# VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 11th day of October, 2018.*

Timothy Eaton, et al., Appellants,

against Record No. 171709
Circuit Court No. CL-82643

Carla Baer, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of Loudoun County.

Upon consideration of the record, briefs, and argument of counsel, the Court is of the opinion that there is reversible error in the judgment of the circuit court.

## I. BACKGROUND

This appeal arises out of a suit for a declaratory judgment to establish an easement by necessity over Carla Baer's property in Loudoun County. Timothy Eaton, Jade Eaton, Andrew Eaton, Julie Adamson, and Zachary Adamson (collectively the "Eatons") own three contiguous lots west of Baer's lot. All three Eaton lots are located on the slope of Short Hill Mountain. Baer's lot, and two others,[1] are between the Eaton lots and the public road. The Eatons' parents also own a lot ("Parent lot"), contiguous to the Eaton and Baer lots.

From 1939 to 1941, John Arnold owned both the three Eaton lots and a 62-acre tract from which Baer's lot was subdivided. When Arnold sold the 62-acre tract, he did not reserve an

[1] The Eatons have an easement over the two other lots.

access easement for the benefit of the three Eaton lots. There is no evidence in the record to show how he or his successors-in-interest accessed the Eaton lots.

Milton Jones, who previously owned the Eaton lots, sued the prior owner of the Baer lot seeking an easement by necessity. Jones died during the pendency of the litigation and his estate was not substituted as a party. The case lay dormant for more than two years and the circuit court discontinued it pursuant to Code § 8.01-335(A) in March 2011. Baer purchased her lot in October 2010 and the Eatons purchased their lots in December 2011.

After negotiations with Baer failed, the Eatons filed a declaratory judgment action to obtain an easement by necessity over Baer's lot to access Route 690. The Eatons asked the circuit court to determine the existence, location, and extent of permissible use of the easement. In order to access their lots from Route 690, the Eatons have to cross Baer's lot at some point. However, because the Eatons had an easement over the Parent lot, they only asked for limited access over Baer's lot. The initial proposed easement crossed Baer's property in the southeast corner, ran up along the northern edge of the Parent lot, and crossed back over the southwest corner of Baer's lot. The crossing back over the Baer lot was due to the steep topography of the land.

Baer filed a plea in bar, and later a motion to dismiss, arguing that the matter was time-barred because the circuit court had discontinued the Jones case and it had not been reinstated during the one-year grace period allowed by Code § 8.01-335(A). The circuit court denied both the plea in bar and the motion to dismiss.

Baer then filed a motion asserting that the Eatons had failed to join necessary parties. Baer contended that because she had authority to select the location of the easement, and the location would be affected by where it ran on other properties, all owners of lots previously part

of the 62-acre tract were necessary parties. The circuit court denied the motion, noting that Baer's authority to select the location of an easement was subject to reasonableness. Since the Eatons already had an easement up to the edge of Baer's lot, it was not reasonable to join the other property owners.

The circuit court initially granted an easement across Baer's property subject to a number of conditions which included (1) a determination regarding the location of the easement; (2) the easement would cross into the Parent lot as soon as possible, and only to the minimum extent necessary cross back into Baer's lot; and (3) the Eatons had to present a recordable easement across the Parent lot at the time the final decree was presented to the court to sign.

The parties could not agree on a location, so the circuit court held another hearing. The parties agreed that the easement had to cross the southeast corner of Baer's lot. The Eatons' expert testified the easement should cross back into Baer's lot at the southwest corner because it would require only going up a 6% grade, whereas staying on the Parent lot would require going up a 20% grade. While Baer's expert testified that the Eatons could build a road without crossing back onto Baer's lot, Baer argued that the County would not grant a permit to build a road on the easement. Over the Eatons' objection, the circuit court entered an order granting an easement by necessity across the southeast corner of the Baer lot, holding that the easement could not re-cross into the southwest corner of Baer's lot, and requiring the Eatons to establish that the County would allow the construction of a road within the easement.

The Eatons attempted to obtain County approval, but were told they would need to expend close to $100,000 to obtain the information that the circuit court ordered. The circuit court modified its order to require only a "proper expert or person with authority" who could credibly testify that the County would approve a roadway in the easement.

At the final hearing, the circuit court heard significant testimony about the grade of the hills on the Parent lot. The Eatons' expert testified that the County would likely grant a waiver to allow a road to be built, even though the 20% grade was over the maximum allowed. Baer's expert testified the opposite, saying that while a waiver may be granted for short distances, it was unlikely to be granted for the long distance across the Parent lot. The circuit court ultimately accepted the testimony of Baer's expert. Because the Eatons did not prove that the County would approve the road in the location under consideration, the circuit court denied any easement by necessity previously conditionally granted across the Baer lot. The Eatons appealed and Baer assigned several cross-errors.

## II. ANALYSIS

### A. Code § 8.01-335(A)

As an initial matter, the Court finds that the matter is not time-barred as asserted by Baer in her first assignment of cross-error. Pursuant to Code § 8.01-335(A), cases are struck from the docket and discontinued when more than two years have passed without an order or proceeding on the matter. The Code section provides that "[a]ny case discontinued under the provisions of this subsection may be reinstated, on motion, after notice to the parties in interest if known or their counsel of record, within one year from the date of such order but not after." Here, Jones, the predecessor in title to the Eaton lots, sued for an easement from the previous Baer lot owner, Thomas Huff, under Case No. CL42934-00. Thereafter, the circuit court discontinued the matter pursuant to Code § 8.01-335(A) on March 9, 2011. The Eatons purchased the property from Jones' estate on December 2, 2011. Baer had previously purchased her property from the Huff Trustees on October 8, 2010.

The Eatons filed suit against Baer for an easement by necessity in 2013. Baer argues that the entire matter is time-barred by Code § 8.01-335(A) because the Eatons did not file to reinstate Jones' suit within one year of its discontinuance. We have previously held that Code § 8.01-335(A) is a method by which trial courts control their dockets by discontinuing matters "dormant for more than two years." *Nash v. Jewell*, 227 Va. 230, 234, 315 S.E.2d 825, 827 (1984). A discontinuance of a case is not a decision "on the merits" and does not implicate *res judicata* which would bar the Eatons from bringing suit. *Payne v. Buena Vista Extract Co.*, 124 Va. 296, 313, 89 S.E. 34, 40 (1919). While the parties to the present case are successors in interest to the prior landowners and parties of the first suit, there was never a final order deciding the merits of the previous lawsuit. Accordingly, we hold that the circuit court did not err in finding that the matter was not time-barred.

B. Necessary Parties

Baer's second assignment of cross-error contends that the Parents and other lot owners were necessary parties to the suit because their property also abuts the Eaton lots. "All persons interested in the subject matter of a suit and to be affected by its results are necessary parties." *Marble Techs., Inc. v. Mallon*, 290 Va. 27, 32, 773 S.E.2d 155, 157 (2015) (citation and internal quotation marks omitted). The neighboring lot owners are not necessary parties as many of their properties do not abut the Eaton lots. Additionally, the circuit court found that "[t]he Eatons have already secured easements from State Route 690 across two lots, one being Lowry & Frye Lot 4 and the other not being a part of this subdivision but was apparently part of the original 62-acre parcel. . . . However, in order to reach their lot, the Eatons must connect this existing easement with an easement that crosses the Baer lot." The Parents also granted a deed of easement to the Eaton children and are not necessary parties to the suit regarding an easement by

necessity over Baer's lot.[2] Thus, we hold that the circuit court did not abuse its discretion in refusing to add additional parties to the suit.

C. Easement by Necessity

The Eatons argue on appeal that the circuit court failed to grant them an easement by necessity across Baer's lot.

> A way of necessity is an easement arising from an implied grant or implied reservation; it is of common-law origin and is supported by the rule of sound public policy that lands should not be rendered unfit for occupancy or successful cultivation. Such a way is the result of the application of the presumption that whenever a party conveys property, he conveys whatever is necessary for the beneficial use of that property and retains whatever is necessary for the beneficial use of land he still possesses.

*Palmer v. R. A. Yancey Lumber Corp.*, 294 Va. 140, 153, 803 S.E.2d 742, 750 (2017) (citation and internal quotation marks omitted). "In establishing an easement by necessity, '[t]he fact of the necessity' thus becomes an issue of 'great importance in determining whether an easement should be implied.'" *Id.* at 154, 803 S.E.2d at 750 (quoting *Jennings v. Lineberry*, 180 Va. 44, 48, 21 S.E.2d 769, 771 (1942)). "Under Virginia law, it has long been the rule that the 'necessity' is 'not a physical or absolute necessity but a reasonable and practicable necessity.'" *Id.* (quoting *Smith v. Virginia Iron, Coal & Coke Co.*, 143 Va. 159, 164, 129 S.E. 274, 276 (1925)).

> The elements of easement by necessity are as follows: (1) the dominant and servient estates were derived from a common title, i.e., "at some time in the past, [they] belonged to the same person," (2) the easement is "reasonably necessary to the enjoyment of the dominant estate," and (3), the dominant estate became landlocked

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[2] To the extent that Assignment of Cross-Error 2 could be read to assign error to the circuit court's granting of an easement over the Parent lot, Baer assigns error to something the circuit court did not do. The circuit court never ordered an easement over the Parent lot, rather the Parents gave the children an easement by deed.

> at the time of the severance of the two estates and there is no "means of ingress and egress" other than over the servient estate. *Hurd v. Watkins*, 238 Va. 643, 653-54, 385 S.E.2d 878, 884 (1989) (citing *Middleton v. Johnston*, 221 Va. 797, 802-04, 273 S.E.2d 800, 803 (1981)). The easement thus arises at the time the dominant and servient estates are severed, even if it is not "judicially established" for many years after the severance. *Carstensen v. Chrisland Corp.*, 247 Va. 433, 442, 442 S.E.2d 660, 665 (1994).

*Id.* at 153 n.11, 803 S.E.2d at 749 n.11.

The Eaton lots and the Baer lot were previously held by a common owner, John J. Arnold (and later by his wife as a dower interest). Arnold purchased the Eaton parcels in 1925 and purchased the 62-acre lot containing the Baer parcel in 1939. Arnold sold the lot containing the current Baer parcel in 1941. Arnold's estate later sold the Eaton lots in 1976. Mr. Ball, the title examiner, noted that "in the course of the title examination I did not find access to the public road for [the Eaton] parcels."

By law, an easement by necessity is awarded when both tracts had a common owner who later sold the tracts resulting in one or more tracts becoming landlocked. Here, Arnold's sale of the 62-acre tract in 1941 resulted in the Eaton lots' landlocked state. The evidence presented by the Eatons showed that Arnold did not reserve an easement for access at the time he sold the 62-acre tract. Furthermore, there was no evidence in the record of any other point of access to the Eaton lots. As such, the Eaton lots are landlocked without an easement across Baer's lot that goes between the Eaton lots and an existing easement on the Parent lot. The circuit court denied an easement by necessity because it concluded that the Eatons had failed to establish that a County approved roadway could be built in the one identified location of the easement.[3] This

[3] The Eatons assign error to the circuit court's consideration of whether a road could be built in the easement, arguing that the issue was not raised in the complaint. A fair

judgment was in error. The granting of an easement by necessity is not predicated on whether or not a road can be built in the easement. Infeasibility of a particular aspect of a proposed path of an easement by necessity is not a basis for denying an easement altogether. As we have long held, once the elements of an implied easement are established, the party is entitled to "such a way. . . [as] is necessary for the beneficial use of that property." *Keen v. Paragon Jewel Coal Corp.*, 203 Va. 175, 179, 122 S.E.2d 543, 546 (1961).

## III. CONCLUSION

Accordingly, we will reverse the judgment of the circuit court denying the Eatons an easement by necessity over Baer's lot and remand for further proceedings consistent with this order.[4]

This order shall be certified to the Circuit Court of Loudoun County.

A Copy,

Teste:

Patricia L Harrington

Clerk

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reading of the relief sought, i.e. the "location" of the easement, could entail consideration of the feasibility of a road. However, as further explained herein, under the facts of this case that factor should not have been determinative.

[4] Baer's third assignment of cross-error is premature as the circuit court did not order an easement. Based on our analysis of an easement by necessity in Section C of this Order, we affirm the circuit court on Baer's fourth and fifth assignments of cross-error.