IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DANIEL HERR, Appellant, v. ESMAEIL FORGHANI and JOY FORGHANI, his wife, and additional parties, PACIFIC NORTHWEST TITLE INSURANCE COMPANY and DEPOSITORS INSURANCE COMPANY, Respondents.	)	NO. 64738-5-I DIVISION ONE UNPUBLISHED OPINION FILED: May 16, 2011

Lau, J. — This case involves a dispute between two neighbors over the alleged increased use of their shared easement. Joy and Esmaeil Forghani operate an adult nursing facility or adult family home on their property near Burien. Alleging that traffic to the adult family home impermissibly expanded the use of an easement across his property, Herr filed a complaint for trespass, seeking injunctive relief and to quiet title to the easement, as well as damages, attorney fees, and costs. After a bench trial, the

trial court ruled that the Forghanis had not "altered or expanded the easement or overburdened the servient estate" and Herr had "failed to make a sufficient showing to support his request for either a permanent injunction or an award of damages." Conclusion of Law (CL) 4, 6. We affirm.

FACTS

The essential facts are undisputed. In 1981, Robert and Velma McKennan and Marguerite Martin short platted property owned by the McKennans to create two parcels—tract 1, now owned by Daniel Herr, and tract 2, now owned by Esmaeil and Joy Forghani. Because tract 2 was landlocked, the short plat included an easement, tract X, across tract 1 for access from the street to tract 2. The easement is 20 feet wide by 200 feet long and dedicated for "ingress, egress, and utilities." In 1987, a duplex was built on tract 2.

The Forghanis bought the tract 2 property in 2004 and converted the duplex unit into an adult residential assisted living facility or adult family home. The residents compensate the Forghanis for room, board, and assisted living services. At the time of trial, seven people lived in the home: five elderly residents, one caregiver, and the Forghanis. Transportation shuttles and buses come to the home twice a day for one pick up and one drop off, doctors and therapists visit once a month, and water is delivered once a month. Other visitors total "six or seven cars a day," and "sometimes they'll have deliveries." Report of Proceedings (Nov. 10, 2009) (RP) at 71.

On December 17, 2007, Herr filed a complaint against the Forghanis, alleging trespass and seeking injunctive relief and to quiet title to the easement, as well as damages, attorney fees, and costs. On

January 31, 2008, the Forghanis served their answer and counterclaims on Herr. But they never filed them with the court. Herr then amended his complaint, adding his title and homeowners insurance carriers, Pacific Northwest Title Insurance Company (PNWT) and Depositors Insurance Company, alleging

> that should Defendant, Forghani, succeed in impressing an expanded implied easement to his property for ingress and egress for commercial use of his property over Plaintiffs land and/or easement, this Court [should] enter judgment against the additional Defendants for sums as represent a diminution or destruction of the merchantability of Plaintiff's property, together with reasonable attorney's fees and costs and expenses herein.

Herr's complaint does not clearly articulate a breach of the duty to defend cause of action. PNWT and Depositors moved for summary judgment, which the trial court granted on January 16 and May 15, 2009,[1] respectively.[2]

Herr's remaining claims against the Forghanis were tried in a bench trial on November 10, 2009. The court entered its findings of fact and conclusions of law on November 12. The court concluded that the Forghanis "have the express authority to utilize their easement over 'Tract X' for purposes of ingress and egress. That is what they are doing." CL 3. Accordingly, the court ruled that the Forghanis had not "altered or expanded the easement or overburdened the servient estate" and Herr had "failed to make a sufficient showing to support his request for either a permanent injunction or an award of damages." CLs 4, 6. The court dismissed Herr's "Petition for a Permanent

[1] The order does not appear in the record, but neither party contests its entry and the minute entry states that the order was granted in Depositors' favor.

[2] Herr also cross moved for summary judgment and declaratory judgment against both PNWT and Depositors. The court denied Herr's motions.

Injunction and Damages" and awarded the Forghanis statutory attorney fees and costs. Herr appeals.

STANDARD OF REVIEW

"A suit for an injunction is an equitable proceeding addressed to the sound discretion of the trial court, to be exercised according to the circumstances of each case." Steury v. Johnson, 90 Wn. App. 401, 405, 957 P.2d 772 (1998). We "give great weight to the trial court's decision, interfering only if it is based on untenable grounds, is manifestly unreasonable or is arbitrary." Steury, 90 Wn. App. at 405.

We review findings of fact under a substantial evidence standard, defined as "'evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise.'" Brin v. Stutzman, 89 Wn. App. 809, 824, 951 P.2d 291 (1998) (quoting Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 819, 828 P.2d 549 (1992)). There is a presumption in favor of the trial court's findings, and the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence. Fisher Props., Inc. v. Arden-Mayfair, Inc., 115 Wn.2d 364, 369, 798 P.2d 799 (1990). If the standard is satisfied, we will not substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently. Sunnyside Valley Irr. Dist. v. Dickie, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003). And we review only those findings of fact to which error has been assigned. Findings to which error has not been assigned are verities on appeal. Robel v. Roundup Corp., 148 Wn.2d 35, 42, 59 P.3d 611 (2002). We then determines whether the findings of fact support the conclusions of law and judgment. Brin, 89 Wn. App. at 824. Questions of law and conclusions of law are

reviewed de novo. Sunnyside, 149 Wn.2d at 880.

When reviewing a summary judgment order, we engage in the same inquiry as the trial court, viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party. Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

ANALYSIS

Claims Against the Forghanis

1. Scope of the Easement

Herr first argues, "The trial court abused its discretion in refusing to enjoin the adult family home, changing a residential access easement road to daily commercial use." Appellant's Br. at 16 (capitalization omitted). The interpretation of an easement is a mixed question of law and fact. Veach v. Culp, 92 Wn.2d 570, 573, 599 P.2d 526 (1979). "What the original parties intended is a question of fact and the legal consequence of that intent is a question of law." Sunnyside, 149 Wn.2d at 880. The extent of the right acquired in an easement is derived from the granting instrument; the duty of the court is to "ascertain and give effect to the intention of the parties, which is determined by a proper construction of the language of the instrument." Schwab v. City of Seattle, 64 Wn. App. 742, 751, 826 P.2d 1089 (1992).

An easement is an irrevocable interest in land. Bakke v. Columbia Valley Lumber Co., 49 Wn.2d 165, 170, 298 P.2d 849 (1956). In determining the scope of an easement that is created by express grant, we look to the language of the original grant to determine the permitted uses. Brown v. Voss, 105 Wn.2d 366, 371, 715 P.2d 514 (1986). Here, the easement provided "for

ingress and egress and utilit[y]" purposes without any words of limitation. Only if an easement is ambiguous can the court look beyond the wording of the document. Sunnyside, 149 Wn.2d at 880. A contract is ambiguous only when "'fairly susceptible to two different interpretations, both of which are reasonable.'" Quadrant Corp. v. Am. States Ins. Co., 154 Wn.2d 165, 171-72, 110 P.3d 733 (2005) (quoting B&L Trucking & Constr. Co., 134 Wn.2d 413, 427-28, 951 P.2d 250 (1998)).

Here, Herr appears to argue that because the easement has traditionally been used for residential purposes only, its use for commercial purposes as an access to the adult family home impermissibly expanded its scope. But the grant language provides for an easement "for ingress and egress" to the properties. There is nothing imprecise about this language. Because the easement language is not ambiguous, we cannot look outside the express language of the grant. See Sunnyside, 149 Wn.2d at 880 ("If the plain language is unambiguous, extrinsic evidence will not be considered."). Nothing in the grant limits the easement to residential purposes. Under the express terms of the easement, the Forghanis may use it for "ingress and egress" without limitation. As the trial court concluded, "That is what they are doing." CL 3.

The lack of a "residential purposes" restriction distinguishes this case from those on which Herr relies. For example, in Mains Farm Homeowners Ass'n v. Worthington, 121 Wn.2d 810, 854 P.2d 1072 (1993),[3] the Supreme Court affirmed the trial court's

[3] Herr assigns error to the trial court's conclusion that "[t]he plaintiff misplaces reliance on the case of Mains Farm Owners Association v. Worthington 121 Wn.2d 810, 854 P.2d 1072 (1993), a case involving a protective covenant expressly restricting use of the subject property to 'single family' residential purposes only." CL 2. But this conclusion accurately reflects that the facts of Mains Farm are distinguishable from

grant of an injunction against an adult family home in a residential neighborhood. But there, the property was subject to a restrictive covenant that stated,

> "All lots or tracts in MAINS FARM shall be designated as 'Residential Lots,' and shall be used for single family residential purposes only.
>
> . . . .
>
> No structure shall be erected, altered or placed on the plat of MAINS FARM which shall serve as other than a single family dwelling unit . . . .

Mains Farm, 121 Wn.2d at 813-14. And in Hagemann v. Worth, 56 Wn. App. 85, 86-87, 782 P.2d 1072 (1989), a covenant restricted use to "'residential and recreational use'" and "restricted buildings to 'single-family residences' and prohibited 'business, industry or commercial enterprise of any kind or nature . . . .'" Hagemann, 56 Wn. App. at 86-87. No such restriction exists here.

Furthermore, the trial court's challenged conclusion that "[t]he evidence presented does not support a conclusion that the defendants have altered or expanded the easement or overburdened the servient estate" is supported by its findings of fact and substantial evidence. CL 4. The trial court found:

> As to be expected, the Defendants' "Happy Heart" adult family home is a relatively quiet neighbor. . . . In the daytime, there are occasional visits by Metro vans, doctors, and pharmacy vehicles. (The Court was saddened to hear that visits by family members of the residents are exceedingly rare.) Based upon the testimony, however, the Court cannot find this volume to be greater than would be expected were there still two fairly active families occupying the duplex unit.

Finding of Fact (FF) 5.

Substantial evidence supports this finding. Herr testified that Metro Access buses visit the home only "once a day," that arrivals by other visitors totaled "six or

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those of this case.

seven cars a day," and that "sometimes they'll have deliveries." RP at 71. Joy Forghani testified that (1) buses come to the home twice a day for one pick up and one drop off, (2) doctors and therapists visit once a month, and (3) water was delivered once a month. A "fair-minded person" could be convinced that twice daily visits by buses, six or seven other visitors a day, and monthly visits from doctors, therapists, and water deliveries is not "greater than would be expected were there still two fairly active families occupying the duplex unit." FF 5. Accordingly, substantial evidence existed to support the trial court's finding.[4] Because the Forghanis' usage is not greater than residential usage, that finding supports the conclusion that they have not "altered or expanded the easement or overburdened the servient estate." CL 4. This same finding in turn supports the court's conclusion that "[t]he plaintiff has failed to make a sufficient showing to support his request for either a permanent injunction or damages." CL 6.[5] In sum, the court did not abuse its discretion in refusing to enjoin the use of the easement for the adult home purposes or award damages.[6]

2. Spot Zoning

[4] This evidence, in conjunction with the court's unchallenged finding that "the recorded easement stated simply that it was for ingress, egress & utilities," supports the court's conclusion of law 3—"The defendants have the express authority to utilize their easement over 'Tract X' for purposes of ingress and egress. That is what they are doing."

[5] Herr assigns error to this conclusion of law, but mistakenly labels it "Conclusions of Law #5." Br. of Appellant at 10.

[6] Herr also assigns error to findings of fact 1, 6, 7, and 8, but he fails to support those assignments with argument. His challenge to those findings are therefore waived. See Cowiche Canyon, 118 Wn.2d at 809 (plaintiffs who assigned error to finding of fact but presented "no argument in their opening brief on any claimed assignment" waived that assignment of error); RAP 10.3(a)(4).

Herr next argues that the adult family home constitutes impermissible "spot zoning" and a taking under the federal and state constitutions. Generally "zoning ordinances are constitutional in principle as a valid exercise of the police power, and will be upheld if there is a substantial relation to the public health, safety, morals, or general welfare." Lutz v. City of Longview, 83 Wn.2d 566, 574, 520 P.2d 1374 (1974). "Courts will not review, except for manifest abuse, the exercise of legislative discretion. Manifest abuse of discretion involves arbitrary and capricious conduct." Farrell v. City of Seattle, 75 Wn.2d 540, 543, 452 P.2d 965 (1969) (citation omitted). Illegal spot zoning is a zoning action by which a smaller area is singled out of a larger area or district and specially zoned for a use classification (1) totally different from, and inconsistent with, the classification of surrounding land and (2) not in accordance with the comprehensive plan. Citizens for Mount Vernon v. City of Mount Vernon, 133 Wn.2d 861, 875, 947 P.2d 1208 (1997). As the Supreme Court has explained:

> "The vice of 'spot zoning' is not the differential regulation of adjacent land but the lack of public interest justification for such discrimination. Where differential zoning merely accommodates some private interest and bears no rational relationship to promoting legitimate public interest, it is 'arbitrary and capricious' and hence 'spot zoning.'"

Citizens for Mount Vernon, 133 Wn.2d at 875 (footnotes omitted) (quoting Richard L. Settle, Washington Land Use and Environmental Law and Practice § 2.11(c) (1983)).

Herr argues that the statute authorizing adult family homes, chapter 70.128 RCW "creat[es] 'spot zoning' for commercial adult family homes in residential neighborhoods

. . . ."[7] Appellant's Br. at 20. But that statute explicitly details the public interest furthered by adult family homes.

> (a) Adult family homes are an important part of the state's long-term care system. Adult family homes provide an alternative to institutional care and promote a high degree of independent living for residents.
>
> (b) Persons with functional limitations have broadly varying service needs. Adult family homes that can meet those needs are an essential component of a long-term system. Different populations living in adult family homes, such as persons with developmental disabilities and elderly persons, often have significantly different needs and capacities from one another.

RCW 70.128.005(1)(a), (b). Promoting the "independent living" and "furthering the varying service needs" of elderly individuals is a legitimate public interest. Indeed, the legislature has found "a compelling interest in protecting and promoting the health, welfare, and safety of vulnerable adults residing in adult family homes." RCW 70.128.005(4). Thus, because adult family homes bear a rational relationship to a legitimate public interest, their use in residential neighborhoods is not arbitrary and capricious spot zoning. Citizens for Mount Vernon, 133 Wn .2d at 877.

Herr repeatedly argues, without citation to authority,[8] that adult family homes serve no legitimate public interest purpose because "[t]hey have no connection with the care of dysfunctional persons." Appellant's Br. at 22. But it is the unique characteristics of adult family homes that the legislature has identified as having value. "Adult family homes provide an alternative to institutional care and promote a high

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[7] Although neither party argues it, it is unclear that Herr can even maintain a "spot zoning" related cause of action against private property owners such as the Forghanis, as opposed to a zoning board. He cites to no authority that so holds.

[8] Where a party fails to cite to authority, this court may assume that none was found. King County v. Seawest Inv. Associates, LLC, 141 Wn. App. 304, 317, 170 P.3d 53 (2007).

degree of independent living for residents." RCW 70.128.005(1)(a). Courts presume that legislative action authorizing zoning is valid, and the party challenging it has the burden to overcome that presumption. Chrobuck v. Snohomish County, 78 Wn.2d 858, 886, 480 P.2d 489 (1971) (Court will uphold legislative decision on zoning "so long as their propriety is at least 'fairly debatable.'") (quoting Farrell, 75 Wn.2d at 543); see also

17 William B. Stoebuck & John W. Weaver, Washington Practice: Real Estate: Property Law § 4.7, at 183 (2d ed. 2004). Herr's unsupported assertions fail to meet his burden.

3. Attorney Fees

The Forghanis request attorney fees on appeal. "Under the American rule, the parties are responsible for their own attorney fees unless an award of fees is authorized by a private agreement, statute, or a recognized ground of equity." Bentzen v. Demmons, 68 Wn. App. 339, 349, 842 P.2d 1015 (1993). The Forghanis cite RCW 4.84.010(6) as the basis for their claim for fees. But that section provides only that prevailing party costs include "[s]tatutory attorney and witness fees." Herr has failed to identify a statutory or contractual basis for attorney fees. RCW 4.84.010(6) is not an independent statutory basis for attorney fees.

Claims Against Pacific Northwest Title Insurance Company

Herr also appeals the summary judgment dismissal of his claims against PNWT. He makes two principle arguments. First, PNWT improperly denied his tender of defense of the Forghanis' counterclaim. In his assignments of error, Herr frames this issue, stating, "Should the trial Court

have ordered Pacific Northwest to defend the Counterclaim of Forghani against Herr based upon its coverage?"[9] Appellant's Br. at 13. Second, Herr appeals the summary judgment dismissal of his claim for "sums as represent a diminution or destruction of the merchantability of Plaintiffs property, together with reasonable attorney's fees and costs and expenses herein."

"The interpretation of an insurance contract is a question of law, properly decided on summary judgment unless terms of the contract are ambiguous and contradictory evidence is introduced to clarify the ambiguity." Estate of Sturgill v. United Servs. Auto. Ass'n, 84 Wn. App. 877, 880, 930 P.2d 945 (1997). An insurance policy is construed as a whole, with the policy being given a " 'fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.' " Key Tronic Corp. v. Aetna (CIGNA) Fire Underwriters Ins. Co., 124 Wn.2d 618, 627, 881 P.2d 201 (1994) (quoting Grange Ins. Co. v. Brosseau, 113 Wn.2d 91, 95, 776 P.2d 123 (1989)).

Herr's appeal of the trial court's failure to require PNWT to defend him against the Forghanis' counterclaims is without merit. The Forghanis served Herr with an answer and counterclaims but failed to file it with the court, as required by CR 5(d)(1).[10] "The triggering event [for the duty to defend] is the filing of a complaint alleging covered

[9] Herr's amended complaint does not allege a cause of action related to this assignment of error, such as breach of the duty to defend. Accordingly, the issue is not properly before this court.

[10] CR 5(d)(1) provides in part "all pleadings and other papers after the complaint required to be served upon a party shall be filed with the court either before service or promptly thereafter."

claims." Griffin v. Allstate Ins. Co., 108 Wn. App. 133, 138, 29 P.3d 777, 36 P.3d 552 (2001). Because the Forghanis never filed their answer and counterclaim, the event triggering PNWT's duty to defend never occurred.

As for Herr's first-party claims, the title policy excludes from coverage Herr's alleged loss. Herr's claims against the Forghanis are based on his allegation that they improperly changed the easement's use from residential to commercial. Herr's policy excludes from coverage any "[d]efects, liens, encumbrances, adverse claims, or other matters" that arise "subsequent to the Date of Policy." Herr's title insurance policy was effective August 2, 2002. Herr's complaint alleges that "on or about 2005, Defendants changed the nature of the existing residence use to a commercial business use . . . ." (Emphasis added.) Because this claimed change of use occurred more than two years after the policy's effective date, no coverage exists for any loss or damage relating to the Forghanis' alleged change of use. See Campbell v. Ticor Title Ins. Co., 166 Wn.2d 466, 472, 209 P.3d 859 (2009) (no coverage under title policy for easement dispute that arose after the date of the policy).

In addition, the special exceptions to coverage in schedule B of the title policy unequivocally except from coverage any loss or damage related to easements contained in short plat 579072 under recording number 8109170624. That portion of the policy reads:

> This policy does not insure against loss or damage by reason of the following:
>
> * * * *
>
> 2. COVENANTS, CONDITIONS, RESTRICTIONS, AND EASEMENTS CONTAINED IN SHORT PLAT, COPY ATTACHED:
>
> RECORDED: September 17, 1981
>
> RECORDING NUMBER: 8109170624

(Emphasis added.) Herr does not dispute that tract X is an easement contained in the short plat. Accordingly, there is no coverage for any loss or damage caused to Herr as a result of the trial court's decision on the scope of tract X. Herr maintains that he "paid for and received an endorsement which extends his coverage and does away with the effect of Schedule B exceptions." Appellant's Br. at 27. But that endorsement was "subject to all of the terms and provisions" of the title policy. And as we conclude, substantial evidence supports the trial court's finding that the Forghanis had not

increased their use of the easement.[11] As such, Herr's claim for damages resulting from any alleged increased use of the easement is not persuasive.

Claims Against Depositors Insurance Company

Herr next argues that the trial court erred in dismissing his claims against Depositors Insurance Company that alleged that Depositors improperly rejected his tender of defense and failed to pay "damages for his loss of market value, attorney's fees and costs." Appellant's Br. at 29. But as discussed above, the Forghanis never filed their answer and counterclaims in court. This claim therefore fails.[12]

[11] In addition, there is no coverage under the policy for "spot zoning." Herr alleges that the Washington legislature's passage of RCW 70.128.715(2) amounts to illegal spot zoning. But Herr's title policy expressly excludes from coverage "[a]ny law, ordinance or governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to (i) the occupancy, use, or enjoyment of the land." (Emphasis added.) Therefore, even if there were "spot zoning," Herr has no coverage for any loss or damage caused from it.

Herr next argues "Loss or diminution of property value from an adult family home's presence in a residential neighborhood is covered by Depositors' policy as a 'loss of use of tangible property.'" Appellant's Br. at 32. This argument is premised on two sections of the policy. First, he argues that his alleged damages are covered under section I(A)(1) of the policy, which states, "We insure against the risk of direct physical loss to property described in Coverages A and B." Herr then cites to a policy definition of "property damage" to argue that his alleged loss of use of his property caused by the supposed increased easement use is a covered event. That definition reads, "Under

Section II, 'Property damage' means physical injury to, destruction of, or loss of use of tangible property." But by its terms, this definition applies only to "Section II," the liability coverage provision. And as discussed above, since the Forghanis never filed their answer and counterclaims, Depositors had no duty to defend under the liability coverage provisions.

Furthermore, the policy provisions for property damage cover only "direct physical loss to property." In Prudential Property and Casualty Insurance Co. v. Lawrence, 45 Wn. App. 111, 116, 724 P.2d 418 (1986), this court interpreted "physical" in an insurance policy to exclude coverage for " 'consequential or intangible damage' such as depreciation in value . . . ." Prudential, 45 Wn. App. at 116 (quoting Wyoming Sawmills, Inc. v. Transp. Ins. Co., 282 Or. 401, 406-07, 578 P.2d 1253 (1978)).

[12] In addition, Herr's amended complaint does not include a cause of action for breach of the duty to defend.

Comparing cases involving policies that define "property damage" without reference to the word "physical" to the policy before it, we reasoned:

> "The inclusion of this word ['physical'] negates any possibility that the policy was intended to include 'consequential or intangible damage,' such as depreciation in value, within the term 'property damage.' The intention to exclude such coverage can be the only reason for the addition of the word. As a result, in the absence of a showing that any physical damage was caused to the [insured structure] by the [defendant's acts], plaintiff cannot recover.

Prudential, 45 Wn. App. at 116 (quoting Wyoming, 282 Or. at 406). Under Prudential, Herr must show direct physical loss to tangible property. His claim of reduced property value caused by increased easement use falls outside the policy's coverage. The trial court properly dismissed these claims on summary judgment.[13]

We affirm.

WE CONCUR:

[13] In addition, even if the use did result in physical damage to the easement, the policy "does not apply to land, including land on which the dwelling is located."