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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

TIMOTHY B. JACKSON, as Trustee, etc.,  
et al.,

Plaintiffs and Respondents,

v.

SUSAN M. SAUNDERS,

Defendant and Appellant.

H036370  
(Monterey County  
Super. Ct. No. M99146)

Appellant Susan M. Saunders appeals from the trial court's judgment against her in an action regarding an access easement through her property. The trial court found that there was an express deeded easement through her property, and it also found that a prior settlement agreement barring "obstructions" to the easement precluded the gate that Saunders had erected across the easement. On appeal, Saunders contends that (1) the judgment is not supported by the evidence and the law, (2) the trial court prejudicially erred in excluding testimony by Saunders's prior attorney about discussions between her prior attorney and a prior attorney for the other parties to the settlement agreement, and (3) the trial court erroneously failed to apportion attorney's fees. We find no merit to her contentions and affirm the judgment.

## I. Facts

Vernon and Junis Olson acquired a 40-acre parcel in 1972.<sup>1</sup> At that time, a graded dirt road (the road) ran through the property. They subsequently subdivided the land into five parcels. The road provided access to these parcels. When Vernon and Junis transferred ownership of three of these five parcels, each of the deeds stated that Vernon and Junis granted “the following described real property” followed by three separate paragraphs. The first paragraph read: “AS PER EXHIBIT ‘A’ ATTACHED HERETO AND MADE A PART HEREOF.” Exhibit A described the parcel. The second paragraph read: “SUBJECT TO ALL COVENANTS, CONDITIONS, RESTRICTIONS AND RIGHTS OF WAY OF RECORD.” The third paragraph read: “AN EASEMENT FOR INGRESS AND EGRESS ON EXISTING GRADED ROADS.” Vernon and Junis intended the easement language in the deeds to “give each lot an easement over the other lots to use” the road. They did not intend for the “SUBJECT TO” language to be read together with the easement language. The “SUBJECT TO” language was intended to apply only to the CC&R’s; the easement language was intended to be a grant of an easement.

Vernon and Junis retained parcel 55. Parcel 54 was subsequently acquired by Vernon and Junis’s son Mark Olson and their daughter-in-law Liana Olson. Saunders ultimately acquired parcel 38. The deed by which her predecessor in interest had acquired parcel 38 from Vernon and Junis did not include the easement language referring to the road. Parcel 41 was acquired by another person but ultimately reacquired

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<sup>1</sup> Because multiple parties share the Olson surname, we will use their first names. We intend no disrespect, but do so solely for clarity and economy.

by Vernon and Junis.<sup>2</sup> Parcel 42 was acquired by Jackson and Chavez. The road, which terminates at parcel 42, has always provided the sole means of access to parcel 42.

Before Vernon and Junis sold parcel 42, they used the road to access parcel 42. They also used the road to access the “back” of the other parcels they owned. Vernon and Junis did so because it “would be very difficult” to access the backs of those parcels by any other means. There is “a canyon that separates” the backs of the parcels from the fronts of the parcels. The backs of the parcels are “very beautiful” and are “a wonderful place for meditation.” In addition, the water tanks for Vernon and Junis’s parcel were installed at a location near the road, and it is “necessary to drive to bring equipment and tools” to the water tanks. The water tanks “need checking on” periodically.

The road provided Mark and Liana’s only means of access to their water tanks. There are no established trails leading to the water tanks, and the canyon or ravine that would have to be crossed is steep and would require “bushwhacking.”

When Saunders acquired parcel 38 in 1988, the road over parcel 38 was being used by the owners of the other parcels to access their parcels.

Jackson and Chavez acquired their parcel in 2002.<sup>3</sup> Saunders “placed logs in the road” to hinder passage along it and “threatened to put up a gate or gates” across the road. In 2005, Jackson and Chavez filed an action against Saunders after she obstructed the road by locking or chaining a cable gate that ran across the road, thereby preventing workers hired by Jackson and Chavez from leaving. In 2006, Jackson and Chavez settled

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<sup>2</sup> Vernon and Junis had apparently mistakenly divided their property into five parcels when they were only allowed to divide it into four parcels. Their reacquisition of parcel 41 solved this problem.

<sup>3</sup> They have never lived on their parcel; it has always been rented to tenants.

their action against Saunders.<sup>4</sup> The settlement agreement stated that the “parties agree that the property of [Chavez and Jackson] has (since 1972) an easement . . . for the purpose of ingress, egress, water and utilities . . . .” In exchange for dismissal of the action, Saunders agreed “to refrain from placing any obstructions in the road.” Chavez used the word “obstructions” in the settlement agreement “[b]ecause we wanted to use a word that was broad and inclusive” so that it would cover gates, logs, and “other things she might put in the road.”

In October 2008, Saunders installed a gate across the road without any notice to Chavez or Jackson. The location of the gate was such that Saunders did not have to pass through it to get to her property, as she had other access to her property. She put a combination lock on the gate, and she did not provide the combination to Mark or Liana, whose property was adjacent to hers. The gate was located at a spot where there was no lighting and no room for a car to turn around if it could not go through the gate. If a car was unable to pass through the gate, it would have to back up, around a blind curve on loose gravel, at least 200 feet to find a spot where it could turn around. If one had the combination for the gate, the process of passing through the gate was daunting. “Park the car. Get out of the car. Walk up to the gate. Unlock the combination. Open the gate. Get back in my car. Drive through the gate. Park the car again. Go back. Close the gate. Return the combination and lock it. Then I’d have to climb over the gate to get back to my car.” All of this would have to be accomplished in the dark if it was nighttime. In addition, Saunders’s dogs ran loose in the area of the gate, creating additional concerns. Saunders’s dogs were known to “charg[e]” at people as they were trying to open the gate. The dogs would growl and bark and act in a “very intimidating”

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<sup>4</sup> This agreement contained a broad attorney’s fees clause. “In the event that either party commences legal proceedings against the other with regard to the road, the prevailing party will be entitled to reasonable attorney’s fees and costs.”

manner. The gate was “very inconvenient” and “hindered . . . access to [the Jackson/Chavez] property.”

Jackson and Chavez asked Saunders to remove the gate, but she refused even though she knew that the gate was a “hassle” for those accessing the Jackson/Chavez parcel.

## **II. Procedural Background**

Jackson, Chavez, and the four Olsons initiated this action in 2009. They sought declaratory and injunctive relief and damages. The superior court issued a preliminary injunction precluding Saunders from “blocking the easement” or “closing or locking a gate across the easement” pending trial of this action.

The trial was bifurcated, with the parties first trying the issue of whether plaintiffs had an easement over Saunders’s parcel. Plaintiffs contended that the deeds expressly granted them an easement over Saunders’s parcel. Saunders contended that the language in the deeds was not a grant of an easement but instead made the granted parcels *subject to* an easement. However, she conceded that the Jackson/Chavez parcel had an implied or prescriptive easement over Saunders’s parcel since there was no other access to that parcel.

Plaintiffs’ expert testified that the easement language was a “grant [of] an easement . . . .” He also testified that the “SUBJECT TO” language preceding the easement language did not “have anything to do with” the easement language. Saunders’s expert testified that the easement language was not a grant of an easement. His position was that “the easement is part of the paragraph and statement of [the covenants] of which the land is subject to . . . .” He concluded that there was no easement over Saunders’s parcel. However, Saunders’s expert admitted that a nonexpert “could misinterpret it and interpret it as being an easement that goes together with the property.”

After the first phase of the trial, the court concluded that there was an “ambiguity in th[ese] deed[s].”<sup>5</sup> It proceeded to consider evidence of intent. The court found that plaintiffs “have easements by grant, by express and implication.” It decided that there was “clear and convincing” evidence that Vernon and Junis had intended this language to convey an easement. “[T]hey picked this language to do it and they didn’t do it too artfully or well and created these problems down the road.” The court explicitly rejected the testimony of Saunders’s expert as “inartful” and illogical. The court also found that, even if the deed language was inadequate, there was an easement by implication.

Additional testimony was then introduced on the issue of whether the gate was an “obstruction” within the meaning of the 2006 settlement agreement.<sup>6</sup> Chavez testified that she did not oppose all gates; she was opposed to Saunders’s gate due to its unsafe

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<sup>5</sup> At the end of the second phase of the trial, Saunders’s trial counsel asked the court to reconsider its earlier ruling regarding the deeds. He argued that, “if you removed that period from the face of the grant deed, there is absolutely no ambiguity in that grant deed.” However, the court pointed out that “it’s not just a period. It’s a whole space. A new sentence. A new line starting with a capital.” It would not just mean taking away the period. The court would have to “take away the space and take away the capital, that starts on a new line.” The court did not alter its ruling.

<sup>6</sup> Plaintiffs’ attorney argued to the court that his position was not that “no gate whatsoever” could be placed on the easement but only that Saunders’s gate was an obstruction within the meaning of the settlement agreement. Saunders’s attorney then complained that this was a change of position of which he had had no notice. “[E]verything was predicated on any gate being an obstruction and prohibited.” Nevertheless, he argued that Saunders had a right to put a gate anywhere on the easement that she wished. Plaintiffs’ attorney pointed out that the court still had to decide “whether this particular gate is an obstruction” even if it concluded that the settlement agreement did not preclude all gates.

The court agreed and noted that it was “kind of easy to decide whether this particular gate is an obstruction.” The court then allowed the parties to reopen and present additional evidence regarding whether this particular gate was an obstruction.

location.<sup>7</sup> Saunders's expert testified that gates across easements were very common in the Cachagua area of Monterey County. Such a gate was typically "part of a fence" that was used to "protect" the property from trespassers. That was not the case here. Saunders's expert and a grading contractor testified that they saw nothing unsafe about the location of Saunders's gate.

Saunders testified that gates were "common" in the area where she lived, and she believed she had the "right to put up a gate anywhere and as many as I wanted to." While Saunders admitted that there was no place to turn around at the gate, and that someone who could not get through the gate would have to back up 200 feet around a curve, she saw nothing unsafe about the location of her gate. However, she conceded that the gate was "a nuisance" to and "a hassle for" those accessing the Jackson/Chavez parcel. Saunders testified that the reason she had put logs in the road in the past was "to act as a speed bump" to slow down the cars on the road because she was concerned that her dogs, which ran free, would be hit by a car. Saunders admitted that the reason she had put up the gate was to preclude Mark and Liana from having access to their water tanks. She also claimed that the gate was the first step in fencing her property, but she admitted that she had made no other effort to fence her property during the 21 years she had lived there. Saunders testified that she believed that the word "obstructions" in the agreement referred to "logs or any speed bump in the road." Saunders also testified that she believed that a gate "was not an obstruction," and she claimed that her attorney in the 2005 action had assured her that a gate would not be considered an obstruction under the settlement agreement.

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<sup>7</sup> Plaintiffs' attorney argued that the court was obligated to "balance the need and necessity for this gate in this location versus the inconvenience and safety concerns."

The court found that the gate constituted an obstruction within the meaning of the settlement agreement. “I think it could even be argued, although I don’t think I even need to go that far, that the parties intended that no gates be put up. But the plaintiffs are not making that argument at this point. Certainly this particular gate as constructed under the evidence creates an obstruction to the Jackson/Chavez that would violate the terms of the agreement.” “I think the evidence is kind of close to call on whether they [the parties to the agreement] had a clear understanding that a gate of any sort would be an obstruction -- and it could be argued that you retained your right under that agreement to put up a gate that was not an obstruction . . . .”

The court found that Saunders had breached the agreement, and it declared Jackson and Chavez to be the prevailing parties. “[T]he court interprets the agreement made between the parties and the easement that exists to preclude you putting up a gate without the agreement and consent on the details of that gate from” Jackson and Chavez. Saunders’s attorney requested a statement of decision, and the court directed plaintiffs’ trial counsel to prepare it.

In its statement of decision, the court found that the Jackson/Chavez parcel and the Mark/Liana parcel had an express easement over Saunders’s property. The court also found that, if they did not have an express easement, they had an implied easement. The court found that Junis and Vernon’s parcels had an implied easement. The court made extensive factual findings about the gate, and it concluded that the gate was an “obstruction” within the meaning of the settlement agreement.

The trial court entered a judgment declaring that the Jackson/Chavez parcel and the Olson parcels have “a road easement for ingress and egress” over Saunders’s property. The court’s judgment also found that the “wooden gate” erected by Saunders “is an obstruction” within the meaning of the settlement agreement, and Saunders “shall remove it” and “shall not install or cause to be installed any gate” on the road without the consent of Jackson and Chavez. The court found that Jackson and Chavez were the

prevailing parties and were entitled to their attorney's fees under the settlement agreement.

Jackson and Chavez thereafter filed a motion seeking their attorney's fees. Their attorney declared that his billings "reflect only the time spent representing" Jackson and Chavez. He also noted that the deeds for the Jackson/Chavez parcel and the Mark/Liana parcel "contained virtually identical language" and therefore "virtually all the time that was spent proving that those deeds created an easement for Jackson/Chavez would have been expended even if [Mark and Liana] had not been parties to this action." The court awarded Jackson and Chavez their attorney's fees of \$79,297.93.

Saunders timely filed a notice of appeal from the judgment and the attorney's fees order.

### **III. Discussion**

#### **A. Interpretation of Deeds**

Saunders contends that the trial court misinterpreted the deeds. She asserts that the deeds were unambiguous and did not grant an easement but only reserved one.

##### **1. Standard of Review**

Grant deeds are generally interpreted in the same fashion as contracts. (*Riley v. Bear Creek Planning Committee* (1976) 17 Cal.3d 500, 516.) "The interpretation of a written instrument, even though it involves what might properly be called questions of fact [citation], is essentially a judicial function to be exercised according to the generally accepted canons of interpretation so that the purposes of the instrument may be given effect. [Citations.] Extrinsic evidence is 'admissible to interpret the instrument, but not to give it a meaning to which it is not reasonably susceptible' [citations], and it is the instrument itself that must be given effect. [Citations.] It is therefore solely a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence. Accordingly, '[a]n appellate court is not bound by a

construction of the contract based solely upon the terms of the written instrument without the aid of evidence [citations], where there is no conflict in the evidence [citations], or a determination has been made upon incompetent evidence [citation].’” (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866.)

“The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.” (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 37.) “[E]xtrinsic evidence as to the circumstances under which a written instrument was made has been held to be admissible in ascertaining the parties’ expressed intentions, subject to the limitation that extrinsic evidence is not admissible in order to give the terms of a written instrument a meaning of which they are not reasonably susceptible.” (*Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 522.) This test for the admissibility of extrinsic evidence is just as applicable to a grant deed as it is to a contract. Ordinarily, “[g]rants are to be interpreted in like manner with contracts in general” (Civ. Code, § 1066), although there are a few special rules that apply to grant deeds, none of which are pertinent here.<sup>8</sup>

## 2. Analysis

The grant deeds in question were identical with respect to the easement language. Each of them stated that Vernon and Junis, the grantors, granted to the grantees “[t]he following described real property . . . .” This language was followed by three separate

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<sup>8</sup> “A grant is to be interpreted in favor of the grantee, except that a reservation in any grant . . . is to be interpreted in favor of the grantor.” (Civ. Code, § 1069.) This is not a useful rule here, where the question posed by Saunders is whether the easement language is actually a “grant” or a “reservation.” None of the other special rules are applicable here. “A clear and distinct limitation in a grant is not controlled by other words less clear and distinct.” (Civ. Code, § 1067.) “If several parts of a grant are absolutely irreconcilable, the former part prevails.” (Civ. Code, § 1070.)

items: (1) “AS PER EXHIBIT ‘A’” (an attached document that described the metes and bounds of the parcel), (2) the “SUBJECT TO” the CC&R’s language, and (3) the easement language. Saunders contends that there was “nothing ambiguous” in the language of these deeds. She maintains that each deed granted only the property described in exhibit A. Saunders asserts that the deed’s language unambiguously provided that the granted property was “[s]ubject to” both the CC&R’s and the easement.

As the trial court aptly noted, due to the format and punctuation of the deeds, Saunders’s interpretation was not the only one to which the language was reasonably susceptible. If the grantor had simply intended to make the property subject to the easement, the easement language would logically have appeared in the same sentence as the CC&R language. Instead, the easement language was separated from the CC&R language by a period and placed on a new line as a separate sentence. Due to this circumstance, the deeds could reasonably be read to *grant* two things. First, the deed granted the property described in exhibit A, subject to the CC&R’s, and second, the deed granted the described easement. This interpretation was consistent with the extrinsic evidence of the intent of the grantors. Vernon and Junis intended to grant an easement, not to make the parcels subject to an easement.<sup>9</sup>

Saunders contends that this reasonable interpretation, which is consistent with the grantors’ intent, must be rejected because the description of the easement in the deed was insufficiently precise to meet the requirements for a grant and would be “void for indefiniteness.” Her argument is that the easement description “lacks any identifiable location of the existing graded roads over which the easement for ingress and egress is

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<sup>9</sup> In her reply brief, Saunders argues that this interpretation cannot be upheld because her own deed does not reference the easement. The lack of reference to the easement in Saunders’s deed means only that, like the easement rights appurtenant to the parcels owned by Vernon and Junis, any easement rights appurtenant to Saunders’s parcel were implied rather than deeded.

granted.”<sup>10</sup> “In general if a competent surveyor can take the deed and locate the land on the ground from the description contained therein, with or without the aid of extrinsic evidence, the description will be held to be sufficient.” (*Blume v. MacGregor* (1944) 64 Cal.App.2d 244, 251-252.) As the “existing graded roads” providing “ingress and egress” to these parcels could be readily located “on the ground” by a surveyor, the deed’s description of the easement was not inadequate.

### **B. Implied Easement**

Saunders contends the Vernon/Junis parcels did not have an implied easement over her parcel because it was not “reasonably necessary” for them to use the road.<sup>11</sup> “[T]he degree of necessity is such merely as renders the easement necessary for the convenient and comfortable enjoyment of the property as it existed when the severance was made. The test of necessity is whether the party claiming the right can, at reasonable cost, create a substitute on his own estate.” (*Navarro v. Paulley* (1944) 66 Cal.App.2d 827, 830 (*Navarro*); accord *Owsley v. Hamner* (1951) 36 Cal.2d 710, 718.) We review a trial court’s finding of reasonable necessity for substantial evidence. (*Navarro*, at p. 830.)

Evidence was presented at trial that it would be “very difficult” for Vernon and Junis to access the “beautiful” rear portions of their parcels and their water tanks without using the road. This was true because there is “a canyon that separates” the backs of the

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<sup>10</sup> Her reliance on *Edwards v. City of Santa Paula* (1956) 138 Cal.App.2d 375 (*Edwards*) is inapt. *Edwards* concerned the sufficiency of a description in a *tax* deed, to which special rules apply. (*Edwards*, at p. 381.)

<sup>11</sup> Plaintiffs assert that we need not reach the implied easements issue if we find that there were deeded easements. Not so. The trial court found that the Jackson/Chavez and Mark/Liana parcels had deeded easements, but it did not find that the Vernon/Junis parcels had deeded easements. Hence, we must consider whether these parcels had implied easements.

parcels from the fronts of the parcels. This evidence supports the trial court's finding that the comfortable and convenient enjoyment of the parcels owned by Vernon and Junis, including convenient road access to their water tanks, reasonably necessitated use of the road easement. We therefore reject Saunders's challenge to the trial court's reasonable necessity finding.

Saunders also contends that there cannot be an implied easement where there is a deeded easement. Since the parcels owned by Vernon and Junis did not have deeded easements, this argument does not apply to them. As to the parcels that did have deeded easements, it is immaterial whether they also could have implied easements.

### **C. Breach of Settlement Agreement**

Saunders contests the trial court's finding that she breached the settlement agreement. She claims that substantial evidence does not support the court's finding that her gate was an "obstruction" within the meaning of the settlement agreement. She claims that there was no evidence that the parties had a mutual understanding that the word "obstructions" in the settlement agreement included gates.

The 2005 action was brought by Jackson and Chavez after Saunders put logs in the road, impeded their workers by locking them in with *a gate*, and threatened to install *gates* across the road. Chavez testified at trial that the word "obstructions" was used in the 2006 settlement agreement "[b]ecause we wanted to use a word that was broad and inclusive" so that it would cover logs, "gate[s]," and "other things she might put in the road." Chavez also testified that she did not *oppose* all gates. She *opposed* Saunders's gate due to its unsafe location. Saunders, on the other hand, testified that she believed that the word "obstructions" did not restrict her erection of gates in any way whatsoever, and that her attorney in the 2005 action had told her that the settlement agreement would not preclude her from erecting a gate.

Since the source of the 2005 dispute involved Saunders's use of a gate to trap Jackson and Chavez's workers and her threats to erect gates, the trial court could reasonably conclude that the parties' execution of a settlement agreement using the broad term "obstructions" was mutually intended to prevent the recurrence of Saunders's actions and threats concerning gates. If the settlement agreement had not applied to gates, it would have been utterly ineffective in resolving the dispute underlying the 2005 action. While Saunders denied that she had intended to give up her right to erect a gate, the trial court could readily discredit this testimony. Furthermore, the trial court could reasonably conclude that an intent to permit gates would have been explicitly addressed in the agreement if "any obstructions" was not intended to apply to gates.

Saunders attacks the evidence on the ground that Chavez's testimony that she did not oppose all gates conflicted with her testimony that she intended "obstructions" to include gates. Chavez's testimony that she did not necessarily oppose the installation of a gate in an appropriate location was consistent with her reasonable position that, even though the settlement agreement barred Saunders from erecting any gates, Chavez would be willing to consider a proposal for the installation of an appropriate gate at a safe location. This does not constitute a basis for discrediting Chavez's testimony regarding the meaning of "obstructions."

Saunders argues that there was no evidence of a "mutual meeting of the minds" on the meaning of "obstructions." The mere fact that Saunders testified that she believed that "obstructions" did not apply to gates did not preclude the court from finding that there had in fact been a meeting of the minds when the settlement agreement was signed. Because the facts surrounding the execution of the settlement agreement were sufficient to inform Saunders that the word "obstructions" was intended to refer to gates, the trial court could reasonably reject her trial testimony to the contrary.

Saunders also maintains that, as a matter of law, "obstructions" does not include gates. She claims: "According to the California Supreme Court gates are not

obstructions to an easement in rural areas. *O'Banion v. Borba* (1948) 32 Cal.2d 145, 153-155." The cited case did not concern the meaning of the term "obstructions" *in a contract* and did not address any other issue that is pertinent here. The California Supreme Court stated: "The question as to the right of defendants to maintain gates or cattle guards across said easements is therefore not before us." (*O'Banion v. Borba* (1948) 32 Cal.2d 145, 154 (*O'Banion*)). Nevertheless, the court mentioned in dicta that, "[i]n view of the nature of the [prescriptive] easements here involved, *it would seem* that the maintenance of gates across the roads in question, which gates could be opened and closed by plaintiffs at will, would not constitute obstructions prohibited by the judgment." (*O'Banion*, at p. 154, italics added.) "Whether under such interpretation of the judgment defendants may construct and maintain gates across said easements, which will not interfere with plaintiffs' use thereof, *is a matter for the future determination of the court* if and when the question is presented." (*O'Banion*, at p. 155, italics added.) Nothing in *O'Banion* established as a matter of law that gates are not obstructions.

Saunders also asserts that the "common law" meaning of "obstructions" must be applied to the parties' use of this term in the settlement agreement, and she insists that this common law meaning does not include gates. No evidence was presented at trial that the parties to the settlement agreement (Jackson, Chavez, and Saunders) were even aware of the "common law" meaning of the word "obstructions" let alone that they intended for it to have its "common law" meaning. Saunders claimed that her attorney had told her that "obstructions" did not include gates. Chavez testified that she used this broad term specifically to include gates in the prohibition. Since neither of them claimed to have used the word as a legal term of art, the trial court could properly reason that they intended the word to have its common meaning. The common meaning of "obstruct" is hinder or impede. (Merriam-Webster's Collegiate Dict. (10th ed. 1999) p. 803.) Considering the history of the dispute, the trial court could reasonably conclude that the

parties understood that a gate would hinder or impede use of the road to access the Jackson/Chavez parcel.

#### **D. Exclusion of Evidence**

Saunders contends that the trial court prejudicially erred in excluding evidence that her prior attorney and the prior attorney for Jackson and Chavez orally “agreed that the word ‘obstruction’ did not include a gate if the dominant tenement had a key to the gate.”<sup>12</sup> She insists that this evidence was “extremely relevant” and would have established that the word “obstructions” in the settlement agreement was not intended to include any gates.

##### **1. Background**

Kimberly Kirk represented Saunders in the 2005 lawsuit. Saunders called Kirk to testify at trial. When Saunders’s attorney attempted to question Kirk about her communications with Doc Etienne, the attorney who had represented Jackson and Chavez in the 2005 lawsuit, plaintiffs’ trial counsel objected.<sup>13</sup> Saunders’s attorney explained

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<sup>12</sup> “The land to which an easement is attached is called the dominant tenement; the land upon which a burden or servitude is laid is called the servient tenement.” (Civ. Code, § 803.) In this case, the Jackson/Chavez parcel was the dominant tenement and Saunders’s parcel was the servient tenement.

<sup>13</sup> Plaintiffs’ attorney initially asserted that such testimony was inadmissible because it pertained to “settlement negotiations.” Saunders’s attorney responded: “Because in terms of trying to determine the party’s intention in presenting this and interpreting this agreement, I think I’m entitled to know what the parties said to each other in the settlement that resulted in the language which we are trying to interpret now.” He contended that Kirk and Etienne “should testify and are able to testify about what the word ‘obstruction’ meant in the settlement context.” Saunders’s attorney argued that “the inadmissibility of settlement discussions goes out the window when you are having a contest over the term in a settlement agreement and what it means.” The trial court agreed and did not base its ruling on the fact that this evidence concerned settlement negotiations.

that he wanted to ask Kirk “what did you mean in the word ‘obstruction’ in the settlement negotiations that resulted in that word appearing in the settlement agreement.” Plaintiffs’ attorney interposed an Evidence Code section 352 objection on the ground that the attorneys’ opinions were “collateral issues.” “That’s not what’s important. What’s important are the parties’ meaning, what they put in the wording; not the attorneys.” He asserted that the admission of such evidence would raise issues of “[h]earsay, attorney-client privilege.”

The trial court agreed with plaintiffs’ attorney’s position. “I don’t think the conversations and correspondence between [Kirk] and [Etienne] . . . go toward the issue of the parties’ intent. It goes . . . to the attorney’s intent maybe . . . . [¶] But ultimately the Court would have to determine what was the parties’ intent and was there a meeting of the minds as to whether ‘obstruction’ under both parties’ intent included a gate.” “So, again, I’m not saying there’s nothing to explore from Ms. Kirk. But what you are exploring does seem subject to those objections, and under 352, as well as privilege issues relating to settlement discussions that are what’s really going on between the two attorneys talking to one another I would sustain.”

Saunders’s attorney continued to argue that it would be appropriate for Kirk to testify that “there was notice given to Lori Chavez’s attorney that the word ‘obstruction’ included gate.” The court recalled Chavez’s testimony and asserted that she “never received communication from her attorney that ‘obstruction’ did not include a gate. And certainly gate was being discussed from the beginning, the fact that Ms. Saunders was threatening to put in a gate.” The court maintained that even if “you’re proving that Ms. Kirk may have given notice to the Chavez-Jackson attorney doesn’t necessarily translate that they had notice.” Plaintiffs’ attorney echoed this point: “what’s important is the intent of the people signing; not the attorneys.” “What matters is what the clients understood this to mean.” He argued that his clients would be “forced to waive the attorney-client privilege” and “under 352 this is frankly an impossible situation.” “I think

it's a 352 question. Especially when what matters is you can get it from the clients themselves, the people who matter."

The trial court concluded that "this is a 352 analysis at bottom in which the probative value versus the prejudice has to be weighed by the Court." "[T]o fully address it and explore it, as the plaintiffs have pointed out, very likely it is then going to open up discussions between the attorney and the clients about did you communicate it. . . . Because you're forcing them over this to open up the attorney-client privilege when I'm not sure they have put that at issue to the extent that this should be waived by the interpretation of this word in this agreement." The court also found that admission of the proffered testimony would be "time-consuming," "confusing and misleading." "What does it matter in the negotiations back and forth with the attorneys in terms of that communicating finally what the parties agreed on and what they intended to mean when they put 'obstruction' in the agreement."

At that point, Saunders's attorney made an offer of proof that Kirk would testify "that the attorneys [orally] agreed that the word 'obstruction' did not include a gate if the dominant tenement had a key to the gate." This offer did not alter the court's conclusion. "It doesn't rise to the probative value enough. In fact, it kind of sinks it a bit in terms of comparing it to the prejudicial factors of all the different policy considerations and time and likelihood of not ultimately -- confusing the issues as opposed to clarifying the issues." After this ruling, Saunders's attorney adduced no further testimony from Kirk.

## **2. Analysis**

Trial courts have the discretion to exclude evidence pursuant to Evidence Code section 352 "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) "[I]t is the exclusive province of the trial court to determine whether the probative value of evidence outweighs its possible prejudicial effect. [Citation.] And the

trial court's exercise of discretion on this issue will not be disturbed on appeal absent a clear showing of abuse. [Citation.]’” (*Gouskos v. Aptos Village Garage, Inc.* (2001) 94 Cal.App.4th 754, 762.) “‘In the absence of a clear showing that its decision was arbitrary or irrational, a trial court should be presumed to have acted to achieve legitimate objectives and, accordingly, its discretionary determinations ought not be set aside on review.’” (*Ibid.*)

The proffered evidence was Kirk's testimony that she and Etienne had orally “agreed” that the word “obstructions” would not include a gate to which Jackson and Chavez had a key. Saunders did not offer any evidence that this alleged oral agreement had been communicated to Jackson or Chavez or even to Saunders, and Chavez's testimony regarding her understanding of the term was to the contrary. Saunders testified that Kirk assured her that the term would permit a gate, but she did not claim that Kirk had told her that Jackson, Chavez, or their attorney had agreed to that definition. Hence, the sole relevance of this evidence would have been its circumstantial support for Saunders's testimony.

As circumstantial support for Saunders's testimony, Kirk's proffered testimony had little probative value and a high risk of prejudice. First, Saunders's testimony was inconsistent with the proffered testimony of Kirk. Saunders testified that she understood that obstructions simply did not include gates at all. Kirk's proffered testimony was that a gate would not fall within the meaning of the term obstructions only if Jackson and Chavez had a key to the gate. Kirk's more subtle definition plainly conflicted with Saunders's exclusive definition. Second, an alleged agreement between the attorneys, who did not sign the agreement, was, as the court pointed out, not particularly probative on the issue of the intent of the parties who did sign the agreement, both of whom testified at trial. Consequently, the admission of this evidence would pose a substantial risk of confusing the issue that was before the court. The issue was not what the attorneys understood or agreed but what their clients understood and agreed. Third,

Jackson and Chavez would have been prejudiced by the admission of this evidence because they would have been unable to effectively counter Kirk's testimony with testimony by Etienne without waiving their attorney-client privilege. The trial court was therefore faced with evidence of little probative value that posed a substantial risk of confusing the issue and causing undue prejudice to Jackson and Chavez. In this situation, we can find no abuse of discretion in the trial court's decision that the risks substantially outweighed the probative value of the proffered evidence.<sup>14</sup>

### **E. Attorney's Fees**

Saunders claims that the trial court erred in failing to apportion the attorney's fees. She claims that the attorney's fees awarded to Jackson and Chavez included fees for time spent on the Olsons' case.

Jackson and Chavez's attorney's fees motion was supported by their attorney's declaration that his billings "reflect only the time spent representing" Jackson and Chavez. He explained that the deeds for the Jackson/Chavez parcel and the Mark/Liana parcel "contained virtually identical language" so "virtually all the time that was spent proving that those deeds created an easement for Jackson/Chavez would have been expended even if [Mark and Liana] had not been parties to this action."

Saunders complains on appeal that plaintiffs' attorney's time spent proving that Jackson and Chavez had a *deeded* easement was unnecessary to establish Jackson and Chavez's easement rights because she acknowledged in the settlement agreement that they had an easement. It is true that the settlement agreement acknowledged that the

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<sup>14</sup> Moreover, even if we concluded that the trial court had erred in excluding this evidence, we would find no ground for reversal. The trial court acted as the trier of fact in this case, and it expressly stated that it found this evidence to be of no value. Hence, it is improbable that the admission of this evidence would have impacted the trial court's finding on this issue.

Jackson/Chavez parcel had an easement for ingress and egress over the road through Saunders's parcel. However, Saunders's attorney insisted at trial that "it *does make a difference* if it's deeded." (Italics added.) Although Saunders now insists that it makes no difference whether this easement was deeded, her attorney's position in the trial court had the effect of requiring plaintiffs' attorney to establish the deeded nature of the easement.<sup>15</sup> She certainly did not concede that the Jackson/Chavez parcel had a deeded easement.<sup>16</sup> It follows that plaintiffs' attorney's time spent to prove the deeded nature of the Jackson/Chavez easement was properly incurred on behalf of Jackson and Chavez and was compensable under the settlement agreement's broad attorney's fees clause.

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<sup>15</sup> On appeal, Saunders argues, in contradiction of her position below, that "it mattered not in this litigation whether the right to cross [Saunders's] parcel enjoyed by the Jackson/Chavez Respondents had its genesis in a deed or by implication, necessity, or prescription."

<sup>16</sup> We find it unnecessary to consider what difference it might have made whether the easement was deeded rather than prescriptive. What matters is that Saunders contested the matter, and Jackson and Chavez, who were seeking *declaratory* and *injunctive* relief, were required to prove that their parcel had a deeded easement.

#### IV. Disposition

The judgment is affirmed.

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Mihara, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P. J.

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Walsh, J.\*

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\* Judge of the Superior Court of Santa Clara County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.