



# Wagenseller Law Firm

Real Estate and Business Litigation Newsletter



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Real Estate Litigation  
Partnership Disputes  
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## Our Most Recent Trial: Backyard Dispute

Our client was sued by his neighbor (an attorney) for prescriptive easement, intentional destruction of a fence, ejectment, encroachment, water diversion, forcible entry and forcible detainer.

**Background:** Our client and the plaintiffs were long time neighbors with a wild, unmaintained hillside between them. An old chain link fence sat on the hillside. The plaintiffs became angry when our client did some landscaping, mistakenly believing that our client tore down a portion of the old fence. The neighbor wrote a letter on law firm stationary to our client noting that he did not know who owned the fence and that if the fence sat on our client's land he

was entitled to tear it down. Plaintiffs had a survey done and found that it was a 'disaster' for them. The true boundary line was 10-15' towards his house. Our client went through the permitting process and erected a new fence along the true boundary. The neighbors then filed suit.

**The Ask:** Plaintiffs asked that our client be ordered to tear down the new chain link fence along the entire boundary, that Plaintiffs be given "possession" of the "Disputed Area" (the area between the boundary and the old fence), that Plaintiffs be given a prescriptive easement to maintain walls on our client's property, that our client be forced to pay Plaintiffs for emo-

tional distress and the cost of rebuilding the original fence.

**The Trial:** During our cross-examination Plaintiff's husband testified that he had always assumed that he owned the fence and that it represented the boundary. He had never had a survey done until 2014 when this dispute arose. He admitted that he did not build the fence, did not know who did, did not pay for the fence and did not maintain the fence. He had to concede that neither he nor his wife actually used the Disputed Area (but that deer did). Plaintiff testified that he had gone onto our client's property to attach a large rubber pipe to an old concrete culvert/drain. He testified (continued on page 2)

### Inside this issue:

Our Most Recent Trial	1
Easements: What Do You Need To Know?	1
Refusing to take a Risk	3
Message from Laine T. Wagenseller	3
News and Happenings	4



## Easements: What Do You Need To Know?

In another case we recently handled, our real estate developer client began excavation on an apartment building near downtown Los Angeles. In the middle of the excavation they uncovered an unknown and unpermitted sewer line from their neighbor's property going through their lot to the street. The client came to us with the question—what do we do?

The case presented a number of issues. Could the developer simply remove the sewer line and cap it at the boundary line (self help)? What solutions were available immediately so that the developer could continue with excavation and construction? But most importantly—did the neighbor have a

claim of right that would allow them to maintain their sewer line through the property?

We looked at a number of scenarios involving prescriptive and equitable easements. An easement is generally defined as a right to use someone's land for a specific purpose.

Prescriptive easements arise when a party has used a property for five years or more and that use has been 'open and notorious', 'continuous and uninterrupted', 'hostile to the true owner' and 'under a claim of right'.

Equitable easements are somewhat more amorphous. A court has the ability to fashion an equi-

table easement when the trespass was 'innocent' rather than 'willful or negligent', the public or property owner will not be 'irreparably harmed' by the easement and the 'hardship' to the trespasser from having to cease the trespass is 'greatly disproportionate to the hardship cause the owner by the continuance of the encroachment.' In other words the court will balance the 'relative hardships.'

With regard to the prescriptive easement question, a very similar case was already on the books. In that case a property owner discovered a buried sewer line while building a new house.

(continued on page 2)

## Our Most Recent Trial: Backyard Dispute (Continued)

that this was more than five years ago, however, we were able to show him old photos which showed that he had actually installed the pipe less than five years ago and, in fact, after he had received the survey showing he did not own that land.

**The Issues:** Our first attack on the prescriptive easement claim was factual. A prescriptive easement only arises after a party has used property for over five years. Plaintiffs were unable to point to any “use” of the hillside and admitted that they did not build on it or maintain it. We also attacked the prescriptive easement claim legally—prescriptive easements are not appropriate in garden-variety residential boundary disputes where there is a valid deed and the boundaries are easily surveyable. We elicited testi-

mony from Plaintiff that when he thought the land was his and wanted to establish the boundary, he had a survey done. The law also does not allow for “exclusive” prescriptive easements since this is the equivalent of adverse possession. Plaintiffs did not meet the requirements for adverse possession in that they had not paid property taxes on the Disputed Area. The burden of proof for prescriptive easements is clear and convincing evidence (a higher standard) and we argued that Plaintiffs had not met that standard.

Apparently conceding that they would lose the prescriptive easement claim, Plaintiffs then argued that they “owned the fence” even if it was on our client’s property, that they were “ejected” and that our client was liable for “forcible entry” and “forcible detain-

er.” These are concepts normally used when a landlord unlawfully evicts a tenant. Plaintiffs argued that the remedy was drastic but that they should be therefore given possession of the Disputed Area. Forcible entry and detainer, understandably, require force, a “circumstance of terror,” or breaking open doors or windows. No testimony was elicited of force but we did show that our client had actually gone through the City permitting process and given notice that our client would be building a fence.

**The Outcome:** After trial ended both side submitted post-trial briefs arguing both the factual and legal issues in this case. We await the Court’s ruling.



Laine travelled to Bringing Hope to the Family Orphanage in Kaihura, Uganda in July. This was his 9th annual trip! His Building Men program with teenagers at the orphanage has grown from 15 boys to 100 boys and girls.



## Easements (Continued)

The sewer line had been permitted 23 years earlier but an easement had not been recorded so a title search did not reveal the presence of the pipe. The property owner sued for the removal of the pipe. The neighbor claimed a prescriptive easement and argued that the permit provided constructive notice of the pipe’s existence.

The trial court found a prescriptive easement and issued an injunction prohibiting the removal of the pipe. The Court of Appeal, however, found that a buried sewer line is not ‘open and notorious’ and that the permits for it did not provide constructive notice. The court observed that a landowner must be aware of an encroachment in order to have the opportunity to take action. It therefore denied the prescriptive easement.

What is less clear is whether a court would allow an equitable easement. Courts have 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.

I recently attended a lecture by three Court of Appeal justices who discussed equitable easements and who

all agreed that it was very difficult to give attorneys some hard and fast rules for the creation of equitable easements.

There are just no specific rules and each judge will approach the balancing test with a different perspective. The justices conceded that this does not help an attorney in advising his clients. Equitable easements are most commonly found in situations where a building may have been built but a portion of it encroaches on a neighbor’s land.

In these cases, tearing down a portion of the building is a substantial hardship. But, in other cases, such as our client with the sewer line, the balancing act is less clear. Our analysis would look at the costs of relocating the sewer line and whether our client could construct around the existing sewer line.

**Postscript:** While we were able to quickly research the issues regarding easements, the more pressing issue was time. Our client did not have time to engage in lengthy litigation. The neighbor refused to settle so we proceeded to file a lawsuit. A day after serving the lawsuit, the neighbor settled the case, allowing our client to cap and remove the pipe right away.

## A Message from Laine...

The excerpt below talks about taking risks. As a lawyer my whole training and practice has been in avoiding, analyzing and mitigating risks. So how do I turn that off when I am not lawyering?

All year I have been thinking about the 10X concept—how do I grow my business by 10 times, how do I improve the quality of my life by 10 times, how do we improve our customer service by 10 times. In other words what are my big goals?

I want to get out on the edge and seize opportunities. I want to be intentional about living a bigger life. It struck me the other day that my first step must be purpose. Another step is encouraging others to step up to the edge with me.

What are your big goals? How can you improve the quality of your life by 10 times? Let's talk about it.

*Laine*



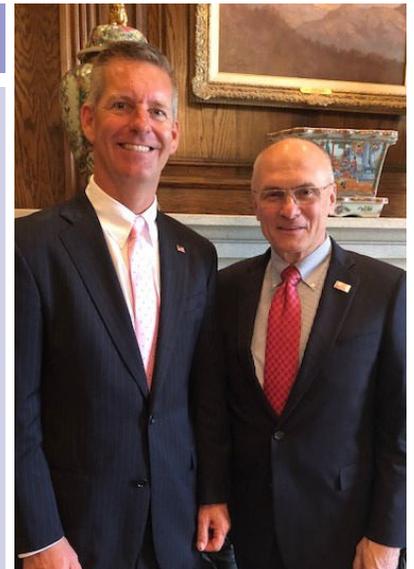
## REFUSING TO TAKE A RISK

Life means risk. People who sabotage themselves shouldn't worry about failure as much as they should be concerned about the chances they miss when they don't even try. Speech writer Charles Parnell observed, "Too many people are having what might be called 'near-life experiences.' They go through life bunting, so afraid of failure that they never try to win the big prizes, never knowing the thrill of hitting a home run or even taking a swing at one."

French writer, poet and art critic Guillaume Apollinaire wrote, "Come to the edge. No, we will fall. Come to the edge. No, we will fall. They came to the edge. He pushed them and they flew."

Those who fly are always first get out on the edge. If you want to seize opportunity, you must take a risk. If you want to grow, you must make mistakes. If you want to reach your potential, you will have to take chances. If you don't, you will be resigned to a life of mediocrity. The people who don't make mistakes end up working for those who do. And in the end, they often end up regretting the safe life they lived.

John Maxwell, The Difference Maker



Laine with Andy Puzder.

Mr. Puzder is the former CEO of CKE Enterprises and was President Trump's nominee for Labor Secretary.



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## Wagenseller Law Firm: News and Happenings

- Laine went to trial in late June in the Los Angeles Superior Court. In a prescriptive easement case. We are awaiting the Court's ruling. See article on page 1.
- We settled a lawsuit brought by the City of Los Angeles against our client and others over nuisance and drug abatement issues in a transient hotel. The case also involved a cross-complaint for failure to disclose during the sales transaction.
- We continue to represent clients in a lawsuit with their siblings over a number of apartment buildings. Various siblings are suing each other for fraud, quiet title and conversion. Allegations include whether there was a family fund, who is entitled to an ownership interest in each property and whether one brother is stealing the rental income from one of the buildings. The litigation continues with trial set for the end of November.
- A warehouse client hired us to pursue a tenant who owed \$91,000 in Common Area Maintenance charges. We filed a breach of lease law-

suit and were able to settle the case for almost the entire amount.

- Another warehouse client was sued by a former tenant for wrongful eviction, breach of contract, conversion and intentional infliction of emotional distress. We counter-claimed for unpaid rent of \$96,000. We are currently moving for judgment on the pleadings against the corporate tenant because it is a suspended corporation.

*Our goal is to be the preeminent boutique real estate litigation law firm in Los Angeles.*

We specialize in real estate lawsuits, including partnership, family and breach of contract lawsuits.

Please let us know how we can help you.

### What Do We Do?

#### Real Estate Litigation

Breach of Contract  
Breach of Lease  
Specific Performance  
Partnership Disputes  
Ownership Disputes/Quiet Title  
Partition  
Neighbor Disputes  
Commercial Landlord/Tenant  
Boundary Disputes

#### Business Litigation

Partnership Disputes  
Corporate Litigation  
Breach of Contract  
Business Fraud

#### Real Estate Law

Commercial Leases  
Purchase and Sale Agreements  
Contract Review