

**GREGORY J. BARNETT, Plaintiff and Appellant,**

**v.**

**SOUTHERN CALIFORNIA EDISON COMPANY,  
Defendant and Respondent.**

**G037937**

**California Court of Appeal, Fourth District, Third  
Division**

**September 21, 2007**

**NOT TO BE PUBLISHED**

Appeal from a judgment of the Superior Court of Orange County, Randell L. Wilkinson, Judge. Super. Ct. No. 04CC12597

Marsh & Associates, Gary L. Marsh; and Law Offices of Michael Drell and Michael Drell for Plaintiff and Appellant.

Patricia A. Cirucci for Defendant and Respondent.

**OPINION**

O'LEARY, ACTING P. J.

Gregory J. Barnett appeals from a summary judgment entered in his premises liability and negligence action in favor of Southern California Edison Company (Edison). Barnett claimed he suffered horrendous injuries when he was bitten by a spider while he was standing in Edison's six-foot wide easement which runs along the length of his backyard. Barnett asserts the court erred in not finding Edison, as the exclusive owner and beneficiary of the dominant tenement portion of the easement, had an affirmative duty to maintain the property in a safe condition and in good repair. We conclude summary judgment was properly entered because Barnett failed to present evidence to rebut Edison's claim (and evidence) it merely owned a nonexclusive easement with limited control and rights over Barnett's property. Because there is no evidence in the record or legal reason to hold Edison had a duty to exterminate insects in Barnett's backyard, we affirm the judgment.

**Facts**

Since 1994, Barnett has owned his home and real property on Hayes Avenue in Costa Mesa. Edison has a six-foot wide easement on the westerly portion of the property "to construct, lay, install, use, maintain, alter, add to, repair, replace, inspect and/or remove, at any time and from time to time, aerial and underground electric lines and communication lines, consisting of poles, guys

and anchors, crossarms, wires, cables, conduits, manholes, vaults, pull boxes, markers[,] and other fixtures and appliances, for conveying electric energy to be used for light, heat, power, telephone[,] and/or other related uses . . . ."

The easement runs the entire length of the western boundary of the property. There is also a fence that runs along the western boundary (the rear of Barnett's backyard), which separates Barnett's property from his neighbor's property. His neighbor built that fence. Barnett also built a fence, which overlaps part of his neighbor's fence. There is a small gap of land between the two fences measuring approximately two feet wide and four feet long.

In January 2004, Barnett was bitten by a spider while cleaning out the area between the two fences in his backyard. In his deposition, Barnett said he was cleaning out a few small pieces of cement, branches, leaves, and old paper trash. He asserted he was doing this "to abate the infestation of rats, spiders, and other vermin . . . ." Barnett claimed Edison ignored his complaints about this dangerous condition and told him that he could not close the gap or take other remedial measures because Edison's lineworkers needed access to the utility pole located between the two fences.

Barnett filed a lawsuit seeking damages for "negligence/premises liability." After answering the complaint, Edison filed a motion for summary judgment, arguing it did not owe Barnett a duty of care to prevent the spider bite. Barnett opposed the motion, asserting Edison exerted exclusive control over the area and, therefore, had a duty to maintain the premises in a safe condition.

To support his argument Edison exercised exclusive control of the portion of land between the fences, Barnett alleged Edison (1) trimmed and cut down a rat-infested palm tree on the easement portion of his property, (2) refused to allow Barnett to build a fence to close the gap between the fences, and (3) refused to allow Barnett to pour a concrete slab.

In its opposition, Edison presented evidence the palm tree was cut down because its branches were growing up into the wires. Edison was required by the California Public Utilities Commission to maintain certain clearances between its electric lines and tree branches. As for Barnett's allegations Edison refused to allow him to take certain remedial actions, Edison points out Barnett could not identify a single person or document during discovery to support his claim. It also submitted photographs and declarations to support its claim Barnett exercised exclusive control over his entire backyard. And finally, Edison argued Barnett had failed to present evidence: (1) Edison installed or owned the

fences; (2) Edison deposited the debris between the fences; (3) the spider came from Edison's pole or overhead conductors on the easement; (4) Edison's electrical facilities on the easement caused any injury; (5) Barnett asked Edison for permission to sprinkle rat pellets behind the fence, to clear debris, or to spray insecticide before going between the fences; and (6) Barnett asked permission before installing the fence which created the two-by-four foot gap at issue.

After sustaining several evidentiary objections raised by Edison, the court ruled, "Edison has met its burden to show that [Barnett] cannot establish the duty element of his cause of action for negligence." The court elaborated, "Edison has established that it [was] a nonexclusive easement for the maintenance of electric facilities which burdened [Barnett's] property. [Barnett's] alleged injury from a spider bite, however, was unconnected to Edison's use of the property pursuant to its easement. Therefore, as a matter of law, Edison did not owe [Barnett] a duty of care to prevent spiders from nesting behind [Barnett's] fence."

#### Discussion

"Generally, easements are distinguished from estates in land such as ownership in fee, tenancy in common, joint tenancy, and leaseholds, which are forms of possession of land. (12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, §§ 9-10, [pp. 59-60;] § 382, [pp. 446-447].) "An easement involves primarily the privilege of doing a certain act on, or to the detriment of, another's property." [Citation.] An easement gives a nonpossessory and restricted right to a specific use or activity upon another's property, which right must be *less* than the right of ownership. [Citation.] [Citation.] Thus, "[t]he owner of the easement is not the owner of the property, but merely the possessor of a "right to use someone's land for a specified purpose . . . ." (*Cody F. v. Falletti* (2001) 92 Cal.App.4th 1232, 1242 . . . [(*Cody F.*)], quoting *Long Beach Unified Sch. Dist. v. Godwin Liv. Trust* (9th Cir. 1994) 32 F.3d 1364, 1368; see *Kazi v. State Farm Fire & Casualty Co.* (2001) 24 Cal.4th 871, 881 . . . [An easement 'represents a limited privilege to use the land of another[,] . . . but does not create an interest in the land itself.])" (*Blackmore v. Powell* (2007) 150 Cal.App.4th 1593, 1598 (*Blackmore*)).

Barnett's arguments on appeal are premised on the faulty assumption Edison owned the "dominant tenement" portion of the easement, and he owned the "servient tenement." However, these legally technical terms are used only when there is an appurtenant easement involving two parcels of property owned by different entities.

As Witkin explains, "Easements may be appurtenant or in gross. An easement is appurtenant when it is attached to the land of the owner of the easement, and benefits him or her as the owner or possessor of that

land. . . . [¶] An easement in gross is not attached to any particular land as dominant tenement, but belongs to a person individually." (12 Witkin, Summary of Cal. Law, *supra*, Real Property, § 383, pp. 447-448, italics omitted.)

For example, in *Blackmore*, the underlying dispute concerned adjoining parcels of residential real property. (*Blackmore, supra*, 150 Cal.App.4th at pp. 1596-1597.) The owner of one parcel executed a grant deed conveying an easement to the owners of the other parcel for "parking and garage purposes." (*Ibid.*) Several years later, the property enjoying the easement was sold, and the new owner (Blackmore) obtained a permit from the city to build a two-car garage covering approximately 11 percent of the easement. In reviewing the trial court's determination Blackmore had the right to build the garage, the appellate court explained, "The easement here is appurtenant: it attaches to Blackmore's property, the so-called 'dominant tenement,' and burdens appellants' property, the so-called 'servient tenement.' [Citation.]" (*Id.* at p. 1599.)

In this case, it is undisputed, there is but one parcel of property owned exclusively by Barnett. Edison's easement was a limited privilege to use Barnett's land for a particular purpose, and it had no ownership interest in the land itself and accordingly, there was no dominant tenement. Stated another way, Edison held an easement in gross, limited to the purpose of conveying electricity to its customers. Perhaps where Barnett's confusion arises is from the case law discussing an easement in gross sometimes refers to the easement in terms of an interest in the "servient tenement." However, as stated above, because an "easement in gross is a personal right to its owner, [it] involves no dominant tenement[.]" (12 Witkin, Summary of Cal. Law, *supra*, Real Property, § 383, p. 448.)

In any event, the issue raised in this appeal is whether Edison owed a general duty of care for all purposes on its easement in gross, or more specifically, a duty to rid the area of spiders, rats, and other vermin. Simply stated, the answer is no. It is well settled the easement owner's possessory right is limited to the use of the land granted by the easement. Accordingly, an "easement holder has a duty to act reasonably under the circumstances *in its use* of the servient estate, but the duty does not extend beyond the scope of that use." (*Clark v. New Magma Irrigation & Drainage Dist.* (2004) 208 Ariz. 246 [92 P.3d 876], agreeing with California law that the duty of an easement holder is narrower in scope than a property owner's.)

As explained in *Cody F.*, *supra*, 92 Cal.App.4th at p. 1243, "Examples demonstrating the required relationship between a plaintiff's injury and the scope of the easement owner's rights in the land are primarily cases involving power companies with easements for the placement of electric lines. (See, e.g., 8 Miller & Starr, Cal. Real Estate [(3d ed.2000)] Landowners' Liability, §

22:40, pp. 156-157, fn. 31.) In these examples, the scope of the easement was to maintain and operate an electric power line. (*Dunn v. Pacific Gas & Electric Co.* (1954) 43 Cal.2d 265 . . .) In such a case, liability is imposed on the easement holder for harm caused by the presence of the electrical fixtures. ([Citation]; see also *Polk v. City of Los Angeles* (1945) 26 Cal.2d 519, 525 . . . [duty of care must be commensurate with dangerous character of electricity]; *Lozano v. Pacific Gas & Elec. Co.* (1945) 70 Cal.App.2d 415, 420 . . . [power company liable for electrocution by uninsulated wires].) A duty clearly arises for one who creates and controls the potential hazard."

The court in *Cody F.* also determined the nonexclusive easement owner's duty does not necessarily extend to all possible hazards because the right of control has a narrower scope than the degree of control held by an ordinary landowner. It reasoned, "The nature of the duty owed by the owner of an interest in real property must have a relationship to the degree of control conferred by the scope of the ownership interest itself. An easement interest does not necessarily translate into a tort duty." (*Cody F., supra*, 92 Cal.App.4th at p. 1243.)

In *Cody F.*, a child was injured in a vicious dog attack while he was walking on a private street. (*Cody F., supra*, 92 Cal.App.4th at p. 1237.) He sued defendants "who did not own the dogs, the property they escaped from, or the road where the attack occurred." (*Ibid.*) Rather, defendants were members of an association owning property in the subdivision where the attack occurred, and "owned access easements over the road." (*Id.* at p. 1236.) The association was "responsible for maintenance of the private streets and promulgation and enforcement of rules for use and enjoyment of the streets." (*Ibid.*) The court concluded no member of the association, other than the dogs' owner, owed a duty to the child. It noted, "Appellants have not cited, and we are unaware, of any case in which an easement holder was held responsible for an action that had no relationship to the scope of the easement granted." (*Id.* at p. 1243.)

Similarly, Barnett has failed to cite a single case stating an easement holder has a duty to guard against a risk of harm unrelated to the scope of the interest represented by the easement. We agree with Edison that to impose such an unlimited duty "would impose a tremendous burden on Edison, its customers, and all other utilities in California. [It is undisputed] Edison provides electric service to more than 13 million people in an approximate 50,000 square-mile area of central, coastal and southern California. [Citation.] . . . As of year-end 2004, Edison had approximately 97,000 miles of electrical lines in its service territory." As noted by Edison, "It is not difficult to imagine how impractical it would be to require Edison [as well as other utility easement holders] to exterminate privately-owned property beneath its [electrical] lines." We cannot say Edison's limited easement to maintain its electrical lines warranted imposing a general duty of care to guard

against all possible hazards that could exist on Barnett's property.[1]

Barnett argues he presented evidence Edison exerted exclusive control over the easement property and therefore assumed the duty of care typically held by a landowner. As examples of exclusive control, Barnett maintains Edison cut down a palm tree in the area and precluded him from sealing off the area with additional fencing or a concrete slab. However, he failed to provide relevant admissible evidence to support these claims below.

Barnett attempted to support his exclusive control allegation with only the statements found in his own declaration and deposition testimony. However, the record shows the trial court sustained Edison's objections to all of Barnett's unsupported and hearsay statements the tree was cut down because of a rat infestation and unnamed representatives of Edison refused to allow Barnett to build a fence or pour concrete.[2] Barnett provided no other evidence indicating who he spoke with at Edison or the scope of their authority. Moreover, Barnett admitted he told Edison the palm tree was growing up into Edison's lines, and Edison presented evidence it had an obligation to maintain a certain clearance between its trees and electric lines. Trimming and removing trees is part of the express terms of its easement right.

Finally, as aptly noted by Edison, Barnett's undisputed use and control of his property belies his assertion Edison exerted exclusive control. The record contains photographs showing Barnett installed (without seeking preapproval from Edison) a wooden fence, a garden, a cement wall, pool equipment, and a shed along the western edge of his property. In addition, he admitted he did not ask for Edison's permission before attempting to remove debris or spread poisonous substances in the area. Based on this record, it cannot be said a triable issue of fact existed as to whether Edison exerted exclusive control over its easement to warrant imposition of a landowner's duty of care. The authority supports the legal conclusion Edison's duty was "narrower in scope and tied to the reason that the easement is granted." (*Cody F., supra*, 92 Cal.App.4th at p. 1246.) We agree with the trial court's decision that summary judgment was appropriate in this case.

#### Disposition

The judgment is affirmed. Edison shall recover its costs on appeal.

WE CONCUR: ARONSON, J., IKOLA, J.

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Notes:

[1] We note, if Edison had exterminated spiders, rats, and

other vermin on Barnett's property, it appears Edison could be criticized for conducting activities beyond that permitted by the scope of its easement.

[2] Barnett does not challenge the trial court's rulings on Edison's evidentiary objections in his opening or reply briefs. (*Tilton v. Reclamation Dist. No. 800* (2006) 142 Cal.App.4th 848, 864, fn. 12 [waiver rule].)

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