

## *Shoen v. Zacarias*

Court of Appeal of California, Second Appellate District, Division Two

May 22, 2015, Opinion Filed

B254487

### Reporter

237 Cal. App. 4th 16; 2015 Cal. App. LEXIS 448; 187 Cal. Rptr. 3d 560

LILLI SHOEN, Plaintiff and Appellant, v. JULIET ZACARIAS, Defendant and Respondent.

**Subsequent History:** Modified and rehearing denied by [Shoen v. Zacarias, 2015 Cal. App. LEXIS 523 \(Cal. App. 2d Dist., June 17, 2015\)](#)

Review denied by [Shoen v. Zacarias, 2015 Cal. LEXIS 5545 \(Cal., Aug. 12, 2015\)](#)

**Prior History:** **[\*\*1]** APPEAL from judgment of the Superior Court of Los Angeles County, No. BC486560, Soussan G. Bruguera, Judge.

**Disposition:** Reversed and remanded.

## Case Summary

### Overview

**HOLDINGS:** [1]-An equitable easement should not have been granted in an action between neighbors relating to a flat patch of land that was part of one property but accessible only to the other because the trespasser's hardship in having to remove her portable patio furniture did not qualify as "greatly disproportionate" to the hardship on the land's owner in losing use of the land; deprivation of a substantial benefit falls short of the imposition of a substantial hardship.

### Outcome

Reversed and remanded.

**Counsel:** Haight Brown & Bonesteel, Jules S. Zeman; Goodkin & Lynch and Dan Goodkin for Plaintiff and Appellant.

Ervin Cohen & Jessup, Allan B. Cooper and Pantea Yashar for Defendant and Respondent.

**Judges:** Opinion by Hoffstadt, J., with Boren, P. J., and Ashmann-Gerst, J., concurring.

**Opinion by:** Hoffstadt, J.

## Opinion

**HOFFSTADT, J.**—A trial court has the power to issue an equitable easement authorizing a trespasser to continue her trespass in exchange for paying **[\*18]** damages, but only if, among other things, the hardship on the trespasser in ceasing the trespass is "greatly disproportionate" to the hardship on the land's owner in losing use of the trespassed-upon portion of her land. (E.g., [Tashakori v. Lakis \(2011\) 196 Cal.App.4th 1003, 1009–1012 \[126 Cal. Rptr. 3d 838\]](#) (*Tashakori*); [Christensen v. Tucker \(1952\) 114 Cal.App.2d 554, 560–563 \[250 P.2d 660\]](#) (*Christensen*.) Here, we address what constitutes a "greatly disproportionate" hardship, and conclude that a trespasser's hardship in having to remove her portable patio furniture does not qualify. We accordingly reverse the trial court's issuance of an equitable easement, and remand for further proceedings.

### FACTS AND PROCEDURAL HISTORY

Plaintiff Lilli Shoen (Shoen) and defendant Juliet Zacarias (Zacarias) **[\*\*2]** are neighbors. Shoen and Zacarias own adjacent parcels on a hillside. Situated between them is a relatively flat patch of land a little more than 500 square feet in area. It is undisputed that most of the patch (approximately 481 square feet) is part of Shoen's property. However, as a practical matter, the patch is accessible only from Zacarias's property by a staircase built before she bought her property; the patch is not easily accessible from Shoen's property given the slope and the fact that a hillside staircase currently on Shoen's property does not connect to the patch.

When Zacarias purchased the property in 2003, she thought the patch was on her property and populated it with outdoor

furniture—a cabana, a chaise chair, tables, and stools; none of it is set in concrete. In 2005, the prior owner of Shoen’s land surveyed the boundaries and discovered that the patch belonged to him, but told Zacarias she could continue to use it for as long as he owned the property. A year later, Shoen’s father bought the property and deeded it to Shoen around 2012. Shoen and her father learned of Zacarias’s use of the property in 2006, but said nothing about it until 2011, when Shoen communicated—orally [\*\*3] and later in writing—her demand that Zacarias remove the furniture.

When Zacarias refused, Shoen sued for damages, as well as injunctive and declaratory relief, on theories of (1) trespass, (2) nuisance, (3) ejectment, and (4) negligence. Zacarias asserted, as an affirmative defense, that she was entitled to an equitable easement, and also countersued Shoen for damages and injunctive relief on theories of (1) prescriptive easement and (2) nuisance. The trial court bifurcated the matter, litigating the matter of the equitable easement first.

Following an eight-day trial, the court issued a 17-page order declaring that Zacarias was entitled to an exclusive, 15-year equitable easement over the [\*19] patch of land contingent upon payment of \$5,000 to Shoen. The court found that Zacarias’s initial occupation of the patch was innocent; that Shoen would not suffer irreparable injury if Zacarias were allowed to keep using the patch; and that the balance of equities favored Zacarias. With respect to the balance of equities, the court found that Shoen was unlikely to be harmed by Zacarias’s exclusive use of the patch because it would cost Shoen at least \$100,000 to build a staircase that accesses the patch, [\*\*4] and because Shoen “has adequate space, land and other areas of her property to do the things [(sit, read, have a cup of coffee, or plant a garden)] she professes she wants to do on the” patch. On the other side of the balance, the court found the hardship to Zacarias to be greater because it would cost Zacarias \$275 to remove her patio furniture; her staircase would then lead to a patch she cannot effectively use; and Shoen’s intention to build a wall on her property would minimize Zacarias’s hillside view, reduce the natural light into her home, and somehow shrink the usefulness of other parts of Zacarias’s yard. The court alternatively ruled that it would grant an equitable easement independently of these considerations based on its own, unfettered view of “whatever it deems important ... in determining how the equities are to be balanced.” The court found that its grant of the equitable easement obviated all remaining issues, and entered judgment.

Shoen timely appealed.

## DISCUSSION

(1) For well over 75 years, the California courts have had the discretionary authority to deny a landowner’s request to eject a trespasser and instead force the landowner to accept damages as compensation for the judicial creation of an easement over the trespassed-upon property in the trespasser’s favor, provided that the trespasser shows that (1) her trespass was “innocent” rather than “willful or negligent,” (2) the public or the property [\*\*5] owner will not be “irreparabl[y] injur[ed]” by the easement, and (3) the hardship to the trespasser from having to cease the trespass is “greatly disproportionate to the hardship caused [the owner] by the continuance of the encroachment.” (*Tashakori, supra, 196 Cal.App.4th at p. 1009*; see *Linthicum v. Butterfield* (2009) 175 Cal.App.4th 259, 265 [95 Cal. Rptr. 3d 538] (*Linthicum*); *Christensen, supra, 114 Cal.App.2d at pp. 559, 562–563*; *Warsaw v. Chicago Metallic Ceilings, Inc.* (1984) 35 Cal.3d 564, 576 [199 Cal. Rptr. 773, 676 P.2d 584] (*Warsaw*).) Unless all three prerequisites are established, a court lacks the discretion to grant an equitable easement. (*Warsaw, at p. 576* [so noting]; *Brown Derby Hollywood Corp. v. Hatton* (1964) 61 Cal.2d 855, 858 [40 Cal.Rptr. 848, 395 P.2d 896] (*Brown Derby*) [same]; see *Tashakori, at p. 1009* [all three “must be present”].) Contrary to the trial court’s suggestion, the equitable nature of this doctrine does not give a court license to grant easements on the basis of “whatever [a court] deems important,” even when these prerequisites are absent. We review the trial court’s application of this doctrine for an abuse of discretion. (*Tashakori, at p. 1008*.)

Although the equitable easement doctrine is sometimes called the doctrine of “balancing of conveniences” or the doctrine of “relative hardships” (see *Linthicum, supra, 175 Cal.App.4th at p. 265*), these labels are somewhat misleading. These labels suggest that an equitable easement may issue if the conveniences or hardships merely favor the trespasser, when the doctrine actually requires that they tip disproportionately in favor of the trespasser. These labels also suggest that the conveniences or hardships between the trespasser and property owner start out in equipoise, when the doctrine actually requires that they begin tipped in favor of the property owner due to the owner’s substantial interest in exclusive use of her property arising solely from her ownership of her land. [\*20] What is more, there are good reasons to require the trespasser seeking an equitable easement to prove that she will suffer a *greatly disproportionate* hardship from denial of the easement than the presumptively heavy hardship the owner will suffer from its grant.

First and most fundamentally, courts first crafted equitable easements to prevent a property owner inconvenienced to a

“minor degree” by a trespass from nevertheless engaging in “legal extortion” against an innocent trespasser by demanding [\*\*6] an exorbitant sum in exchange for not filing suit to enjoin the trespass. (*Christensen, supra*, [114 Cal.App.2d at p. 560.](#)) This danger of “legal extortion” is greatest where the cost of ceasing the trespass is highest—that is, when the hardship on the trespasser is greatly disproportionate to the hardship on the owner—because the trespasser in that situation cannot easily avoid the “legal extortion” by ceasing the trespass on her own. This is no doubt why equitable easements have thus far been granted in cases involving permanent physical encroachments such as buildings (*D’Andrea v. Pringle* (1966) [243 Cal.App.2d 689, 695 \[52 Cal. Rptr. 606\]](#); *Brown Derby, supra*, [61 Cal.2d at p. 858](#); *Morgan v. Veach* (1943) [59 Cal.App.2d 682, 688–689 \[139 P.2d 976\]](#); *Christensen, at pp. 555–556* [garage and driveway]; *Dolske v. Gormley* (1962) [58 Cal.2d 513, 520 \[25 Cal. Rptr. 270, 375 P.2d 174\]](#) [porch pillar and roof eaves] (*Dolske*)), walls (*Hirschfield v. Schwartz* (2001) [91 Cal.App.4th 749, 756 \[110 Cal.Rptr.2d 861\]](#) (*Hirschfield*)), reservoirs (*Ukhtomski v. Tioga Mutual Water Co.* (1936) [12 Cal.App.2d 726, 728 \[55 P.2d 1251\]](#)), and utility lines (*Field-Escandon v. DeMann* (1988) [204 Cal.App.3d 228, 237 \[251 Cal. Rptr. 49\]](#) [sewer lines]; *Hirschfield, at p. 756* [underground water and electrical lines]; *Dolske, at p. 520* [gas pipes and meters]), as well as in cases involving intermittent trespasses necessary to access landlocked parcels of property (*Tashakori, supra*, [196 Cal.App.4th at p. 1007](#); *Miller v. Johnston* (1969) [270 Cal.App.2d 289, 305 \[75 Cal. Rptr. 699\]](#) (*Miller*); *Linthicum, supra*, [175 Cal.App.4th 259](#); *Donnell v. Bisso Bros.* (1970) [10 Cal.App.3d 38, 46 \[88 Cal. Rptr. 645\]](#) (*Donnell*)).<sup>1</sup>

(2) Second, equitable easements give the trespasser “what is, in effect, the right of eminent domain by permitting him to occupy property owned by another.” (*Christensen, supra*, [114 Cal.App.2d at p. 560](#); see *Donnell, supra*, [10 Cal.App.3d at p. 46.](#)) Such a right is in tension with the general constitutional prohibition against the taking of private property. (*U.S. Const., 5th Amend.* [“private property” “shall” not “be taken for public use, without [\*\*21] just compensation”]; *Cal. Const., art. I, § 19, subd. (a)* [same]; *Miller, supra*, [270 Cal.App.2d at 305](#) [so noting].) This is why courts approach the issuance of equitable easements with “[a]n abundance of caution” (*Linthicum, supra*, [175 Cal.App.4th at p. 269](#)), and resolve all doubts against their

issuance (*Christensen, at p. 562*). It explains why additional weight is given to the owner’s loss of the exclusive use of the property arising from her ownership, independent of any hardship caused by the owner’s loss of specific uses in a given case. And it elucidates why there must be a showing that the hardship on the trespasser be greatly disproportionate to these hardships on the owner. To allow a court to reassign property rights on a lesser showing is to dilute the sanctity of property rights enshrined in our Constitutions.

Lastly, the requirement that the trespasser establish a greatly disproportionate hardship properly narrows and focuses the universe of considerations relevant to the issuance of an equitable easement—namely, [\*\*8] whether the burden on the trespasser in ceasing the trespass is so greatly disproportionate to the burden on the property owner from the loss of use of the trespassed-upon property that the courts should make an exception to the general rules of property ownership and require the owner to accept damages instead of reclamation of her own land. This focus precludes a more open-ended and free-floating inquiry into which party will make better use of the encroached-upon land, which values it more, and which will derive a greater benefit from its use. It also prevents equitable easements from becoming a means of obtaining an adverse easement without having to satisfy the more onerous requirements of prescriptive easements, including the requirement of five years of adverse use. (*Pulido v. Pereira* (2015) [234 Cal.App.4th 1246, 1250 \[184 Cal. Rptr. 3d 754\]](#) (*Pulido*); see *Brandwein v. Butler* (2013) [218 Cal.App.4th 1485, 1501 \[161 Cal. Rptr. 3d 728\]](#) [courts are reluctant to interpret a doctrine in a way that nullifies other doctrines].)

(3) In this case, the hardship Zacarias would suffer in spending less than \$300 to remove her patio furniture from Shoen’s property (and to have a stairway that leads to her neighbor’s property) is not greatly disproportionate to the hardship Shoen would suffer in losing the use of land that she owns. The hardship to Zacarias in this case is nothing like the hardships to trespassers who would be forced to move buildings or be airlifted to their landlocked property. At most, Zacarias loses the benefit of her use of the patch of land, but “[d]eprivation of a substantial benefit ... falls short of the imposition of a substantial hardship.” (*Fairington v. Dyke Water Co.* (1958) [50 Cal.2d 198, 200 \[323 P.2d 1001\]](#); see *Hirschfield, supra*, [91 Cal.App.4th at p. 760.](#)) We also

<sup>1</sup> This latter use of the equitable easement doctrine is not to be confused with a court’s separate but narrower power to establish an “easement by necessity.” An “easement by necessity” allows for the creation of an easement that provides access to a landlocked parcel over a neighboring parcel, [\*\*7] but only if (1) the two parcels were once commonly owned, (2) an access road is “strict[ly] necess[ary],” and (3) the prior, common owner never evinced an intent *not* to have an access road. (*Murphy v. Burch* (2009) [46 Cal.4th 157, 164–165 \[92 Cal. Rptr. 3d 381, 205 P.3d 289\]](#).)

reject Zacarias's suggestion that Shoen's allegedly harassing conduct is itself a greatly disproportionate hardship; the equitable easement doctrine is not a tool for penalizing unneighborly conduct through the reassignment of property interests. On these facts, [\*\*9] we conclude as a matter of law that the hardship on Zacarias in this case was not greatly disproportionate to the hardship on Shoen.<sup>2</sup> The trial court's grant of an equitable easement must accordingly be reversed and remanded for litigation of the parties' remaining claims.

(4) Shoen invites us to reach out and dismiss Zacarias's counterclaim for prescriptive easement on the ground that Zacarias's exclusive use of the patch precludes a prescriptive easement. Prescriptive easements require proof of "open, notorious, continuous and adverse" use of land "for an

uninterrupted period of five years." (*Pulido, supra*, 234 Cal.App.4th at p. 1250.) However, the trial court made no factual [\*22] findings regarding these elements, and we leave it to the trial court on remand to do so and when it does so, to consider Shoen's challenges to Zacarias's prescriptive easement claim.

#### **DISPOSITION**

The judgment is reversed and the case is remanded for further proceedings on the remaining claims and counterclaims. Costs are awarded to Shoen.

Boren, P. J., and Ashmann-Gerst, J., concurred.

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<sup>2</sup> This conclusion obviates the need to discuss whether Zacarias established the other elements of her equitable easement claim.