

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2005-051885

10/29/2012

HONORABLE MICHAEL R. MCVEY

CLERK OF THE COURT
R. Tomlinson
Deputy

GERALD C FREEMAN, et al.

STEVEN C MAHAFFY

v.

DONALD R SORCHYCH

CAROL L DE SZENDEFFY

FINANCIAL SERVICES-CCC

MINUTE ENTRY

This case was tried to the Court on August 29-30, and September 5, 2012. At the invitation of the Court, the parties submitted proposed Findings of Fact and Conclusions of Law on September 10, 2012. The case has been under advisement since that date.

The Court has considered the testimony of the parties and their witnesses, the exhibits admitted into evidence, oral argument by counsel for the parties and the proposed Findings of Fact and Conclusions of Law submitted by each side.

I
Background.

Plaintiffs and Defendant have been neighboring landowners since 2000. Plaintiffs own approximately 30 acres of property. Defendant owns ten acres. The only means of accessing their properties is a common appurtenant roadway easement granted in 1969. That easement granted both parties “an easement for existing roadway as it exits on October 2, 1969 ...”

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2005-051885

10/29/2012

The roadway easement has never been paved. Due to erosion from rain and other factors this road requires periodic maintenance in order to keep it in a condition substantially similar to its condition at the time the easement was granted in 1969.

Beginning in 2002, Plaintiffs began to perform work on this road. The stated purpose was road maintenance and repair. In 2004 Plaintiffs sued Defendant in Scottsdale Justice Court alleging that he tortiously interfered with maintenance work being performed by their contractor T. L. Hanks Excavating, Inc. They alleged that they were damaged in the amount of \$2,168.18.

In August 2005, Plaintiffs filed a First Amended Complaint alleging that they were also entitled to one-half contribution for maintenance and repair of the road for all work performed between 2002 and 2005. The First Amended Complaint sought damages on theories of contribution, unjust enrichment, and tortious interference.

The parties filed motions for summary judgment. Judge Ballinger granted partial summary judgment in favor of Plaintiffs on their tortious interference with contract claim. That judgment has been satisfied.

In March 2009 the Court held a bench trial on the remaining claims of contribution and unjust enrichment. At the end of the trial Judge Ballinger dismissed Plaintiffs' claims of legal and equitable contribution, as well as the claim of unjust enrichment. Plaintiffs appealed.

On January 13, 2011, the Arizona Court of Appeals affirmed the court's ruling that there was no evidence that Plaintiffs were entitled to legal contribution. The court also held that the trial court did not abuse its discretion in dismissing Plaintiffs' claim of unjust enrichment. However, the Court of Appeals did recognize that Plaintiffs' right to seek equitable contribution, and remanded the matter back to this Court to conduct proceedings consistent with the court's holding. The court stated:

“We conclude that, absent the creation of a duty expressly in the conveyance document or by other contract, the doctrine of equitable contribution should be extended to permit one dominant tenant to require another dominant tenant to contribute to the necessary **repair** and **maintenance** of an easement if both tenants are using the easement. Consequently, the [parties] have a shared obligation for the necessary *maintenance* and *repair* of the roadway easement.” *Freeman v. Sorchych*, 226 Ariz 242, 250, 245 P.3d 927, 935 (App. 2011). (Emphases added).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2005-051885

10/29/2012

The court then provided this Court with a non-exclusive list of factors to consider in determining an equitable apportionment of costs for repair and maintenance:

“Each party’s contribution should be based on an equitable apportionment determined after consideration of various relevant factors, which may include, but are not limited to each party’s proportionate use of the easement, including the amount and intensity of actual use, and the benefits derived therefrom; whether each party received proper notice and a reasonable opportunity to participate in the decisions regarding repairs and maintenance; whether the completed work was reasonable and necessary; whether the repairs and maintenance were performed adequately, properly, and at a reasonable price; the value of any other contributions (monetary or in kind) by the parties to repairs and maintenance; and any other factors that may be deemed relevant. *Id.* 226 Ariz at 250-51, 245 P.3d at 935-36.

II
Findings of Fact.

1. Each Parties’ Proportionate Use of the Easement, Including the Amount and Intensity of Actual Use, and the Benefits derived.

Each party presented evidence on this hotly contested issue. Each party claimed that the other used the common easement more frequently than the other. Each claimed that the other used the road more intensely, and that the other derived a greater benefit from the use of improvements to the road.

Simply put, neither party presented convincing evidence that over the past ten years the other party used the road more frequently, used the road more intensely, or derived greater benefit from the improvements made to the roadway.

At various times each party used the roadway more frequently and more intensely than the other.

In the past, Plaintiffs used the roadway more frequently than did Defendant. This was particularly true during the time that Mrs. Freeman was receiving medical treatment for an illness. Plaintiffs received occasional deliveries to their home by large UPS and/or FedEx trucks. They also had more visiting guests than did Defendant.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2005-051885

10/29/2012

In the past few years Defendant and his wife have travelled the road more frequently throughout the week. Defendant permitted third parties to travel over this easement. For some period of time Defendant also has had tenants on his property that travelled the road, sometimes with horse trailers.

The Court finds that over the last ten years, each party used the road approximately the same number of times and with the same intensity. Each party derived equal benefits from the use of the road.

2. Whether Each Party Received Proper Notice and a Reasonable Opportunity to Participate in the Decisions Regarding Repairs and Maintenance.

This is one issue where there is little disagreement between the parties. Plaintiffs testified that they approached Defendant in approximately 2002, and indicated that they wished to hire a contractor to periodically repair and maintain the road. They asked Defendant to make a contribution to the repairs and maintenance.

Defendant flatly refused to contribute to the repairs and maintenance performed by Plaintiffs' contractor. Defendant told Plaintiffs that he wanted the roadway to remain "rustic." To this day, Defendant maintains that the road would be best in a bedrock condition.

Over the years, Plaintiffs' contractor made various repairs to the road, and (with one exception, *infra*) attempted to maintain the road in a condition substantially similar to its condition in October 1969. Plaintiffs made periodic requests that Defendant reimburse them for his proportionate share for this work. Defendant refused each such request.

3. Whether the Completed Work was Reasonable and Necessary.

All of the work performed by Plaintiffs' contractor Terry Hanks was reasonable. The purpose of most of this work was to leave the road in a condition virtually identical to its condition when the easement was conveyed in October 1969. However, not all of the work performed by Mr. Hanks was necessary to "repair" or "maintain" the roadway as it was conveyed in 1969.

When Plaintiffs began implementing plans to build their home between 2003 and 2004, they did so under the jurisdiction of the Town of Cave Creek Building Department. The Town of Cave Creek and the Rural Metro Fire Department placed various conditions on Plaintiffs during this time, as a prerequisite to the issuance of a building permit. The Freeman's building permit included a Town of Cave Creek Engineering requirement that, "... access road to meet

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2005-051885

10/29/2012

Rural Metro requirements.” Exhibit 18. The same day that Cave Creek issued this directive, Plaintiff Gerald Freeman wrote Cave Creek Assistant Town Engineer Jeff Lowe. Exhibit 16. Mr. Freeman acknowledged meeting with Rural Metro Fire Department Chief John Armstrong and an Assistant Fire Marshall to “assess the drive **to my property across a particular easement for the purpose of fire equipment access.**” (Emphasis added). Mr. Freeman promised to “rework” this driveway to facilitate the movement of Rural Metro fire trucks across this easement.

Mr. Freeman’s claim that the work he referenced in the letter to Mr. Lowe was to be performed on his private driveway is unconvincing. He promised to “rework” the drive “to” his property “across a particular easement.”

The work that was performed following this letter occurred between April 30 and May 28, 2004. \$9,800.00 was billed during this time. While some of this work involved maintenance and repair, a significant portion involved alterations to the roadway and surrounding area in order to meet the requirements of the Town of Cave Creek and Rural Metro. Terry Hanks testified that among other things he widened the road and deepened the ditches. He altered the grade of the road in a few locations and added decomposed granite to the surface.

Mr. Freeman’s protestations aside, he acknowledged that the bulk of the work performed in 2004 was for alterations and improvements to this easement, and not for repair and maintenance. The work was performed solely to obtain a building permit on his property. See Exhibit 17, June 2, 2004 letter to Rural Metro Fire Department Chief John Armstrong.

The Court finds that the work performed by Terry Hanks from April 30 – May 28, 2004 (\$9,800.00) was solely for the benefit of Plaintiffs.

The Court further finds that all of the remaining work performed and billed between 2002 and 2010 (\$42,180.72) was reasonable and necessary in order to repair and maintain the roadway in a condition substantially similar to that conveyed in October 1969.

4. Whether the Repairs and Maintenance Were Performed Adequately, Properly, and at a Reasonable Price.

The completed work performed by Mr. Hanks was all performed adequately and properly. The amounts charged by Mr. Hanks and his suppliers were at or below the amounts other contractors and suppliers charged during the times such services were performed.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2005-051885

10/29/2012

5. The Value of Any Other Contributions (Monetary or In Kind) by the Parties to Repairs and Maintenance.

Both parties have personally performed repairs and maintenance to the common easement over the past ten years. While Plaintiff Gerald Freeman has devoted more of his personal time and labor to such repair and maintenance than Defendant, he does not seek compensation for this work.

The Court having found that the reasonable and appropriate expenses for maintenance and repair of the roadway is \$42,180.72; that the parties used the easement approximately the same amount of time and with the same intensity of use; that with the exception of the work performed in 2004, each party enjoyed an equal benefit from such work; and that Defendant consciously chose not to participate in decisions to improve or maintain the road,

IT IS ORDERED entering judgment in favor of Plaintiffs and against Defendant in the amount of \$21,090.36.

IT IS FURTHER ORDERED awarding Plaintiffs their taxable costs of suit.

IT IS FURTHER ORDERED that the Clerk of Court shall release to Plaintiffs the bond posted following their appeal from the arbitrator's decision.

IT IS FURTHER ORDERED that each party shall pay their own attorneys' fees.

FILED: Exhibit Worksheet

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.