99148-1

No. 79758-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

MAX HURLBUT and HUEIH-HUEIH HURLBUT,

Petitioners

v.

JAMES M. and JONI J. CRINES,

Respondents

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONERS

Petitioners Max Hurlbut and Hueih Hueih Hurlbut ("Hurlbuts") were Respondents/Cross-Appellants in the Court of Appeals and the Plaintiffs in the Trial Court.

II. CITATION TO COURT OF APPEALS DECISION

Hurlbuts seek review of the September 28, 2020, Published Opinion of Division One of the Court of Appeals of the State of Washington in Hurlbut v. Crines, No. 79758-1-I, attached as Appendix A ("Opinion").[1]

III. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals take action in direct conflict with Ross v. Harding, 64 Wn.2d 231, 391 P.2d 526 (1964) when it concluded, contrary to this decision, that the parties' Amenities Easement Agreement could only be terminated based upon its breach if the document contained an express provision providing for such a remedy?

2. Did the Court of Appeals take action in direct conflict with decisions of the Washington Supreme Court and Washington Court of Appeals when it refused to enforce an undisputed oral modification to the parties' Amenities Easement Agreement, based upon a provision in the

[1]Citation to the Opinion will be to the copy attached as Appendix A, since the reported decision is not yet available.

Amenities Easement Agreement prohibiting oral modifications and the statute of frauds, RCW 64.04.010?

3. Should this Court review whether an easement can only be terminated based upon the breach of an express condition, where the document contains an express provision contemplating such remedy?

IV. STATEMENT OF THE CASE

This case relates to the interpretation and application of a June 27, 2002, Amenities Easement Agreement ("Easement") that was originally granted by Hurlbuts to Respondent/Cross-Appellant Max Hurlbut's ("M. Hurlbut") brother, Kim Hurlbut. CP 148, ¶ 4; Ex 25. The underlying facts relating to the Easement are undisputed:

- Hurlbuts own property on Lake Whatcom in Whatcom County, Washington ("Lakefront Property"), and four lots across the street from the Lakefront Property ("Hurlbut Property"). CP 146-147, ¶ 1.

- Appellants/Cross-Respondents James M. and Joni J. Crines ("Crines") currently own four lots that are also across the street from the Lakefront Property ("Crines Property"). CP 148, ¶ 2.

- Kim Hurlbut also once owned another three lots across from the Lakefront Property that were eventually sold to Steven M. and Kelly L. Wynkoop, and Bradley J. Krantz and Elizabeth Dunphy on April 14, 2004 ("Wynkoop Property"). CP 148, ¶ 3 and CP 151-152, ¶ 17.

- On June 27, 2002, Hurlbuts and Kim Hurlbut executed and recorded the Easement, which burdened the Lakefront Property and benefited the Crines Property, the Wynkoop Property, and the Hurlbut Property. CP 148, ¶ 4.

Although a variety of Easement provisions were evaluated by the Court of Appeals, only three are at issue in terms of this request for review. The first is the critical provision which conditionally grants the Crines their underlying easement rights:

> Grant of Easement. Grantors grant the current and future owners or tenants of Grantees Property, the right to use Grantors Property and associated Amenities. It is the intent of the parties that the easement granted herein and hereby be conditioned upon the Owners paying their fair share of the costs of maintaining the Amenities and the Owners or tenants of the Owners obeying all the generally applicable rules of use of the Amenities, as defined herein and from time to time amended by the owners of Grantors Property. In consideration of which, the current and future Owners or tenants of the Owners shall have the same rights to use the Amenities and any owners or tenants of the Grantors Property, subject, of course, to the terms and conditions set forth herein.

CP 149, ¶ 6 (emphasis added) ("Compliance Condition"). There is no dispute that over the years, M. Hurlbut regularly advised Crines that he had a right to terminate the Easement if the Compliance Condition was not met. This first occurred during a meeting with Crines shortly after their acquisition when he explained that he could "rescind the agreement if the

conditions were not adhered to….," including the obligation to pay assessments and follow any adopted rules of use. RP 29-32 (12/4/18). The Crines did not object to this purported right. RP 32 (12/4/18).

M. Hurlbut also asserted this right in many written reports to the Crines, including in a December 31, 2004, Annual Report: "The abuse or violation of the rules will be cause for the suspension of the violator's use of grantors' facilities and Amenities." Ex 20, p. 3. He expressed the same thing verbally to the Crines and Wynkoops during a 2004 meeting, to which the Crines did not object. RP 38-39 (12/4/18). See also Ex 3, p. 9; Ex 5, p. 9; Ex 9, p. 3; Ex 18, p. 3; Ex 19, p. 3; and Ex 36, p. 2.

Not only did Joni Crines understand M. Hurlbut's opinion, but she actually agreed that Hurlbuts had the right to terminate the Easement:

> Q. Did Mr. Hurlbut talk to you about that, you following the rules and paying your fair share was a condition of your right to use the lakefront property, did he talk to you about that?
>
> A. Are we still talking about the day that he came over and met us or are you talking about a different time?
>
> Q. Did he ever talk about that between 2004 and 2013?
>
> A. Yes. We spoke about those things at the annual meeting.
>
> Q. Okay. And, um, was that a frequent topic that Mr. Hurlbut brought up, the fact that your right to use the lakefront property was conditioned on your following the

> rules and pay paying your fair share, reasonable, following reasonable rules?
>
> A. I think if you read his things, he repeats that over and over, so yeah.
>
> Q. All right.
>
> A. So it was a continuous thing.
>
> * * *
>
> Q. But did you disagree with him that your right to use it was conditioned upon you following reasonable rules and paying your fair share, did you ever disagree with that?
>
> A. I agreed.

RP 240-41 (12/4/18).

The other two critical provisions relate to the financial obligation for maintenance of the Lakefront Property. Under the Easement, the obligation to maintain the Lakefront Property is imposed on its owner, but the financial responsibility is placed on each of the benefiting property owners on a pro rata basis:

> Operations and Maintenance. Grantors agree to operate, maintain and repair the Amenities in good condition and repair, the costs of which shall be borne proportionately between all the Owners, i.e., based upon number of lots respectively owned. For example, if someone owns three of the eleven lots comprising Grantees Property, his or her share of costs will be 3/11ths of the total. The costs may be collected annually through regular or special assessments, as set forth below.

CP 149, ¶ 7) ("Cost Sharing Provision"); see also CP 149, ¶ 8.

There is no dispute that there was a verbal modification to the Easement's Cost Sharing Provision under which the parties agreed that the Crines and Wynkoops[2] would be solely responsible to pay all annual maintenance costs for the Lakefront Property for the same amount of time in which M. Hurlbut performed these services for free, when M. Hurlbut ceased doing the work. As the Trial Court's uncontested Findings of Fact explain:

> 19. Since Crines' acquisition of the Crines Property and until 2013, M. Hurlbut performed in good faith all maintenance work to the Hurlbut Lakefront Property personally, and without charge to the benefiting properties under the Easement. In various writings over the years, M. Hurlbut stated to the Crines and Wynkoops that he was performing maintenance for a period of time without charge and that he expected at some point to become unable to perform them personally. As Crines and Wynkoops paid nothing for maintenance for a period of time, M. Hurlbut expected that they would pay all of the maintenance costs for a similar period of time after he was unable to continue to do such work, but this expectation was not put into writing and signed by the Crines and/or the Wynkoops.
>
> 20. Nonetheless, Crines did not have to pay maintenance costs for ten years, and this was a benefit to them, and M. Hurlbut notified them of his expectation and understanding that the parties had an agreement that the other owners would be responsible to solely pay for maintenance costs for a comparable amount of time that he provided such work for free. The Crines were aware

[2] All references to Crines as the sole party responsible for maintenance costs under the parties' modification is based upon the fact that Wynkoops executed a Quit Claim Deed to Hurlbut of any and all interest in the Hurlbut Lakefront Property, thereby effectively terminating the Easement as to the Wynkoop Property. CP 155-56.

> of M. Hurlbut's expectation and belief, and never objected or otherwise responded to his communications on this issue. M. Hurlbut performed the maintenance work for the benefit of all Owners in reliance that the other Owners (including the Crines) would pay all maintenance costs for an equal period of time. Such reliance was reasonable and to Hurlbut's detriment.

CP 152-153.

In conjunction with this undisputed modification, the Easement contains a standard provision requiring amendments to be in writing:

> Amendments. It is hereby mutually agreed and understood that any additions, variations, or modification to this Easement shall be void and ineffective unless in writing and signed by the parties hereto or their successors ion [sic] interest.

CP 151, ¶ 16 ("Modification Provision").

Hurlbuts filed the underlying action seeking, inter alia: (1) termination of the Easement based upon Crines' failure to pay annual assessments and/or comply with rules adopted by Hurlbuts; and (2) if not terminated, then Hurlbuts alternatively sought a modification to the Easement to conform to the parties' agreement that Crines would pay all costs of maintaining the Lakefront Property. After a bench trial, the Trial Court agreed that the Easement was terminable based upon Crines' failure to pay assessments or follow rules adopted by Hurlbuts. Nonetheless, it concluded that Crines' failure to pay assessments was not a "breach" of

the Easement, based upon a convoluted interpretation that each annual assessment needed to be unanimously adopted by all parties.[3]

As to the request to modify the Easement's apportionment of maintenance costs, the Trial Court found, as a matter of fact, that the parties had orally modified the cost apportionment to require Crines to pay all such expenses for ten years. Nonetheless, the Trial Court concluded that this modification was unenforceable under the Easement's Modification Provision.

The Court of Appeals reversed the Trial Court's legal conclusion that the Easement was subject to termination based upon a breach, instead concluding that such relief was only available if expressly referenced in the Easement. As to the parties' modification to payment of maintenance expenses, the Court of Appeals agreed with the Trial Court that such could not be enforced because of the Modification Provision and the statute of frauds, RCW 64.04.010.[4]

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[3] The Trial Court also found that the Crines did not materially fail to follow the rules set by Hurlbuts. Hurlbuts challenged this Finding of Fact on appeal. Given the Court of Appeals' decision, this issue and the Trial Court's conclusion that the Crines needed to approve all annual assessments was never considered. Either this Court will need to consider these derivative issues if the Court of Appeal's determination of the terminability of the Easement is reversed, or remand to the Court of Appeals.

[4] Crines did not challenge the Trial Court's finding that a modification had occurred, and therefore the Court of Appeals was without any avenue to alter this factual finding.

V. ARGUMENT

Appeal of the Opinion is authorized under RAP 13.3(b), and whether review should be accepted is subject to the following factors:

> A petition for review will be accepted by the Supreme Court only:
>
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
>
> * * *
>
> (3) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

A. The Opinion Is in Direct Conflict With Longstanding Supreme Court and Court of Appeals Precedent.

The two pertinent issues are both legal ones and have been subject to controlling precedent which is directly contrary to the conclusions of the Court of Appeals. Given the drastic inconsistency, it is imperative for the Supreme Court to accept review and ultimately reverse the Opinion in order to avoid uncertainty for future litigants.

1. This Court Has Already Concluded, Inconsistent to the Court of Appeals, That a Contract Is Terminable Where an Express Condition Is Breached.

Notably absent from the Opinion is citation to nor addressing of this Court's ruling in Ross v. Harding, supra, 64 Wn.2d, which requires a

different outcome then that of the Court of Appeals. Again, the Court of Appeals' premise to reject a termination is based on a conclusion that such relief is only available where expressly noted:

> 'Termination of easements is disfavored under the law.' City of Edmonds v. Williams, 54 Wn. App. 632, 636, 774 P.2d 1241 (1989). Because the easement does not provide for the remedy of termination—and instead provides remedies for both the failure to pay annual assessment and for a violation of the rules—the trial court erred in concluding that the easement can be terminated for a violation on one of the conditions in paragraph 2.

Opinion, p. 10.

Ross holds to the contrary. Initially, the Court of Appeals failed to recognize that rights arising under an easement "like any other conveyance of rights in real property, is fixed by the language of the instrument granting the right." Sanders v. City of Seattle, 160 Wn.2d 198, 214, 156 P.3d 874 (2007) (citation omitted). In this, an "easement must be construed strictly in accordance with its terms in an effort to give effect to the intentions of the parties." Id. at 214-15. Crines were privileged to use the Lakefront Property "only to the extent expressly allowed by the easement." Id. at 215 (citation omitted).

The ruling in Ross long ago established that in Washington, a contract is terminated where one party fails to comply with an express "condition subsequent":

> A 'condition' whether it be 'precedent' or 'subsequent' may be either express, implied in fact, or constructive.…'Conditions precedent' are those facts and events, occurring subsequently to the making of a valid contract, that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty, before the usual judicial remedies are available.…A breach of a 'promise' subjects the promissor to liability in damages, but does not necessarily excuse performance on the other side. Nonperformance or nonoccurrence of a 'condition' prevents the promissee from acquiring a right, or deprives him of one, but subjects him to no liability.…Where it is doubtful whether words create a 'promise' or an 'express condition,' they are interpreted as creating a 'promise.'
>
> Whether a provision in a contract is a condition, the nonfulfillment of which excuses performance, depends upon the intent of the parties, to be ascertained from a fair and reasonable construction of the language used in the light of all the surrounding circumstances….
>
> Any words which express, when properly interpreted, the idea that the performance of a promise is dependent on some other event will create a condition. Phrases and words such as 'on condition,' 'provided that,' 'so that,' 'when,' 'while,' 'after,' or 'as soon as' are often used.

Id. at 236-37.

Neither Crines nor the Court of Appeals has argued that the pertinent language in the Easement is anything but a "condition subsequent" that would be controlled by this rule of law. Such an argument would be futile, since the Crines' rights under the Easement are expressly "conditioned upon the Owners paying their fair share of the costs of maintaining the Amenities and the Owners or tenants of the

Owners obeying all the generally applicable rules of use of the Amenities,…." CP 149, ¶ 6; Ex 25, p. 2, ¶ 2 (emphasis added).

There is equally no authority or basis to support the need for an express provision because the underlying agreement is an Easement. Although it is true that termination of easements is disfavored, City of Edmonds v. Williams, 54 Wn.App. 632, 636, 774 P.2d 1241 (1989), such can occur for a variety of reasons, including through abandonment or adverse possession. See Hanna v. Margitan, 193 Wn.App. 596, 606-607, 373 P.3d 300 (2016). The easement rights are expressly conditioned upon satisfaction of certain obligations and there is absolutely no reason why the pertinent rights should not be terminated as mandated by Ross.[5]

The Court of Appeals' attempt to avoid this inevitability based upon a proposition that the Easement expressly limits the available relief is a misstatement of what the document says. It is true that the failure to pay an assessment creates a lien. However, the Easement does not limit the scope of relief for the failure to pay an assessment to enforcement of the lien. Indeed, it provides the exact opposite:

[5] In the past, Crines have argued that an express right must be included to terminate an easement for a breach based upon such a conclusion in the Washington Real Property Deskbook. However, the deskbook's reference is allegedly based upon the ruling in Cowan v. Gladder, 120 Wn. 144, 206 P. 923 (1922). Cowan did not review the impact of a breach of a condition in an easement or termination of an easement. Instead: "It will be seen that the question involved is whether an easement was created by the first instrument, and, if so, whether it ran with the land or was simply an easement in gross, creating a right personal to the grantor." Id. at 145. Thus, the relied-upon reference provides no legal support to the statement in the Real Property Deskbook.

> 11. Remedies. In the event of a breach of any of the covenants or agreements set forth in this Easement, the parties hereto shall be entitled to any and all remedies available at law or in equity, including, but not limited to the equitable remedies of specific performance or mandatory or prohibitory injunction issued by a court of appropriate jurisdiction.

Ex 25, p. 5, ¶ 11. Thus, for any breach of the Easement, whether Crines' failure to pay an assessment or to follow the rules, Hurlbuts are entitled to any relief allowed by law or equity, which necessarily includes termination as mandated in Ross.

Although not controlling, the ruling in Akasu v. Power, 325 Mass. 497, 91 N.E.2d 224 (S.Ct. MA 1950) is certainly persuasive in the context of applying Ross. There, the at-issue easement was granted in a "'right of way in a passage way ten feet wide leading from the granted premises over my other land to State Street, but the right to use said passage way is on the condition that said grantees and their heirs and assigns shall pay to me and my heirs and assigns the sum of fifteen dollars annually, during the time that they shall use the said passage way.'" Id. at 497. Payment ceased in 1926, and the successor to the grantor blocked the access.

In sustaining termination of the easement for failure to comply with the payment condition, the court first recognized that "[a]n easement may be granted which will terminate upon the happening of some particular act or upon the nonperformance of a condition subsequent,…."

Id. at 501 (citations omitted). In the case of the rent, the court recognized that it was stated as a specific condition, and that it had been breached, and therefore the easement rights terminated: "The owner in possession of the land which is subject to an easement granted upon a condition subsequent may extinguish the easement for a breach of condition." Id.

2. Courts Have Universally Enforced Oral Modifications Despite a Contrary Contractual Provision or the Statute of Frauds.

In refusing to enforce the admitted modification of the Easement's provision relating to the payment of maintenance expenses, the Court of Appeals concluded:

> The trial court erred in concluding the Crineses agreed, through their silence, to modify the easement. The easement is a recorded document and not subject to oral modification. The easement prohibits oral modification: 'any additions, variation, or modification to this Easement shall be void and ineffective unless in writing and signed by the parties hereto or their successors in interest.' All parties were on notice of the terms of the easement that oral modifications were void.
>
> Further,
>
> > RCW 64.04.010 provides that every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed; and RCW 64.04.020 requires that every deed shall be in writing, signed by the party bound thereby, and acknowledged before a person authorized by statute to take acknowledgments of deeds.

> Perrin v. Derbyshire Scenic Acres Water Corp., 63 Wn.2d 716, 719, 388 P.2d 949 (1964).

Opinion, p 12.

In relying upon the Modification Provision and statute of frauds to refuse to enforce the parties' oral modification, both the Trial Court and Court of Appeals surprisingly ignored universal and longstanding legal precedent. First, courts have long recognized that although a paradox, provisions requiring a written modification to a contract are themselves subject to an oral modification. This legal rule stretches back at least to the ruling in Ritchie v. State, 39 Wash. 95, 81 P. 79 (1905):

> It is common, in building contracts, to provide that no claim shall be made for extras unless ordered in writing. Such provisions are usually a limitation on the authority of architects, engineers, and other agents in charge of the work. They are intended for the protection of the employer, are valid, and should in all proper cases be enforced. But it must be remembered that a party cannot, by contract, limit his own power as to its modification, or as to the making of future contracts. Notwithstanding the parties in this case agreed that no charges for extra compensation should be made on any account whatever, unless previously agreed upon in writing, they nevertheless retained full power to modify this contract, or to make a further contract without a writing; and in this case it is for the court or jury to say, under all the circumstances, whether the services mentioned in the fourth cause of action were performed under the written contract attached to the answer, or under some subsequent agreement, express or implied.

Id. at 100 (citation omitted). This rule of law has preserved over time, without exception or narrowing. Indeed, in the words of this Court: "The right to modify a written contract by a subsequent oral one is unquestioned." Haley v. Brady, 17 Wn.2d 775, 788, 137 P.2d 505 (1943) (citation omitted). See also Davis v. Altose, 35 Wn.2d 807, 814, 215 P.2d 705 (1950) ("With respect to the provision in the contract to the effect that any change in the work should be made only upon written orders and the cost thereof agreed upon in writing before the execution of the work, the trial court correctly held that the parties had subsequently modified this provision by their conduct.") (citation omitted); and Henderson v. Bardahl Int'l. Corp., 72 Wn.2d 109, 121, 431 P.2d 961(1967) ("We agree with Bardahl that a written agreement may be modified by a subsequent oral agreement between the parties.")[6]

[6] This rule is not only universally followed in the state of Washington, but is also recognized as a general absolute:

> 'It is true that a simple contract completely reduced to writing cannot be contradicted, changed, or modified by parol evidence of what was said and done by the parties to it at the time it was made, because the parties agreed to put the contract in writing and to make the writing part and evidence thereof. The very purpose of the writing is to render the agreement more certain and to exclude parol evidence of it. Nevertheless, by the rules of the common law, it is competent for the parties to a simple contract in writing, before any breach of its provisions, either altogether to waive, dissolve, or abandon it, or to add to, change, or modify it, or vary or qualify its terms, and thus make it a new one. * * * Moreover, though the parties to a contract may stipulate that it is not to be varied except by an agreement in writing, they may, by a subsequent contract not in writing, modify it by mutual consent. One who has agreed that he will only contract by

The Opinion's ruling is even more surprising because it directly conflicts with every published opinion from all divisions of the Washington Court of Appeals. For instance, Division One definitively, and unequivocally, confirmed the enforceability of oral modifications in Pacific N.W. Group A v. Pizza Blends, Inc., 90 Wn.App. 273, 277-78, 951 P.2d 826 (1998):

> A paradox of the common law is that a contract clause prohibiting oral modifications is essentially unenforceable because the clause itself is subject to oral modification. See, e.g., Martinsville Nylon Employees Council Corp. v. NLRB, 969 F.2d 1263, 1267 (D.C.Cir.1992). The common-law rule has been lauded as allowing parties to quickly modify their contractual obligations when faced with unforeseen circumstances, see Cert'd Corp. v. Hawaii Teamsters & Allied Workers, 597 F.2d 1269, 1271 (9th Cir.1979); Martinsville, 969 F.2d at 1270–72 (Wald, J., dissenting), and has been consistently followed in Washington, see Kelly Springfield Tire Co. v. Faulkner, 191 Wash. 549, 554–56, 71 P.2d 382 (1937) (citing Ritchie v. State, 39 Wash. 95, 81 P. 79 (1905)); Consol. Elect. Distrib., Inc. v. Gier, 24 Wash.App. 671, 677–78, 602 P.2d 1206 (1979).

The Court of Appeals' reliance on the statute of frauds, RCW 64.04.020, is equally contrary to precedent. This very issue was addressed in Gerard-Fillio Co. v. McNair, 68 Wash. 321, 123 P. 462 (1912):

> writing in a certain way does not thereby preclude himself from making a parol bargain to change it. There can be no more force in an agreement in writing not to agree by parol than in a parol agreement not to agree in writing, and every agreement of that kind is ended by the new one which contradicts it.'

Kelly Springfield Tire Co. v. Faulkner, 191 Wn. 549, 555-56, 71 P.2d 382 (1937) (quoting 6 R.C.L. 914, § 299).

> While it is the rule that a written executory agreement to sell or purchase real estate cannot be rescinded or abrogated by an oral executory agreement to rescind or abrogate, it does not follow that such an agreement cannot be modified or abrogated by an executed oral agreement. On the contrary, it is recognized by our own cases above cited, and it is the rule of all the cases in so far as we are advised, that an executed oral contract to modify or abrogate a written contract, required by statute to be in writing, can be successfully pleaded as a defense to an action on the original contract. To hold otherwise is to make the statute of frauds an instrument of fraud; for it would be a fraud to allow a person to enforce a contract which he had agreed on sufficient consideration to modify or abrogate after he has accepted the consideration for its modification or abrogation.

Id. at 327. See also Kelly Springfield Tire Co. v. Faulkner, supra, 191 Wn. at 554.[7]

B. The Applicability of Ross to an Easement Is of Public Interest.

Even if Ross does not apply on its own, then whether or not an express termination provision is required in the context of an easement is of significant public interest which warrants review. Such public interest is evidenced by the lack of particular consideration of the issue in the context of an easement. Such interest is further triggered by the fact that

[7] It is possible that Crines may point out that the rule applies only to an "executed" oral modification, which is one "'where nothing remains to be done by either party.'" Ennis v. Ring, 49 Wn.2d 284, 290, 300 P.2d 773 (1956) (quoting Black's Law Dictionary (4th ed.), p. 395). However, the Court of Appeals did not address nor rely upon this potential distinction in refusing to enforce the parties' oral modification, but instead pronounced an absolute prohibition that is in direct conflict with precedent.

secondary authorities have expressed such an absolute rule based upon precedent that does not support this conclusion. See infra, p. 12, n. 5.

In addition to the guidance provided in general by Ross, other courts have applied the same general to easements, without the need for an express provision. This initially includes the court in Akasu v. Power, supra, 325 Mass. 497. Moreover, in Pinkum v. Eau Claire, 51 N.W. 550, 553 (1892), the court recognized the ultimate inequity in requiring a burdened property owner to be subject to an easement obligation where the other party was not meeting a condition subsequent:

> In this case the plaintiff does not claim as the assignee of a mere right of action or right of entry on land, but he claims as owner in fee of land burdened with an easement granted upon condition, which condition is alleged to have been broken. It would be a singular rule of law which would forever prevent the owner in fee of lands from questioning the right of another to maintain an easement upon his land, when there existed a violation of the express condition upon which the easement was granted. No such rule exists.

VI. CONCLUSION

The Court of Appeals' Opinion contradicts significant and specific longstanding rules of law. These inconsistencies are not subject to any logical distinction or explanation and therefore create uncertainty, since the Opinion was published. It is prudent and appropriate for the

Washington Supreme Court to rectify these inconsistencies and grant review and rule as follows:

1. an easement is subject to termination where the benefiting party fails to comply with an express condition of the right to occupy;

2. the Crines breached the Easement by failing to comply with its express conditions, and therefore the Easement is terminated;

3. alternatively, if the Easement is not terminated, the parties' agreement for the Crines to pay all maintenance fees for the same time period that Hurlbuts maintained the Lakefront Property is enforceable, and the Easement should be so modified; and

4. Hurlbuts should be declared the prevailing party and awarded their attorneys' fees and costs against Crines incurred at the Trial Court, Court of Appeals, and the Supreme Court, pursuant to the Easement's attorneys' fee provision.

Respectfully submitted this 23rd day of October, 2020.

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DECLARATION OF SERVICE

SUZANNE M. COLLINS DECLARES AS FOLLOWS:

1. I am a paralegal with Brownlie Wolf & Lee, LLP, am over the age of 18, and make this declaration based upon personal knowledge and belief.

2. On October 23, 2020, I filed the foregoing Petition for Review via the Court's ECF system. A copy of this document will also be e-mailed to the attorney named below at the following address via the Court's ECF system:

Greg Greenan
Carmichael Clark, P.S.
tggreenan@carmichaelclark.com

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my knowledge and belief.

October 23, 2020

Suzanne M. Collins

Bellingham, Washington

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MAX HURLBUT and HUEIH-HUEIH HURLBUT, in their individual capacities and as a marital community, Respondents, v. JAMES M. and JONI J. CRINES, in their individual capacities and as a marital community; STEVEN M. and KELLY L. WYNKOOP, in their individual capacities and as a marital community; BRADLEY J. KRANTZ and ELIZABETH A. DUNPHY, in their individual capacities and as a marital community; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation, Appellants.	)	No. 79758-1-I DIVISION ONE PUBLISHED OPINION

MANN, C.J. — This is an easement dispute over an access easement to Lake Whatcom. The easement encumbers waterfront property owned by Max and Hueih-Hueih Hurlbut (collectively Hurlbuts). The easement provided lake access and benefitted upland properties owned by the Hurlbuts, James, and Joni Crines

(collectively Crineses), and Steven M. and Kelly L. Wynkoop, and Bradley J. Krantz and Elizabeth A. Dunphy (collectively Wynkoops).

The Hurlbuts sought quiet title to the easement claiming that the Crineses and Wynkoops violated the rules of the easement and failed to fully pay annual assessments. The Hurlbuts and Wynkoops settled, with the Wynkoops giving up their easement right. After a bench trial, the trial court determined that the easement included a termination provision, but it found that the Crineses had not materially violated the terms. The trial court also ordered the Crineses to reimburse the Hurlbuts for maintenance expenses and for a portion of the Hurlbuts' insurance premiums.

The Crineses appeal and contend that the trial court erred in concluding that the easement included a termination provision and erred in ordering that the Crineses reimburse the Hurlbuts for past maintenance expenses. We agree with the Crineses and reverse those portions of the trial court's decision.

The Hurlbuts cross appeal contending that the trial court erred in concluding: (1) that the Crineses did not substantially violate the easement and thereby justify termination of the easement; (2) in failing to enforce the unwritten agreement making the Crineses solely responsible for maintenance costs for 10 years; (3) that the attorney fees incurred by the Hurlbuts to challenge the Wynkoops' actions were not a shared costs; (4) that the Crineses were only responsible for a 1/11th share of the liability insurance obtained by the Hurlbuts; and (5) that the Crineses' base cost sharing remained 4/11ths instead of 4/8ths after the Wynkoops gave up their interest in the easement. We disagree with the Hurlbuts' contentions and affirm the trial court's relevant conclusions. We also reverse the trial court's order requiring the Crineses to

pay 1/11th of the Hurlbuts' insurance premium because it was outside the scope of the easement.

FACTS

Brothers Kim Hurlbut and Max Hurlbut[1] owned 11 lots, comprising 3 parcels, upland and separated from Lake Whatcom by Lake Whatcom Boulevard. Kim and Hurlbut also owned the lakefront parcel directly across from the 11 lots (lakefront property). In 2002, Kim and Hurlbut executed and recorded an easement agreement, creating an easement that benefitted the three upland parcels by providing access to Lake Whatcom through the lakefront property.

In 2004, the Hurlbuts sold one of the four-lot upland parcels to the Crineses (Crineses' property) and a three-lot upland parcel to the Wynkoops. The Hurlbuts retained a four-lot parcel for themselves (Hurlbut property). The Crineses and Hurlbuts have single family residences on their parcels. The Wynkoops property is a vacant lot.

The Crineses purchased their property, in part, because of the easement providing lake access over the lakefront property. Over the years, the Hurlbuts adopted various rules for the owners' use of the lakefront property. At first, the owners were cooperative, but eventually the Hurlbuts claimed that the Wynkoops became "bad actors and even worse neighbors." The Crineses, however, did not materially violate any of the rules of the easement.

From 2004, when the Crineses purchased their property, until 2013, Hurlbut personally performed all of the maintenance work on the lakefront property without

[1] Max Hurlbut will be referred to as Hurlbut, while his brother Kim Hurlbut, who is a nonparty, will be referred to as Kim. No disrespect is intended.

charge to the benefitting properties under the easement. In various writings over the years, Hurlbut stated to the Crineses and the Wynkoops that he was performing maintenance for a time without charge and, eventually, he would be unable to perform the maintenance personally. As the Crineses and the Wynkoops paid nothing for maintenance, Hurlbut expected that they would be responsible for the maintenance and any associated expense for a similar time when he could no longer complete the work himself. This expectation was neither put into writing, nor signed by the Crineses or the Wynkoops. Even so, the Crineses and the Wynkoops did not pay any maintenance costs associated with the lakefront property for 10 years. The Crineses were aware of the Hurlbuts' expectation and did not object or otherwise respond to the Hurlbuts' communications.

The easement provides that the grantor may assess the grantees on a pro rata share basis, all expenses associated with maintenance, taxes, and repair of the lakefront property. The Hurlbuts issued assessments at the end of the year to the Wynkoops and the Crineses, based on the proportionate lots they each owned. In 2012, the Hurlbuts added an umbrella policy to their homeowner's insurance for the lakefront property out of concern over the Wynkoops' use, which included inviting people to swim and use a jet ski from the lakefront property dock. The Hurlbuts included a proportionate share of the cost of the policy in the annual assessment for 2012.

The Crineses paid all assessments issued by the Hurlbuts until the 2013 assessment. In the 2013 assessment, the Hurlbuts assigned a total assessment to the Crineses of $616.24 for the maintenance, liability insurance coverage, and real estate

taxes. The Hurlbuts allocated 4/7ths of the total maintenance costs to the Crineses, 3/7ths of the maintenance costs to the Wynkoops, and none to themselves. The Crineses objected to the increased allocation for maintenance costs and the assessment for the liability insurance. The Crineses tendered a check for $274.83 to the Hurlbuts. The Hurlbuts returned the check.

In November 2014, the Hurlbuts issued the Crineses an assessment for maintenance, liability insurance, and attorney fees, totaling $ 3,082.92. The assessment included a share of $4,056.25 in attorney fees that the Hurlbuts incurred challenging the Wynkoops' attempt to build a parking lot on the Wynkoops' property. The Crineses did not pay the assessment.

In late January 2015, the Hurlbuts notified the Crineses and the Wynkoops by letter that they were terminating the easement. On February 10, 2015, the Hurlbuts filed a complaint in superior court seeking declaratory relief that the easement was terminated and to quiet title the lakefront property. In December 2015, the Hurlbuts settled all claims here against Wynkoops. The settlement included the Wynkoops' execution of a quitclaim deed to the Hurlbuts of all interest they held in the lakefront property and easement.

After a bench trial, on March 8, 2019, the trial court entered extensive findings of facts and conclusions of law. The trial court reformed the easement, striking a requirement that owners must unanimously agree to the yearly assessments. The court also concluded that the easement could be extinguished for failure to follow its terms and conditions, including failure to pay annual assessments. But the trial court determined that there was a reasonable dispute related to the annual assessments that

justified the Crineses' nonpayment, and that the Crineses did not violate the rules of using the easement. As a result, it concluded the Crineses did not substantially violate the terms of the easement and extinguishing their interest would be inequitable. The court also concluded that in a quasi-contract, the Crineses should pay 6/11th of the maintenance costs from 2013 until 2022, even though there was no written modification to the easement. Under this ruling, the court ordered the Crineses must reimburse 1/11th of the Hurlbuts' liability insurance, 6/11th of the landscaping and maintenance expenses, and 4/11th of the property taxes from 2013 until 2017. Going forward, the trial court held that the Hurlbuts could set policy and coverage limits for liability insurance and

> then either allow the Crines to purchase their own insurance consistent with those parameters and name Hurlbut as a third-party insured, or Hurlbut can insure the Easement property and name the Crines as third-party insureds, and then expect 4/11ths of the cost of that insurance premium to be paid by the Crines.

The court also concluded that Hurlbut could not assess the Crineses any portion of the attorney fees he spent disputing whether the Wynkoops could build a parking lot on their property and litigating his quiet title action against them. Finally, the court found that, although there was a provision for attorney fees in the easement, both parties prevailed on substantial issues, and decided neither the Crineses, nor the Hurlbuts were entitled to attorney fees.

The Crineses appeal. The Hurlbuts cross appeal.

DISCUSSION

We review a trial court's conclusions of law de novo. Robel v. Roundup Corp., 148 Wn.2d 35, 60, 59 P.3d 611 (2002). We review a trial court's findings of fact for substantial evidence. Nejin v. City of Seattle, 40 Wn. App. 414, 418, 698 P.2d 615 (1985). "Furthermore, mixed questions of law and fact are subject to review despite a party's failure to assign error to the finding." Robel, 148 Wn.2d at 60. "A trial court's findings of fact that are supported by substantial evidence will not be disturbed on appeal." Nejin, 40 Wn. App. at 418. "Where the findings are supported by substantial evidence, the question is whether they support the conclusions of law." Nejin, 40 Wn. App. at 418-19.

A. Crineses' Appeal

The Crineses contend that the trial court erred in concluding that the easement is terminable and that they are responsible for 6/11th of the maintenance for the lake property from 2013 through 2022. We address each argument in turn.

1. Is the Easement Extinguishable?

The Crineses first argue that the trial court erred in concluding that the easement can be extinguished for failing to follow its terms and conditions, including failure to pay annual assessments. We agree.

The rules of contract interpretation apply to the interpretation of an easement. Hendrickson v. Murphy, 8 Wn. App. 2d 150, 156, 437 P.3d 736 (2019). The interpretation of an easement is a mixed question of law and fact. Sunnyside Valley Irr. Dist. v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). "What the original parties intended is a question of fact and the legal consequence of that intent is a question of

law." Sunnyside, 149 Wn.2d at 880. "The intent of the original parties to an easement is determined from the deed as a whole." Sunnyside, 149 Wn.2d at 880. "If the plain language is unambiguous, extrinsic evidence will not be considered." Sunnyside, 149 Wn.2d at 880. "If ambiguity exists, extrinsic evidence is allowed to show the intentions of the original parties, the circumstances of the property when the easement was conveyed, and the practical interpretation given the parties' prior conduct or admissions." Sunnyside, 149 Wn.2d at 880.

While the trial court ultimately concluded that the Crineses did not act in a manner that substantially violated the easement, the court did conclude that the easement could be extinguished if, after trial, a court concludes that lack of performance or a violation merited termination. The trial court explained:

> The Easement can be extinguished as to the Crines for failure to follow the terms and conditions of the Easement, including the failure to pay regular annual assessments that are due. However, this could not be done unilaterally by Hurlbut because there is no mechanism in the Easement for doing so, and the Crines have a property interest in the Easement that they paid good consideration. Without a mechanism that permits unilateral action in the Easement itself, a trial is necessary to find facts and then conclude that a lack of performance or a violation of terms and conditions merited extinguishing the Easement.

The parties do not dispute that the easement does not have an express termination clause. Instead, the trial court based its conclusion on paragraph 2 of the easement which provides:

> 2. Grant of Easement. Grantors grant the current and future owners or tenants of Grantees Property ("Owner"), the right to use Grantors Property and associated Amenities. It is the intent of the parties that the easement granted herein and hereby be conditioned upon the Owners paying their fair share of the costs of maintaining the Amenities and the Owners or tenants of the Owners obeying all the generally applicable rules of use of the Amenities, as defined herein and from time to time amended by the

> owners of Grantors Property. In consideration of which, the current and future Owners or tenants of Owners shall have the same rights to use the Amenities as any owners or tenants of Grantors Property, subject, of course, to the terms and conditions set forth herein.[2]

The Hurlbuts argue, and the trial court agreed, that the language "conditioned upon" in paragraph 2 is equivalent to a termination clause. We disagree. The easement does not provide for termination if the grantee fails to pay their annual assessment. Instead, the easement provides that delinquent assessments become a lien against the property:

> 3.1 Lien/Personal Obligation. Annual and special assessments, together with interest, costs and reasonable attorney's fees, shall be a personal obligation of each Owner at the time when the assessment is due. Delinquent assessments, together with interest (12% per annum), costs, and reasonable attorneys' fees, shall become a lien upon the Owner's property if Grantors file[s] a Claim of Lien with the Whatcom County Auditor. The property of such lien shall be based upon the date the Claim of Lien is filed.[3]

The mechanism for enforcing any such lien is addressed in the easement:

> 3.10 Lien Indebtedness. All assessments shall be joint and several personal debts and obligations of each Owner or Owners for which the same are assessed as of the time the assessment is made, and shall be collectible as such. The amount of any assessment, whether regular or special, assessed to any Owner, plus interest, and costs including reasonable attorney fees, shall be a lien upon such Owner's property. Suit to recover a money judgment for unpaid assessments shall be maintainable by the Grantors without foreclosure or waiving the lien securing the debt. The Grantors may bring an action at law against another Owner personally obligated to pay the same, or foreclose any lien against the subject property in the same manner as an action to non-judicially foreclose a deed of trust on real property. From the time of commencement of such action, the delinquent Owner shall pay all costs, interest, and fees incurred in the foreclosure action, where it proceeds to judgment or is resolved earlier.

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[2] (Emphasis added.)
[3] (Emphasis added.)

The easement also does not provide for termination based on a failure to follow applicable rules. Instead, the easement provides an express remedy for breach of any of the covenants or agreements, including injunctive relief:

> 11. Remedies. In the event of a breach of any of the covenants or agreements set forth in this Easement, the parties hereto shall be entitled to any and all remedies available at law or in equity, including, but not limited to the equitable remedies of specific performance or mandatory or prohibitory injunction issued by a court of appropriate jurisdiction.

"Termination of easements is disfavored under the law." City of Edmonds v. Williams, 54 Wn. App. 632, 636, 774 P.2d 1241 (1989). Because the easement does not provide for the remedy of termination—and instead provides remedies for both the failure to pay annual assessment and for a violation of the rules—the trial court erred in concluding that the easement can be terminated for a violation on one of the conditions in paragraph 2.

2. Maintenance Costs

Next, the Crineses contend that the trial court erred in concluding that they are responsible for 6/11ths of the maintenance for the lakefront property from 2013 through 2022. We agree.

The court concluded that the Crineses should be responsible for 6/11ths of the maintenance expense because the Hurlbuts provided the maintenance for the Hurlbuts' Lakefront Property for a time period at no cost to the Crineses and the Wynkoops. In turn, the court concluded that it would be unfair to the Hurlbuts if the Crineses and Wynkoops did not have to pay a greater share of the maintenance expenses for a similar time period.

The court found:

19. Since Crines' acquisition of the Crines Property and until 2013, M. Hurlbut performed in good faith all maintenance work to the Hurlbut Lakefront Property personally, and without charge to the benefitting properties under the Easement. In various writings over the years, M. Hurlbut stated to the Crines and Wynkoops that he was performing maintenance for a period of time without charge and that he expected at some points to become unable to perform them personally. As Crines and Wynkoops paid nothing for maintenance for a period of time, M. Hurlbut expected that they would pay all of the maintenance costs for a similar period of time after he was unable to continue to do such work, but this exception was not put into writing and signed by the Crines and/or the Wynkoops.

20. Nonetheless, Crines did not have to pay maintenance costs for ten years, and this was a benefit to them, and M. Hurlbut notified them of his expectation and understanding that the parties had an agreement that the other owners would be responsible to solely pay for maintenance costs for a comparable amount of time that he provided such work for free. The Crines were aware of M. Hurlbut's expectation and belief, and never objected or otherwise responded to his communication on this issue. M. Hurlbut performed the maintenance work for the benefit of all Owners in reliance that the other Owners (including the Crines) would pay all maintenance costs for an equal period of time. Such reliance was reasonable and to Hurlbut's detriment.

21. The Crines would be unjustly enriched if they are not obligated to pay an additional obligation towards maintenance costs for the same number of years that M. Hurlbut provided such services for free to all of the Owners.

The court concluded:

Despite the requirement in the Easement for written amendments, the Court concludes that failure to address these circumstances would work [an] inequity and also concludes that quasi contract is appropriate. If the Wynkoops' right under the Easement had not been terminated, then the split of Hurlbut's 4/11th share of maintenance costs could have been split evenly between the Crines and Wynkoops with each absorbing an increase of 2/11ths. The Crines could have therefore paid 6/11ths of the cost, and the Wynkoops would have paid 5/11ths of the cost. Because the Crines had no control over termination of the Wynkoops' Easement rights, the Court concludes that in quasi contract, the Crines must pay 6/11ths of the cost of the maintenance reasonably incurred and accounted for by the Owner of the Hurlbut Lakefront Property between 2013 through

> 2022. Thereafter, the Crines portion of these regular maintenance assessments will revert to 4/11ths.

The trial court erred in concluding the Crineses agreed, through their silence, to modify the easement. The easement is a recorded document and not subject to oral modification. The easement prohibits oral modification: "any additions, variation, or modification to this Easement shall be void and ineffective unless in writing and signed by the parties hereto or their successors in interest." All parties were on notice of the terms of the easement that oral modifications were void.

Further,

> RCW 64.04.010 provides that every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed; and RCW 64.04.020 requires that every deed shall be in writing, signed by the party bound thereby, and acknowledged before a person authorized by statute to take acknowledgments of deeds.

Perrin v. Derbyshire Scenic Acres Water Corp., 63 Wn.2d 716, 719, 388 P.2d 949 (1964).

The Hurlbuts have no right to recover under a theory of implied or a quasi-contract. "A party to a valid express contract is bound by the provisions of that contract, and may not disregard the same and bring an action on an implied contract relating to the same matter, in contravention of the express contract." Chandler v. Washington Toll Bridge Authority, 17 Wn.2d 591, 604, 137 P.2d 97 (1943). Further, "[t]he courts will not allow a claim for unjust enrichment in contravention of a provision in a valid express contract." MacDonald v. Hayner, 43 Wn. App. 81, 86, 715 P.2d 519 (1986).

The easement apportions to the Crineses 4/11ths of the property taxes and maintenance costs. The trial court erred by modifying the express written terms of the easement.

B. Hurlbuts' Cross Appeal

The Hurlbuts cross appeal and contend that the trial court erred in concluding: (1) that the Crineses did not substantially violate the easement and thereby justify termination of the easement; (2) in failing to enforce the unwritten agreement making the Crineses solely responsible for maintenance costs for 10 years; (3) that the attorney fees incurred by the Hurlbuts to challenge the Wynkoops' actions were not a shared costs; (4) that the Crineses were only responsible for a 1/11th share of the liability insurance obtained by the Hurlbuts; and (5) that the Crineses' base cost sharing remained 4/11ths instead of 4/8ths after the Wynkoops gave up their interest in the easement. Because of our conclusions that the easement was not extinguishable and not subject to oral modification, we do not address the Hurlbuts' first two contentions.

1. Attorney Fees for Challenging Wynkoops

The Hurlbuts contend that the court erred when it concluded that they could not recover from the Crineses a portion of the fees incurred in challenging the Wynkoops' attempt to build a parking lot on their property, and the later action to terminate the easement on the Wynkoops' Property. We disagree.

First, under the easement, the annual assessment includes "legal action to protect Grantors Property and Amenities." The "grantors' property" is defined in the easement as the lakefront parcel on Lake Whatcom. Thus, as grantors, the Hurlbuts may recover attorney fees necessary to protect the lakefront parcel. The Hurlbuts may

not, however, collect attorney fees for litigation with the Wynkoops over the Wynkoops' efforts to build a parking lot on their upland property. The Crineses were not involved in the Hurlbuts' dispute with the Wynkoops and the litigation was not over protecting the lakefront parcel.

Nor are the Crineses responsible for the attorney fees incurred in the Hurlbuts' action seeking to terminate the easement against the Wynkoops. The easement provides that the prevailing party in litigation for breach of any covenant or agreement "shall be entitled to be reimbursed for all costs and expenses incurred or expended in connection therewith, including, but not limited to, reasonable attorneys' fees (including appellate fees) and court costs." Thus, any fees that the Hurlbuts incurred in litigation against the Wynkoops were recoverable against the Wynkoops.

The trial court did not err in concluding that the Crineses were not responsible for the attorney fees incurred in the Hurlbuts' actions against the Wynkoops.

2. Share of Expenses

The Hurlbuts contends that, if the court affirms, it should reverse the trial court's use of 11 lots to divide the expenses because the grantor's property is no longer encumbered by the Wynkoops' 3 lots and instead, this court should divide the expenses by 8 lots. We disagree.

The trial court correctly concluded that, under the easement, the Crineses have a right to use the Hurlbut Lakefront Property 4/11ths of the total time. After the Wynkoops released their interest in the easement, the Hurlbuts may use the property for the remaining time, or 7/11ths of the total time. It would therefore be inconsistent with the property rights enumerated in the easement and the time allocated between Hurlbut and

the Crineses to require the Crineses to pay 4/8ths of the expenses, but only allow them to use the Hurlbut Lakefront Property 4/11ths of the time. We decline to modify the terms of the easement to divide expenses between eight lots.

3. Insurance Premiums

Hurlbut contends that the trial court erred when it ordered the Crineses to pay only 1/11ths of the insurance premiums for the Hurlbut Lakefront Property. We agree that the trial court erred, but for a different reason. We conclude the trial court erred in ordering the Crineses to pay any portion of the Hurlbuts' liability insurance.

Under the express terms of the easement, the annual assessment "shall be used to administer and carry out the maintenance of the Grantors' Property and associated Amenities, including but not limited to property taxes, maintenance, clean up, repairs, legal action to protect Grantors Property and Amenities, and the like." Liability insurance is not addressed in the express terms of the easement.

Instead, potential liability for use of the easement is addressed by an indemnification clause:

> 6. Release and Indemnification. Each party ("Indemnitor") does hereby release, indemnify and promise to defend and save the other party ("Indemnitee") harmless from and against any and all liability, loss, damage, expense, actions and claims, including costs and reasonable attorneys' fees incurred by the Indemnitee in defense thereof, asserted or arising directly or indirectly on account of injury to persons or damage or property occurring on or to the Amenities, the Grantors Property, or the Grantees Property by the Indemnitor; provided, however, that this paragraph does not purport to indemnify the Indemnitee against liability for damages arising out of bodily injury to persons or damage to property to the extent caused by or resulting from the negligence of the Indemnitee and/or Indemnitee's agent or employees.

This indemnification manages the risk between the parties. Further, the trial court found that the "Crines maintained an insurance policy covering their use of the Hurlbut Lakefront Property." Thus, it was an error for the trial court to order the Crineses to reimburse the Hurlbuts for past insurance premiums.

We reverse the trial court's order that the Crineses to pay 1/11ths of the Hurlbuts' insurance premiums. Going forward, both parties may maintain their own insurance policies on the Hurlbut Lakefront Property, unless the parties agree otherwise in writing.

C. Attorney Fees

Both parties assign error to the trial court's determination that each substantially prevailed and therefore, each should pay their own attorney fees. Both parties request attorney fees on appeal as the prevailing party.

The easement allows an award of attorney fees to the prevailing party and specifically includes appellate fees. The Crineses have prevailed on their appeal and thus were the prevailing party below and on appeal.

Since the Crineses prevailed at trial and on appeal, the award of attorney fees and costs is reversed and remanded for further proceedings. The trial court is also tasked on remand to determine an appropriate award of attorney fees on appeal, as it is in the best position to safeguard against the risk of duplication or double recovery. RAP 18.1(i) ("[t]he appellate court may direct that the amount of fees and expenses be determined by the trial court after remand").

Reversed and remanded for modification of the findings and conclusions consistent with this opinion, and an award of attorney fees below and on appeal to the Crineses.

Mann, C.J.

WE CONCUR:

Andrus, A.C.J.

Duyn, J.

BROWNLIE WOLF & LEE, LLP

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