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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' RESPONSE TO CROSS-APPELLANTS' OPENING BRIEF

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

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I. Introduction

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

II. Summary of Argument

The trial court's ruling denying attorneys' fees following the Cross-Appellant's Offer was proper as they did not improve their position following trial.

III. Argument

A. The Easement was Misconstrued

Washington law provides that a court must construe and enforce easements in accordance with the intent of the parties. *Brown v. Voss,* 105 Wn.2d 366, 271, 715 P.2d 514 (1986). Again, the Court must evaluate the right acquired is to be determined from the terms of the grant properly construed to give effect to the intention of the parties. *Seattle v. Nazarenus,* 60 Wn.2d 657, 665, 374 P.2d 1014 (1962).

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). 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

Here, easement expressly identifies the intent of the view easement; to protect the view as it existed when the easement was created. CP 59. 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.

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.

Further, 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.

B. Offer of Judgment - Standard of Review

Issues involving construction of an offer of judgment are reviewed de novo, while disputed factual findings concerning the circumstances under which the offer was made are usually reviewed for clear error. *Seaborn Pile Driving Co., Inc. v. Glew,* 132 Wn.App. 261, 131 P.3d 910 (2006), *review denied* 158 Wash.2d 1027, 152 P.3d 347.

C. CR 68's Application

CR 68[1] provides:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the court shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by

[1] CR 68 is similar to its federal counterpart. In the absence of state authority, Washington courts will to look to the federal interpretation of Fed. R. Civ. P. 68. *Hodge v. Development Services of America,* 65 Wn. App. 576, 828 P.2d 1175 (Div. 1 1992).

> further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

CR 68 is intended to encourage settlements and avoid lengthy litigation. *Dussault v. Seattle Pub. Schs.*, 69 Wn.App. 728, 732, 850 P.2d 581 (1993). If a party does not accept a timely CR 68 offer of judgment and then obtains a judgment at trial for less than the amount offered, then that party must pay the offeror's costs incurred after the making of the offer. *See* CR 68. However, the costs awarded are limited to those as prescribed in RCW 4.84.030 and RCW 4.84.080. *Jordon v. Berkey,* 26 Wn.App. 242, 245, 611 P.2d 1382 (1980) *citing Sims v. KIRO, Inc.*, 20 Wn.App. 229, 580 P.2d 642 (1978).

Courts must construe ambiguities in an offer of judgment against the drafter. *Lietz v. Hansen Law Offices, P.S.C.,* 166 Wn.App. 571, 271 P.3d 899 (2012). When an offer of judgment is silent on the issue of attorney fees, a court determines whether the offeree is entitled to an award of fees by looking to the underlying authority for such an award. *Washington Greensview Apartment Associates v. Travelers Property Cas. Co. of America,* 173 Wn.App. 663, 295 P.3d 284 (2013).

In comparing amount recovered by plaintiff against amount offered in settlement for purposes of determining whether attorney fees can be

awarded for time expended after rejection of settlement, only monetary award should be compared. *Real v. Continental Group, Inc.*, 653 F.Supp. 736 (N.D.Cal.1987). In *Real*, the Court held:

> The imprecision inherent in making such an evaluation for the purposes of the *Marek* comparison persuades me that, without more direction, the better course is to compare monetary awards only. In so doing, it is clear that the plaintiff's $50,000 judgment exceeds the approximately $42,000 in monetary relief offered in 1983. Accordingly, *Marek* does not preclude an award of reasonable fees incurred by the plaintiff subsequent to September 1983. I will, therefore, proceed to evaluate the plaintiff's instant fee request pursuant to the guidelines set forth for determining reasonable fees and costs in *Hensley v. Eckerhart,* 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) and its progeny.

Real v. Continental Group, Inc., 653 F.Supp. 736, 739 (N.D.Cal.,1987). Here, the offer made was more than just a monetary offer. It expanded and changed the language of the easement. As a result, under CR 68, the Court should not compare the equitable nature of relief granted following a trial, with the equitable relief offered in the CR 68 offer.

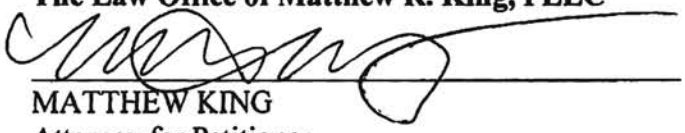
IV. Conclusion

The trial court erred in construing the easement. The intent of the easement has been frustrated by the Court's incorrect interpretation of the easement. This Court should reverse the trial court, order that the intent of the easement be carried out.

Further, the Babich motion for CR 68 attorneys' fees was properly denied. Comparing equitable relief presents a difficult situation for a trial court to quantify. As a result, the Court's order denying fees should be sustained.

RESPECTFULLY SUBMITTED this 25th day of September, 2014.

The Law Office of Matthew R. King, PLLC



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 September, 2014.

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

The Law Office of Matthew R. King, PLLC

MATTHEW KING
Attorney for Petitioner
Washington State Bar Association No. 31822