IN THE SUPREME COURT OF THE STATE OF NEVADA

THERESA L. CURRIVAN, INDIVIDUALLY AND AS TRUSTEE OF THE THERESA L. CURRIVAN LIVING TRUST; JAMES D. CURRIVAN; AND TENT MOUNTAIN RANCH, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Appellants,
vs.
STEPHEN T. BENETO AND DARLENE E. BENETO, INDIVIDUALLY AND AS TRUSTEES OF THE BENETO FAMILY TRUST; PAUL J. MARCHI, INDIVIDUALLY AND AS TRUSTEE OF THE PAUL J. MARCHI FAMILY REVOCABLE TRUST; BYRON L. SNEDAKER; JILL OSWALT; AND A. GRANT GERBER,
Respondents.

No. 42415

FILED

DEC 20 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a district court judgment in an easement case and a post-judgment order regarding fees and cost. Fourth Judicial District Court, Elko County; Dan L. Papez, Judge.

Although we generally affirm the judgment and order of the district court, we remand this matter for the limited purposes of amending the damages award and clarifying the easement rights granted by the boundary line adjustment involving a sliver of land.

Interpretation of the easement

When reviewing a trial court's interpretation of an easement, this court has held that "[w]here the testimony conflicts the judge can

weigh the conflicting testimony and determine an adequate width and location of the easement;"[1] "'[a]s the trier of fact the trial court had the right to consider the credibility of the witnesses;' the appellate court will not 'substitute an appellant's construction of the facts for the meaning given them by the trial judge;'"[2] and "[o]ur inquiry on this issue is limited to whether there is evidence in the record to support the finding of the trial court. If the record contains such evidence, the judgment may not be disturbed on appeal."[3]

Finally, in the first of two companion cases, this court held that "[t]he question of whether the actual use to which an easement is devoted constitutes an unreasonable burden on the servient estate is primarily a question of fact and not of law."[4] After the remanded matter was also appealed, this court reiterated the "substantial evidence" standard of review, and noted that "substantial evidence is that which 'a reasonable mind might accept as adequate to support a conclusion.'"[5]

There was conflicting testimony about the intent of the easement. The gist of all the testimony was that the easement was originally and primarily used for access to the national forest, but not

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[1]Keller v. Martini, 86 Nev. 492, 494, 471 P.2d 207, 208 (1970).

[2]Sievers v. Zenoff, 94 Nev. 53, 56, 573 P.2d 1190, 1192 (1978) (quoting Fox v. First W. Sav. & Loan Ass'n, 86 Nev. 469, 472, 470 P.2d 424, 426 (1970)).

[3]Jensen v. Brooks, 88 Nev. 651, 653, 503 P.2d 1224, 1224-25 (1972).

[4]Breliant v. Preferred Equities Corp., 109 Nev. 842, 848, 858 P.2d 1258, 1262 (1993).

[5]Breliant v. Preferred Equities Corp., 112 Nev. 663, 669, 918 P.2d 314, 318 (1996).

exclusively for such access. The language of the easement does not mention the national forest at all, it simply grants "an easement across any existing roads or existing trails, or future roads built by Grantors or Grantors' assigns across [specific property section numbers]."

We conclude that the district court did not abuse its discretion in finding that the easement was not limited strictly to trips to and from the national forest. There was substantial evidence to support that interpretation, and the trial court was able to assess the credibility of the witnesses and weigh the conflicting testimony.

The district court also heard conflicting testimony about the location of roads and trails. It is obvious from its written decision that the district court considered both the weight of the testimony and the credibility of the witnesses in determining that the map made by the Gerbers was the correct map of roads and trails existing when the easement was granted, along with roads built subsequently. We conclude, therefore, that the district court's decision was supported by substantial evidence.

As to commercial use, there was evidence that the Currivans knew of the commercial use by Mike Gerber when they purchased the property. As well, there was abundant evidence that the easement was both intended and actually used for commercial purposes. We conclude that the district court did not err in permitting that use to continue.

Finally, there was conflicting testimony as to the location of the roadway easement, although there was very little testimony to support the Currivan's position that the roadway easement was strictly limited to an 80-foot wide strip adjacent to the southern boundary of their property. The roadway deviated slightly from the 330-foot easement boundary, but

the evidence showed that the deviation was necessary due to extreme elevation changes in the land at that point. We conclude that there was substantial evidence to support the district court's conclusion that the parties intended this road to be included in the easement.

Boundary line adjustments

Although NRS 278.461 generally calls for a parcel map to be recorded when land is divided, subsection (4)(c) provides an exemption for a division that is for the express purpose of "[a]n adjustment of the boundary line between two abutting parcels or the transfer of land between two owners of abutting parcels, which does not result in the creation of any additional parcels," as long as the adjustment complies with other planning and zoning statutes which primarily require a record of survey, the approval of each affected land owner, and proof that property taxes are current.[6]

Since the bulk of Oswalt's property that was not subject to the boundary line adjustment was part of the easement grant, the propriety of that boundary line adjustment does not in any way effect Oswalt's ownership of the easement. Therefore, we conclude that the district court properly determined that the issue of the allegedly improper boundary line adjustment between two parcels included in Oswalt's land purchase from Gerber was moot.

As for the Beneto sliver boundary line adjustment, the first survey map recorded was missing the signatures of a few of the affected owners, but a subsequent map was recorded that included the missing signatures. County authorities signed off on both maps, attesting to the

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[6]See NRS 278.5693.

payment of taxes and the approval of the county surveyor. Additionally, the easement grant appeared to contemplate the division of property that owned the easement, and approved of such a division in advance: "If any of the property owned by Grantees or any other after acquired property is divided by separation of ownership or by lease all parts shall enjoy the easement hereby created." Therefore, we conclude that there was sufficient evidence to support the district court's decision that the Beneto boundary line adjustment was properly done, and did grant easement rights to Beneto.

However, the district court further ruled that Beneto's easement rights from the sliver merged with his adjoining parcel. The rules of interpretation in this court's S.O.C., Inc. v. The Mirage Casino-Hotel[7] decision make it clear that an easement must be strictly construed in favor of the owner of the property, and that the "easement is only as broad as needed to achieve the intended result."[8] Here, the intended result was that owners of any part of the dominant estate had easement rights; that means that those easement rights only attach to the specific property in the easement grant, and not property subsequently attached to the specified property.

We conclude that although Beneto was properly granted easement rights based on his purchase of a sliver of land described in the easement grant as part of the dominant estate, those rights should attach only to the actual sliver of land, and not the entire 6.355-acre parcel to which the sliver was added.

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[7]117 Nev. 403, 23 P.3d 243 (2001).

[8]Id. at 408-09, 23 P.3d at 246-47.

The district court's order should be corrected to state that easement rights attach only to the sliver of land that was formerly part of Gerber's parcel, as that is the only land that was granted an easement in the conveyance. We therefore reverse that portion of the district court judgment, and remand this matter to the district court for correction of that portion of the order.

Counterclaims and damages

This court provided a thorough analysis of the "intrusion upon seclusion" tort in PETA v. Bobby Berosini Ltd..[9] That opinion provides, in pertinent part:

> To recover for the tort of intrusion, a plaintiff must prove the following elements: (1) an intentional intrusion (physical or otherwise); (2) on the solitude or seclusion of another; (3) that would be highly offensive to a reasonable person.
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> In order to have an interest in seclusion or solitude which the law will protect, a plaintiff must show that he or she had an actual expectation of seclusion or solitude and that that expectation was objectively reasonable.[10]
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> . . . .
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> A court considering whether a particular action is "highly offensive" should consider the following factors: "the degree of intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder's motives and objectives, the setting into which he intrudes, and

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[9]111 Nev. 615, 895 P.2d 1269 (1995).

[10]Id. at 630-31, 895 P.2d at 1279.

> the expectations of those whose privacy is invaded.[11]

The district court found that Oswalt had intentionally purchased her home in the Starr Valley for seclusion, and thus had an expectation of solitude while living there. Citing evidence that Oswalt was followed and chased by the Currivans, threatened with arrest by the Currivans, and watched through binoculars by the Currivans, the district court found that there was active, intentional, and unreasonable intrusion into Oswalt's solitude and seclusion. In considering whether the conduct was "highly offensive," the district court considered the facts of the specific behaviors by the Currivans, as well as the nefarious motives on the part of the Currivans, and determined that their behavior was indeed highly offensive. We conclude that the evidence is substantial in support of the trial court's decision, and that decision should be affirmed.

As to the counterclaim of civil conspiracy, this court has held that "[t]o prevail in a civil conspiracy action, a plaintiff must prove an agreement between the tortfeasors, whether explicit or tacit."[12] Further, "[a]n actionable conspiracy consists of a combination of two or more persons who, by some concerted action, intend to accomplish an unlawful objective for the purpose of harming another, and damage results from the act or acts."[13]

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[11]Id. at 634, 895 P.2d 1282 (quoting Miller v. National Broadcasting Co., 232 Cal. Rptr. 668, 679 (Cal. Ct. App. 1986).

[12]Dow Chemical Co. v. Mahlum, 114 Nev. 1468, 1489, 970 P.2d 98, 111-12 (1998).

[13]Sutherland v. Gross, 105 Nev. 192, 196, 772 P.2d 1287, 1290 (1989).

Although there was scant evidence of Mrs. Currivan actually participating in the physical destruction and blocking of roadways, there was evidence of discussions and confrontations about use of the easement and locked gates between the respondents and both of the Currivans. Given the level of discretion accorded the trial judge in such situations, we conclude that there was sufficient evidence to support the finding of civil conspiracy.

In considering the district court's finding of intentional interference and grant of injunctive relief, this court has held that the granting of an injunction must be preceded by the violation of a right, and that "[p]ermanent injunctive relief is available where there is no adequate remedy at law, where the balance of equities favors the moving party, and where success on the merits has been demonstrated."[14] This court has further held that "whether a determination in an action for declaratory judgment is proper is a matter for the district court's discretion and will not be disturbed on appeal unless the district court abused that discretion."[15]

The district court here found that the Currivans intentionally interfered with easement rights of the defendants. The injunctive relief granted does not specifically prohibit the Currivans from asking easement users to identify themselves. The district court's order states that legal users do not need to obtain permission from the Currivans to use the

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[14]State Farm Mut. Auto. Ins. v. Jafbros Inc., 109 Nev. 926, 928, 860 P.2d 176, 178 (1993) (quoting 43 C.J.S. § 16 (1978)).

[15]County of Clark v. Upchurch, 114 Nev. 749, 752, 961 P.2d 754, 756 (1998).

easement, nor do they need to report to or identify themselves to the Currivans. The Currivans were enjoined from harassing, intimidating, threatening, or coercing respondents, or in any way unreasonably interfering with the respondents' rights to use the easement.

We conclude that the district court did not abuse its discretion in fashioning such injunctive relief here. The relief is supported by competent evidence of easement rights having been violated, and the injunction is reasonable and within the discretion of the district court.

As to damages, this court has held that a "district court is given wide discretion in calculating an award of damages, and this award will not be disturbed on appeal absent an abuse of discretion."[16]

The only evidence of actual damages to Oswalt was from the deposition of her then-husband Snedaker. Snedaker testified that he and Oswalt spent $100 to fix a bulldozed road, $1,300 to fix a diverted drainage ditch, and $2,500 to reset a fence. Although the bulldozed road repair relates to the Currivan's conduct as to Oswalt's easement rights, it is apparent that the other two incidents resulted from run-of-the-mill neighbor disputes between the adjoining properties of Currivan and Oswalt. Therefore, we conclude, the district court's damage award to Oswalt should be reduced by $3,800, as those damages are not related to the easement dispute. On remand, we direct the district court to reduce the damage award to Oswalt by $3,800.

As to the award of $150 to Grant Gerber, appellants are correct when they assert that there was no evidence that Gerber suffered

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[16]Diamond Enters., Inc. v. Lau, 113 Nev. 1376, 1379, 951 P.2d 73, 74 (1997).

any monetary damage as a result of his nephew being charged to use the easement. However, the district court made it clear in its post-trial order that Gerber was harmed by the Currivan's coercive and unlawful acts toward a family member and guest, who was legally entitled to use the easement. The $150 award to Grant Gerber was determined by the district court to be an appropriate measure of damages for this harm.

Appellants point out that at the time the fee was charged to Gerber's nephew, Grant Gerber did not own easement rights, they belonged to his mother. The district court stated in the "procedural history" section of its findings of fact that at Laura Gerber's death, Grant Gerber became the sole owner of the parcel by joint tenancy. There is no evidence in the record challenging that finding of the district court, nor is there any evidence that the issue was raised to the district court below in appellants' motion to amend the findings of fact, conclusions of law and judgment. Accordingly, we conclude that it was within the discretion of the district court to award such damages.

Attorney fees

"The decision to award attorney's fees is within the sound discretion of the district court, but an award made in disregard of applicable legal principles may constitute an abuse of discretion."[17]

NRS 18.010(2)(a) permits a court to award attorney fees to a prevailing party who has not recovered more than $20,000. However, if property is awarded, the market value of the property must be included in the calculation of a party's recovery.[18] As to calculating attorney fees, this

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[17]Barozzi v. Benna, 112 Nev. 635, 638, 918 P.2d 301, 303 (1996).

[18]Locken v. Locken, 98 Nev. 369, 373, 650 P.2d 803, 805 (1982).

court in Hornwood v. Smith's Food King No. 1, held that the trial "court should consider the qualities of the advocate, the character of the work to be done, the work actually performed by the lawyer, and the result."[19]

The district court awarded attorney fees to Oswalt based on NRS 18.010(2)(a) as a prevailing party who recovered less than $20,000. The district court properly disagreed with appellants' contention that the value of the property right conferred upon Oswalt exceeded the statutory maximum, finding instead that no additional property rights were created or conferred since the court merely defined the scope of the easement.

The district court further refused to separate out fees spent on defense against the Currivans' claims from those spent on counterclaims, finding that claims and counterclaims were interrelated in a common factual setting, and that separating out specific hours of time to a particular portion of the case was not necessary or practical. We agree.

Finally, the district court properly analyzed the documentation submitted by Oswalt under the Hornwood factors, eventually reducing the amount from over $121,000 requested to an award of just over $81,000. Therefore, we find no abuse of discretion in the award of attorney fees to Oswalt.

NRS 18.010(2)(b) permits a trial court to award attorney fees to a party regardless of the recovery if the court finds that the opposing party's claims were "brought or maintained without reasonable ground or to harass the prevailing party." The trial court must determine if the action, at the time it was initiated, was frivolous or based on unreasonable

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[19]107 Nev. 80, 87, 807 P.2d 208, 212 (1991).

grounds.[20] That determination "depends on the actual circumstances of the case,"[21] and may include such factors as whether the party made reasonable investigation into the claims before they were made,[22] and whether allegations were supported by any credible evidence at trial.[23]

The district court here cited NRS 18.010(2)(b) as the basis for awarding attorney fees to both Gerber and Beneto, and noted that the $150 damage award to Gerber also made him eligible for an award of attorney fees under NRS 18.010(2)(a).

While the district court acknowledged that the easement at issue here was ambiguous, the court also acknowledged finding numerous instances where the Currivans acted unreasonably, and questioned the legitimacy of the claims brought in light of the Currivans' threats of a lawsuit to both Oswalt and Beneto in attempting to dissuade them from purchasing property that included the easement. The district court concluded that a substantial portion of the Currivans' action was brought in bad faith and/or to harass the respondents, in an attempt to coerce the respondents to give up their easement rights. These conclusions are supported by substantial evidence.

Further, the district court once again reviewed the documentation submitted by the parties under the Hornwood factors, and awarded amounts substantially reduced from the original requests.

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[20]Barozzi, 112 Nev. at 639, 918 P.2d at 303.

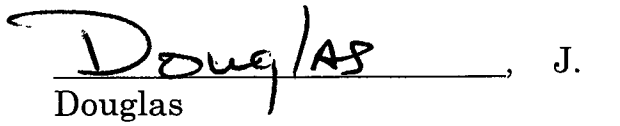
[21]Bergmann v. Boyce, 109 Nev. 670, 675, 856 P.2d 560, 563 (1993).

[22]Barozzi, 112 Nev. at 640, 918 P.2d at 304.

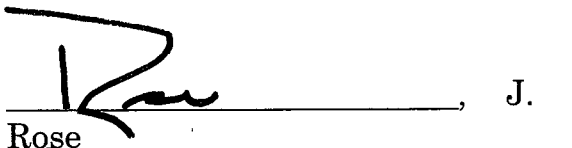
[23]Semenza v. Caughlin Crafted Homes, 111 Nev. 1089, 1095, 901 P.2d 684, 688 (1995).

The district court carefully considered all the circumstances of the case, including evidence presented and the situation at the time the action was initiated. Based on the above, we conclude that the district court did not abuse its discretion in awarding attorney fees to Gerber and Beneto. Accordingly, we

ORDER this matter REMANDED WITH INSTRUCTIONS to the district court to amend its judgment in a manner consistent with this order.



_____, J.
Douglas



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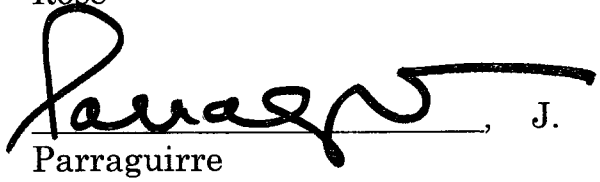
Rose



_____, J.
Parraguirre

cc: Hon. Dan L. Papez, District Judge
Goicoechea, DiGrazia, Coyle & Stanton, Ltd.
Thomas J. Hall
A. Grant Gerber & Associates
Phil Coker
James M. Copenhaver
Marc P. Picker
Michael L. Shurtz
Elko County Clerk