2011 WL 5892552 (Alaska) (Appellate Brief)
Supreme Court of Alaska.

David MCCARREY and Donna McCarrey, Appellants, v. Ronald KAYLOR and Jean K. Kaylor, Appellees.

No. S14114.
September 20, 2011.

Appeal from the Superior Court Third Judicial District At Anchorage, Alaska
Honorable John Suddock
Trial Court No. 3AN-10-7799 CIV

Reply Brief of Appellants

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*i TABLE OF CONTENTS

*ii TABLE OF AUTHORITIES

Cases

*1 I. INTRODUCTION

The Appellees, Ronald and Jean Kaylor ("Kaylors"), concede that the superior court erred in concluding that the Appellants David and Donna McCarrey's ("McCarreys") property is subject to a public roadway pursuant to the original land patent issued by the United States pursuant to the Small Tract Act since the right-of-way dedication was never accepted by actual use as a road prior to 1976. Instead, the Kaylors claim a public prescriptive easement over the McCarrey property. The superior court made no findings of fact or conclusions of law regarding a prescriptive easement. Further, as discussed below, the Kaylors' argument is without merit. Even assuming, for purposes of argument only, that East 136th Avenue - which runs east and west through the interior of the McCarrey property - is a public easement by prescription, the Kaylors have failed to establish a right to turn off of East 136th Avenue and travel north across McCarrey property to access the southern portion of their property.

*2 II. ARGUMENT

A. Because the McCarreys did Not Have Adequate Notice that a Legally Designated Public Road Was At Issue, Their Due Process Rights Were Violated.

The Kaylors have misconstrued *Price v. Eastham,* 75 P.3d 1051 (Alaska 2003) and erroneously contend that *Price* stands for the proposition that "broad discretion is permitted in allowing the evidence admitted to conform to a legal theory that was not initially pled." Kaylor Brief at 8. The issue in *Price* was not whether a pleading may be amended to conform to the evidence; rather, the *Price* Court expressly held that "[B]ecause Price did not have notice that an RS-2477 right-of-way was at issue, his due process rights were violated." *Id.*at 1056.

The Alaska Constitution provides that "'[n]o person shall be deprived of life, liberty, or property, without due process of law.'" *Price v. Eastham,* 75 P.3d 1051, 1056 (Alaska 2003) (quoting Alaska Const. art. I, § 7). The Alaska Supreme Court has

held repeatedly that "[p]rocedural due process under the Alaska Constitution requires notice and opportunity for hearing appropriate to the nature of the case." Parties must have notice of the subject of proceedings that concern them "so that they will have a reasonable opportunity to be heard." "A hearing is required in order to give the parties an opportunity to present the quantum of evidence needed [for the court] to make an informed and principled determination."

Id. at 1056 (citations omitted).

In *Price v. Eastham,* plaintiff filed suit against Price claiming that it had perfected a prescriptive easement over Price's property. *Id.* at 1054. The trial court concluded that the trail at issue was an

RS 2477 right-of-way and declined to *3 decide whether a public or private easement was created. *Id.* Price then moved for reconsideration of the trial court's order, arguing that an RS 2477 right-of-way could not have been created on his land. *Id.* In denying Price's motion for reconsideration, the court supplemented its earlier ruling by determining that Eastham had established that a public prescriptive easement existed across Price's land, in addition to the RS 2477 right-of-way. *Id.*

Holding that the trial court erred in determining that Price's property was subject to a public right-of-way, the Alaska Supreme Court reasoned:

> To determine whether sufficient public use exists to establish an RS 2477 right-of-way, courts usually consider two factors: evidence of use and evidence of the route's definite character. However, a preliminary issue in this case makes it unnecessary for us to reach the merits of the RS 2477 claim. Neither of the parties raised the issue of an RS 2477 right-of-way at the trial court level. Rather, the trial court - declining to rule upon the prescriptive easement claim Eastham presented - found on its own that an RS 2477 right-of-way existed over Price's land. This lack of notice raises serious due process concerns.

Id. at 1056.

Similar to *Price v. Eastham,* the Kaylors acknowledge that their Complaint alleged two counts, “namely (1) a claim for a prescriptive easement; and (2) a claim for injunctive relief to bar interference with the easement.” Kaylor Brief at 3. [Exc. 005-008] The Kaylors did not allege in their Complaint that the McCarrey property was subject to a public right-of-way nor did they allege that the right-of-way is a legally designated public road. *Id.*

*4 Like the Price trial court, the superior court in the instant case declined to hear evidence or rule upon the prescriptive easement claim presented by the Kaylors. The superior court stated: “I don't think you have a factual dispute here if you set aside the prescriptive easement issue.” [Tr. 97]; [Tr. 90-99] (“... we just set all prescriptive issues aside,... setting whether or not there is a prescriptive by continual hostile use for more than the statute - statutory period, setting that aside.... Instead, the superior court simply concluded on its own that since the original land patent for the McCarrey property included a right-of-way for roadway purposes, a road presently exists, the road is named 136th Avenue, and the road is signed at Davis and Elmore, the road must be a legally designated public road. [Tr. 101-102] The court then concluded that the road is “there to benefit the world” and, therefore, the Kaylors are entitled to unlimited access to the southern boundary of their property from the road. [Tr. 102-104] The court found as a matter of law that “the Kaylors are entitled to an injunction preventing the McCarreys from limiting their access to their property by a gated fence.” [Tr. 106]

While the McCarreys did not object to the admission of evidence showing that a road currently exists, that the road is named 136th Avenue, and that the road is currently signed at Elmore and Davis, the McCarreys disputed that their property is subject to a public road, and they disputed that East 136th Avenue is a *5 legally designated public road. [Tr. 94-97] [1] However, like the defendant in *Price,* the McCarreys were given inadequate notice that a public road, rather than a prescriptive easement, was at issue and the McCarreys had inadequate opportunity to argue the law or present additional evidence to support their position. [Tr. 94 - 97]

Unlike Price, the superior court in the instant case did not make the alternative ruling that a prescriptive easement exists over the McCarrey property. *Price,* 75 P.3d at 1056. The superior court made no findings of fact or conclusions of law with regard to the existence of a prescriptive easement. [Tr. 101-107] In Price, the Alaska Supreme Court affirmed the superior court's finding of a

prescriptive easement, but remanded for a precise determination of the easement's scope. *Id.* at 1059.

Because the McCarreys' due process rights were violated, the permanent injunction order should be reversed and the judgment vacated.

B. The Kaylors Concede that the Superior Court Erred in Concluding that the McCarrey Property is Subject to a Public Road Pursuant to the Original Land Patent.

The Kaylors concede that the superior court erred as a matter of law in concluding that a common law dedication of property for public use occurred. *See* Kaylor Brief at 13. Contrary to the superior court's conclusion, 136th Avenue is *6 *not* a legally designated public road by virtue of the original land patent for the McCarrey property.

The McCarreys purchased their property in 2009 subject to the "reservations and exceptions as contained in United States Patent and/or in Acts authorizing the issuance thereof." [Exc. 3] The original land patent for the McCarrey property was issued by the United States pursuant to the June 1, 1938 Small Tract Act, 52 Stat.609 (repealed October 1976), and "is subject to a right-of-way not exceeding 50 feet in width, for roadway and public utilities purposes, to be located along the north boundary of said land." [Exc. 1] As noted by the Kaylors, the superior court's decision was based on the right-of-way set forth in the original land patent. *See*Kaylor Brief at 13. The superior court stated:

> The wording of this patent is subject to a right-of-way. A right-of-way in common parlance is an area in which a group of people or a political entity can do some specified thing. It's delimitated at 50 feet in length and its purpose is both for public utility purposes and for a roadway to be located along the north boundary of the land.

[Tr. 103]. In essence, the superior court incorrectly concluded that a common law dedication occurred. A common law dedication of property for public use requires: (1) an owner's offer of dedication to the public and (2) acceptance by the public. *Swift v. Kniffen,* 706 P.2d 296, 301 (Alaska 1985). Acceptance may occur through a formal official action or by public use consistent with the offer of dedication or by substantial reliance on the offer of dedication that would create an estoppel. *State v. Fairbanks Lodge No. 1392, Loyal Order of Moose,* 633 P.2d 1378, 1380 (Alaska 1981.

*7 Here, however, the common law public right-of-way dedication set forth in the patent terminated since it was not accepted by actual use prior to 1976, the year the Small Tract Act was repealed. *See* Instruction Memorandum No. 91-196.[2] [Attachment A at 1-2, Appendix] The Kaylors acknowledge that the dedication of the property for use as a public roadway disappeared no later than 1976. The Kaylors state, "[T]he Appellant is correct that with the 1976 repeal of the Small Tract Act, 33 U.S.C. Sec. 682, and with the absence of East 136th Avenue having been constructed prior to the 1976, the roadway provisions of the small tract were inapplicable." Kaylor Brief at 13.

As a matter of law, East 136th Avenue is not a legally designated public road since the dedication was not accepted by actual use prior to 1976.

C. The Kaylors Have Not Established That A Prescriptive Easement Exists Across the McCarrey Property.

The Kaylors argue that even though the superior court erred in concluding that East 136th is a legally designated public road, a public prescriptive easement *8 entitles them to unrestricted use of East 136th Avenue to access the southern portion of their property (their "backyard"). Kaylor Brief at 13; 16. The Kaylors' argument is without merit. Even assuming, for purposes of argument only, that East 136th Avenue is a public prescriptive easement, the Kaylors have failed to establish a private

prescriptive easement to cross the McCarrey property to access the southern portion of their property. In other words, the Kaylors do not seek entitlement to travel east or west down 136th Avenue. Indeed, the proposed fence would not impede, in any manner, either the Kaylors' or the public's travel on East 136th Avenue. Rather, the Kaylors claim a right to turn north off of East 136th Avenue to access their property. Because East 136th Avenue is located within the interior of the McCarrey property, and because East 136th Avenue is only approximately 14 feet wide, the Kaylors must cross approximately 4 feet of McCarrey property that is not within the boundary of East 136th Avenue in order to access their property. As a matter of law, the Kaylors have not established a private prescriptive easement to use this 4 foot wide area along the length of the McCarreys' property.

1. The Kaylors Have Not Established That East 136th Avenue is a Public Prescriptive Easement.

Prior to 2003, Alaska had two adverse possession statutes. *Cowan v. Yeisley,* 255 P.3d 966, 972 (Alaska 2011). Under former AS 09.45.052(a), claimants with color of title could establish adverse possession by showing that their use of the land was continuous, open, and notorious, exclusive, and hostile to ***9** the true owners of the land for seven years. *Id.* Under former AS 09.10.030, claimants without color of title claiming adverse possession had to fulfill the same requirements for ten years. *Id.* AS 09.10.030 also constitutes a method for establishing an easement through prescription." *McGill v. Wahl,* 839 P.2d 393, 396 (Alaska 1992); *Hansen v. Davis,* 220 P.3d 911, 915 (Alaska 2010) (Alaska Statutes govern the establishment of an easement by prescription).

In 2003, the Alaska Legislature modified AS 9.45.052(a) to add a claim for adverse possession where there was "'uninterrupted adverse notorious possession of real property for 10 years or more because of a good faith but mistaken belief that the real property lies within the boundaries of adjacent real property owned by the adverse claimant." *Id.* (quoting Ch. 147, § 3, SLA 2003). The Legislature also modified AS 09.10.030with the intent of abolishing adverse possession in cases where the claimant does not have color of title. *Id.*at 973 The net effect of these changes was to limit Alaskans' adverse possession claims to cases where the claimant had either color of title or a good faith but mistaken belief that the claimant owned the land in question. *Id. See also Hansen,* 220 P.3d at 915 n. 7.

The Kaylors do not claim either color of title or a good faith but mistaken belief that they owned the land in question. Accordingly, unless an easement by prescription was established before the statute was changed in 2003, the Kaylors' prescriptive easement claim is barred as a matter of law. *Id.;* AS 09.45.052.

The focus in a prescriptive easement claim is on "use." *Interior Trails Preservation Coalition,* 115 P.3d 527, 529 (Alaska 2005). The required elements ***10** are the same for public and private prescriptive easements. *Id.*The only difference is that a public prescriptive easement requires qualifying use by the public, while a private prescriptive easement requires qualifying use only by the private party. *Id.* To succeed on a prescriptive easement claim, a claimant must show that (1) the use was continuous and uninterrupted for the same ten-year period that applies to adverse possession; (2) the claimant acted as an owner and not merely as a person having the permission of the owner; and (3) the use was reasonably visible to the record owner. *Id.* The claimant must prove each element by clear and convincing evidence. *Id.* Further, the claimant must establish use during a ten year period prior to 2003. Cowan v. Yeisley, 255 P.3d at 973-974.

There is a presumption that the use of land by an alleged easement holding was permissive. *Dillingham Commercial Co., Inc. v. City of Dillingham,* 705 P.2d 410, 417 (Alaska 1985). The Alaska Supreme Court has explained:

> Use alone for the statutory period - even with knowledge of the owner - would not establish an easement. When one enters into possession or use of another's property, there is a presumption that he does so with the owner's permission and in subordination to his title. This presumption is overcome only by showing that such use of another's land was not only continuous and uninterrupted, but was openly adverse to the owner's interest, i.e., by proof of a distinct and positive assertion of a right hostile to the owner of the property.

Id. at 417 (citation omitted). In *Dillingham,* the Court found a triable issue of fact existed on the question of whether public use of the alleyways was permissive or adverse. *Id.* In that case, the property in dispute had always contained public businesses. The Court stated that a reasonable inference is that the public used the *11 alleys on the north and east borders in conjunction with conducting business. *Id.* If the public did use the alleys in conjunction with business at the stores, then use would have been with permission. The Court concluded that "[T]his theory, together with the presumption of permissiveness, leads us to conclude that the issue of whether a prescriptive easement was created by public use should have been submitted to a factfinder." *Id.* Additionally, when possession has begun permissively, it cannot become hostile until the presumption of permissive use is rebutted "by proof of a distinct and positive assertion of a right hostile to the owner of the property."' *Cowan v. Yeisley,* 255 P.3d at 974.

Here, the superior court made no findings of fact regarding the alleged public prescriptive easement issue and the Kaylors have pointed to no evidence in the record showing sufficient adverse public use of East 136th Avenue for ten years prior to 2003 sufficient to establish a public easement by prescription. The original purpose of the right-of-way was to provide normal vehicular access to the landlocked small tract lots. *See* Department of Interior Memorandum ("The intent of the Small Tract easements was to provide access and utility accessibility to the affected tracts."). [Attachment A at 3] Because the right-of-way was not actually used for a road, the dedication for that purpose disappeared when the classification terminated in 1976. Accordingly, authorization for the right-of-way road across the interior boundaries of the small tract lots was later secured from the private landowners. See Department of Interior Memorandum. [Attachment A at 3 and *12 5] The purpose of the right-of-way road - to provide access to the landlocked parcels - did not change.

As of 1980, the right-of-way road extended west from Davis Road across only two lots, 13 and 14, and it ended at lot 15. [Tr. 59; 77; Exc. 2] In 1987, a home was built on lot 16 and the road was extended to provide lot 16 with ingress and egress. [Attachment C at p. 7] The purpose of this dead-end road was to provide ingress and egress to the landlocked small tract parcels 13-16. Thus, between 1980 and 1993, [3] it can be reasonably assumed that any continuous public use of the right-of-way was to access the landlocked parcels and such use was with the permission of the property owners. [4] There is no evidence in the record that the public made any other continuous use of East 136th Avenue other than to access the small tract lots. [Tr. 61-62] Since such use was permissive, the Kaylors cannot establish a public prescriptive easement as a matter of law.

***13 2. Even Assuming, Arguendo, that East 136th Avenue is a Public Prescriptive Easement, the Scope of the Alleged Easement is Limited.**

East 136th Avenue, as depicted on the Grid Map, runs to the interior of the small tract lot lines (lots 13-20) and does not burden adjacent property (lots 1-8), such as the Kaylor property. [Exc. 2; Tr. 81] Even assuming, arguendo, that East 136th Avenue is a public prescriptive easement, the scope of the alleged easement is limited: the use is limited to access to the land-locked Small Tract Act lots 13-20 and the width is limited to no greater than the current width of the existing unimproved, dirt roadway. Thus, even assuming for purposes of argument only that East 136th Avenue is a public prescriptive easement, that easement does not entitle the Kaylors to use McCarrey property to access the southern boundary of their property.

The Alaska Supreme Court has held that "[T]he scope of a prescriptive easement is defined narrowly to include only the 'use that created the easement and closely related ancillary uses.' " *Price v. Eastham,* 75 P.3d at 1058. (citation omitted). In Price, the Court explained:

"Because an easement directly affects ownership rights in the servient tenement, judicial delineation of the extent of an easement by prescription should be undertaken with great caution." According to the Restatement (Third) Property, determining the extent of a prescriptive easement should focus on the servient estate owner's reasonable expectations: "The relevant inquiry is what a landowner in the position of the owner of the servient estate should reasonably have expected to lose by failing to interrupt the adverse use before the prescriptive period had run." Although the use made of a prescriptive easement may evolve beyond the original prescriptive uses, new uses cannot substantially increase the burden ***14** on the servient estate or change the nature and character of the easement's original use.

Id. at 1058 (citations omitted). Courts have restricted the scope of prescriptive easements significantly to limit the burden on the servient estate. Id. For example, courts have limited the width of prescriptive easements. *Id.* (citing *Hash v. Sofinowski,* 487 A.2d 32, 36 (Pa. Super. 1985) (holding width of prescriptive easement limited to width of vehicles used to make easement); *Johnson v. Roy,* 279 S.W.2d 20, 21 (Ky. App. 1955) (restricting easement width to fifteen feet where servient estate owner had no notice of any use beyond fifteen feet in width)). In considering a prescriptive easement for recreational purposes, the Supreme Judicial Court of Maine limited the use of the easement to the "eneral recreational purposes for which the road was used during the period that the prescriptive easement was being created." *Id.* at 1059 (quoting *Benner v. Sherman,* 371 A.2d 420, 423 (Me. 1977)).

In *Hash v. Sofinowski,* the court explained that when a right-of-way is expressly granted, its scope is determined by ascertaining the intention of the parties to the grant. *Hash,* 487 A.2d at 33-34. Unlike an express easement by grant, a prescriptive easement is narrowly limited to the extent of use rather than mode of use exercised during the period of prescription. Id. at 33. The width of a prescriptive easement must be established by the extent of actual use during the prescriptive period. *Id.* at 36. *See also Johnson v. Roy,*279 S.W.2d 20, 21 (Ky. 1955) ("It is the rule that where an easement is acquired by prescription or use, as ***15** here, such an easement exists only to the extent of the use. In adjudging the passway to be 18 feet in width, the lower court did so without any evidence to show that there was continuous use of the passway greater than 15 feet in width.").

As discussed above, the original purpose of the right-of-way was to provide normal vehicular access to the landlocked small tract lots. *See* Department of Interior Memorandum ("The intent of the Small Tract easements was to provide access and utility accessibility to the affected tracts."); *Spittler v. Routsis,* 2010 WL 2717701 (Nev. Dist. Cit. April 21, 2010) (the rights-of-way are to serve a small tract, not to serve parcels outside the tract); *Neal v. Brown,* 191 P.3d 1030, 1035 (Ariz. App. 2008) ("[T]he clear intent of the reserved right-of-way was to ensure adequate roadway access; it was not to create a right in nearby parcel owners to traverse a neighbor's property regardless of need.") [Attachment A at 3; Attachment B at 2, 8] Because the right-of-way was not actually used for a road, the dedication for that purpose disappeared when the classification terminated in 1976. Accordingly, authorization for the right-of-way road across the interior boundaries of the small tract lots was secured from the private landowners. *See* Department of Interior Memorandum. [Attachment A at 3 and 5] The purpose of the right-of-way road - to provide access to the landlocked parcels - did not change.

As of 1980, the right-of-way road extended west from Davis Road across only two lots, 13 and 14, and it ended at lot 15. [Tr. 59; 77; Exc. 2] In 1987, a home was built on lot 16 and the road was extended to provide lot 16 with ingress ***16** and egress. [Attachment C at p. 7] The purpose of this dead-end road was to provide ingress and egress to the landlocked small tract parcels 13-16. The width of the alleged prescriptive easement is limited to its actual use during the prescriptive period,

which was no greater than its current 14 feet - not the 50 foot right-of-way forth in the original land patent which terminated in 1976.

Thus, even if East 136th Avenue is a public easement by prescription, its use is limited to access the Small Tract Act lots and its width is limited to 14 feet, the actual use of the alleged easement during the prescriptive period. Accordingly, the Kaylors are not entitled to turn off from East 136th Avenue and travel over an additional 4 feet of McCarrey property to access the southern boundary of their property.

3. The Kaylors Cannot Establish a Private Prescriptive Easement Over McCarrey Property to Access Their Backyard.

The Kaylors are not merely seeking use of East 136th Avenue, an unimproved, dirt road that is approximately 14 feet wide and is located entirely within the interior of the McCarreys' property. [Exc. 057, 058, 060, 138, 142] Rather, the Kaylors claim that they are entitled to use an additional 4 feet width along the entire length of McCarrey property to access their backyard. In other words, between the northern boundary of East 136th Avenue and the southern boundary of the Kaylor property is an additional four feet of McCarrey property. *Id.* The Kaylors claim that they are entitled to cross this four feet of McCarrey property at any point to access their backyard. [Tr. 31-32] This disputed property *17 is not subject to a prescriptive easement since there is no evidence in the record establishing that the Kaylors' use was continuous and hostile for the prescriptive period.

The evidence in the record demonstrates only sporadic use, at best, of the McCarrey property in question from 1988, when the Kaylors purchased their property, until 1993. [Exc. 019; Tr. 71] The Kaylors did not offer evidence of use of the McCarrey property - driving across it to access their backyard - until the mid-1990s. [Tr. 87-88] Moreover, the Kaylors' use of the property at issue was permissive rather than hostile. The Alaska Supreme Court has held that hostile possession means that the adverse possessor held the land in such a way that his interest in the property was incompatible with the record owner's interest. *Cowan v. Yeisley,* 255 P.3d at 974. If the adverse possessor, without the true owner's permission, acted toward the land as if he owned it, then his claim is hostile. *Id.* The test is an objective one. *Id.* The Kaylors did not act as if they were the owner and not merely acting with the permission of the owner.

For example, in *Hansen* the issue was whether an easement was extinguished by prescription. *Hansen,* 220 P.3d at 915. The Court stated, "[A]t what point, then, does use of the easement area by the owner of the servient estate cross the line from permissible to hostile and adverse so as to trigger the prescriptive period?" *Id.* at 916. The Court concluded:

> We hold that the prescriptive period is triggered where the use of the easement "unreasonably interfere[s]" with the current or prospective use of the easement by the easement holder... . Determining what *18 constitutes unreasonable interference, and thus triggers the prescriptive period, will be heavily fact dependent... . As a general guideline, temporary improvements to an unused easement area that are easily and cheaply removed will not trigger the prescriptive period; permanent and expensive improvements that are difficult and damaging to remove will trigger the prescriptive period... As a matter of law, the maintenance of a garden on the easement area did not constitute an improvement sufficiently adverse to commence the prescriptive period.

Id. at 916-917.

In the instant case, there is no evidence in the record that the Kaylors have used the McCarrey property as if they were the owners. The Kaylors have made no improvements whatsoever to the property at issue - they have not constructed a driveway or any other structures on the property, they

have not landscaped, cleared or otherwise used the McCarrey property except to drive over it to access their backyard where they park vehicles, a boat and a motorhome. [Exc. 020] The lack of any ownership-type use, together with the presumption of permissiveness, demonstrates that the Kaylors' sporadic use of the McCarrey property to access their backyard was not adverse.

As a matter of law, the Kaylors' use of the property was neither continuous nor hostile for the prescriptive period sufficient to establish a prescriptive easement.

4. The Superior Court's Injunction is Too Broad.

Citing to *Williams v. Fagnani,* 228 P.3d 71 (Alaska 2010), the Kaylors argue that this Court has been reluctant to allow the use of gates that restrict travel on roadways. *See* Kaylor Brief at 11. *Williams* is easily distinguished from the *19 case at bar. In the Court's first decision, it held that Williams was entitled to an implied roadway easement over property owned by Fagnani because the road was the only route to the Williams' parcel when it was originally severed from Harrison's estate. *Williams v. Fagnani,* 175 P.3d 38, 39 (Alaska 2007). On remand the superior court ruled that Fagnani was entitled to maintain a locked gate across the roadway, so long as Williams was advised of the combination. *Williams,* 228 P.3d at 72. Remanding to the superior court to make findings as to the facts that are relevant to the balance that must be struck to determine whether the gate constitutes an unreasonable interference with Williams's use of the roadway easement, the Court reasoned:

> As indicated by this summary, courts have recognized that gates, especially locked gates, amount to a significant burden on a rural homeowner's right of access... Further, a gate may bar or deter guests, visitors, delivery and service providers, and emergency vehicles from reaching a home served by a roadway easement.

Id. at 75.

By contrast, access to the Kaylor property is not served by East 136th Avenue and access to their home will not be impeded in any way by a gated fence. Significantly, the Kaylors access their property from East 135th Avenue, a legally designated public road. [Tr. 68; Exc. 059] The Kaylors have a garage and a paved driveway on the northern boundary of their property that provides access to and from East 135th Avenue. *Id.* The Kaylors, their tenant, guests, visitors, delivery, service providers, and emergency vehicles all may reach the Kaylor *20 home unimpeded from 135th Avenue. The Kaylors' street address is 4500 East 135th Avenue. [Exc. 017]

Further, the proposed gated fence would run east and west adjacent to the northern boundary of East 136th Avenue, similar to the fence depicted in the photograph set forth at Excerpt of Record 057. [Exc. 057] Thus, the proposed gated fence would not interfere in any way with access to the Small Tract Act lots 13-20 nor would it unduly burden the Kaylors who have unfettered access to their property from East 135th. At the very least, the Kaylors should be required to identify a “driveway” for ingress and egress and the McCarreys should be permitted to fence that portion of the northern boundary of their property that is not used by the Kaylors as a driveway.

The superior court's broad injunction prevents the McCarreys from making full use of their property but provides no benefit to the Kaylors' property that is not already available using East 135th Avenue. *See Neal v. Brown,* 191 P.3d 1030, 1035-1036 (Ariz. App. 2008). Even assuming, arguendo, that the Kaylors have a prescriptive easement across the McCarrey property, the superior court's injunction is overly broad and should be vacated.

III. CONCLUSION

The superior court erred in ordering a permanent injunction. The superior court's Order dated November 11, 2010 granting the Kaylors' motion for a permanent injunction should be reversed and

the Judgment granting injunctive *21 relief and awarding the Kaylors attorney's fees and costs should be vacated.

DATED this *20th* day of September, 2011, at Anchorage, Alaska.

Footnotes

1 The McCarreys argued that "... it is a right-of-way that runs to the benefit of the landowners upon which the right-of-way exists... It is an ... undedicated right-of-way..." [Tr. 95]

2 Instruction Memorandum No. 91-196 provides, "From 1949 until the Small Tract Act was repealed in 1976, a right-of-way along the borders of each tract was available for public use as provided in the terms on the lease form, the classification order, or through the regulation requirements. The right-of-way remained available as long as the lands were classified for small tract use. These rights-of-way were determined to be common law dedications and had the effect of a public easement. However, until *acceptance by use* of the easement made the dedication complete, the United States could revoke or modify the offer to dedicate in whole or in part. Said another way, unless the common law rights-of-way were actually used for a road or public utilities to serve a small tract, the dedication disappeared with the termination of the classification. [Appendix Attachment A at 1-2] (Emphasis in original).

3 Any adverse public use beginning after 1993 would not vest prescriptive easement rights until after AS 09.10.030 was changed in 2003 to eliminate adverse possession. Thus, the public prescriptive easement claim must have been perfected prior to 1993.

4 Sometime after 2000, the right-of-way road was extended west to Elmore Road by lot owners 18, 19, and 20. [Tr. 77; 79-81] Even if the public began using East 136th Avenue as a through street between Davis and Elmore beginning in 2000, the prescriptive period would not have expired until 2010, well after the statute was amended in 2003 to eliminate easements by prescription.

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