NUMBER 13-15-00604-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

JOHN CLAYTON WIATREK, **Appellant,**

v.

MARK SHIMEK, **Appellee.**

On appeal from the 267th District Court of Calhoun County, Texas.

MEMORANDUM OPINION

Before Justices Contreras, Perkes[1] and Longoria
Memorandum Opinion by Justice Longoria

Appellant John Clayton Wiatrek appeals a judgment which denied his motion for summary judgment and petition for declaratory relief, granted appellee Mark Shimek's

[1] The Honorable Gregory T. Perkes, former Justice of this Court, did not participate in this decision because his term of office expired on December 31, 2016.

cross-motion for summary judgment, and awarded Shimek $48,350 in attorneys' fees plus contingent appellate fees. We reverse and remand.

I. BACKGROUND

A. Wiatrek Purchases 245.13 Acres From Shimek

Shimek owned a large parcel of land in Calhoun County that was often used by hunters pursuant to a hunting lease. Wiatrek, who had hunted there before, purchased 245.13 acres of the land with plans to run a hunting guide business. Shimek executed a warranty deed which transferred the 245.13 acres and, because the tract was fully enclosed by Shimek's remaining land and land owned by others, expressly granted Wiatrek a "roadway easement" across Shimek's remaining land. The deed provides that the roadway easement is 4.48 acres long, seventy-five feet in width, and half a mile in length. A document attached to the deed and incorporated into it describes the location of the easement in metes and bounds.

Both parties agree that the easement begins at a gate leading off of the highway and runs parallel to a canal operated by the Guadalupe-Blanco River Authority ("GBRA") until it reaches Wiatrek's property. At one point, the easement crosses an open drainage ditch on Shimek's land which runs perpendicular to the canal. A dirt-and-gravel road fifteen feet wide begins at the same gate and runs parallel to the canal until it diverges to meet a culvert (the "old culvert") which allows passage over the drainage ditch. At the time Wiatrek purchased the land, the old culvert was the only way for him to reach his new property from the road. It is undisputed that both parties believed at the time of the purchase that the easement followed the dirt road all the way from the gate to the old

culvert.[2]

Wiatrek operated his hunting guide business on his property for approximately ten years after the purchase without problems. According to his petition, Wiatrek's customers during this time would often use the dirt road to access his property. When rain made the road impassible, Wiatrek stated that he would often instruct his customers to park on a gravel-covered area in front of the gate that is wider than the road. The dispute between

[2] We reproduce the graphic below from Wiatrek's brief to assist the reader in visualizing the property at issue.

the parties began when Wiatrek's customers allegedly parked directly on the dirt road and obstructed Shimek's own use of the road. The disagreement escalated to the point that Shimek blocked both entrances to the easement by placing steel I-beams and parking tractors across the road.

B. Wiatrek Files Suit

Wiatrek filed suit against Shimek alleging various causes of action, including one under the Uniform Declaratory Judgment Act for a declaration of his rights under the easement. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.004 (West, Westlaw through 2015 R.S.). The trial court granted Wiatrek's request for a temporary restraining order and enjoined Shimek from obstructing Wiatrek's use of the easement. Shimek complied with the order and removed the tractors and I-beams, but also commissioned an engineering firm to re-survey the express easement. The firm's report disclosed that the divergent area of the road, including the old culvert, was not within the boundaries of the express easement. Shimek responded by constructing a fence across the divergent area of the road. Around the same time, a new culvert was built across the drainage ditch that enabled Wiatrek to access his property from the dirt road without leaving the boundaries of the express easement.[3]

Wiatrek amended his petition to seek only a declaratory judgment that he (1) owned an easement by estoppel over the divergent area of the road; and (2) had the "legal right to park cars on the gravel portion of his easement" as long as he did not block the road. Wiatrek also asked the court to award him reasonable and necessary attorneys' fees. *See id.* § 37.009 (West, Westlaw through 2015 R.S.).

[3] The parties disagree on whether Shimek or the GBRA constructed the new culvert.

Wiatrek filed a traditional motion for summary judgment asserting that he was entitled to both declarations as a matter of law and that he had incurred $44,187.50 in attorneys' fees plus contingent appellate fees. Wiatrek attached to his motion (1) a copy of the warranty deed; (2) his affidavit; (3) an affidavit from his counsel regarding the amount and reasonableness of the claimed fees; and (4) the affidavit of John Brouillette, one of Wiatrek's customers, describing a confrontation between Brouillette and Shimek.

Shimek filed a combined response and cross-motion for summary judgment asserting that no easement by estoppel existed and that Wiatrek had no right to park "on the 15 foot portion of the express easement." Shimek also sought an award of $48,350 in attorney's fees plus contingent appellate fees. Shimek attached his own affidavit and the affidavit of Mike Crane, his lead attorney, regarding the amount and reasonableness of his fees. Shimek further moved to strike Wiatrek's affidavit as violating the parol evidence rule.

In response, Wiatrek moved to strike Shimek's affidavit for falsely alleging that Shimek still owned the land burdened by the easement. Specifically, he alleged that Shimek had sold his remaining land to Cumberland & Western Resources, LLC. Wiatrek also objected to the portion of Crane's affidavit which detailed the fees for legal services performed by Patrick A. Cullen, another lawyer who worked on the case for Shimek, as excessive. As support, Wiatrek attached to his response an affidavit prepared by Misty Segura, an attorney in the firm representing Wiatrek, opining that the fees Crane claimed Cullen incurred were unreasonable.

Shimek filed a reply in which he admitted that he no longer owned the land but asserted the case was not moot because of the issue of which party was entitled to

attorneys' fees. He also moved to strike Segura's affidavit as conclusory. Shimek attached to his response an affidavit from Cullen regarding the legal work Cullen performed on the case. Neither party moved to involve Cumberland & Western Resources, LLC, the successor in title to the servient estate, in the case.

The trial court considered the motions on written submission and issued a final judgment which expressly: (1) sustained Shimek's objections to the Wiatrek and Segura affidavits and struck both documents; (2) overruled Wiatrek's objections to Shimek's affidavit; (3) denied Wiatrek's motion for summary judgment and granted Shimek's motion; (4) denied Wiatrek's petition for declaratory relief; and (5) awarded Shimek $48,350 in attorneys' fees plus contingent appellate fees. This appeal followed.

C. Appellate Issues

Wiatrek now argues in four consolidated and reordered issues on appeal that: (1) the court abused its discretion in striking his affidavit for violating the parol evidence rule; (2) the court erred in granting Shimek's motion for summary judgment; (3) the court erred in denying Wiatrek's motion for summary judgment and his petition for declaratory relief; and (4) the award of attorneys' fees should be reversed and a judgment rendered for Wiatrek or, alternatively, remanded for further consideration.

II. MOOTNESS

Before addressing the merits of Wiatrek's issues we must determine whether Shimek's sale of the land burdened by the easement rendered the case moot. *See Heckman v. Williamson County*, 369 S.W.3d 137, 162 (Tex. 2012) (observing that a live controversy must exist in a case during the entire course of the litigation). Both parties assert that the case is not moot because the competing claims for attorneys' fees is a live

controversy. *See Allstate Ins. Co. v. Hallman*, 159 S.W.3d 640, 642–43 (Tex. 2005); *Camarena v. Tex. Employment Com'n*, 754 S.W.2d 149, 151 (Tex. 1988).

We agree. "A case becomes moot if a controversy ceases to exist or the parties lack a legally cognizable interest in the outcome." *Hallman*, 159 S.W.3d at 642. In *Hallman*, the Texas Supreme Court ruled that a suit for declaratory relief regarding an insurer's duty to defend did not become moot on appeal when the insurer provided the requested defense because there was still a live controversy over whether the insured was entitled to attorneys' fees. *Id.* at 642–43. The trial court ruled that the insurer had no duty to defend, and the Texas Supreme Court explained that a different answer on the merits question would require a remand for the trial court to reconsider whether an award of fees to the insured was appropriate. *Id.* at 643. Similarly, the trial court in this case granted Shimek's motion for summary judgment, denied Wiatrek's motion for summary judgment and petition for declaratory relief, and awarded Shimek his attorneys' fees. If Wiatrek is correct that the trial court's ruling was error, further proceedings may show that an award of attorneys' fees to Wiatrek is appropriate. Accordingly, we will address the merits of the land dispute. *See id.*; *Ward v. Lamar Univ.*, 484 S.W.3d 440, 452 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (op. on reh'g) (addressing a free-speech retaliation claim, even though the plaintiff had resigned from her position with the defendant university, because she requested attorneys' fees under the UDJA).

III. Exclusion of Wiatrek's Affidavit

By his first issue, Wiatrek argues that the trial court abused its discretion in excluding his affidavit for violating the parol evidence rule.

A. Standard of Review and Applicable Law

We review a trial court's ruling on the admissibility of summary judgment evidence for an abuse of discretion. *Fred Loya Ins. Agency, Inc. v. Cohen*, 446 S.W.3d 913, 926 (Tex. App.—El Paso 2014, pet. denied). When reviewing matters committed to the trial court's discretion, we may not substitute our judgment for that of the trial court. *Id.* at 927. We will find an abuse of discretion only when the court acts without reference to any guiding rules or principles or its decision is arbitrary and unreasonable. *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002).

The parol evidence rule is not a rule of evidence but of substantive contract law. *Jarvis v. K&E Re One, LLC*, 390 S.W.3d 631, 638 (Tex. App.—Dallas 2012, no pet.). It provides that courts may not use extrinsic evidence to vary, add to, or contradict the terms of an unambiguous and integrated written agreement. *David J. Sacks, P.C. v. Haden*, 266 S.W.3d 447, 450 (Tex. 2008) (per curiam); *Jarvis*, 390 S.W.3d at 638.

B. Discussion

Wiatrek asserts that the trial court erred because he did not use his affidavit to add to, vary, or contradict the terms of the warranty deed. Shimek replies that description of the express easement's location within the deed is unambiguous, so no exception to the parol evidence rule applies.

We do not agree that the trial court abused its discretion in excluding Wiatrek's affidavit. Wiatrek correctly asserts that only the first paragraph of the affidavit addresses the terms of the warranty deed and so could implicate the parol evidence rule. That paragraph reads:

> On August 27, 2004, I purchased a 245.13 acre tract of land in Calhoun County, Texas ("Property") from Mark Shimek to operate my businesses,

> which include[s] running a waterfowl hunting company and crawfish farming. The Warranty Deed conveying the Property included a 4.48 acre tract of land, designated as a "Roadway [E]asement"[ ]. The conveyance of the Roadway Easement in the Warranty Deed represented my right to use the existing dirt road that ran from the highway, across Mr. Shimek's property, onto my Property ("Road"). My right to use the Road was necessary because the Road provided the only means of ingress and egress to the Property; without it, the Property is landlocked by Guadalupe-Blanco River Authority ("GBRA") drainage ditches and property owned by Mr. Shimek and others. Prior to my purchase of the Property, there was a hunting lease on the Property and Mr. Shimek allowed hunters, including me, to use the Road to access the Property. Moreover, for the past 60 to 70 years, it is my understanding GBM employees have been using the Road to access and maintain its drainage ditches on the Property.

Wiatrek argues that this paragraph does not vary or add to the terms of the easement but discusses the conveyance and the reason for it, and describes the easement and the relevant details of the two estates. The first paragraph does all of those things, but it also explicitly states that "[t]he conveyance of the Roadway Easement in the Warranty Deed represented my right to use the existing dirt road that ran from the highway, across Mr. Shimek's property, onto my Property." Read in the context of the full paragraph, it would not have been an abuse of discretion for the trial court to interpret Wiatrek as asserting that the parties agreed that the express easement would encompass the full dirt road, including the divergent portion and the old culvert. It is undisputed that the written description of the easement's location incorporated into the deed does not include that area of the road. Thus, the first paragraph of the affidavit directly contradicts the written terms of the deed. Furthermore, Wiatrek has not alleged mutual mistake or another exception to the parol evidence rule. *See DeClaire v. G & B Mcintosh Family Ltd. P'ship*, 260 S.W.3d 34, 45 (Tex. App.—Houston [1st Dist.] 2008, no pet.). We conclude that the trial court did not abuse its discretion in excluding Wiatrek's affidavit. We overrule Wiatrek's first issue.

IV. SUMMARY JUDGMENT

Wiatrek argues in his second issue that the trial court erred by granting Shimek's motion for summary judgment. By his third issue, Wiatrek asserts the court erred when it denied Wiatrek's own motion for summary judgment.

A. Standard of Review

We review a trial court's decision on a motion for summary judgment de novo. *Katy Venture, Ltd. v. Cremona Bistro Corp.*, 469 S.W.3d 160, 163 (Tex. 2015). In a traditional motion for summary judgment, the movant has the burden of showing no genuine issue of material fact and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Katy Venture,* 469 S.W.3d at 163. Evidence raises a genuine issue of material fact if "reasonable and fair-minded jurors could differ in their conclusions in light of all the evidence presented." *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007) (per curiam).

When both parties move for summary judgment, each of them independently bears the burden of establishing it is entitled to judgment as a matter of law. *Knapp Med. Ctr., Inc. v. Grass*, 443 S.W.3d 182, 187 (Tex. App.—Corpus Christi 2013, pet. denied). When the trial court grants one motion and denies the other, we review the evidence presented by both sides and determine all questions presented. *Sw. Bell Tel., L.P. v. Emmett*, 459 S.W.3d 578, 583 (Tex. 2015). If the trial court erred, we should reverse and render the judgment the court should have rendered or, if neither party met its summary judgment burden, remand for further proceedings. *ViewPoint Bank v. Allied Prop. & Cas. Ins. Co.*, 439 S.W.3d 626, 629 (Tex. App.—Dallas 2014, pet. denied).

B. Easement by Estoppel

Regarding an easement by estoppel, Shimek moved for summary judgment on two grounds: (1) an easement by estoppel does not exist when there is an express easement which gives the owner adequate access to the land; and (2) the evidence conclusively established that Shimek had no knowledge of material facts regarding the easement. Wiatrek, in turn, moved for summary judgment on the ground that the evidence established all three elements of an easement by estoppel as a matter of law.

1. Applicable Law

An easement is a nonpossessory interest in the land of another that authorizes the holder to use that property for a particular purpose. *Marcus Cable Assocs., L.P. v. Krohn*, 90 S.W.3d 697, 700 (Tex. 2002). It is a "liberty, privilege or advantage in land without profit, existing distinct from the ownership of the soil." *Allen v. Allen*, 280 S.W.3d 366, 381 (Tex. App.—Amarillo 2008, pet. denied) (internal quotation marks omitted). An easement is a burden on one estate, called the servient estate, for the benefit of another, the dominant estate. *Id*.

The statute of frauds generally requires a writing to establish an easement. *McClung v. Ayers*, 352 S.W.3d 723, 729 (Tex. App.—Texarkana 2011, no pet.); *Allen*, 280 S.W.3d at 381. The doctrine of easement by estoppel creates an exception to this rule "to prevent injustice and to protect innocent parties from fraud." *Storms v. Tuck*, 579 S.W.2d 447, 451 (Tex. 1979). The essence of the doctrine is that a landowner may be estopped to deny the existence of an easement by making representations which an innocent party acted on to that party's detriment. *Id*.

Establishing an easement by estoppel requires proof of three elements: (1) a representation by word or action to the promisee; (2) that was believed by the promisee; and (3) relied upon by the promisee to his detriment. *Id.* at 452. Each of these elements apply at the time the communication creating the alleged easement was made. *Martin v. Cockrell*, 335 S.W.3d 229, 237 n.11 (Tex. App.—Amarillo 2010, no pet.); *Vinson v. Brown*, 80 S.W.3d 221, 229 (Tex. App.—Austin 2002, no pet.). Each case in which a party seeks to establish an easement by estoppel "must rest upon its own facts."[4] *Vrazel v. Skrabanek*, 725 S.W.2d 709, 711 (Tex. 1987); *Martin*, 335 S.W.3d at 237.

2. Effect of Wiatrek's Express Easement

Shimek argued in his first ground for summary judgment that an easement by estoppel is unavailable when the owner also owns an express easement which affords adequate access to the owner's land. For support, Shimek pointed to *Storms* where the Texas Supreme Court observed that the "traditional case" of an easement by estoppel does not involve a written easement but either the parol grant of an easement or a representation that one already exists. *See* 579 S.W.2d at 452. Wiatrek responded that an easement by estoppel is not subject to such categorical rules.

We agree with Wiatrek. Shimek is correct that the Texas Supreme Court observed in *Storms* that

> First, in the traditional case [asserting an easement by estoppel], there generally is no written grant of an easement; instead, there is a parol grant

[4] The "exact nature and extent of" the doctrine of easement by estoppel "has not been clearly defined." *Storms v. Tuck*, 579 S.W.2d 447, 451 (Tex. 1979). There are three definite categories of cases in which courts will apply it: (1) dedication of a street, alley, or square; (2) conveyance of land with reference to a map or plat displaying designated streets, alleys, squares, and similar areas; (3) expenditures by the owner of the alleged easement on the servient estate. *Id.* at n.3; *Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 209–10 (Tex. 1962). Authority for applying the doctrine outside of these three types of cases is "rare and nebulous." *Drye*, 364 S.W.2d at 209; *Martin v. Cockrell*, 335 S.W.3d 229, 237 n.10 (Tex. App.—Amarillo 2010, no pet.). This case does not fit into any of the three definite categories in which courts will apply the doctrine of easement by estoppel.

> or a representation that an easement already exists. In the instant case, however, we are faced with an express written grant of an easement. Secondly, in the traditional case, the issue revolves around the very existence of the easement. By contrast, this case entails the scope of an easement; its existence is not questioned.

Id. Even though the facts of *Storms* did not fit the "traditional case," the Court decided whether Tuck could claim an easement by estoppel based on the particular facts of the case. *See id.* The Court ruled that an easement did not exist because Storms made no representation regarding an easement, not because Tuck already owned an express easement. *See id.* at 452–53. Nothing in *Storms* forecloses an easement by estoppel merely because the party claiming one also owns an express easement.

In any event, we need not decide the effect on Wiatrek's claim of his newfound access to his land over the new culvert because the new culvert did not exist at the relevant time. Courts determine whether the three elements of an easement by estoppel are met from the time the communications creating the alleged easement were made. *Martin*, 335 S.W.3d at 237 n.11; *Vinson*, 80 S.W.3d at 229. All of the representations by Shimek that Wiatrek alleged took place at the time of the sale and the ten-year period which followed. Neither party disputes that Wiatrek did not have access to his land through the express easement before he filed this lawsuit. If an easement by estoppel was indeed created by Shimek's representations during that time, he has presented no authority that the fact of Wiatrek's newly-gained access would cause it to cease, and we can find none.[5]

[5] There are cases holding that an easement by estoppel is binding on the successors in title to the servient estate but ceases when the easement owner no longer relies on it. *E.g. Martin v. Cockrell*, 335 S.W.3d 229, 237–38 (Tex. App.—Amarillo 2010, no pet.); *Holden v. Weidenfeller*, 929 S.W.2d 124, 131 (Tex. App.—San Antonio 1996, writ denied). That situation is not present here because only Shimek, the original owner of the servient estate, is a party to the case.

Every case in which a party claims an easement by estoppel "must rest upon its own unique facts." *Vrazel*, 725 S.W.2d at 711; *see Martin*, 335 S.W.3d at 237. Under the facts of this case, we hold that Wiatrek's ownership of an express easement which now affords him adequate access to his land does not make an easement by estoppel unavailable. The trial court erred to the extent it granted summary judgment to Shimek on this ground.

3. Shimek's Knowledge of Material Facts

Shimek argued in his second ground for summary judgment that the evidence conclusively established he had no knowledge of material facts regarding the true location of the easement. He reasoned that this is fatal to Wiatrek's claim because knowledge of material facts is an essential element of equitable estoppel. Wiatrek responded that knowledge of material facts is an element of the defense of equitable estoppel but not of an easement by estoppel.

We agree with Wiatrek. Shimek is correct that an element of the defense of equitable estoppel is that a misrepresentation or concealment of material facts is "made with knowledge, actual or constructive, of those facts." *Ulico Cas. Co. v. Allied Pilots Ass'n*, 262 S.W.3d 773, 778 (Tex. 2008). An easement by estoppel is a creature of equity, but it is a distinct claim with its own requirements: (1) a representation; (2) that was believed by the innocent party; and (3) relied upon to the innocent party's detriment. *See Storms*, 579 S.W.2d at 452. Each of the cases we have found applying the doctrine of easement by estoppel requires these three elements, and no others.[6] Shimek does not

[6] *E.g. Horner v. Heather*, 397 S.W.3d 321, 325 (Tex. App.—Tyler 2013, no pet.); *McClung v. Ayers*, 352 S.W.3d 723, 729 (Tex. App.—Texarkana 2011, no pet.); *Ingham v. O'Block*, 351 S.W.3d 96, 100 (Tex. App.—San Antonio 2011, pet. denied); *Goodenberger v. Ellis*, 343 S.W.3d 536, 541 (Tex. App.—Dallas

point us to any contrary authority or explain why we should recognize a new element of an easement by estoppel.

We do not mean to say that proof of one party's knowledge of material facts will never be necessary to an easement-by-estoppel claim. For example, the knowledge of the party to be estopped can be necessary to establish a duty to speak when the party claiming an easement seeks to rely on the other party's silence as a representation. *See id.*; *Martin*, 335 S.W.3d at 238. Absent further guidance from the Texas Supreme Court, however, we hold that knowledge of material facts by the party to be estopped is not an essential element of an easement by estoppel. The trial court erred to the extent it granted summary judgment on this ground.

4. Wiatrek's Entitlement to Summary Judgment

Wiatrek moved for summary judgment on the ground that the evidence conclusively established all three elements of an easement by estoppel and that he was entitled to judgment as a matter of law.

To be entitled to summary judgment, Wiatrek had the burden to prove that Shimek misrepresented that Wiatrek owned an easement over the divergent area and that Wiatrek believed the misrepresentation and relied upon it to his detriment. *See Storms*, 579 S.W.2d at 451. The only evidence Wiatrek offered of his belief and reliance, however, were the factual allegations in his sworn affidavit, which was struck by the trial court. Without the affidavit, there was no evidence of two of the essential elements of an

2011, pet. denied); *Allen v. Allen*, 280 S.W.3d 366, 381 (Tex. App.—Amarillo 2008, pet. denied); *Mitchell v. Garza*, 255 S.W.3d 118, 122 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (op. on reh'g); *Cleaver v. Cundiff*, 203 S.W.3d 373, 375 (Tex. App.—Eastland 2006, pet. denied); *Murphy v. Long*, 170 S.W.3d 621, 625 (Tex. App.—El Paso 2005, pet. denied); *Wilson v. McGuffin*, 749 S.W.2d 606, 610 (Tex. App.—Corpus Christi 1988, writ denied).

easement by estoppel. We conclude the trial court did not err in denying Wiatrek's motion for summary judgment.

C. Scope of the Express Easement

Wiatrek's second requested declaration was that he possessed the "legal right to park cars on the gravel portion of his easement, as long as he does not burden Shimek's servient estate by blocking or otherwise making the roadway impassible."

1. Shimek's Motion for Summary Judgment

Wiatrek requested a declaration of his right to park "on the gravel portion of his easement," but Shimek moved for summary judgment that Wiatrek had no right to park "on the 15 foot portion of the roadway easement," meaning the dirt road. The express easement is indisputably seventy-five feet wide, but nothing in Shimek's motion or its attachments addressed Wiatrek's right to park on the other fifty-five feet or established that none of that portion of the easement is covered in gravel. Whether or not Shimek demonstrated as a matter of law that Wiatrek had no right to park on the fifteen-foot road, Shimek cannot meet his burden without at least addressing Wiatrek's right to park on gravel-covered parts of the easement other than the road or establishing that no such areas exist. We conclude the trial court erred in granting him summary judgment on this ground.

2. Wiatrek's Motion for Summary Judgment

Wiatrek argued in his motion for summary judgment that the grant of the express easement carried with it the right to park vehicles on the gravel portion of the easement in a manner which did not interfere with use of the road by Shimek or others. As summary judgment proof, he cited *Baer v. Dallas Theater Center*, 330 S.W.2d 214, 216 (Tex. Civ.

App.—Waco 1959, writ ref'd n.r.e.), where the court construed an express easement granted "for use as a private road for pedestrian and vehicular traffic" to include the Theater Center's right to construct parking spaces on the portion of the easement which was not taken up by the road and a sidewalk. *Id.* at 219. Wiatrek asserted that the same reasoning is applicable to the easement here.

When interpreting an easement, we examine its express terms in light of the circumstances surrounding the grant. *Krohn*, 90 S.W.3d at 700–01; *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996). We give terms undefined by a grant their plain, ordinary, and generally accepted meaning. *Id.* "An easement's express terms, interpreted according to their generally accepted meaning, therefore delineate the purposes for which the easement holder may use the property." *Id.* at 701. No rights pass to the easement holder by implication except for "what is reasonably necessary to fairly enjoy the rights expressly granted." *Id.*

In *Baer*, Sylvan Baer had donated land to the Dallas Theater Center to construct a new theater complex. 330 S.W.2d at 215. The deed included the grant of an easement "for use [as] a private road for pedestrian and vehicular traffic" across land Baer retained. *Id.* at 216. After Baer attempted to block access to the land, the Theater Center won a judgment which recognized its right under the easement to create at least 140 parking spots in the area of the easement not taken up by a road and a sidewalk. *Id.* at 218. On appeal, the court noted that the easement expressly recited it was part of the gift of the theater site and was its sole entrance. *Id.* at 219. Furthermore, it was undisputed that Baer knew when he granted the easement both that the theater center would be used by large numbers of employees, artists, and patrons, and that there were no parking facilities

there. *Id.* Faced with that record, the court upheld the judgment that the deed granted the right to park within the easement. *See id.*

Applying *Baer*, Wiatrek argues on appeal that the circumstances surrounding the purchase clearly indicate that Shimek intended to grant the right to park within the easement because Shimek knew that: (1) Wiatrek intended to run a year-round hunting business on his new property; (2) Wiatrek's customers would use vehicles to reach it; (3) there were no parking facilities on Wiatrek's land; and (4) the dirt road, which was the only way to access Wiatrek's property at the relevant time, becomes effectively unusable after heavy rain. Based on these facts and circumstances, Wiatrek argues, the deed in this case unambiguously includes the right to park vehicles within the easement. Even if we agreed that the deed unambiguously granted the right to park within the easement when considered in light of these circumstances, there is no summary-judgment evidence of these circumstances within the record. We conclude Wiatrek has not carried his burden to demonstrate his entitlement to summary judgment. The trial court did not err in denying Wiatrek's motion for summary judgment on this ground.

D. Summary

We conclude that the trial court erred in granting Shimek's motion for summary judgment on both of Wiatrek's requested declarations. We further conclude that, on this record, the trial court correctly denied Wiatrek's motion for summary judgment on his petition for declaratory judgment. We sustain Wiatrek's second issue and overrule his third issue.

V. ATTORNEYS' FEES

Wiatrek asserts in his fourth issue that we should render judgment for him regardless of our disposition of his other issues because any award of attorneys' fees to Shimek would be inequitable and unjust as a matter of law. In the alternative, Wiatrek argues that Shimek did not establish the amount of his reasonable and necessary attorneys' fees. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 ("In any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just.").

We decline to address either of these arguments because they are not properly before us. Our conclusion that neither party was entitled to prevail on summary judgment necessitates a reversal of the fee award and a remand for further proceedings. *See Hallman*, 159 S.W.3d at 643. On remand, the trial court has the option following further proceedings to award either party their attorneys' fees or decline to award fees entirely. *See Montfort v. Trek Res., Inc.*, 198 S.W.3d 344, 358 (Tex. App.—Eastland 2006, no pet.) ("In the exercise of its discretion, the trial court may award attorney's fees to the prevailing party, may decline to award attorney's fees to either party, or may award attorney's fees to the nonprevailing party."). Because of the uncertainty of what, if any, fee award will result after further proceedings, we decline to address this issue. *See* TEX. R. APP. P. 47.1.

VI. CONCLUSION

We conclude that neither party met their summary judgment burden. Accordingly, we reverse the trial court's judgment for Shimek, including its award of attorneys' fees,

and remand for further proceedings consistent with this opinion. *See Hallman*, 159 S.W.3d at 643; *ViewPoint Bank*, 439 S.W.3d at 629.

NORA L. LONGORIA,
Justice

Delivered and filed the
25th day of May, 2017.