

71195-4

71195-4

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

2014 JUN 27 AM 11:08

NO. 71195-4-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

DOUGLAS AND REBECCA SLATER,
PLAINTIFFS, APPELLANTS,
V.
JOHN AND MICHELLE BABICH,
DEFENDANTS, CROSS-APPELLANTS

APPEAL FROM THE SUPERIOR COURT OF KING COUNTY
KING COUNTY CAUSE NO. 11-2-25748-7 KNT

APPELLANTS' OPENING BRIEFING



MATTHEW KING, WSBA 31822
Attorney for Appellants Slater
1420 Fifth Avenue, Suite 2200
Seattle, WA 98101
Telephone: 206-274-5303

TABLE OF CONTENTS

	PAGE
I. Introduction	4
II. Assignments of Error	4
Issues Pertaining to Assignments of Error	4
III. Statement of the Case	4
IV. Summary of Argument	9
V. Argument	10
VI. Conclusion	16

TABLE OF AUTHORITIES

Cases

<i>Brown v. Voss</i> ,	
105 Wn.2d 366, 715 P.2d 514 (1986).....	10, 11, 13
<i>Butler v. Craft Engineering Const. Co. Inc.</i> ,	
67 Wn.App. 684, 843 P.2d 1071 (1992).....	11
<i>Cent. Puget Sound Reg'l Transit Auth. v. Miller</i> ,	
156 Wn.2d 403, 128 P.3d 588 (2006).....	10
<i>County of Spokane</i> ,	
114 Wn.App. 523, 58 P.3d 910 (2002).....	11
<i>Harris v. Ski Park Farms, Inc.</i> ,	
120 Wn.2d 727, 844 P.2d 1006 (1993).....	12
<i>Hollis v. Garwall, Inc.</i> ,	
137 Wn.2d 683, 974 P.2d 836 (1999).....	16
<i>Logan v. Brodrick</i> ,	
29 Wn.App. 796, 631 P.2d 429 (1981).....	12
<i>Maxwell v. Maxwell</i> ,	
12 Wash.2d 589, 123 P.2d 335 (1942).....	11
<i>Queen City Sav. & Loan Ass'n v. Mechem</i> ,	
14 Wn. App. 470, 543 P.2d 355 (1975).....	11
<i>Schwab v. City of Seattle</i> ,	
64 Wn.App. 742, 826 P.2d 1089 (1992).....	12
<i>Seattle v. Nazarenius</i> ,	
60 Wash.2d 657, 374 P.2d 1014 (1962).....	10, 11, 12
<i>Snyder v. Haynes</i> ,	
152 Wn. App. 774, 217 P.3d 787 (2009).....	13
<i>Sunnyside Valley Irr. Dist. v. Dickie</i> ,	
149 Wn.2d 873, 73 P.3d 369 (2003).....	12, 13
<i>Veach v. Culp</i> ,	
92 Wn.2d 570, 599 P.2d 526 (1979).....	10, 12, 13
<i>Wenatchee Sportsmen Ass'n v. Chelan County</i> ,	
141 Wn.2d 169, 4 P.3d 123 (2000).....	11
<i>Wingert v. Yellow Freight Systems, Inc.</i> ,	
146 Wn.2d 841,50 P.3d 256 (2002).....	10
<i>Zobrist v. Culp</i> ,	
95 Wash.2d 556, 627 P.2d 1308 (1981).....	10, 11, 12, 13

I. Introduction

This case arises from a bench trial seeking to interpret and enforce a view easement.

II. Assignments of Error

Assignments of Error

1. The Court's Finding of Fact Nos. 2, 3, 5, 10 are not supported by substantial evidence and conflict with each other.
2. The Court's Conclusion of Law Nos. 1, 2 are not properly supported by the Court's Findings of Fact or Washington law.
3. The Court's Order ¶ No. 1-3 are Not Supported by the Express Easement, the Findings of Fact or the Conclusions of Law.

Issues Pertaining to Assignments of Error

1. Whether substantial evidence supported the Court's findings of fact surrounding the scope and purpose of the easement.
2. Whether the Court erred in interpreting the easement.
3. Whether the Court erred in redrafting the terms of the easement.

III. Statement of the Case

This case arises from disputed interpretations of a view easement. CP 47-59. The easement was drafted and recorded in 1990. CP 55-59. The easement provides:

Persons owning property described herein do so, in part, based on the fact that said properties have a reasonable unencumbered view of the Olympic Mountains and a partial view of Mount Rainier. It is the intent of the parties that the terms of this agreement be liberally construed so as to protect the reasonable expectations of landowners to have and protect such views as they exist on the date of the making of this agreement, herein after called the views... No landowner shall allow trees or any other form of vegetation on his property to obstruct or partially obstruct "the views" from any room of any other residence located on the properties described herein, even if said residence or room was constructed after the vegetation was planted and/or began growing...It is, however, understood and stipulated to, hereby and herein, that any and all vegetation controlling "the views," in place as of the date of this agreement shall be limited to the height and species of said date of this agreement and shall be bound no further by this agreement.
CP 56.

Between 1990 and 1994, no action was taken on the easement, since the Slaters had not yet completed construction of the property.
RP P. 41, li. 17-18. The Slaters first began clearing the property in 1994.

17 Q. When did you start clearing the view area?
18 A. Since we built the house, 1994 I'd say.
RP P. 41, li. 17-18.

From 1994 until 2006, the Slater's cleared the view easement without any complaint from the Babichs:

19 Q. And to what levels did you clear or trim the trees?
20 A. To 1990 levels. Anything that had grown up since 1990, I
21 tried to trim those.
22 Q. And how often were you trimming those?
23 A. Every couple of years it needed it.

24 Q. And how long did you trim the trees? For how many years?

25 A. Up to about 2005, 2006.

1 Q. Between 1990 and 2005, did Mr. Babich ever complain about

2 the way you trimmed the trees?

3 A. No.

4 Q. Did he ever ask you or ever tell you that you were trimming the trees excessively?

6 A. No.

CP 41, li. 19-25, P. 42, li. 1-6.

In 2006, the Slaters stopped maintaining the view easement as the Babichs agreed to maintain the views:

20 Q. You stopped trimming in the year 2005 or 2006. Why is

21 that?

22 A. John said he would trim the trees. And that was fine

23 with me. So he asked me to stop and he would do it.

24 Q. Between 2005 and 2010 did he, in fact, trim Government

25 Lot 2 as it applied to your view?

1 A. No, not in our view angle.

2 Q. Did you ask him to trim the trees?

3 A. Yes.

4 Q. How often did you ask him to trim the trees?

5 A. Every year or so, yeah.

6 Q. Did --

7 A. Because they had grown up and they needed trimming. You

8 know, it was a constant reminder that the trees needed a

9 trim.

10 Q. When you asked him to trim it, was it verbal and in

11 person?

12 A. Yes.
13 Q. Did he ever indicate that he would get around to
trimming
14 the trees?
....
19 THE WITNESS: Yes. He told me once that the
trimming
20 of the trees was not his high priority.
21 THE COURT: Now, you physically did it
yourself?
22 THE WITNESS: Yes.
23 THE COURT: I mean, this looks like a lot of
trees.
24 How do you do that?
25 THE WITNESS: Well, at first -- they were pretty
1 small, so at first it's just a few trees at a time would
2 get up into the view. And I've got a lot of experience
3 in tree care. My dad is an arborist, I grew up, so I've
4 got the chainsaw and all the equipment to do so. It's
5 not a problem for me.
RP P. 42, li. 20-25, P. 43, li. 1-25, P. 44, li. 1-5.

The Babichs knew Slater was trimming the easement during that time. RP P. 316, li. 19-25, P. 317, li. 1-14.

Despite the promise to cut the trees to meet the view easement requirements to 1990 levels, the Babichs did not do so. RP P. 340, li. 14-18.

After attempting to trim the trees to comply with the easement, and being chased off Babich's property, Slater filed this lawsuit:

3 Q. Was there a date certain that you were going to trim
the
4 trees yourself?
5 A. Yes. The first correspondence said we needed the
trees

6 trimmed and we were going to do it on a certain date
if
7 they weren't trimmed already by then.
8 Q. And did you, in fact, trim the trees?
9 A. I started to, yes.
10 Q. And what happened?
11 A. John came and stopped me.
12 Q. And how did he stop you?
13 A. He chased me off the property.
RP 64, li. 3-13.

Further, Slater testified as to the intent of the easement:

11 Q. Did you tell Mr. Schipper that you had any
requirements
12 on that view easement?
13 A. I objected to it, yeah, because Seattle wasn't listed
14 like -- specifically listed -- like the Olympic
Mountains
15 were. And he told me that --
16 MR. HANIS: Objection. Hearsay.
17 Q. (By Ms. Driessen) What was your understanding
from that
18 meeting?
19 A. That the easement calls out 1990 levels and being
20 maintained to those levels, including Seattle too.
21 Q. Before Mr. Shipper went to Mr. Bailey to
negotiate that
22 easement, did you tell them what level you wanted
those
23 trees at?
24 A. Well, the whole purpose of the easement was to
lock in
25 the level of the vegetation on Government Lot 2 as
it was
1 in 1990. RP P. 32, li. 11-25, RP. P. 33, li. 1.
2

Babich admitted he had no knowledge about the intent of the
easement:

2 Q. Were you a party to the easement?
3 A. No. But what it says, it's a view easement. I wasn't
4 party. No one here was a party to the easement.
5 Q. So you have no idea what the intent of the makers
actually
6 was?
7 A. Yeah. I don't know if they meant for people to have
8 daylight basements. I don't know that. They -- they
9 probably didn't think that people would build below
the
10 ground level and try to make a view out of it.
11 Q. But they understood that homes were going to be -
12 A. But they didn't understand that people would build
below
13 ground level.
14 Q. How do you know that?
15 A. I don't know. How do you?
16 Q. That's my point. That's my point.
17 A. But I know. My point is, is that we don't know
these
18 things. So we can only go with the hard thing, and
that
19 is the Olympic Mountains are there. RP 339, li. 2-
19.

After a bench trial on the issues, the Court entered findings and fact and conclusions of law. CP 108. The Court findings of fact and conclusions of law conflict with both the easement, but also with each other.

IV. Summary of Argument

The plain language of the easement, and the intent of the easement support an interpretation that maintains the view easement as it existed at 1990 levels. The trial Court erred in holding the view easement should be

solely interpreted to view the mountains, without regard to the foothills and balance of the view. Further the trial court erred in entering an order addressing the costs of compliance with the view easement that conflicts and materially changes the terms of the easement.

V. Argument

A. Standard of Review

Findings of fact are reviewed for substantial evidence. *Cent. Puget Sound Reg'l Transit Auth. v. Miller*, 156 Wn.2d 403, 419, 128 P.3d 588 (2006). Questions of law and conclusions of law are reviewed de novo. *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 847, 50 P.3d 256 (2002). *See Also Veach v. Culp*, 92 Wn.2d 570, 573, 599 P.2d 526 (1979).

B. Interpretation of Easements

It is well settled that a court should construe and enforce an express easement in accordance with the intention of the parties to the grant. *See Brown v. Voss*, 105 Wn.2d 366, 271, 715 P.2d 514 (1986) (“The extent of the right acquired is to be determined from the terms of the grant properly construed to give effect to the intention of the parties.”) *See Zobrist v. Culp*, 95 Wash.2d 556, 561, 627 P.2d 1308 (1981); *Seattle v. Nazarene*, 60 Wash.2d 657, 665, 374 P.2d 1014 (1962).

The extent of the right acquired is to be determined from the terms of the grant properly construed to give effect to the intention of the parties.

See Zobrist v. Culp, 95 Wn.2d 556, 561, 627 P.2d 1308 (1981); *Seattle v. Nazareus*, 60 Wn.2d 657, 665, 374 P.2d 1014 (1962). *Brown v. Voss*, 105 Wn.2d 366, 371, 715 P.2d 514, 517 (Wash.,1986). Findings of fact are reviewed under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

The intent of the parties to a deed is determined from the circumstances in which it was signed. *Hanson Industries. Inc. v. County of Spokane*, 114 Wn.App. 523, 58 P.3d 910 (2002). In interpreting an easement “a court is to look at ... the subject matter and objective of the contract, the circumstances under which the contract was made....” *Butler v. Craft Engineering Const. Co. Inc.*, 67 Wn.App. 684, 698, 843 P.2d 1071 (1992).

“Where the description of land in a deed or mortgage is vague, uncertain, or indefinite, parol evidence is admissible to explain and remove the uncertainty, and to identify the property intended to be conveyed, thus giving effect to the intention of the parties to the instrument.” *Maxwell v. Maxwell*, 12 Wash.2d 589, 596, 123 P.2d 335 (1942), *Queen City Sav. & Loan Ass'n v. Mechem*, 14 Wn. App. 470, 474, 543 P.2d 355 (1975) (if the intent is claimed to be unclear, courts may take into account parol evidence about the surrounding circumstances).

The intent of the original parties to an easement is determined from the deed as a whole. *Zobrist v. Culp*, 95 Wn.2d 556, 560, 627 P.2d 1308

(1981). A court's primary duty in construing an express easement is to ascertain and give effect to the parties' intent. *Schwab v. City of Seattle*, 64 Wn.App. 742, 751, 826 P.2d 1089 (1992). The parties' intent is determined from the language of the easement and the circumstances surrounding the grant. *Id.*; see also *Harris v. Ski Park Farms, Inc.*, 120 Wn.2d 727, 743, 844 P.2d 1006 (1993).

If ambiguity exists, extrinsic evidence is allowed to show the intentions of the original parties, the circumstances of the property when the easement was conveyed, and the practical interpretation given the parties' prior conduct or admissions. *City of Seattle v. Nazaremus*, 60 Wn.2d 657, 665, 374 P.2d 1014 (1962). *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 879-80, 73 P.3d 369, 372 (2003). Courts asked to determine the scope of an easement will generally consider the intention of the parties to the original grant, the nature and situation of the properties subject to the easement, and the manner in which the easement has been used and occupied. *Logan v. Brodrick*, 29 Wn.App. 796, 799–800, 631 P.2d 429 (1981). What the parties intended by their grant is a question of fact. *Veach v. Culp*, 92 Wn.2d 570, 573, 599 P.2d 526 (1979). The legal consequence of that intent is a question of law. *Id.*

The courts of Washington have clearly recognized that “.. [t]he interpretation of an (expressed) easement is a mixed question of law and

fact. What the original parties intended is a question of fact and the legal consequence of that intent is a question of law.” *Sunnyside Valley Irrigation District v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003) (interpretation of easement with respect to enlargement and maintenance of irrigation lateral); *Veach v. Culp*, 92 Wn.2d 570, 573, 599 P.2d 526 (1979) (conveyance of right-of-way to a railroad presented mixed question of fact and law).

The intent of the parties presents a factual question. *Veach v. Culp*, 92 Wn.2d at 573. (“It is a factual question to determine the intent of the parties.”) And the courts interpret grants to give effect “... to the parties original intent.” *Snyder v. Haynes*, 152 Wn. App. 774, 779, 217 P.3d 787 (2009) (ATV and ORV use of access road not contemplated by original agreement); and *Brown v. Voss*, 105 Wn.2d 366, 371, 715 P.2d 514(1986). The intent of the original parties is to be initially ascertained from the documents giving rise to the purported easement. *Zobrist v. Culp*, 95 Wn.2d 556, 560, 627 P.2d 1308 (1981).

**A. Both the Plain Language and the Intent of the Easement
Require 1990 Vegetation Levels**

Here, the express language of the easement establishes the intent of the view easement; to protect the view as it existed when the easement

was created. CP 59. Specifically, the easement's language provides, in part, that:

It is, however, understood and stipulated to, hereby and herein, that any and all vegetation controlling "the views" in place as of the date of the making of this agreement shall be limited to the height and species as of said date of this agreement and shall be bound no further by this agreement.

CP 56.

The Court's Findings of Fact and Conclusions of Law contradict. Finding of Fact No. 3 specifically holds that the vegetation is supposed to be kept at 1990 levels. CP 108. However, Finding of Fact No. 10 states, "Only that portion of the vegetation impairing the view of the top of the foothills is required to be trimmed/removed from the Babich property." CP 111.

Further, Conclusion of Law No. 1 states, "If any vegetation is exceeding the top of the foothills, that portion of the vegetation exceeding the top of the foothills shall be trimmed or otherwise removed, as set forth below." CP 112.

Here, the Conclusions of Law and Findings of Fact are internally inconsistent with the Court's Finding of Fact related to the vegetation

height. As a result, this Court should find that the Conclusions of Law should reflect the Court's findings of fact.

B. The Court Erred in Where the View Easement is to Be Determined

In Conclusion of Law #2, the Court held that the Slaters were entitled to a view easement at 1990 levels, but “[b]asement windows are not a reasonable vantage point.” CP 112. The Court's conclusion directly contradicts the plain language of the easement:

No landowner shall allow trees or any other form of vegetation on his property to obstruct, or partially obstruct “the views” from any room of any other residence located on the properties described herein.

The easement provides for no obstructions from any room. The Court's conclusion of law directly contradicts the easement and is in error.

C. The Court Erred in Allocating Costs for Future Compliance with the Easement

The Court's findings of fact and conclusions of law addressed future compliance with the view easement. Not only does the Court's findings of fact and conclusions of law conflict with the easement's plain language and intent, they also impose new and different conditions for compliance with the view easement.

In *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 696, 974 P.2d 836 (1999), the Supreme Court held that extrinsic evidence, contained in the affidavit of one of the developers that “the developers of the subdivision intended the restrictions to apply only to the smaller parcels of land included in the survey” was not admissible because it “is the unilateral and subjective intent of 1 of 10 of the original contracting parties.” *Hollis*, 137 Wn.2d at 696. The Court refused to “redraft or add to the language of the covenant” based on the unexpressed “intent” of one of the drafting parties. *Hollis*, 137 Wn.2d at 697.

Here, the Court’s Findings of Fact and Conclusions of Law dramatically change the language of the easement. First, the findings of fact create both notice and cost-shifting requirements that were not in the original easement. The original easement gave no requirement for notice to the burdened parcel. The Court’s order, imposing costs on the Slaters has no basis in the original document.

VI. Conclusion

The Court’s findings of fact and conclusions of law are directly conflict with the express language of the easement and are also internally inconsistent. As a result, the Court should reverse the trial court’s findings.

RESPECTFULLY SUBMITTED this 25th day of June, 2014.

The Law Office of Matthew R. King, PLLC

A handwritten signature in black ink, appearing to read 'M. R. King', is written over a horizontal line.

MATTHEW KING

Attorney for Petitioner

Washington State Bar Association No. 31822

Declaration of Mailing

I, Matthew King, hereby declare under penalty of perjury under the laws of the State of Washington, that I caused two copies of this brief to be mailed to the Court of Appeals and transmitted a copy via email to Respondent's counsel on the 25th day of June, 2014.

RESPECTFULLY SUBMITTED this 25th day of June, 2014 at Bellevue, Washington.

The Law Office of Matthew R. King, PLLC

A handwritten signature in black ink, appearing to read 'Matthew King', written over a horizontal line.

MATTHEW KING

Attorney for Petitioner

Washington State Bar Association No. 31822