

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 06-0498

2007 MT 191A

WILLS CATTLE COMPANY,

Plaintiff and Appellant,

v.

ORDER

WILLIAM J. SHAW and E. KATHLEEN SHAW,

Defendants and Respondents.

Respondents William J. Shaw and E. Kathleen Shaw have filed a petition for rehearing in this matter. Respondents state they had requested that this Court award their attorney fees on appeal in their Respondents' brief but that this Court's Opinion of August 7, 2007, is silent on the issue of attorney fees on appeal. Appellant has not filed a response to the petition. This Court having considered the petition,

IT IS HEREBY ORDERED that the petition for rehearing is granted. Paragraphs 33 and 34 of the Opinion of the Court issued on August 7, 2007, are amended to read as follows (new language indicated by underscoring):

¶33 These findings support the court's conclusion that W.K. Wills' intent, in providing each of his sons with a self-sustaining ranch, was to include only those ditch rights that were historically used to convey water to the respective ranches, which, for the Company, only included ditches that actually reached the Company's land. It is within the province of the District Court, as the trier of fact, to weigh conflicting evidence, and this Court will not substitute its judgment for that of the trier of fact. *Ray v. Montana Tech of Univ. of Montana*, 2007 MT 21, ¶ 50, 335 Mont. 367, ¶ 50, 152 P.3d 122, ¶ 50. The District Court did not err in concluding that the Company did not have an ownership interest in the middle and north McDonald ditches. As the prevailing party, the Shaws are entitled to attorney fees on appeal. Section 70-17-112(5), MCA.

¶34 We affirm the judgment of the District Court and remand for determination of attorney fees on appeal.

IT IS FURTHER ORDERED that in all other respects the Opinion of the Court shall remain unchanged and remittitur shall issue forthwith.

DATED this 12th day of September, 2007.

/S/ KARLA M. GRAY
/S/ W. WILLIAM LEAPHART
/S/ JAMES C. NELSON
/S/ BRIAN MORRIS
/S/ JIM RICE