed to ascertain the actual or implied intention of the parties." ***Phillippi***, ***supra*** at 762 (citation omitted). The following factors are utilized in the Restatement analysis:

> (a) whether the claimant is the conveyor or the conveyee,
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> (b) the terms of the conveyance,
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> (c) the consideration given for it,
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> (d) whether the claim is made against a simultaneous conveyance,
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> (e) the extent of necessity of the easement to the claimant,
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> (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
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> (h) the extent to which the manner of prior use was or might have been known to the parties.

Restatement of Property § 476. While none of these factors is dispositive, "the extent to which an easement is necessary under the circumstances is a factor heavily weighed in determining whether an easement should be implied." ***Phillippi***, ***supra*** at 762 (citation omitted). An easement by implication must arise when the ownership of the two parcels in question first became separated. ***Id***.

Initially, we reject the notion that there was never unity of title. Howard and Esther Weirich had unity of title in the acreage that eventually

was sold in parcels to all the parties in question. Furthermore, in this case, when Esther conveyed the portion of her land containing Gizmo Drive, the use of that easement was necessary to access the 6.13 acres eventually purchased by the Scidas, who only subsequently built Freedom Road. Thus, the Scidas' land, when deeded by Esther to the Webers, was completely landlocked absent the use of Gizmo Drive. ***See*** Trial Court Opinion, 9/22/11, at 4. ("When defendants Scida purchased their property in 1985, . . . [t]he only access to the Scida land was afforded by Gizmo Drive until Freedom Road was installed by defendants Scida in 1986 while in the process of building their house.")

Additionally, Gizmo Drive has been referenced in deeds dating back to 1925. Since 1960, in the chain of title from the common owner of all the property in question, Howard and Esther Weirich Weis, what is now known as Gizmo Drive has been expressly delineated as being a private roadway subject to use by Esther Weirich and Glenn Weirich and their heirs and assigns to access the state highway. When Esther sold the landlocked property to the Webers, Gizmo Drive had been used as a means of access to the public road. Gizmo Drive is displayed on the county assessment map. Appellant was aware of the easement in question since his land grant was expressly subject to it. Hence, utilizing the factors contained in the Restatement, we conclude that the equity court did not abuse its discretion in concluding that the Scidas own an easement by implication.

We also observe that Appellant fails to address the secondary finding in favor of the Scidas. The equity court made a specific determination that the Scidas had consistently used Gizmo Drive to access their land since they purchased the property on January 10, 1985. It credited the testimony of Mr. Scida and an independent witness to that use and it discounted Appellant's testimony to the contrary. The equity court concluded that the Scidas did have a prescriptive easement, even though it viewed this determination as inconsequential in light of its finding that the Scidas had an easement by implication. ***Id.*** at 10 (emphasis added) ("The Scidas' claims to a prescriptive easement are of minimal consequence, **although they have continuously used Gizmo Drive as a means of access to their property since 1985**[.]").

We have outlined that a "prescriptive easement is a right to use another's property which is not inconsistent with the owner's rights and which is acquired by a use that is open, notorious, and uninterrupted for a period of twenty-one (21) years." ***Sobien v. Mullin***, 783 A.2d 795, 798 (Pa.Super. 2001) (quoting ***Soderberg v. Weisel***, 687 A.2d 839, 842 (Pa.Super. 1997)). In this case, the Scidas' use of the right of way was not inconsistent with Appellant's rights since he expressly took his land subject to the right of way, which was used by other people in the same manner as that of the Scidas. They used that roadway openly, notoriously, and consistently. They bought their land on January 10, 1985, and this action

was not instituted until September 7, 2007, which is twenty-two years and eight months after the Scidas started to use Gizmo Drive. Hence, we uphold the equity court's finding that the Scidas enjoyed a prescriptive easement over Gizmo Drive.

Appellant's second position pertains to the Stahlis. Appellant maintains that the court erred in finding that the Zilcoskis had the right to grant the Stahlis permission to use the right of way when they conveyed a portion of their property to the Stahlis. In ***Babcock Lumber Co. v. Faust***, 39 A.2d 298, 303 (Pa.Super. 1944) (emphasis added), we noted:

> 'An appurtenant easement exists for the benefit of the dominant tenement as an entirety, and not solely for any particular part thereof. The law will not presume that either party at the time of the grant of the easement was ignorant that the grantee had a right to alien a part of his lands, or that it was the intention, unless clearly expressed, that by such alienation the easement should be extinguished. **Accordingly, if the dominant estate is divided, the right is not destroyed. The owner or assignee of any portion of that estate may claim the easement so far as it is applicable to his part of the property, provided the easement can be enjoyed as to the separate parcels without any additional burden upon the servient tenement**.' 17 Am.Jur., Easements, § 126; 28 C.J.S., Easements, § 65, subsec. b; 1 Thompson on Real Property (Perm.Ed.) § 340; 3 Tiffany, Real Property, 3d Ed., § 809; Watson v. Bioren, 1 Serg. & R. 227, 7 Am.Dec. 667; Ehret v. Gunn, 166 Pa. 384, 31 A. 200; Seidler v. Waln, 266 Pa. 361, 109 A. 643, 8 A.L.R. 1363.

In this case, the Zilcoskis sold to the Stahlis a portion of their property. When the Zilcoskis subdivided their land, that property enjoyed an express easement over Appellant's property. Additionally, the deed from the Zilcoskis to the Stahlis conveyed to the Stahlis the right to use the easement

that the Zilcoskis owned. There was no additional burden on Appellant by the Stahlis' use of the portion of Gizmo Road traversing Appellant's land because the Stahlis were using Gizmo Drive in the same manner as the Zilcoskis. The Stahlis did not place a business on their land that resulted in a vastly increased use of Gizmo Drive. The present scenario falls squarely within the ***Babcock*** holding.

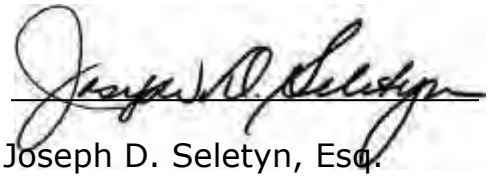
Appellant's position with respect to the Stahlis is that the "conveyance of the triangle of property to the Stahlis in 2002 was not a division of the dominant estate that would carry with it the right to use of Gizmo Drive." Appellant's brief at 18. This position is premised upon the fact that "the parcel that Zilcoski conveyed to the [Stahlis] was not a portion of the parcel which held the easement across Gizmo Drive. Rather, it was a small portion of the [Zilcoski] property." ***Id.***

We disagree. As noted in ***Babcock***, the easement existed for the benefit of the dominant tenement as an **entirety**, and not solely for any particular part of the dominant estate. Thus, the Zilcoskis' entire parcel of land enjoyed an express easement over Appellant's land. It does not matter whether the Zilcoskis subdivided and sold a small amount of their property or a large amount of their property. Rather, when the dominant estate is divided, the right to use the easement continues. The owner of any portion of the dominant estate can use the easement if there is no additional burden

upon the servient estate. Herein, as noted, there is no additional burden upon Gizmo Drive by its use by one more landowner.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/24/2014