

72739-7

72739-7

Cause No. 72739-7-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

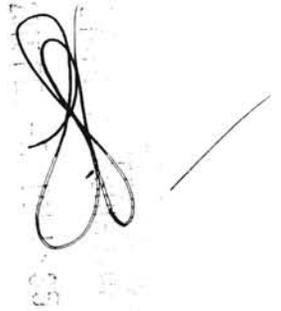
CHET H. SABOTKA and CAROL S. SABOTKA

Appellants,

v.

GERALD PETRICH and
ALICE P. PETRICH

Respondents.



BRIEF OF APPELLANTS

RICHARD H. WOOSTER, WSBA 13752
Kram & Wooster
Attorney for Appellants
1901 South I Street
Tacoma, WA 98405
(253) 572-4161

ORIGINAL

TABLE OF CONTENTS

	Page(s)
Table of Contents.....	i
Table of Authorities.....	ii-iv
I. Introduction.....	1-2
II. Assignments of Error and Issues Pertaining to Assignments of Error.....	2
A. Errors of the Superior Court.....	2
B. Issues Related to Assignments of Error.....	2
III. Statement of the Case.....	2-17
IV. Legal Discussion.....	17-38
A. Standard of Review.....	17-20
B. The Court’s Order Confirming Easement Rights Impermissibly Expands the Scope of the Agreed Maintenance Easements.....	20-27
C. The Extent of Petrich’s “Unclean Hands” Should Operate as a Bar to Any Relief.....	27-31
D. Sanctions of Attorney’s Fees Were Improperly Awarded.....	32-38
V. Conclusion.....	38-39

TABLE OF AUTHORITIES

<u>Table of Cases</u>	<u>Page</u>
<u>Washington Cases</u>	
<i>Baillargeon v. Press</i> , 11 Wash.App. 59, 66, 521 P.2d 746, review denied, 84 Wn.2d 1010 (1974).....	29
<i>Bering v. SHARE</i> , 106 Wn.2d 212, 220, 721 P.2d 918 (1986).....	20, 34
<i>Biggs v. Vail</i> , 124 Wash. 2d 193, 202, 876 P.2d 448, 453-54 (1994).....	19, 33, 35
<i>Bryant v. Joseph Tree, Inc.</i> , 119 Wash.2d 210, 218-19, 829 P.2d 1099 (1992).....	35
<i>City of Seattle v. McCready</i> , 131 Wash. 2d 266, 275, 931 P.2d 156, 161 (1997).....	33
<i>City of Seattle v. Nazarenius</i> , 60 Wash.2d 657, 665, 374 P.2d 1014 (1962).....	24
<i>Cole v. Laverty</i> , 112 Wash.App. 180, 185, 49 P.3d 924 (2002).....	22
<i>Colwell v. Ezzell</i> , 119 Wash.App. 432, 439, 81 P.3d 895 (2003).....	21
<i>Council House, Inc. v. Hawk</i> , 136 Wn.App. 153, 159, 147 P.3d 1305 (2006).....	19
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wash.2d 801, 809, 28 P.2d 549 (1992).....	32
<i>Dexter v. Spokane County Health Dist.</i> , 76 Wash.App. 372, 377, 884 P.2d 1353 (1994).....	33
<i>Income Investors v. Shelton</i> 3 Wn.2d 599, 602, 101 P.2d 973, 974-5 (1940).....	30
<i>In re Marriage of Farr</i> , 87 Wn.App. 177, 184, 940 P.2d 679 (1997).....	20, 34

<i>In re Recall of Pearsall–Stipek</i> , 136 Wash.2d 255, 265, 961 P.2d 343 (1998).....	19
<i>J. L. Cooper & Co. v. Anchor Sec. Co.</i> , 9 Wn.2d 45, 71-76, 113 P.2d 845, 857-59 (1941).....	29, 30
<i>Johnston v. Beneficial Management Corp. of America</i> , 96 Wn.2d 708, 712–13, 638 P.2d 1201 (1982).....	19, 34
<i>Litho Color, Inc. v. Pac. Employers Ins. Co.</i> , 98 Wash.App. 286, 295, 991 P.2d 638 (1999).....	18
<i>Logan v. Brodrick</i> , 29 Wash.App. 796, 799, 631 P.2d 429 (1981).....	20
<i>Lowe v. Double L Properties, Inc.</i> , 105 Wn. App. 888, 895-96, 20 P.3d 500, 504-05 (2001).....	21-22
<i>MacDonald v. Korum Ford</i> , 80 Wash. App. 877, 891-92, 912 P.2d 1052, 1061 (1996).....	36
<i>Rupert v. Gunter</i> , 31 Wash.App. 27, 31, 640 P.2d 36 (1982).....	21, 25
<i>State v. S.H.</i> , 102 Wash. App. 468, 473, 8 P.3d 1058, 1060-61 (2000).....	20, 34, 35
<i>Steury v. Johnson</i> , 90 Wn.App. 401, 405, 957 P.2d 772 (1998).....	19
<i>Sunnyside Valley Irrigation Dist. v. Dickie</i> , 149 Wash.2d 873, 879–80, 73 P.3d 369 (2003).....	18, 19
<i>Thompson v. Smith</i> , 59 Wash.2d 397, 407, 367 P.2d 798 (1962).....	22
<i>Tiger Oil Corp. v. Department of Licensing</i> , 88 Wash.App. 925, 937–39, 946 P.2d 1235 (1997).....	19
<i>Town of Woodway v. Snohomish Cnty.</i> , 172 Wash. App. 643, 647, 291 P.3d 278, 279.....	18

<i>Town of Woodway v. BSRE Point Wells, LP</i> , 177 Wash. 2d 1008, 302 P.3d 181 (2013) and aff'd, 180 Wash. 2d 165, 322 P.3d 1219 (2014).....	18
<i>Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.</i> , 122 Wash.2d 299, 338, 858 P.2d 1054 (1993).....	19
<i>Zobrist v. Culp</i> , 95 Wash.2d 556, 560, 627 P.2d 1308 (1981).....	24

All other jurisdictions

<i>Chambers v. NASCO, Inc.</i> , 501 U.S. 32, 45–47, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991).....	34, 35
<i>City of Pasadena v. California–Michigan Land & Water Co.</i> , 17 Cal.2d 576, 110 P.2d 983 (1941).....	22
<i>Primus Automotive Fin. Servs., Inc. v. Batarse</i> , 115 F.3d 644, 649 (9th Cir.1997).....	35
<i>Roadway Express, Inc. v. Piper</i> , 447 U.S. 752, 767, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980).....	35

Statutes

RCW 7.40.030.....	29
-------------------	----

Rules and Regulations

King County Local Rule 7(5)(B)(v).....	32
--	----

I. Introduction

Appellants, Chet H. Sabotka and Carol S. Sabotka appeal the court's orders that they assert impermissibly expanded the scope of a non-exclusive easement for maintenance of two structures belonging to the Petriches, their neighbors which abut their property to the south. Following a bench trial, the Sabotkas offered their neighbors a non-exclusive maintenance easement which has been represented in various orders and settlement agreements. The parties each continue to view the scope of the easements differently. The Sabotkas view the easement as one extending 24" from the extremity each encroaching structure. The Petriches view the easement as one forming a single plane 24" north from the furthest reaches of the encroaching structure down into the earth and up to sky. The court ultimately sided with the Petriches. Although the court did not find the Sabotka's engaged in bad faith, the court assessed sanctions against the Sabotkas in the form of an attorney fee award of \$7,933.50.

The Sabotkas assert that the Court's description of the easement is erroneous and contrary to the parties' intent. That the Petriches' have engaged in serious misconduct which renders them with "unclean hands" with should operate as a bar to any relief sought. The Sabotkas assert that it was an abuse of discretion to award monetary sanctions against them

when they have a valid basis for their description of the easement and there has been no interference with the Petriches' intended use of the easement.

II. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

A. Errors of the Superior Court

- a. The Court Erred When it Modified the Prior Decisions of the Court Defining the Non-exclusive Easement for Maintenance Purposes.
- b. The Court Erred When it Disregarded Petriches' Unclean Hands and Fashioned Remedy for Petrich.
- c. The Court Erred When it Imposed Sanctions for Attorney's Fees Against Sabotka Despite Finding Sabotkas Did Not Engage In Bad Faith.

B. Issues Related to Assignments of Error.

- a. **What is the Standard of Review For the Court's Order Confirming Easement Rights?**
- b. **Did the Court Err When It Expanded the Easement's Scope Beyond What Was Agreed to and Had Been Ordered by Prior Rulings of the Court?**
- c. **Under the Orders of the Court, What is the Scope of the Easement As It Relates to the Eaves and Box Window of the Petriches' Encroaching Structures?**
- d. **Were Petriches Before the Court With "Unclean Hands" Such That a Remedy Should Have Been Denied?**
- e. **Did the Court Err When It Imposed Sanctions of Attorney's Fees?**

III. STATEMENT OF THE CASE

This action involves a long running dispute between adjoining property owners of two Puget Sound waterfront parcels. An aerial view of the two properties is attached as Appendix 1 for reference. Following a bench trial, which included a visit by the trial judge to the property, title was quieted in the respective parties.

The Petrich Property includes a detached garage near the property line at the East end of the property, a centrally located main house with a pool and a small beach house on the property line located at the water's edge at the West End of the property. The eave and gutter of the main house protrude approximately 18" from the plane of the north wall of the main house. (CP 323) The popout window on the beach house protrudes approximately two feet from the beach house. (CP 325) The Sabotkas have a rock bulkhead with a walkway including steps to the beach along the property line to the water's edge. (CP 374, 378-79).

The Sabotkas regard Mr. Petrich as a violent and dangerous person, whom they fear. (CP 355-57, 413-14)

The Sabotkas voluntarily granted Petrich a non-exclusive maintenance easement onto the Sabotkas' property "parallel to the Beach House of as much as two feet along the space that is located immediately north of the Beach House and bulkhead, for maintenance of the Beach House, and bulkhead and pilings for dock only, as the Beach House, bulkhead and

pilings for dock currently exist. The fence in this area is on the Sabotka property and therefore belongs to Sabotka, who shall have the sole right to it as well as the property between the fence and the foundation of the beach house. (CP 41-42), findings of fact ¶ 24). Petrich was required to provide a minimum of five days written notice before using the easement except for emergencies posing the risk of damage to property or injury to persons rendering such notice impractical. (CP 48).

At the time the easement was granted there was a white picket fence in the easement zone and the court ruled the fence in this area is on the Sabotka Property and therefore belongs to Sabotka, who shall have the sole right to it as well as the property between the fence and the foundation of the Beach House. (CP 42, FF ¶24, CP 43-44, Conclusion of Law ¶¶6 & 8).

In Judge Fleck's memorandum decision she described the easement as follows: "The Sabotkas have offered and I will therefore order a prescriptive easement of two feet, the space that is approximately located between the current fence and the beach house, for maintenance of the beach house only. The fence in this area is on Sabotka property and therefore belongs to the Sabotkas who shall have the sole right to it including its maintenance as well as the property between the fence and the foundation of the beach house." (CP 33)

In the Judgment and Order on Findings of Fact and Conclusion of Law the wording on the easement states: “At the west portion of the Sabotka property, immediately north of the Petrich Beach House, Petrich is granted a non-exclusive maintenance easement onto the Sabotka Property for that so much of the Sabotka Property that is two feet north of the northernmost extremity of Petrich Beach House, bulkhead, and pilings for dock as they presently exist, for so long as the Petrich Beach House, bulkhead and pilings for dock exist.” (CP 47, ¶5)

There was a white picket fence in the easement zone which the Court made clear was the property of Sabotka. (CP 33, 44, 49, 298-303, 363-66)

Thereafter through clever drafting the two foot easement granted was modified to the “extremity” of the encroaching structure. Petrich was also granted “a non-exclusive easement onto the Sabotka Property for so much of the Sabotka Property that is two feet north of the northernmost extremity” of the Petrich main house and beach house for the purpose of maintenance of such house. (CP 47-48).

Petrich was required to give five days notice in writing describing the work to be done and the start and estimated completion date. Exceptions to the notice period were allowed for exigent circumstances. (CP 48, ¶7).

Petrich was tasked with the obligation of removing encroaching vegetation from his property onto the Sabotkas’ property. CP 48-49, ¶ 8).

Following entry of the Findings of Fact and Conclusions of Law the trial judge, Judge Fleck ceased her assignment to the case and the case was transferred to Judge Craighead. The parties participated in several proceedings to define their rights and obligations. These included entry into a settlement agreement on certain issues during a mediation (CP 80-82) and settlement of other issues following the mediation (CP 83-93). Thereafter the parties arbitrated certain issues before the mediator which resulted in an Interim Award (CP 94 -100). The parties sought clarification and a Second Interim Award was entered by the Arbitrator on January 29, 2010. (CP 101-104) A request for reconsideration was denied.

These Orders were confirmed by Judge Craighead on January 24, 2011. (CP 188-89) The Sabotkas requested Clarification of that Order requesting that each party must demonstrate compliance with their obligations before asserting non-compliance by the other party. (CP 190-93). That request was denied. (CP 194). The Court issued an Order for Reference to a Referee in July 2012 to address outstanding issues. (CP 195-200)

That new Order appointed a referee to monitor the parties' conduct and established a "no man's zone" between the two properties. (CP 207) The referee was to address the issue related to any work or removal within

the no man's zone. The referee was to have a surveyor establish the area of the Non-exclusive Maintenance Agreement near the beach house and the proper location of the Sabotka's fence as established by Judge Fleck's order of November 14, 2007. (CP 294) Petriches' Request for Reconsideration of that order was denied. (CP 201).

On December 6, 2012 the Referee, Thomas Lether entered his "Order by Referee." (CP 202-208). The Sabotkas were ordered to remove the portion of the fence that was within two feet from any part of the beach house *located on the Petrich property.* (emphasis supplied)(CP 98, 204) This language distinguishes the house from the eaves and the pop out window that are encroaching. That Order permitted the Sabotkas to meet their obligation regarding the fence by using a "two foot buffer [that] shall include ensuring that the fence is two feet from the roof or eave of the beach house. In order to effectuate this removal and replacement the Sabotkas may construct a perpendicular deviation in the fence line at the northeast corner of the boat house [sic] to accomplish the two-foot buffer." (CP 204).

The deviation was further clarified by the Arbitrator as follows: "Perpendicular deviation means simply there can be an angle in the fence line such that the fence is two feet from the guest [sic] house. Whatever method is utilized, the current fence must be modified so that any and all

portions of the fence is at least two feet from any portion of the guest house.” (CP 472-73).

The order further confirmed Petriches’ obligation to trim vegetation and trim trees, including whorls, along the property line. Such work is to be performed twice a year, before May 1 and before September 31 each year through a licensed and bonded arborist. If additional trimming is necessary it should be limited to a maximum of once per quarter. (CP 205-06)

That Order was clarified by Judge Craighead on April 2, 2013 (CP 209-211). The Sabotka’s made a request for clarification of that order. (CP 216-218). In response the Court issued a new order dated May 13, 2013. (CP 239-240).

In this new order the Court removed the referee, made clear the Petriches were not required to remove their no trespassing signs, granted the Sabotkas an extension of time to make any modification to their fence near the beach house until after Petrich chose an qualified person to perform the required trimming activities and notified both the Court and the Sabotkas and required the Petriches to make their selection by May 31, 2013. Thereafter, the Court issued a stay on July 3, 2013 pending Petriches’ discretionary review. (CP 241). It appears that appeal was abandoned.

On October 21, 2013 the Court issued a new order (CP 242-244) that purported to “supercede all previous orders to the extent that they are inconsistent with this order.” (CP 244).

This new order provided that the Petriches shall retain a surveyor to measure and stake the perimeter of the maintenance easement by the Petrich beach house and main house. The surveyor was to restake the common boundary line from the street to the Petrich beach house at the expense of both parties (CP 244) the expense of measuring and staking the maintenance easement was to be born by Petrich. (CP 244).

On December 23, 2013 the Court entered another order reconsidering portions of the October 21, 2013 Order. (CP 293-95) The Court allowed the parties to agree upon a surveyor and if they could not agree, the Court would chose the surveyor, who shall be left with the responsibility of determining the safest and most efficacious manner to demonstrate where the property line is at eye level and preferably, above. (CP 294-95) The Court postponed any action required of Sabotka on the property could be postponed until April 2014 when they returned to Washington. (CP 295).

Sabotka filed a request for clarification of the Court’s orders. (CP 296-305). On March 17, 2014, Judge Craighead entered a letter ruling acknowledging that she did not intend to supercede any of Judge Fleck’s prior rulings. (CP 307) The Court asserted that her Order of 2013, as

modified on reconsideration superseded all of this court's prior Orders. (CP 307) (emphasis in original).

The court chose Ken Anderson as the surveyor for both surveying jobs by order dated March 20, 2014. (CP 329). For ease of reference, the Orders in this case have been gathered in the Declaration of Carol Sabotka. (CP 354-533).

On April 15, 2014 the parties held a telephone conversation regarding the surveying job. Sabotka objected to the use of certain permanent markers they regarded as dangerous and disagreed with the Petrich definition of the easements granted. (CP 329). Sabotka asserts that the 24" buffer runs from the extremities of the beach house wall, not from the extremities of the Beach House and then from the center of the earth to the stratosphere. (CP 374).

Sabotkas assert that the fence as constructed, with the angle away from the beach house roof, complies with the Court's orders and the Petriches' interpretation would greatly impact their use of their property and create a narrow space that would prevent them from taking canoes, kayaks, and boat to the beach without lifting them high over their head. (CP 374-375).

The disputed fence, as constructed, does not interfere with Petriches' use of the maintenance easement or impair their ability to maintain the benefited structures. (CP375-381) Sabotka points out that the fence is

more than 24” from the eaves of the main house and the Beach House. (CP 380). The Parties reached no meeting of the minds in that April 15, 2014 phone conversation. No effort was undertaken to resume the discussion before the motion at issue (CP 312-321) was filed several months later. (CP 355, 367).

Following the April 15, 2014 phone conversation there was a change of counsel for Sabotka because the attorney representing them left the firm he was with and the case was assigned to new counsel in a new law firm and a notice of appearance was filed. (CP 552). Petriches counsel made no effort to contact new counsel to resolve the issue and new counsel was unaware there were outstanding issues. (CP 551-553)

Petrich has made absolutely no showing that his ability to maintain the main house or the Beach House has actually been interfered with by the fence in question.

Sabotka further asserted that the relief requested by Petrich should have been denied because he comes before the Court with “unclean hands” as he has consistently violated his obligations under the court’s orders. (CP 357-361; 365; 368-373; 378-380)

The Sabotkas put in a section of “beach fence” that runs from the fence post specifically referenced just east of the Northeast corner of the Petrich beach house. This “beach fence is further than 24” from the

foundations or walls of the Petrich beach house, except for one point where there is a pop out window or any part of the structure that is on the Petrich property. Ms. Sabotka sought and obtained clarification that the space could be satisfied by angling the fence away from the beach house eave. Sabotka Dec. (CP 366-367; 472-73; 502-5; 507-8;) The fence is retained with a bungee cord so that it can be moved if necessary to facilitate maintenance. It should be noted that there are no gutters to clean on the beach house as it has a straight eave. (CP 504). The beach house is low to the ground and can be reached without a ladder. A short step ladder would provide full access to any adult. In eleven years the Sabotkas never observed Petrich use a ladder on the north side of his structures. (CP 521, 526, 529) The beach house roof is readily accessible from three sides of the structure and the fence has not interfered with work carried out on the roof. (CP 375-78).

The fence was installed in strict compliance with the parties' settlement agreement: "The Sabotkas shall erect a fence, which shall be located on the Sabotka property, immediately adjacent to and parallel to the common boundary line separating the Sabotka and Petrich properties, which shall be solely and exclusively owned by the Sabotkas. The fence shall run from the southeasternmost corner of the Sabotka property, at a standard height of six feet, and shall extend westward along the property

line, to a location immediately north of the northeasternmost corner of the Petrich beach house. (CP 419, 426)

The Sabotkas extended the fence west from the agreed end point immediately north of the beach house. The right to install a fence was approved by the referee with the proviso that it not be installed in a way that impedes the Petrich easement rights. (CP 438). The fence was ordered to be removed at a point beginning at the northeastern corner of the beach house down to the beach and may be “reinstalled at a point no closer than a line starting two feet from the northwestern eave of the beach house and running easterly in a line parallel with the northern eave of the beach house.” (CP 439) When the issue was presented to the referee the referee ruled:

...Sabotka is herein required to remove and replace the previously installed fence at the western or water end of the fence line so as to ensure that the fence is a minimum of two (2) feet from *any* part of the beach house located on Petrich property. This two-foot buffer shall include ensuring that the fence is two feet from the roof of the subject beach house at the Northeastern corner of the roof or eave of the beach house. In order to effectuate this removal and replacement the Sabotkas may construct a perpendicular deviation in the fence line at the northeast corner of the boat house to accomplish the two-foot buffer.

(CP 466)(emphasis in original).

On motion for clarification the referee described the deviation in the fence as follows: “Perpendicular deviation means simply there can be an

angle in the fence line such that the fence is two feet from the guest house. What ever method is utilized, the current fence must be modified so that any and all portion of the fence is at least two feet from any portion of the guest house.” (CP 472-73)

Despite the lack of a showing of interference with Petriches’ ability to maintain the Beach House or the main house or an attempt to address the issue, the court issued an “Order Confirming Easement Rights” (CP 567-569),

That Order redefined the non-exclusive easements for the main house follows:

With respect to the easement adjacent to the Petrich main house, the easement area is that portion of the Sabotka property lying south of a straight line running parallel to the roof line of the northern roof section of the Petrich main house, from a point due north of a point 2 feet east of the northeastern most portion of the main house, to a point due north of a point 2 feet due west the northernmost portion of the main house, intersecting a point that is 2 feet due north of the northernmost extremity of the Petrich main house.

(CP 568)

That Order redefined the non-exclusive easements for the Beach House follows:

With respect to the easement adjacent to the Petrich beach house, the easement area is that portion of the Sabotka property lying south of a straight line running parallel to the roof line of the roof above the “box window” protruding from the north side of the Petrich beach house, from a point due north of a point 2 feet west

of the northwestern most portion of the deck extending off the west end of the beach house, intersecting a point that is 2 feet due north of the northernmost extremity of the Petrich beach house.

(CP 568).

This modification pushed the easement zone further onto Sabotka's property along the entire length of the beach house even though the box window only covers a couple of feet of the beach house. See photo (CP 504). This modification also contradicts the prior agreements and orders that allowed the Sabotkas to construct a six foot fence running from the street to a point immediately north of the northeasternmost corner of the Petrich Beach house. (CP , 80, 97-98, 361, 438). The Court's order could be interpreted as requiring a change in the location of the end point of the agreed upon six foot fence which was to be immediately north of the northeasternmost corner of the Petrich Beach house. *Id.*

After revising the scope of the easements, the court assessed sanctions of \$7,933.50 against the Sabotkas for the costs of bringing the motion to confirm the easement. (684-686). The court expressly found there was no bad faith shown by the Sabotkas in asserting their position for what the easement embraced. (CP 685). However, the Court stated: "The Sabotkas are attempting to thwart this court's orders by refusing to cooperate in instructing the court-appointed surveyors, Ken Anderson, to enter upon the Petrich and Sabotka properties to measure and stake the

perimeters of the two maintenance easements upon the Sabotka's property." (CP 685) Sabotkas had pointed out that there was no showing of interference with the Petriches' intended use of the easement. (CP 355, 367, 375-78,663). At no time had the Sabotkas refused to co-operate in instructing the court-appointed surveyor but asked that Ken Anderson consider all documents of the Referee Tom Lether and the Memorandum of Decision and Conclusions of Law by Judge Deborah Fleck.

The award of sanctions was made notwithstanding Petrich's "unclean hands" as demonstrated by no attempt to contract Sabotka before bringing the motion three months after their last conversation and following a change in legal counsel (CP 355); painting dripping, blood red signs on his house facing Sabotka. (CP 355, 410-11); frequently walking the goat like "no mans land" the parties were ordered to stay out of and breaking the privacy slats in the fence and hanging objects in the shrubs abutting Sabotka's entry to their home (CP 357, 370); failing to trim the brush he has been ordered to trim (CP 357); coming onto Sabotka's property in violation of Court orders (CP 365); Petrich has refused to top trees he was ordered to top or perform other trimming he was ordered to perform (CP 368-69); Petrich harasses the Sabotkas on a regular basis (CP 372); he has installed an unsightly pipe sticking from his house and pointed toward the Sabotka's entry. (CP 380, 517).

The Sabotkas assert that the six foot fence in question is installed pursuant to the parties' agreements and the orders in the case and should not be required to be moved regardless of what is required for the portion of the fence west of the agreed end point. They further assert that the angle in the fence that moves the top of the fence away from the eave of the beach house is in compliance with the parties' agreements and the orders in this case, particularly in the absence of any showing of interference with the maintenance of the structure in the area of the non-exclusive easement. The Sabotkas assert that because they did not act in bad faith that the award of sanctions was inappropriate.

IV. LEGAL DISCUSSION

A. Standard of Review

In this case the Court of Appeals is being requested to review both the trial court's review and analysis of the parties' settlement agreements and prior court orders which Sabotka asserts modified the agreements and orders in the case, as well as, the court's award of attorneys' fees as sanctions against Sabotka for advocating their position.

As to review of the "Order Confirming Easement Rights" that order is very much like a summary judgment order in that it analyzes the law of the case and the prior agreements of the parties. As such the standard

would appear to be *de novo*. Pure legal questions receive full *de novo* review. *Town of Woodway v. Snohomish Cnty.*, 172 Wash. App. 643, 647, 291 P.3d 278, 279 review granted *sub nom. Town of Woodway v. BSRE Point Wells, LP*, 177 Wash. 2d 1008, 302 P.3d 181 (2013) and *aff'd*, 180 Wash. 2d 165, 322 P.3d 1219 (2014).). “Absent disputed facts, the legal effect of a contract is a question of law to be reviewed *de novo*.” *Litho Color, Inc. v. Pac. Employers Ins. Co.*, 98 Wash.App. 286, 295, 991 P.2d 638 (1999). However, because of the unusual posture of this case the standard of review to be applied on the fundamental issue is not entirely clear, but *de novo* review seems most appropriate.

Customary principles require that the trial court's conclusions of law are reviewed *de novo* and the trial court's findings of fact for substantial evidence. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wash.2d 873, 879–80, 73 P.3d 369 (2003). Interpreting an easement is a mixed question of law and fact. *Sunnyside*, 149 Wash.2d at 880, 73 P.3d 369. The easement's scope is determined by looking to “the intentions of the parties connected with the original creation of the easement, the nature and situation of the properties subject to the easement, and the manner in which the easement has been used and occupied.” *Logan v. Brodrick*, 29 Wash.App. 796, 799, 631 P.2d 429 (1981). “What the original parties

intended is a question of fact and the legal consequence of that intent is a question of law.” *Sunnyside*, 149 Wash.2d at 880, 73 P.3d 369.

A trial court's exercise of discretion in an equitable proceeding is reviewed for an abuse of discretion. *Steury v. Johnson*, 90 Wn.App. 401, 405, 957 P.2d 772 (1998). Errors of law constitute an abuse of discretion. *Council House, Inc. v. Hawk*, 136 Wn.App. 153, 159, 147 P.3d 1305 (2006).

The burden is on the moving party to justify the request for sanctions. *Biggs v. Vail*, 124 Wash. 2d 193, 202, 876 P.2d 448, 453-54 (1994).

The standard of review of an award of attorney fees is abuse of discretion. *In re Recall of Pearsall–Stipek*, 136 Wash.2d 255, 265, 961 P.2d 343 (1998). Sanctions decisions are reviewed for abuse of discretion. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash.2d 299, 338, 858 P.2d 1054 (1993). The appropriate standard of review regarding sanctions under the statute or rule is abuse of discretion. *Tiger Oil Corp. v. Department of Licensing*, 88 Wash.App. 925, 937–39, 946 P.2d 1235 (1997).

In contempt proceedings, the facts found must constitute a plain violation of the order. *Johnston v. Beneficial Management Corp. of America*, 96 Wn.2d 708, 712–13, 638 P.2d 1201 (1982). A trial court's factual findings entered in support of a contempt order are reviewed to

determine if they are supported by substantial evidence in the record. *In re Marriage of Farr*, 87 Wn.App. 177, 184, 940 P.2d 679 (1997). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Bering v. SHARE*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986).

A court is required to preserve a balance between protecting the court's integrity and encouraging meritorious arguments and must make and set forth specific findings supporting its finding of bad faith and the reasoning for imposing sanctions. *State v. S.H.*, 102 Wash. App. 468, 473, 8 P.3d 1058, 1060-61 (2000). The trial court's scant findings of an allegation of an attempt to thwart the surveyor is insufficient.

B. The Court's Order Confirming Easement Rights Impermissibly Expands the Scope of the Agreed Maintenance Easements.

The Court's Order Confirming Easement Rights redefined the easement zone and it contrary to the establishment of the easement as demonstrated by the parties' agreements and the prior rulings in this case.

The easement's scope is determined by looking to "the intentions of the parties connected with the original creation of the easement, the nature and situation of the properties subject to the easement, and the manner in which the easement has been used and occupied." *Logan v. Brodrick*, 29 Wash.App. 796, 799, 631 P.2d 429 (1981). "What the original parties

intended is a question of fact and the legal consequence of that intent is a question of law.” *Sunnyside*, 149 Wash.2d at 880, 73 P.3d 369.

In *Lowe v. Double L Properties, Inc.*, 105 Wn. App. 888, 895-96, 20 P.3d 500, 504-05 (2001) the court found an abuse of discretion where the court modified the prior judgment in the case which established the easement. This court should not affirm the court’s Order Confirming Easement Rights which had the effect of rejecting the work of Judge Fleck’s prior orders. (CP 385-408).

‘[I]f the easement is ambiguous or even silent on some points, the rules of construction call for examination of the situation of the property, the parties, and surrounding circumstances.’ ” *Colwell v. Etzell*, 119 Wash.App. 432, 439, 81 P.3d 895 (2003) (alteration in original) (quoting *Rupert v. Gunter*, 31 Wash.App. 27, 31, 640 P.2d 36 (1982)). Similarly:

Whether or not the owner of land, over which an easement exists, may erect and maintain fences, bars, or gates across or along an easement depends upon the intention of the parties connected with the original creation of the easement, as shown by the circumstances of the case; the nature and situation of the property subject to the easement; and the manner in which the easement has been used and occupied.

Rupert, 31 Wash.App. at 30–31, 640 P.2d 36.

In this case, the security fence replaced the white picket fence that was in place in the area of the maintenance easement when the easement was granted and many years before that time. (CP 363-65). Petrich now

seeks to disregard that fact and the fact that the picket fence and the right to maintain it was granted by Judge Fleck to the Sabotkas. (CP 405-08; 362-67). Requiring ejection of the new security fence would be contrary to how the land had previously been used and the understanding of the parties at the time the maintenance easement was granted and Judge Flecks prior ruling.

In *Lowe v. Double L Properties, Inc.*, 105 Wn. App. 888, 895-96, 20 P.3d 500, 504-05 (2001) the court found an abuse of discretion where the lower court modified the prior judgment in the case. A servient estate owner may use his property in any reasonable manner that does not interfere with the original purpose of the easement. *Thompson v. Smith*, 59 Wash.2d 397, 407, 367 P.2d 798 (1962). A court determines reasonable use from the facts as to the “mode of use of the particular easement.” *Thompson*, 59 Wash.2d at 408, 367 P.2d 798 (citing *City of Pasadena v. California–Michigan Land & Water Co.*, 17 Cal.2d 576, 110 P.2d 983 (1941)). The rights of both dominant and servient estate owners are not absolute and “ ‘must be construed to permit a due and reasonable enjoyment of both interests so long as that is possible.’ ” *Cole v. Laverty*, 112 Wash.App. 180, 185, 49 P.3d 924 (2002) (quoting *Thompson*, 59 Wash.2d at 409, 367 P.2d 798).

Here the creation of the easement was from the foundation of the structures. (CP 33, 41-42) The Court further observed, “The fence in this

area is on the Sabotka property and therefore belongs to the Sabotkas who shall have the sole right to it including its maintenance as well as the property between the fence to the foundation of the beach house.” (CP 33).

The court’s Order Confirming Easement Rights (CP 567-69) expanded the non-exclusive easement from a perimeter around the encroaching structures to a larger foot print measured from the farthest reaches of the encroaching structures from the center of the earth to the sky. Like the impermissible expansion in *Lowe*, the court erred in broadening the easement in this case. This expansion would impact Sabotka’s access to their beach. (CP 365,374-375 378),

Even though the fence, as modified, is more than 24” from any point of contact with the encroaching structures and does not impair use of the non-exclusive maintenance easement, the Court expanded the easement by dropping the easement from a line 24” north of the eaves and box window of the encroaching structures to the ground. The expansion of the easement makes the non-exclusive easement for maintenance purposes into an exclusive easement by forcing the removal of the fence that is outside the 24” zone agreed to by the Sabotkas.

The court’s order further expands the easement such that it is not only measured around the encroachment of the structures but into an imaginary line from the point two feet north of encroachment down to the to ground.

For the beach house the imaginary line begins at a point two feet north of the pop out window, which extends further than the eaves of the beach house, and runs that line along the beach house so that for the majority of the length of the line described it is more than two feet from the line from the beach house eave to the ground.

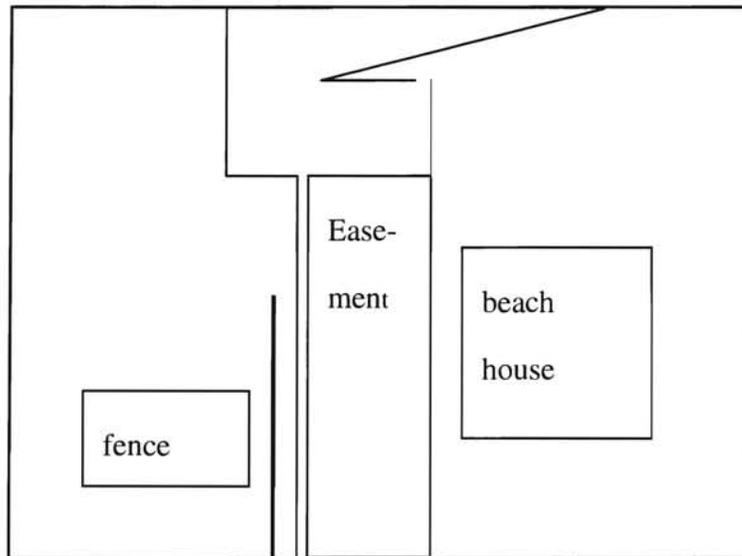
There is no need to expand this limited easement where Petrich has failed to demonstrate an unreasonable interference with their use of the easement. As Sabotka points out in unrebutted testimony, the Petriches have suffered no interference with their ability to maintain their structures, nor have they made contact suggesting that maintenance needed to be performed for which the Sabotka's fence was impeding the work. Evidence showed Petriches' maintenance activities on the beach house were unimpeded. (CP 355, 367, 375-381).

The intent of the original parties to an easement is determined from the [agreement] as a whole. *Zobrist v. Culp*, 95 Wash.2d 556, 560, 627 P.2d 1308 (1981). If the plain language is unambiguous, extrinsic evidence will not be considered. *City of Seattle v. Nazareus*, 60 Wash.2d 657, 665, 374 P.2d 1014 (1962). 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. *Id.* 'Instruments creating easements will be construed in accordance with the intention of the

parties. *Id.* “[I]f the easement is ambiguous or even silent on some points, the rules of construction call for examination of the situation of the property, the parties, and surrounding circumstances.” *Rupert v. Gunter*, 31 Wash.App. 27, 31, 640 P.2d 36 (1982).

Although an inconvenience to the easement holder, “[w]hen the owner of a servient estate is being subjected to a greater burden than that originally contemplated by the easement grant, the servient owner has the right to restrict such use and to maintain gates in a reasonable fashion necessary for his protection, as long as such gates do not unreasonably interfere with the dominant owner's use.” *Id.* Although *Rupert* dealt with gates, the analogy is appropriate and the case discusses fences in the same terms as gates.

The Sabotkas interpretation of the non-exclusive maintenance easement measures the zone from the structure as a perimeter around the encroaching structures as depicted below.



The court’s interpretation pushes the easement further north than the easement conveyed and clarified by the orders of the court and the parties’ agreements. Those orders establish that Sabotka can satisfy the easement by a perpendicular deviation in the fence line with “an angle in the fence line such that the fence is two feet from the guest house. Whatever method is utilized, the current fence must be modified so that any and all portions of the fence is at least two feet from any portions of the guest house.” (CP 472-73) The top of the fence is further than two feet from the eave and is therefore compliant. (CP 367, 502-507). The Court had no authority to expand the easement which was the effect of its order. (CP 568).

The intent of the parties, and in particular the grantors, is that the point of reference is the structure itself and not a line dropping from the

structure to the ground or extending from the structure into the sky from the furthest reaches of the structure. Such an interpretation is unnecessary for the purpose of the easement to conduct maintenance. The newly defined easement could require relocation of the six foot fence that the parties agreed would run from the southeasternmost corner of the Sabotka property, at a standard height of six feet, and shall extend westward along the property line, to a location immediately north of the northeasternmost corner of the Petrich beach house. (CP 419, 426).

The expansion of the easement is unnecessary and is contrary to the orders and agreements in this case. The Order should be vacated.

C. The Extent of Petrich’s “Unclean Hands” Should Operate as a Bar to Any Relief.

The Petriches come before this court with “unclean hands.” Prior to bringing the motion, Petrich made no effort to suggest that there has been necessary maintenance to be undertaken which is impeded by the fence at issue. (CP 355, 367-68)

Petriches have ignored the requirement for the Petriches to keep the vegetation trimmed back at least 18 “ from the property line and perform interim pruning every six weeks during the growing season. (CP 357-58, 368). Mr. Petrich refuses to top the trees or cut back the whorls in open defiance of the parties’ agreements and subsequent court rulings. (CP

368-370, 371-2, 510) Petrich regularly walks along the narrow strip of land that the court has declared is “no man’s land” for no discernable purpose other than impose his presence upon the Sabotkas as a form of harassment. (CP 357, 458). Mr. Petrich deposits boards and chunks of concrete against the fence which separates the two properties and is constructed entirely upon the Sabotkas’ property. *Id.* (CP 416, 417) Mr. Petrich climbs into trees and stares into the Sabotkas home. (CP 357, 369, 372). He has allowed vegetation to grow up on his property blocking his access to his structures, which he then attributes to the Sabotka’s fence. (378-80). Mr. Petrich’s behavior is consistent with one who disregards his court imposed obligations while demanding that his rights be given an expansive interpretation. See generally, Sabotka Dec. (CP 354-533).

Since the easement was granted Mr. Petrich has installed an exhaust pipe pointing at the Sabotkas’ entry into their home which extends past the eave. (CP 355, 380, 517). On the side of his house, also next the entry to Sabotka’s home, Mr. Petrich maintains dripping, blood red signs stating, “No Trespase [sic] Please”; “No Trespass Please.” He has posted a sign in the faux lighthouse on top of his beach house stating “Stop Your Behavior” creating an offensive and glaring disruption of the view of the Puget Sound and surrounding tidelands. (CP 355, 410).

Baillargeon v. Press, 11 Wash.App. 59, 66, 521 P.2d 746, review denied, 84 Wn.2d 1010 (1974), established the elements necessary to prove the erection of a “spite fence”:

[I]n order to apply the spite fence statute, RCW 7.40.030, to restrain the erection of a fence or other structure or to abate an existing structure, the court must find (1) that the structure damages the adjoining landowner's enjoyment of his property in some significant degree; (2) that the structure is designed as the result of malice or spitefulness primarily or solely to injure and annoy the adjoining landowner; and (3) that the structure serves no really useful or reasonable purpose.

Here the signs on the structures, in the light house and the exhaust pipe serve no purpose except to be a constant jarring image for the Sabotkas and their arriving guests. They damage the Sabotka’s enjoyment of their property, they are designed as the result of malice and spitefulness to annoy the Sabotkas and they serve no really useful or reasonable purpose. Petrich may feel entitled to maintain the signs based upon this Court’s ruling on May 8th, 2013 that: “The Petriches may, but are not required to, remove the signs.” (CP 483) See *J. L. Cooper & Co. v. Anchor Sec. Co.*, *infra*, discussing cases where the inapplicability of the “clean hands” doctrine is questioned where a party had an honest belief that their conduct was lawful. “Equity will not interfere on behalf of a party whose conduct in connection with the subject matter or transaction in litigation has been unconscientious, unjust, or marked by the want of good faith, and will not

afford him any remedy. *Income Investors v. Shelton* 3 Wn.2d 599, 602, 101 P.2d 973, 974-5 (1940).

It is one of the fundamental principles upon which equity jurisprudence is founded, that before a complainant can have a standing in court he must first show that not only has he a good and meritorious cause of action, but he must come into the court with clean hands. He must be frank and fair with the court, nothing about the case under consideration should be guarded, but everything that tends to a full and fair determination of the matter in controversy should be placed before the court. The complainant ought not to be the transgressor himself, and then complain that by chance he has been injured on account of his own wrongful misconduct. When, as is sometimes the fact, the original wrong-doer is the party who sustains the greater injury by reason of his inequitable scheme or plan, he ought to bear the burden and the consequences of his own folly, and the equity court will not lend him its jurisdiction to right a wrong of which he himself is the author. Equity leaves the parties in *pari delicto* to fight out their own salvation and remedy their own wrongs in the law court. Equity will not assume jurisdiction where both parties are in the wrong. The purpose of equity is to afford to the complainant a full, complete, and adequate remedy, and it will not undertake to balance the equities between the parties when they are both in the wrong, nor give the complainant relief against his own vice and folly.

J. L. Cooper & Co. v. Anchor Sec. Co., 9 Wn.2d 45, 71-76, 113 P.2d 845, 857-59 (1941).

Even if the spite signage does not establish “unclean hands” in view of prior orders, Mr. Petrich’s conduct in creating and maintaining those signs provides insight into Mr. Petrich’s motivation and purpose for Motion to Confirm Easement Rights is Petrich’s malice directed against his neighbor

and not because of an actual and unreasonable interference with his right to use the maintenance easement for its intended purpose.

Petrich's breaches of his obligations to stay out of the "no man's land" and keep his vegetation trimmed do establish unclean hands to the extent his requested relief should have been denied. There was no attempt to suggest that a maintenance activity has been interfered with by the fence and no evidence to support any interference other than a hypothetical suggestion that calls upon the court to suspend common sense, ignoring the full range of available access for maintenance. All that has been presented is counsel's declaration that suggests leaning a ladder on the structure within the easement zone would be inconvenient unless the fence is moved (CP 326-27), even where no ladder is necessary or a step ladder within the easement zone would suffice (CP 380-81, 524-533) and where Petrich had not used a ladder in that area for eleven years. (CP 529) The ordered change in the scope of the easement will impact Sabotkas' access to the beach. (CP 374) Petriches' unclean hands in failing to perform their obligations, abandoning efforts to resolve the issue, despite change in Sabotkas' counsel, and refusal to show any interference with their ability to perform maintenance should have precluded consideration of Petriches' motion and the relief should have been denied. The Order Confirming Easement Rights should be vacated on that basis alone.

D. Sanctions of Attorneys Fees Were Improperly Awarded.

Even though no bad faith was found, the court assessed sanctions against the Sabotkas for advancing their legitimate understanding of the scope of the easement conveyed. The court abused its discretion by sanctioning the Sabotkas. Petrich did not include in their motion (CP 312-321) any argument or briefing justifying their request for attorney fees beyond a statement in the conclusion of their brief, unsupported by citation, that “The Petriches further request that the Sabotkas be ordered to reimburse the Petriches for the expense they have incurred in making this request, which became necessary only as a result of the Sabotkas’ intransigence and unreasonable position.” (CP 321)

Counsel for Petrich presented a proposed order containing a paragraph providing for an award of fees. King County Local Rule 7(5)(B)(v) requires any legal authority relied upon to be cited. Only when the issue is argued with supporting authority can a meaningful analysis be performed. Arguments that are not supported by any reference to the record or by any citation of authority need not be considered. *Cowiche Canyon Conservancy v. Bosley*, 118 Wash.2d 801, 809, 828 P.2d 549 (1992). This is particularly important in this instance where no request for attorney’s fees was made in “Relief Requested” (CP 312) or “Issues Presented” (CP 317) portion of the Petrich motion (CP and no analysis of the sanction

issue was presented in the body of Petriches' brief. This court should reverse the attorney's fees award on that basis alone.

The sanctions were not awarded for a CR 11 violation or because the court found the Sabotkas' claims frivolous or in contempt.

The burden is on the moving party to justify the request for sanctions. *Biggs v. Vail*, 124 Wash. 2d 193, 202, 876 P.2d 448, 453-54 (1994). Washington follows the American rule on attorney fees is that fees are not available as *costs or damages* absent a contract, statute, or recognized ground in equity. *City of Seattle v. McCready*, 131 Wash. 2d 266, 275, 931 P.2d 156, 161 (1997).

In ordering CR 11 sanctions, 'it is incumbent upon the court to specify the sanctionable conduct in its order.' *Id.* at 201, 876 P.2d 448 (emphasis added); see *Dexter v. Spokane County Health Dist.*, 76 Wash.App. 372, 377, 884 P.2d 1353 (1994). Without such findings, effective appellate review is impossible. Here the court did not specify what conduct it found sanctionable beyond the untethered comment "The Sabotkas are attempting to thwart this court's orders by refusing to cooperate in instructing the court-appointed surveyor..." The Court did not find the Sabotkas engaged in bad faith or conduct tantamount to bad faith. The Sabotkas assert they were not being uncooperative when they requested the surveyor to consider the complete set of orders on the case, raised safety

concerns about how the boundaries were staked, and what is the scope of the easement as laid out by the relevant orders and agreements.

State v. S.H., 102 Wash. App. 468, 473, 8 P.3d 1058, 1060-61 (2000) observes that a court is required to preserve a balance between protecting the court's integrity and encouraging meritorious arguments and must make and set forth specific findings supporting its finding of bad faith and the reasoning for imposing sanctions. The Court of Appeals in *State v. S.H* remanded to require the court to enter express findings supporting its sanction to enable further review.

In contempt proceedings, the facts found must constitute a plain violation of the order. *Johnston v. Beneficial Management Corp. of America*, 96 Wn.2d 708, 712-13, 638 P.2d 1201 (1982). A trial court's factual findings entered in support of a contempt order are reviewed to determine if they are supported by substantial evidence in the record. *In re Marriage of Farr*, 87 Wn.App. 177, 184, 940 P.2d 679 (1997). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Bering v. SHARE*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986). Under federal case law, courts may assess attorney fees as an exercise of inherent authority only where a party engages in willfully abusive, vexatious, or intransigent tactics designed to stall or harass. *Chambers v.*

NASCO, Inc., 501 U.S. 32, 45–47, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991).

The Ninth Circuit “insist[s] on the finding of bad faith because it ensures that restraint is properly exercised, ... and it preserves a balance between protecting the court's integrity and encouraging meritorious arguments.”

Primus Automotive Fin. Servs., Inc. v. Batarse, 115 F.3d 644, 649 (9th Cir.1997) (internal quotation marks and citation omitted).

While an express finding of bad faith by the trial court is not required, a sanction of attorney fees imposed under the court's inherent authority must be based on a finding of conduct that was at least “ ‘tantamount to bad faith.’ ” *State v. S.H.*, 102 Wash.App. 468, 474, 8 P.3d 1058 (2000) (quoting *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980)).

In *Biggs v. Vail*, 124 Wash. 2d 193, 196-202, 876 P.2d 448, 450-54 (1994) (a CR 11 case) the court held any sanctions imposed should be limited to the minimum necessary, and should not be used as a fee-shifting mechanism (citing to *Bryant v. Joseph Tree, Inc.*, 119 Wash.2d 210, 218-19, 829 P.2d 1099 (1992)). *Biggs* voiced concern that sanctions be reserved for “egregious conduct and not be viewed as simply another weapon in a litigator's arsenal.” *Biggs*, 124 Wash.2d at 198 n. 2, 876 P.2d 448. The court also noted that the court must make explicit findings as to what conduct is sanctionable, if any, as well as how such conduct

constituted a violation. Sanctions must be directed solely to the sanctionable conduct and not ancillary matters. *MacDonald v. Korum Ford*, 80 Wash. App. 877, 891-92, 912 P.2d 1052, 1061 (1996). Attorney fee sanctions should not exceed the amount expended by the nonoffending party in responding to the sanctionable conduct. *Biggs*, 124 Wash.2d at 202, 876 P.2d 448.

Here the court did not make express findings as to what conduct was sanctionable, if any, or how such conduct was a violation and not just appropriate advocacy for their reasonable position of what the complicated overlay of orders and agreements in this case permit the Sabotkas to do with their own property that is subject to a non-exclusive, maintenance easement with no showing of any interference with the dominant estates ability to carry out maintenance.

Mr. Lawyer asserts that he had discussions with the Sabotkas' prior attorney that gave him hope there would be an agreement. Yet he took no steps to renew those discussions with the Sabotkas' new counsel who was unaware that there was even a pending issue. (CP 552). As noted in the Sabotka's responsive pleadings (CP 354-547), the Petriches have not demonstrated any interference with their ability to conduct maintenance upon the two encroaching structures. Just what conduct of Sabotka was an attempt to thwart the court's orders?

Attorney David Lawyer notes in his declaration that in May it was necessary for him to review the prior orders in this case a task he described as “a daunting assignment” for which he spent 8.1 hours, but only billed his client 6.0 hours, which also included some preliminary drafting of a motion. (CP 585). The interpretation of the orders by the Sabotkas is no less daunting. Mr. Lawyer then let the matter lay dormant until June and July, where he worked more on the pleadings. The court can assume that the gap of time involved some inefficiency to get back up to speed on the issues and supporting evidence. This comment further reflects that Sabotkas efforts and actions are not clearly contrary to their obligations. Nor can Sabotkas’ actions be properly characterized as intransigent or unreasonable.

The record does not establish any conduct of the Sabotkas to form the basis for a sanction. The Sabotkas’ valid interpretation of the prior orders that demonstrate their fence does not interfere with the two foot non-exclusive maintenance easement’s purpose and is in all locations more than 24” from the eaves of the encroaching structures.

It would be an abuse of discretion to award sanctions against the Sabotkas. The amount of the sanctions requested necessarily includes time necessary to review the extensive record in this case and address the legitimate positions of the Sabotkas. The Sabotkas are entitled to have

their interpretation of the orders in this case reviewed without fear of being subjected to sanctions from the court.

It is particularly egregious to award sanctions where there has been no showing by the Petriches that their easement rights have been interfered with in any appreciable measure. This court should reverse the award of sanctions against the Sabotkas.

V. CONCLUSION

The fence in its current position is more than 24” away from the encroaching structures and complies with the intent of the easement. The court erred in reinterpreting the non-exclusive maintenance easement in a fashion that pushed the Sabotkas’ fence back onto their walkway to the beach and measured the easement from the eaves to the ground, plus 24” and from the box window to the ground, plus 24” which would have the effect of expanding the easement on the ground by 18” on the main house and approximately 24” from the beach house. This court should rule that the Sabotkas’ angled fence satisfies the easement which requires no further redefinition and the court’s order redefining the easement should be reversed and vacated.

The Petriches should have been denied all relief for their intransigent conduct that placed them before the court with “unclean hands.” The

court's order on both the easement and the sanctions should be reversed and vacated on that basis.

The court abused its discretion by sanctioning the Sabotkas for asserting their legitimate interpretation of the scope of the non-exclusive easement for maintenance purposes, particularly in a case where the Petriches did not even attempt to show any interference with the purpose of the easement and engaged in only minimal effort to reach an accord before petitioning the court. The award of sanctions against the Sabotkas should be vacated and reversed as an abuse of discretion, unsupported by adequate findings.

RESPECTFULLY SUBMITTED this 30th day of January, 2015.



Richard H. Wooster, WSBA 13752
Attorney for Appellants

APPENDIX 1

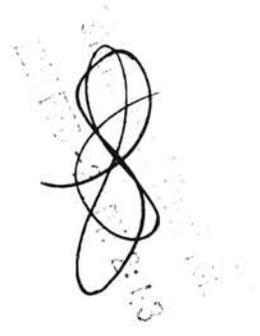
30213 33rd Ave SW

Street View - Search nearby



**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

CHET H. SABOTKA and)	
CAROL S. SABOTKA)	Cause No. 72739-7-1
Appellants)	
)	DECLARATION OF
vs.)	SERVICE
)	
GERALD M. PETRICH and)	
ALICE P. PETRICH,)	
)	
Respondents)	



KNOW ALL PERSONS BY THESE PRESENTS: That I, Connie DeChaux, the undersigned, of Bonney Lake, in the County of Pierce and State of Washington, have declared and do hereby declare:

That I am not a party to the above-entitled action, am over the age required and competent to be a witness;

That on the 30th day of January, 2015, I delivered via ABC Legal Messenger a copy of the following documents:

1. Declaration of Service;
2. Brief of Appellants;

ORIGINAL

properly addressed to the following person:

David Lawyer
10900 NE 4th St
Skyline Tower, Ste 1500
Bellevue WA 98004

I declare under penalty of perjury under the laws of the State of
Washington and of the United States that the foregoing is true and correct.

Signed at Tacoma, Pierce County, Washington this 30th day of
January, 2015.



Connie DeChaux

Kram & Wooster, Attorneys at Law
1901 South I Street
Tacoma WA 98405
(253) 572-4161
(253) 572-4167 fax