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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1592**

Timothy A. Costley, et al.,
Respondents,

vs.

Cynthia Leeson Hvamb Verchota, et al.,
Appellants.

**Filed July 13, 2010
Affirmed in part, reversed in part, and remanded
Lansing, Judge**

Lake County District Court
File No. 38-CV-06-610

Timothy A. Costley, The Costley Law Firm P.C., Two Harbors, Minnesota (attorney pro se)

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Considered and decided by Lansing, Presiding Judge; Peterson, Judge; and Stauber, Judge.

UNPUBLISHED OPINION

LANSING, Judge

The district court granted summary judgment determining that a written agreement created an easement for six Lake County residents to obtain access to Victor Lake over

Cynthia and Steve Verchota's property. Alternatively, the district court determined that any ambiguities in the written agreement were resolved by undisputed extrinsic evidence, and that the six Lake County residents were entitled to a prescriptive easement. Because the agreement is ambiguous and genuine issues of material fact exist on the alternative bases for the district court's enforcement of the easement, summary judgment is inappropriate, and we reverse and remand for resolution of the disputed issues.

F A C T S

Cynthia and Steve Verchota purchased property on the western shore of Victor Lake from Bruhn-Leone, LLC in December 2004. The Verchotas' land was part of a larger parcel that Bruhn-Leone purchased in 2003 and subdivided through a plat-approval process. The initial stage of the litigation that gives rise to this appeal began in 2004, before the Verchotas owned the property. In September 2004 Timothy, Lee, Michael, and Kyle Costley served Bruhn-Leone with a complaint alleging Bruhn-Leone's interference with the Costleys' prescriptive easement rights. These rights, according to the complaint, were based on more than fifteen years of the Costleys' using the land as access to Victor Lake and the public lands beyond it for hunting, fishing, snowmobiling, and ATV riding.

The Costleys' complaint incorporated a map that showed Victor Lake Road starting in the northwest and branching into two major forks; one fork runs east to public lands north of Victor Lake and is labeled Four Corners Road. The other fork runs southeast to the public lands south of Victor Lake. This fork appears to be labeled Victor Lake Road to the point where a smaller fork runs east across the property that the

Verchotas later purchased, toward the shore of Victor Lake. The main branch is labeled Hill Creek Road beginning at this juncture. The smaller fork is not labeled and, contrary to the complaint's allegations, does not extend to the shore.

Roger Bruhn, one of the managers of Bruhn-Leone, negotiated with the Costleys to resolve the litigation. Bruhn indicated that he wanted to honor existing access routes across the parcel. He used a copy of the Costleys' map on which he highlighted the roads labeled Four Corners Road, Victor Lake Road, and Hill Creek Road, but not the unnamed fork, and sent it to them at the end of September, asking them to confirm that he had correctly identified the access they were seeking. He then provided a written agreement granting an easement for the stated purpose of "access to the public lands beyond the [p]roperty and Victor Lake." The legal description incorporated in the agreement describes the two larger forks running across the Bruhn-Leone parcel to the adjacent public lands. Bruhn sent two follow-up requests for confirmation in October and the Costleys still did not comment on the easement agreement. In November Bruhn recorded the easement.

After recording the easement, Bruhn sold the tract abutting Victor Lake to the Verchotas. In mid-February the Costleys asked to review the surveyor's records of the easement description and then wrote a letter to Bruhn saying that "the proposed easement . . . is not acceptable due to the fact that the easement being granted [for] Victor Lake Road . . . does not provide us with access to Victor Lake." They revised their original map to show the small fork across the Verchotas' land extending all the way to the lake. Bruhn's attorney replied to the letter, informing the Costleys that Bruhn-Leone

no longer owned that land; that the plaintiffs had not requested access across “the private driveway off of Victor Lake Road”; and that [the Costleys] had access to Victor Lake “via adjacent federal lands.”

The Costleys renewed their litigation in August 2006. The four original Costley plaintiffs together with Mitch Costley and Ronald Svec (collectively referred to as Costleys) sued the Verchotas for interference with their recorded easement and prescriptive-easement rights. The Costleys’ complaint appended a copy of the easement agreement that Bruhn had recorded in November 2004. Tim Costley later submitted an affidavit setting forth his account of the negotiations with Bruhn. Tim Costley acknowledged that the Costleys had not responded to Bruhn’s October 2004 requests to confirm the easement description and also acknowledged that the legal description provided with the recorded easement did not include a legal description of an access road to Victor Lake that crossed the Verchotas’ property. But he asserted that the language stating the purpose of the agreement created an easement along the smaller, unnamed fork located on the Verchotas’ property. Additional affidavits submitted by the Costleys for the purpose of establishing a prescriptive easement attested to their open, visible, continuous and unmolested use of the property for access to Victor Lake for more than fifteen years.

Relying on their affidavits, the Costleys moved for summary judgment. The Verchotas opposed the motion and submitted affidavits from Bruhn and Cynthia Verchota. The Bruhn affidavit disputed Tim Costley’s assertion that the easement agreement was intended to create a right of access over the property now owned by the

Verchotas. Cynthia Verchota's affidavit also provided statements contradicting the Costleys' assertions and disputed their claims of open, visible, continuous, and unmolested use. In addition, the Verchotas' opposition relied on the easement document, the appended legal description, and other documents that were part of the 2004 negotiations.

The district court granted summary judgment for the Costleys on three alternative grounds: that the agreement plainly established an easement; that any ambiguity in the easement agreement was overcome by undisputed evidence of the parties' intent; and that the Costleys' evidence establishing an easement by prescription had not been rebutted.

The Verchotas moved for reconsideration and argued, for the first time, that the judge should have recused himself because Mitch Costley represented the judge in a dissolution action. The district court affirmed the judgment, addressed the previous attorney-client relationship with Mitch Costley, and concluded that neither disclosure nor recusal was necessary. The Verchotas now appeal.

D E C I S I O N

“On appeal from summary judgment, we determine whether there are any genuine issues of material fact and whether a party is entitled to judgment as a matter of law.” *Yang v. Voyagaire Houseboats, Inc.*, 701 N.W.2d 783, 788 (Minn. 2005). The evidence presented is viewed in a light favorable to the party against whom summary judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

I

In granting summary judgment for the Costleys, the district court first concluded that an easement across the Verchotas' land was established by the "clear and unambiguous terms" of the easement agreement recorded by Bruhn-Leone in November 2004. The Verchotas argue that the language of the agreement does not establish an easement across their property.

When an easement is created by an express grant, its terms constitute a contract, and the easement's scope depends on construction of the contract terms. *Lindberg v. Fasching*, 667 N.W.2d 481, 487 (Minn. App. 2003), *review denied* (Minn. Nov 18, 2003). "[T]he primary goal of contract interpretation is to determine and enforce the intent of the parties." *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 323 (Minn. 2003). When intent is expressed in unambiguous terms, courts give effect to their plain and ordinary meaning. *Id.* If, however, an agreement is susceptible of more than one reasonable interpretation, it is ambiguous and its meaning is subject to further interpretation. *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999). Whether an ambiguity exists is a question of law, reviewed de novo. *Blattner v. Forster*, 322 N.W.2d 319, 321 (Minn. 1982); *see also Scherger v. N. Natural Gas Co.*, 575 N.W.2d 578, 580-81 (Minn. 1998) (reviewing de novo whether easement agreement is ambiguous).

The easement agreement recorded by Bruhn-Leone lists Bruhn-Leone as the grantor and the four Costleys in the initial action as the grantees. The agreement states that the grantees "desire to obtain" an easement over property "described [in] Exhibit C

and referred to on the exhibit and in this [a]greement as the *Victor Lake Road Easement, Hill Creek Road and Four Corners Road Easement.*” (Italics in original.) The agreement grants “perpetual and nonexclusive access” for the purpose of “access to the public lands beyond the [p]roperty and Victor Lake.” The legal description provided in the exhibit describes portions of the Bruhn-Leone property and centerlines for two easements across those portions. The centerlines follow Victor Lake Road, Four Corners Road, and Hill Creek Road leading to the public lands north and southeast of Victor Lake. The smaller, unnamed fork, which is located on what is now the Verchotas’ property, is not included in the description.

This language does not plainly create an easement across the Verchotas’ property. The legal description places the easement along Victor Lake Road as it forks and extends to the public lands around the lake. Although the stated purpose for the easement is to grant “access to the *public lands beyond* the [p]roperty and Victor Lake,” this phrase could reasonably mean access to “public lands beyond . . . Victor Lake,” and not necessarily to the shore of Victor Lake.

The Costleys read the language to create an easement across the Verchotas’ property to Victor Lake. The phrase “access to public lands beyond the [p]roperty and Victor Lake” can reasonably be read to mean two separate locations: access to public lands *and* to Victor Lake. In ordinary usage, access to a lake would entail access to the shore of the lake. This meaning is consistent with language in the agreement describing the reasons for the access, which include “minnow trapping, ATV riding, fishing, hunting and snowmobiling.”

The terms of the agreement do not create a “clear and unambiguous” easement to Victor Lake across the Verchotas’ property. Therefore, the language of the agreement alone does not provide the Costleys with the easement they allege and the district court erred in granting summary judgment based on the contract language.

II

In its second, alternative, ground for summary judgment, the district court concluded that, even if the agreement’s plain language did not create an easement across the Verchotas’ property, the undisputed extrinsic evidence shows this was the parties’ intent. If an agreement is ambiguous, extrinsic evidence can be considered to determine the parties’ intent. *Blattner*, 322 N.W.2d at 321. On a motion for summary judgment, ambiguity can only be resolved by the court if the extrinsic evidence presented is conclusive. *Blackburn, Nickels & Smith, Inc. v. Erickson*, 366 N.W.2d 640, 643 (Minn. App. 1985), *review denied* (Minn. June 24, 1985).

The affidavit and documentary evidence presented by the Verchotas and the Costleys at the hearing on summary judgment raised issues of whether an established route to the lake exists across the Verchotas’ property. Tim Costley’s affidavit states that only one route to the shore of Victor Lake exists, and that is the route across the Verchota property. The Costleys’ motion included a map of roadways near the lake, which labels the previously unnamed fork as Victor Lake Road and shows it extending to the shore of the lake. The Verchotas, however, provided other maps and an affidavit by Cynthia Verchota to establish that no existing route goes to the shore of Victor Lake. Verchota’s

affidavit states that a private driveway extends onto her property from Victor Lake Road but that the driveway does not reach the lake.

Whether or not an existing roadway extends to Victor Lake, the evidence is disputed on whether Bruhn-Leone intended to grant that access. The Costleys provided statements by Bruhn suggesting that he knew they wanted access across the land the Verchotas now own and intended to grant it. A letter from Bruhn's attorney confirms that Bruhn said publicly that he wanted to "preserve the historic use of the lake access and forestry trails." This intent is consistent with an e-mail from Bruhn to his attorneys instructing them to draft the easement to comply with Tim Costley's requests.

The Verchotas' motion, however, included the map that Bruhn had marked up and sent back to the Costleys before drafting the agreement. The map highlights the two major forks but not the disputed access across the Verchotas' property. Bruhn asked the Costleys to "[p]lease confirm this is the access you want." The Costleys did not amend their map or comment on the agreement until after it was recorded. In addition, the Bruhn e-mail instructing his lawyers to draft an easement agreement in response to the Costleys' complaint mentions only the use of the "north and south forks" of Victor Lake Road to access public lands.

The Verchotas also provided evidence that the Verchota access was acknowledged as a "private driveway" and that the Costleys had not asked for that access, but only "direct access to Victor Lake via adjacent federal lands." The district court stated that it would not consider "e-mails purporting to have been generated" because they are "not the kind of evidence contemplated by the rules," which would be necessary to rebut

statements under oath. But neither the Costleys nor the Verchotas challenged the admissibility of the e-mail correspondence, and the Bruhn and Verchota affidavits provided additional foundation for the submitted documents.

The Verchotas' evidence permits a conclusion that there is no access to the shore through the smaller fork and private driveway and that, even if there were, Bruhn-Leone did not intend the easement agreement to grant that access. Thus, the record does not support the district court's second basis for summary judgment because the extrinsic evidence includes disputed facts and does not conclusively resolve the ambiguous language of the agreement.

III

The district court's third basis for summary judgment is its conclusion that the Costleys established a prescriptive easement across the Verchotas' property. The Verchotas contend that summary judgment was improper on this ground because material facts are in dispute. To establish an easement by prescription, a claimant must prove personal use of the easement for the prescriptive period of fifteen years and that this use was hostile, actual, open, continuous, and exclusive. *Burns v. Plachecki*, 301 Minn. 445, 448, 223 N.W.2d 133, 135 (1974). To show exclusivity, an easement claimant does not have to show that they were the only ones to use the access for the prescriptive period, but they must show that their access did not "depend on a similar right in others." *Wheeler v. Newman*, 394 N.W.2d 620, 623 (Minn. App. 1986). Access "must be exclusive against the community at large." *Id.*

The evidence on the hostile, actual, open, and continuous use is minimal but present. The record, however, contains no evidence that the Costleys' access across the Verchotas' land was exclusive. The Costleys do not contend that they had exclusive use and the record raises a fact question about whether the Costleys used the disputed access other than as members of the general public. In their complaint, they allege that "[p]laintiffs and the general public have continuously and frequently" used the access in question, and that "[p]laintiffs and the general public have no other road and launch access to Victor Lake." Their affidavits refer to reaching Victor Lake by way of "the access road commonly known as the 'Victor Lake Road.'" Cynthia Verchota's affidavit refers to a statement by a contractor familiar with her property who said that it "has been used by the general public for recreational purposes." At minimum, the exclusivity factor raises an issue of disputed fact. *See Oliver v. State ex rel. Comm'r of Transp.*, 760 N.W.2d 912, 918-19 (Minn. App. 2009) (concluding that summary judgment on exclusivity factor was premature because of conflicting evidence on public use).

The record also contains evidence that contradicts the Costleys' claims of open, continuous, and unmolested use. Cynthia Verchota's affidavit states that no signs of continuous use are present on her property and that a former owner said he walked the property daily, never saw the Costleys, and would not have let them use it. Her affidavit also states that Ronald Svee, one of the easement claimants, asked her for permission to use the access, indicating that his use has been permissive rather than prescriptive. This evidence, viewed in a light favorable to the Verchotas, contradicts the Costleys' claim

that their use was open, continuous, and unmolested. Summary judgment on the issue of prescriptive easement is not supported by the record.

None of the three grounds stated by the district court provide a basis for summary judgment. Consequently, we reverse and remand for further proceedings. In light of our decision to reverse and remand all three grounds for summary judgment, we necessarily reverse the district court's order that the Verchotas must pay the Costleys' attorneys' fees attributable to enforcing the easement. The Verchotas have also argued on appeal that Minnesota law prohibits the establishment of a prescriptive easement through recreational use. This issue was not fully addressed in the district court. Because we are remanding for resolution of other disputed issues, the Verchotas may properly raise this issue on remand.

IV

The Verchotas' final challenge is to the district court's denial of their posttrial motion to vacate the summary-judgment order and to reassign the case because of the district court judge's actual or apparent partiality. This motion is based on Judge Kenneth Sandvik's undisclosed 1997 attorney-client relationship with Mitch Costley. The Verchotas appended a copy of a district court register of actions stating that Mitch Costley represented Judge Sandvik, the presiding judge in this proceeding, in a marital-dissolution action. This fact is not contested.

The Minnesota Code of Judicial Conduct recognizes that judicial authority depends on public confidence in judges' independence and integrity and cautions that judges must not only avoid impropriety, but also avoid the appearance of impropriety.

Minn. Code Jud. Conduct Canon 2; Minn. Code Jud. Conduct Canon 1 cmt. Accordingly, a judge must “disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.” Minn. Code Jud. Conduct Canon 3(D)(1). Impartiality includes bias or prejudice in favor of a particular litigant. Minn. Code Jud. Conduct Canon 3(F). The comment to canon 3(D)(1) states that a judge “should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to . . . disqualification, even if the judge believes there is no real basis for disqualification.”

The 2006 complaint served on the Verchotas listed Mitch Costley as a plaintiff. Neither Mitch Costley nor Judge Sandvik disclosed Mitch Costley’s previous representation of Judge Sandvik. In the order denying the Verchotas’ posttrial motions, Judge Sandvik acknowledged the representation and stated that the case was resolved without a trial, involved a limited number of issues, required no continuing jurisdiction, and was completed in 1997. For those reasons, Judge Sandvik concluded that the representation was “not of a type that should reasonably have been disclosed . . . to the parties or counsel.” To determine whether disclosure was required, we first look to the question of disqualification.

When a judge’s decision not to recuse or disqualify is challenged, a reviewing court conducts a de novo, objective review into the circumstances surrounding the disqualification request. *Powell v. Anderson*, 660 N.W.2d 107, 118 (Minn. 2003). If the judge who is hearing the case has had an attorney-client relationship with an attorney appearing in the case, the objective analysis should consider (1) the extent of the previous

attorney-client relationship, (2) the nature of the representation, (3) the frequency, volume, and quality of the contacts, and (4) any special circumstances that might either enhance or limit the significance of the attorney to the judge or the appearance of impropriety to the public. *Id.* Although Timothy Costley, rather than Mitch Costley, represented the Costleys in this action, the four-factor test provides a reasonable method to analyze disqualification whether it applies to the former attorney as counsel or as a party in the current action.

In considering the extent of the attorney-client relationship between Mitch Costley and Judge Sandvik, the record indicates that the representation extended only to Judge Sandvik's marital-dissolution action. That litigation began and was resolved without trial in 1997, more than ten years before Mitch Costley became involved in the litigation over the easement. A single, short episode that is concluded prior to the litigation weighs against disqualification. But it is not readily apparent that this would qualify as a "short" episode of representation. The second factor, the nature of the representation, weighs in favor of disqualification because the attorney-client relationship was direct; Costley represented Judge Sandvik personally, rather than in an institutional or technical role. On the third factor, frequency, volume, and quality of contacts, the limited evidence suggests that the issues were resolved and the representation did not continue beyond the resolution of the case. These facts do not weigh heavily for or against disqualification. On the last factor of special circumstances, it is noteworthy that, unlike the circumstances of *Powell*, Mitch Costley is not acting as an attorney in this case, but is a named party

with a personal stake in the outcome of the litigation. This relationship weighs in favor of disqualification.

On balance, the issue of disqualification is close. In these circumstances, the prudent course is for a judge to disclose the prior relationship. Even if the judge is confident that his decision will not be affected by the past relationship, failure to disclose precludes a potentially affected party from raising further questions or exercising other options. And the public might reasonably question the judge's impartiality. Whether the failure to disclose requires vacation of the original summary judgment is, however, a separate question. *Powell*, 660 N.W.2d at 119.

Not every case presenting an appearance of impropriety merits vacation. *Id.* at 120. In deciding whether to vacate, we consider “the risk of injustice to the parties in the particular case” and “the risk of undermining the public’s confidence in the judicial process.” *Id.* at 121 (adopting test from *Liljeberg v. Health Svcs. Acquisition Corp.*, 486 U.S. 847, 864, 108 S.Ct. 2194, 2205 (1988)). The order that Judge Sandvik issued at the end of the summary-judgment proceeding has been reversed in this appeal. The case returns to the district court and the determinations made in the earlier proceeding will not influence the case going forward. Furthermore, we note that Judge Sandvik has announced his retirement from the bench and, thus, the case will not be before him for trial. In these circumstances, vacation is not necessary.

Affirmed in part, reversed in part, and remanded.