IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

GregORY J. Daniels, dba Daniels NURSERY,	)	**No. 26483-1-III**
Appellant,	)	
v.	)	
RENAE E. OELKE, a single person; JOEL SUTHERLAND and CINDY R. SUTHERLAND, husband and wife; RICHARD ZELMER, a single person; MARY OELKE, a single person; WILLIAM RUSSELL and MANJEET RUSSELL, husband and wife; EARNEST H. LEISEKE, a single person,	)	**Division Three**
Respondents.	)	**UNPUBLISHED OPINION**

Korsmo, J. — Daniels Nursery seeks review of the order denying its request for an injunction against six adjacent property owners (property owners). It sought to restrict a 20 foot easement which runs across its property for use only by logging equipment, and not allow residential access.[1] Daniels contends the trial court's findings are not supported

[1] Daniels also sought injunctive relief to restrict an adjacent property owner (Oelke) from building a road over a buried waterline easement which benefits its

by the evidence and the trial court misinterpreted the easement language. Daniels did not meet the burden of proof and the trial court properly denied the preliminary injunction. We affirm.

FACTS

Greg and Peggy Daniels own and operate Daniels Nursery, a commercial tree nursery located near Kettle Falls, Washington. The Daniels' property is subject to a 20 foot perpetual nonexclusive easement, which originated between Raymond Thompson, as grantor, and Boise Cascade Corporation, as grantee; Daniels is the successor to the original grantor of the easement.

The easement reads in part:

> This Easement is granted subject to the following reservations by Grantor, for itself, its permittees, assigns and successors in interest:
>
> (a) The right to cross and recross the premises and the road at any place along said road by any reasonable means and for any purpose and in such manner as will not unreasonably interfere with Grantee's use of said road.
>
> (b) The right to use the road for all purposes deemed necessary or desirable by Grantor in connection with the protection, administration, management and utilization of Grantor's lands, or resources, now or hereafter owned or controlled by it; subject to such traffic control regulations and rules as Grantee may reasonably impose upon or require of other users of the road without reducing the rights of Grantor hereby reserved; provided, however, that the right to use the road for the purpose of operating and moving specialized logging vehicles or other equipment shall not be restricted.

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property. Daniels abandoned this issue on appeal. The record shows Oelke obtained the services of an engineer to ensure the safety of the buried line.

> (c) The right to all timber now or hereafter growing on the premises, subject to Grantee's right to cut such timber as hereafter provided.

Clerk's Papers (CP) 72-75. This easement also provides "Grantee shall prohibit noncommercial use of said road unless provisions have been made by Grantee or by the noncommercial users to bear the proportionate maintenance costs of such noncommercial use." CP 73. Oelke's predecessor in title filed a road maintenance agreement outlining the maintenance allocation for noncommercial use of the road.

In September 2006, Oelke purchased real property adjacent to Daniels. Oelke also is a successor grantor of the Thompson easement which burdens Daniels' land and benefits Oelke's land. Oelke immediately started to subdivide the property into 20 acre parcels.

Daniels sought injunctive relief to enjoin the property owners from any usage other than by logging trucks and equipment. The trial court dissolved the preliminary restraining order and found Daniels had not met its burden of proof. The trial court entered findings of fact and conclusions of law, which Daniels now contends are not supported by the evidence. Daniels timely appeals to this court.

ANALYSIS

The primary issue is the scope of the easement and whether the trial court abused its discretion in denying injunctive relief. Daniels is not seeking reversal of the trial

court's order. Rather, it specifically requests review of the factual, legal and equitable basis for the trial court's order.

"Findings of fact are reviewed under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). The reviewing court will not substitute its judgment for that of the trial court even though it could interpret the evidence differently. *Id*. at 879-880. Questions of law and conclusions of law are reviewed *de novo*. *Id.* at 880. "The interpretation of an easement is a mixed question of law and fact." *Id.* The original parties' intent is a question of fact and the legal consequence of that intent is a question of law. *Veach v. Culp*, 92 Wn.2d 570, 573, 599 P.2d 526 (1979).

The intent of the original parties to an easement is determined from the deed as a whole. *Zobrist v. Culp*, 95 Wn.2d 556, 560, 627 P.2d 1308 (1981). If the plain language is unambiguous, extrinsic evidence regarding intent will not be considered. *Sunnyside*, 149 Wn.2d at 880 (citing *City of Seattle v. Nazarenus*, 60 Wn.2d 657, 665, 374 P.2d 1014 (1962)).

Initially, the property owners contend that this appeal is moot since Daniels now argues that a preliminary injunction is no longer required or needed. If a court can no

longer provide effective relief a case is moot, but if the case presents an issue of continuing and substantial public interest that will likely reoccur, then this court may still reach a determination on the merits to provide guidance to lower courts. *State v. Ross*, 152 Wn.2d 220, 228, 95 P.3d 1225 (2004); *State v. Blilie*, 132 Wn.2d 484, 488 n.1, 939 P.2d 691 (1997); *Grays Harbor Paper Co. v. Grays Harbor County*, 74 Wn.2d 70, 73, 442 P.2d 967 (1968).

Daniels provides inconsistent arguments on appeal, but it appears controversy still exists over the scope of the easement. Given the nature of this case, it is appropriate for this court to review the trial court's findings and conclusions challenged on appeal.

Construction of the Easement

Daniels' main contention is the easement is unambiguous. It contends the trial court misinterpreted the language and should have considered extrinsic evidence with regard to the original intent of the parties. Daniels contends that the easement is limited to forest management only and does not provide for residential access. Extrinsic evidence regarding intent is only allowed "*if ambiguity exists*." *Sunnyside*, 149 Wn.2d at 880 (emphasis added); *Nazarenus*, 60 Wn.2d at 665. We agree that there is no ambiguity in the easement language. The trial court did not err by not making a finding regarding the intent of the original parties to the easement.

Daniels contends the language expressly limits access only to logging equipment and for forest management purposes. The language does not bear that interpretation. "Unless limited by the terms of creation or transfer, appurtenant easements follow possession of the dominant estate through successive transfers." *Green v. Lupo*, 32 Wn. App. 318, 323, 647 P.2d 51 (1982). The rule applies even when the dominant estate is subdivided into parcels, with each parcel continuing to enjoy the use of the servient tenement. *Clippinger v. Birge*, 14 Wn. App. 976, 547 P.2d 871 (1976).

Construing the entire easement shows (1) that the easement was reserved for grantor or grantor's successors in interest; (2) the grantee (Oelke) has the right to use the easement in any way she deems necessary to administer, manage or utilize her property; (3) Daniels can erect traffic controls to protect its property, but cannot impede access by logging equipment; (4) if there is noncommercial usage, the costs shall be established via a maintenance agreement; and (5) a maintenance agreement apportioning the costs for residential use was filed with the Stevens County Auditor's Office by Oelke's predecessor in title. The easement is clear and unambiguous. It contemplates that there may be noncommercial usage of the easement. Daniels' argument to the contrary is without merit.

The challenged findings are supported by the evidence and the trial court did not

misinterpret the easement.

Injunction

Daniels next contends the trial court abused its discretion in dissolving the temporary restraining order and denying the motion for the preliminary injunction. "Questions of law and conclusions of law are reviewed de novo." *Sunnyside*, 149 Wn.2d at 880; *Veach*, 92 Wn.2d at 573. "The granting or withholding of an injunction is addressed to the sound discretion of the trial court to be exercised according to the circumstances of each case." *Wash. Fed'n of State Employees*, *Council 28*, *AFL-CIO v. State*, 99 Wn.2d 878, 887, 665 P.2d 1337 (1983); *Alderwood Assocs. v. Wash. Envtl. Council*, 96 Wn.2d 230, 233, 635 P.2d 108 (1981); *Blanchard v. Golden Age Brewing Co.*, 188 Wash. 396, 415-416, 63 P.2d 397 (1936). For purposes of granting or denying injunctive relief, the standard for evaluating the exercise of judicial discretion is whether it is based on untenable grounds, or is manifestly unreasonable, or is arbitrary. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); *Lenhoff v. Birch Bay Real Estate*, *Inc.*, 22 Wn. App. 70, 74-75, 587 P.2d 1087 (1978).

One who seeks relief by temporary or permanent injunction "must show (1) that he has a clear legal or equitable right, (2) that he has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to him." *Port of Seattle v. Int'l Longshoremen's &*

Warehousemen's Union, 52 Wn.2d 317, 319, 324 P.2d 1099 (1958). The failure to establish any one of the above criteria dictates that the requested relief be denied. *Wash. Fed'n of State Employees*, 99 Wn.2d at 888. "The law assumes parties to an easement contemplate a normal development under conditions which may be different from those existing at the time of the grant." *Logan v. Brodrick*, 29 Wn. App. 796, 800, 631 P.2d 429 (1981). There was no evidence before the trial court that Daniels would have suffered actual or substantial damage by noncommercial use of the road easement. The trial court did not err in denying the motion for the preliminary injunction and dissolving the temporary restraining order.

Additional Evidence

Daniels also argues that post-appeal changes to the land use regulations should be considered on appeal and that the easement road is not wide enough to support a housing development. His motion to reopen the record was properly denied by the trial court and is better raised before the zoning board at the time the road is developed. Appellate courts will not consider evidence that is not in the record. *State v. Bugai*, 30 Wn. App. 156, 158, 632 P.2d 917, *review denied*, 96 Wn.2d 1023 (1981).

The trial court properly found the easement language to be clear and unambiguous. The property owners have the right to use the road for all purposes deemed necessary in

connection with utilizing or managing their land. Daniels can erect traffic control regulations that do not interfere with their right to use the road. However, Daniels cannot restrict logging equipment access. The easement also contemplates noncommercial usage so long as there is an allocation of costs to maintain the road, which was done here. The trial court did not err in dissolving the temporary restraining order and denying the preliminary injunction.

Attorney Fees

The property owners request attorney fees on appeal. There is no basis to award attorney fees as the trial court dissolved the temporary restraining order and denied the request for an injunction prior to this appeal. *See Alderwood Assocs.*, 96 Wn.2d at 247 (attorney fees allowed when wrongfully issued temporary restraining order not previously dissolved); *Cecil v. Dominy*, 69 Wn.2d 289, 292, 418 P.2d 233 (1966) (true test for allowance of attorney fees is procuring the dissolution of the injunction when that is the sole relief sought); *Ritchie v. Markley*, 23 Wn. App. 569, 575, 597 P.2d 449 (1979) (attorney fee award appropriate if injunctive relief is the sole purpose of the suit and injunction is dissolved), *overruled on other grounds sub nom.*, *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 828 P.2d 549 (1992); *Seattle Fire Fighters Union, Local 27 v. Hollister*, 48 Wn. App. 129, 138, 737 P.2d 1302 (allowing attorney

fees on appeal when defendant incurred the fees to dissolve the temporary injunctions which were still effective prior to appeal), *review denied*, 108 Wn.2d 1033 (1987). Respondents are not entitled to attorney fees on appeal. They are entitled to their costs. RAP 14.1; RAP 14.2.

CONCLUSION

The trial court's findings are supported by the evidence and in turn support the conclusions of law. The trial court properly denied the injunction. Attorney fees should not be awarded on appeal. The judgment is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, J.

WE CONCUR:

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Schultheis, C.J.

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Brown, J.