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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**No. 31946-6**

**COURT OF APPEALS**

**DIVISION III**

**OF THE STATE OF WASHINGTON**

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**DONALD RUSSELL,**

**Respondent,**

**vs.**

**JOSHUA T. AUAYAN and IDA AUAYAN,**

**Appellants.**

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**THE HONORABLE ALLEN NIELSEN**

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**BRIEF OF APPELLANTS**

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## TABLE OF CONTENTS

	<u>Page</u>
Table of Contents	i.
Table of Authorities	ii.
Summary of the Appeal	iv.
Assignments of Error	vi.
Issues Pertaining to Assignment of Error	viii.
Statement of the Case	1.
Argument I: Vacate the Order of April 25, 2013, substantively unconscionable	4.
Argument II: Vacate the Order of April 25, 2013, violation of public policy	9.
Argument III: Vacate the Order of April 25, 2013, lack of mutual assent of Ida M. Auayan	11.
Argument IV: Vacate the Order of April 25, 2013, order contained terms not in the complaint	14.
Argument V: Vacate the Order of April 25, 2013, failure to make Findings of Fact Conclusions of Law	19.
Argument VI: CR 2A does not apply	22.
Argument VII: Attorney's Fees not supported by Findings of Fact Conclusions of Law	23.
Auayan's attorney's fees request of Joshua Auayan	24.
Conclusion	25.
Appendix 1	28.

TABLE OF AUTHORITIES P.1

<u>TABLE OF CASES</u>	<u>Page</u>
<u>Al-Safin v. Circuit City Stores, Inc.</u> , 394 F.3d 1254 (2005) (9 <sup>th</sup> Cir. (Wash.) Sep 9, 2002)	4
<u>Alder v. Fred Lind Manor</u> , 153 Wn.2d 331, 103 P.3d 773 (2004)	5
<u>Baird v. Baird</u> , 6 Wn.App. 587, 494 P.2d 1387(1972)	22
<u>Becker v. Washington State University</u> , 165 Wash.App. 235, 266 P.3d 893, (2011)	12
<u>Jain v. Clarendon America, Co.</u> , 304 F.Supp.2d 1263 (2004)	9
<u>Lietz v. Hansen Law Offices, P.S.C.</u> , 166 Wash.App. 571, 271 P.3d 899 (2012)	11
<u>Mahler v. Szucs</u> , 135 Wn.2d 398, 957 P.2d 632 (1998)	23
<u>Marriage of Hammack</u> , 114 Wn.App. 805, 60 P.3d 663 (2003)	9
<u>Nguyen v. Sacred Heart Medical Center</u> , 97 Wn.App. 728, 987 P.2d 634 (1999)	22
<u>Pacesetter Real Estate, Inc. V. Fasules</u> , 53 Wn.App. 463, 767 P.2d 961 (1989)	21
<u>Schultz v. United Airlines, Inc.</u> , 797 F.Supp.2d 1103 (2011)	11
<u>Summers v. Department of Revenue</u> , 104 Wn.App. 87, 14 P.3d 902 (2001)	22
<u>Tacoma Auto Mall, Inc., v. Nissan North America, Inc.</u> , 169 Wash.App. 111, 279 P.3d 487 (2012)	12

**TABLE OF AUTHORITIES P. 2**

	<b><u>STATUTES</u></b>	<b><u>Page</u></b>
Wash. Const. Article 1 Paragraph 7		8, 10, 20

**COURT RULES**

CR 2A Stipulations		22, 27
CR 60(b)(1)		3
RAP 18.1		24, 27

**RULES OF PROFESSIONAL CONDUCT**

RPC 1.2(a) Scope of Representation and Allocation of Authority Between Client and Lawyer		13
--	--	----

**RULES OF EVIDENCE**

NONE.

## SUMMARY OF THE APPEAL

**JOSHUA AUAYAN** and **IDA AUAYAN**, husband and wife, hereinafter referenced as “**AUAYANS**”, own real property in Stevens County, Washington, adjacent to real property owned by **DONALD RUSSELL**, hereinafter referenced as “**RUSSELL**”. (CP 004, 005)

Both properties are subject to real estate protective covenants<sup>1</sup> that basically say, in part, that landowners will not conduct activities on their property that cause any annoyances to the neighborhood. (CP 030-031)

A Stipulated Settlement Agreement<sup>2</sup> was entered and put on the record, by the Court, on April 25, 2013, in lieu of trial. (CP 079-094)

**JOSHUA AUAYAN** was present and assented. **IDA AUAYAN** was not present, and she did not assent to the terms of that Settlement Agreement<sup>2</sup> and Order. (CP238) Her lack of contract assent, creates the issue of contract lack of mutual assent, and contract unenforceability.

The Agreement<sup>2</sup> Order contained terms that were substantially

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<sup>1</sup> All references to the real estate covenant material in this case, (CP 030-031) shall hereinafter be referred to as “**COVENANT**”.

<sup>2</sup> All references to a Stipulated Settlement Agreement Order dated April 25, 2013, shall hereinafter be noted as “**AGREEMENT**”.

unconscionable, and violated public policy, as well, creating the additional issue of contract unenforceability.

**RUSSELL'S** Complaint, did not pray for some terms contained in the Agreement<sup>2</sup> Order, nor did the Trial Court include any Findings of Fact, or Conclusions of Law, in the Agreement<sup>2</sup> Order. **(CP 003-056)**

Attorney's fees issues exist, as well as the applicability of **CR 2A**. **(CP 246) (CP 212-220)**

The standard of review is error at law.

**AUAYANS'** filed a Motion to Vacate the Courts Agreement<sup>2</sup> Order. **(CP 166-175)**

It was denied in a Final Order<sup>3</sup>, **(CP 239-240)** and a contempt Final Order<sup>3a</sup> which were entered against them. **(CP 241-246)**

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<sup>3</sup> References to the two Final Orders, entered by the Trial Court on August 20, 2013:

3. Order denying **AUAYANS'** Motion to Vacate the Stipulated Settlement Agreement Order, dated April 24, 2013, **(CP 239-240)**

3a. Order finding **AUAYANS** in contempt, **(CP 241-246)** shall hereinafter be noted as "**FINAL ORDERS**".<sup>3&3a</sup>

**ASSIGNMENTS OF ERROR**  
**FINAL ORDER (3) (VACATE)**

1. **AUAYANS' Motion to Vacate denied, by Final Order<sup>3</sup>, entered August 20, 2013. (CP 239-240)**

The Trial Court erred, as a matter of law, when it entered a Final Order<sup>3</sup> on August 20, 2013, denying (AUAYAN'S) Motion to Vacate the Agreement<sup>2</sup> Order. (CP 079-094)

The Agreement<sup>2</sup> Order contained terms that were substantively unconscionable, which rendered the agreement illegal, void, and unenforceable, from its inception.

**FINAL ORDER (3a) (CONTEMPT)**

2. **Final Order<sup>3a</sup> of August 20, 2013, finding AUAYANS in contempt. (CP 241-246)**

A. The Trial Court erred, as a matter of law, when it entered Finding #3, in its Final Order<sup>3a</sup>, that found AUAYANS in Contempt of the void Agreement<sup>2</sup> Order. (CP 079-094)

**Finding #3, in that Final Order<sup>3a</sup>:**

***"The Defendants, JOSHUA T. AUAYAN and IDA M. AUAYAN, husband and wife, have willfully not complied with the terms of the Stipulated Settlement Agreement dated April 25, 2013."***

B. The Trial Court erred, as a matter of law, when it entered Finding #4 in its Final Order<sup>3a</sup> of August 20, 2013, that found AUAYANS in contempt of the void Agreement<sup>2</sup> Order.

**Finding #4 in its Final Order<sup>3a</sup>:**

***“There is no basis to justify setting aside the Stipulated Settlement Agreement dated April 25, 2013.”***

C. The Trial Court erred, as a matter of law, when it included Paragraphs C-D-E-F-G-H-I, in its Final Order<sup>3a</sup>, that found AUAYANS in Contempt of the void Agreement<sup>2</sup> Order.

All of these provisions, contained in the Agreement<sup>2</sup> Order, (CP 079-094), were based on the Courts erroneous acceptance of the Agreement<sup>2</sup>, that contained substantively unconscionable terms and terms that violated public policy, making it void, illegal, and unenforceable, as a matter of law.

3. The Trial Court erred when, in its Final Order<sup>3a</sup> of August 20, 2013, when it awarded RUSSELL’s attorney’s fees, without making written Findings of Fact, Conclusions of Law. (CP 246)

## ISSUES PERTAINING TO ASSIGNMENT OF ERROR

- Issue I.** Should the Trial Court have vacated the Agreement<sup>2</sup> Order, entered on April 25, 2013, as a matter of law, that contained terms that were substantively unconscionable, rendered the agreement illegal, void, and unenforceable, from its inception? **(CP 079-094)**
- Issue II.** Should the Trial Court have vacated the Agreement<sup>2</sup> Order, entered on April 25, 2013, as a matter of law, when it contained terms, that violated **AUAYANS'** rights of privacy, in their private affairs, and quiet enjoyment of their real property, a violation of public policy? The contract was illegal, void, and unenforceable from its inception.
- Issue III.** Should the Trial Court have vacated the Agreement<sup>2</sup> Order, as a matter of law, on the basis that **IDA AUAYAN** did not sign it, and did not agree to the terms?
- Her lack of mutual assent of the Agreement<sup>2</sup> Order's terms, caused the Agreement<sup>2</sup> Order to be void from inception.

**ISSUE IV.** Should the Trial Court have vacated the Agreement<sup>2</sup> Order as a matter of law, on the basis that the order contained terms that were not prayed for in **RUSSELL'S** Complaint?  
**(CP 003-056)**

**ISSUE V.** Should the Trial Court have vacated the Agreement<sup>2</sup> Order, as a matter of law, on the basis that the Court had failed to make findings of fact, that the real estate covenant<sup>1</sup>, **(CP 030-031)** that is the basis of this case, was valid and that **RUSSELL'S** neighborhood annoyances were reasonable, and that it was reasonable to restrict **AUAYANS'** activities on their real estate?

**ISSUE VI.** Do **CR 2A** Stipulations apply to void agreements?

**ISSUE VII.** Should the Trial Court have ordered an award of attorney's fees to **RUSSELL**, in its Final Order<sup>3a</sup>, when no written Findings of Fact, or Conclusions of Law supported the attorney's fees award? **(CP 246)**

**ISSUE VIII.** Should **AUAYANS** be awarded attorney's fees on appeal?  
**(CP 30, Covenant<sup>1</sup>, Paragraph 4)**

**STATEMENT OF THE CASE**

AUAYANS, and their extended family, are from the Philippines, and live on rural acreage property, in Stevens County, Washington.

**(CP 003-005)**

RUSSELL lives on the adjacent property, and gains access to his property, using an easement, across AUAYANS' property. **(CP 003-005)**

Both real properties are subject to a restrictive covenant<sup>1</sup>, **(CP 30-31 Appendix 1)**, that generally says, in part, that property owners will not conduct activities on their property, that is an annoyance to the neighborhood. **(CP 031, Paragraph 10 (b)) (RP 5 Lines 24-25 and 6 Lines 1-5)**

A Declaratory Relief and Injunction Action, (Complaint) was brought by RUSSELL, against AUAYANS, on March 23, 2012, in the Stevens County Washington Superior Court Case# 12-2-00122-5. **(CP 003-056)**

The AUAYANS' answered on May 16, 2012, and trial was set for April 25, 2013. **(CP 057-064)**

The day of the trial, an Agreement<sup>2</sup> Order, was entered into, between the parties, in which JOSHUA AUAYAN agreed to a variety of

unconscionable terms, on the record, that adversely affected his and his wife, **IDA AUAYAN**'s constitutional rights, their right of privacy, in their private affairs, and right of quiet enjoyment of their property. **(CP 079-094)**

In that Agreement<sup>2</sup> Order, it required **AUAYANS** to give up control, to **RUSSELL**, of their private affairs and use of their real property, and applicable easement. A non-party neighbors easement rights, were also effected. **(RP 4 Lines 18-25 and 5 Lines 1-5) (CP 89-90 Ex. B)**

**IDA AUAYAN**, did not attend the pretrial settlement meeting and did not agree to the terms of the Agreement<sup>2</sup> Order or enter anything on the Court record. She specifically noted that in her Declaration. **(CP 238)**

Attorney, Terry L. Williams had been appointed, by the Honorable Judge Patrick Monasmith, to sign for **IDA AUAYAN**, **(CP 077-078)** on the easement transfer documents. **(CP 089-090)** He did not represent her, as her attorney of record. **(RP 7 Lines 14-20)**

The Agreement<sup>2</sup> Order, was entered in the case, on April 25, 2013. **(CP 079-094)**

On August 2, 2013, through new counsel, **DALE L. RUSSELL**, **JOSHUA AUAYAN** brought a Motion to Vacate the Agreement<sup>2</sup> Order.

**(CP 166-175) (RP Lines 2-6)**

AUAYANS argued that the Agreement<sup>2</sup> Order **(CP 079-094)** should be vacated on the basis that it was based on a contract that contained unconscionable provisions, and provisions against public policy and, as such, was void, and unenforceable, from its inception. **(CR 60(b)(1)) (RP 7 Lines 5-24)**

Since IDA AUAYAN, **(CP 238)** did not agree to the Agreement<sup>2</sup> Order terms, **(CP 079-094)** it also was void, for her lack of assent, to the contract terms, when the contract was formed. **(RP 7 Lines 24-25)**

AUAYANS' Motion to Vacate the Agreement<sup>2</sup> Order was denied, by Final Order<sup>3</sup> **(CP 166-175)** and a Final Order<sup>3a</sup> finding them in contempt of the Agreement<sup>2</sup> Order, was entered against them, on August 20, 2013. **(CP 241-246)**

## ARGUMENT I

**Issue I. Should the Trial Court have vacated the Agreement<sup>2</sup> Order (CP 079-094), that contained terms that were substantively unconscionable, that rendered the agreement illegal, void, and unenforceable, from its inception? (RP 7 Lines 24-25) (RP 8 Lines 1-5)**

### CONTRACT

#### SUBSTANTIVE UNCONSCIONABILITY

Where a clause or term in a contract is one-sided or overly harsh it is substantively unconscionable, which makes the entire contract illegal, unenforceable, and void from its inception.

Whether or not the contract is substantively unconscionable is a question of law.

**Al-Safin v. Circuit City Stores, Inc., 394 F.3d 1254 (2005)**

In that case, an arbitration agreement was deemed to contain contract terms that were substantively unconscionable. Those terms made the contract illegal, unenforceable, and void from inception. The offensive term was a clause, permitting an employee to amend the terms of the arbitration agreement each year, which violated substantive and procedural

rights of the employee.

The case of **Adler v. Fred Lind Manor, 153 Wn.2d 331, 103 P.3d 773 (2004)**, contained similar facts, where an arbitration agreement was invalidated and deemed illegal and unenforceable, because it contained substantively unconscionable terms.

A single substantively unconscionable term, made the entire agreement illegal, void, and unenforceable, in that case.

That case notes, that the burden of proving that the agreement is unenforceable, is on the party opposing enforcement of the agreement.

That case, also, defines substantive unconscionability, as contract terms that do any of the following: are one-sided, overly harsh, shocking to the conscience, monstrously harsh, and exceeding calloused.

That definition of substantive unconscionability applies directly to all of the paragraphs in the Agreement<sup>2</sup> Order (**CP 079-094**), in this case, but specifically Paragraph 2 c. (**CP 81**) and Paragraph 5 (**CP 82**).

These paragraphs contain the most egregious terms, where **RUSSELL** effectively controls the lives of the **AUAYANS**, and activities on their real property, in a manner that is monstrously harsh, exceedingly calloused, and shocking to the conscience.

**A. Agreement<sup>2</sup> Order Paragraph 2(c)(CP 81)**

“2(c)The following vehicles shall be stored in the existing portable ready made garages no later than June 30, 2013 and said garages shall be maintained or replaced in a fully functional capacity at all times:

1. 1994 GMC Suburban, Washington State License Plate No. 447XCN; and
2. Unlicensed Gray Chevrolet Legend Van with USA-1 for License Plate.

Any vehicles without a current license for more than six (6) months shall be deemed abandoned and removed from the property by the 1<sup>st</sup> day of the 7<sup>th</sup> month. Auayan shall mail to Russell (P.O. Box 28837, Spokane, Washington 99228) copies of the currently renewed yearly Registration for each and every vehicle situated upon their property immediately after being renewed, if said registration results in the issuance of a new license plate number, and the registration for any new vehicles, so that Russell has the ability to verify correct registration.” (RP 2 Lines 22-28 and 3 Lines 1-18)

These provisions allow RUSSELL to dictate AUAYANS’ use and storage of vehicles, on their real property, and gives RUSSELL shocking and monstrosly harsh, and exceedingly calloused control over AUAYANS’ private affairs and vehicle registrations. As such, the Agreement<sup>2</sup> Order, Paragraph 2(c)(CP 81) is substantively unconscionable.

**B. Agreement<sup>2</sup> Order Paragraph 5 (CP 82)**

“5. Defendants, JOSHUA T. AUAYAN and IDA M.

AUAYAN, husband and wife, agree to not store any more non-street legal vehicles (excluding those vehicles set forth in Paragraph 2 above.) None of the allowed vehicles shall be replaced with other non-street legal vehicles as determined by the Washington State Patrol. Non-street legal vehicles does not encompass vehicles and equipment normally used for agricultural purposes.” (RP 4 Lines 10-17)

This provision allows RUSSELL to dictate how AUAYANS’ vehicles are stored and gives RUSSELL the shocking and overly harsh

power to limit AUAYANS' ownership of off road, non-street vehicles, and their replacement, of all private affairs of the AUAYANS.

It allows RUSSELL to use the Washington State Patrol, police power to define AUAYANS' personal affairs concerning their non-street legal vehicles.

The Washington State Patrol would never use their police power to define which of AUAYANS' vehicles are non-street legal vehicles, and how or whether they should be replaced, or whether or not their ownership should be restricted. (RP 4 Lines 10-12)

The police power of the Washington State Patrol would extend only to AUAYANS' vehicles on the public roadways, and to determine whether or not vehicles on public streets or in public areas, are abandoned.

The AUAYANS' vehicles are vehicles existing on their private, real property, where it is legal to store off-road, unlicensed, vehicles.

Paragraph 5, (CP 82) of the Agreement<sup>2</sup> Order is therefore substantively unconscionable.

These two paragraphs of terms, in the Agreement<sup>2</sup> Order, (CP 81-82), contain major overreaching terms that are substantively unconscionable, where RUSSELL has way too much personal control

over AUAYANS' daily activities, and private affairs conducted, on their real property, and violates **Wash.Const. Art. 1, Paragraph 7**.

The other terms, paragraphs 1 through 14,(CP 079-085), in the Agreement<sup>2</sup> Order contain similar overreaching provisions, that rise to the level of substantively unconscionability, and similar constitutional violations.

Since the Court's Agreement<sup>2</sup> Order (CP 079-094), was void, and unenforceable, from inception it should have been vacated, on AUAYANS' Motion to Vacate. (CP 166-175)

The Final Order<sup>3a</sup>, finding AUAYANS' in contempt of Court, should never have been entered. (CP 241-246)

**ARGUMENT II:**

**Issue II. Should the Trial Court have vacated the Agreement<sup>2</sup>**

**Order that contained terms, that violated AUAYANS' public policy rights of privacy in their private affairs and quiet enjoyment of their real property? (RP 7 Lines 24-25)**

**CONTRACT**

**VIOLATION OF PUBLIC POLICY**

A party attacking enforcement of a contract, on the basis, that it is void, **as against** public policy, has the burden to prove that the contract is void against public policy.

**Jain v. Clarendon America Co., 304 F.Supp.2d 1263 (2004)**

If the contract is deemed void against public policy, it is void as abin ito, or null from the beginning.

**Marriage of Hammack, 114 Wn.App. 805, 60 P.3d 663 (2003)**

In that case, a term in a dissolution settlement agreement, calling for non payment of child support, entered into between the parties to the dissolution, was determined to be against public policy, and as such, the settlement agreement was deemed to be void and unenforceable, as against public policy.

The public policy that is involved in the case at Bar, is do **AUAYANS'** have a right to privacy in their private affairs and also have a right of quiet enjoyment of their property? **Wash. Const. Article 1 Paragraph 7**

All of the terms of the Agreement<sup>2</sup> Order violate public policy, but the most egregious, are Paragraph 2(c) and Paragraph 5, **(CP 81-82)**.

These provisions gave **RUSSELL** control over **AUAYANS'** private affairs and their actions on their property, that were shocking, monstrously harsh, exceeding calloused.

Those Agreement<sup>2</sup> Order **(CP 079-094)** terms, not only violated public policy, on that basis, but caused **JOSHUA AUAYAN** and **IDA AUAYAN** to lose control over their real property easement, and said provisions eliminate an easement right of a neighbor, not a party to the action. **(RP 4 Lines 18-25) (RP 5 Lines 1-5)**

### ARGUMENT III.

**Issue III. Should the Trial Court have vacated**

**the Agreement<sup>2</sup> Order (CP 079-094), on the basis that IDA AUAYAN did not sign it, and did not agree to the terms? (RP 7 Lines 14-20)**

**Contract Mutual Assent**

Washington follows the objective manifestation test for contract formation.

A valid contract requires mutual assent, which takes the form of offer and acceptance.

**Lietz v. Hansen Law Offices, P.S.C., 166 Wash.App. 571, 271 P.3d 899, (2012)**

Even an implied contract requires an offer and acceptance.

The acceptance should be in the terms of the offer, and communicated to the offeror. If that occurs, there is a mutual intention to a contract of the parties, and there is a meeting of the minds of the parties.

**Schultz v. United Airlines, Inc., 797 F.Supp.2d 1103(2011).**

The party asserting the existence of an express or implied contract, has the burden of proving its elements.

In the case at Bar, that party would be **RUSSELL**.

**Tacoma Auto Mall, Inc., v. Nissan North America, Inc., 169 Wash.App. 111 279 P.3d 487, (2012)**

**Becker v. Washington State University, 165 Wash.App. 235 266 P.3d 893 (2011)**

The terms of the Agreement<sup>2</sup> Order (**CP 079-094**), that forms the substance of the case at Bar, was not accepted by **IDA AUAYAN**, (**CP 238**) and as such, she has not mutually assented to any terms in the contract, and the contract should fail for faulty construction, based on the absence of **IDA AUAYAN'S** acceptance, of any of the Agreement<sup>2</sup> Order terms. (**RP 7 Lines 14-20**)

It may be argued that, **IDA AUAYAN'S** attorney provided acceptance for her, but **RPC 1.2(a)** disallows an attorney to settle a case for a client, without the client's consent.

**IDA AUAYAN** did not give her attorney, or specifically, Terry Williams, (**CP 077-078**), an attorney appointed by the Court, to sign easement documents for her, the authority to settle her case on the basis of terms, included in the Agreement<sup>2</sup> Order.

**“RPC 1.2 (a): Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decision concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.”**

The Trial Court should have vacated the Agreement<sup>2</sup> Order (CP 079-094), that was based on faulty construction, the lack of IDA AUAYAN'S acceptance, and as such, is void and unenforceable.

**ARGUMENT IV:**

**ISSUE IV.                    Should the Trial Court have vacated**  
**the Agreement<sup>2</sup> Order (CP 079-094) on the basis that the order**  
**contained terms that were not prayed for in Plaintiff's complaint?**

**Contract Extra Terms**

Of the variety of allegations, in RUSSELL'S Complaint,(CP 007-008) against JOSHUA AUAYAN and IDA AUAYAN, only the four following Complaint allegations actually apply to those individuals.

**(Paragraphs 4.5, 4.6, 4.7, 4.8) (CP 007-008)**

The remainder of the allegations, included in the Complaint, apply to predecessors, in title, to JOSHUA AUAYAN and his wife, IDA AUAYAN.

**Complaint Paragraph 4.5**

**“(CP 007) Defendant, JOSHUA T. AUAYAN, and the invitees of Defendant and his extended family have been misusing the Easement to harass RUSSELL and his invitees by moving their garbage pick-up location from their property on Bittrich-Antler County Road to the twenty-foot (20') opening off the Easement Right-of-Way, causing an 80,000 pound refuse pick-up vehicle to turn onto the Easement Right-of-Way and turn again through the twenty-foot (20') opening, causing damage to the shoulders of the Right -of-Way and ruts in the road bed. RUSSELL contacted the refuse company and was able to re-direct the refuse pick-up vehicle to its original pick-up site on Bittrich-Antler County Road.”**

**Complaint Paragraph 4.6**

**“(CP 007) Auayan and the invitees of Auayan and their extended family have on numerous occasions intentionally sought to cause damage to the Easement roadbed by backing up to Russell’s gate (Approximately 700' South of Bittrich-Antler County Road) and/or starting at the twenty-foot (20') opening (approximately 300'+ South of Bittrich-Antler County Road) and peeling out and creating up to six inch (6'') deep ruts for distances up to fifty feet(50') or more and driving on the shoulder to break it down on the East and West Sides of distances of eighty (80') to two hundred feet (200'), and on at least one(1) occasion blocked ingress and ingress to the RUSSELL property by leaving an alleged disabled vehicle in the middle of the Right -of-Way, preventing access to RUSSELL’S property for at least thirty (30) minutes.**

**Complaint Paragraph 4.7**

**“(CP 007) Auayan and the invitees of Auayan and their extended family have caused damage to the Short Plat Easement Right-of-Way in the amount of \$1,565.28, as Estimated by G and S Landscape from Deer Park, Washington. A copy of Estimate #198 from G and S Landscape dated April 18, 2011 is attached hereto as Exhibit “I”.”**

**Complaint Paragraph 4.8**

**“(CP 007-008) Auayan and the invitees of Auayan and their extended family have on thirteen (13) different occasions verbally harassed RUSSELL and made threats to kill RUSSELL, including directing others to retrieve a firearm for just such a purpose, resulting in reports to the Stevens County Sheriff’s Office.”**

Based on those four allegations, RUSSELL, in 6.1, of the Agreement<sup>2</sup> Order, (CP 079-094), notes AUAYANS’ activities are a nuisance.

All of those allegations concerning **AUAYANS**, should have been analyzed in the context of the real estate covenant, that is the basis of this case.

**REAL ESTATE COVENANT LANGUAGE (CP 031) (APPENDIX 1)**

**“10(b) No noxious or offensive trade or activity shall be carried on upon any parcel nor shall anything be done thereon which may be or become an annoyance to the neighborhood.”**

Those four allegations against, **AUAYANS** have nothing to do with the real estate covenant<sup>1</sup> language.

**AUAYANS** did not conduct any noxious or offensive trade on the property.

There was no evidence in the record, that **AUAYANS**, did anything to annoy the “neighborhood”.

Only **RUSSELL** seems annoyed by their activities, and activities of their predecessors in title.

**RUSSELL**, must be alleging, then, that **AUAYANS**, conducted an offensive activity on their property and said activity was offensive to **RUSSELL**, who somehow is the representative of the entire neighborhood.

**RUSSELL’S** Complaint (**CP 003-056**) allegations, nor does anything in the record, mention **AUAYANS’** offensive activity or offense

to the neighborhood at all.

**RUSSELL'S** Complaint (CP 003-056) allegations, in summary, are that **AUAYANS** have misused the easement during garbage pickup and once, for 30 minutes, and they blocked the easement with a broken down vehicle. In addition, they verbally harassed **RUSSELL**.

The day of the trial, these four Complaint issues were addressed in the Agreement<sup>2</sup> Order. (CP 079-094)

The most the Court could have done at trial, based on these allegations, is found that **AUAYANS**, abused the easement, found damages and that they verbally harassed **RUSSELL**.

An injunction against verbal harassment and for further abuse of the easement would have been reasonable.

Instead, the Agreement<sup>2</sup> Order (CP 079-094), required **AUAYANS** to deal with a variety of their activity issues, on their property, that allegedly annoyed, only **RUSSELL**. (Paragraphs 1 through 11 of the Agreement<sup>2</sup> Order )(CP 079-084)

The Agreement<sup>2</sup> Order, (CP 079-094) also gave **RUSSELL** complete control of an access easement where **AUAYANS** owned real estate, that a non-party neighbor had easement rights on.

The Agreement<sup>2</sup> Order (CP 079-094) had nothing to do with the four Complaint allegations applicable to AUAYANS.

The Agreement<sup>2</sup> Order (CP 079-094) should have been vacated on that technical basis.

**ARGUMENT V:**

**ISSUE V.                    Should the Trial Court have vacated**

**the Agreement<sup>2</sup> Order (CP 079-094) entered on April 25, 2013, on the basis that the Court had failed to make the following findings of fact:**

**1. That the real estate covenant, that is the basis of this case, was valid.**

**2. That RUSSELL'S neighborhood annoyances existed and were reasonable.**

**3. That it was reasonable to restrict AUAYANS' personal affairs and activities on their own property. (RP 7 Lines 5-7)**

This case is based entirely, on the real estate covenant<sup>1</sup>, that affects the land of AUAYANS and RUSSELL. (CP 30-31 Appendix 1)

**Real Estate Covenant<sup>1</sup>: 10(b). "No noxious or offensive trade or activity shall be carried on upon any parcel, nor shall anything be done thereon which may be or become an annoyance to the neighborhood." (CP 031 Appendix 1)**

All of the provisions of the Agreement<sup>2</sup> Order (CP 079-094), entered on August 20, 2013, should have had this real estate covenant<sup>1</sup> analyzed, as their basis.

The Court failed to deal with the covenant language, directly, at all.

No where in the Agreement<sup>2</sup> Order (**CP 079-094**), was the covenant determined to be a valid restriction on the land of **AUAYANS**.

No where in the Agreement<sup>2</sup> Order did the Court determine that **AUAYANS'** activities, alleged to be "annoyances", under the covenant by **RUSSELL**, were reasonable annoyances of the neighborhood, that should be remedied, by entering an Agreement<sup>2</sup> Order, adversely affecting **AUAYANS'** right of privacy, in their private affairs, and right to quiet enjoyment of their property. (**RP 7 Lines 5-7**) **Wash. Const. Article 1 Paragraph 7**

The Court even failed to address the fact that there was no evidence of neighborhood annoyances in the record. Only the general annoyances of **RUSSELL**, were deemed to be the base for activity restrictions against **AUAYANS** on their real property.

It would seem that this type of analysis should have been done, as a first step, in the Courts Findings, before entering Final Orders<sup>3</sup>&<sup>3a</sup>, causing **AUAYANS** to be in contempt of Court, and denying **AUAYANS'** Motion to Vacate the Agreement<sup>2</sup> Order (**CP 166-175**)and before entering a Final Order<sup>3a</sup> of Contempt against them. (**CP 241-246**)

In addition, "Absence of a finding, on an issue, may be deemed to be a finding against the party having the burden of proof." **Pacesetter Real Estate, Inc. V. Fasules, 53 Wn.App. 463, 767 P.2d 961 (1989)**

The lack of Findings of Fact, may in itself, be reason for **AUAYANS** to have the Agreement<sup>2</sup> Order vacated.

**ARGUMENT VI:**

**CR 2A**

RUSSELL has argued that CR 2A indicates that a stipulation of the parties is binding, since it was made in Open Court, on the record, and memorialized in writing, cannot be reviewed on appeal, or disturbed where it is supported by evidence. (CP 212-220)

**Baird v. Baird, 6 WN.App. 587, 494 P. 2d 1387 (1972)(CP 10-219)**

Since the Agreement<sup>2</sup> Order is void. The Court made an, error at law, in using the void agreement as a basis for its Agreement<sup>2</sup> Order.

CR 2A only applies to agreements that are valid agreements.

**Nguyen v. Sacred Heart Medical Center, 97 Wn. App. 728, 987 P.2d 634 (1999)**

A void agreement should amount to an irregularity, as noted in **Summers v. Department of Revenue 104 Wn. App. 87, 14 P.3d 902(2001).**

Since, IDA M. AUAYAN, was not present in Court, when the Agreement<sup>2</sup> Order was put on the record and memorialized in writing, the Agreement<sup>2</sup> Order is void and unenforceable against her. (CP 238)

## ARGUMENT VII.

Attorney's fee awarded to **RUSSELL**, in the Final Order<sup>3a</sup>, not supported by Findings of Fact, on that issue.

The Court in its Final Order<sup>3</sup> of August 20, 2013, where it denied **AUAYANS'** Motion to Vacate the Agreement<sup>2</sup> Order of April 25, 2013, and found **AUAYANS'** in Contempt in a Final Order<sup>3a</sup>, for violation of the Agreement<sup>2</sup> Order, awarded **RUSSELL's** attorney's fees of \$3,690.00.

**Mahler v. Szucs, 135 Wn.2d 398, 957 P.2d 632 (1998)** requires the Court to make Findings of Fact, specific to the attorney's fees issue, or it is not proper to award them to **RUSSELL**.

The Trial Court abused its discretion, in its Order awarding attorney's fees to **RUSSELL**.

The attorney's fees award to **RUSSELL** should be vacated.

**ATTORNEY'S FEES REQUEST OF JOSHUA AUAYAN**

The genesis of this case, is a Declaration of Protective Covenants<sup>1</sup>, recording number 481807, recorded on March 2, 1979, dated February 25, 1979, **(CP 030-031, Appendix 1)** declared by Donald A. Hertz, and Lee Hertz, Debbie Colbert and James A. Colbert, applicable to: NW 1/4- Section 12 TWP 28N Range 41 E.W.M.

**Paragraph 4 Enforcement, states as follows:**

**“4. Enforcement. Every person now or hereinafter having any right, title or interest in or to any parcel of the property shall have the right to prevent or stop violation of any of these said restrictions or to compel compliance therewith by injunction or other lawful procedure, and to recover any damages resulting from such violation, together with reasonable attorney’s fees.”**

The covenant<sup>1</sup> is applicable to **JOSHUA T. AUAYAN** and **RUSSELL** because of the conveyances, noted in the title history of the real properties, on **(CP 005, Paragraph 3.1)**

As such, if **JOSHUA T. AUAYAN**, is successful in his appeal, the enforcement provision of the Protective Covenant<sup>1</sup>, **Appendix 1 (CP 030-031)** notes that he may be awarded his attorney’s fees. **(RAP 18.1)**

## CONCLUSION

**JOSHUA AUAYAN and IDA AUAYAN's Motion to Vacate the April 25, 2013 Agreement<sup>2</sup> Order, should have been granted. (CP 166-175)**

Normally, a Motion to Vacate is reviewed on an abuse of discretion basis.

In this case, however, the Agreement<sup>2</sup> Order should be reviewed de novo on the error at law basis.

The Agreement<sup>2</sup> Order, that formed that Orders basis, contained terms that were substantively unconscionable, and those unconscionable terms caused the entire Agreement<sup>2</sup> Order, to be illegal void and unenforceable, from its inception.

**(RP 7 Lines 23-25, and 8 Lines 1-4)**

The Agreement<sup>2</sup> Order terms also violated **JOSHUA AUAYAN** and **IDA AUAYAN'S** right of privacy in their private affairs, and right to quiet enjoyment of their property, which was a violation of public policy.

**Wash. Const. Article 1 Paragraph 7**

The Agreement<sup>2</sup> Order was illegal, void, and unenforceable, on that basis, as well.

**IDA AUAYAN** did not participate or give her mutual assent, at the formation stage of the Agreement<sup>2</sup> Order, so the Agreement<sup>2</sup> Order fails, for a major formation deficiency, and was void, and unenforceable, for lack of **IDA AUAYAN's** lack of mutual assent. **(RP 7 Lines 14-20)**

The Agreement<sup>2</sup> Order, **(CP 079-094)** also, failed for technical reasons.

Since there were only four allegations in **RUSSELL'S** Complaint that had any applicability to **AUAYANS**, and they dealt exclusively with damages to an access easement **RUSSELL** had over **JOSHUA AUAYAN** and **IDA AUAYAN's** land, the Agreement<sup>2</sup> Order **(CP 079-094)**, should have been restricted to the four issues in **RUSSELL'S** Complaint.

There were no provisions in the Agreement<sup>2</sup> Order **(CP 079-094)** that dealt with damages to the easement. The entire Agreement<sup>2</sup> Order dealt, exclusively with **RUSSELL'S** personal annoyances. **(RP 4 Lines 18-25 and 5 Lines 1-5)**

In addition, the Agreement<sup>2</sup> Order **(CP 079-094)** was deficient because it did not contain findings that tied the ordered terms to the real estate covenant<sup>1</sup>, that formed the basis of this case. **(RP 7 Lines 5-8)**

Nor did the Agreement<sup>2</sup> Order **(CP 079-094)**, contain findings,

where the covenant<sup>1</sup> was deemed to be a reasonable restriction of activities on **AUAYANS'** land.

The Agreement<sup>2</sup> Order (**CP 079-094**) contained no findings, that **RUSSELL'S** annoyances were reasonable annoyances, or that his personal annoyances rose to the level of neighborhood annoyances, enough to adversely affect **AUAYANS'** right of privacy in their private affairs, and to enjoy quiet enjoyment of their real property. (**RP 7 Lines 5-8**)

Since the Agreement<sup>2</sup> Order (**CP 079-094**) was deficient, as aforementioned. It should have been vacated, by **AUAYANS'** Motion to Vacate, (**RP 2 Line 6**) filed on August 2, 2013.

The Final Order<sup>3a</sup> of August 21, 2013, finding **AUAYANS** in contempt of the tainted Agreement<sup>2</sup> Order, should not have been entered and should be vacated.

**CR 2A** does not apply to the void agreement.

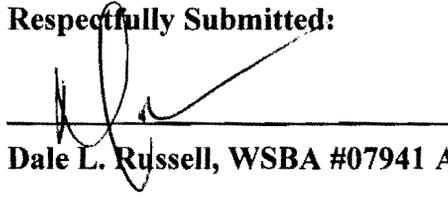
The attorney's fees award of **RUSSELL** should be overturned. The Trial Court abused its discretion in awarding these fees to **RUSSELL**, without Findings of Fact.

The standard of review for attorney's fees awards is the abuse of discretion standard.

**JOSHUA AUAYAN** should be awarded his attorney's fees in this appeal. (RAP 18.1)

Dated this 26<sup>th</sup> day of December, 2013.

**Respectfully Submitted:**

A handwritten signature in black ink, appearing to read "Dale L. Russell", is written over a horizontal line.

**Dale L. Russell, WSBA #07941 Attorney  
For Appellants JOSHUA T. AUAYAN  
And IDA M. AUAYAN**

**APPENDIX 1**

**Declaration of Protective Covenants Attached.**

**CP 30-31**

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FILED FOR RECORD AT REQUEST OF

Indexed Recorded Compared Page  
State of Washington, County of Stevens, or  
Filed MAR 2 1979 at 12:27 P.M.

request of **Stevens County Title Company**

WHEN RECORDED RETURN TO

Name..... Clyde M. Vickers

**MARGARITA M. JENSEN**  
County Auditor

*Colleen Buckley*  
Deputy

Address..... N. 910 Washington

City, State, Zip... Spokane, WA 99201

44.50

DECLARATION OF PROTECTIVE COVENANTS

1. PREAMBLE. Donald A. Hertz and Lee Hertz, husband and wife, Debbie Colbert and James A. Colbert, husband and wife, do hereby declare and set forth the covenants hereinafter stated, to effect the following described property:

NW 1/4 - Section 12 - TWP 28 North - Range 41 E.W.M.

2. AREA OF APPLICATION. All of the covenants set forth hereinafter shall apply in their entirety to the above described real property.

3. TERM. These covenants are to run with the land and shall be binding on all parties and all persons claiming under them until December 31, 2009, PROVIDED, that during said period, the said covenants may be amended by the owners of two-thirds of the property above described (by area), by an instrument in writing and duly recorded. Thereafter, these covenants shall be automatically extended for successive periods of ten (10) years, unless an instrument signed by a majority of the then owners of the property (by area) has been recorded, agreeing to change said covenants in whole or in part.

4. ENFORCEMENT. Every person now or hereinafter having any right, title or interest in or to any parcel of the property shall have the right to prevent or stop violation of any of these said restrictions or to compel compliance therewith by injunction or other lawful procedure, and to recover any damages resulting from such violation, together with reasonable attorney's fees.

5. SEVERABILITY. Invalidation of any of these covenants by judgment or court order shall in no way effect any of the other provisions which shall remain in full force and effect.

6. BUILDINGS. Any dwelling or structure (to include out buildings) erected or put upon any parcel shall be completed as to exterior structure and appearance, including exterior finished painting, within twelve (12) months of the date of commencement of construction. Any dwelling structures, other than mobile home, shall be a minimum of 900 square feet of finished living area on the main floor.

7. MOBILE HOMES. Single-wide mobile homes of minimum dimensions of 14 feet in width by 56 feet in length (living area), or double-wide mobile homes containing a minimum of 800 square feet (living area), shall be permitted, provided that they comply with all of the other restrictions herein contained. No mobile home will be allowed that was manufactured eight (8) or more years prior to the date (year) that it is placed upon any parcel. To further clarify this age restriction, the intent is to allow only mobile homes that are seven (7) years old or newer. Skirting, of a compatible material, is to be installed around the entire base of the mobile home within 90 days after its placement upon any parcel.

8. UTILITIES. All owners or purchasers of parcels in the property are responsible for the installation, connection, maintenance and expense of all utilities, including without limitation, domestic water, electricity, sewerage, gas and telephone.

9. TEMPORARY STRUCTURES. Pickup campers, camper-type trailers and other recreational vehicles shall not be occupied as residences on the property, except as

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REF. 47 PAGE 1567

APPENDIX

temporary quarters while the building of a dwelling is in process. Mobile homes being used as temporary quarters while the building of a dwelling is in process need not comply with the size, age, and skirting restrictions contained in paragraph 7 of these covenants.

10. LAND USE.

(a) No commercial enterprise shall be operated on any parcel or parcels of the herein described real property, provided however, that this shall not prevent the private renting of a dwelling upon any parcel, or the keeping of animals kept for breeding purposes. No commercial dog kennels will be maintained on this property.

(b) No noxious or offensive trade or activity shall be carried on upon any parcel, nor shall anything be done thereon which may be or become an annoyance to the neighborhood.

(c) No signs of any kind shall be displayed to the public eye on any parcel except one professional sign of not more than five square feet, one sign of not more than five square feet advertising the property for sale or rent, or signs used by a builder to advertise the property during the construction and sales period.

(d) The owner of any parcel or parcels shall not permit the accumulation of refuse, garbage or abandoned vehicles thereon, nor shall the premises be used as a storage area for any purpose other than the storage of materials used in connection with the operation of a household.

11. LIVESTOCK, POULTRY, SWINE. No livestock, poultry or swine shall be maintained upon the property in such a manner as to constitute a nuisance or to be offensive to other property owners or for other than personal and domestic purposes.

12. STATE AND COUNTY LAWS. All property owners shall comply with all laws of the State of Washington applicable to all types of construction and use of property and shall comply with all County and State requirements as to sewers and onsite disposal systems for sewage.

Dated this 25 day of February, 1979.

*James A. Colbert* \_\_\_\_\_ *Donald A. Hertz* \_\_\_\_\_  
*Debbie Colbert & Lee Hertz* \_\_\_\_\_ *See Hertz by Donald Hertz* \_\_\_\_\_

STATE OF Washington }  
County of Spokane }

On this 28th day of February, A. D. 1979 before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared James A. Colbert and Donald A. Hertz to me known to be the individual described in and who executed the foregoing instrument for them self and as attorney in fact of Debbie Colbert & Lee Hertz also therein described, and acknowledged to me that they have signed and sealed the same as their voluntary act and deed and as the free and voluntary act and deed of the said Debbie Colbert & Lee Hertz for the use and purposes therein mentioned and on oath stated that the power of attorney authorizing the execution of this instrument has not been revoked and that the said Debbie Colbert & Lee Hertz is now living.

WITNESS my hand and official seal hereto affixed the day and year in this certificate above written.  
*[Signature]* \_\_\_\_\_  
Notary Public in and for the State of Washington  
residing at Spokane