COLORADO COURT OF APPEALS

DATE FILED: August 17, 2023
CASE NUMBER: 2022CA749

Court of Appeals No. 22CA0749
Las Animas County District Court No. 21CV30026
Honorable J. Clay McKisson, Judge

Heidi Marie Fresquez, James Patrick Fresquez, Marc Wilson, Sara Ann Wilson, Carmen Richards, Joseph Richards, Jerry Barnes, and Ann Kost,

Plaintiffs-Appellants,

v.

Santa Fe Trail Ranch Property Owners Association and Robert L. Scott,

Defendants-Appellees.

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division II
Opinion by JUDGE TOW
Furman and Berger*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced August 17, 2023

Dulaney Miller LLC, Daniel B. Miller, Colorado Springs, Colorado, for Plaintiffs-Appellants

Hall Booth Smith, P.C., Elizabeth C. Moran, Lawrence D. Stone, Greenwood Village, Colorado, for Defendants-Appellees

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2022.

¶ 1 Plaintiffs[1] are a group of owners and residents in the Santa Fe Trail Ranch community (the Residents). They appeal the district court's orders denying their motion to compel discovery and granting summary judgment in favor of defendants, the Santa Fe Trail Ranch Property Owners Association (the Association) and its president, Robert L. Scott. We affirm the judgment in part, reverse it in part, and remand the case for proceedings consistent with this opinion.

I. Background

¶ 2 Santa Fe Trail Ranch (the Ranch) is a community of homeowners in southern Colorado. It is governed by a declaration of protective covenants, conditions, and restrictions. The Association is the Ranch's homeowners' association.

¶ 3 At issue is the Association's closure of a road (the Exit 2 Road), which connects the Ranch to Interstate Highway 25 (I-25). The Exit 2 Road originates in the Ranch, passes through a tunnel owned by the BNSF Railway, and then connects to an I-25 frontage

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[1] Plaintiffs are Heidi Marie Fresquez, James Patrick Fresquez, Marc Wilson, Sara Ann Wilson, Carmen Richards, Joseph Richards, Jerry Barnes, and Ann Kost.

road that allows access to the I-25 Exit 2 interchange. There is also another road in the Ranch (the Exit 6 Road), which connects to the I-25 Exit 6 interchange. The Residents used the roads frequently.

¶ 4 Citing security concerns, the Association installed a gate on the Exit 2 road, which, at first, all residents of the Ranch could unlock. Eventually, however, the lock was changed and only the residents closest to the gate were given access to pass through. In the event of an emergency, the Association claims that the gate would be accessible to all residents at the Ranch.

¶ 5 The Residents filed four claims in district court. The first three argued that the Association violated the declaration by permanently closing and failing to maintain the Exit 2 Road, that Scott violated the declaration by closing the Exit 2 Road, and that the Association breached its fiduciary duty. Further, the Residents sought a declaratory judgment stating that residents of the Ranch are entitled to use the Exit 2 Road and that the Association violated the declaration by permanently closing, obstructing, and failing to maintain the Exit 2 Road.

¶ 6 The parties filed cross-motions for summary judgment. The district court granted summary judgment for the Association and

Scott on the claims that they violated the declaration by closing the Exit 2 Road and on the declaratory judgment that the Residents are entitled to use the Exit 2 Road. However, it denied summary judgment for both parties on all claims related to whether the Association or Scott failed to maintain the Exit 2 Road and on the breach of fiduciary duty claim. After the district court's summary judgment order, the Residents voluntarily dismissed their remaining claims with prejudice.

II. Summary Judgment

¶ 7 The Residents argue that the district court erred by granting summary judgment because it misinterpreted the meaning of the declaration or, at least, improperly resolved an ambiguity in the declaration. In addition, the Residents assert that, even if the court correctly interpretated the declaration, it nevertheless improperly resolved an issue of material fact as to whether the Association violated the declaration. We disagree that the district court misinterpreted the declaration. But we agree that the district court improperly resolved a factual dispute regarding whether the declaration was violated.

A. Standard of Review

¶ 8 We review de novo both the interpretation of covenants and other recorded instruments and whether a court properly granted summary judgment. *Pulte Home Corp. v. Countryside Cmty. Ass'n*, 2016 CO 64, ¶¶ 22-23. Summary judgment is proper when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." C.R.C.P. 56(c).

B. Interpretation of Declaration

¶ 9 When interpreting covenants and other recorded instruments, like the declaration here, "we give words and phrases their common meanings and will enforce such documents as written if their meaning is clear." *Pulte Home Corp.*, ¶ 23.

¶ 10 Section 2.1.4 of the declaration gives the Association the right to adopt "any and all reasonable rules and regulations for the use of the Common Area . . . including, without limitation, rules and regulations relating to vehicular traffic and travel upon, in and under the Common Area." "Common Area" is defined to include "[r]ights of way for roads" under Section 1.5.

¶ 11 Thus, the plain language of the declaration empowers the Association to adopt "rules and regulations relating to vehicular

traffic" on roads in the Ranch. Limiting the use of the Exit 2 Road to emergency use falls within that language.

¶ 12 The Residents' arguments to the contrary are unpersuasive. First, they contend that the declaration gives them the unqualified right to use the Exit 2 Road because section 2.2 states that "every Owner . . . shall have an easement of ingress and egress over, across and upon the Common Areas for purposes of getting to and from such Owner's individual Lot and the public way for . . . vehicular travel." But the Residents fail to mention that section 2.2 says it is "[s]ubject to the above conditions" — one of which is section 2.1.4, which, again, gives the Association authority to adopt "any and all reasonable rules and regulations . . . relating to vehicular traffic."

¶ 13 The Residents also point to section 5.3, which states, "There shall be no obstruction of the Common Area." However, as the district court noted, the other sections in article V of the declaration deal with "use restrictions" and are aimed at limiting the owners' use of their property within the Ranch — such as limiting what structures are permitted (section 5.1), prohibiting business uses (section 5.1.2), and limiting storage of "junked" vehicles/equipment

(section 5.11). Construing article V "as a whole, 'seeking to harmonize and to give effect to all provisions,'" *Pulte Home Corp.*, ¶ 23 (quoting *Copper Mountain, Inc. v. Indus. Sys., Inc.*, 208 P.3d 692, 697 (Colo. 2009)), we agree with the district court that section 5.3 limits only the owners' use of their respective properties.[2]

¶ 14 Moreover, even if section 5.3 applied to the Association, section 5.3 expressly says that use of the "Common Area [is] subject to rules and regulations governing the [Common Area] that may from time to time be adopted by the Board." And, again, section 2.1.4 allows the Association to make reasonable traffic rules. Adopting the Residents' interpretation, therefore, would essentially render section 2.1.4 meaningless and prevent the Association from adopting any rule that "obstruct[s]" road use under section 5.3, regardless of the reason. *See id.* ("[W]e construe [covenants and other recorded instruments] '. . . so that none will

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[2] The Residents' argument, that section 5.3 applies to the Association because the Association (a nonprofit organization) is comprised of owners, is inapposite. *See Krystkowiak v. W.O. Brisben Cos.*, 90 P.3d 859, 866 (Colo. 2004) ("A nonprofit corporation is a legal entity separate from its members . . . .").

be rendered meaningless.'" (quoting *Copper Mountain*, 208 P.3d at 697)).

¶ 15 The Residents counter that this interpretation allows for owners to join the Association and enact rules allowing unreasonable violations of the declaration (such as firing guns in common areas). But this argument is belied by the fact that the provisions at issue only give the Association power to enact "reasonable rules and regulations."

¶ 16 In short, we agree with the district court that the declaration unambiguously permitted the Association to impose reasonable restrictions on the use of the Exit 2 Road. The district court's interpretation, therefore, was not error.[3]

C. Reasonableness Issue

¶ 17 But that does not end our inquiry. Though the court correctly concluded that the declaration empowered the Association to regulate the use of the Exit 2 Road, the question remained whether the specific regulation enacted was reasonable, as the declaration required. And while the district court's summary judgment order

[3] In light of this conclusion, we necessarily reject the Residents' argument that the declaration is ambiguous.

did not expressly find the Association's rule reasonable, such a finding is necessarily implied by its ruling that the Association properly exercised its authority to enact reasonable regulations.

¶ 18 Issues of reasonableness are generally issues of fact and "are particularly unsuitable for summary judgment." *Woodward v. Bd. of Dirs. of Tamarron Ass'n of Condo. Owners*, 155 P.3d 621, 625 (Colo. App. 2007).

¶ 19 Moreover, the burden of establishing the nonexistence of a genuine issue of material fact is on the moving party. C.R.C.P. 56; *Cont'l Air Lines, Inc. v. Keenan*, 731 P.2d 708 (Colo. 1987). The Association's motion for summary judgment did not establish that there was no dispute regarding whether the closing of the Exit 2 Road was reasonable.[4]

¶ 20 Because the district court's order resolved a material factual dispute, it erred by granting summary judgment.

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[4] Further, at oral argument there was confusion, and apparently dispute, about whether the entire Exit 2 Road was closed, including those portions within the Ranch, or the road was merely closed at the locked gate.

III. Motion to Compel Discovery

¶ 21 The Residents also challenge the district court's denial of their motion to compel discovery of emails between counsel for the Association and counsel for BNSF. The district court ruled the emails were protected by the work product doctrine because the Association and BNSF shared a common legal interest. We agree with the Residents that the documents should be disclosed.

A. Standard of Review

¶ 22 We review a district court's discovery order for an abuse of discretion. *People v. Knisley*, 2022 CO 59, ¶ 21. A district court abuses its discretion "when its ruling is manifestly arbitrary, unreasonable, or unfair, or when it misapplies the law." *Id.* (quoting *People v. Johnson*, 2021 CO 35, ¶ 16).

B. Common Legal Interest Doctrine

¶ 23 Under the work product doctrine, documents prepared in anticipation of litigation are generally not discoverable by an opposing party, absent substantial need and undue hardship. C.R.C.P. 26. However, the work product privilege can also be waived if material is voluntarily disclosed "to a party having no common interests so as to establish a basis for expectations of

confidentiality." *Denver Post Corp. v. Univ. of Colo.*, 739 P.2d 874, 881 (Colo. App. 1987).

¶ 24 To maintain the privilege in this context, the disclosed communication must be "intended and reasonably believed to be part of an on-going and joint effort to set up a common legal strategy." *Black v. Sw. Water Conservation Dist.*, 74 P.3d 462, 469 (Colo. App. 2003). The common interest analysis focuses on "the circumstances surrounding the disclosure of the communications or documents rather than on when the communications or documents were generated." *Id.*

¶ 25 The Association and BNSF do not share a common legal strategy because they are subject to liability in different ways. The Association asserts it could be held liable (1) under common law negligence as a non-owner for injuries resulting from unauthorized use of BNSF's right-of-way; or (2) for failing to secure the Ranch from trespass, theft, and vandalism. First, the Association's status as non-owner and BNSF's as owner would require different — not common — legal strategies to avoid liability. Indeed, as the Residents point out, these strategies could very well be adverse. Second, there is nothing in the record that would suggest that

BNSF has a duty to the Residents to protect against trespass, theft, and vandalism occurring within the Ranch. The Association and BNSF thus do not share a common legal strategy, and it was error to deny the Residents' discovery motion.

IV. Attorney Fees

¶ 26 Finally, because the Association was unsuccessful on appeal, the request for attorney fees under section 38-33.3-123, C.R.S. 2022, is denied.

V. Disposition

¶ 27 The judgment is affirmed in part and reversed in part, and the case is remanded for proceedings consistent with this opinion.

JUDGE FURMAN and JUDGE BERGER concur.

Court of Appeals

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PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Gilbert M. Román,
Chief Judge

DATED: January 6, 2022

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