

NO. 45433-5-II

WASHINGTON STATE COURT OF APPEALS, DIVISION TWO

Tom Moyer Theatres, an Oregon Partnership,

Plaintiff-Respondent,

v.

Michael J. Walker, Deborah A. Wray, and Kristin D.
Stump, Co-Trustees of the Amended and Restated Walker
family trust dated August 18, 2001; and Greenway Terrace,
LLC, an Oregon limited liability company,

Defendants-Appellants.

ON APPEAL FROM CLARK COUNTY SUPERIOR COURT
(Hon. Barbara D. Johnson)

APPELLANTS' REPLY BRIEF

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I. SUMMARY OF REPLY

The fundamental shortcoming with TMT's case is that it convinced the trial court to enforce a right it never had.

Specific performance may not be ordered unless "there is a valid binding contract; a party has committed or is threatening to commit a breach of its contractual duty; [and] the contract has definite and certain terms[.]" *Crafts v Pitts*, 161 Wn.2d 16, 24, 162 P.3d 382 (2007). Moreover, that right must be proven by clear and unequivocal evidence.

TMT claims that it was entitled to move utilities from its property onto Greenway's property, even if Greenway did not consent. This claim was not supported by the parties' written agreement *and* conflicted with the undisputed physical facts that no such move was even possible when the parties entered into their agreement in 2001. Mr. Laster, TMT's only witness testifying that the parties agreed in 2001 that TMT should have such a right, admitted that the parties' written agreement did not set forth such a right and that if such an understanding had been reached it should have been reflected in the written agreement. In fact, the only right of access contained in the written agreement was a one way right, granting Greenway the right to access the property it had sold to TMT.

The Washington Supreme Court recently held in *Wilkinson v. Chiwawa Communities Association*, that, where a written agreement has addressed a subject matter, extrinsic evidence may not be used to add another term on the same subject matter. 180 Wn.2d 241, 327 P.3d 614 (April 17, 2014). TMT has attempted to use extrinsic evidence to add a

term granting it the right to move utilities from its property onto Greenway's property; *Wilkinson* makes clear that this is not permitted under Washington contract law.

The trial court's decree should be vacated, and this case remanded with directions that TMT's claims should be dismissed with prejudice.

II. ARGUMENT

A. **TMT Cannot Prevail Unless There is Substantial Evidence from Which a Reasonable Trier of Fact Could Conclude that TMT Proved Clearly and Unequivocally that the Parties Agreed in 2001 to Give TMT the Right to Relocate the Utilities Onto the Greenway Property, even if Greenway Objected to that Relocation.**

There is no dispute that TMT was required to prove the *terms* of the agreement it sued to enforce by clear and unequivocal evidence. *See Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993) ("When specific performance is sought, rather than legal damages, a higher standard of proof must be met: clear and unequivocal evidence that leaves no doubt as to the terms, character, and existence of the contract" (citation and internal quotation omitted)). Under the clear and unequivocal standard, the fact at issue must be shown to be "highly probable." *See* Respondent's Brief, at 11, citing *In re Matter of H.J.P.*, 114 Wn.2d 522, 532, 789 P.2d 96 (1990). *H.J.P.* holds that "the ultimate fact in issue must be shown by evidence to be '*highly probable*'" where clear, cogent and convincing evidence is required. 114 Wn.2d at 532 (citation omitted; emphasis added).

The higher standard of proof is reflected in the standard of review for findings of fact. The trial court's findings must be supported by substantial evidence which satisfies the highly probable test. *H.J.P.*, 114 Wn.2d at 532; *In re Dependency of C.B.*, 61 Wn. App. 280, 283, 810 P.2d 518 (1991); *In re Marriage of Mueller*, 140 Wn. App. 498, 505, 167 P.3d 568 (2007) (where the "evidentiary standard is clear and convincing, [the court of appeals] uphold[s] the trial court's findings of fact if they are supported by 'highly probable' substantial evidence."). This Court is not being asked by Greenway to re-weigh the evidence that was presented to the trial court, but to determine whether TMT met its burden of showing it was highly probable that it had the contractual right to relocate the utilities onto the Greenway Property. Accordingly, TMT only prevails if there is substantial evidence from which a reasonable trier of fact could conclude that TMT proved it was highly probable that the parties agreed in 2001 to give TMT the right to relocate the utilities onto the Greenway Property even if Greenway objected to that relocation.

B. The Express Terms of the 2001 Agreement Do Not Provide TMT with the Unilateral Contractual Right to Relocate the Utilities onto the Greenway Property over Greenway's Objection.

As stated, TMT had the burden to establish convincingly and unequivocally that the parties entered into an agreement with terms that gave TMT the unilateral right to move utilities onto the Greenway Property. TMT fails to identify any documentary evidence to support the trial court's conclusion that it met its burden at trial. As TMT

acknowledges, the express terms of the 2001 agreement, and in particular the easement which forms a part of that agreement, do not provide TMT with the right to move the utilities onto the Greenway Property. *See* Respondent's Brief, at 4 (TMT admitting that "[n]o location for movement of the Utilities was specified in the Agreement, . . ."). The easement over the TMT Property states only that:

Buyer [TMT] shall have the right to relocate or alter utilities which are located in the 6.25 acres after closing, but in no event shall such relocation or alteration interrupt Seller's utility service without Seller's prior express written consent.

Ex. 2 (p.10 of 12).

As TMT's lawyer, Mr. Alan Laster, admitted at trial, there was no language in that easement to specify *where* the utilities could be moved. RP (6/25/13) at 152. *See also* CP 382 (FoF 14) (trial court finding that "[n]o location for the movement of the Utilities was specified in the Agreement"). TMT's lawyer further testified that there was no language in the easement that would have allowed TMT to do work on Greenway's property. RP (6/25/13) at 153-54. In fact, the easement ran one way only: it allowed Greenway to access TMT's land for any necessary repairs or maintenance of the underground utilities located in the 6.25 acres, without allowing TMT any access to the Greenway Property. *See* Ex. 2 (p. 10 of 12). Nothing in the written agreement between the parties permitted TMT to enter the Greenway Property, either by way of an easement burdening that estate or by way of permission to TMT.

Consistent with TMT's desire to develop its property, the right to relocate the easement allowed TMT, as the owner of the burdened estate, to move the easement to a different location. But it does not follow merely from the fact that TMT had been granted a right to move the easement that TMT thereby *also* acquired the separate and distinct right to move the easement off its property and onto Greenway's property, ***and to do so even if Greenway objected to such a move.*** It is a basic principle of property law that ownership includes the right of exclusive possession and that the unprivileged interference with those rights is trespass. *See* Appellant's Opening Brief, at 33. Silence cannot give the owner of a burdened estate the privilege to interfere with another property owner's right of exclusive possession of that owner's property. As will be discussed more fully in Section II.C of this brief, TMT attempts to fill the silence with (1) the later, *failed* negotiations of the parties to allow TMT the right of access not granted to it by the express terms of the parties' original written agreement, and (2) the claim of a single witness (Mr. Laster) that the parties did agree in 2001 to grant TMT such a right -- all the while admitting that this supposed oral side deal could and should have been, but was not made, a part of the parties' written agreement.

It is worth keeping in mind that this case ultimately is about the circumstances under which a party may properly obtain a court order compelling another party to allow entry onto its land under the claim of a contractual right. The fundamental shortcoming with TMT's case is that it convinced the trial court to enforce a right it never had. Specific

performance may not be ordered unless “there is a valid binding contract; a party has committed or is threatening to commit a breach of its contractual duty; [and] the contract has definite and certain terms[.]” *Crafts v. Pitts*, 161 Wn.2d 16, 24, 162 P.3d 382 (2007). Here, TMT failed to prove that its agreement with Greenway imposed a duty on Greenway to allow TMT entry onto its land, and without an agreement imposing such a duty TMT was not entitled to a decree compelling Greenway to allow TMT to come onto Greenway’s land for the purpose of moving the utilities onto Greenway’s land.

That TMT failed to meet its burden is not surprising, given the trial court held a trial on the wrong issue. Although TMT sought specific performance of a contractual right, the trial court held a trial focused on the reasonableness of TMT’s plans to relocate the utilities onto Greenway’s property instead of a trial focused on whether TMT had a right to enter onto that property in the first place. *See* RP (6/7/13) at 29. TMT obliged, trying the issue of the “reasonability and practicality of the plans to relocate the water lines[,]” *see* RP (6/25/13) at 24, while doing its level best to avoid coming to grips with the question of whether it had the right to impose any such plan on Greenway in the first place. The issue, however, should never have been whether “it would be better to have the utilities on [Greenway’s] property.” RP (6/7/13) at 29, quoted on page 18 of the Respondent’s Brief. If the parties never agreed that TMT had the right to move the utilities onto Greenway’s property, there was “nothing

for equity to enforce[.]” *Haire v. Patterson*, 63 Wn.2d 282, 286-87, 386 P.2d 953 (1963), and no basis for the trial court’s decree.

It is revealing that TMT, in its Respondent’s Brief, always stops a beat short of making the argument it must make and support to prevail, which is that it had the right to effect such a relocation *onto the Greenway Property*. See Respondent’s Brief, at 1 (“undisputed right to relocate utilities . . .”); *id.* (“right to relocate the utilities.”); and *id.*, at 18 (“TMT’s right to relocate the Utilities was and is undisputed[.]” citing the purchase and sale agreement, the easement, and the Finding of Fact quoting the easement). Instead, TMT focuses primarily on evidence of an agreement that was later desired but never reached, as if such “discussions,”¹ “request[s],”² “contemplat[i]ons,”³ and “positions,”⁴ could confer the

¹ Respondent’s Brief, at 1 (“All of those discussion and plans contemplated . . .”); *id.* at 21-22 (“but the discussion was ultimately to move them off of the parcel being acquired . . .”) (quoting Mr. Laster from RP (6/25/13) at 152).

² Respondent’s Brief, at 12 (“Greenway specifically requested that TMT move all of the Utilities in response to TMT’s proposed plan . . .”) (quoting Finding of Fact No. 11), *id.* at 14 (“Mr. Walker confirmed in his testimony that Mr. Zipper, on behalf of Greenway, requested that all of the utilities be moved onto Greenway’s property at the same time as the water lines . . .”).

³ Respondent’s Brief, at 1 (“All of those discussion and plans contemplated . . .”); *id.* at 5 (“Greenway sent further correspondence about the contemplated work in February 2009 . . .”); *id.* at 19 (“Mr. Zipper confirmed that movement of the utilities had always been contemplated . . .”).

⁴ Respondent’s Brief, at 2 (Counterstatement of the Issues: “Whether the trial court properly issued its findings of fact and conclusions of law given the relevant standards and the parties’ positions both prior to and during litigation.”); *id.* at 4 (“the position of both parties for several years was consistently that it should be to somewhere onto the Greenway Property.”); *id.* at 8 (“The trial court’s findings of fact and conclusions of law were properly issued given the relevant standards and the parties’ positions both prior to and during litigation.”); *id.* at 19 (“the position of both parties for several years was consistently that it should be to somewhere on the Greenway Property.”) (underline in original).

contractual rights TMT was required to prove here. As Greenway will discuss in Section II.C of this brief, neither that evidence nor the testimony of Mr. Laster is sufficient to constitute proof making highly probable that the parties in fact granted TMT the right it needed to be granted, in order to be entitled to the decree at issue in this appeal.

C. The Extrinsic Evidence Does Not Establish Clearly and Unequivocally that Greenway Had a Contractual Duty to Allow TMT to Move the Utilities onto Greenway's Property. To the Contrary: the Undisputed Physical Evidence Showing Such a Move Was Not Possible Compels the Conclusion that the Parties Could Not Have Intended to Grant TMT the Right to Move the Utilities onto Greenway's Property.

Without express contract language to support its specific performance claim, TMT has to rely on evidence outside of the agreement to establish parties' supposed intent and understanding. That "extrinsic" evidence consists of (1) the parties' discussions, requests, contemplations, and proposals, arising out of the post-2008 efforts to reach an agreement by which Greenway would allow TMT to move all the utilities onto its property (and thereby settle the ongoing problems caused by having the utilities running across TMT's land); and (2) testimony from Mr. Alan Laster, TMT's counsel, relating to the 2001 deal struck between the parties.

None of that evidence, however, clearly and unequivocally demonstrates that TMT had a contractual right to move the utilities onto the Greenway property, without Greenway otherwise agreeing to such an arrangement through a separate deal. Moreover, the undisputed physical

evidence showing that such a move was not possible in 2001 compels the conclusion that the parties could not have intended to grant TMT such a right.

1. Evidence from the Post-2008 Negotiations Between the Parties Does Not Support the Trial Court’s Conclusion that TMT Proved It Had the Contractual Right Under the 2001 Agreement to Move the Utilities onto the Greenway Property.

The testimony and exhibits relating to the post-2008 negotiations do not support the trial court’s conclusions about the parties’ contract rights or original intent under the 2001 agreement, even if such evidence was admissible (which it is not, see Section II.D). Whether the parties attempted to negotiate a new deal *after 2008* to allow TMT the right to relocate the utilities onto the Greenway property—under terms acceptable to Greenway—does not and cannot show that the parties understood that TMT already possessed the right to move the utilities onto the Greenway property. Yet that is TMT’s argument—that Greenway had an absolute duty to allow work to be done on its property because TMT and Greenway, years after the 2001 agreement, attempted to agree on terms to allow TMT to move the utilities onto the Greenway Property. *See* RP (6/26/13) at 244-45 (TMT’s closing argument); Respondent’s Brief, at 1-2. This Court should reject that argument. Evidence of the bargain that one party would be willing to reach to settle a dispute may not be taken as evidence that the other party to the original agreement possessed those rights all along.

(a) No Evidence Supports the Suggestion that Greenway's 2009 Request that TMT Move the Utilities Was Not Contingent on a New Agreement, Nor Does Finding of Fact No. 11 Support the Order of Specific Performance.

Finding of Fact No. 11⁵ is not supported by substantial evidence, to the extent it is read to suggest that Greenway's request that TMT move *all* of the Utilities (made in response to TMT's proposed plan to move the waterlines and water meter) was not contingent on the parties negotiating a new agreement. Exhibit 13 (which is inadmissible⁶) does not support that interpretation of Finding of Fact No. 11 because it does not show that Greenway requested that TMT move the waterlines free from the execution of a new agreement. Exhibit 13 is the February 2009 letter sent by Greenway as a response to TMT's rejection of Greenway's proposed waterline agreement. *See* RP (6/25/13) at 85. The letter closes by stating: "Please consider whether TMT is willing to move all of the utilities and execute an agreement protecting [Greenway] from costs incurred as a result of TMT's work." Ex. 13.

Other than the inadmissible and unresponsive Exhibit 13, the only evidence TMT cited in support of Finding of Fact No. 11 consists of: (1) Mr. Walker's testimony that he asked TMT if it would consider moving

⁵ Finding of Fact No. 11 (CP 382) states that:

Greenway specifically requested that TMT move all of the Utilities in response to TMT's proposed plan to move the waterlines and water meter off the TMT Property and onto the Greenway Property.

⁶ *See* Appellant's Opening Brief, at 20-22, 41-46 (arguing for the inadmissibility of Exhibit 13 under ER 408). *See also* Section II.D of this brief.

all the utilities off the TMT property instead of just the waterlines to alleviate the many problems between the parties, RP (6/26/13) at 198-99, and (2) the testimony of Mr. Berry, the civil engineer, that Greenway requested that no part of the water line remain on the TMT property in the engineering plan TMT commissioned. Ex. 3; RP (6/25/13) at 113. Respondent's Brief, at 12-13

That evidence falls short in that it demonstrates contingent requests only, *i.e., if* TMT intended to move the water lines *and* the parties could reach a new agreement to allow that, *then* Greenway would want *all* the utilities moved off the TMT property to alleviate the conflict between the neighbors. *See* RP (6/26/13) at 198-99 (Mr. Walker's testimony). The same is true of Mr. Berry's testimony—it shows nothing more than that Greenway, if it reached an agreement with TMT on waterline relocation, wanted to make sure TMT did the job to completion such that no waterlines were left on the TMT property. *See* Ex. 3; RP (6/25/13) at 113. That evidence does not support Finding of Fact No. 11 to the extent that the trial court found that Greenway's request was not contingent on the parties coming to terms on a new agreement.

Greenway's position on appeal is the same as at trial. Greenway wanted a new agreement only if its interests could be protected and if any new deal would resolve the dispute between the parties with finality. When the parties could not settle the ongoing dispute with a new agreement and TMT sought to claim the rights that had been the subject of negotiations under the old agreement, Greenway opposed TMT's attempt

to add a term to the 2001 agreement. TMT's argument that Greenway took an inconsistent position at trial rests on nothing more than a single sentence from the summary judgment proceedings which TMT quotes without including the qualifier in the very next sentence. Read in whole, Greenway argued that: "And in -- I think Greenway wants them moved off of TMT's property. But the distinction here is does TMT have a right to move them off over Greenway's objection under this easement?" Compare Respondent's Brief at 9 (TMT quoting only the underlined portion to this Court) with RP (6/7/13) at 20 (the complete quote is continued in bold). The complete quotation shows that Greenway argued then, as it does now, that the issue is TMT's rights under the easement.

In fact, a longer excerpt from the summary judgment argument captures Greenway's argument on appeal: that, while the original agreement did not give TMT the unilateral right to move the Utilities onto the Greenway property, Greenway was willing to negotiate over the terms of a new deal that would give TMT that right because it would solve the ongoing issues between the parties. As Greenway's counsel put it at the summary judgment hearing:

But the key here is what Mr. Walker testified in his deposition, which was that, had it been the original intent of the contracting parties to the easement that the utilities on TMT's property could at some point be completely moved off of TMT's property and relocated onto Greenway's property, it would have been a completely different agreement.

It would have been an agreement that is more along the lines of the *new agreement* that Greenway and TMT have been trying to work out for the past several years, which is: Who is going to do the work? Are licensed and bonded contractors going

to be the ones doing the work? What happens if TMT doesn't pay one of those contractors and there is a lien imposed on Greenway's property? Is TMT going to take responsibility for that? What happens if the work is done in a faulty manner on Greenway's property? Is TMT going to indemnify Greenway for that and agree to go after the contractors at fault?

...

With regard to Plaintiff's argument that the Court should not look at any of this evidence of pre-agreement negotiations, I think the key here is that the easement is somewhat silent on this issue. And we're not putting in evidence that there was a completely different agreement, that there was, say, some other part of the bargain that didn't make it into the agreement.

What we're saying, what Mr. Walker and Mr. Zipper are testifying to is to what the intent of the parties were at the time they entered into this agreement. And it's my understanding based on the Washington law we put in our motion that the Court looks at the intent of the original contracting parties in determining the scope of the easement.

And there is -- there was no other evidence in the record put in by Plaintiffs to counter that intent. They could have in their response put in a declaration from Mr. Laster, who was present at those negotiations, but that's absent.

* * * *

It is undisputed that there have been problems with these water lines on TMT's property. There have been multiple instances of broken water lines and disputes that arose from those. There was one instance in which some contractors boldly spliced into TMT's water line and filled up a 2200-gallon water truck, and Greenway got a \$15,000 water bill as a result. So, yes, there has [sic] been a lot of problems.

And in -- I think Greenway wants them moved off of TMT's property. ***But the distinction here is does TMT have a right to move them off over Greenway's objection under this easement?*** And it does not based on the intent of the parties who contracted to the easement and the plain language of the easement itself. If -- I mean, this is --

RP (6/7/13) at 18-20 (emphasis added).

In sum, that Greenway wanted TMT to move all the utilities, not just the waterlines and water meter, does not make it highly probable that TMT had a pre-existing contractual right to move the utilities onto Greenway's property, based on the parties' 2001 agreement. Evidence of the conditions Greenway requested as part of a new agreement do not support any conclusions about the content of the original 2001 agreement. This Court should reject the suggestion that rights laid on the table as bargaining chips by one party somehow become the property of the adverse party should negotiations fail.

(b) The Trial Court's Finding About the Parties' Original Intent, Set Forth in Finding of Fact No. 15, Is Not Supported by Clear and Unequivocal Evidence -- A Conclusion Compelled by the Undisputed Physical Facts Evidence Showing the Parties Could Not Have Intended as the Trial Court Found.

The trial court's finding about the parties' original intent under the 2001 agreement, set forth in Finding of Fact No. 15, comes the closest to a specific finding that the parties reached some sort of agreement in 2001 giving TMT the right to move the utilities onto the Greenway Property.⁷ TMT's evidence, with the exception of Mr. Laster's testimony discussed below, either related to the parties' intentions after 2008 or actually supported Greenway's point that the parties understood the 2001

⁷ Finding of Fact No. 15 (CP 382), states:

The parties have evidenced mutual agreement that leaving the Utilities on the TMT property does not make sense and is contrary to their original intent.

agreement to allow movement of the utility easement to another location on TMT's property. *See* Brief of Respondent at 19-20, citing Ex. 51, at 46-47 (Mr. Zipper testifying about post-2008 plans), RP (6/25/13) at 77 (a TMT representative testifying about post-2008 plans), and Ex. 51, at 12-13, 16-18 (Mr. Zipper testifying that Greenway gave TMT "flexibility to move the utilities on *its property*"). TMT argues that its purpose for moving the utilities—to facilitate future development—supports a finding that the parties' original intent was to move the utilities off the TMT Property and onto the Greenway Property. But TMT offered no evidence that facilitating future development could only be achieved relocating the Utilities onto the Greenway Property.

Incredibly, TMT fails to address the physical facts that make it particularly *improbable* that the parties originally intended to grant TMT the right to move the Utilities off its property and onto Greenway's Property. Before 2005, the only viable option for moving the utilities without depriving the tenants of the Greenway Property of access to water and power would have involved moving the utilities to the northern boundary of the TMT Property. RP (6/25/13) at 123-25, RP (6/26/13) at 173-74. There could have been no intention to move the utilities off the TMT Property as of 2001 because doing so would have required connections with waterlines that did not exist and were not contemplated at the time. *See* Ex. 51, at 13-14, RP (6/26/13) at 174-75, 212-13. The plans developed by TMT's engineer in 2008 to move the waterlines onto the Greenway Property depended on the ability to connect with the

waterlines beneath NE 69th Street, but neither NE 69th Street nor the Orchards Elementary School (the school served by the waterline added under NE 69th Street) existed when the parties made their agreement in 2001. *See* RP (6/25/13) at 119-20, 126-29; RP (6/26/13) at 174-75, 187; Exs. 3-4. *See also* App. C and D to Opening Brief (aerial maps showing conditions at the time of the 2001 agreement and after the establishment of NE 69th Street in 2005) (copies attached as Appendices 1 and 2 to this brief).

TMT has *no response* to this evidence. That both parties eventually -- *i.e.*, after the construction on an adjacent property in 2005 made new plans possible -- worked on trying to form a new agreement that would take advantage of the new waterline along NE 69th Street, in order to settle ongoing grievances, cannot reasonably serve as evidence that the parties *originally* intended for TMT to have the right to move the utilities off the TMT Property and onto the Greenway Property, whenever TMT saw fit to make that move and notwithstanding any objection by Greenway.⁸ The undisputed evidence shows there was no way to move the utilities off TMT's property and onto Greenway's retained portion at the time the parties signed the agreement, without cutting off services to the mobile home park located on Greenway's property. It is unreasonable

⁸ For the same reason, Greenway obviously did not waive the issue on appeal by arguing before the trial court that it was working on a new agreement to locate the water meter on its property, provided it could approve the location, secure other terms to protect its interests, and reach an agreement that would settle all the ongoing issues between the parties. *See* RP (6/7/13) at 18-21.

to conclude that the parties intended to grant TMT the right to deprive the mobile home park residents of services essential to habitability, especially where the agreement required Greenway's express written consent to any interruption in utility service. *See* Ex. 2 (p. 10 of 12). Yet that is *precisely* the conclusion that must be drawn in order to conclude that the parties intended to grant TMT the right that is the basis for the decree granted by the trial court.

2. The Testimony of Mr. Laster is TMT's Only Contemporaneous Evidence Offered to Support its Specific Performance Claim, and Laster's Testimony Cannot Sustain that Claim as a Matter of Law.

As discussed in Section II.A, the 2001 purchase and sale agreement did not expressly provide TMT with the right to relocate the Utilities onto the Greenway Property. The testimony of TMT's counsel, Mr. Laster, is the only contemporaneous evidence of the parties' 2001 understanding offered by TMT to support its specific performance claim. But Mr. Laster's testimony is insufficient to support the trial court's order of specific performance for a number of reasons:

- He admits that his understanding that TMT could relocate the utilities anywhere never made it into the final agreement, even though the agreement could have been drafted to provide that right to TMT, RP (6/25/13) at 152-54;
- He admits that permission for TMT to do work on Greenway's property would ordinarily have to be provided for in an agreement

so that TMT could effect such a relocation without trespassing, *id.* at 153;

- There are no contemporaneous documents of any kind (drafts, letters, e-mails) supporting Mr. Laster's understanding; and
- The physical facts contradict Mr. Laster's understanding—the parties could not have understood that the utilities were to be moved onto the Greenway Property where there was no feasible way to do so until 2005, *see* Appellant's Opening Brief, at 34-36.

Defending basing the decree on Mr. Laster's testimony, TMT argues that the evidence from one witness may provide substantial evidence in support of sustaining the judgment, “no matter how strongly [the appellate court] may be convinced that the evidence *preponderates* with the other side.” Respondent's Brief, at 21 n.11, quoting *Williams v. Bartz*, 52 Wash. 153, 100 P. 186 (1909) (emphasis added). TMT's argument, however, assumes that the testimony of the one witness constitutes substantial evidence sufficient to sustain the judgment and Mr. Laster's evidence does not meet that bar, particularly given his admission that the parties' written agreement should have but did not reflect the purported understanding to which he testified.⁹ Moreover, in this case the bar is higher than the preponderance standard cited by TMT in favor of its one witness rule. It will not do for Mr. Laster's evidence merely to

⁹ As pointed out in Greenway's Opening Brief, Laster's testimony is at best evidence supporting a claim for reformation, yet TMT never advanced such a claim (perhaps because of Laster's additional admission that he was not privy to the parties' full negotiations). *See* Greenway's Opening Brief at 32 n.25.

support the trial court’s judgment, no matter how much evidence “preponderates” to the other side; under the governing clear and unequivocal standard, Mr. Laster’s testimony must make it *highly probable* that the parties agreed to grant TMT the contractual right the trial court specifically enforced. Mr. Laster’s testimony plainly does not meet that bar.

Moreover, a recent decision of the Washington Supreme Court, issued after Greenway filed its opening brief in this case (but before TMT filed its brief), nullifies the legal viability of TMT’s attempt to use Mr. Laster’s testimony -- indeed, any extrinsic evidence -- to supplement the parties’ written agreement.¹⁰ In *Wilkinson v. Chiwawa Communities Association*, the Supreme Court addressed the question of whether extrinsic evidence could be used to support a claim of right based on an oral term supplementing a written contract, where the subject matter of the alleged oral term was already addressed in the written contract. 180 Wn.2d 241, 327 P.3d 614 (April 17, 2014). *Wilkinson* is the latest in a series of decisions in which the Supreme Court has worked to clarify the meaning of the so-called “context” approach to contract interpretation adopted by the court in *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990), a decision which raised questions as to the proper role of extrinsic evidence in contract interpretation cases. *See, e.g., Wright v.*

¹⁰ Greenway may benefit from the change in the law that arose while this appeal has been pending. *See Brundridge v. Fluor Fed. Svcs., Inc.*, 164 Wn.2d 432, 441, 191 P.3d 879 (2008).

Dave Johnson Ins. Inc., 167 Wn. App. 758, 770, 275 P.3d 339 (2012) (noting the “confusion” generated by *Berg*’s adoption of the context rule of contract interpretation). Under the Supreme Court’s subsequent clarification of *Berg*, extrinsic evidence may only be used “‘to illuminate what was written, *not what was intended to be written.*”” *Wilkinson*, 180 Wn.2d at 251, quoting *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 697, 974 P.2d 836 (1999) (emphasis added). Washington courts are not to consider extrinsic evidence “‘that would vary, contradict or modify the written word’ or ‘show an intention independent of the instrument.’” *Wilkinson*, 180 Wn.2d at 251, quoting *Hollis*, 137 Wn.2d at 695.¹¹

In *Wilkinson*, the contract at issue—restrictive covenants for a residential community—included detailed provisions outlining various things residents could not do, including a limit on the size of rental signs

¹¹ The court in *Berg* praised the California Supreme Court’s “context” approach, as set forth in *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal.2d 33, 69 Cal. Rptr. 561, 442 P.2d 641 (Cal. 1968). See *Berg*, 115 Wn.2d at 667 (describing *Pacific Gas* as an “excellent articulation”). Yet even as our state Supreme Court was embracing *Pacific Gas*, that decision was coming in for scathing criticism for having undermined the ability of parties to rely on the language of written contracts. See, e.g., *Trident Ctr. v. Conn. Gen. Life Ins. Co.*, 847 F.2d 564, 569 (9th Cir. 1988) (op. per Kozinski, J.) (“Under *Pacific Gas*, it matters not how clearly a contract is written, nor how completely it is integrated, nor how carefully it is negotiated, nor how squarely it addresses the issue before the court: the contract cannot be rendered impervious to attack by parol evidence. If one side is willing to claim that the parties intended one thing but the agreement provides for another, the court must consider extrinsic evidence of possible ambiguity. If that evidence raises the specter of ambiguity where there was none before, the contract language is displaced and the intention of the parties must be divined from self-serving testimony offered by partisan witnesses whose recollection is hazy from passage of time and colored by their conflicting interests. [citation omitted] We question whether this approach is more likely to divulge the original intention of the parties than reliance on the seemingly clear words they agreed upon at the time. [citation omitted].”). The subsequent clarification of *Berg* suggests a rethinking by our state Supreme Court of the wisdom of the *Pacific Gas* approach.

that residents could hang, but nothing about for how long a resident could rent their residence. 180 Wn.2d at 251. When certain residents challenged an attempt to bar them from renting their homes for a period of less than 30 days, the community association attempted to prove with extrinsic evidence that such a limitation had been intended at the time of the promulgation of the covenants. The Supreme Court held that the evidence could not be considered:

As the text of the Chiwawa covenants demonstrates, the drafters included detailed provisions outlining what residents cannot do. From this it is evident that had the drafters wanted to prohibit rentals of a particular duration, they would have done so. The dissent argues that the restriction on rental signage merely establishes that the drafters intended to permit some rental activity and that it remains a question of fact to determine, based on extrinsic evidence, whether the drafters contemplated long-term or transient rentals, or both. Dissent (Gordon McCloud, J.) at 631, 632 n. 6, 8. This argument misapprehends Washington law. While extrinsic evidence can be “used to illuminate what was written,” *Hollis*, 137 Wn.2d at 697, it cannot be used to “show an intention independent of the instrument.” *Id.* at 695.

180 Wn.2d at 251-52.

Here, the parties’ 2001 purchase and sale agreement included a provision addressing the issue of relocation of the Utilities and post-sale access to the other party’s property, and that provision granted only Greenway a right of access to the property being sold to TMT. Had the parties wanted TMT to have a right of access to Greenway’s retained property, they could have said so in their written agreement but they did not say so (a point conceded by Mr. Laster, *see* RP (6/25/13) at 152-54). TMT is using extrinsic evidence to show an intention independent of the

parties' written contract, and on a subject covered by the contract, and that course is forbidden by *Wilkinson*.

D. The Trial Court Erred by Failing to Exclude ER 408 Evidence.

TMT is wrong to argue that Greenway failed to make proper objections to the ER 408 evidence. An objection is preserved for review where the specific ground for the objection is apparent. *See State v. Swanson*, __ Wn. App. __, 327 P.3d 67 (June 23, 2014), citing ER 103(a)(1). TMT complains that Greenway's objection to Exhibit 13 was that it covers "settlement discussions not related to the easement agreement." Respondent's Brief, at 34, quoting RP (6/25/13) at 86. That explains exactly why the evidence should be excluded under ER 408: because it contains settlement discussions. As for the issues raised with Greenway's objections to Exhibits 14, 15, 16, 17, 18, and 20, the fact that those items of correspondence covered a brand-new agreement—the proposed settlement agreement—is precisely the reason those exhibits were inadmissible under ER 408. The specific ground for the objection is apparent here and there can be no reasonable dispute as to the nature of the objection, especially in light of the motion in limine on settlement communications under ER 408, argued the first day of trial, and the continued objections and discussion on that subject during trial. *See Appellant's Brief*, at 20-22.

TMT argues that Exhibit 13 is not a settlement communication, but that ignores the arguments made by Greenway in favor of selective quoting from the exhibit. That some sentences in Exhibit 13 reference the

parties' 2001 agreement does not mean that the letter was not evidence of conduct or statements made in compromise negotiations. In Exhibit 13, Greenway was responding to TMT's rejection of its proposed Waterline Relocation Agreement, a new agreement intended to resolve the parties' issues related to the waterlines. See Ex. 51, at pp. 45-46; RP (6/26/13) at 62, 85. The closing paragraph of Exhibit 13 requests that TMT consider whether it is willing to execute an agreement eliminating the need for TMT and Greenway to deal with each other on the utility issues. See Ex. 13. That is an inadmissible settlement communication, even if not labeled as such. See ER 408; *Knapp v. Hoerner*, 22 Wn. App. 925, 930-31, 591 P.2d 1276 (1979).

Mr. Zipper's characterization of Exhibit 13 cannot make admissible what is otherwise inadmissible. Mr. Zipper admitted he was not offering an opinion as to admissibility under the rules of evidence, which in any event are the province of the courts to apply. Under the correct legal standard, pre-filing settlement communications are excluded by ER 408 if there was an actual dispute at the time and at "least some hint of possible litigation." See *Finley v. Curley*, 54 Wn. App. 548, 557-58, 774 P.2d 542 (1989). TMT fails to address that standard when citing to Mr. Zipper's testimony, even though it establishes that the trial court erred when it ruled that Exhibit 13 was admissible because it was sent before this lawsuit had begun.

Nor can the Supreme Court's decision in *Matteson v. Ziebarth*, 40 Wn.2d 286, 292 P.2d 1025 (1952), salvage the trial court's ruling. In

Matteson, a minority stockholder sued the majority stockholder to set aside a merger agreement between the Ziebarth Corporation and another corporation. 40 Wn.2d at 288-89. The minority stockholder had opposed a proposed merger agreement, which blocked the deal and led the majority stockholder to attempt to salvage the deal by merging the Ziebarth Corporation with another corporation and then consummating the originally proposed merger. The mergers were approved and the minority shareholder sued to undo the agreement but lost. While those mergers were pending, the minority stockholder indicated a willingness to vote for the merger agreement if he could receive a share of, in essence, the sale proceeds. The minority shareholder took the position that the conversation should be inadmissible as an offer of compromise.

The Supreme Court ruled that the conversation was admissible because the agreement had not been approved at the time and the testimony was relevant to the minority shareholder's objection to the proposed agreement. *Matteson*, 40 Wn.2d at 294. No analogy can be drawn between *Matteson* and the facts here, where the parties exchanged correspondence in an attempt to come to an agreement that would end an ongoing dispute that had already caused litigation and which had the potential for further litigation, a potential realized less than a year after Exhibit 13 was sent. And even assuming *Matteson* could properly be analogized to this case, *Matteson* is not controlling because was decided well before ER 408 was adopted in 1979. See 5A Karl B. Tegland, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 408.1 (5th ed.

2013) (cautioning against citing pre-rule authority due to differences between the common law and Rule 408).

TMT fails to identify any purpose for introducing the compromise negotiations into evidence other than to set up the argument that Greenway expressed a willingness after 2008 to allow TMT to relocate the Utilities onto Greenway's property because Greenway had already agreed back in 2001 that TMT could carry out such a relocation. Prohibiting parties from using compromise negotiations to make that sort of argument is precisely why ER 408 exists. The trial court erred in failing to apply it here.

III. CONCLUSION

The trial court's decree should be vacated. A judgment dismissing TMT's claims with prejudice should be entered. Greenway should be awarded the fees it incurred before the trial court and on appeal, defending against a claim for specific performance that the trial court should have dismissed with prejudice.

RESPECTFULLY SUBMITTED this 29th day of July, 2014.

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Attorneys for Appellants

APPENDIX

1



N

Greenway Property

TMT Property

No street where NE 69th would later go

APPENDIX

2



Greenway Property

TMT Property

NE 69th Street

Orchard Elementary School



NO. 45433-5-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

Tom Moyer Theatres, an Oregon
Partnership,

Respondent,

vs.

Michael J. Walker, Deborah A.
Wray, and Kristin D. Stump, Co-
Trustees of the Amended and
Restated Walker Family trust dated
August 18, 2001; and Greenway
Terrace, LLC, an Oregon limited
liability company,

Appellants.

Clark County
Superior Court
No. 09-2-03671-7

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington as follows: I am an employee at Carney Bädley Spellman, P.S., over the age of 18 years, and not a party to nor interested in this action. I caused to be delivered **via email and U.S. Mail** *Appellant's Reply Brief and Declaration of Service* on the following parties at the last known address as stated:

J. Kurt Kraemer, WSBA 29509 McEwen Gisvold LLP 1100 SW Sixth Ave., Ste. 1600 Portland, OR 97204 kurtk@mcewengisvold.com	Steven E. Turner, WSBA No. 33840 1409 Franklin St., Suite 216 Vancouver, WA 98660 steven@steventurnerlaw.com
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I declare under penalty of perjury under the laws of the state of
Washington that the foregoing is true and correct.

DATED this 29th day of July, 2014.


Patti Saidu, Legal Assistant

CARNEY BADLEY SPELLMAN

July 29, 2014 - 9:22 AM

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