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IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

PAUL DRINKWINE *et al.* vs. PATRICK ASCOLESE *et al.*	NO. 16-2-24646-0SEA PLAINTIFFS' MOTION FOR RECONSIDERATION OR ALTERATION OR AMENDMENT OF ORDER ON CROSS MOTIONS FOR PARTIAL SUMMARY JUDGMENT

I. RELIEF REQUESTED

Plaintiffs move the Court to reconsider or to amend its order on the parties' cross motions for summary judgment by altering and supplementing the relief granted, finding that they substantially prevailed, and awarding reasonable attorneys' fees to them and denying them to defendants.

II. STATEMENT OF FACTS

In the recent summary judgment proceeding, plaintiffs pursued the following relevant relief requested in their Complaint. The Court responded (**Attachment 1**) as annotated, green/**bold** indicating plaintiffs effectively or necessarily prevailed, yellow/*italics* indicating that no party has yet prevailed, and magenta/normal font indicating defendants prevailed:

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Complaint Paragraph	Court's Holding	Prevailing Party
3.2 Pursuant to RCW 7.28.010 *et seq.*, plaintiffs are entitled to entry by the Court of a decree removing any and all clouds that defendants have, through their actions and statements, placed upon plaintiffs' property interest in the Easement, including upon their right to use the Easement for ingress and egress to Lot E and for maneuvering vehicles in and out of the parking pad assigned to Lot E free of obstruction and interference caused by defendants' placement or permitting or suffering of the parking of vehicles and placement of other personal property upon the Easement and free of defendants' threat to enclose a portion of, and to construct structures and to place fixtures upon and over, the Easement. . . .	Court held Lot B is subject to Easement and Joint Use/Maintenance Agreement in Short Plat by endorsing common uses of Disputed Area for Trash/Recycle Area, ingress-egress, and utilities, not parking by Ascoleses, and mere interim use by them to park pending mandated relocation of trash/recycle facility is not cloud on plaintiffs' title. ____________________ Court did not rule on plaintiffs' request for declaration against defendants building deck or other structure on or over the Easement, including Disputed Area, or enclosing it with fence, as they stated they were planning in 2016. *See* **Attachments 2** and **3**.	**Plaintiffs prevailed** in preserving permanent use rights in Easement. Defendants failed to establish permanent right to park in Disputed Area or otherwise to free their properties of regulation by Short Plat and Declaration. ____________________ *Prevailing party still to be determined* as to plaintiffs' request for declaration against construction on and over and enclosure of Disputed Area.

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Complaint Paragraph	Court's Holding	Prevailing Party
3.4 Plaintiffs are entitled to a declaration that the Short Plat and the Declaration, by virtue of their purchase and ownership of Lot E, gave them ownership of an ingress-egress easement benefiting Lot E and the benefits of real covenants and/or equitable restrictions that run with the land and burden Lots A and B of the Short Plat such that defendants have no rights (a) to park or to permit or to suffer the parking of vehicles on the Easement or anywhere on Lots A or B other than where authorized by the Declaration; (b) to place or to leave other personal property anywhere in the Easement; (c) to enclose any portion of the Easement; (d) to construct or to place a fence, deck, or any other structure or fixture on or over the Easement; or (e) otherwise to use the Easement for any purpose other than ingress and egress to their properties in common with plaintiffs.	Court ruled Lots A and B are subject to Short Plat and Declaration. Court held defendants ultimately have no right to park in Easement, including Disputed Area. Court's allowance of interim parking by Ascoleses in Disputed Area shall immediately disappear upon mandated relocation of trash/recycle facility to Disputed Area. __________ Court did not rule on plaintiffs' request for declaration that defendants may not construct structures and fences in, above, and around Disputed Area or use it for any other purpose not allowed by Short Plat and Declaration.	**Plaintiffs prevailed** in contentions that they possess ingress-egress Easement upon, and are benefited by servitudes encumbering, Lots A and B, contrary to defendants' position, including that they ultimately prevailed as to parking in the Disputed Area since relocation of trash/recycle facility is ordered. __________ *Prevailing party yet to be determined* as to Plaintiffs' requests in subparagraphs (b)-(e) of ¶3.4.

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Complaint Paragraph	Court's Holding	Prevailing Party
3.5 Pursuant to the grant of declaratory relief requested by this Complaint, plaintiffs are further entitled to and request issuance of an order preliminarily and permanently enjoining defendants from committing, permitting, or suffering any of the actions described in clauses (a) through (e) of the immediately preceding paragraph of this Complaint.	Defendants subjected to permanent injunction against parking in Disputed Area, effect of which is merely stayed pending ordered relocation of trash/recycle facility. ____________________ Court has not yet ruled on relief requested in subparagraphs (b) through (e) of paragraph 3.4 of Complaint.	**Plaintiffs prevailed** in request for permanent prohibition of parking in Disputed Area. ____________________ *Prevailing party yet to be determined* as to Plaintiffs' requests under ¶3.4(b)-(e) of Complaint.
Request for Relief No. 5: Request for an award of attorneys' fees	Denied to Plaintiffs, despite thrust of rulings and the absence of rulings noted above.	Defendants prevailed.

Defendants requested the following relevant relief in their Counterclaim with the following results (next page):

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Counterclaim Paragraph	Court's Holding	Prevailing Party
5.3 The as-built locations of certain improvements do not match the locations of said improvements as described or depicted in the Declaration and/or the Short Plat. Upon information and belief, this was the result of mistake or misrepresentation and/or was done illegally and/or without consent. 5.4 As a result, Third-Party Plaintiffs are entitled to reformation of the Declaration and the Short Plat to conform said documents to each other and to the as-built locations of certain improvements that includes, for example and not by means of limitation, parking locations for Unit Lot A and Unit Lot B and the location(s) of trash enclosures consistent with Seattle City Code and zoning requirements and other applicable laws. In the alternative, Third-Party Plaintiffs are entitled to a judgment that the Declaration and the Short Plat do not encumber Unit Lot A or Unit Lot B. . . .	Court did not grant reformation of Short Plat and Declaration to conform to as-built location of Trash Enclosure as defendants sought in order permit Ascoleses' permanent private use of Disputed Area. Court merely invalidated one sentence of Declaration referring to placement of trash/recycle facility on Lot A, which happened to affect Lot A's parking pad owing to its as-built placement, because it was contrary to Short Plat, which was upheld in all respects. Court confirmed that, except with respect to construction of Trash Enclosure on Lot A, Short Plat and Declaration encumber Lots A and B, contrary to defendants' request to free their Lots from their regulation.	**Plaintiffs prevailed** as to defendants' requests in ¶5.4 of Counterclaim. Court did not reform Short Plat and Declaration or declare they do not encumber Lots A and B so as to allow Ascoleses to park anywhere in Disputed Area on a permanent basis or otherwise to convert it to private use.

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Counterclaim Paragraph	Court's Holding	Prevailing Party
9.2 Pursuant to RCW Ch. 28, Third-Party Plaintiffs are entitled to entry of a judgment removing any and all clouds that Third-Party Defendants have, through their acts and statements, placed upon Third-Party Plaintiffs' property, including, but not limited to: upon Third-Party Plaintiffs' right to park their vehicles in an east-west direction, wholly or partially, upon Unit Lot A, Unit Lot B, or in the Easement . . . [and] upon Third-Party Plaintiffs' right to use the area identified as the "Trash/Recycle Area" as drawn on the Short Plat and on the Declaration in any lawful manner, means, or fashion . . .	Court ruled that defendants may not park on the Disputed Area portion of the Easement upon ordered relocation of trash recycle facility. Court ordered that the "Trash/Recycle" area shall be used for common purpose of a trash/recycle facility, not by defendants for private purposes.	**Plaintiffs prevailed** in request for affirmation of their common rights of use of the Disputed Area and ultimate prohibition of parking there.
10.4 Third-Party Plaintiffs are entitled to a declaratory judgment regarding the rights, status, and legal relations between the Parties, including, but not limited to, a determination and declaration that: . . . b. Third-Party Plaintiffs may park their vehicles in an east-west direction, wholly or partially, upon Unit Lot A, Unit Lot B, or in the Easement; . . .	Court prohibited defendants' parking anywhere in Disputed Area portion of Easement as incident of mandated relocation of trash/recycle facility.	**Plaintiffs prevailed** in request to prohibit parking on easement since relocation of trash/recycle facility is mandated. Ascoleses' right to parking anywhere in Disputed Area is merely transitory.
e. The "Trash/Recycle Area" as drawn on the Short Plat and on the Declaration (e.g., west of the "Parking Pad" for Unit Lot B) does not encumber Unit Lot B;	Court ruled that "Trash/Recycle Area" encumbers Lot B.	**Plaintiffs prevailed.**

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Counterclaim Paragraph	Court's Holding	Prevailing Party
f. Third Party Plaintiffs' have not obstructed any easement burdening Unit Lot A and/or Unit Lot B;	Court impliedly held that defendants have obstructed the Disputed Area by permanently prohibiting parking there upon relocation of trash/recycle facility.	**Plaintiffs prevailed.**
g. Third-Party Plaintiffs may use Unit Lot A and Unit Lot B, including, but not limited to, the ground underneath and the space over and above said lots, to the extent any ingress or egress rights under any applicable easement are not unduly interfered with;	Court did not rule on this point.	*Prevailing party yet to be determined.*
h. Third-Party Plaintiffs may use Unit Lot A and Unit Lot B, including, but not limited to, the ground underneath and the space over and above said lots, in any lawful manner, means, or fashion to the extent it does not violate Seattle City Code and is not expressly prohibited by the Short Plat and/or the Declaration; . . .	Court prohibited parking in Disputed Area in long-term, but did not rule as other uses, such as construction of a deck over the Easement.	**Plaintiffs ultimately prevailed** as to parking on Easement on Lots A and B. *Prevailing party has not yet been determined* as to defendants' request for declaration that they may build structures over the Easement.
q. Unit Lot A or Unit Lot B are not encumbered by the Declaration and the Short Plat.	Court held that Lots A and B are encumbered by the Short Plat and Declaration.	**Plaintiffs prevailed.**
Re Request for Relief No. F: Request for an award of attorneys' fees	Granted to defendants' despite thrust of rulings and the absence of rulings noted above.	Defendants prevailed.

Also pertinent to this Motion is the fact that, since well before this litigation began and continuing through the summary judgment preceding, defendants have, with the assistance of

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legal counsel, sought to justify the incorporation of the entire Disputed Area into their private yard, contrary to the Short Plat. They revealed this agenda and the purported justification for it in their email to all residents of April 2016, pertinent excerpts of which follow:

> We've pulled the recorded 'plat', <u>which is considered the most accurate legal property description available</u>, and is the origin of the map used in the CC&R. . . .
>
> Our plan is to construct a beautiful fence between our yard and the shared easement driveway, <u>as well as a second story deck around the foot of the 'L' of our home</u>. . . .
>
> <u>The fence will run westward from the edge of the short retaining wall to the corner of the gray tiles, where it will turn right and connect to the southwest corner of our home</u>. . . .
>
> The attachment 'RecordedPlat.PNG' shows the status of the entire property as is recorded in both the short plat and the CC&Rs. . . . The important thing to note is that this was recorded before the property was constructed. We saw this before purchasing, and were assured that the as-built factors supersede, as is common in easement practice, and that this view is bolstered because the easements have in fact never physically existed as drawn.
>
> <u>Our interpretation has always been, and continues to be, that the garbage area, upon being built in it's [*sic*] currently location permanently nullifies and invalidates the easement directly to the southwest of Lot B</u>. . . . We have legal confirmation that our interpretation of Pads A and B being shifted west is in fact correct and appropriate and we do not simply lose our parking pads because the trash was built somewhere else. . . .
>
> Our parking pads, the trash, and the short wall were not built as-drawn, but where they exist defines the usage rights. This fact is supported by Section 5 of the CC&R.

Drinkwine Opening Decl., **Ex. C** (**Attachment 2**) (emphasis added); *see* Drinkwine Opposit. Decl., **Ex. H** (**Attachment 3**).

Defendants continued to pursue the objectives stated in their April 2016 email throughout this litigation. They contended that either their use of the Disputed Area was not subject to the Short Plat and Declaration or those instruments should be reformed so as to sever completely the Disputed Area from the Easement. *See* Ans., Aff., Defs. and Countercl. ¶5.4

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(Third Cause of Action immediately after complaints about plaintiffs' conduct). Nowhere in their Counterclaim is there a request to relocate the trash/recycle facility to the Trash/Recycle Area within the Disputed Area. Defendants did not raise that suggestion until moving for summary judgment. *See* Defs.' Mot. For Part. Summary J., at 17. They persisted, however, in pursuing reformation in order to appropriate the Disputed Area for their private use, consistent with the agenda they announced in April 2016. *Id.*, at 18-19 ("Furthermore, it was the intent of the parties to shift the parking pads for Lots A and B westward, into the area designated on the plat map as the Trash/Recycle Area. This intention is supported by the extrinsic evidence of the imbedded outline of the parking pad extending into this area").

In summary, the Order necessarily or impliedly affirmed, over defendants' claims to the contrary, that plaintiffs have easement interests over the entirety of the Disputed Area for common community purposes. The defendants did not garner any of the contrary relief they sought, principally freeing the Disputed Area for the Ascoleses' exclusive and private use. The Court confirmed that defendants ultimately have no right to park anywhere in the Disputed Area, just as plaintiffs have contended since this litigation began. The Order, therefore, clears the cloud that defendants' actions and statements, at least as to parking, placed upon plaintiffs' rights under the governing documents. The Ascoleses' temporary use of the Disputed Area for parking pending the relocation of the trash/recycle facility, being merely transitory and minor, does not relate to any fundamental property right.

As to the their temporary right to park on the Disputed Area, the Order appears to provide that the Ascoleses may park all the way to the west of it if they choose. The east-west width of the Disputed Area is 14.5 feet. *See* Survey, Table, L-18. The defendants' engineer

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stated that the as-built Trash Enclosure and retaining wall to its west cover no more than 10 feet of Lot A's Parking Pad shown in the Short Plat. *See* Breske Decl., ¶16 and **Ex. C**. The Order, therefore, essentially allows Lot B's interim parking to encroach on an area almost 50 percent wider than the area of encroachment by the Trash Enclosure.

The Order did not speak to the defendants' rights to engage in other uses of the Easement on their property, such as to-built structures above it. Such issue remains outstanding for determination by the Court.

Notwithstanding the foregoing, the Court determined that the defendants are the prevailing parties for purpose of determining an award of fees pursuant to the Declaration. Based on the above-described circumstances, plaintiffs respectfully move for reconsideration.

III. STATEMENT OF ISSUES

1. Should the Court declare that Lot B is encumbered by, and the Ascoleses, are subject to, all terms and provisions of the Short Plat, including, without limitation, the Easement to the full extent depicted and described therein, the Joint Use/Maintenance Agreement set forth on its first page, and the Declaration (CR 59(a)(7) and (9) and CR 60(a))?

2. Should the Court quiet in plaintiffs, in common with all owners in the Short Plat, rights in the entire Easement, including the Disputed Area, to have it maintained, at all times following relocation of the trash/recycle facility, free of (1) parking of vehicles by, by the permission of, or at the sufferance of the Ascoleses; and (2) fences, other barriers, objects, and structures constructed or placed by, by the permission of, or at the sufferance of, the Ascoleses (CR 59(a)(7) and (9) and CR 60(a))?

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3. Should the Court dismiss defendants' counterclaims that conflict with the relief granted to plaintiffs (CR 59(a)(7) and (9) and CR 60(a))?

4. Should the Court reconsider its order authorizing the Ascoleses temporarily to park anywhere on the Disputed Area because the extent of the Trash Enclosure's encroachment on Lot A's parking is less than the width of the Disputed Area and amend its order to limit the Ascoleses' parking to the eastern ten feet of the Disputed Area (CR 59(6), (7), and (9))?

5. Should the Court reconsider its determination that defendants substantially prevailed and order that the plaintiffs' and counter-defendants substantially prevailed parties in light of the parties' respective achievement of the relief they sought (CR 59(a)(7) and (9))?

IV. ARGUMENT

A. <u>Grounds for Motion.</u>

The Order is plainly not a final judgment and is subject to reconsideration and revision until entry of a final judgment concluding this litigation. CR 54(b). Plaintiffs, however, move for reconsideration under CR 59 upon the following grounds to preserve their right to reconsideration and revision of the Order:

> (6) Error in the assessment of the amount of recovery whether too large or too small, when the action is upon a contract, or for the injury or detention of property;
>
> (7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law; . . . [and]
>
> (9) That substantial justice has not been done.

Because the Order is interlocutory, CR 59(h), which provides that "[a] motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment," may not be applicable. *See Gridley v. Cleveland Pneumatic Co.*, 127 F.R.D. 102, 103 (M.D.Pa. 1989)

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(distinguishing motion to reconsider under Fed.R.Civ.P. 54(b) from motion to amend or later a final judgment under Fed.R.Civ.P. 59(e)); *Hirata v. Evergreen State Limited Partnership No. 5*, 124 Wn.App. 631, 640 n.10, 103 P.3d 812 (2004) ("Federal Rule of Civil Procedure 59(e) is the federal court analogue to CR 59(h)"). To the extent CR 59(h) applies, the following grounds for alteration or amendment of the Order are pertinent: "(1) manifest errors of law or fact upon which the judgment was based; . . . [or] (3) manifest injustice in the judgment . . ." *Jacobs v. Electronic Data Systems Corp.*, 240 F.R.D. 595 (2007) (citing 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 2810.1, at 124-27 (2d ed.1995).

To the extent the Court omitted to expressly grant plaintiffs relief that was impliedly and necessarily incorporated in the Order, such omissions should be rectified under CR 60(a). That rule provides, "[c]lerical mistakes in . . . orders , , , and errors therein arising from oversight or omission may be corrected by the court at any time . . ."

B. <u>The Court Should Amend the Order to Expressly Grant Relief Plaintiffs' Sought.</u>

Because it may have affected the its prevailing party analysis, the Court should alter or amend the Order in order to grant claims that plaintiffs pursued, but as to which the Court has not expressly ruled. Those claims encompass requests that the Court declare that plaintiffs possess, and quiet in them, permanent rights to use the Easement for its defined purposes; declare that defendants may not construct or place a fence, deck, or other structure or fixture on or over the Easement; and dismiss defendants' counterclaims that contradict those claims, such as their demands to reform the Short Plat and to declare their properties to be unencumbered by the Easement or Declaration.

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Complete rulings on plaintiffs' requests for reliefs were impliedly encompassed in or made necessary by the substance of the Order. The Order effectively affirmed, over defendants' claims to the contrary, that their Lots are subject to the Short Plat and, except to the extent it placed the Trash Enclosure on Lot A's Parking Pad, to the Declaration. The Court, therefore, ordered that the Ascoleses shall not park in the Disputed Area, merely holding in abeyance the effect of that prohibition until the trash/recycle facility is moved.

The Court did not address plaintiffs' request for a declaration that the defendants may not enclose or build structures on or over the Easement, including the Disputed Area. That omission can only be deemed the product of an oversight since plaintiffs clearly requested such relief and such activities by defendants would be inconsistent with the Court's order in other respects.

C. <u>Temporary Parking Should Be Limited to the Eastern Ten Feet of the Disputed Area.</u>

Donna Breske found that the as-built Trash Enclosure excised just ten feet from Lot A's Parking Pad. Under the evidence, therefore, it was not necessary or reasonable to permit the Ascoleses to temporarily park on the entire Disputed Area, which is 14.5 feet wide. The Order should be amended accordingly to limit their interim parking to the eastern ten feet in order to avoid needless continuing interference with plaintiffs' ability to maneuver in and out of their Parking Pad and community conflict. CR 59(a)(6), (7), and (9).

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D. <u>The Court's Determination the Defendants Are the Prevailing Parties is Contrary to Law and Unjust, or At a Minimum, Premature.</u>

As a general principle, a prevailing party is one who receives an affirmative judgment in its favor. *Schmidt v. Cornerstone Invs., Inc.*, 115 Wn.2d 148, 164, 795 P.2d 1143 (1990).

If neither side of the litigation wholly prevails, the party who substantially prevails is deemed the prevailing party. Such analysis turns on the extent of the relief afforded the parties. *Rowe v. Floyd*, 29 Wn.App. 532, 535 n. 4, 629 P.2d 925 (1981); *Marine Enters., Inc. v. Security Pac. Trading Corp.*, 50 Wn.App. 768, 772, 750 P.2d 1290 (citing *Herzog Aluminum, Inc. v. General Am. Window Corp.*, 39 Wn.App. 188, 196-97, 692 P.2d 867 (1984)), *review denied*, 111 Wn.2d 1013 (1988).

If both sides prevail on major issues, an attorney fee award is not appropriate under contract and RCW 4.84.330. *American Nursery Prods. v. Indian Wells Orchards*, 115 Wn.2d 217, 235, 797 P.2d 477 (1990) (citing *Sardam v. Morford*, 51 Wn.App. 908, 756 P.2d 174 (1988)); *Rowe*, 29 Wn.App. at 535; *Puget Sound Serv. Corp. v. Bush*, 45 Wn.App. 312, 320-21, 724 P.2d 1127(1986).

As shown by the analysis in the Statement of Facts, above, plaintiffs must be deemed to have prevailed on every major point that the parties respectively pursued. In evaluating who substantially prevailed, it is necessary to keep in focus the larger picture of what the parties sought in the months before and during this litigation. Crucially, this case did not entail a narrow dispute about where a trash/recycle facility should be located. Until adding single sentence to that effect to their motion, <u>defendants never sought its relocation</u>. They, instead,

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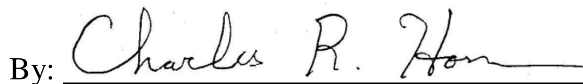
sought to parlay its as-built location into an argument that the entire Disputed Area should be removed from the Easement which would, in turn, allow the Ascoleses to carry out their construction plans or anything else they wished to do there. Defendants conspicuously failed to achieve that goal.

The sole point on which defendants prevailed was with regard to a transitory right to park in the Disputed Area that will disappear just as soon as the trash/recycle facility is relocated, as ordered. That cannot be deemed a significant point in light of the parties' clashing positions on several issues of far greater moment and permanency. In the end analysis, plaintiffs received what they sought, a permanent prohibition on parking in the Disputed Area. Getting the right to park somewhere for a few weeks to months and, perhaps, only just the eastern ten feet of the Disputed Area as requested herein, is not "prevailing."

The Court should hold that the plaintiffs substantially prevailed and deny that status to defendants. Plaintiffs must be deemed to have prevailed upon more and more substantial issues than did defendants. Only if the Court does not elect to deem plaintiffs the substantially prevailing parties, it should hold that no party substantially prevailed.

DATED this 26th day of February 2018.

LAW OFFICE OF CHARLES R. HORNER, PLLC

By: 

Charles R. Horner, WSBA No. 27504
Attorney for Plaintiffs
I certify that this memorandum contains less than 4200words, in compliance with the Local Civil Rules

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