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668404

No. 668404

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

ASHLEY THOMAS and WENDI SMITH, husband and wife, and their marital community composed thereof; CHARLES M. OGDEN, an unmarried individual; and WILLIAM G. BROWN and G. LYNN BROWN, husband and wife, and their marital community composed thereof,

Appellants,

v.

BARRY REISS, an unmarried individual; and WALTER GUSTAFSON and SHEILA GUSTAFSON, husband and wife,

Respondents.

ASHLEY THOMAS and WENDI SMITH, husband and wife,

Counterclaimants/Third Part Plaintiffs,

v.

BARRY REISS, an unmarried individual; and WALTER GUSTAFSON and SHEILA GUSTAFSON, husband and wife,

Counterdefendants,

and

HOMESTREET BANK, a Washington State Chartered Savings Bank,
Third-Party Defendant.

RESPONDENT'S APPELLATE BRIEF

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July 22, 2011

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INTRODUCTION

This appeal involves an interpretation of a Stipulation and Order relating to a boundary line agreement, which states that a “new property boundary” between the parties’ properties “will be located along the new position of [a] re-located fence (4 feet south of the exterior wall of the garage) and will extend in a straight line west to the public road.” (CP 67). The fence to be relocated abutted the parties’ eastern boundary line.

The issue is whether the parties’ boundary line should be adjusted in its entirety to run from east to west and parallel to the fence four feet south of Respondent Barry Reiss’ (“Reiss”) garage or if the boundary should be only along the garage itself and to the west. Reiss submits that the language in the Stipulation and Order results in a new east-west boundary not just at the garage and to the west, but extending the entire length of the existing fence to the east, which is adjacent to the eastern boundary. The Trial Court agreed. The Trial Court’s ruling is correct as a matter of law, as more fully explained below.

ASSIGNMENTS OF ERROR

Reiss does not disagree with Ashley Thomas’ and Wendi Smith’s (the Thomases’) description of the issue on appeal, but submits that the Thomases did not include the entirety of the language of the applicable provision of the Stipulation and Order in their assignment of error. The

issue on appeal is whether the following language results in an east-west straight line property boundary between the Reiss/Thomas properties:

Defendants Thomas/Smith will relocate the chain link fence and footings from their current location on the south side of the Reiss garage to a location four feet (4') from the exterior wall of the Reiss garage.

The new property boundary between the Reiss and Thomas/Smith properties will be located along the new position of the re-located fence (4 feet south of the exterior wall of the garage) and will extend in a straight line west to the public road.

(CP 67). Reiss submits that it does and the Trial Court's ruling should be upheld.

STANDARD OF REVIEW

Reiss does not dispute that the standard of review is *de novo*.

STATEMENT OF THE CASE

In July 2007, a lawsuit was filed in this matter relating to a boundary line dispute between the parties in this appeal. The parties eventually entered into a Stipulation and Order regarding settlement, which was entered by the Court on June 4, 2010. (CP 66-80). The Stipulation and Order called for the relocation of a boundary line, a revised legal description, and required the Thomases to "pay the cost of the survey work necessary to prepare the description of the new legal boundary and new legal descriptions of their respective parcels consistent with the new boundary as described in the Stipulation and Order," as well

as to cut down some trees and relocate a fence according to the new boundary line. (CP 67, ¶¶1, 2, & 4). Per the Thomases' request, the survey work was performed by Thomas Barry of Metron & Associates. (CP 67, ¶4).

The new boundary line between the Reiss and Thomas properties was to be repositioned to align with a fence that was relocated to an area four feet south of the exterior wall of the Reiss garage.¹ (CP 67, ¶3). The fence previously ran from the parties' southeastern boundary line to the southwest corner of the Reiss garage. The pertinent language of the Stipulation and Order states, "**The new property boundary** between the Reiss and Thomas/Smith properties **will be located along the new position of the re-located fence** (4 feet south of the exterior wall of the garage) and will extend in a straight line west to the public road." (CP 67, ¶¶2 & 3) (emphasis added).²

In late June 2010, Mr. Barry began his work, including a survey of the properties. (CP 57, ¶3). The work was completed on August 5, 2010. (CP 59, ¶4; CP 82-84). However, at that time, the Thomases disputed the placement of the survey stakes in a triangular area near the driveway at

¹ Despite the Thomases' allegations to the contrary, only one fence is required to be relocated under the Stipulation and Order and subsequent Court Order enforcing the same. There is no evidence in the record supporting their allegation that multiple fences would need to be moved under the Court's Order.

² As it stood at the time the Stipulation and Order was entered, the Thomases' fence was inches from the Reiss garage.

the southwest corner of the property. (CP 43, ¶2; CP 58, ¶5). Reiss then brought a Motion to Enforce Settlement Agreement relating to the Thomases' dispute over the triangular area.

The Thomases retained new counsel after the Motion to Enforce was filed.³ The Motion was later stricken because on September 29, 2010, the Thomases agreed to accept the Stipulation and Order and survey as drawn. (CP 98; 107). At that time, the survey included the area in dispute in this appeal and identified that property as belonging to Reiss.

On November 10, 2010, Mr. Barry notified Reiss that the Thomases were disputing a new line location, though he had not yet restaked the property and it was not clear what their dispute was. (CP 100-101). On December 7, 2010, after the Thomases once again failed to follow the Stipulation and Order, counsel for Reiss wrote their new counsel a letter stating:

As you will recall, the Thomases previously agreed, after we filed a motion to enforce the settlement agreement, to the survey as performed by Mr. Barry and did not disagree with the areas surveyed or staked pursuant to the terms of the Settlement Agreement. As a result of that agreement, I cancelled the motion to enforce. However, it is now my understanding that the Thomases have failed to follow up with the surveyor and have failed to pay him for his work ...

(CP 107) (emphasis added). At no point did the Thomases disagree with the letter or its contents, including the fact that they agreed to the

³ The Thomases claim they never reviewed or signed the Stipulation and Order and that their former attorney gave away more than they authorized. However, their former attorney's declaration and attached exhibits indicate that he met with them to discuss the details on several occasions. (CP 14-15; 17-18; 20-21).

Stipulation and Order and Mr. Barry's survey. That survey provided (1) that the boundary line south of the Reiss garage would run from the eastern to western boundary in a straight line and (2) for four feet of space between the Reiss garage and the boundary line. (CP 83-84; 87; 101). Again, not once from August 2010 on, when the survey was completed, or during the dispute over the triangular area to the west, did the Thomases raise any issue with the ten foot area southeast of the garage, which is the subject of this dispute.

The surveyor staked the property again⁴ on December 13, 2010. The Thomases then began disputing the line at issue in this appeal. The survey and photos provided by Mr. Barry depict the area in dispute. (CP 44, ¶6; CP 48-50; 111; 114).

In late December 2010 after Reiss filed another Motion to Enforce with the Court, the Thomases finally moved their fence.⁵ It was moved only at the Reiss garage and did not extend east to the boundary. It was moved four feet from the garage and then at the southeast corner of the garage, it jogged back north toward the Reiss garage restricting Reiss' access.

This was contrary to the Stipulation and Order. Illustrations and photos from the surveyor show the issue. (CP 48-50). According to the

⁴ In August 2010, Mr. Thomas had pulled out the stakes.

⁵ However, the Thomases did not move and have not moved the footings for the fence, which is required in the Stipulation and Order.

Stipulation and Order, the entire boundary line and fence were to be reset to correspond with the distance of four feet from the Reiss garage. (CP 67 ¶¶3-4). The Thomases contend that the boundary line should be reset by four feet only at the garage and to the west, but not to the east. Adopting the Thomases' position on the boundary line would allow Reiss only a two foot opening at the southeast corner of his garage, which would substantially limit his access for purposes of maintenance. (CP 111).

The Trial Court determined that the language in the Stipulation and Order was clear that the entire boundary line would be adjusted; not just the area by the Reiss garage. (CP 3-6). The Court ordered that the survey and boundary lines completed by Mr. Barry, which were consistent with the Stipulation and Order, be used to establish the parties' ownership interests. (CP 4).

LEGAL ARGUMENT

A. The Trial Court had the authority to interpret the provision at issue on appeal.

Enforcement of a settlement agreement is governed by CR 2A. *Lavigne v. Green*, 106 Wn. App. 12, 16, 23 P.3d 515 (2001). CR 2A applies when (1) the agreement was made by the parties or attorneys with respect to the lawsuit and (2) the purport of the agreement is disputed. *In re Marriage of Ferree*, 71 Wn. App. 35, 39, 856 P.2d 706 (1993). In this case, CR 2A applies because the parties and their attorneys made the

agreement and the purport, or meaning, of one of the provisions is in dispute.

Under Washington law, settlement agreements are governed by general principles of contract law. *See Stottlemyre v. Reed*, 35 Wn. App. 169, 171, 665 P.2d 1383 (1983). Further, final judgments entered by stipulation or consent are contractual in nature. *Balmer v. Norton*, 82 Wn. App. 116, 121, 915 P.2d 544 (1996). In this case, there is a settlement agreement that was made final by virtue of a Stipulation and Order. Therefore, principles of contract law apply.

A court will enforce a settlement agreement when there is no genuine dispute as to the existence and material terms of the agreement, even in the absence of a writing signed by the party against whom the agreement is to be enforced. *See In re Marriage of Ferree*, 71 Wn. App. at 40-41. The dispute also must be genuine. *Id.* at 40. Immaterial terms simply do not matter. *Id.* “A litigant’s remorse or second thoughts about an agreement is not sufficient” to create a genuine dispute. *Lavigne*, 106 Wn. App. at 19.

In this case, neither party disputes that a settlement agreement exists or that all material terms were reached. However, it is evident from the Thomases’ numerous previous disputes over the Stipulation and Order that they may have remorse or second thoughts. Simply put, remorse or second thoughts do not matter. They cannot take back what they

previously agreed to give up. The only dispute is over the meaning of a specific provision and it is doubtful that the Thomases' dispute over the provision is genuine. In any case, the Trial Court had authority to enforce the Stipulation and Order and interpret the meaning of the provision at issue on appeal.

B. The Trial Court properly interpreted the provision.

Pursuant to established Washington contract law, contract terms must be given their ordinary meaning and their full effect. *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 502-503, 115 P.3d 262 (2005). “‘The touchstone of contract interpretation is the parties’ intent.’ Contract interpretation must be based on the intent of the parties **as reflected in their agreement.**” *Litowitz v. Litowitz*, 146 Wn.2d 514, 528, 48 P.3d 261 (2002) (emphasis added) (*quoting Tanner Elec. Coop. v. Puget Sound Power & Light*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996)). “Intent may be discovered . . . from actual language in an agreement, viewing the contract as a whole, the subject matter and objective of the contract, and the reasonableness of respective interpretations advocated by the parties.” *Id.*

Where contract terms are clear and unambiguous, courts look to the four corners of the contract for its interpretation. Courts “generally give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent.

[Courts] do not interpret what was intended to be written but what was written.” *Hearst Communications, Inc.*, 154 Wn.2d at 503-504 (internal citations omitted).⁶

Here, the parties had agreed to all applicable terms relating to the boundary line dispute and entered the Stipulation and Order in June 2010. In their appellate brief, the Thomases agree that the Stipulation and Order covered all issues between the parties and is clear on its face. (Thomas Brief, pp. 9 & 11). All parties involved have indicated that they do not dispute that the settlement agreement was entered into and the only issue in dispute is the interpretation of where the boundary line is to be set after the four feet from the garage is established.

The terms of the Stipulation and Order are clear and unambiguous. It states in part, “**The new property boundary between the Reiss and Thomas/Smith properties will be located along the new position of the re-located fence . . .**” (CP 67, ¶¶2 & 3) (emphasis added). The intent of the parties was that after a line four feet from the Reiss garage was established, the fence that ran from the Reiss garage to the eastern

⁶ The situation in *Carpenter v. Remtech Inc.*, cited in the Thomases’ brief, is distinguishable from the present situation. From the outset of the analysis, the court states that the suit is one in equity for contribution, not a suit in law on a contract. Further, the agreement that is analyzed is a general indemnity agreement. Unlike the present situation, a general indemnity agreement is very broad, overarching, and relatively ambiguous because it is used to apply to a vast array of issues. The court referred to extrinsic evidence because neither general indemnity agreement in that case referred to a specific bond or project. *Carpenter v. Remtech, Inc.*, 154 Wn. App. 619, 624, 226 P.3d 159 (2010). The Stipulation and Order in this case, however, is specific, precise, and pertains only to the situation at hand for which it was written. *Carpenter*, and its consideration of extrinsic evidence, is inapplicable to the case at bar.

boundary line (and its footings) would be relocated to that position and the entire boundary line would be moved and run in a straight line from east to west. A common sense reading of the Stipulation and Order also dictates that it requires the fence to be moved four feet from the south side of the Reiss garage and that the boundary should continue west and east; not stop at one point and provide only two feet of space for which Mr. Reiss would have to side step to get on the east side of his garage. The four corners of the document evidence the same.

Moreover, a given boundary line is presumed to continue in a straight line unless otherwise stated. 11 C.J.S. Boundaries § 198 (*citing Burgess v. Healey*, 73 Utah 316, 273 P. 968 (1929)). Here, the agreement did not state otherwise and therefore, the Trial Court properly applied a straight line extending the length of the properties.

The Thomases make a big deal out of the “straight line west” language as meaning that the line will only extend to the west and not to the east. However, if the Stipulation and Order is read as a whole, one can see that the intention was for the entire boundary line to be changed based on the line four feet from the Reiss garage would establish.

The parties added the westerly language only because to the west there is a circular drive that could have been confusing relating to the boundary line. This was also an area that was in dispute as one of the main issues of contention in the lawsuit, which is why it was more

specifically addressed. Additionally, the fence extended to the eastern boundary but not to the west. Therefore, a statement regarding the boundary line running to the east was unnecessary, as the fence already ran to the east. (CP 48; 84; 87; 101; 111) .

The Thomases also contend that if the line were to run east to west or in a straight line, the Stipulation and Order could have simply stated such. As previously discussed, this was unnecessary, as the fence and boundary already ran to the east and the Stipulation and Order required that the entire fence and all of its footings be moved to a location that would provide Reiss with four feet of space between his garage and the Thomases' boundary line. (CP 67).

The same argument regarding language that could have been stated can also be made regarding the Thomases' position. If the line were intended to jog back north several feet at the southeast corner of the Reiss garage, the parties should have, and arguably would have, stated as much, especially since the line would not have been straight and the entire fence would not have been moved. There is no provision in the Stipulation and Order discussing a decrease in square footage at the southeast wall of the Reiss garage. It is obvious that a straight line was intended, as the language states that the new boundary line between Reiss and Thomas (which clearly discusses the entire boundary line and not a portion thereof) would be located along the new position of the relocated fence. (CP 67).

Despite the submissions of several affidavits, the Trial Court based its decision on the unambiguous language of the Stipulation and Order. While the Trial Court was aware that Mr. Barry had interpreted the Stipulation and Order the same way that Reiss had and provided drawings evidencing this review, the Trial Court independently found the meaning of the provision from within the Stipulation and Order itself. The Trial Court determined that boundary lines are intended to run in a straight line through the entire property unless the parties specifically state otherwise. The Trial Court was correct as a matter of law and its decision should be upheld.

C. The Trial Court did not consider extrinsic evidence, but even if it had, its ruling was proper.

The Trial Court ruled correctly when it did not consider extrinsic evidence. However, even if it is found that the Trial Court considered extrinsic evidence, its ruling was proper and should be upheld.

Only when ambiguity exists, may extrinsic evidence be admitted to determine the parties' intent. *Hall v. Custom Craft Fixtures, Inc.*, 87 Wn. App. 1, 8, 937 P.2d 1143 (1997). "A contract provision is ambiguous when its terms are uncertain or when its terms are capable of being understood as having more than one meaning." *Mayer v. Pierce Co. Med. Bureau*, 80 Wn. App. 416, 421, 909 P.2d 1323 (1995). However, a contract provision is not ambiguous merely because the parties suggest opposite meanings. *Id.* at 421. "[A]mbiguity will not be read into a

contract where it can reasonably be avoided.” *McGary v. Westlake Investors*, 99 Wn.2d 280, 285, 661 P.2d 971 (1983).

In this case, there is a dispute over the meaning of a provision, but the dispute itself does not result in a finding of ambiguity. However, even if the Trial Court found an ambiguity and admitted extrinsic evidence, its ruling was proper.

Extrinsic evidence is admitted “not for the purpose of importing into a writing an intention not expressed therein, but with the view of elucidating the meaning of the words employed. Evidence of this character is admitted for the purpose of aiding in the interpretation of what is in the instrument, and not for the purpose of showing intention independent of the instrument.” *J.W. Seavey Hop Corp. of Portland, Or. v. Pollock*, 20 Wn.2d 337, 349, 147 P.2d 310 (1944) (*cited with approval in Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990)). Extrinsic evidence will be allowed in contract cases under the “context rule” set forth in *Berg* to determine the intent of the parties to the agreement – specifically when the court is asked to “declare the ‘meaning of what is written, and not what was intended to be written.’” *Martinez v. Miller Industries, Inc.*, 94 Wn. App. 935, 946, 974 P.2d 1261 (1999) (*quoting Berg*, 115 Wn.2d at 657).

Washington courts follow the objective manifestation rule of contract interpretation, which holds that the “unilateral or subjective

purposes and intentions about the meanings of what is written do not constitute evidence of the parties' intentions.” *Lynott v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 123 Wn.2d 678, 684, 871 P.2d 146 (1994). Under this approach, Washington courts “determine the parties’ intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties.” *Hearst Communications, Inc.*, 154 Wn.2d at 503 (internal citations omitted). Courts “impute an intention corresponding to the reasonable meaning of the words used. Thus, when interpreting contracts, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used.” *Id.* at 503-504.

Therefore, if the Trial Court used extrinsic evidence, it properly used it to determine the meaning of what was written in the Stipulation and Order and not what the parties contend was intended to be written. Documentation showing the parties’ negotiations evidences intent to move the entire fence and boundary line. Further, the fence that was to be relocated already extended from the Reiss garage to the eastern boundary. The surveyor, a professional with over 20 years of experience, also independently interpreted the Stipulation and Order the same way and created a survey and legal descriptions in accordance therewith. The Trial Court’s ruling that the new boundary line was a straight line running east to west was correct and should be upheld.

CONCLUSION

The parties' intent to relocate the boundary line to a location running in a straight line from east to west and providing four feet of clearance from the Reiss garage is clear from the Stipulation and Order. This intent is also apparent when reviewing extrinsic evidence, which is unnecessary in this case. Therefore, the Trial Court's ruling that the boundary line be relocated to such a position, as identified by the surveyor, should be upheld on appeal.

Dated this 22nd day of July, 2011.

Respectfully submitted,

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