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No. 71195-4-I

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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DOUGLAS AND REBECCA SLATER, HUSBAND AND WIFE,

*Appellants/Cross Respondents*

v.

JOHN AND MICHELLE BABICH, HUSBAND AND WIFE

*Respondents/Cross Appellants*

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RESPONSE BRIEF AND OPENING BRIEF OF RESPONDENT

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## **I. ASSIGNMENTS OF ERROR**

The trial court committed an error in denying the Babichs' request for attorney's fees and costs pursuant to Civil Rule 68, which order was entered on November 27, 2013, and filed on December 2, 2013. CP 38-39.

## **II. STATEMENT OF THE CASE**

The Slaters and Babichs are neighbors that have resided in their respective homes since the mid 1990's. CP 90, Ex. 1. The Babichs also own an undeveloped parcel of property adjoining the Slaters' property. CP 90, Ex. 9, 21, 22. The adjoining property owned by the Babichs has been kept and preserved as vacant, undeveloped land providing a park-like atmosphere. CP 90, Ex. 9, 22, 34.

On October 10, 1990, a "View Easements and Covenants" (herein "easement") was executed and recorded which provides a view easement in favor of the Slaters across one of the Babichs' undeveloped parcels. CP 109; CP 89, Ex. 2.

At the time the easement was executed, the Slaters' home was not under construction and consisted of raw land. RP 53, Ln. 14-19. There are very few pictures showing the vegetation of the properties from this time period. Photographs from 1990 and 1993 were admitted at trial. CP 90, Exhibit 12. In 1990, a picture of the Slaters' lot is shown prior to home

construction. *ID*, first picture. The home was constructed in the area in the middle of the picture in front of the large trees. RP 35, ln. 3-8. The lower vegetation in the foreground was approximately twelve to sixteen feet tall in areas and "scrubbed out with alder." RP P 227, ln. 18-21. As part of construction of the Slaters' home, the property was excavated about ten feet under the then existing grade for installation of the garage and first floor. CP 90, Ex. 12, picture 2; RP 131, ln. 3-10. The first floor windows are about two feet below the original grade at the time the easement was executed. RP 131, ln. 7-15.

Over the years, vegetation on the Babichs' property was occasionally trimmed by the Slaters with the permission of the Babichs, and more expansive trimming and clearing performed by the Babichs. RP 230, ln. 6-23. A picture taken on September 10, 2013, the first day of trial, shows the side of the Slaters' home looking across the Babichs' property with the Olympic Mountains just showing through the haze above the foothills. CP 91, Ex. 34; RP 311, ln. 5-14. The picture is taken on the property line between the Slaters' and Babichs' property with the Slaters home and side yard to the left, and the Babichs' property subject to the easement to the right. *ID*. One of the Slaters' living room windows is the farthest window at the corner of home. *Id*. The large trees to the left of

the picture are on the Slaters' property, and the grassy cleared area is the Babichs' property subject to the easement. RP 296, ln. 9-12.

A dispute regarding the easement arose and a lawsuit was filed by the Slaters on July 27, 2011, which resulted in a bench trial on September 10, 11, and 16, 2013. CP 84-88.

On August 19, 2013, the Babichs served the Slaters with an Offer of Judgment under Civil Rule 68, more than ten days before trial. CP 11-13. The offer was not accepted. CP 1-15.

On October 31, 2013, the trial court entered Findings of Fact and Conclusions of Law. CP 108-114. The Babichs' brought a motion for attorney's fees and costs pursuant to Civil Rule 68 claiming the offer made was more favorable than the judgment finally obtained. CP 1-15.

The offer made and court order are as follows:

<b>OFFER MADE</b>	<b>COURT ORDER</b>
Remove/cut any trees/vegetation currently interfering with Olympic Mountain view within 60 days as seen from any room in Slaters' home.	Remove/cut any trees/vegetation currently interfering with Olympic Mountain view within 61 days (December 31, 2013) as seen from the living room main level windows.
In the future, cut/remove any trees/vegetation interfering with a view of the Olympic Mountains from any room in the Slaters' home within 90 days from the date a picture is provided by the Slaters to the Babichs of any	In the future, cut/remove any trees/vegetation interfering with a view of the Olympic Mountains as seen from the living room main level windows within 120 days (October 15) from the date (June 15) a picture is provided by

offending tree/vegetation.	the Slaters to the Babichs of any offending tree/vegetation.
Judgment against the Babichs for all attorney's fees, costs, and any damages claimed in the amount of \$20,000.00.	No judgment for attorney's fees, costs, or damages.

CP 1-15.

The trial court denied the Babichs' motion for attorney's fees and costs on November 27, 2013. CP 38-39. The trial court found,

The offer made is slightly more favorable than the judgment finally obtained following trial, but not in terms of an award financially. The easement in this matter allows for an award of attorney's fees and costs, but that is separate from any award made (or not) made in the case. The Declaration of Patrick Hanis sets forth reasonable attorney's fees and costs incurred since August 19, 2013, in the amount of \$14,597.46, but Judgment is not entered.

CP 38-39. The trial court also denied the Slaters' request for attorney's fees, finding "Plaintiff's Motion for Attorney Fees is denied. The Easement and View Covenant allows for an award of attorney fees and costs, but Plaintiff did no better than offer of settlement." CP 36-37.

### III. ARGUMENT

#### A. Standards of Review

"Findings of fact are reviewed under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wash.2d 169, 176, 4 P.3d 123 (2000). Evidence is substantial if it is sufficient to persuade a fair-minded person that the declared premise is true. *Am. Nursery Prods., Inc. v. Indian Wells Orchards*, 115 Wash.2d 217, 222, 797 P.2d 477 (1990). If the standard is satisfied, a reviewing court will not substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently. *Croton Chem. Corp. v. Birkenwald, Inc.*, 50 Wash.2d 684, 314 P.2d 622 (1957). Questions of law and conclusions of law are reviewed de novo. *See Veach v. Culp*, 92 Wash.2d 570, 573, 599 P.2d 526 (1979). The interpretation of an easement is a mixed question of law and fact. *Id.* What the original parties intended is a question of fact and the legal consequence of that intent is a question of law. *Id.*" *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wash.2d 873, 879-80, 73 P.3d 369 (2003).

The Slaters sought declaratory relief from the court requesting the right to entire upon the Babichs' property to trim vegetation. CP 50-51.

The trial courts equitable decisions are reviewed for abuse of discretion and great weight is given to the trial court's decision, with the appellate court interfering only if it is based on untenable grounds, is manifestly unreasonable or is arbitrary. *Steury v. Johnson*, 90 Wash. App. 401, 405, 957 P.2d 772 (1998).

An appellate court's review of the trial court's ruling on a Civil Rule 68 offer of judgment is "a mixed question of law and fact, the issue is reviewed under the error of law standard". *Magnussen v. Tawney*, 109 Wash. App. 272, 275, 34 P.3d 899 (2001). An error of law is reviewed de novo. *Schlener v. Allstate Ins. Co.*, 121 Wash. App. 384, 386, 88 P.3d 993 (2004).

#### **B. Interpretation of "View Easements and Covenants"**

The primary objective in interpreting a restrictive covenant is to "determine the intent or purpose of the covenant." *Hollis*, 137 Wash.2d 683, 696, 974 P.2d 836 (citing *Mains Farm*, 121 Wash.2d at 818, 854 P.2d 1072; *Burton*, 65 Wash.2d at 621–22, 399 P.2d 68); see also *Riss*, 131 Wash.2d at 623, 934 P.2d 669; *Green*, 137 Wash.App. at 683, 151 P.3d 1038. This objective is tempered, however, by the presumption strongly favoring the free, lawful use of land. *Burton v. Douglas County*, 65 Wash.2d 619, 622, 399 P.2d 68 (1965). In *Burton*, our Supreme

Court announced the following three principles governing the interpretation of restrictive covenants:

(1) The primary objective is to determine the intent of the parties to the agreement, and, in determining intent, clear and unambiguous language will be given its manifest meaning. *Gwinn v. Cleaver*, 56 Wash.2d 612, 354 P.2d 913 (1960); *Katsoff v. Lucertini*, 141 Conn. 74, 103 A.2d 812 (1954). (2) Restrictions, being in derogation of the common-law right to use land for all lawful purposes, will not be extended by implication to include any use not clearly expressed. Doubts must be resolved in favor of the free use of land. *Granger v. Boulls*, 21 Wash.2d 597, 152 P.2d 325 [1944].... (3)The instrument must be considered in its entirety, and surrounding circumstances are to be taken into consideration when the meaning is doubtful. *Gwinn v. Cleaver, supra*; *B.T. Harris Corp. v. Bulova*, 135 Conn. 356, 64 A.2d 542 (1949); *Parrish v. Newbury*, 279 S.W.2d 229 (Ky.1955).

"Admissible extrinsic evidence does not include: Evidence of a party's unilateral or subjective intent as to the meaning of a contract word or term; Evidence that would show an intention independent of the instrument; or

Evidence that would vary, contradict or modify the written word." *Hollis v. Garwall, Inc.*, 137 Wash.2d 683, 695, 974 P.2d 836 (1999).

**i. The trial court correctly found the protected view is that of the Olympic Mountains.**

The Slaters' interpretation of the easement that all vegetation must be maintained at "1990 levels" fails to take into consideration the specific language and limitations of the easement and instead attempts to add language that does not exist. *Appellants' Brief*, pg. 9. Nowhere in the easement is there a requirement to maintain vegetation at "1990 levels". CP 90, Ex. 2. The easement clearly defines its "intent" and parol evidence is unnecessary to establish intent:

INTENT. Persons owning property described herein do so in part, based on the fact that said properties have a reasonable unencumbered view of the Olympic Mountains and a partial view of Mount Rainier. It is the intent of the grantors that the terms of this agreement be liberally construed so as to protect the reasonable expectations of landowners to have and protect such views as they exist on the date of the making of this agreement, herein after called "the Views".

CP 89, Ex. 2, underlining added. The easement must be read in mind with the limitation as to what view is being protected, a "reasonable unencumbered view of the Olympic Mountains"<sup>1</sup>. This requirement was a finding of fact by the trial court, "The views, to be protected, identified in the Easement are of the Olympic Mountains and not views of the area, power lines, or other landmark." CP 109, para. 2. There is no ambiguity as to what view is protected so as to require use of extrinsic evidence.

Mr. Slater's testimony attempting to offer extrinsic evidence as to the intent of the easement is not evidence sufficient to overcome the express language in the easement. RP 64, ln. 3-13. Extrinsic evidence is not permitted since "what was intended to be written" is not permissible evidence, nor is a "party's unilateral or subjective intent as to the meaning of a contract word or term." *Hollis v. Garwall, Inc.*, 137 Wash.2d 683, 695, 974 P.2d 836 (1999). The interpretation suggested by the Slaters would require the court to redraft or add to the language of the easement. "Extrinsic evidence is to be used to illuminate what was written, not what was intended to be written." *Nationwide Mut. Ins. Co.*, 120 Wash.2d 178, 189, 840 P.2d 851 (1992).

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<sup>1</sup> The "partial view" of Mount Rainier was not at issue in this matter. CITE

The view of the Olympic Mountains is a "reasonable unencumbered" view. This necessarily means there may be some "reasonable" encumbrances of the view. This is addressed in the "Exception and Stipulation" section 3 of the easement,

It is, however, understood and stipulated to, hereby and herein, that any and all vegetation controlling "the views" in place as of the date of the making of this agreement shall be limited to the height and species as of said date of this agreement and shall be bound no further by this agreement.

*Underlining added.* Thus, any vegetation that was already "controlling" the view of the Olympic Mountains when the easement was executed, did not have to be removed, could remain in place, and was "bound no further" by the agreement. The result is the easement creates two classes of vegetation: 1) A class that was "controlling" the view when the easement was signed; and, 2) All other vegetation that was not "controlling" the view when the easement was signed.

Testimony and exhibits at trial established that the vegetation in existence was approximately twelve to sixteen feet in height and "scrubbed out with alder." RP P 227, ln. 18-21. All vegetation that might have been "controlling" the views in 1990 has been removed and the area is now

primarily maintained by mowing grass, which provides a far superior view to that which existed in 1990. RP 231, ln. 6-15; CP 91, Ex. 34 (year 2013) compared to Ex. 12 (year 1990-1993).

Vegetation that was not "controlling" the view of the Olympic Mountains when the easement was executed did not have to be limited in height or species. However, such vegetation could not be allowed to grow to the point that it would interfere with "the view" of the Olympic Mountains as set forth paragraph 3 and the "Intent" section of the easement.

The trial court correctly found that, "Only that portion of the vegetation impairing the view of the top of the foothills is required to be trimmed/removed from the Babich property." CP 110-111, para 10. The testimony and exhibits at trial established that the Olympic Mountains are only viewable above the foothills. RP 90, ln. 12-20; 301, ln 3-8; 310, ln 6-10. As such, vegetation must grow high enough to block the top of the foothills before it will interfere with any view of the Olympic Mountains.

The trial courts use of the foothills as a reference point for compliance with the view easement is appropriate. There is no inconsistency between the findings of fact and conclusions of law, and the

court's ruling is in perfect harmony with the express intent and purpose of the easement.

**ii. The trial court correctly determined the location from which to determine compliance with the view easement.**

Because of the limited pictures that exist from when the easement was executed and the Slaters' home was built, it is impossible to determine what vegetation "controlled" the easement at the period in time when the easement was executed. CP 90, Exhibit 12. At the time the Slaters' home was built, there was vegetation "controlling" the views that did not have to be removed, but which has since been removed. ID; RP 35, ln. 3-8; 227, ln. 18-21; CP 91 Ex. 34.

The trial court found the best location from which to determine compliance with the view easement is from a living room window of the Slaters' home, which window is consistent with pictures from the time of construction of the Slaters' home. CP 110, para 5; CP 91, Ex. 12, 17. This viewpoint serves as a "benchmark for establishing the Olympic view in the Slater's home". CP 109, para. 5. Specifically, the court found, "preserving a reasonably unencumbered view from the living room windows will preserve the upper level view and the first floor, smaller view." CP 110, para. 5.

Mr. Slater admitted that the current view from the first floor window is two feet lower than the view in place when the easement was executed. RP 131, ln. 7-10. In 1990, a person would have had to put their head two feet underground to achieve the current view from the first floor window. RP 131, ln. 11-15. No evidence was offered at trial to show the intent of the easement was to provide an unobstructed view of the Olympic Mountains after digging several feet into the ground, and having a view that was two feet below the property level at the time the easement was executed.

The trial court found that the view from the first floor window, had it existed in 1990, would have been blocked. RP 402, ln. 22-25. The court found that by using the living room as a reference point, all windows in the Slaters' home have the protected view, including the first floor window. RP 403, ln. 1-8, CP 109.

The court did not error in providing a location for determining compliance with the view easement. The court did not limit or otherwise change the easement. Rather, the conclusion of law allows for a known, set point to assist the parties in avoiding future disputes as it relates to compliance with the protected view.

**iii. The trial court correctly provided a process for future compliance.**

The Slaters fail to identify the specific findings and conclusions that they believe are in error. Without specific error assigned, the findings are verities on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wash.2d 801, 808, 828 P.2d 549 (1992).

The context of the easement supports the courts order setting forth a process to aid in compliance with the easement. *Hollis v. Garwall*, 137 Wash.2d 683, 974 P.2d 836 (1999), *court can discern the meaning or intent of a covenant*. An express intent of the easement is to protect "the views" of the Olympic Mountains from the Slater's home. Since the Babichs cannot enter the Slaters' home to see if vegetation is violating "the views", they must rely upon the Slaters. Consistent with the intent and context of the easement, the trial court exercised appropriate judgment in providing a process for the parties to follow so that compliance with the easement can occur.

Given the Slaters request for declaratory judgment seeking the right to self enforcement of the easement, the trial court's decision setting forth a process for notice of any claimed violation and an opportunity to remedy any claimed violation was appropriate. The trial court's decision

should be upheld since it is not based upon "untenable grounds, is [not] manifestly unreasonable or is [not] arbitrary. *Steury v. Johnson*, 90 Wash. App. 401, 405, 957 P.2d 772 (1998).

**iv. The trial court correctly set forth a process for allocating costs of future compliance**

In the court's oral ruling, reference was made as whether or not the expense for removal of any violating vegetation should be borne entirely by the Babichs or not. RP 406-407, ln. 8-25, ln. 1-6. However, the trial court specifically elected not to rule on the issue at that time. *Id.* Following the trial court's oral ruling, the parties agreed that sharing of costs was appropriate and included proposed language in their respective proposed Findings and Conclusions, which the trial court ultimately ruled upon. CP 113. This agreement is contained in the Findings of Fact and Conclusions of Law, "The parties agree that the trimming shall be accomplished in the most professional yet cost effective manner." CP 113, para. 2.

The easement is silent on the issue of responsibility for trimming vegetation. The trial court found that the Slaters performed some of the trimming work until approximately 2008. CP 110, para. 6. The Babichs also performed trimming and clearing work. CP 110, para. 10.

In *Buck Mountain Owner's Ass'n v. Prestwich*, 174 Wash.App. 702, 308 P.3d 644 (2013), this court reviewed a road easement that did not allocate responsibility for the cost of road maintenance. *Buck Mountain Owner's Ass'n*, 174 Wash. App. at 652. The court adopted the *Restatement* approach, "in the absence of an agreement, joint use of an easement creates an obligation to share costs: Joint use by the servient owner and the servitude beneficiary of improvements used in enjoyment of an easement or profit, or of the servient estate for the purpose authorized by the easement or profit, gives rise to an obligation to contribute jointly to the costs reasonably incurred for repair and maintenance of the portion of the servient estate or improvements used in common." *Id.* at 653, citing *Restatement (Third) of Property: Servitudes Sec. 4.13(3)(1998)*.

The courts decision to allocate costs, with the parties agreement, to preserve the view easement that both parties benefit from, was an appropriate exercise of its equitable authority.

**C. The trial court's failure to aware the Babichs attorneys fees and costs pursuant to Civil Rule 68 was in error.**

Civil Rule 68 states in relevant part,

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days

after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the court shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

The trial court found that the "Offer of Judgment was served on Plaintiffs by Defendants on August 19, 2013, and the offer was not accepted." CP 39, CP 11-13. After reviewing the Offer of Judgment in relation to the judgment, the trial court found, "The offer made is slightly more favorable than the judgment finally obtained following trial". CP 39. CR 68 compels payment of "costs incurred after the making of the offer."

The trial court committed error in not requiring the Slaters to pay the Babichs' attorney's fees and costs incurred after August 19, 2013. By the trial court's own order, the CR 68 offer was "slightly more favorable" than the judgment finally obtained. CR 68 requires payment of costs and attorneys fees to the Babichs.

**i. The trial court determined reasonable attorney's fees and costs that should be awarded to the Babichs.**

When a contract, statute or other authority allows for attorney's fees, then attorney's fees are awardable under CR 68. *Washington*

*Greensview Apartment Assoc. v. Travelers Property Cas. Co. of America*, 173 Wash. App. 663, 681-682, 295 P.3d 384 (2013).

The "View Easement and Covenants" provides that "the prevailing party shall be entitled to recover all costs incurred in said action, together with a reasonable attorney's fee to be included in the judgment." CP 90 ex. 2. The portion of fees and costs awardable are those "accruing after the offer of judgment". *Tippie v. Delisle*, 55 Wash. App. 417, 420, 55 Wash. App. 417 (1989). While the trial court denied the Babichs' motion for fees, the court did find that their fees and costs incurred after August 19, 2013, in the amount of \$14,597.46 were reasonable. CP 39. Because the amount is liquidated, interest should be imposed at the statutory rate since the November 27, 2013. CP 39.

**ii. CR 68 fulfills an important policy in civil litigation.**

CR 68 "aims to encourage parties to reach settlement agreements and to avoid lengthy litigation." *Lietz v. Hansen Law Offices, P.S.C.*, 166 Wash. App. 571, 581, 271 P.3d 899 (2012), *citing Dussault v. Seattle Pub. Schs.*, 69 Wash. App. 728, 732, 850 P.2d 581 (1993). "The rule achieves this objective by shifting any post-offer of judgment costs of litigation to a plaintiff who rejects a CR 68 offer and does not achieve a more favorable result at trial." *Seaborn Pile Driving Co. v. Glew*, 132 Wash. App. 261,

267, 131 P.3d 910 (2006), review denied, 158 Wash. 2d 1027, 152 P.3d 347 (2007).

Had the Slaters accepted the offer of judgment, a trial would have been avoided and substantial attorney's fees and costs saved by both parties. By not requiring the Slaters to pay the Babichs' attorney's fees and costs, the objective of CR 68 is unmet.

**iii. The Babichs' are entitled to attorney's fees and costs on appeal.**

The Babichs request an award of reasonable attorney's fees and costs on appeal pursuant to RAP Title 18. The Babichs' CR 68 Offer of Judgment continues to be more favorable than the judgment finally obtained by the Slaters. The portion of fees and costs awardable are those "accruing after the offer of judgment". *Tippie v. Delisle*, 55 Wash. App. 417, 420, 55 Wash. App. 417 (1989).

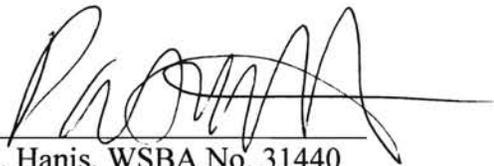
**IV. CONCLUSION**

The trial court's Findings of Fact and Conclusions of law are appropriate and should not be disturbed on appeal. The trial court relied upon substantial evidence, after hearing testimony, carefully reviewing all exhibits, and listening to argument of counsel prior to rendering its decision.

The Babichs complied with the provisions of CR 68. Their offer was more favorable to the Slaters than the outcome ultimately awarded by the Court. The Babichs should be awarded their attorneys fees and costs in the amount of \$14,597.46, plus statutory interest, which amount was previously determined to be reasonable by the trial court, together with reasonable attorneys fees and costs incurred on appeal.

Respectfully submitted this 31st day of July, 2014.

**HANIS IRVINE PROTHERO, PLLC**

A handwritten signature in black ink, appearing to read 'Patrick M. Hanis', written over a horizontal line.

Patrick M. Hanis, WSBA No. 31440  
Attorneys for Respondents/Cross-Appellants  
John and Michelle Babich

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the below date, I caused to be mailed two true copies of this document, to the Court of Appeals, as follows:

Court of Appeals  
Division I  
Attn: Court Clerk  
One Union Square  
600 University Street  
Seattle, Washington 98101-4170

with a copy to:

Matthew Ryan King  
Law Offices of Matthew R. King PLLC  
1420 5th Ave Suite 2200  
Seattle, Washington 98101-1346

DATED this 1<sup>st</sup> day of August, 2014, at Kent, Washington.

  
\_\_\_\_\_  
Patrick M. Hanis, WSBA #31440

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