COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-15-00392-CV

LINDEMANN PROPERTIES, LTD. APPELLANT

V.

WARD A. CAMPBELL APPELLEE

FROM THE 97TH DISTRICT COURT OF ARCHER COUNTY
TRIAL COURT NO. 2013-0050A-CV

DISSENTING OPINION ON REHEARING

I. INTRODUCTION

By its express terms, the easement at issue here (the Easement), authorized the installation of a single radio-transmission tower and terminated if "said radio transmission tower" was "abandoned and/or removed." Because the Easement here is susceptible to only one reasonable interpretation after applying established rules of contract construction, and because the pertinent facts—that

a second, bigger, taller, and wider radio transmission tower was installed on the dominant estate in a new location and the original "said radio transmission tower" was dismantled and destroyed—are conclusively established, I would construe the Easement as a matter of law. In accordance with that construction, I would reverse the trial court's judgment for appellee Ward A. Campbell declaring that the Easement had not terminated and render judgment for appellant Lindemann Properties, Ltd. declaring that the Easement did terminate. *See Marcus Cable Assocs., L.P. v. Krohn*, 90 S.W.3d 697, 703 (Tex. 2002) (explaining that when an easement is susceptible to only one reasonable, definite interpretation after applying established rules of contract construction, we are obligated to construe it as matter of law even if the parties offer different interpretations of the easement's terms). The majority reaches a different conclusion, so I am compelled to dissent.

II. THE EASEMENT

In 1977, Lindemann's predecessor-in-title to the servient estate granted the Easement to Campbell's predecessor-in-title to the dominant estate. The Easement was granted "for and in consideration of TEN AND NO/100 ($10.00) Dollars." It was limited to granting:

> *[A]n easement or right for the installation of* ***a*** *radio transmission tower,* consisting of the tower itself and guy wires as necessary to support the same.
>
> ***Said*** *radio transmission tower will be located on a tract 500 feet by 500 feet,* the center of which to be determined by the actual

> location when installed on the following tract of land located in the County of Archer, State of Texas, to-wit:
>
> Situated on Lot No. One (1), Block No. Seventy-Five (75) ATN Subdivision, Archer County, Texas.
>
> Grantor recognizes that the general location as above described is based on a preliminary survey only *and hereby agrees that the easement hereby granted shall apply to the actual location of* ***said*** *radio transmission tower when located*.
>
> Together with the right of ingress and egress over my adjacent lands to or from said easement *for the purpose of inspecting, maintaining, constructing and removing* ***said*** *radio transmission tower* and appurtenances.
>
> TO HAVE AND TO HOLD the above described easement and rights unto the said A. O. Campbell, Jr., his successors and assigns, perpetually, *until* ***said*** *radio transmission tower shall be abandoned and/or removed*. [Emphases added.]

In accordance with the Easement, a 400-foot tall, 18-inch wide radio transmission tower was built in 1977 on what became the center point of the 500 foot by 500 foot easement.

In 2011, to facilitate a lucrative lease with LKCM Radio Group, L.P. for placement of F.M. radio-broadcasting equipment, Campbell built a new, bigger, taller, and wider radio-transmission tower on the Easement. The new radio tower was constructed out of larger metal tubing and was at least 20 feet taller and 3 feet wider than the old radio tower. After the new radio tower was built 18 feet from the old one, Campbell tore down the old radio tower.

III. THE LAWSUIT

Lindemann sued Campbell, seeking a declaration that the Easement had terminated. Following a bench trial, the trial court ruled for Campbell, made

findings of fact and conclusions of law,[1] and signed a judgment against Lindemann declaring that the Easement had not terminated. Lindemann perfected this appeal.

The pertinent facts of this appeal are not in dispute.[2] The relief sought by Lindemann, however, pivots on the legal correctness of the trial court's conclusions of law.

IV. THE LAW CONCERNING EASEMENTS

A property owner's right to exclude others from his or her property is recognized as "'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Id.* at 700 (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 384, 114 S. Ct. 2309, 2316 (1994)). A landowner may grant an easement that relinquishes a portion of this right to exclude others, but such a relinquishment is limited in nature. *Id*. An easement is a nonpossessory interest that authorizes its holder to use the property for only particular purposes. *Id*.; *see also Severance v. Patterson*, 370 S.W.3d 705, 721 (Tex. 2012) (recognizing easement allows another to use property for a specific purpose).

[1]A copy of the trial court's findings of fact and conclusions of law is attached hereto as Appendix A.

[2]The majority addresses Findings of Fact 13, 16, 22–24 and Conclusions of Law 9, 11, 12, 13, and 14. But Findings of Fact 16, and 22–24 are actually conclusions of law. *See Seasha Pools, Inc. v. Hardister*, 391 S.W.3d 635, 637 (Tex. App.—Austin 2012, no pet.) ("[A] trial court's designation of items as findings of fact or conclusions of law is not controlling on appeal, and we may treat the court's ruling as a factual finding or legal conclusion regardless of the label used.").

That is, an easement extends to certain persons the right to use the land of another for a specific purpose. *Corley v. Entergy Corp.*, 246 F. Supp. 2d 565, 572 (E.D. Tex. 2003). If a use does not serve an easement's express purpose, that use becomes an unauthorized presence on the land whether or not it results in any noticeable burden to the servient estate; thus, the threshold inquiry is not whether the proposed use results in a material burden but whether the grant's terms authorize the proposed use. *Id*. (citing *Marcus Cable*, 90 S.W.3d at 703).

When the terms used in the grant of an easement are not specifically defined, they should be given their plain, ordinary, and generally accepted meaning. *Marcus Cable*, 90 S.W.3d at 701. An easement's express terms provide the purpose for which the easement holder may use the property. *Id*.; *see also Canyon Reg'l Water Auth. v. Guadalupe-Blanco River Auth.*, 258 S.W.3d 613, 616 (Tex. 2008) ("The express terms of the easement determine the scope of the easement holder's rights."). Only what is necessary to "fairly enjoy the rights expressly granted" passes by implication because those who grant easements should be assured that their conveyances will not be construed to undermine their private-property rights—like the rights to "exclude others" or to "obtain a profit"—any more than what was intended in the grant. *Marcus Cable*, 90 S.W.3d at 701–02 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436, 102 S. Ct. 3164, 3176 (1982)). That is, in construing an easement, "[i]t is not necessary for [the easement grantor] to make any reservation to protect his interests in the land, for what he does not convey, he

still retains." *Id*. (quoting *City of Pasadena v. Calif.-Mich. Land & Water Co.*, 110 P.2d 983, 985 (Cal. 1941)).

V. STANDARDS OF REVIEW

We review a trial court's conclusions of law de novo to determine whether the trial court drew the correct legal conclusions from the facts. *State v. Heal*, 917 S.W.2d 6, 9 (Tex. 1996). We are not bound by the trial court's conclusions of law and will review them independently to determine their legal correctness. *Am. Flood Research, Inc. v. Jones*, 192 S.W.3d 581, 583 (Tex. 2006).

We likewise review the trial court's interpretation of the easement de novo. *See DeWitt Cty. Elec. Co-op., Inc. v. Parks*, 1 S.W.3d 96, 101 (Tex. 1999); *Eddins Enters., Inc. v. Town of Addison*, 280 S.W.3d 544, 548 (Tex. App.—Dallas 2009, no pet.). The rules of contract construction and interpretation apply to an express easement agreement. *N. Tex. Mun. Water Dist. v. Ball*, 466 S.W.3d 314, 319 (Tex. App.—Dallas 2015, no pet.) (citing *Parks*, 1 S.W.3d at 100).

VI. ANALYSIS

A. Scope of the Easement: The Easement Granted the Limited Right to Install a Single Radio-Transmission Tower

The scope of Campbell's rights is determined by the express terms of the Easement's grant. *Parks*, 1 S.W.3d at 103 ("[T]he scope of the easement holder's rights must be determined by the terms of the grant"). The Easement granted a "right for the installation of *a* radio transmission tower . . . [t]ogether

with the right of ingress and egress over [Lindemann's] adjacent lands to or from said easement for the purpose of inspecting, maintaining, constructing and removing *said* radio transmission tower and appurtenances." [Emphases added.] Thus, the express terms of the Easement grant a limited, specific use of the dominant estate for the installation and construction of *a* (singular) radio-transmission tower and provide for a limited right of ingress and egress over the servient estate for maintenance and removal of *said* (singular) radio-transmission tower. *See Kearney & Son v. Fancher*, 401 S.W.2d 897, 905 (Tex. Civ. App.—Fort Worth 1966, writ ref'd n.r.e.) (recognizing that because easement specifically stated the use or purpose for which it was created, easement was limited to such use and could not be enlarged); *see also Ybanez v. U.S.*, 98 Fed. Cl. 659, 667–68 (Fed. Cl. 2011) (holding Texas case law dictates that scope of easement be narrowly construed in accordance with its express terms so that original easement granting right-of-way to railroad for railroad-purpose use precluded subsequent use of easement for trails and railbanking and holding action by Surface Transportation Board allowing such use constituted a Fifth Amendment taking because it was beyond the scope of the original easement).[3]

The majority's scope-of-the-easement analysis would be correct if the Easement were a general-purpose easement or if the Easement included

[3]The *Ybanez* court relied on three Texas cases for this proposition, which are cited and relied upon herein as well. *See Marcus Cable*, 90 S.W.3d at 707–08; *Kearney & Son*, 401 S.W.2d at 903; *Mo., K. & T. Ry. Co. of Tex. v. Anderson*, 36 Tex. Civ. App. 121, 126–30, 81 S.W. 781, 785–86 (1904, writ ref'd).

language specifically authorizing construction of the new, bigger, taller radio transmission tower built in a new location. The scope of a general-purpose easement includes not only the use required at the time of the grant but also the right to use the easement in other ways that are connected to the articulated, general purpose of the easement. *See, e,g*., *Peterson v. Barron*, 401 S.W.2d 680, 683–84, 686 (Tex. Civ. App.—Dallas 1966, no writ) (holding general-purpose easement to be used for drainage and utilities facilities granting right to "construct, reconstruct and perpetually maintain drainage and utility facilities . . . upon and across the following described property" also included right "not only to install a sanitary sewer line, but also the right to use the area covered by easement for other drainage and utility facilities, including a drainage canal"). But the Easement is not a general-purpose easement; it does not grant a general, radio-transmission right-of-way or a general easement for the operation of a radio-broadcasting network. *Cf. Houston Pipe Line Co. v. Dwyer*, 374 S.W.2d 662, 663, 666 (Tex. 1964) (construing general-purpose easement for transportation of gas by pipeline); *Harris v. Phillips Pipe Line Co.*, 517 S.W.2d 361, 364 (Tex. Civ. App.—Austin 1974, writ ref'd n.r.e.) (construing general-purpose easement to be used for transportation of oil and gas); *Peterson*, 401 S.W.2d at 683–84, 686 (construing general-purpose easement to be used for drainage and utilities facilities). In fact, the Easement does not include the terms "right-of-way" or "operate" or any other terms that would grant to Campbell the right to administer some type of ongoing radio-transmission

business on the Easement in excess of "said radio transmission tower." *Cf. Dwyer*, 374 S.W.2d at 666 (construing general-purpose easement granting "a right of way to lay, maintain, operate, repair[,] and remove a Pipe Line for the transportation of gas"); *Harris*, 571 S.W.2d at 362 (construing general-purpose easement granting "the right of way from time to time to lay, construct, reconstruct, replace, renew, maintain, repair, change the size of and remove pipes and pipe lines for the transportation of oil, petroleum, or any of its products"); *Peterson*, 401 S.W.2d at 683 (construing general-purpose easement granting right to "construct, reconstruct and perpetually maintain drainage and utility facilities"). The Easement could have granted a general-purpose easement for a radio transmission right-of-way or for the operation of a radio-transmission broadcasting system, but it did not. *See, e.g.*, *Corley*, 246 F. Supp. 2d at 575 ("The grantor of an easement may limit the grant in any way the grantor chooses, and the grantee takes the easement subject to the restrictions imposed."); *see also Marcus Cable*, 90 S.W.3d at 703–05 (holding easement's grant of right to use property for the purpose of constructing and maintaining an electric transmission or distribution line or system did not authorize use of easement to provide cable-television services); *Kearney & Son*, 401 S.W.2d at 903 (holding easement's grant of "use of railroad switch track and grounds" did not grant access via vehicles or roads and holding easement terminated when railroad was abandoned).

Nor do the terms of the Easement specifically grant the rights Campbell now seeks—to reconstruct, replace, alter, enlarge, move, and change the size of the radio-transmission tower. *Cf*. *Boland v. Nat. Gas Pipeline Co. of Am.*, 816 S.W.2d 843, 844 (Tex. App.—Fort Worth 1991, no writ) (construing easement granted rights to "construct thereon and to reconstruct, operate, maintain, repair, alter, replace, move[,] and remove an initial pipeline, and any additional pipeline described by Grantee, for the transportation of gas, oil, or other substances transportable by pipeline, at route or routes selected by Grantee") (emphasis removed); *Harris*, 517 S.W.2d at 364 (discussing landowner's grant to Shell Oil as "patently . . . very broad" and including "the right to 'construct, reconstruct, replace, renew, maintain, repair, change the size of[,] and remove pipes and pipe lines'"); *Edgcomb v. Lower Valley Power & Light, Inc.*, 922 P.2d 850, 853 (Wyo. 1996) (explaining easement was perpetual and granted right to "construct, reconstruct, rephase, repair, operate[,] and maintain on the above-described lands and/or in or upon all streets, roads[,] or highways abutting said lands, an electric transmission and/or distribution line or system"). Nowhere do the terms of the Easement grant the right to engage in a second construction project to install a second radio-transmission tower on the dominant estate. Nowhere do the terms of the Easement grant the right to build on the dominant estate a new radio-transmission tower, that is bigger, taller, and wider and in a different spot than the original tower.

Despite the fact that the Easement is not a general-purpose easement that encompasses the right to construct a new, bigger, taller radio-transmission tower in a new location, and despite the fact that the Easement does not include language specifically authorizing construction of a new, bigger, taller radio-transmission tower in a new location, the majority holds that even Campbell's simultaneous broadcasting on the original radio-transmission tower and the new tower did not violate the scope of the Easement because the simultaneous broadcasting served "a potentially more important purpose: the safety and welfare of the residents of Archer County."[4] But promoting public safety cannot expand the express terms of a private easement. *See Marcus Cable*, 90 S.W.3d at 704 ("In sum, the easement language here, properly construed, does not permit cable-television lines to be strung across the Krohn's land without their consent. However laudable the goal of extending cable service might be, we cannot disregard the easement's express terms to enlarge its purposes beyond those intended by the contracting parties."); *cf. Harris*, 571 S.W.2d at 364 (holding simultaneous use of new and old pipeline was authorized when the easement was a general-purpose easement for the transportation of oil and gas and when the easement specifically granted "the right of way from time to time to lay, construct, [r]econstruct, replace, renew, maintain, repair, change the size

[4]Maj. Op. at 26.

of[,] and remove pipes and pipe lines for the transportation of oil, petroleum, or any of its products").

Instead, the terms of the Easement grant only the limited "right for the installation of ***a*** radio transmission tower." [Emphasis added.] Thus, the scope of the Easement does not include the right to build a new, bigger, taller, and wider radio-transmission tower in a new location. *See, e.g.*, *Ybanez*, 98 Fed. Cl. at 667–68 (holding that where "a particular purpose is not provided for in the [easement's] grant, a use pursuing that purpose is not allowed" (quoting *Marcus Cable*, 90 S.W.3d at 701–02)); *Kearney & Son*, 401 S.W.2d at 903 (explaining that "[w]here the terms [of easement's granting clause] are specific, they are decisive of the limits of the use, so that the use may not be enlarged beyond that warranted by the grant").

I would hold as a matter of law that the express terms of the limited, narrow grant provided by the Easement's use of the singular indefinite article "a" and the Easement's use of the adjective "said"—both describing the single, original radio transmission tower—do not include a grant of the right to build and install successive, new, bigger, taller, and wider radio transmission towers anytime lessees of space on the tower request such accommodations.[5] I would therefore hold that the trial court erred in its conclusions of law to the contrary.

[5]The majority holds that a literal singular construction of the terms "a" and "said" used in the Easement's granting clause somehow conflicts with the term "maintaining" used in the Easement's ingress/egress clause, but I see no conflict. The ingress/egress clause grants a right of access for the purpose of

B. The Easement's Habendum Clause Was Triggered When the Original Tower was Removed and Abandoned; thus, the Easement is Determinable

An easement that terminates upon the happening of a particular event or contingency is a "determinable easement." *See, e.g.*, *Thompson v. Clayton*, 346 S.W.3d 650, 655 (Tex. App.—El Paso 2009, no pet.). The Easement's habendum clause provides that the Easement is perpetual "*until* ***said*** *radio transmission tower shall be abandoned and/or removed*." [All emphases added.] Thus, the Easement here is a determinable easement. *See id.* And under the plain language of the Easement's habendum clause, when "said" (i.e., the original) radio-transmission tower was removed, the Easement automatically terminated. To construe the Easement as continuing even after removal of "said" radio transmission tower eviscerates the habendum clause and its specific language making the Easement determinable and rewrites the Easement to make it perpetual. *See ETC Tex. Pipeline, Ltd v. Payne*, No. 10-11-00137-CV, 2011 WL 3850043, at *7 (Tex. App.—Waco Aug. 31, 2011, no pet.) (mem. op.) (declining to adopt ETC's interpretation of easement because its interpretation

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"maintaining . . . *said* radio transmission tower." [Emphasis added.] And the Easement's habendum clause terminates the Easement when "*said* radio transmission tower shall be abandoned and/or removed." [Emphasis added.] The rights granted by the Easement are consistently tied to "*said* radio transmission tower," not to a radio transmission right-of-way or to a right to operate a radio-broadcasting network. The Easement grants the right to install one radio-transmission tower; subsequent towers require subsequently negotiated easements. *See Dwyer*, 374 S.W.2d at 665–66 (holding gas pipeline easement granted thirty years earlier for $32 did not authorize an increase in the size of the pipeline every time increased consumer demand for gas occurred).

would make the easement perpetual and "eviscerate the eighteen-month non-use termination clause"); *Kearney & Son*, 401 S.W.2d at 905 ("To hold that a permanent easement of access across appellant's property exists by virtue of the grant in the deed violates the express language and terms of the grant and enlarges the use of the appellant's property from that stated in the express grant."); *see also Scott v. Walden*, 165 S.W.2d 449, 451 (Tex. 1942) (holding habendum clause, providing that easement "shall continue so long as the same may be necessary and required for ingress and egress[,]" could not be ignored because it manifested parties' intent that easement not be perpetual and evidence presented raised fact issue on whether easement remained necessary). Such an interpretation of the Easement violates one of the most basic rules of contract construction—it fails to give effect to an entire clause, the habendum clause.[6] *See, e.g.*, *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996) (recognizing presumption that parties to a contract intend every clause to have effect); *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983) (recognizing rule of construction that entire contract will be harmonized to give effect to all provisions of the contract so that none will be rendered meaningless).

[6]Although "said" radio transmission tower was both abandoned and removed, the majority holds that the habendum clause was not triggered and is not rendered meaningless because it hypothetically could be triggered if said original tower is subsequently removed and not replaced or replaced when unnecessary for said tower's maintenance. *See* Maj. Op. at 29. The fallacy in this hypothetical is that "said" radio transmission tower, the original tower, is now gone forever; it cannot be again removed or abandoned, so the habendum clause now cannot be triggered and has been eviscerated.

We must presume that the parties to the Easement intended every clause to have some effect.

The undisputed evidence conclusively established that Campbell "abandoned and/or removed . . . said radio transmission tower," that is, the original radio-transmission tower. Consequently, by its own express terms, the Easement terminated. I would therefore hold that the trial court erred in its conclusions of law to the contrary.

C. Construction of an Entirely New Radio-Transmission Tower Does Not Constitute Maintenance of the Old Tower

In addition to the granting clause and the habendum clause, the Easement contains a clause authorizing ingress and egress over the servient estate for "the purpose of inspecting, maintaining, constructing[,] and removing *said* radio transmission tower and appurtenances." [Emphasis added.] The trial court and the majority construe this ingress-egress clause as authorizing Campbell to build an entirely new, bigger, taller, and wider radio transmission tower in a spot 18 feet from the old tower under the guise of "maintaining" the old tower.

Because the term "maintenance" is not defined in the Easement, it is to be given its ordinary and common meaning. *See Heritage Res.*, 939 S.W.2d at 121 (explaining that if a term in a conveyance is not specifically defined then that term is given its plain, ordinary, and generally accepted meaning). No definition of "maintenance" exists that includes the destruction of the thing being maintained. Maintenance performed on a radio-transmission tower does not include tearing

down and dismantling that radio-transmission tower and constructing an entirely new radio-transmission tower. *See, e.g.*, *Parks*, 1 S.W.3d at 103 (reversing court of appeals' construction of easement because the terms "obstruction," "cut," and "cut down" were unambiguous and court's construction failed to give terms their common meanings). Even when an easement grants a general right-of-way for the operation of a gas pipeline and grants a right of ingress and egress to maintain that pipeline, to qualify as "maintenance," any replacement of the original pipe must be with pipe of the same size. *See Dwyer*, 374 S.W.2d at 664 (holding that easement for transportation of gas by pipeline that granted right to "lay, construct, maintain, operate[, and] repair" a pipeline nonetheless prohibited defendant from replacing 18-inch pipeline defendant elected to install in given location with a 30-inch, high-pressure pipeline under the guise of maintenance). Thus, here, if replacement of the original radio-transmission tower could qualify as "maintenance," *Dwyer* mandates that such replacement be with a radio transmission tower of the same size. *Id*.

The undisputed evidence here conclusively established that Campbell did not remove and replace the original radio-transmission tower with a tower of the same size. Instead, under the guise of maintenance, Campbell constructed a new, bigger, taller, and wider radio-transmission tower and placed it in a different spot—the very conduct prohibited in *Dwyer* as inconsistent with "maintenance." *Id*. at 666 ("Defendant was not authorized to remove this 18-inch line initially constructed and replace it with a line of substantially greater size."). Accordingly,

I would hold that Campbell's destruction of the original radio-transmission tower and his construction—to satisfy the needs of potential lessees like LKCM Radio Group, L.P.—of a new, bigger, taller, and wider radio-transmission tower located in a different spot does not constitute "maintenance" authorized by the Easement. *See id*. Just as the supreme court in *Dwyer* held that it did not follow from the easement's granting language that the grantor for $32 in 1926 intended to burden the servient estate with an easement that might be enlarged over and over again as often as an increase in demands for gas might make it necessary, so I would hold that it does not follow from the Easement's narrow granting language that the grantor here for $10 in 1977 intended to burden the servient estate with an easement that might be enlarged over and over again as often as an increase in tower size is demanded by potential lessees. *See id*. at 665–66.

D. Construction of the New Radio-Transmission Tower and the Boundaries of the Easement

On rehearing, the majority holds that the construction of a new radio-transmission tower in a new spot does not alter the physical boundaries of the Easement.[7] This may or may not be true. It is, however, irrelevant. The express terms of the Easement do not authorize construction of a completely new, taller, bigger, wider radio-transmission tower regardless of whether such construction falls inside or outside the physical boundaries of the Easement. *See, e.g.*,

[7]Maj. Op. at 24.

Ybanez, 98 Fed. Cl. at 667–68; *Parks*, 1 S.W.3d at 101; *Kearney & Son*, 401 S.W.2d at 905.

Even assuming the relevancy of the no-change-in-the-boundaries-of-the-Easement analysis, the majority's holding—that because Campbell's positioning of the new tower in a new location purportedly within the existing boundaries of the Easement caused no day-to-day change in Lindemann's day-to-day operations, the new tower's change in location was not "substantial"—is incompatible with Texas case law.[8] The fact that the new location of the new tower did not cause a change in Lindemann's operations does not authorize an expansion of the Easement's express terms, which are limited to "a right for the installation of a radio transmission tower." *See Corley*, 246 F. Supp. 2d at 572 ("If a use does not serve the easement's express purpose, it becomes an unauthorized presence on the land whether or not it results in any noticeable burden to the servient estate . . . [t]hus, the threshold inquiry is not whether the proposed use results in a material burden, but whether the grant's terms authorize the proposed use."). Texas courts do not consider whether a change in the location of an Easement is substantial; instead, once established, the

[8]The majority cites only out-of-state cases for the proposition that the location of a fixed easement can be changed without the consent of the dominant and servient estate owners so long as the change is not "substantial." But Texas cases hold otherwise; any alteration in the boundaries of a fixed easement requires the consent of both parties. *See, e.g., Dwyer*, 374 S.W.2d at 665-66 (rejecting construction of easement that would permit easement, once fixed, to be unilaterally enlarged over and over again); *Cozby v. Armstrong*, 205 S.W.2d 403, 407 (Tex. Civ. App.—Fort Worth 1947, writ ref'd n.r.e).

location of an easement cannot be changed by either the owner of the dominant estate or the owner of the servient estate without the consent of both parties. *See, e.g*., *Severance*, 370 S.W.3d at 722; *Harbor Ventures, Inc. v. Dalton*, No. 03-10-00690-CV, 2012 WL 1810205, at *10 (Tex. App.—Austin May 18, 2012, pet. denied) ("Once established, the location of the easement cannot be changed by either the easement owner or the servient owner without the consent of both parties.") (mem. op.); *Holmstrom v. Lee*, 26 S.W.3d 526, 533 (Tex. App.—Austin 2000, no pet.) ("Once established, the location or character of the easement cannot be changed without the consent of the parties."); *Samuelson v. Alvarado*, 847 S.W.2d 319, 323 (Tex. App.—El Paso 1993, no writ) ("Once established, the location of the easement cannot be changed by either the easement owner or the servient owner without the consent of both parties."); *Cozby v. Armstrong*, 205 S.W.2d 403, 407 (Tex. Civ. App.—Fort Worth 1947, writ ref'd n.r.e.) ("When an easement granted in indefinite terms has been once selected and located, its location cannot be changed by either the owner of the land or the owner of the easement without the consent of the other party, for it would be an incitement to litigation to treat such an easement as a shifting one, and would greatly depreciate the land on which it is charged and discourage its improvement." (quoting 15 Tex. Jur. 769)). The undisputed evidence establishes that Lindemann did not consent to the new location selected by Campbell for the building of the entirely new, bigger, taller, and wider radio-transmission tower.

VII. CONCLUSION

For the reasons set forth above, I would hold that the trial court's conclusions of law—that the scope of the Easement was not violated, that the construction of the new radio-transmission tower was maintenance of the original tower, that the original tower was not abandoned, and that the Easement did not automatically terminate—were erroneous as a matter of law. I would sustain Lindemann's first three issues, reverse the trial court's judgment for Campbell—including the award of attorney's fees (mooting Lindemann's fifth issue), render a judgment for Lindemann declaring that the Easement automatically terminated under its terms, and remand the case to the trial court to address Lindemann's claim for injunctive relief (its fourth issue) and Lindemann's claim for attorney's fees. Because the majority does not, I am compelled to dissent.

/s/ Sue Walker
SUE WALKER
JUSTICE

DELIVERED: June 22, 2017

APPENDIX A

NO. 2013-0050A-CV

LINDEMANN PROPERTIES, LTD.	§	**IN THE DISTRICT COURT**
Plaintiff,	§	
	§	
V.	§	**97TH JUDICIAL DISTRICT**
	§	
WARD A. CAMPBELL	§	
Defendant.	§	**OF ARCHER COUNTY, TEXAS**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

NOW COMES the Court, having heard the evidence and argument of counsel in this cause and makes the following findings of fact and conclusions of law listed below. To the extent any findings of fact are deemed to be conclusions of law, they are incorporated herein as conclusion of law. To the extent that any conclusions of law are deemed to be findings of fact, they are incorporated herein as findings of fact.

I.

Findings of Fact

1. On or about March 7, 1977, Howell E. Smith d/b/a Muleshoe Cattle Company granted an easement (the "Easement") to A.O.Campbell, Jr.

2. A true and correct copy of the instrument that created the Easement (the "Easement Instrument") referenced in Paragraph 1, above, was admitted into evidence during the trial of this cause on June 29, 2015, as Plaintiff's Exhibit 1, and is attached hereto as Exhibit A.

3. Defendant Ward A. Campbell ("Campbell" or "Defendant") is A.O. Campbell, Jr.'s son and succeeded to A.O. Campbell, Jr.'s interest in the Easement.

4. Defendant held a valid Easement on the Property for the purpose of installing a radio tower and guy wires necessary to support the same.

5. Lindemann Properties, Ltd. ("Lindemann" or "Plaintiff") acquired title to the Property (defined below in Paragraph 7) in 2009, subject to the Easement.

6. The Easement Instrument states that it granted "an easement or right for the installation of a radio transmission tower, consisting of the tower itself and guy wires as necessary to support the same."

7. The Easement Instrument states that "said radio transmission tower will be located on a tract 500 feet by 500 feet" (the "Tract") within a larger area described as "Lot No. One (1), Block No. Seventy-five (75) ATNC Subdivision, Archer County, Texas." Lot No. One (1), Block No. Seventy-five (75) ATNC Subdivision, Archer County, Texas," is referred to herein as the "Property."

8. The Easement Instrument granted "the right of ingress and egress over my adjacent lands to or from said easement for the purpose of inspecting, maintaining, constructing and removing said radio transmission tower and appurtenances."

9. The boundaries of the Tract would be determined by the location of the tower itself, with the center of the Tract being the site of the tower.

10. The Easement would remain in existence perpetually, until said radio transmission tower should be abandoned and/or removed.

11. A radio transmission tower (the "Original Tower") was constructed within the Tract in 1977.

12. The Original Tower was enclosed by a pipe fence since the 1970's.

13. The Original Tower remained standing until it was replaced and removed in 2012 due to evidence of structural instability.

14. The Original Tower was standing while a replacement tower (the "New Tower")

was constructed on the Tract.

15. The New Tower was constructed within the same pipe-fenced enclosure as the Original Tower.

16. Replacement of the Original Tower was necessary to maintain a functional tower in the Tract.

17. The Original Tower was removed after it was replaced by the New Tower.

18. The Original Tower was removed as soon as was practicable after all transmission equipment was relocated to the New Tower.

19. The Original Tower was removed only after it was no longer transmitting.

20. The New Tower does not increase the burden on the surface estate.

21. The New Tower does not exceed the scope of the Easement.

22. The building of the New Tower does not effect a termination of the Easement.

23. No actions of Defendant in connection with the maintenance of the Easement effected a termination of the Easement.

24. The Easement has not terminated and is still in existence.

25. $51,763.75 is a reasonable fee for the necessary services performed by Defendant's attorneys through the trial court phase of this case.

26. Defendant incurred $4,342.44 in reasonable and necessary expenses through the trial court phase of this case.

27. Exhibit 29 was offered by Plaintiff.

28. Exhibit 29 was Defendant's list of revenue received from both the Original and New Towers.

29. $25,000 is a reasonable fee for the necessary services to be performed by

Defendant's attorneys if there is an appeal to the Court of Appeals.

30. $10,000 is a reasonable fee for the necessary services to be performed by Defendant's attorneys if a Petition for Review is filed with the Texas Supreme Court.

31. $20,000 is a reasonable fee for the necessary services to be performed by Defendant's attorneys if the Texas Supreme Court grants the Petition for Review.

II.

Conclusions of Law

1. The award of $51,106.19 in attorney's fees to Defendant is equitable and just.

2. The award of $4,342.44 in reasonable and necessary expenses to Defendant is equitable and just.

3. The award of $25,000 in attorney's fees to Defendant if there is an appeal to the Court of Appeals is equitable and just.

4. The award of $10,000 in attorney's fees to Defendant if a Petition for Review is filed with the Texas Supreme Court is equitable and just.

5. The award of $20,000 in attorney's fees to Defendant if the Texas Supreme Court grants the Petition for Review is equitable and just.

6. Necessary legal services performed for Defendant on Lindemann's trespass claim are indistinguishable from necessary legal services performed for Defendant to create and sustain its arguments regarding the surface burden of the Original and New Towers.

7. The New Tower does not increase the burden on the surface estate.

8. The New Tower does not exceed the scope of the Easement.

9. The building of the New Tower does not effect a termination of the Easement.

10. Defendant's Easement included the right to maintain the radio transmission tower

on the Tract.

11. Defendant's right to maintain included his right to replace the Original Tower with the New Tower.

12. The removal of the Original Tower after replacement with the New Tower does not effect a termination of the Easement.

13. The Original Tower was not abandoned; it was replaced.

14. No actions of Campbell in connection with the maintenance of the Easement effected a termination of the Easement.

15. The Easement has not terminated and is still in existence.

16. Exhibit 29 as offered by Plaintiff at trial was not relevant to the issues before the Court.

Signed this 12 day of November, 2015.

Jack A. McGaughey, Judge Presiding