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ORDER

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Case No. 00-CV-0252

Dept. No. II

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF DOUGLAS

JUDY LU SHALLENBERGER, Trustee of the Judy Lu Shallenberger Trust, Dated February 29, 1984,

Plaintiff/
Counter-Defendant,

vs.

O R D E R

MICHAEL BOGDANOVICH; ROSE BOGDANOVICH; R. BRUCE BRAUN and SUSAN T. BRAUN, husband and wife; RUSKA BOGDANOVICH; THE JESSEAN II FAMILY LIMITED PARTNERSHIP, a Nevada limited partnership; and DOES I-X,

Defendants/
Counterclaimant.
_____/

and related claims.
_____/

THIS MATTER comes before the court upon third-party counterclaimant Rock Island Corporation's (Rock Island) Motion for Partial Summary Judgment. Plaintiff/counterdefendant Judy Lu Shallenbreger, Trustee of the Judy Lu Shallenberger Trust, (Shallengerger) joins in the Motion.

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Facts

In 1987 Rose Bogdanovich obtained lot 6 from James Nezgoda. Rose Bogdanovich recorded a parcel map splitting lot 6 into lots 6A and 6B in February 1989. Later that same year, parcel 6A was sold to the Judy Lu Shallenberger Trust.

On or about January 12, 1994, a Memorandum of Option Agreement executed by the Brauns granted defendants/ counterclaimants Michael and Ruska Bogdanovich (Bogdanoviches) an option to buy the property located directly north of parcels 6A and 6B. The Bogdanoviches had previously gained access to the Braun parcel - which they apparently used for occasional recreational activities - by crossing parcel 6B, with the permission of the owner, Rose Bogdanovich. On November 8, 1994, Rose Bogdanovich transferred 6B to Michael Bogdanovich, who sold the parcel to Cathy Victor (Rock Island) on the same day.

On May 20, 1999, the Victors objected to the Bogdanoviches' traversing their parcel, 6B, to reach the Braun parcel. Nevertheless, the Bogdanoviches exercised their option to purchase the Braun property north of parcels 6A and 6B in September 2000. The Shallenbergers, followed suit, objecting to the Bogdanoviches' use of their property, by means of an application for temporary restraining order, preliminary injunction and permanent injunction filed on September 13, 2000.

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Rock Island and Shallenberger assert that all of five possible easement theories available to the Bogdanoviches, namely, express easement, easement by necessity, easement by implication, prescriptive easement, and easement by estoppel, are precluded as a matter of law.

Standard

Summary judgment is only appropriate when, after viewing the evidence in a light most favorable to the non-moving party, there remain no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Butler v. Bogdanovich*, 101 Nev. 449, 451 (1985). The court must give the party opposing summary judgment the benefit of all favorable inference. *O'Dell v. Martin*, 101 Nev. 142, 144 (1985). Further, summary judgment is foreclosed if there exists the slightest doubt as to the operative facts. *Sawyer v. Sugarless Shops*, 106 Nev. 265, 267 (1990).

Analysis

The central issue upon which the easement by implication rests is unity of ownership. During a hearing on these matters in which the court entertained oral argument, the Bogdanoviches raised the issue of unity of ownership in regard to implied easements, asserting that Michael Bogdanovich's option to buy the Braun property constituted equitable title in that property. The Bogdanoviches contend, in essence, that as the holder of equitable title to the Braun property at the time title to parcel 6B passed to Michael Bogdanovich, there was

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unity of title. Although the court left open this possibility at a previous hearing, the court now disagrees.

In certain circumstances equitable title may win the day. In *Roemer v. Pappas*, 203 Cal. App. 3d 201 (Ca. App. 1988), the California Court of Appeals held that the common owner of two parcels held equitable title to the parcel he retained because he had bought it using an installment land contract:

> Under an installment land contract, the buyer agrees to make payments over time and the seller agrees to convey legal title to the buyer at some future date. "During the term of the contract the [buyer] acquires an 'equity ownership' in the property." (Citations omitted.) Equity "considers the purchaser to be the owner of the land," and the seller is said to have "no greater rights than he would possess if he had conveyed the land and taken back a mortgage." (Citations omitted.) The buyer's interest is subject to property tax (citation omitted), and the buyer will receive title free and clear, as against the seller's judgment creditors, upon making the final payment under the contract.... In sum, the buyer is generally deemed the 'owner' notwithstanding the retention of legal title by the seller. (Citations omitted.)

Id. at 205-06. Michael Bogdanovich's rights and responsibilities pursuant to his option to buy do not approximate those possessed by the buyer enumerated in *Roemer*.

Had there had been unity of title, the Bogdanoviches' implied easement claims would still fail. First, the Bogdanoviches' claim to unity of title appears to be predicated on Michael's possession of an option agreement to purchase the Braun parcel at the same time that he possessed parcel 6B, which he conveyed to the Cathy Victor on the same day in 1994 that he acquired it.

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The Nevada Supreme Court, in explicating the requisites of an implied easement noted:

> The second requirement is that at the time that the common owner severed the two parcels, the owner must have been using one parcel so as to benefit the other in an **apparent and continuous manner** (citations omitted.) In *Boyd*, the court states that an easement by implication is grounded in the court's decision that as to a particular transaction in land, the owner of two parcels had so used one to the benefit of his other that, on selling the benefitted parcel, a purchaser could reasonably have expected, without further inquiry, that these benefits were included in the sale. (Emphasis added.)

Jackson v. Nash, 109 Nev. 1202, 1214 (1993). Moreover, "[i]n deciding whether an implied easement by necessity has been established, the court looks to conditions at the time of severance. *Breliant v. Preferred equities Corp.* 112 Nev. 663, 672 (1996).

Unless the court misapprehends the thrust of the Bogdanoviches' technical argument, the very brief time in which Michael Bogadanovich enjoyed his alleged unity of title over the Braun parcel and either parcel 6A or 6B would hardly have sufficed to establish the apparent and continuous use requirement enunciated in *Jackson*.

Second, on February 8, 1989, Rose Bogdanovich recorded a parcel map containing a 30' private access and public utility easement for the use of parcels 6A and 6B followed by a Maintenance Agreement, on May 31, 1989, between herself, as owner of parcels 6A and 6B, and Shallenberger, the purchaser of parcel 6A, regarding the maintenance of the aforementioned private access easement. Had Rose intended the easement

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servicing parcels 6A and 6B to extend to the property line of the Braun parcel, she could have effectuated her intentions by means of the recorded instruments, but chose not to do so. Indeed, there is substantial evidence in the record that Michael discussed this option with a professional land planner, Dan Jenkins, and a licensed surveyor, David Winchell.

Although Nevada precedent does not specifically touch upon the relationship between implied and express easements, other jurisdictions have. The Supreme Court of Ohio has observed the implied easements are not favored by law because "they are in derogation of the rule that written instruments shall speak for themselves." Furthermore,

> because easements of necessity are *implied* by law to provide a right of way over land which could have been effectuated by an *express* grant but was not, one may not simultaneously have an easement over another's land both by express grant and an easement implied of necessity.

Tiller et al. v. Hinton, 482 N.E.2d 946, 950 (Ohio 1985). North Carolina's highest court has similarly decreed that "[t]he express granting of an easement negatives the finding of an implied easement of similar character." *Waters et al. v. North Carolina Phosphate Corporation*, 312 N.E.2d 428, 441 (N.C. 1984). An express easement already sets forth the nature, character, and extent of the easement affecting the three parcels in question.

Consequently, the court reaffirms its preliminary ruling that an easement by implication or necessity will not lie in

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the instant case.

With respect to the existence of a prescriptive easement, the foundation of such a right is the acquiescence of the owner of the servient tenement in the acts relied on to establish the easement. *Southern Bell Tel. & Tel. Co. v. Southern Precision Pattern Works, Inc.*, 251 Fed. 537, 538 (5th Cir. 1958). *Accord, Richesin v. McNeill*, 1992 Ark. App. LEXIS 543 (Ark. App. 1992).

In Nevada, one may create a prescriptive easement over the property of another "through five years of adverse, continuous, open, and peaceable use of land." *Michelsen v. Harvey*, 107 Nev. 859, 863 (1991). Moreover, the state's highest court has clarified that

> [m]ere use does not constitute adverse use: Adverse use occurs when the use asserts a claim of right to use the land.... The party claiming an easement by prescription must establish the easement by clear and convincing evidence.

Id. at 863-64.

The central issue upon which the existence of a prescriptive easement rests, in the case at bar, is whether from 1994, when the Bogdanoviches sold parcel 6B, to 2000, when suit was filed against them, the Bogadanoviches' use of the roadway was adverse or permissive. "Whether the use is with permission or is adverse presents an issue of fact." *Jackson v. Hicks*, 95 Nev. 826, 829 (1979). Permissive use cannot ripen into an adverse use without specific notice to the owner of the servient estate that such use is henceforth adverse for

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purposes of creating a prescriptive easement. *Jordan v. Bailey*, 113 Nev. 1038, 1046 (1997).

As the court indicated in its previous Order, communications to the Bogdanoviches' realtor that there was no access to their property could serve as notice that the Bogdanoviches no longer had permission to access their property over the Shallenbergers' or the Victors' property. If this proves to be the case, no prescriptive easement took hold. However, if the Bogdanoviches gained access to the Braun property without the latter two parties' permission, a prescriptive easement could have arisen, depending on whether the Shallenbergers effectively interrupted the Bogdanoviches' use of this access way.

The Wisconsin Supreme Court has specified that continuity depends on the nature and the character of the right claimed. Such acts need not be constant, daily, or weekly:

> One of the essentials to an easement by prescription is that the use and enjoyment must be continuous and uninterrupted. By 'continuous and uninterrupted use' is meant use that is not interrupted by the act of the owner of the land, or by voluntary abandonment by the party claiming the easement. If the use of a way is interrupted, prescription is annihilated and must begin again, and any unambiguous act by the owner, such as closing the way at night or erecting gates or bars, which evinces his intention to exclude others from its uninterrupted use destroys the prescriptive right.

Red Star Yeast & Prods. Co. v. Merchandising Corp., 90 N.W.2d 777, 781 (Wis. 1958).

The court has unsuccessfully sought guidance from Nevada precedent in order to clarify what constitutes interruption of

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adverse use in this jurisdiction. Washington and Oregon, however, have spoken to this issue. In *Huff*, Washington's highest court declared, with respect to whether a protest letter constituted sufficient termination of implied acquiescence, that

> {w]here the entry has been adverse and hostile, its character as such could not be interrupted or destroyed by the property owner's unsought consent. (Citation omitted.)
>
> The same conclusion must be reached if this letter is to be regarded as a protest or remonstrance against the hostile and adverse character of appellant's prior use of the roadway. In the latter situation, while there is some conflict in the cases, the weight of authority and the sounder reasoning seem to support the view that there must be something more than a protest to interrupt adverse use and prevent the prescriptive right from accruing. (Citations omitted.)
>
> If the interruption is produced by an act not involving a judicial determination, the act must be intended to cause and must be of such a character as actually to cause a cessation of use. The cessation of use may be merely temporary, but if it actually occurs as a result of an act of the possessor of the land done for that purpose there is an interruption.

Huff, et al. v. Northern Pacific Railroad, 228 P.2d 121, 127 (Wash. 1951).

In what this court believes to be the better reasoned opinion, the Oregon Court of Appeals does not go quite so far, finding that obstructions do not actually have to prevent actual use of the alleged easement. Citing Justice Holmes, the court explained:

> "We are of opinion that such an assertion of the right on the part of the railroad company was sufficient to prevent the gaining fo a right of way. A landowner, in order to avoid that result, is not required to battle successfully

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> for his right. It is enough if he asserts them to the other party by an overt act, which, if the easement existed, would be a cause of action. Such an assertion interrupts the would-be dominant owner's impression of acquiescence, and the growth in his mind of a fixed association of ideas; or, if the principle of prescription be attributed solely to the acquiescence of the servient owner, it shows that the acquiescence was not a fact."

Garrett, et al. v. Mueller, 927 P.2d 612, 617 (Ore. App. 1996). The court then found that "[p]laintiffs interrupted defendants' use when, after telling Mueller that he was trespassing, they locked the gates to stop him." *Id.* at 618.

Michael Bogdanovich sold parcel 6B to Cathy Victor on November 3, 1994. Until then, his use of the roadway to gain access to the Braun parcel could not reasonably be construed as adverse, since it was owned by his mother and then by him. It is not clear from the record at what point before 1999, if ever, permission was given or withdrawn by the Shallenbergers or Victors for the Bogdanoviches to use the roadway to gain access to the Braun property or what steps the Shallenbergers or Victors took to stop the Bogdanoviches from using that roadway. In both Cathy Victor's and Judy Lu Shallenberger's affidavits, filed on June 15, 2004, these two real parties in interest aver that in mid May through June, 1999 they vociferously protested the Bogdanoviches' use of their property to reach the Braun parcel, by confronting realtors, and even going so far as to interrupt showings by realtors. On July 20, 1999, Judy Lu Shallenberger filed a complaint with the State of Nevada, Department of Business and Industry, Real Estate

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Division. She also called the Douglas County Sheriff's Office on several occasions. Regardless of whether the court subscribes to the Washington or Oregon standard for defining the extent of protestation necessary to interrupt adverse or hostile use of property, resort to legal recourse must suffice - to conclude otherwise, would be to encourage violence and vigilantism.

Hence, the court concludes that the five-year period of adverse use by the Bogdanoviches did not run, thereby eliminating easement by prescription as a matter of law.

Even if the court were to find an easement by prescription, the extent of that easement would be fixed by the use which created it, namely, occasional recreational use. *Keller v. Martini*, 86 Nev. 492, 493 (1970). Insofar as there remain no genuine issues of material fact, the court GRANTS the Motion for Partial Summary Judgment in its entirety. This Order, combined with the court's previous orders, now resolve all questions pertaining to easements on the property in question. Therefore, this is a final order.

IT IS SO ORDERED.

Dated this 31 day of August, 2004.

/s/ Michael P. Gibbons

MICHAEL P. GIBBONS
District Judge

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DISTRICT JUDGE
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Copies served by mail this 31st day of August, 2004, to: Jeffrey K. Rahbeck, Esq., P.O. Box 435, Zephyr Cove, Nevada 89448, Michael Smiley Rowe, Esq., P. O. Box 2080, Minden, Nevada 89423; Allison, MacKenzie, Russell, Pavlakis, Wright & Fagan, Ltd., 402 N. Division Street, Carson City, Nevada 89703.

Ursula K. McManus

CERTIFIED COPY

The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office.

DATE: 8/27/04

Clerk of the 9th Judicial District Court of the State of Nevada, In and for the County of Douglas,

By _____ Deputy

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