

No. 62974-3

THE COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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MARK BLOOME,  
*Appellant,*

*v.*

JACKSON HAVERLY, M.D.,  
*Respondent.*

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STATE OF WASHINGTON  
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BRIEF OF RESPONDENT

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**A. Statement of the Case.**

On June 30, 1995 Appellant Mark Bloome and his then wife Sharon sold a cottage to Respondent Jackson Haverly M.D. CP. 28. The deed was recorded contemporaneously with a "View Covenant" that provided that the "view corridor" that Dr. Haverly's property had across Bloome's property would remain as it "existed" on the date of closing. CP. 23 – 26. *See also* Appendix. Mark Bloome had earlier approached Dr. Haverly about selling Dr. Haverly the small cottage where he had been a tenant the previous year. The cottage was old; it had been built in 1937. The value in the property was its view: a panoramic view of Puget Sound. CP 18. There was only one property that separated the cottage from the Sound – Bloome's home, which has a waterfront location. A public road separated the two properties. CP 19.

Haverly told Bloome that he would not buy the property without a view covenant across Bloome's waterfront property that would preserve the cottage's view of the Sound.<sup>1</sup> CP 19.

Bloome agreed. CP 19.

The grade from the cottage to Bloome's home is a steep slope downward. CP 20; CP 30. On the highest portion of Bloome's

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<sup>1</sup> Because this is an appeal from an order of summary judgment, the Respondent Haverly is attempting to set forth as "facts" the evidence he submitted that was undisputed.

property, adjacent to the public street, were trees and bushes that interfered with the view from the cottage. CP 20.

As part of the transaction, Haverly also wanted the existing interferences with the view – the trees and bushes – removed.

Bloome agreed to this as well. CP 20; CP 39.

Bloome presented to Haverly a proposed instrument with all-encompassing language that the "intent" of the parties was to "maintain the existing view corridor" as it would exist as of the closing date, June 30, 1995:

**It is agreed that between buyer and seller the intent of both parties and the burden upon 4743 West Ruffner to the benefit of 4730 West Ruffner is to maintain the existing view corridor for 4730 West Ruffner as it exists on June 30, 1995.**

CP 24; Appendix at 2.

Bloome included in the View Covenant a description of the trees and bushes that were to be removed and a drawing of where they were located on his property. CP 24 and 30. Appendix at 2 and 8.

One exception was identified in the instrument: "There exists a large conifer in front of the fence at 4751 West Ruffner [a

property that is neither the burdened nor the benefited parcel] that is excluded from this covenant.” CP 25.

11 years later in 2006, Sharon Bloome asked Dr. Haverly if he would give back the view covenant when he sold the house or when he died. Dr. Haverly said he would not. CP 20. CP 35 – 36.

A year later Mark Bloome’s attorney sent letters to Dr. Haverly requesting that he sign an instrument “clarifying” that the view covenant did not apply to structures. This was the first time Mark Bloome had ever raised the possibility of structures being built on his property that would interfere with Dr. Haverly’s view corridor. CP 20. CP 47 – 48.

Dr. Haverly declined. CP 21.

In November 2007, Mark Bloome filed this lawsuit seeking declaratory relief in the form of “clarification” that the view covenant applied only to trees and bushes and not to buildings. CP 1 – 5.

At a deposition, Bloome admitted that the only authority for his request for clarification was the instrument itself; there had been no extrinsic discussions or correspondence in which he had expressed to Dr. Haverly that the covenant did not apply to structures::

Q [by Dr. Haverly's counsel] It's 12 years after this view covenant was executed, why are you seeking clarification with the court now rather than clarifying it 12 years ago in the document?

A. We thought it was clear in the document.

Q. What was clear?

A. That the covenant applied only to trees and bushes.

CP at 35.

Bloome was asked what language comprised the authority for the "clarification" he sought.

A. The document only applied to trees.

Q. Right.

A. So if you're writing a document that only applies to trees, it only applies to trees.

Q. Well is there anything in there? You said it makes it clear. Are you saying it's implied then that it doesn't apply to structures?

A. I'm saying the document only applied to trees.

CP 39 – 40.

Dr. Haverly filed a motion for summary judgment relying on his declaration, the view covenant, and Bloome's deposition testimony. Bloome filed a cross-motion for summary judgment.

The Honorable Douglas McBroom granted Dr. Haverly's motion and denied Bloome's motion. CP 134 – 135.

Bloome filed a motion for reconsideration. CP 172 – 177.

Judge McBroom denied the motion. CP 190. This appeal followed. CP 191 – 195.

## **B. Law and Argument.**

*1. The Trial Court did not err when it dismissed Appellant Bloome's claim as a matter of law based on the unambiguous language in the View Covenant.*

The view covenant in this case provides that "the intent of both parties . . . is to maintain the existing view corridor . . . as it exists on June 30, 1995" for the benefit of Dr. Haverly's property across the property owned by Mark Bloome. CP. 24. There was an express exception for a conifer tree. CP 25. Other than that, Dr. Haverly's "line of sight" was to be preserved. CP 24.

Bloome claims that because the language following the "intent" language mentions the removal of trees that the covenant only applies to trees. CP 40. The language of the covenant as a whole, however, is unambiguous. Bloome's interpretation would lead to an absurd result. This Court should affirm the Trial Court's dismissal of Bloome's claim as a matter of law based solely on the language of the instrument and the extrinsic evidence that showed what the "view corridor" was as of June 30, 1995.

Interpretation of a restrictive covenant is a question of law, reviewed de novo. *Bauman v. Turpen*, 139 Wn. App. 78, 160 P.3d 1050 (2007). A Court's goal in interpreting a restrictive covenant is to determine a covenant's purpose and the interpretation that most reasonably effectuates that purpose. *Meresse v. Stelma*, 100 Wn. App. 857, 865, 999 P.2d 1267 (2000).

Courts will give a practical and reasonable interpretation that fulfills the object and purpose of a covenant rather than a strained or forced construction that leads to an absurd conclusion, or that renders the contract nonsensical or ineffective. *Washington Pub. Util. Dists.' Util. Sys. v. Public Util. Dist. No. 1*, 112 Wn.2d 1, 11, 771 P.2d 701 (1989).

Courts are to determine reasonableness and overall purpose by examining the language of a covenant. Courts may always, however, consider extrinsic evidence when such evidence is probative of the purpose of the covenant. "If the evidence illuminates the situation of the parties and the circumstances under which they executed the agreement, then it is admissible." *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990) quoting *J.W. Seavey Hop Corp. v. Pollock*, 20 Wn. 2d 337, 348-49, 147 P.2d 310 (1944). *Hollis v. Garwall*, 137 Wash.2d 683, 974 P.2d 836 (1999)(Washington Supreme Court extends *Berg v. Hudesman*

context rule to the interpretation of restrictive covenants). Under the context rule, evidence of the “surrounding circumstances of the original parties” is admissible “to determine the meaning of the specific words and terms used in the covenants.” *Bauman v. Turpen*.

Context evidence is not admissible to import into a writing an intention not expressed. Extrinsic evidence is relevant only to determine the meaning of specific words and terms used, not to show an intention independent of the instrument or to vary, contradict, or modify the written word. *Wimberly v. Caravello*, 136 Wn. App. 327, 149 P.3d 402 (2006). The Court is to declare the meaning of what the parties wrote, not what they intended to write. *Id.*

The language of the covenant in this case, it is submitted, is unambiguous when considered in light of the extrinsic evidence that showed the condition of Dr. Haverly's view corridor as it existed on June 30, 1995 and the circumstances surrounding the execution of the covenant. The language provides that it is “the intent of both parties . . . to maintain the existing view corridor . . . as it exists on June 30, 1995” for the benefit of Dr. Haverly's property and burdening Mark Bloome's property. The extrinsic evidence introduced by the parties showed that the only interferences with Dr. Haverly's view as of the date of closing were

trees and bushes that those were to be removed no later than March 30, 1996. CP 19 - 20, ¶ 5, lines 1 -10. The Court need go no further in resolving this dispute than the instrument itself and the extrinsic evidence that showed the status of Dr. Haverly's view as of the closing date. The Court should rule as a matter of law that the covenant does not allow for the construction of buildings within the view corridor.

The Court may, however, consider other extrinsic evidence if it decides that to do so would be probative of the purpose of the covenant and the reasonableness of the competing interpretations. As cited above, under the *Berg v. Hudesman* context rule, the Court may consider extrinsic evidence in interpreting otherwise unambiguous language in a contract or an instrument. Here the extrinsic evidence supports the conclusion that no exceptions to the all-encompassing language of the view covenant were intended other than as expressly identified by the written language of the instrument.

The extrinsic evidence showed that there were no discussions at the time the view covenant was negotiated about structures being a "clear" exception to the view covenant. Bloome Deposition at 12. Moreover, for 12 years Bloome did not express to Dr. Haverly Bloome's recently expressed belief that the view covenant does not

prohibit buildings and structures within the view corridor. Approximately 2 years ago, Bloome's then spouse, Sharon Bloome, asked Dr. Haverly to give up his view covenant. Mark Bloome testified at his deposition that he shared in this request. CP 35 - 36. This request is consistent with the position that the language forbids any interference with Dr. Haverly's view because Bloome has never expressed any concern that he be allowed to grow trees and bushes again within Dr. Haverly's view corridor – only to construct buildings. The extrinsic evidence shows, therefore, that view preservation was the primary purpose of the covenant. Bloome's argument that the covenant must be strictly construed so that only trees and bushes are barred from view interference leads to an absurd result and must be rejected. *Bauman v. Turpen*, 139 Wn. App. 78, 160 P.3d 1050 (2007).

In *Bauman*, a restrictive covenant restricted downhill properties in a development to "one story." Uphill properties contained no such restriction. All of the properties had expansive views of the Puget Sound and the Olympic Mountains. The Defendant Turpen built a home that was "one story" but whose elevation was so high that with its hip and gabled roof blocked the views of uphill neighbors. The neighbors sought an injunction. Turpen defended on the grounds that the restriction on his lot had

been obeyed; a one story home had been built. The neighbors argued that the purpose of the restriction was view preservation. Turpen argued that the covenant had to be strictly construed. There was no language in the covenant mandating view preservation nor was there a height limitation for the one-story structures for the downhill properties. Had the developer intended such limitations, Turpen argued, the developer would have placed language in the covenant to that effect.

The trial court disagreed and required the Turpens to modify their roof so it no longer blocked the uphill properties' views of the Sound and the Olympics. This Court upheld the trial court's decision and wrote that covenants preserving views will be upheld when substantial evidence supports them. The "central question" before the trial court was the purpose of the covenant. The extrinsic evidence showed that the developer's intent was, indeed, to preserve views. Thus, the Turpens' home violated the restrictive covenant even though it complied with the literal language in the covenant restricting a home built on the property to one story.

A similar result was reached in *Wimberly v. Caravello*, 136 Wn. App. 327, 149 P.3d 402 (2006). In *Wimberly*, a restrictive covenant allowed a home and a garage on a development's

residential lots. The covenant went on to state that buildings on the lots were to be “simple, well-proportioned structures.”

The defendant built a garage - with an office above - that reached an elevation of 27 feet 3 ½ inches. The garage/office blocked the view of the Columbia River from a neighboring lot. The owners of that lot sued.

The Defendant argued that nothing in the restrictive covenant restricted the elevations for buildings in the development. 136 Wn. App. at 339. The extrinsic evidence, however, showed that one of the purposes of the covenant was view preservation of the Columbia River. *Id.* at 332. The trial court held that the garage was not a “simple, well-proportioned structure.” *Id.* at 337. The trial court specifically found that the intent of the covenants was to “protect and preserve the lot views.” *Wimberly*, 136 Wn. App. at 338. Division 3 of the Court of Appeals affirmed, writing that:

The scenic location and views are an intrinsic part of the aesthetic and monetary value of the lots. We agree with the trial court that to interpret the garage covenant as permitting a multi-story, multi-purpose structure, considerably taller than the house . . . would defeat the drafters’ manifest purpose.

*Wimberly*, 136 Wn. App. at 337.

Here the facts are even more compelling than in the *Bauman* and the *Wimberly* cases. The language of the

covenant itself provides that the "intent" of both parties is to preserve the view from Dr. Haverly's lot across the lot owned by Plaintiff Bloome. The extrinsic evidence, which is undisputed, shows that there were no buildings or structures blocking Dr. Haverly's view on June 30, 1995. Mark Bloome admits that the parties never discussed prior to closing the possibility of a structure or a building being placed on Bloome's property that would intrude into the "view corridor." For 12 years Mark Bloome never claimed that he could build a structure in the view corridor that would block Dr. Haverly's view. Bloome, by sharing in his wife's request 2 years ago that Dr. Haverly give up his view covenant, acknowledged that he originally believed that building within the view corridor was forbidden.

Bloome's argument is based solely on the language of the covenant itself. He argues that because (1) there was no express prohibition on placing buildings and structures within the view corridor that would block Dr. Haverly's view and (2) because language in the covenant addresses removal of trees that did or would in the future block Dr. Haverly's view, that the covenant should be strictly construed as only applying to trees – not buildings. This is

the same sort of argument rejected by the courts in *Bauman* and *Wimberly*. The language at issue in this case shows that the covenant's purpose was view preservation, as in *Baumann* and *Wimberly*. That purpose is only achieved by forbidding any object from interfering with Dr. Haverly's view within the "view corridor."

This Court should affirm the trial court and dismiss Bloome's appeal.

*2. The Trial Court did not err when it considered context evidence concerning the covenant and subsequently determined that there was no evidence of an ambiguity in the instrument.*

The view covenant in this case provides that "the intent of both parties . . . is to maintain the existing view corridor . . . as it exists on June 30, 1995" for the benefit of Dr. Haverly's property across the property owned by Bloome. Extrinsic evidence was necessary in the Court below to show what the "existing view corridor" was on June 30, 1995. That evidence showed that there was no building blocking Dr. Haverly's view. CP 19 – 20.

The covenant provided that there were trees that interfered with Dr. Haverly's view as of June 30, 1995 but those trees were to be permanently removed by March 30, 1996. CP 30. The extrinsic evidence showed that Dr. Haverly had asked Mark Bloome to remove the trees as a condition of the transaction; that was the

reason the language concerning trees was placed in the covenant. CP 20. Because there was no building blocking Dr. Haverly's view, there was no need to specifically identify buildings as being part of the prohibited class of things that could not interfere with Dr. Haverly's view. The broad language forbidding anything from blocking Dr. Haverly's view sufficiently accomplished that. Anything more would be redundant. When the parties wanted something excluded from the covenant, they did so. One conifer tree was identified as being immune from the covenant's restrictions. Nothing else was excluded. The Court should conclude that the parties knew how to allow exceptions to the view covenant and did so expressly when exceptions were intended. The Court should conclude that exceptions not mentioned were not intended. *Cf. Kreidler v. Eikenberry*, 111 Wn. 2d 828, 835, 766 P.2d 438 (1989)(express mention in a statute of things on which the statute operates means the implied exclusion of things not expressed).

Dr. Haverly argued in the Court below that the covenant's unambiguous language promising that his "view corridor" would remain as it was on June 30, 1995 included interferences of any kind with his property's view.

Bloome, however, claimed in the Court below that because the language following the "intent" language mentioned the removal of trees that the covenant only applied to trees. He testified that it was "clear" that this language allowed him to construct a building that would - as an incidental effect - totally block Dr. Haverly's view. CP 35.

The language in the covenant that the "view corridor" from Dr. Haverly's property across Bloome's property was to remain as it was on June 30, 1995, however, is unambiguous.

Dr. Haverly was concerned, however, that once he presented his case that Bloome would submit extrinsic evidence that would be used for the purpose of arguing that the all encompassing language of the covenant was latently ambiguous in a manner that could be resolved by extrinsic evidence in Bloome's favor. Dr. Haverly conducted discovery so as to pin Bloome down to reliance on the language of the covenant itself. The extrinsic evidence that was introduced by Dr. Haverly was submitted for that reason only and was effective in insuring that Bloome relied, as his complaint alleged, solely on the 4 corners of the covenant instrument.

The undisputed extrinsic evidence presented to the trial court was that no buildings, trees, bushes, or anything else was intended to interfere with the "view corridor" as of the closing date

on June 30, 1995. The trial court rightly allowed the introduction of contextual evidence that showed the condition of the view corridor on June 30, 1995, the discussions between the parties prior to the recording of the covenant, the subsequent conduct of the parties, and the parties' interpretations of the agreement. The evidence was probative of the purpose of the covenant, articulated the parties' conflicting interpretations, and shed light on which interpretation was more reasonable to effectuate the covenant's purpose.

After reviewing the language of the covenant and contextual evidence, the Court below determined that the instrument unambiguously prohibited Bloome from constructing a building or anything else that would obstruct Dr. Haverly's view corridor "as it exist[ed] on June 30, 1995."

This Court should affirm the trial court's ruling and dismiss Mark Bloome's appeal.

Only the objective manifestations of the parties have legal significance. *Saluteen-Maschersky v. Countrywide Funding Corp.*, 105 Wn. App. 846, 22 P.3d 804 (2001)(conclusory testimony by non-moving party concerning the legal effect of language, i.e. "I was clear that this was an agreement," is not relevant in resolving dispute over parties' contractual intent).

Context evidence, however, is important to the analysis of what is reasonable because such evidence can show surrounding facts that give rise to the purpose of a covenant's language.

Accordingly, admissible context evidence includes: "The expressions and general tenor of speech used in negotiations."

*Id.*

Admissible as well are the parties' interpretations of the agreement and their subsequent conduct:

In discerning the parties' intent, subsequent conduct of the contracting parties may be of aid, and the reasonableness of the parties' respective interpretations may also be a factor in interpreting a written contract.

*Berg v. Hudesman*, 115 Wn. 2d at 668, 801 P.2d at 229

(emphasis supplied).

All of the evidence objected to by Mark Bloome concerns the parties' interpretations of what was said between them, their interpretations of the language in the covenant, and their subsequent conduct concerning the covenant. *Berg* expressly permits all such evidence.

The first statement that Bloome objects to is:

- "I concluded that all parties understood that my request meant that nothing would ever be allowed to intrude into what Mr. Bloome called in the covenant my property's 'view corridor' . . . ." Haverly Dec. 2:16-18, CP 19.

Bloome also objects to a similar statement:

- Haverly MSJ at 11:6-8, CP 59: “Dr. Haverly believes, of course, that the view covenant forbids structures, buildings, and everything else from being placed on Bloome’s property in a manner that intrudes into the view corridor.” Mr. Bloome challenged this section because it tended only to establish Dr. Haverly’s subjective belief regarding the View Covenant.

Respondent's Brief at 16 – 17.

This evidence shows Dr. Haverly’s interpretation of the meaning of the words spoken between the parties, his understanding of what he could expect to be put down on paper concerning the restriction on Bloome’s property of any interference with the view from Dr. Haverly’s property, and what was put down on paper. This interpretation flowed from the objective manifestations of the parties. The evidence implies that no discussion of buildings took place and that the all-encompassing language of the covenant to preserve Dr. Haverly’s view corridor reflected the actual discussions of the parties. This evidence also shows that there was no latent ambiguity in the covenant. Dr. Haverly’s interpretation, moreover, was introduced to show his good faith that he has always taken the same position that he takes

in this lawsuit and to provide a position for the Court to balance against Bloome's for purposes of "reasonableness." Such evidence is expressly permitted under *Berg*. See also, *Bort v. Parker*, 110 Wn. App. 561, 42 P.3d 980 (2002)(allowing evidence of a party's interpretation of a home construction contract).

This evidence is little different than the evidence of the developer's intent in the *Wimberley v. Caravello* case, evidence that Division 3 determined was admissible even though the developer's "intent" of view preservation had never been expressly communicated to the defendant Turpen.

The next statement objected to is:

- "I did not see this as limiting the view covenant in any way. I understood the language only as an identification of those objects that were then intrusions to my view. The language aided in expressing what I believed was the parties' intent that the covenant would forever preserve the view of Puget Sound from the property I was about to purchase." Haverly Dec. at 3:10-15, CP 20.

Respondent's Brief at 16.

This statement by Dr. Haverly refers to the inclusion of language in the covenant that required Bloome to remove existing trees and bushes that interfered with Dr. Haverly's view. This evidence shows that the language concerning trees and bushes was incorporated into the view covenant as a result of Dr. Haverly's

request that they be removed by Bloome as part of the transaction. The evidence shows that the purpose of the covenant was view preservation not, as Bloome argues, tree and bush exclusion. It is this language on which Bloome relies in contending that the covenant only prohibits trees and bushes from interfering with Dr. Haverly's view – not the construction of a building. This testimony shows the true purpose of the "tree removal" language was Dr. Haverly's desire that the trees and bushes be removed – and removed by Bloome – not Haverly.

The objection should be overruled.

The next statement objected to is:

- “When I asked for a view covenant, I told Mr. Bloome I wanted to preserve the view – not just preserve the view from trees and bushes.” Haverly Dec. at 3:19-20, CP 20.

*Id.*

This is evidence of what Dr. Haverly told Bloome; the language objected to is not a "subjective belief." It is tied to an admission by Bloome, which occurs earlier in Dr. Haverly's declaration. That testimony was that Bloome agreed to provide a covenant consistent with what Dr. Haverly was asking for, namely, view preservation. CP 19, lines 6 – 7. Bloome's testimony that the covenant was "clear" that it only applied to trees and bushes lacks

credibility and is shown to be unreasonable by the contextual evidence. The Court should overrule the objection. The next statement objected to is:

- “This was the first time anyone had suggested to me that this was Mr. Bloome’s position. Mr. Bloome had never expressed to me directly that the covenant only applied to trees and bushes but not buildings.” Haverly Dec. at 3:23-25, CP 20.

Appellant's Brief at 16.

This is evidence of the subsequent conduct of Bloome. The evidence is relevant because Bloome had been told in 1995 what Dr. Haverly's interpretation of their discussions had been and what Dr. Haverly believed would be the meaning of the language put down on paper. Bloome did not correct Dr. Haverly's "error" for 12 years. This evidence tends to show that Bloome's interpretation of the agreement and the discussions beforehand was the same as Dr. Haverly until something changed 12 years later that affected Bloome's interests. Only then did Bloome's interpretation diverge from that of Dr. Haverly's. Evidence of subsequent conduct is expressly permitted under *Berg*. The objection should be overruled.

The next 2 objections to contextual evidence are those related to Bloome's own testimony about his interpretation of the agreement:

- Haverly MSJ at 3:20-4:22, CP 51: Extensive quotation of Bloome deposition testimony regarding Mr. Bloome's belief that the View Covenant applied only to trees and bushes. Mr. Bloome challenged this section because it tends only to establish Mr. Bloome's subjective belief regarding the View Covenant.

- Haverly MSJ at 5:18-20, CP 53: "Bloome testified that there was no need for any language [about structures] 'Because it was only about trees and bushes.'" (quoting Bloome deposition at 22-23). Mr. Bloome challenged this section because it tends only to establish Mr. Bloome's subjective belief regarding the View Covenant.

Appellant's Brief at 16 - 17.

This evidence was cross-examination of Bloome's interpretation of the agreement that it was "clear" the the covenant only applied to trees and bushes. CP 51 - 53. Bloome, however, was unable to explain how the restriction could apply only to trees and bushes and not buildings when (1) the word "building" did not appear in the covenant and (2) the covenant contained language that broadly protected Dr. Haverly's "view corridor" across Bloome's property as it existed on June 30, 1995.

The evidence was introduced to show that Bloome was relying solely on the language of the covenant and that no extrinsic evidence supported his position. The testimony is an admission; the objection should be overruled.

The next objection was to the introduction of evidence that Bloome had never taken the position that the covenant only applied to trees until 12 years after the covenant was recorded and not until after Haverly refused to give up the covenant:

- Haverly MSJ at 10:25-11:1, CP 58: “For 12 years Bloome did not express to anyone his current belief that the view covenant does not prohibit buildings and structures within the view corridor.” Mr. Bloome challenged this section because it was either not probative or because it was evidence of subjective intent.

- Haverly MSJ at 13:11-16, CP 61: “For 12 years Bloome never claimed that he could build a structure in the view corridor that would block Dr. Haverly’s view. By sharing in his wife’s request 2 years ago that Dr. Haverly give up his view covenant, Bloome acknowledged that he then believed that building within the view corridor was forbidden.” ). Mr. Bloome challenged this section because it was either not probative, it requested that the trial court grant inferences to the moving party, and because it was subjective evidence of intent.

Appellant's Brief at 17.

The evidence showed that for 12 years Bloome never communicated to Dr. Haverly that the covenant "clearly" applied

only to trees. In 2007, Bloome's wife asked Dr. Haverly to give up the covenant. Bloome testified that he shared in his wife's request. After Dr. Haverly declined the request, Bloome for the first time expressly communicated the position he takes in this lawsuit that the covenant only applied to trees and bushes. Bloome asked Dr. Haverly to sign a "clarification" of the covenant that expressly would have allowed blockage of the view by anything other than trees. There should, of course, be no need for "clarification" of a covenant when, according to Bloome, its language "clearly" only applies to trees and bushes and not buildings.

This evidence of subsequent conduct is expressly permitted by *Berg* and tends to show that the position Mark Bloome takes in this lawsuit is a change from his original understanding of the agreement. If the original covenant was "clear," as Bloom has testified, there would be no need for a new document "clarifying" the language of the 1995 covenant.

All of the evidence objected to, moreover, is probative of the purpose of the covenant, namely view preservation, and whose interpretation of the language is more reasonable.

Bloome relies on *Hollis v. Garwall* for the proposition that extrinsic evidence of a drafter's interpretation of a covenant is not

admissible. The facts in *Hollis*, however, were different from the ones in this case.

In *Hollis*, the defendant was running a mining operation in a residential development. The language in the plat for the development expressly restricted the subdivision's lots to residential uses. The defendant submitted an affidavit of the original developer in which he testified that the intent of the plat was to "permit" residential development but not to exclude commercial development.

The Supreme Court rightly held that this "evidence" contradicted the express language of the plat. The Court held that such evidence was inadmissible because it contradicted unambiguous express language in a real property covenant.

Bloome's reliance on *Ross v. Bennett*, 148 Wn. App. 40, 203 P.3d 383 (2008) is similarly misplaced.

In *Ross*, covenants in a subdivision restricted the lots created thereby to residential use, which included rental use.

The homeowner's association passed a bylaw restricting rentals of homes in the subdivision to those of more than 30 days. The justification was that "vacation rentals" of fewer than 30 days constituted a business use and that rentals of 30 days or more were "residential" in nature.

The trial court entered an injunction prohibiting the defendant from renting his property for fewer than 30 days. This Court reversed holding that the covenant permitted residential uses and that renting a home for fewer than 30 days constituted a residential use.

The defendant attempted to introduce evidence of the original developer's intent by declaration. Portions of the declaration were deemed to be inadmissible as expressing a unilateral subjective intent by the trial court and this Court upheld some of the lower court's order to strike.

In *Ross v. Bennett*, the stricken testimony was never objectively expressed to the plaintiff. In this case, Dr. Haverly testified as to what his interpretation was at the time and that this interpretation was expressed to Bloome. Dr. Haverly's interpretation, moreover, was relevant to establishing his good faith and that no latent ambiguity existed in the covenant. Suppose the reverse were true, and Dr. Haverly had testified that his subjective interpretation was that the covenant only applied to trees and bushes yet he was relying on what his attorneys had told him was unambiguous language in the covenant to the contrary. Would this not be relevant to show that the parties had created a latent ambiguity with the language that they had used and Dr.

Haverly's lack of good faith? If so, then the contrary must also be true: that Dr. Haverly's interpretation is evidence of the lack of a latent ambiguity and of his good faith and should, therefore, be relevant.

In a case directly on point, *Wimberly v. Caravello*, the trial court considered evidence by the original developers of their "intent" to preserve views in a residential development of the Columbia River even though the restrictive covenants for the subdivision did not mention view preservation as one of its purposes.

The defendant strenuously objected to this testimony as constituting "subjective" intent. The Court of Appeals upheld the trial court's decision to allow the evidence and even relied on that evidence in determining that the trial court's decision was supported by "substantial evidence." 136 Wn. App. at 338 – 39.

The issue of extrinsic evidence is not crucial to Dr. Haverly's case. The only absolutely necessary extrinsic evidence was that which showed the condition of Dr. Haverly's view as of June 30, 1995. Nevertheless, it is submitted that all of the evidence submitted by Dr. Haverly is admissible under *Berg*, *Baumann*, and *Wimberly*. Even if it is not, however, the result is the same.

Bloome relies solely on the language of the covenant for his position that the restriction on his property only applies to trees and bushes. This flies in the face of the all encompassing language that he caused to be drafted namely that "the intent of both parties . . . is to maintain the existing view corridor . . . as it exists on June 30, 1995" for the benefit of Dr. Haverly's property across the property owned by Bloome.

This language, which is mentioned in the Appellant's Brief only in passing, trumps everything else in the View Covenant. This language shows that the purpose of the covenant is view preservation. It follows that Dr. Haverly's interpretation of the covenant is more reasonable than that of Bloome.

The Court should dismiss Bloome's appeal and affirm the trial court's order of summary judgment.

*3. No question of fact was created by Bloome's testimony that his interpretation of the covenant was that "it only applied to trees."*

Mark Bloome admitted in his deposition that the issue of buildings within the view corridor never arose in discussions with Dr. Haverly prior to closing. Bloome also testified that he thought it was "clear" that the language of the covenant only applied to trees. Bloome does not dispute that the first time he told Dr.

Haverly of Bloome's interpretation was 12 years after the instrument was recorded.

Bloome now argues that if evidence of Dr. Haverly's interpretation is allowed, then his subjective interpretation of the covenant's language creates an issue of fact.

Bloome, however, is mistaking interpretation by a party for legal argument. He admits that he never expressed this interpretation to Dr. Haverly. Dr. Haverly, on the other hand, testified that he did express his interpretation to Mark Bloome. CP 19 - 21.

The Court can, of course, consider Bloome's subjective interpretation as legal argument, but the interpretation, because it was never expressed to Dr. Haverly, is not admissible evidence that creates an issue of fact.

*4. The restrictions on development on Dr. Haverly's property provide no authority for Bloome's contention that the "View Covenant" did not apply to buildings.*

Mark Bloome argues that because extensive restrictions on development of Dr. Haverly's property were agreed to in a separate instrument at the same time the view covenant was executed that no restrictions on building development applied to the View Covenant.

Bloome's argument first of all makes the phrase "View Covenant" an oxymoron. An instrument that stresses "view" in its title means, "no view" according to Bloome – the "view covenant" permits view blockage by all development on his property other than that related to landscaping.

Second, the argument is a fallacy. Bloome's argument takes the form of a syllogism. The major premise is "all covenants that deal with restrictions on buildings expressly identify those restrictions with particularity." The minor premise is "the View Covenant has no restrictions on buildings." The conclusion drawn is that there must not be any restrictions on building in the View Covenant.

The problem with the argument is with the major premise. The premise is untrue. Not all covenants that deal with restrictions expressly identify those restrictions with particularity. Some covenants that restrict development on property do so with general language, of say, "There shall be no development of any kind on the property."

According to Bloome, unless the View Covenant identified an obstruction to be restricted, that obstruction could block the view of Dr. Haverly. Bloome's argument implies that Dr. Haverly needed to include specific restrictions on cell phone towers, piles of

3-man rocks, pit run storage, large mounds of beauty bark and any other imaginable obstruction for those to be excluded as a use on Bloome's property.

According to Bloome, the all-encompassing language that Dr. Haverly's view was to be preserved as it was on June 30, 1995 does not mean what it says,. This "general" language prohibiting all development was modified by the inclusion of specific restrictions only on trees.

The problem with the argument is that the language Bloome refers to was not intended to specifically restrict horticultural development on his property but to require removal of trees and bushes that were already there. The restriction on horticultural development was included in the all-encompassing language that forbade any kind of development on Bloome's property that blocked Dr. Haverly's view.

Bloome's reliance on *Mack v. Armstrong*, 147 Wn. 2d 522, 195 P.3d 1027 (2008) is misplaced. In that case a restrictive covenant restricted homes to a 30-foot elevation unless approved by an architectural control committee. Another covenant required approval by the same architectural control committee. The Armstrongs constructed an addition to their home. The elevation was less than 30 feet. There was a complaint of view blockage. A

suit was brought to force the removal of a portion of the roof because the architectural control committee did not approve the addition. The trial court ordered removal of 4 feet of the Armstrong's roof and they appealed.

Division 3 held that the specific covenant allowing homes to be built to an elevation of 30 feet prevailed over the more general covenant requiring architectural control committee approval.

The facts are different in this case. There is a broad unequivocal restriction placed on Bloome's property so that nothing thereon can intrude into the "view corridor" of Dr. Haverly's property that did not "exist" on the day of closing. There is no specific restriction on horticultural development. Rather, there is a promise by Bloome to remove trees and bushes from the view corridor by March 30, 1996, which he fulfilled.

*Mack v. Armstrong* had 2 restrictions that involved the same entity, the architectural control committee. Here we have 1 restriction – the broad prohibition of any view obstruction in Dr. Haverly's view corridor – and Bloome's promise to remove trees and bushes. The second of these is not a covenant that "runs with the land." It is a promise of temporal duration followed by execution. The language dealing with removal of trees no longer has any purpose in the View Covenant and, indeed, never needed

to be in that instrument in the first place. The promise could just as easily have been included as part of the terms of the purchase and sale agreement that would survive closing. An example would be a promise to remove a septic tank after closing. Such an obligation is not a covenant but an executory promise of limited duration that could as easily be covered within a purchase and sale agreement.

Bloome's argument that the specific restriction triumphs over the general is flawed. There is only one restriction: view preservation. The promise to remove trees and bushes is not a restrictive covenant. The argument fails.

*5. Dr. Haverly gave consideration for the view covenant.*

Mark Bloome argues that it would be unreasonable to interpret the View Covenant as prohibiting development on his property (other than horticultural development) because he received no "meaningful" consideration for the removal of "most of the value" of his waterfront lot.

Dr. Haverly paid money to Bloome for the property benefited by the View Covenant. While the parties did not allocate the amount of value between the property itself and the right to a view, the agreement to sell implies that part of the money Dr. Haverly gave Bloome was for the view.

Bloome does not argue that there was lack of consideration only lack of "meaningful" consideration. Courts, of course, are not empowered to judge what is and what is not meaningful consideration. They do not rewrite contracts. *McCormick v. Dunn & Black, P.S.*, 140 Wn. App. 873, 167 P.3d 610 (2007)

Second, there was no evidence that there was a lack of "meaningful consideration." All Bloome did was to provide conclusory testimony that he believed the inability to build within the view corridor substantially devalued his property. CP 97 – 98. Conclusory testimony is irrelevant and cannot be considered on a motion for summary judgment. *Strong v. Terrell*, 147 Wn. App. 376, 384, 195 P.3d 977 (2008)( "statements of ultimate fact and conclusory statements of fact will not defeat a summary judgment motion").

Bloome's argument that his interpretation is more reasonable is based solely on his unsupported claim that his property would be substantially devalued for an unreasonably small amount of consideration and that to uphold Dr. Haverly's interpretation would mean that Bloome had made an egregiously bad bargain. There is no evidence that Bloome made a bad bargain. But even if he did, this Court should not re-write the covenant.

The trial court's decision should be affirmed.

**C. Conclusion.**

The language of the covenant unambiguously promises that the view corridor for Dr. Haverly's property shall remain as it was on June 30, 1995. The extrinsic evidence shows that Dr. Haverly's property had a panoramic view of Puget Sound and the Olympic Mountains as of that date except for some trees and bushes that Bloome promised to permanently remove.

This Court should affirm the trial court's decision to dismiss Mark Bloome's complaint.

Respectfully submitted June 15, 2009

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DAVID JOSEPH SMITH  
WSBA #12832  
Attorney for Respondent Haverly

**D. Appendix**

1. View Covenant (CP 23 – 25) ..... A-2

2. Drawing of Trees to Be Removed (CP 30) ..... A-6

BEST AVAILABLE IMAGE POSSIBLE

① Final View Covenant June 1995

Addendum II to Purchase and Sale Agreement, 4730 West Ruffner Street.  
(Revised June 26, 1995)  
(and revised June 28, 1995)

**Declaration of View Covenant to be Recorded against  
4743 West Ruffner, in Favor of 4730 West Ruffner**

This Declaration is effective as of this 27 day of June, 1995. Mark Bloome and Sharon Bloome, husband and wife, are hereinafter referred to as "the Bloomes."

Whereas, the Bloomes are the owners of two parcels of land abutting that certain street right of way in Seattle, King County, Washington, known as West Ruffner Street; and

Whereas, the two parcels owned by the Bloomes are referred to herein as Parcel A (4743 West Ruffner Street) and Parcel B (4730 West Ruffner Street) and are legally described on Exhibit A hereto, which Exhibit is incorporated herein by this reference; and

Whereas, The Bloomes are planning on selling Parcel B to a third party, and as a part of the contemplated transaction wish to provide a view covenant; and

Whereas, the new owner and all future owners of Parcel A will acquire Parcel A with full knowledge of these restrictions by virtue of the recording of this Declaration in the real property records of King County, Washington.

Now, therefore, the Bloomes, as present owners of Parcel A and Parcel B hereby

Addendum II, 4730 West Ruffner

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declare and impose the following covenant as perpetual restrictions on and against Parcel A, for the benefit of Parcel B, as follows:

It is agreed that between buyer and seller the intent of both parties and the burden upon 4743 West Ruffner to the benefit of 4730 West Ruffner is to maintain the existing view corridor for 4730 West Ruffner as it exists on June 30, 1995. It is the intent of both parties and both parties acknowledge that to maintain the exact view is impossible, that due to tree pruning and/or removal, sometimes the view will be better than the view on June 30, 1995, and sometimes due to tree growth, it shall be worse. It is the intent and understanding to maintain a corridor of view from 4730 West Ruffner through 4743 West Ruffner, that this corridor shall have trees in the line of sight, but that the trees shall not substantially, but may partially, block out portions of the view corridor.

It is understood that initially at seller's expense, seller shall remove nine trees as shown in the attached Exhibit B. Said tree removal shall be on or before March 30, 1996. Buyer understands that in the same general area where trees are to be removed, seller shall replace those trees with trees whose height when grown shall not exceed the height of West Ruffner Street above 4743 West Ruffner. It is at the expense of the seller to maintain the heights of the trees that are used as replacement trees such that they do not exceed the height of West Ruffner Street above 4743 West Ruffner.

It is further understood that in the future, if trees located on 4743 West Ruffner should block the view corridor of 4730 West Ruffner, and therefore require cutting or pruning, such cutting and pruning will be at the expense of the owner of 4730

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West Ruffner, with the approval of the owner of 4743 West Ruffner. The tree cutting company shall be a mutually agreed upon tree company.

No trees or plants shall be planted or allowed to grow in front of or directly behind the street level fence at 4743 West Ruffner either to such a height or such a density that they interfere with the view corridor of 4730 West Ruffner Street. There exists a large conifer in front of the fence at 4751 West Ruffner; this tree is excluded from this covenant. Should this large conifer die, or in some way be diminished in health and vigor and be removed, it is agreed that a tree or several trees that will give shielding similar to that provided by the current tree, can be planted in the same general vicinity, and those trees will not interfere with the view corridor to any greater extent than the removed conifer.

Notices. All notices required hereunder shall be in writing. All notices sent by United States mail, postage prepaid, addressed to the party at the address for each parcel on West Ruffner Street shall be deemed received on the second day after mailing.

Recording. This declaration of Covenant shall be recorded with the King County Recorder's Office. After filing with the Recorder's Office for recording, parties acquiring an interest in Parcel A shall be construed to have notice of the terms hereof.

Dated this 29 day of June, 1995.

Mark Bloome  
Mark Bloome

Sharon Bloome  
Sharon Bloome

Addendum II, 4730 West Ruffner

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BEST AVAILABLE IMAGE POSSIBLE

STATE OF WASHINGTON )  
 ) ss.  
COUNTY OF KING )

On this 29 day of JUNE, 1995, personally appeared before me Mark Bloome, to me known to be the individual described in and who executed the within and foregoing Declaration of Covenant, and acknowledged that he signed the same as his free and voluntary act for the uses and purposes therein mentioned

GIVEN UNDER MY HAND and official seal the day and year first above written.

Kristin M. Carter



Name: KRISTIN M. CARTER  
NOTARY PUBLIC in and for the State  
of Washington, residing at Lynnwood

My Commission expires: March 23, 1996

STATE OF WASHINGTON )  
 ) ss.  
COUNTY OF KING )

On this 29 day of JUNE, 1995, personally appeared before me Sharon Bloome, to me known to be the individual described in and who executed the within and foregoing Declaration of Covenant, and acknowledged that she signed the same as her free and voluntary act for the uses and purposes therein mentioned

GIVEN UNDER MY HAND and official seal the day and year first above written.

Kristin M. Carter



Name: KRISTIN M. CARTER  
NOTARY PUBLIC in and for the State  
of Washington, residing at Lynnwood

My Commission expires: March 23, 1996



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THE COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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<p>MARK BLOOME,  Appellant,  v.  JACKSON L. HAVERLY,  Respondent.</p>	<p>No. 62974-3  DECLARATION OF SERVICE</p>
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I, DAVID JOSEPH SMITH, declare under penalty of perjury under the laws of the State of Washington:

1. I am over the age of 18, am competent to make this declaration, and represent the Respondent Dr. Jackson Haverly M.D.

2. On June 16, 2009, I placed a copy of the Respondent's Brief and this Declaration of Service in the United States Mail, postage prepaid, addressed to opposing counsel Patrick Schneider and Steven J. Gillespie at Roberts Kaplan LLP, 1111 3rd Ave Ste 3400, Seattle, WA 98101-3299.

DATED June 15, 2009 in Kirkland, Washington.

  
DAVID JOSEPH SMITH, WSBA #12832  
Attorney for Respondent Haverly