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*“Through the doctrine of balancing conveniences or relative hardship, a trial court may create an easement by refusing to enjoin an encroachment or nuisance.”*

**New Case Law on Equitable Easements****THIS ISSUE**

The law of equitable easements has changed, and the impact may be substantial.

**FACTUAL SCENARIO**

Lawsuits centered on real estate matters tend to come in three general categories: non-disclosure cases involving the transfer of real property, lease disputes between landlord and tenant, and neighbor disputes over boundaries. Of all of these, the most difficult tend to be the neighbor disputes, because they involve people who have to live next to each other, each of which believes his neighbor is trampling upon his property rights.

And neighbor litigation tends to come in three flavors as well: boundary locations, easements and encroachments or trespassing. Most neighbor disputes involve several, and sometimes, all of these elements at once. A new decision by the Second Appellate District Court\* has redefined the law of equitable easements, which may well impact several of these neighbor dispute issues.

The background facts of the *Linthicum* case are reasonably parallel to any number of neighbor disputes we have handled over the years. Property owners sought to prevent their neighbors from using a roadway on the owners' land. The roadway, which had been constructed before the owners bought their land, was the only access to the neighbors' parcels. And the neighbors bought their properties assuming that they had an easement to use the roadway. The trial court found that an alternative access could not be developed, that the owners could enjoy the full use of their parcel with the roadway remaining where it was, and that the balance of equities favored the neighbors' continued use of the roadway.

\* *Linthicum v. Butterfield* (2009) 175 Cal.App.4th 259

Thus the trial court entered judgment in favor of the neighbors, giving them an equitable easement to use the roadway. The owners appealed.

The court of appeal noted that the owners had bought their land with full knowledge of the historical use of the roadway and had sought to deprive the neighbors of the value and use of their properties. The court of appeal agreed with the trial court's balancing of the parties' conveniences and hardships in granting an equitable easement to the neighbors to continue using the roadway. But the trial court erred in failing to specify the width of the roadway so the case was remanded back to the trial court to make that determination.

### ***What is an equitable easement?***

Through the doctrine of balancing conveniences or relative hardship, a trial court may create an easement by refusing to enjoin an encroachment or nuisance. Case law sets forth the factors that the trial court should consider in exercising its discretion to deny an injunction: (1) The defendant must be innocent--the encroachment must not be the result of the defendant's willful act, and perhaps not the result of the defendant's negligence. The court should also weigh the plaintiff's conduct to ascertain if he or she is in any way responsible for the situation. (2) If the plaintiff will suffer irreparable injury by the encroachment, the injunction should be granted regardless of the injury to the defendant, except, perhaps, where the rights of the public will be adversely affected. (3) The hardship to the defendant by the granting of the injunction must be greatly disproportionate to the hardship caused the plaintiff by the continuance of the encroachment, and this fact must clearly appear in the evidence and must be proved by the defendant. But where these factors exist, the injunction should be denied; otherwise, the court would lend itself to what practically amounts to extortion. Doubtful cases should be decided in favor of granting an injunction.

### ***Were the defendant' negligent?***

Here, the plaintiffs sought to have the defendants remove their roadway to make room for the plaintiffs to build a home. The plaintiffs argued that the defendants were negligent in not getting a use permit reissued by the US Forrest Service. Relying upon the language from prior case law that the court should consider the defendant's innocence, and whether the encroachment is "perhaps not the result of the defendant's negligence," the plaintiff argued that it was the prevailing party as a matter of law.

But the court of appeal held differently. It recognized that it is well settled law that the doctrine of balancing the conveniences does not apply to willful conduct. "But negligence is another story. The doctrine presumes the defendant is a wrongdoer. It hardly could be applied if a showing of some negligence is in every case enough to defeat its application." Thus, the court held that mere negligence on the defendant's part is insufficient to defeat a claim for an equitable easement. And whether the conduct rises to the "willful" level is a judgment best left to the trial courts to determine on a case by case basis.

### ***So what happened here?***

The court determined that in this case the plaintiffs brought the matter upon themselves. They purchased the lot with full knowledge of the existing roadway and its use. And the plaintiffs sought to enjoin the long-time users of that roadway by showing that they had simply not renewed a special use permit that the Forrest Service had issued decades earlier to a prior owner.

Also, the court found that there would be no significant impact on the parties seeking an injunction if the injunction were denied, while granting the injunction would make the defendant's property entirely inaccessible and thus worthless.

The trial court thus found by clear evidence, as required by existing case law on this topic, "the hardship to defendant by granting the injunction [is] greatly disproportionate to the hardship caused plaintiff by the continuance of the encroachment."

## CONCLUSION

The law of easements is a relatively stable doctrine. It does not frequently change. The "new" cases in this area usually focus on the meaning of small clauses in prior rulings, such as here, where the plaintiffs sought to capitalize on the phrasing of a prior decision that held "the encroachment must not be the result of defendant's willful act, and *perhaps not the result of defendant's negligence.*" That loose language in a prior decision has now been "tightened up" so that future litigants will realize that mere negligence on the defendant's part is insufficient to avoid the creation of an equitable easement where other factors weigh in favor of its creation.

## NEXT ISSUE

Liquidated damage provisions in residential purchase agreements.

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