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HENRY ELLEN DUNLAP
CLERK OF SUPERIOR COURT

DR

DEPUTY JR SV

10 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
11 IN AND FOR THE COUNTY OF COCHISE

12 DANNY R. HATCH, JR. and DENICE R.
13 HATCH, husband and wife,

14 Plaintiffs,

15 vs.

16 RONALD J. KLUMP and JANE DOE
17 KLUMP, husband and wife, ROY J. KLUMP
18 and JANE DOE KLUMP, husband and wife,
19 and DAYLA HEAP and JOHN DOE HEAP,
20 wife and husband,

21 Defendants

NO. CV 201400128

MEMORANDUM OF POINTS
AND AUTHORITIES

Assigned: Hon. John Keliher

22 **I. FACTS:**

23 A. Plaintiff's purchased parcel 32 being located in Cochise County which address
24 is 3983 North Sheppard Road, Wilcox, Arizona August 18, 2003. See Exhibit 4.

25 B. Plaintiff purchased subject property from Sandra Erhardt August 18, 2003. See
26 Exhibit 4.

27 C. Leland and Betty Reif did purchase subject property from Continental Service
28 Corporation September 17, 1977. See Exhibit 2.

D. Between 1989 and 2003 Sandra Erhardt did use the easterly 60 foot strip as a
private driveway to her residence to the exclusion of both the public and the Defendant's.
See affidavit of Sandra Erhardt.

E. Plaintiff's did, from August 2003 through December 29, 2013 use said 60 foot

1 strip as a private driveway to the exclusion of the general public including the Defendant's
2 herein. See affidavit of Danny D. Hatch, Jr.

3 F. Contra to Defendant's statement of facts the right of way easement being Exhibit
4 5 specifically states that "Continental Service Corporation, as trustee under #99383, does
5 hereby grant and convey to the public for ingress and egress for public utilities, an
6 easement to construct, operate and maintain utilities and appurtenances across, over and
7 under the surface of the premisses here and after described.". See Exhibit 5.

8 G. Defendant does claim on page 3 lines 9 and 10 that Continental Service
9 Corporation withdrew permission for Defendant's to use North Johnson Saddle Road
10 being specifically described in the right of way easement hereinabove referred to. See
11 Statement of Facts of Ronald Klump.

12

13 **II. STATEMENT OF LAW:**

14 Plaintiff's would agree that summary judgment should be granted by the Court
15 where the record indicates that "there is no genuine dispute as to any material fact and the
16 moving party is entitled to judgement as a matter of law. **Orme school V. Reeves, 166**
17 **ARIZ. 301, 802 P. 2d 1000 (ARIZ 1990).**

18 **Creation of a Public Easement:**

19 Under the well-established common law, an owner of land can make a dedication
20 of roadway easements for public use with the effect that the public acquires an easement
21 to use the property for the purposes specified. *Pleak v. Estrada Property Owners*, 207 Ariz.
22 418, 87 P.3d 831, 834 (2004). "An effective dedication of private land to a public use has
23 two general components- an offer by the owner of land to dedicate and acceptance by the
24 general public." *Id.* At 836-7. The offer can be made with anything fully demonstrating the
25 intent of the donor to dedicate to "the public". *Id.* At 837. In *Pleak*, the owner recorded a
26 "Record of Survey" indicating the owner "hereby dedicates these easements to the public
27 for the use as such." *Id.* at 833; see also *Lowe V. Pima County*, 217 Ariz. 642, 177 P3d.
28 1214, 1215 (App. 2008) ("Deed of Dedication" "conveyed unto the public, for road and

1 utility purposes.”); Hunt V. Richardson, 216 Ariz. 144, 163 P.3d 1064, 1067 (App. 2007)
2 (“Easement Instrument” granting an “easement for ingress, egress, public and private
3 utilities”)

4 Acceptance of the record easement offer can be completed with a sale of the
5 effected land parcels and a specific reference to the public easement in the conveyance.
6 Pleak, 87 P.3d at 837. Mere recording of the dedication instrument is insufficient, and the
7 instrument should be expressly referenced in the deed to the parcel that is later sold “so
8 that buyers would have had notice of the dedication.” Lowe, 177 p.3d at 1219.

9 In this case, the easement Instrument specifically states the owner “does hereby
10 grant and convey to the public for ingress and egress and public utilities, an easement to
11 construct, operate and maintain utilities and appurtenances across, over and under the
12 surface of the premises hereinafter described.” The Easement Instrument describes the
13 easterly 60 feet of parcel 32 and the instrument was properly recorded.

14 Although, the grant does not expressly state the easement is for the purpose of a
15 road, the use of “ingress and egress” to describe the easement implies a roadway as the
16 public is unlikely to use the narrow 60-foot easement in any other fashion. i.e., the narrow
17 easement along the border of parcel 32 would not be used as a public park. Furthermore,
18 the court in Hunt interpreted the easement instrument granting an “easement for ingress,
19 egress public and private utilities” as contemplating a “roadway”. Hunt, 163 P.3d at 1067,
20 1070 (“Here, the easement consists of a roadway...”).

21 Acceptance of the public easement offer would be completed with the sale of parcel
22 32 if the Easement Instrument is referenced in the chain of title to parcel 32. If the chain
23 of title to parcel 32 fails to reference the Easement Instrument, acceptance of the
24 easement offer would not be accepted, and a public easement would not have been
25 created, notwithstanding the execution and prior recording of the Instrument. See Lowe,
26 177 P.3d at 1219.

27 The Parcel 32 conveyances to Hatch and his predecessors, back to Continental
28 Service Corporation, do not contain a legal description of the property being conveyed.

1 Rather, it references a separate document titled, "Report of Survey". The reference was
2 probably intended to reference the "Record of Survey" that is recorded in Cochise County
3 in Book 1 of Surveys, pages 56 and 56A. The Record of Surveys describes an easement
4 60 feet in width on the presumably eastern and southern boundaries of Parcel 32.
5 However, it does not describe the easement as a "public easement", nor does it refer to
6 the Easement Instrument.

7 Without a specific reference to the Easement Instrument and absence of reference
8 to a public easement in the Record of Survey, none of the conveyances for Parcel 32 act
9 as an acceptance of the intended easement for public use. Therefore, any easement on
10 Parcel 32 does not create a public easement.

11 **Creation of Express Private Easement:**

12 Since the Record of Survey indicates an "easement fo ingress, egress and utilities,
13 60 foot in width" along the eastern and southern boundaries of Parcel 32 and the Record
14 of Survey is referenced in conveyances of Parcel 32, and presumably adjacent parcels, the
15 60 foot easement was created by express grant. See Squaw Peak Community Covenant
16 Church of Phoenix v. Anozira Development, Inc., 149 Ariz. 409, 412 719 P.2d 295, 298
17 (App. 1986).

18 **Extinguishment of Express Private Easement:**

19 An easement acquired through grant may be extinguished by the owner of the
20 servient tenement by acts adverse to the exercise of the easement for the period required
21 to give title to land by adverse possession, i.e., ten years. Sabino Town & Country Estates
22 Associations v. Carr, 186 Ariz. 146, 149, 920 P.2d 26, 29 (App. 1996). Because the owner
23 of the servient estate claiming adverse possession of an easement already has the right
24 to possess and use the land, the "servient owner is required to show by clear, positive and
25 unequivocal evidence that is use of the easement was inconsistent with and antagonistic"
26 to the easement beneficiary. Id.

27 Thus, the question of whether the elements of adverse possession have been
28 established is "one of fact which must be determined from the circumstances of each

1 case.” Id.

2 Generally, fencing of the disputed property is evidence of possession to put the true
3 owner on notice that his land is held under an adverse claim of ownership. Sabino, 186
4 Ariz. at 30. However, “when an unrestricted, perpetual, recorded easement of ingress and
5 egress has not been needed or used for that purpose, and when the owner of the dominant
6 estate has had uncontested access to the easement and has continuously used it for other
7 purposes, “the maintenance of a fence which obstructs the unused easement does not
8 terminate the easement by adverse possession.” Id. Rather, the servient estate’s owner
9 must provide a “clear, unequivocal message”, beyond mere fencing, prohibiting any future
10 use of the easement for ingress/egress. Id.

11 Fencing that completely blocks access to the easement must be held sufficient to
12 start the prescriptive period:

13 Blackacre is burdened by an easement appurtenant to Whiteacre for ingress and
14 egress to a public road. Without permission from the owner of Whiteacre, O, the owner of
15 Blackacre, constructed a fence along the boundary between Blackacre and Whiteacre. The
16 fence completely blocked entrance to the easement. In the absence of other facts or
17 circumstances, maintenance of the fence in its current location for the prescriptive period
18 will terminate the easement. Restatement, supra, 7.7 cmt. B, illus. 1; see also White v.
19 Lambert, 332 S.E.2d 266, 268 (W. Va. 1985) (servient owners extinguished part of an
20 express right-of-way by erecting a fence along the road and maintaining grass, shrubs,
21 trees, and a shed within the unused portion of the easement); but see Brimstone Mining,
22 Inc. V. Glaus, 77 P.3d 175 (Mont. 2003) (locked gate was insufficiently adverse where the
23 dominant owner had a key).

24 Posting of “no trespassing” signs along fencing restricting motor vehicle use of the
25 easement was held to be sufficient evidence of adverse possession. See Sabino, 186 Ariz.
26 at 151.

27 Hatch and his predecessors-in-interest to Parcel 32 restricted use and access of the
28 easement “as a private drive to the exclusion of all persons” by erecting a fence along the

1 eastern boundary of the easement, a locked gate at the north end of the easement and
2 signage displaying "private driveway, no outlet, no trespassing." The fence, gate and
3 signage had been in place since at least 2003 when Hatch purchased Parcel 32. There are
4 no indications that Klump or other adjacent property owners had accessed or utilized the
5 easement for vehicular traffic prior to December 30, 2013.

6 If the fence and gate completely blocked Klumps access to the easement, these
7 circumstances define a meritorious claim for termination of the express private easement
8 on Parcel 32 through prescription.

9 ARS 12-521 defines adverse possession as follows (A) "1" (adverse possession)
10 means an actual, visible appropriation of land commenced and continued under a claim
11 of right inconsistent with and hostile to the claim of another.

12 ARS 12-525 specifically provides an (A) "an action to recover real property from a
13 person in peaceable and adverse possession, and cultivating, using and enjoying the
14 property, and paying taxes thereon, and claiming under a deed or deeds duly recorded,
15 shall be commenced within 5 years after the cause of action accrues and not afterward."

16 ARS 12-526 specifically provides: "A person who has a cause of action for recovery
17 of any lands, tenements or hereditaments from a person having peaceable and adverse
18 possession thereof, cultivating, using and enjoying such property, shall commence an
19 action therefore within 10 years after the action accrues, and not afterward."

20 ARS 12-527 specifically provides "when a action for recovery of real property is
21 barred by any provision of this article, the person who pleads and is entitled to the bar shall
22 be held to have full title precluding all claims."

23 **III. ARGUMENT:**

24 It is clear from the affidavit attached to Plaintiff's answer, that the easterly 60 feet
25 of Plaintiff's property has been treated both by the general public, Cochise County and
26 Continental Service Corporation as a private easement since it's creation December 8,
27 1976. The affidavits of both the Plaintiff's and their predecessor in title, Sandra Erhardt
28 leave no doubt that between May 11, 1989 and December 30, 2013, said 60 foot strip of

1 land was used as a private driveway to Plaintiffs' residence to the exclusion of the general
2 public including but not limited to the Defendant's. If this is not enough, the admission of
3 Defendant in his Statement of Facts, paragraphs 7, 9, and 10 confirm that N. Johnson
4 Saddle Road is a private ingress and egress easement to Defendants' property as defined
5 in Exhibit 5.

6 The right away easement, being Exhibit 5, must be interpreted pursuant to
7 "ejusdem generis" which provides that in interpreting language a general phrase
8 subsequently limited by specific, limiting words is subject to interpretation based upon the
9 stated limitation. As a result the language in Exhibit 5: "grant and convey to the public for
10 egress and ingress and public utilities, an easement to construct, operate and maintain
11 utilities...would specifically, by application of said principle, limit the right away to the use
12 to construct, operate or maintain utilities. As a result this right away easement is a private
13 easement which is subject to extinguishment by adverse possession.

14 It is clear that since 1989, the easterly 60 feet of Plaintiff's property has been
15 fenced, has been used exclusively, openly, notoriously and hostilely by both Plaintiff's and
16 their predecessors in title. Since 2005, Plaintiff's have fenced said 60 foot strip,
17 constructed a gate thereon, a lock on the gate, a sign indicating private property and paid
18 taxes thereon.

19 The Plaintiff's have, pursuant to ARS 12-521 (B), acquired title to 60 foot strip by
20 adverse possession and as a result is entitled to quiet title thereon. This is further bolstered
21 by the fact that Sandra Erhardt also used said 60 foot strip openly, notoriously, hostilely
22 and peaceably since 1989 which period would also be tacked to Plaintiff's use resulting in
23 continuous use for more than 24 years!

24 Since the 60 foot strip must be found to be a private easement, it can be
25 extinguished under the mandates of *Lowe*, supra, page 1219.

26 It is well established common law that a owner of land can make a dedication of
27 roadway easements for public use with the effect that the public acquires an easement to
28 use the property for the purposes specified. *Pleak*, Supra, page 834. Much of dedication

1 to be affective to the public it must be found that there was a offer by the owner of land to
2 dedicate and acceptance by the general public. The offer can be made by anything fully
3 demonstrating the intent of the donor to dedicate to the public. In Pleak, the owner
4 recorded a "record of survey" indicating the owner in the case at bar the easement has
5 never been accepted by the public. As this instrument has never been expressly
6 referenced in any deed to any parcel adjacent to or including Plaintiff's property to put said
7 purchasers on notice of the dedication. The conveyances to Reif, Erhardt and Plaintiff's fail
8 to specifically reference the right away easement there would be no acceptance and as
9 a result a public easement would not thereby been created. Consequently the actions of
10 both Plaintiff's and there predecessors in title restricted use in access of the easement by
11 there use as a private drive to the exclusion of all other persons with a sign and a lock gate
12 at the easement for a period of 24 years. Such actions clearly would terminate a private
13 easement through prescription. See restatement (third) servitude section 7.7.

14

15 **IV: CONCLUSION:**

16 The Court must find that there are no material facts in dispute. Plaintiff's can obtain
17 title by adverse possession of a private roadway that has been used exclusively, openly
18 and notoriously for more than 10 continuously years. Therefore Plaintiff's are entitled to
19 judgment against the Defendant's together with an award of Attorney's fees pursuant to
20 both ARS 12-341.01 and ARS 1103.

21

22 RESPECTFULLY SUBMITTED this 2 day of APRIL, 2015.

23

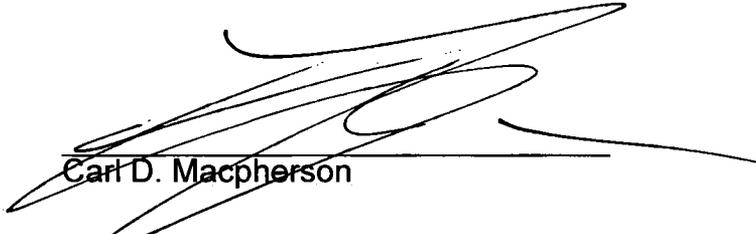
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Carl D. Macpherson

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