

**IN THE DISTRICT COURT OF BROWN COUNTY, NEBRASKA**

**PLINIO PRIORESCHI and MARY  
PRIORESCHI, husband and wife,**  
Plaintiffs,

vs.

**JOEL A. GILLESPIE and DIONNE  
GILLESPIE, husband and wife,**  
Defendants.

Case No. CI03-2

**ORDER DENYING MOTION  
FOR SUMMARY JUDGMENT**

**DATE OF HEARING:** December 12, 2003.

**DATE OF RENDITION:** December 21, 2003.

**DATE OF ENTRY:** See court clerk's file-stamp date.

**APPEARANCES:**

For plaintiffs: Mark Kozisek.

For defendants: Cory R. Locke.

**SUBJECT OF ORDER:** Plaintiffs' motion for summary judgment filed November 17, 2003.

**PROCEEDINGS:** See journal entry rendered following hearing.

**FINDINGS:** The court finds and concludes that:

1. In *Hogan v. Garden County*, 264 Neb. 115, 646 N.W.2d 257 (2002), the Nebraska Supreme Court restated the familiar principles applicable to motions for summary judgment:

a. Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

b. In considering a summary judgment motion, the court views the evidence in a light most favorable to the nonmoving party and gives such party the benefit of all reasonable inferences deducible from the evidence.

c. On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.

d. The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.

e. A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial.

f. After the moving party makes a prima facie case for summary judgment, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.

2. This court must not weigh the evidence or consider which party the court considers more likely to prevail at trial. This court must, at this stage, merely determine whether a genuine issue of fact exists, and not how such factual issues should be determined. A mere inference favorable to the nonmoving party is sufficient to defeat a summary judgment motion.

3. At its core, the parties' contentions assert two interpretations of the contract granting the present easement and abandoning the former easement. Exhibit 1, p. 18-19. The plaintiffs view the instrument as a relocation of the former easement granted by judicial decree. The defendants contend that the instrument performs two independent functions: (a) creating a new easement which defines the terms and conditions of entry without reference to the prior easement, and (b) abandoning the old easement.

4. Construction of a contract constitutes a matter of law. Considering the plain and ordinary meaning of the words used, the court must determine whether the contract is ambiguous, i.e., susceptible of two reasonable, conflicting interpretations. The mere fact that the parties urge conflicting interpretations does not determine the existence of ambiguity.

5. This court concludes that, on its face, the agreement can be given two reasonable, conflicting interpretations. To that extent, the agreement is ambiguous. Parol

evidence may be admitted to resolve the ambiguity. Such extraneous evidence, of which a considerable amount appears in this record, raises an issue of fact. If this matter was before the court following trial on the merits, this court would have no difficulty resolving the claim based on the evidence submitted. However, that is *not* the proper function of this court on summary judgment motion. Because a dispute of facts exists, this court cannot grant the motion.

6. The pretrial conference cannot be scheduled at this time because of the imminent vacancy in the office of district court judge when the undersigned district judge assumes office in the Nebraska Court of Appeals. Of course, the successor district judge will not be bound by these interlocutory determinations and will be free to reexamine the disposition of the motion.

**ORDER:** IT IS THEREFORE ORDERED that:

1. The plaintiffs' motion for summary judgment is denied.
2. The scheduling of a final pretrial conference must be deferred until further order of the successor district judge or the presiding judge.
3. This order is interlocutory in character and subject to reconsideration or modification at any time before entry of final judgment without further notice or hearing.

Signed in chambers at **Ainsworth**, Nebraska, on **December 21, 2003**;  
DEEMED ENTERED upon file stamp date by court clerk.  
If checked, the court clerk shall:

Mail a copy of this order to all counsel of record and any pro se parties.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.

Note the decision on the trial docket as: [date of filing] Signed "**Order Denying Motion for Summary Judgment**" entered; pretrial conference to be scheduled by further order of successor district judge or presiding judge.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.

Mailed to:

**BY THE COURT:**

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**William B. Cassel**  
District Judge