840.25 IMPLIED EASEMENT - WAY OF NECESSITY.

The (*state number*) issue reads:

"Is the plaintiff entitled to an easement across the land of the defendant because of necessity?"

(An easement is a right to make [a specific use] [specific uses] of land owned by another.[1] One who has an easement does not own the land but has only the right to use the land for the purpose(s) of the easement.[2] The owner of land burdened by an easement continues to have all the rights of a landowner which are not inconsistent with the reasonable use and enjoyment of the easement.)[3]

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, two things:[4]

First, that the parcel of land now owned by the plaintiff and the parcel of land now owned by the defendant were owned at one time by the same [person] [entity], that is, that both parcels had an earlier common owner.[5] (It is not necessary that the parcels of land now owned by the plaintiff and the defendant were part of a single larger tract. It is sufficient that both parcels were previously owned by the same person.)[6] (It is not necessary for either the plaintiff or the defendant to have been the earlier common owner.)[7]

And Second, when the common owner sold or transferred the parcel of land now owned by the plaintiff, it then became necessary for the [plaintiff] [plaintiff's predecessor-in-title] to be able to cross other land owned by the common owner in order to have beneficial use of the land purchased or acquired. Absolute necessity is not required.[8] It is

sufficient that the physical conditions and uses at the time of the sale or transfer by the common owner were such that a reasonable person under the same or similar circumstances would believe that the common owner intended for the [plaintiff] [plaintiff's predecessor-in-title] to have a right of access over the other land.[9]

Finally, as to the (*state number*) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the parcel of land now owned by the plaintiff and the parcel of land now owned by the defendant had an earlier common owner, and that at the time the common owner sold or transferred the parcel of land now owned by the plaintiff, it became necessary for the [plaintiff] [plaintiff's predecessor-in-title] to be able to cross other land owned by the common owner in order to have beneficial use of the land the [plaintiff] [plaintiff's predecessor-in-title] purchased or acquired, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.[10]

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1 *Builders Supplies Co. v. Gainey*, 282 N.C. 261, 266, 192 S.E.2d 449, 453 (1972).

2 *Thomas v. Morris*, 190 N.C. 244, 248, 129 S.E. 623, 625 (1925); *Brown v. Weaver-Rogers Assocs.*, 131 N.C. App. 120, 123, 505 S.E.2d 322, 324 (1998).

3 *North Asheboro-Central Falls Sanitary District v. Canoy*, 252 N.C. 749, 752, 114 S.E.2d 577, 580 (1960); *Nantahala Power & Light Co. v. Carringer*, 220 N.C. 57, 58, 16 S.E.2d 453, 454 (1941); *Ferrell v. Doub*, 160 N.C. App. 373, 377, 585 S.E.2d 456, 459 (2003).

4 *Dickinson v. Pake*, 284 N.C. 576, 585, 201 S.E.2d 897, 903 (1974).

5 *Le Oceanfront, Inc. v. Lands End of Emerald Isle Ass'n*, ___ N.C. App. ___, 768 S.E.2d 15 (2014) (quoting Wiggins v. Short, 122 N.C. App. 322, 331, 469 S.E.2d 571, 577-78 (1996)).

6 *Broyhill v. Coppage*, 79 N.C. App. 221, 226, 339 S.E.2d 32, 36 (1986).

7 It is possible that the "defendant" and the "common owner" will be the same person. In all cases the general language of this instruction will require modification to fit the evidence.

A way of necessity cannot be established over the land of a party not in privity of estate with the common owner. *Roper Lumber Co. v. Richmond Cedar Works*, 158 N.C. 161, 168, 73 S.E. 902, 905 (1912).

8 "It is not necessary to show absolute necessity. It is sufficient to show such physical conditions and such use as would reasonably lead one to believe that grantor intended grantee should have the right to continue to use the [land] in the same manner and to the same extent which his grantor had used it. . . ." *Barbour v. Pate,* __ N.C. App. ___, ___, 748 S.E.2d 14, 18 (2013) (quoting *Smith v. Moore*, 254 N.C. 186, 190, 118 S.E.2d 436, 438-39 (1961)).

9 *Oliver v. Ernul*, 277 N.C. 591, 599, 178 S.E.2d 393, 397 (1971); *Tedder v. Alford*, 128 N.C. App. 27, 33-34, 493 S.E.2d 487, 491 (1997); *Wiggins v. Short*, 122 N.C. App. 322, 331, 469 S.E.2d 571, 577-78 (1996). Note that *Cieszko v. Clark*, 92 N.C. App. 290, 295, 374 S.E.2d 456, 459 (1988) recognizes a "reverse" easement by necessity where the reservation of an easement by the common owner over the land he conveys away is implied. In such circumstances, this instruction will need to be modified.

10 In some cases it may be advisable to instruct the jury that if the plaintiff establishes the way of necessity, the defendant will have the right to select the location of the way, provided that he does so in a reasonable manner with due regard for the interests of plaintiff. *See Pritchard v. Scott*, 254 N.C. 277, 283, 118 S.E.2d 890, 895 (1961); *Joines v. Herman*, 89 N.C. App. 507, 509, 366 S.E.2d 606, 608 (1991); *Oliver*, 277 N.C. at 600, 178 S.E.2d at 397-98 (quoting 25 Am. Jur. 2d, *Easements and Licenses* § 64 (1971))(when two land-locked tracts were conveyed, a way of necessity across the lands retained was impliedly granted to the grantees- "a reasonable and convenient way for all parties is thereby implied, in view of all the circumstances").