GEORGE A. MURRELL et al., Plaintiffs and Appellants,

v.

ROLLING HILLS COMMUNITY ASSOCIATION, Defendant and Respondent.

GEORGE A. MURRELL et al., Plaintiffs and Appellants,

v.

ROLLING HILLS COMMUNITY ASSOCIATION, Defendant and Respondent.

GEORGE A. MURRELL et al., Plaintiffs, Cross-defendants and Appellants,

v.

ROLLING HILLS COMMUNITY ASSOCIATION, Defendant, Cross-complainant and Appellant;

LEONARD FULLER et al., Plaintiffs, Cross-defendants and Respondents,

v.

GEORGE A. MURRELL et al., Defendants, Cross-complainants and Appellants.

GEORGE A. MURRELL et al., Plaintiffs, Cross-defendants and Appellants,

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ROLLING HILLS COMMUNITY ASSOCIATION, Defendant, Cross-complainant and Appellant;

LEONARD FULLER et al., Plaintiffs, Cross-defendants and Respondents,

v.

GEORGE A. MURRELL et al., Defendants, Cross-complainants and Appellants.

B202019, B204632, B206240, B210814

California Court of Appeal, Second District, First Division

January 31, 2011

NOT TO BE PUBLISHED

APPEALS from judgments and orders of the Superior Court of Los Angeles County, Los Angeles County Super. Ct. No. BC358599, BC325047, BC327629, Andria K. Richey, Judge; Donald G. Umhofer, Judge (retired Judge of the San Luis Obispo Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.); and Warren L. Ettinger, Judge (retired Judge of the L.A. Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.).

Law Offices of Harold J. Light, Harold J. Light and Bruce A. Gilbert for Plaintiffs and Appellants; Plaintiffs, Cross-defendants and Appellants; and Defendants, Cross-complainants and Appellants George A. Murrell and Anne-Merelie Murrell.

Horvitz & Levy, Peter Abrahams, Stephen E. Norris and Kris Bahr for Defendant, Cross-complainant and Appellant Rolling Hills Community Association.

Albright, Yee & Schmit, Clifton W. Albright, Derek S. Yee and Ashkan Y. Shakouri for Defendant and Respondent Rolling Hills Community Association and Plaintiffs, Cross-defendants and Respondents Leonard Fuller and Linda Fuller.

MALLANO, P. J.

I. INTRODUCTION

A contentious and costly feud over trees and a neighbor's view has spawned multiple legal actions, cross-actions, five appeals and two cross-appeals. George and Anne-Merelie Murrell and Leonard and Linda Fuller are neighbors on adjacent residential lots overlooking the Pacific Ocean in the city of Rolling Hills. To obtain an unobstructed ocean view, the Fullers wanted certain trees on "the Murrell property" trimmed or removed. The Murrells, who sought to preserve privacy, resisted. So began the decade-plus dispute now before this court.

In June 2000, the Fullers filed their first view complaint with the Rolling Hills Community Association (RHCA). They filed another in June 2003. RHCA responded by trimming and removing some trees on the Murrell property.

In November 2004, the Murrells sued RHCA and Donald Crocker, a volunteer on the RHCA Board of Directors (Board), for allegedly mishandling these complaints and sought abatement of RHCA rulings in favor of the Fullers and the right to replant in areas where trees had been removed (BC325047).[1] In January 2005, the Fullers sued the Murrells to enforce an alleged oral agreement to trim trees and to prevent them from planting additional foliage in the disputed view corridor (BC327629). The Murrells filed a cross-complaint in that action against the Fullers alleging flooding from "the Fuller property" and encroachments on the Murrell property. The trial court (Hon. Andria K. Richey) consolidated both actions, selecting BC325047 as the lead case. RHCA and Crocker then filed a

cross-complaint against the Murrells for indemnity, contribution, and declaratory relief (BC325047).

At the Fullers' urging, RHCA removed an Aleppo Pine tree (Pine Tree #1) that had been growing for more than 45 years on RHCA's easement on the Murrell property. In response, the Murrells filed a second action in September 2006 against RHCA for trespass and conversion, among other claims (BC358599). The trial court consolidated this latter action with the other two actions under BC325047 as the lead case.

After the dust had settled at the trial level, Crocker prevailed against the Murrells on summary judgment (BC325047). RHCA obtained summary judgment against the Murrells in the Pine Tree #1 action (BC358599) and prevailed against the Murrells following a court trial on its declaratory relief claim as to RHCA's right to remove trees on RHCA's easement portion of the Murrells' property (BC325047). The Fullers also obtained declaratory relief against the Murrells.

"Despite five (5) separate attempts at mediation with four (4) different neutrals, ... and in the face of multiple trial date continuances, " the remaining "consolidated matters finally went forward in September of 2007" to a jury trial. The Fullers obtained judgment in full against the Murrells in the amount of $10, 000 (BC327629), and the Murrells obtained judgment in the amount of $30, 000 against RHCA on two of four causes of action, namely, RHCA's breach of its covenants, conditions and restrictions (CC&R's) and breach of fiduciary duty (BC325047).

The Murrells incurred $891, 966.50 in attorney fees. They were awarded $399, 930.88 as attorney fees against RHCA in BC325047 but were ordered to pay $159, 148.84 as attorney fees to RHCA on their Pine Tree #1 claim (BC358599) and $333, 525 as attorney fees to the Fullers (BC327629).

In an unpublished decision filed June 28, 2007, this court affirmed the summary judgment entered in favor of Crocker and against the Murrells (B190152).[2] Presently before us are: (1) the Murrells' appeal from the summary judgment in favor of RHCA on the Pine Tree #1 action and their challenge to a discovery-related order concerning production of a letter from counsel for RHCA and the Fullers to the Board (B202019); (2) the Murrells' appeal from the order awarding RHCA attorney fees in the amount of $159, 148.84 in connection with that summary judgment (B204632); (3) the Murrells' appeal challenging that portion of the judgment in favor of the Fullers following a jury trial and that portion of the judgment in favor of RHCA on its declaratory relief claim (B206240); (4) RHCA's cross-appeal challenging that portion of the judgment in favor of the Murrells on their breach of the CC&R's and fiduciary duty claims (B206240); (5) the Murrells' appeal challenging, as improper and excessive, the order awarding the Fullers $333, 525.00 as attorney fees and challenging, as inadequate, the order awarding the Murrells $399, 930.88 as attorney fees from RHCA (B210814); and (6) RHCA's cross-appeal from the order awarding the Murrells $399, 930.88 as attorney fees (B210814).

We have consolidated these remaining appeals and the cross-appeals for argument and disposition. Based on our review of the record and applicable law, we affirm the judgments and orders appealed.

II. OVERVIEW

A. CC&R's, RHCA, Murrells' Trees and Fullers' View Complaints

The Murrells reside on a sloped lot with an ocean view in the upscale community of Rolling Hills. In 1990, the Fullers bought a lot upslope from the Murrells, and in 1991 built their house. The Fullers desired an ocean view. The Murrells valued the privacy afforded by their trees, but as a neighborly goodwill gesture, the Murrells attempted to accommodate the Fullers by trimming back some of the offending trees and shrubs.

By virtue of their home ownership, the Murrells and the Fullers are members of RHCA, a nonprofit cooperative corporation governed by a five-member board of directors. The Agreement and Declaration No. 150-AR, containing the CC&R's, is the governing document setting out the rights and obligations among RHCA, the Murrells and the Fullers. According to the CC&R's, in order to improve the view from and to protect adjoining property, RHCA has the authority to cut back or trim trees and shrubs on a member's property; and in RHCA's easement over the member's lot (a 10-foot wide strip along the boundary of each lot), RHCA has the right to remove trees or shrubs.

In 1997, RHCA passed Resolution No. 166, establishing procedures for implementing its authority to maintain and improve views. At this time, the Fullers demanded that the Murrells remove foliage on their property to create a view for the Fullers. To be neighborly and to avoid a dispute, the Murrells removed and trimmed some trees and shrubs on their property. In 2000, the Fullers brought a view complaint before RHCA, which submitted the matter to its View Preservation Committee (View Committee). The View Committee recommended the removal of 12 trees from the Murrell property. During 2001, RHCA "caused the removal" of five trees and the trimming or topping of an additional 12 trees on the Murrell property.

In November 2002, the Board adopted Resolution No. 181, which set forth additional detailed guidelines and procedures regarding views. In June 2003, the Fullers submitted a second view complaint to the RHCA. The View Committee recommended that two of the Murrells' trees be trimmed, and in late August or early September 2003, the Murrells trimmed the trees. The Fullers

complained the trees were not trimmed enough, and in July 2004 the Board caused a pine in RHCA's easement to be removed and other trees not on the easement to be severely trimmed.

B. Three Legal Actions and Two Cross-actions

1. BC325047: *Murrells v. RHCA and Crocker* (Complaint); *RHCA v. Murrells* (Cross-complaint)

On November 24, 2004, in BC325047, the Murrells sued RHCA and Donald Crocker, in his capacity as a Board member, pleading causes of action for breach of the CC&R's, breach of fiduciary duty, nuisance, invasion of privacy, declaratory relief, and injunctive relief. The Murrells claimed the CC&R's did not authorize RHCA to "trim, top and/or remove trees and foliage on the Murrell property" for the purpose of providing the Fullers with an ocean view. In a second amended complaint (the operative complaint), the Murrells pleaded an additional cause of action for rescission of any purported oral agreement for tree trimming.

On June 24, 2005, RHCA filed a cross-complaint against the Murrells seeking, among other things, declaratory relief regarding its right to trim and remove trees on the Murrell property and for enforcement of the CC&R's.[3]

2. BC327629: *Fullers v. Murrells* (Complaint); *Murrells v. Fullers* (Cross-complaint)

On January 21, 2005, in BC327629, the Fullers sued the Murrells for breach of the CC&R's, breach of oral agreement, nuisance, specific performance, and injunctive and declaratory relief. On May 24, 2005, the Murrells filed a cross-complaint against the Fullers for nuisance and trespass, among other things.[4]

3. BC358599: *Murrells v. RHCA* (Complaint)

On September 15, 2006, in BC358599, the Murrells sued RHCA for breach of the CC&R's, breach of fiduciary duty, trespass, and conversion.[5] This action arose from RHCA's removal earlier that month of Pine Tree #1 located on the easement portion of the Murrell property.

C. Crocker Prevails on Summary Judgment (BC325047)

The operative complaint alleged: Crocker took actions and encouraged other Board members to take action in connection with the Fullers' view complaints, inconsistent with their fiduciary duties and the CC&R's, to wit: (1) failing or refusing to inform other Board members that the CC&R's did not permit the removal of trees or other plantings from the portion of the Murrell property not encumbered with the easement; (2) causing the adoption of Resolution Nos. 166 and 181, which are inconsistent with the powers granted to RHCA under the CC&R's; (3) enthusiastically supporting the removal of trees and the remedies proposed in the Fullers' view complaints, which violated Resolution No. 181 as well as the CC&R's; (4) ignoring the Murrells' concerns about the adverse impacts of severe trimming and tree removal; (5) attempting in July 2004 to force the Murrells to agree to radical trimming of trees which were not blocking the Fullers' view; (6) calling for the removal of Pine Tree #1 when the Murrells did not agree to the radical trimming of their trees; and (7) calling for the trimming of trees to the point they would not grow back for three or four years.

Also, Crocker and other Board members (1) worked with the Fullers and allowed the Fullers to control the actions of the Board so that all matters involving the Murrells went in favor of the Fullers' interests and against the Murrells' interests; (2) took actions purposely designed to interfere with the Murrells' privacy rights; (3) passed and applied resolutions to allow the illegal removal of trees to create a view for the Fullers; (4) ignored important issues relating to the Murrells' privacy and the stability of the hillside on which the pine tree was growing; and (5) ordered the removal and trimming of trees for arbitrary and capricious reasons.

After answering the complaint, Crocker moved for summary judgment on the ground that there was no factual basis for the claims against him. The trial court (Judge Richey) granted the motion. In an unpublished opinion, this court affirmed the summary judgment (B190152).

D. RHCA Prevails on Summary Judgment (BC358599)

In its summary judgment motion, RHCA claimed the right to remove Pine Tree #1 located on the easement portion of the Murrell property. The Murrells filed opposition. Following a hearing, the trial court (Judge Richey) granted summary judgment in favor of RHCA.

E. Attorney Fees Award in Favor of RHCA (BC358599)

RHCA sought an award of $237, 053.00 as the prevailing party in obtaining summary judgment against the Murrells. The trial court (Hon. Donald G. Umhofer, retired) awarded RHCA $79, 394.16 as reasonable attorney fees.

F. Trial: Fullers' Complaint (BC327629); Murrells' Complaint and RHCA's Cross-complaint (BC325047)

In BC327629, the Fullers sought damages against the Murrells for alleged breach of the CC&R's by blocking the Fullers' protected view, breach of an oral agreement to trim and maintain the Murrells' trees according to agreed-upon conditions, and nuisance. The Fullers also sought specific performance and injunctive and declaratory relief against the Murrells. In their

answer, the Murrells generally denied the complaint's material allegations and alleged various affirmative defenses, including a preexisting condition, namely, the Fullers had no view when they purchased their property, and pleaded waiver or estoppel arising from the Fullers' own conduct; and detrimental reliance, that is, the Fullers did not raise any "view concerns before the Murrells constructed the addition to their property on the privacy shield that had existed on their property for years."

In BC325047, the Murrells sought damages against RHCA for breach of the CC&R's, breach of fiduciary duty, nuisance, and invasion of privacy in addition to declaratory relief and injunctive relief and rescission of any oral contract allowing RHCA to trim their trees. In its cross-complaint, RHCA requested a declaration that RHCA had the right to trim and remove trees on the Murrell property under the CC&R's and the authority to enforce such right.

At trial, in BC327629, the jury returned a general verdict in favor of the Fullers on their claims for breach of the CC&R's, breach of oral agreement, and nuisance and awarded them $10, 000 as damages from the Murrells. In BC325047, the jury returned a general verdict in favor of the Murrells on their claims for breach of the CC&R's and breach of fiduciary duty and awarded them $30, 000 as damages from RHCA. The trial court (Hon. Warren L. Ettinger, retired) declared the Fullers had the right to a view (BC327629) and RHCA was authorized to trim and to remove trees on that portion of the property burdened by its easement to protect the Fullers' view so long as RHCA did not act "arbitrarily and capriciously" (BC325047).

G. BC327629: Award of Attorney Fees to Fullers from Murrells

The Fullers sought recovery of attorney fees from the Murrells in the amount of $488, 906.69. The trial court (Judge Ettinger) awarded the Fullers $333, 525.00.

H. BC325047: Award of Attorney Fees to Murrells from RHCA

The Murrells moved for an award of attorney fees from RHCA in the amount of $647, 974.29 and for $18, 724.12 for costs under section 1354 of the Civil Code. The trial court (Judge Ettinger) awarded attorney fees in the amount of $399, 930.88, but nothing for the costs sought under section 1354.

III. B202019 APPEAL

Murrells v. RHCA (BC358599)

Summary Judgment for RHCA Proper

On appeal (B202019) from the summary judgment in favor of RHCA (BC358599), the Murrells contend the trial court committed prejudicial error by refusing to order RHCA to produce the September 6, 2006 letter from counsel for RHCA to the Board before their "opposition to the [summary judgment] was to be filed." The Murrells also contend material issues of fact exist as to whether RHCA's removal of Pine Tree #1 on September 11, 2006, on its easement was arbitrary, capricious and unauthorized under the CC&R's. We disagree.

In their complaint seeking damages against RHCA for its removal of Pine Tree #1, the Murrells alleged that by going onto the Murrell property and removing, over the Murrells' objections, Pine Tree #1 in order to benefit the Fullers' purported view at the expense of the Murrells' privacy, RHCA, through its Board, acted contrary to the CC&R's and its fiduciary duty to act in good faith and fair dealing. In so doing, the Murrells claim RHCA violated the CC&R's because: (1) the CC&R's did not empower RHCA "to remove trees in the easement on the Murrell property for any reason unrelated to the express and implied purposes of the easement, which are the creation of and maintenance of roads, bridle trails, utilities, parkways, park areas, above ground poles, wires and conduits as well as sewers, drains, pipes and below ground conduits"; (2) removal of Pine Tree #1 was "not supported by any fair or substantial reason(s)"; (3) removal of Pine Tree #1 was contrary to the stated policies and provisions of Resolution No. 181; and (4) the Board "refused to address, or even consider, the many issues of concern [the Murrells had] in respect to removal of... Pine [Tree #1] in advance of such removal."

In its answer, RHCA generally denied the complaint's material allegations and pleaded 17 affirmative defenses.

The trial court (Judge Richey) entered summary judgment for RHCA.

The Murrells contend the summary judgment in favor of RHCA must be reversed because the trial court erred in deferring a ruling on their motion to reconsider its discovery order. The Murrells are foreclosed from raising this claim of error for the first time on appeal.

On April 20, 2007, the trial court denied the Murrells' request for production of a letter dated September 6, 2006, written by Mr. Albright to RHCA (September 6, 2006 letter), which was listed on RHCA's privilege log.[6] On April 26, 2007, the Murrells filed a motion for reconsideration. On May 11, 2007, the Murrells filed a reply to RHCA's opposition.

At the May 24, 2007 hearing, the trial court first heard argument on RHCA's motion for summary judgment and the Murrells' motion for summary adjudication and then on the reconsideration motion. After the court announced its intent "to order [the September 6, 2006 letter]... be produced [by RHCA]... by whenever I said, " Mr. Albright requested the court defer

its ruling until it ruled on the summary judgment motion, because if RHCA prevailed then a ruling on the reconsideration motion would be moot. Although arguing against mootness, Mr. Light, the Murrells' attorney, did not protest or otherwise oppose the deferral request. The court granted the request and stated it would "wait and issue that ruling at the same time [as the] rul[ing] on the summary judgment[]" motions. Following argument on other matters, the court reminded counsel of its tentative ruling on the reconsideration motion and advised it would not "issue a [final] ruling until [the court] rule[d] on [the] summary judgment" motion. Mr. Light did not object. The court took the matters under submission.

On June 4, 2007, the court granted RHCA's summary judgment motion and denied the Murrells' summary adjudication motion. The court then ruled: "Given this ruling, the Court now finds that [the Murrells'] Motion for Reconsideration, which the Court agreed to defer ruling upon pending its ruling on these [other] motions, is moot, and on that basis [the court] denies the motion."

The Murrells have forfeited their belated claim that summary judgment is improper on the ground that the trial court failed to rule beforehand and grant its reconsideration motion.

At the May 2007 hearing, the Murrells did not request the trial court to defer ruling on RHCA's summary judgment motion until after ruling on their reconsideration motion. (See *Lewinter v. Genmar Industries, Inc.* (1994) 26 Cal.App.4th 1214, 1224 [plaintiffs waived any objection to trial court's decision to rule on summary judgment motion before ruling on motion to compel discovery where plaintiffs failed to request continuance of summary judgment motion in order to conduct additional discovery]; see also *Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 548 [burden on movant for continuance to show "'facts essential to justify opposition may exist'"].) Additionally, on June 4, 2007, the Murrells, who knew in advance of the trial court's timing of its rulings, did not object or request the court to change its mind.

Courts are imbued with broad discretion in the management of their calendars, including the timing of their orders. (See, e.g., *Walker v. Superior Court* (1991) 53 Cal.3d 257, 267; *County of San Luis Obispo v. Bailey* (1971) 4 Cal.3d 518, 527–528.) No abuse transpired here.

The Murrells also contend summary judgment was improper on the grounds that neither RHCA nor the trial court addressed their equitable estoppel claim and the trial court thus erred, as a matter of law, in concluding the CC&R's authorized RHCA to remove trees on its easement for view purposes. In any event, the Murrells argue that summary judgment was improper in view of the issues of material fact remaining on their breach of fiduciary duty cause of action. We disagree.

RHCA moved for summary judgment on the grounds that, as a matter of law, RHCA had not breached its fiduciary duty to the Murrells and that RHCA's removal of Pine Tree #1 was authorized and removed pursuant to the CC&R's. In their opposition, the Murrells argued the CC&R's cannot be interpreted to authorize RHCA to remove Pine Tree #1, which was on RHCA's easement, for the purpose of enhancing the Fullers' view. They further argued that even if such authority existed, questions of fact existed regarding whether RHCA complied with its fiduciary duty to the Murrells in light of expert evidence that removal of Pine Tree #1 was unnecessary to improve the Fullers' view; expert evidence that removal of that tree, which was on a slope, would substantially increase the risk for future slope failure; and evidence that RHCA conducted "secret" meetings which led to the Board's decision to remove Pine Tree #1, particularly evidence that Director Crocker voted to remove that tree in a "secret" 2006 meeting when he already had recused himself in 2004. In its reply, RHCA argued the Murrells' position that its right to remove trees is restricted to furtherance of easement purposes is contrary to the clear language of the CC&R's and that, as a matter of law, RHCA fulfilled its fiduciary duty owed to the Murrells.[7] The trial court granted RHCA's summary judgment motion and entered judgment in favor of RHCA and against the Murrells.

"Any party may move for summary judgment in any action or proceeding if it is contended that the action has no merit." (Code Civ. Proc., § 437c, subd. (a).) A defendant is entitled to summary judgment if he meets his burden to present evidence negating an essential element of the plaintiff's cause of action. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843; see also *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) Applying a de novo review standard, we independently determine whether no material factual issue exists and the moving party is entitled to judgment as a matter of law. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.)

The Murrells contend that summary judgment is premature because RHCA and the trial court did not address their equitable estoppel claim. They argue RHCA is estopped from asserting any right to remove Pine Tree #l for the reason RHCA and the Fullers did not complain to the Murrells about their plans to construct an addition to their residence involving floor to ceiling windows, and in reliance on this "silence, " the Murrells constructed this addition with the expectation that their "foliage and mature trees[, including Pine Tree #1,]" would preserve their privacy. We disagree.

As alleged in the complaint: "The City [of Rolling Hills (City)] is situated on the Palos Verdes peninsula and is known for its rural environment and many horse trails. It is a gated community governed privately by the [CC&R's] of [RHCA] and publicly by the City." "In or

around 1995, the Murrells applied to the City and other appropriate agencies" for approvals to construct their glass addition. "At least in part because of the foliage and mature trees which existed on their property which gave them an effective privacy shield, the Murrells' construction plan called for all windows along the east facing wall of [this addition]. [¶]... During the planning and construction process, neither the Fullers, nor any other person, raised any complaint as relates to [this addition], as relates to the foliage and trees which were growing on the Murrell property, or as relates to any alleged view impairment." The Murrells "relied on the silence of their neighbors (including the Fullers) as well as of [RHCA], in proceeding forward with construction of [this addition] with the east side constructed almost entirely of glass windows as planned. Accordingly, even assuming, arguendo, [RHCA] had the right to create a view for the Fullers, [RHCA] should have been (and should be) estopped from taking actions (or failing to act) in order to create or improve the view of the Fullers. In light of the referenced facts, [RHCA] should further be estopped from doing anything to stop (or attempting to stop) [the Murrells] from taking steps to recreate a reasonable privacy shield on the Murrell property."

The Murrells fail to cite pertinent authority that RHCA should be estopped from removing a tree on its easement because of the Murrells' addition plans. Accordingly, their estoppel argument fails.

The Murrells also contend RHCA was not authorized to remove Pine Tree #1 because its removal was to enhance the Fullers' view, which is not a reason recognized as an easement use under section 2(b) of article V under the CC&R's. The fallacy of their position lies in their misinterpretation of the pertinent provisions of the CC&R's. When viewed in context, these provisions reveal RHCA has the right to remove trees located in its easement, without regard to purpose.

Generally, "'interpretation of the [CC&R's] provisions... is a question of law we address de novo. [Citations.]'" (*Ekstrom v. Marquesa at Monarch Beach Homeowners Assn.* (2008) 168 Cal.App.4th 1111, 1121 (*Ekstrom*).) "CC&R's are interpreted according to the usual rules for the interpretation of contracts generally, with a view toward enforcing the reasonable intent of the parties. [Citations.] Where, as here, the trial court's interpretation of the CC&R's does not turn on the credibility of extrinsic evidence, we independently interpret the meaning of the written instrument. [Citation.]" (*Harvey v. The Landing Homeowners Assn.* (2008) 162 Cal.App.4th 809, 817 (*Harvey*).)

"The language of the CC&R's governs if it is clear and explicit, and we interpret the words in their ordinary and popular sense unless a contrary intent is shown. [Citations.] The parties' intent is to be ascertained from the writing alone if possible. [Citation.] If an instrument is capable of two different reasonable interpretations, the instrument is ambiguous. [Citation.] In that instance, we interpret the CC&R's to make them lawful, operative, definite, reasonable and capable of being carried into effect, and must avoid an interpretation that would make them harsh, unjust or inequitable. [Citations.]" (*Harvey, supra,* 162 Cal.App.4th at pp. 817–818, fns. omitted.)

It is uncontroverted that the Murrell property is burdened by an easement in favor of RHCA and that Pine Tree #1 is located on this easement portion of that property. It is undisputed that RHCA has the right to remove trees located on that portion of the Murrell property burdened by its easement. In dispute is whether RHCA is authorized to remove such trees for view purposes. A plain reading of the pertinent provisions of the CC&R's resolves this issue in the affirmative.

Section 15 of article I of the CC&R's, entitled "Trimming and Removal of Trees and Shrubs, " empowers RHCA with the "sole authority and right to *trim*, *remove*... trees, shrubs and plantings in or along any easements...."[8] (Italics added.) Section 2(b) of article V of the CC&R's, entitled "Uses and Purposes of Easements and Rights-of-Way, " provides "[t]he easements and rights-of-way reserved under Section 2 of Article V... are reserved for the use and purpose of erecting, constructing, operating and maintaining thereon: [¶] 1. Roads, streets, or bridle trails, parkways and park areas[;] [¶] 2. Poles, wires and conduits for the transmission of electricity...; [¶] 3. Public and private sewers, storm water drains, land drains, and pipes, water systems, water, heating and gas mains or pipes; and [¶] 4. Any other method of conducting and performing any public or quasi-public utility service or function on, over and under the surface of the ground."

The unambiguous language of section 15 revealing the phrase "in or along any easements" simply refers to the physical location of the tree which RHCA is authorized to remove rather than to any particular qualifying reason(s) for its removal, for example, solely for an easement use or purpose. And section 2(b), which addresses the uses and purposes of a RHCA easement, does not concern itself with trees or other plantings, much less the authority of RHCA over such matters. That enhancing a member's view is not an enumerated easement use is thus inconsequential. The Murrells' attempt to graft section 2(b) of article V onto section 15 of article I therefore falls flat.[9]

Finally, the Murrells contend that even if RHCA were authorized to remove Pine Tree #1 for view purposes, material issues of fact concerning their breach of fiduciary duty cause of action preclude summary judgment. We disagree.

Ownership of a unit in a common interest development usually "entails mandatory membership in an owners association, which, through an elected board of

directors, is empowered to enforce any use restrictions contained in the project's declaration or master deed and to enact new rules governing the use and occupancy of property within the project. [Citations.]" (*Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 373.) "[W]hen an association determines that a unit owner has violated a use restriction, the association must do so in good faith, not in an arbitrary or capricious manner, and its enforcement procedures must be fair and applied uniformly. [Citations.]" (*Id.* at p. 383.) Whether the proper procedures were followed by the association is subject to de novo review unless this issue was submitted to the trier of fact on disputed facts, in which case the standard of review is substantial evidence. (See, e.g., *Rancho Santa Fe Assn. v. Dolan-King* (2004) 115 Cal.App.4th 28, 42–43.) "Generally, courts will uphold decisions made by the governing board of an owners association so long as they represent good faith efforts to further the purposes of the common interest development, are consistent with the development's governing documents, and comply with public policy." (*Nahrstedt, supra,* 8 Cal.4th at p. 374.)

RHCA owes a fiduciary duty to its members regarding the approval or disapproval of a homeowner's proposal or requested action under the CC&R's. (See, e.g., *Cohen v. Kite Hill Community Assn.* (1983) 142 Cal.App.3d 642, 650–651; accord, *Kovich v. Paseo Del Mar Homeowners' Assn.* (1996) 41 Cal.App.4th 863, 867.) "Breach of duty is usually a fact issue for the jury. [Citation.] Breach may be resolved as a matter of law, however, if the circumstances do not permit a reasonable doubt as to whether the defendant's conduct violates the degree of care exacted of him or her. [Citation.]" (*Harvey, supra,* 162 Cal.App.4th at p. 822.) The trial court's duty is to review the association's decision to ensure it was neither arbitrary nor violated the CC&R's. (*Cohen, supra,* 142 Cal.App.3d at p. 652.) The substantial evidence standard applies where the trial court's decision is based on resolution of disputed material facts. Where these facts are undisputed, only questions of law are at issue, and the reviewing court applies a de novo standard. (See, e.g., *Ekstrom, supra,* 168 Cal.App.4th at p. 1121.)

We agree with the trial court's ruling that there are no triable issues of material fact which could support the Murrells' cause of action for breach of fiduciary duty in removing Pine Tree #1 and adopt its rationale, which is based in part on the court's review of the Board's actions as reflected in various documents attached as exhibits to Minor's declaration. As the court stated: "The parties do not dispute the fact that the Board removed the pine at issue pursuant to Board decision, after investigation and discussion (although [the Murrells] dispute the extent and breadth of the Board's consideration). (See Decl. of Peggy Minor; Exhibits 4-24.) The Board was not obliged by the CC&R's to obtain consent to remove the tree, given the grant of sole authority to the Board to remove trees within the easement property. But the record here reflects that the Board did give [the Murrells] an opportunity to be heard, and conducted an investigation into resolution of the issues. (See Decl. of Peggy Minor; Exhibits 4-24.) The Board hired a landscape consultant (See Decl. Of Peggy Minor; Exhibit[s] 4, 10, 15) and gave [the Murrells] and their counsel an opportunity to present their own views and 'evidence' to the Board. (See Decl. of Peggy Minor; Exhibit[s] 9, 11, 12, 17, 19). [The Murrells] have not... show[n] that the Board acted arbitrarily or capriciously in its decision finally to remove the tree, after less onerous measures had been considered and even implemented. (See Decl. of Peggy Minor, Exhibit[s] 12, 17, 24)."

IV. B204632 APPEAL

Murrells v. RHCA (BC358599)

RHCA's Summary Judgment Attorney Fees and Costs Award

The Albright firm represented RHCA in obtaining summary judgment against the Murrells. As the prevailing party, RHCA was awarded $159, 148.84 as attorney fees. (Civ. Code, § 1354, subd. (c).) Judge Richey presided over this view controversy litigation from its commencement in 2006 with No. BC325047 through entry of the summary judgment in No. BC358599. Judge Richey retired in September 2007, and the subject motion for attorney fees was heard and resolved by Judge Umhofer.[10]

In this appeal, the Murrells challenge the propriety of the attorney fees award as unsupported by the evidence and, alternatively, as an abuse of discretion.[11] They also challenge the award of $664.83 as costs as duplicative. Based on our review of the record and applicable law, we affirm the attorney fees award in its entirety. We reject the Murrells' double costs award claim as unsupported by the record.

A presumption in favor of an award of attorney fees exists because "[a]n 'order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness. [Citations.]'" (*Cruz v. Ayromloo* (2007) 155 Cal.App.4th 1270, 1274.) A trial court's exercise of discretion concerning an award of attorney fees will not be reversed unless there is a manifest abuse of discretion. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) "'The "experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong["] - meaning that it abused its discretion. [Citations.]'" (*Ibid.*, quoting *Serrano v. Priest* (1977) 20 Cal.3d 25, 49.) Accordingly, there is no question our review must be highly deferential to the views of the trial court. (*Children's Hospital & Medical Center v. Bonta* (2002) 97 Cal.App.4th 740,

777, 782.)

The Murrells concede, as they must, that the standard of review applicable to an award of attorney fees is the deferential abuse of discretion. Nonetheless, they argue that such deference should not be accorded to Judge Umhofer, who acknowledged he "did not preside over the two and one-half years of litigation which began with Case No. BC325047 and... did not hear and grant the summary judgment in favor of [RHCA] in this Case No. BC358599." The Murrells urge "this Court [to] apply a higher level of scrutiny in reviewing the appropriateness of the Fee Award" but do not identify what such scrutiny, for example, de novo review, should be, and they fail to provide supporting argument and applicable authority. Thus, the Murrells forfeit the point. (*Boyle v. CertainTeed Corp.* (2006) 137 Cal.App.4th 645, 649–650 [challenge to presumption of correctness requires pertinent "argument and legal authority on each point raised, " not just "bare assertion of error"]; *Sporn v. Home Depot USA, Inc.* (2005) 126 Cal.App.4th 1294, 1303 [forfeiture where point unsupported "with reasoned argument and citations to authority"]; *Amato v. Mercury Casualty Co.* (1993) 18 Cal.App.4th 1784, 1794 [legal proposition asserted without apposite authority necessarily fails].)

Although the Murrells acknowledge "the trial court did reduce the $237, 053.00... RHCA initially sought" to recover as attorney fees to an award of fees in the reduced amount of $159, 148.84, they contend "RHCA's failure even to attempt to apportion its fees should have resulted in outright denial of the Fee Motion" and that they "have suffered significant prejudice by... RHCA's failure to differentiate between attorneys' fees incurred on behalf of... RHCA in BC325047 and/or the Fullers in BC327629 from fees allegedly reasonably incurred on behalf of... RHCA in BC358599." They urge, "at the very least, ... close calls should go against... [RHCA as the] moving party."

In opposition to the fees motion, the Murrells argued RHCA improperly was seeking to collect fees incurred in connection with two cases consolidated with BC358599, namely, BC325047 (the Murrells' other action against RHCA) and BC327629 (the Fullers' action against the Murrells). In its reply, RHCA stated "RHCA has not included the attorney fees and costs for case numbers BC325047 or BC327629 in this Motion."

At the hearing on the fees motion, counsel for the Murrells conceded that claim apportionment was not warranted, stating: "[I]n this case, I have not even gone there because I don't disagree that it is too difficult to differentiate. What time was spent on the trespass? What time was spent on the conversion? And therefore, any time actually spent on this, I think, is legitimate to reasonably get the fee award for."

At the trial court's request, RHCA submitted a supplemental brief clarifying which fees were incurred for "joint-work" on the consolidated cases. RHCA's itemized list of the joint-work and apportionment of such work by two-thirds resulted in a voluntary reduction of $11, 791.48.

In granting RHCA's fees motion in part, the trial court explained the requested amount was "Reduced by - Apportionment - $20, 066.66."

The Murrells contend that such apportionment was insufficient. The burden rests with the Murrells to demonstrate by reference to the particular portions of the record with accompanying argument and applicable authority the specific fee amounts they claim are attributable to matters not recoverable in conjunction with RHCA's summary judgment. In his opposing declaration, Mr. Light, the Murrells' attorney, stated generally that he had observed time entries which were attributable to other cases. He did not, however, cite any particular itemized entry in support of his statement. The failure of the Murrells to carry this burden forfeits their lack of adequate apportionment claims. "'It is incumbent upon appellants to state fully, with transcript references, the evidence which is claimed to be insufficient to support the findings. The reviewing court is not called upon to make an independent search of the record where this rule is ignored. [Citation.]' [Citation.] 'A claim of insufficiency of the evidence to justify findings, consisting of mere assertion without a fair statement of the evidence, is entitled to no consideration, when it is apparent, as it is here, that a substantial amount of evidence was received on behalf of the respondents. Instead of a fair and sincere effort to show that the trial court was wrong, appellant's brief is a mere challenge to respondents to prove that the court was right. And it is an attempt to place upon the court the burden of discovering without assistance from appellant any weakness in the arguments of the respondents. An appellant is not permitted to evade or shift his responsibility in this manner.'" (*Grand v. Griesinger* (1958) 160 Cal.App.2d 397, 403.) In addition, a challenge to the presumption of the order's correctness necessitates pertinent "argument and legal authority on each point raised, " not just "bare assertion of error." (*Boyle v. CertainTeed Corp.*, *supra*, 137 Cal.App.4th at pp. 649–650.)

The Murrells also contend the evidence is insufficient to support the award of attorney fees. Specifically, they argue: (1) the evidence does not support the finding of a $250 hourly rate for the associates of the Albright firm; (2) the fees for "intake" and insurance coverage work were improperly charged as reasonably related to RHCA's defense in BC358599; and (3) the fees associated with RHCA's request for costs and the Murrells' challenge to this request are not recoverable. The record does not support the Murrells' claims.

RHCA filed its fees motion requesting $237, 053 in incurred attorney and paralegal fees, plus an additional

$1, 500 in anticipated fees for prosecuting the fees motion. The motion contained a list of all motions, ex parte applications, and hearings. Judge Umhofer noted that the verified itemized billing statement, which detailed the time spent, the work performed, and billing rates was "95 pages long (approximately 10 entries per page)." The fees motion was further supported by the declaration of Ashkan Shakouri, an associate at the Albright firm, in which he authenticated the items in this statement and addressed the reasonableness of the fees sought. The Murrells filed their opposition, and RHCA filed its reply.

Judge Umhofer held a hearing on the motion, at which time each party appeared and argued. Afterward, he provided the parties with a four-page recommendation report, or tentative ruling, regarding the validity of the billing statement and the proposed reduction of the amount sought. He then requested supplemental briefing from both parties regarding the propriety of the fees sought. Each party filed a supplemental brief. A second hearing was held on the fees motion, and Judge Umhofer took the matter under submission. A few days later, Judge Umhofer granted the motion in the amount of $159, 148.84, a reduction of $79, 394.16 of the amount requested, as follows:

"*Summary*

"Requested award $237, 053.00

"Motion fees $1, 500.00

"Reduced by - Apportionment –$20, 066.66

"Post MSJ Hours –$8, 847.50

"Inaccurate billings –$2, 255.00

"Lost Motions to Compel –$22, 100.00

"Paralegal time –$26, 125.00"

The trial court found "[b]y way of declaration authenticating time records, [RHCA] has presented competent evidence of the nature and value of the attorneys' services." Items set forth in a verified cost bill constitute prima facie evidence that the services so listed were incurred. (See, e.g., *Melnyk v. Robledo* (1976) 64 Cal.App.3d 618, 624; *Oak Grove School Dist. v. City Title Ins. Co.* (1963) 217 Cal.App.2d 678, 698.) Unless a specific item is challenged as improper, the moving party need not further justify the fees sought. (*Hadley v. Krepel* (1985) 167 Cal.App.3d 677, 681; *Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2008) 163 Cal.App.4th 550, 564.)

The Murrells challenge the $250 hourly rate for associates, in particular Mr. Shakouri, at the Albright firm, as excessive in view of the rate charged by Mr. Gallo, cocounsel with the Albright firm in BC325047, by Mr. Light, their own counsel, and by Mr. Croft, RHCA's cocounsel. They argue Mr. Shakouri's contributions justified an hourly rate of only $125. They also point to the absence of a declaration showing he "was top of his class coming off a Supreme Court Clerkship" and to Mr. Shakouri's relatively short association with the Albright firm.

We find the Murrells' challenge to be unpersuasive and unsuccessful. They cite no authority for the proposition that Mr. Shakouri, who performed a substantial portion of his contributions as a second year associate, was disqualified from billing a $250 hourly rate unless he "was top of his class coming off a Supreme Court Clerkship." And comparing the rates charged by other attorneys in this matter to that of Mr. Shakouri is the proverbial equivalent of comparing apples to oranges.

The Murrells fail to meet their burden to demonstrate the trial court abused its discretion in allowing a $250 hourly rate for work performed by an associate with the Albright firm in this matter.[12] The trial court was entitled and authorized to consider the prevailing market rate customarily charged in the community where the legal services are provided. (*Clejan v. Reisman* (1970) 5 Cal.App.3d 224, 240.)

The court also took into account these factors. The Murrells provided information regarding the education and experience of Mr. Shakouri. In its reply, RHCA argued Mr. Shakouri's $250 hourly "rate is reasonable for a downtown Los Angeles firm associate who graduated from UCLA and USC." Mr. Albright, RHCA's counsel, represented to the trial court that the Albright firm was located in downtown Los Angeles and of its 27 years of practice, the last 15 years consisted of representing major clients, including the City and County of Los Angeles, the City of Bell, and the Department of Water and Power. The trial court concluded that "[t]he Albright firm obviously charges 'downtown L.A.' rates with Mr. Albright charging out $400 per hour" and found "the reasonableness of [Mr. Shakouri's $250 hourly billing] rate can be inferred from the client's willingness to pay it."

We reject the Murrells' bare contention that in the absence of RHCA's "retainer agreement with the Albright Firm or a declaration from an authorized representative of the RHCA stating the RHCA agreed to pay such [$250] hourly rate, " the evidence is insufficient to support the trial court's finding. The law is otherwise. As our Supreme Court has explained, the reasonableness of the attorney fees award is not dependent on the prevailing party's liability for the fees requested or actual payment of those fees. (*PLCM Group, Inc. v. Drexler*, *supra*, 22 Cal.4th at p. 1097; *Moran v. Oso Valley Greenbelt Assn.* (2004) 117 Cal.App.4th 1029, 1036.) In his declaration, Mr. Shakouri verified the authenticity of the hourly rates incurred by RHCA. It was within the province of the trial court to determine the credibility and weight to be

accorded this evidence. (*Stokus v. Marsh* (1990) 217 Cal.App.3d 647, 656.)

Finally, the Murrells fail to provide any record reference to evidence establishing that a $250 hourly rate for an associate with Mr. Shakouri's qualifications in a downtown Los Angeles law firm is manifestly unreasonable.

The trial court overruled the Murrells' "objections to hours spent on intake and possible insurance matters.... This is a reasonable course of action in all litigation."

The Murrells contend the trial court abused its discretion in allowing RHCA to recover fees for "insurance coverage work and attorney time addressing retention and conflict waiver issues, " which they contend totals "something in the range of $7, 725.00 of the attorneys' fees included in the Fee Award." They fail to demonstrate any abuse. The Murrells argue they should not be charged for fees regarding insurance coverage because they "had no ability to see that... RHCA obtained proper insurance and had nothing to do with the decision to submit the matter to... RHCA's insurance carrier (let alone to challenge the carrier's apparent decision not to provide coverage)." They further contend "the fees associated with the fact that... RHCA wanted to use the Fullers' counsel - requiring what one must assume would be rather extensive conflict waiver letters - should not be the Murrells' responsibility."

We deem the Murrells' contentions, which are unsupported by appropriate record references or applicable supporting authority, to be forfeited. And in light of the record, the trial court did not abuse its discretion in allowing the challenged fees, which would not have been incurred had the Murrells not brought this action against RHCA.

The Murrells also contend the trial court abused its discretion in awarding $4, 120.50 for the fees associated with RHCA's request for costs and the Murrells' challenge to that request. The Murrells acknowledge after they filed a motion to tax, "RHCA then withdrew portions of the costs" sought but argue RHCA "continued to seek $3, 784.17, the vast majority of which were not recoverable." The Murrells point out they "did not challenge some $520 in costs sought by" RHCA and argue that if "RHCA sought an amount of costs to which it arguably was entitled in the first place, in the range of $1, 200, instead of the $4, 318.65 initially sought..., the Murrells would undoubtedly have not bothered bringing a motion to tax costs over less than $700."

In addressing the challenge to the fees sought in connection with the motion to tax, the trial court overruled the Murrells' complaint that "0.3 hours of partner time and 8.5 associate hours were not well-spent since many of the costs claimed were not allowed by Judge Richey." The court explained, "This is just advocacy and [the fees are] properly chargeable."

The trial court did not abuse its discretion in allowing the challenged fees. The prevailing party is entitled to be compensated for time expended on fee-related issues. (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 580; *Serrano v. Unruh* (1982) 32 Cal.3d 621, 639.) This is not a situation where the costs sought were unrecoverable as a matter of law. Rather, RHCA sought recovery of costs which were not otherwise prohibited by statute, and the trial court had discretion to award such costs (Code Civ. Proc., § 1033.5, subd. (c)(4)). That such discretion was exercised against RHCA in part does not foreclose RHCA's recovery of its fees for advocating the unawarded costs.

Finally, the Murrells contend RHCA erroneously was awarded costs totaling $1, 849.66, which included a duplicate payment of costs in the sum of $664.83. The record refutes their contention. When viewed in context, the record reflects that the trial court (Judge Umhofer) did not order the Murrells to pay an additional $664.83 as costs in conjunction with $159, 148.84 in attorney fees. Rather, the court was simply memorializing in its order the fact that $664.83 already had been ordered as costs. Any ambiguity in this regard was resolved in the amended judgment, which expressly reflects the costs award is in the amount of $1, 184.83.

When the trial court (Judge Richey) entered summary judgment in favor of RHCA in BC358599, it awarded RHCA costs in the amount of $4, 318.65. Later, the court reduced its cost award to $1, 184.83. Thereafter, the parties stipulated that "[t]he court modify its award of costs to RHCA from $4, 318.65 to $1, 184.83."

On October 19, 2007, the trial court (Judge Umhofer) issued a ruling awarding RHCA $159, 148.84 as attorney fees and in that ruling stated: "The Court will concurrently sign an order which will include the previously determined costs ($664.83)." The order signed by the court on the same date recites RHCA's "Motion for Recovery of Attorney Fees and Costs is granted, and [the Murrells] are ordered to pay [RHCA] the amount of $159, 813.67, " which amount consists of the $159, 148.84 awarded as attorney fees and $664.83 referred to by the court as representing previously awarded costs.

Later, the trial court (Hon. Joseph P. Kalin) entered an amended summary judgment which provided RHCA "shall recover from [the Murrells] reasonable attorney fees and costs. Costs shall be in the sum of $1, 184.83."

V. B206240 APPEAL AND CROSS-APPEAL

Murrells v. RHCA (BC325047) and *Fullers v. Murrells* (BC327629)

On September 4, 2007, a jury trial was commenced in the consolidated cases BC325047 and BC327629.[13] On September 22, 2007, a unanimous jury returned

verdicts as follows:

On the Murrells' claim against RHCA, the jury found in favor of the Murrells on the causes of action for breach of the CC&R's and breach of fiduciary duty but found in favor of RHCA on the causes of action for nuisance and invasion of privacy. The jury awarded the Murrells $30, 000 as damages and made a further finding that RHCA did not act with malice, oppression or fraud toward the Murrells, resolving their exemplary damages claim against them.

On the Fullers' claim against the Murrells, the jury found in favor of the Fullers on the causes of action for breach of the CC&R's, breach of the oral agreement, and private nuisance. The jury awarded the Fullers $10, 000 as damages.

On November 29, 2007, at the court trial on the declaratory relief claims of the Murrells, RHCA, and the Fullers, the trial court (Judge Ettinger) ruled against the Murrells and in favor of RHCA and the Fullers. On the same date, the court denied the motion for JNOV filed by the Murrells and the one filed by RHCA, as well as their respective motions for a new trial.

On January 4, 2008, judgment was entered on the general jury verdict and on the court's declaratory relief decision that RHCA "may remove and/or cut back trees from within the easement on the Murrells' property and cut back trees not growing in the easement in order to maintain and improve the view of the Fullers so long as such actions are not done arbitrarily and capriciously."[14]

On appeal, the Murrells challenge the jury's verdict in favor of the Fullers on their causes of action for breach of the CC&R's, breach of the oral agreement, and nuisance. In its cross-appeal, RHCA challenges the sufficiency of the evidence to support the verdicts in favor of the Murrells on the breach of the CC&R's and fiduciary duty causes of action.

The contentions of both the Murrells and RHCA on their respective appeals are unsuccessful. We therefore affirm the judgment in full.

A. The Murrells' Appeal

The Murrells contend the evidence is insufficient to support the verdict for the Fullers on the CC&R's and nuisance claims. The Murrells argue the trial court erred in allowing the oral agreement claim to go to the jury and to stand afterward and the court erred in instructing the jury on the oral agreement and the CC&R claims. They contend the court further erred in denying their JNOV motion.

The Murrells also challenge the trial court's declaration that pursuant to the CC&R's, RHCA had the right to remove trees on its easement on the Murrell property to improve the Fullers' view.

The Murrells contend the trial court committed prejudicial error in instructing the jury on the CC&R's claim by giving the Fullers' jury instruction 303, as modified (JI 303).[15] We disagree.

JI 303 advised the jury: "To recover damages from the Murrells for breach of the CC&R's, the Fullers must prove all of the following: [¶]... That Section 15 of the CC&R's required the Murrells to allow [RHCA] to enter the Murrell property for the purpose of cutting back trees and/or other plantings which, in the opinion of... RHCA, was warranted to maintain and improve the view of, and protect, the Fullers' property; [¶]... From July 2003 to the present, the Murrells have refused to allow... RHCA to enter their property to cut back the trees which... RHCA determined was necessary to maintain and improve the view of, and protect, the Fullers' property; [¶]... That the Fullers suffered damages as a result of the Murrells' refusal to allow... RHCA to enter their property to cut back trees which... RHCA determined was necessary to maintain and improve the view of, and protect, the Fullers' property."

A party is entitled to instruction on every legal theory advanced which is supported by substantial evidence. (*Lunghi v. Clark Equipment Co.* (1984) 153 Cal.App.3d 485, 491–493.) This court reviews the evidence in the light most favorable to the proponent in determining whether a particular instruction is sufficiently supported. (*Selinsky v. Olsen* (1951) 38 Cal.2d 102, 103.) "Instructions not supported by any substantial evidence should not be given... [and] it is error to instruct on any theory that is untenable as a matter of law or is unsupported by the evidence. [Citation.]" (*Pittman v. Boiven* (1967) 249 Cal.App.2d 207, 218.)

The Murrells argue JI 303 is unsupported by the evidence because "there is no (let alone substantial) evidence... the Murrells ever 'refused to allow... RHCA to enter their property to cut back' their trees to improve the Fullers' view, let alone during the period '[f]rom July 2003 to the present.'" They argue the instruction is "an erroneous statement of law as to the legal effect of [section] 15" of article I of the CC&R's, which does not require RHCA to obtain the permission of the Murrells to cut back their trees for the benefit of the Fullers' view. Rather, section 15 expressly provides RHCA "shall have the right at any time to enter on or upon any part of said property for the purpose of cutting back trees or other plantings which, in the opinion of... [RHCA] is warranted to maintain and improve the view of, and protect, adjoining property." They further argue this instruction misled the jury because "no evidence was even presented that during the time in question... RHCA ever sought to cut back the Murrells' trees" or "the Murrells' alleged threat of litigation had any detrimental effect on... RHCA." The Murrells assert the erroneous JI 303 was prejudicial, especially when considered with the

erroneous argument by counsel for the Fullers that the July 15, 2004 Board minutes recited that at this meeting the Murrells' attorney *threatened to sue* if RHCA tried to "*trim*" the trees on the Murrell property when in fact he said "*remove*."[16]

The Murrells' contentions, which are cast in terms of insufficient evidence, arise from their false premise that RHCA must present evidence that the Murrells *physically* barred RHCA from entering the Murrell property to justify the giving of JI 303. The Murrells misconstrue the applicability of section 15 of article I of the CC&R's, which expressly gives RHCA "the right any time to enter on or upon any part of said property for the purpose of cutting back trees or other plantings which, in the opinion of... [RHCA] is warranted to maintain and improve the view of, and protect, adjoining property." The Murrells resisted RHCA's authority to provide the Fullers the view to which they were entitled under the CC&R's. And implicit in this grant of authority is the requirement that the Murrells, members of the RHCA by virtue of their property ownership, allow RHCA to exercise this right by doing nothing to inhibit or prohibit RHCA from doing so, such as forbearing threatening to sue RHCA.[17] The trial court thus did not err in giving JI 303.

The Murrells also contend the trial court erred in allowing the Fullers' breach of oral agreement claim to go before the jury and thereafter to allow the verdict in favor of the Fullers to stand. They argue, as a matter of law, the evidence is insufficient to establish an enforceable contract because no evidence of consideration from the Fullers to the Murrells was presented nor was there any evidence of a "meeting of the minds" as to its terms. (*Holmes v. Holmes* (1950) 98 Cal.App.2d 536; CACI No. 302; Civ. Code, §§ 1550, 1565.) And, as a matter of law, the Murrells argue that the alleged oral agreement is barred by the statute of frauds and the agreement is too uncertain to be enforceable. Again, we disagree.

Initially, we point out the Murrells do not challenge the jury's findings that an oral agreement to trim trees between themselves and the Fullers exists and that the Murrells breached that agreement. Rather, their position is that this agreement is unenforceable, as a matter of law. We disagree.

Substantial evidence was adduced at trial from which the jury was entitled to find in the spring of 2001 the Murrells and the Fullers reached an oral agreement regarding the trimming of the Murrells' trees located on the RHCA easement, and the jury impliedly so found. Similarly, there also exists substantial evidence that the agreement was sufficiently certain to be enforced; there was adequate consideration underlying the agreement; there existed sufficient writing and, alternatively, part performance to satisfy the statute of frauds. (*Sterling v. Taylor* (2007) 40 Cal.4th 757, 766; *Macmorris Sales Corp. v. Kozak* (1968) 263 Cal.App.2d 430, 442; *Hausen v. Goldman* (1954) 124 Cal.App.2d 25, 30.)

This evidence showed the Murrells promised to trim and maintain the trees in question at the levels which existed in spring 2001. In return, the Fullers promised not to pursue their view complaint with the Board and not to seek enforcement of the Board's decision to remove an Aleppo pine tree[18] located in the RHCA's easement on the Murrell property.

In a signed letter dated January 11, 2004, to the Fullers, Dr. Murrell wrote: "After our discussions of specific concerns, my understanding was that you would be satisfied if the tufts of new growth on the Eucalyptus tree were removed from the vertical and the two branching, smaller trunks up to the beginning of the foliage. On the Aleppo pine tree, to remove the tufts of new growth hanging below the 4 or 5 horizontal major limbs that had been in place there long before the spring 2001 agreement. During the discussions, you said you also wanted considerable trimming on the top of the Aleppo Pine tree but I protested since your view of the ocean was below the 4 or 5 horizontal limbs as established in the agreement of spring of 2001, trimming the top would only enhance your view of the sky, not the ocean and endanger the life of the tree because of the limited amount of green foliage remaining. The Eucalyptus tree and the Aleppo pine not only stabilize the slope but act as a screening effect to lend some degree of view enhancement and privacy to all the other neighbors with houses and yards on the canyon."

In a signed letter dated April 14, 2004, to the View Committee, Dr. Murrell acknowledged: "Discussions with the View Committee led to an arrangement in which... [RHCA] would not remove the pine and eucalyptus trees if we kept them trimmed as they were in the Spring of 2001. [¶] We agreed and during the subsequent trimming in August, 2003, we diligently tried to please Mr. Fuller."

The Murrells do not dispute the contents and authenticity of these letters as attributable to Dr. Murrell. Their position is that these writings cannot serve to memorialize the oral agreement, because Mrs. Murrell was not a signatory. That Mrs. Murrell did not sign these letters is of no import. Ample evidence exists that Mrs. Murrell necessarily was aware of the oral agreement and that she was the one who negotiated and consented to this agreement. For instance, at the March 1, 2001 Board meeting, Mrs. Murrell spoke of her consent to the terms of the oral agreement and agreed to allow trimming of their trees on that date, which evidenced her amenability to performance of the Murrells' obligations under the agreement. In his April 10, 2004 letter to the Murrells, Mr. Sidney F. Croft, RHCA's attorney, wrote: "When the first work was done pursuant to the Fuller [view complaint], RHCA had planned to remove the pine and eucalyptus trees from the RHCA easement. [¶] At your request, it was agreed that the trees would not be

removed if they were maintained in their condition in the Spring of 2001."

Part performance of the agreement in August 2003 by the Murrells is established by Dr. Murrell's April 14, 2004 letter. Part performance on the part of the Fullers is evidenced by the minutes of the February 1, 2001 Board meeting, which reflect: On behalf of the Fullers, the Board agreed not to remove the trees in question provided the Murrells' trees were trimmed to restore the Fullers' view. Neither Mrs. Murrell nor Ric Dykzeul, a landscape consultant, who were present, objected.

The Murrells also contend insufficient evidence supports jury verdicts in favor of the Fullers on their CC&R's and nuisance claims. We disagree. These verdicts are supported by substantial evidence.

"Where findings of fact are challenged on a civil appeal, we are bound by the 'elementary, but often overlooked principle of law, that... the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, ' to support the findings below. [Citation.] We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by [the reviewing] court. [Citations.]" (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660.) "If the record demonstrates substantial evidence in support of the judgment, we must affirm even if there is substantial contrary evidence. [Citation.]" (*Donovan v. Poway Unified School Dist.* (2008) 167 Cal.App.4th 567, 582.)

"Substantial evidence is evidence which is '"reasonable in nature, credible, and of solid value."' [Citation.]... We must presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence. [Citation.] 'The focus of the substantial evidence test is on the *whole* record of evidence presented to the trier of fact, rather than on '"isolated bits of evidence."' [Citation.]' [Citation.]" (*People v. Medina* (2009) 46 Cal.4th 913, 919.)

Substantial evidence supports the breach of CC&R's verdict. The jury was instructed that the Fullers asserted the Murrells breached the CC&R's by their following conduct: "From July 2003 to the present, the Murrells have refused to allow the RHCA to enter their property to cut back trees which the RHCA determined was necessary to maintain and improve the view of, and protect, the Fullers' property." Such refusal is evidenced in the July 15, 2004 Board minutes, which reveal the Murrells had failed to trim their trees as of that date and refused to agree to allow the trees to be trimmed to the original 2001 levels.

The July 15, 2004 Board minutes reflect Mr. Fuller requested the Board to enforce the 2001 agreement to restore the Fullers' view corridor. When asked by Director Crocker whether the Murrells had cut the trees to meet the agreement's criteria, "as illustrated in the photo from 2001, " "Mr. Light responded that the Murrells intended to trim the trees in the winter." Director Crocker advised "the protected Fuller view corridor is the canyon, horizon, ocean, and Catalina Island views. He added that there are other Aleppo pines down the bank and a eucalyptus tree that had been trimmed in 2001 to restore the view corridor and should be kept pruned to comply with the agreement. [¶] Director[s] Crocker and Howroyd discussed the original recommendation of the View Committee to remove [Pine Tree #1] located in the easement, and the Board members' decision to allow the tree to be laced in an effort to compromise and reach a solution agreeable to both parties."

"Director Howroyd observed that trimming has not been a solution over the past four years and foresaw that this would be an ongoing conflict." He moved for removal of Pine Tree #1, "as recommended by the View Committee in 2001, lower[ing of] the Aleppo pines located on the bank below the view corridor, and remov[al of] any lower branches of the eucalyptus to preserve the view corridor."

Director Crocker announced his intent to second this motion if this alternative solution were not adopted. He moved for the Board to allow the trees to be trimmed as "illustrated in the original 2001 photograph, with the Murrells assuming the cost of the trimming, and supervised by RHCA staff, with the trimming to be completed within 15 days. The Murrells will agree to maintain the view corridor at their expense, including the Aleppo pines now growing up into the view corridor. This offer must be accepted or rejected prior to the end of the meeting. If the Murrells reject the offer, Director Crocker will second the motion to remove... [Pine Tree #1] made by Director Howroyd." In response to Mr. Light's inquiry, Director Crocker responded the requirement that the Murrells assume all maintenance costs "was a condition of the original agreement and part of Resolution 166 under which the agreement was made."

Mr. Light and the Murrells left to discuss the proposal. Upon their return, Mr. Light advised the Board "the Murrells rejected the offer and informed the Board that the Murrells intended to sue [RHCA] for damage to their property if the trees are removed." In view of the Murrells' rejection of his offer, Director Crocker seconded the motion to remove Pine Tree #1 "by the next meeting."

Substantial evidence supports the nuisance verdict. On the nuisance cause of action, the jury was instructed that "the Murrells created a condition that interfered with the Fullers' comfortable enjoyment of their lives or property." Abundant evidence was presented which

supports the jury's finding that the Murrells indeed created such a condition by continually obstructing the Fullers' ability to enjoy their ocean view through refusing to allow the trimming of the trees on the Murrell property. (*Koll-Irvine Center Property Owners Assn. v. County of Orange* (1994) 24 Cal.App.4th 1036, 1041.)

The Murrells also contend the trial court committed prejudicial error in excluding, on the motion of RHCA and the Fullers, the September 6, 2006 letter from the Albright firm, the Fullers' counsel, to the Board. They argue this letter shows that Pine Tree #1 was removed at the Fullers' behest on September 11, 2006, which is relevant on two points. First, as for the CC&R's breach claim, "the fact that... RHCA removed [Pine] Tree #1 at the Fullers' request in the middle of the litigation would have significantly countered" the probative value of the earlier threat of the Murrells' counsel to "sue if RHCA 'removed' the Murrells' trees." Second, "the Fullers' conduct in this regard would have been relevant to the Murrells' unclean hands defense." Exclusion of the September 6, 2006 letter was not error because it was not relevant.

"""Relevant evidence is defined in Evidence Code section 210 as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." The test of relevance is whether the evidence tends "'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive. [Citations.]" [Citation.] The trial court has broad discretion in determining the relevance of evidence [citations] but lacks discretion to admit irrelevant evidence. [Citations.]"" [Citation.]" (*People v. Hamilton* (2009) 45 Cal.4th 863, 913.)

The removal of Pine Tree #1 on the RHCA easement is totally unrelated to the issue of whether the Murrells breached the CC&R's by refusing to allow RHCA to trim other trees on their property and thus does not give rise to any unclean hands on the part of the Fullers regarding their CC&R's claim. The trial court therefore properly excluded the September 6, 2006 letter.[19]

The Murrells also contend the trial court erred in denying its JNOV motion "[b]ecause the record is devoid of any substantial evidence to support the CC&R Claim and the Nuisance Claim, and because as a matter of law the verdict on the Oral Agreement Claim cannot stand." They urge that in reversing the judgment, or any cause of action alleged in the Fuller complaint, "this Court properly should direct that portion of the judgment be entered in favor of the Murrells. (Code Civ. Proc., § 629.)" No error was committed.

In ruling on a JNOV motion, the trial court accepts as true the evidence supporting the jury's verdict, disregarding all conflicting evidence and indulging every legitimate inference supporting the judgment. On appeal, denial of a JNOV motion will be upheld if supported by substantial evidence. (*Dell'Oca v. Bank of New York Trust Co., N.A.* (2008) 159 Cal.App.4th 531, 554–555.)

As discussed above, substantial evidence supported the jury's verdict on the Fullers' CC&R's and nuisance claims; and the Murrells' contention that, as a matter of law, the oral agreement verdict must be reversed was rejected. Therefore, no cognizable basis exists to enter judgment in favor of the Murrells on these claims.

On November 29, 2007, the trial court denied the Murrells' declaratory relief claim and granted declaratory relief in favor of RHCA and the Fullers. In that portion of the judgment entered on January 4, 2008, concerning the declaratory relief sought in BC325047 (*Murrells v. RHCA*) and BC327629 (*Fullers v. Murrells*), the trial court ruled RHCA "may remove and/or cut back trees from within [its] easement on the Murrells' property and cut back trees not growing in the easement in order to maintain and improve the view of the Fullers so long as such actions are not done arbitrarily and capriciously."

The Murrells contend the trial court erred in declaring the CC&R's authorized RHCA to remove easement trees from the Murrell property for the sole purpose of benefiting the Fullers' view. They argue that although the CC&R's authorize RHCA to cut back ("trim") easement trees for view purposes, they do not empower RHCA to remove the trees unless such removal advances or benefits an easement purpose reserved to RHCA, which enhancement of a view is not such a purpose. We have already determined the Murrells' interpretation of the CC&R's to be erroneous in connection with the B202019 appeal.

Additionally, we uphold the court's declaration in favor of the Fullers for the same reason. As stated in the Fullers' trial brief, "any determination in this action that... RHCA had the right to order trees trimmed or removed from the Murrell property will automatically support a finding that the Fullers should prevail on their CC&R enforcement cause of action against the Murrells" because the Fullers presented their view impairment claims to the Board in conformity with Resolution Nos. 166 and 199, which were adopted to implement the view impairment provisions of the CC&R's. (See Civ. Code, § 1354, subd. (a) [CC&R's "may be enforced by any owner of a separate interest or by the association, or by both"].)

B. RHCA's Cross-appeal

RHCA challenges the jury's general verdicts in favor of the Murrells on their causes of action for breach of the CC&R's and breach of fiduciary duty. RHCA contends that, as a matter of law, no breach of the CC&R's was committed because: (1) the Murrells manifested their consent to removal of the two trees on

their property, namely, Tree #10 and Tree #11, and such consent was not void as having been induced by fraud or duress (or both) on the part of RHCA or mistake on the part of the Murrells; (2) RHCA did not fail to follow its own procedures; (3) the doctrine of equitable estoppel is inapplicable; and (4) at most, RHCA's trimming and removal of these trees amounted to an ultra vires act which is not actionable as breach of the CC&R's.

RHCA also contends that, as a matter of law, no breach of fiduciary duty transpired because: (1) the Murrells manifested their consent to removal of Tree #10 and Tree #11; (2) RHCA owed no duty to disclose the CC&R's contents to the Murrells; (3) the Murrells presented no evidence they sustained damages by reason of RHCA's failure to inform them of a Board meeting concerning further trimming of Pine Tree #1 and Tree #12, RHCA's failure to mail the Murrells a copy of RHCA's final determination of the view dispute, RHCA's rejection of the Murrells' application to plant a five-foot high hedge in the easement area, and RHCA's suggestion, as a negotiating tactic, that all numbered trees be removed.

Alternatively, RHCA contends reversal of the breach of CC&R's verdict is required because the trial court committed prejudicial error in excluding the January 24, 2001 cover letter Dykzeul faxed along with his report to the Murrells, which RHCA argues was admissible to show he prepared the report, which recommended removal of Tree #10 and Tree #11, on behalf of the Murrells.

We need not, and therefore do not, address these multitudinous contentions individually. That we find substantial evidence to uphold the general verdict on a single count, breach of the CC&R's, suffices. (*Delos v. Farmers Group, Inc.* (1979) 93 Cal.App.3d 642, 650 [no need to address all five causes because "general verdict will be upheld if the evidence supports it on any one count"].)

"Specifically, the jury's general verdict 'imports findings in favor of the prevailing party on all material issues; and if the evidence supports implied findings on any set of issues which will sustain the verdict, it will be assumed that the jury so found. The court on appeal does not have to speculate on what particular ground the jury may have found in favor of the prevailing party.' [Citations.]" (*Everett v. Everett* (1984) 150 Cal.App.3d 1053, 1063–1064.)

Additionally, """[a] verdict should be interpreted so as to uphold it and give it the effect intended by the jury...."' [Citation.]" (*Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424.) "It is well settled that 'where several issues in a cause are tried and submitted to a jury for its determination, a general verdict may not be disturbed for uncertainty, if one issue is sustained by the evidence and is unaffected by error. [Citations.] When a situation of this character is presented it is a matter of no importance that the evidence may have been insufficient to sustain a verdict in favor of the successful party on the other issues or that reversible errors were committed with regard to such issues.' [Citation.]" (*Mouchette v. Board of Education* (1990) 217 Cal.App.3d 303, 315, disapproved on another point in *Caldwell v. Montoya* (1995) 10 Cal.4th 972, 984, fn. 6.)

The uncontroverted evidence establishes: (1) Tree #10 and Tree #11 were on that portion of the Murrell property not encumbered by RHCA's easement; (2) the CC&R's therefore did not authorize RHCA to *remove* these trees; (3) the Board ordered these trees removed; and (4) RHCA removed both trees.

The pivotal issue before the jury was whether the Murrells consented to RHCA's removal of Tree #10 and Tree #11 and, if so, whether such consent was invalid. In returning a general verdict in favor the Murrells on their CC&R's claim, the jury necessarily resolved the issue of consent against RHCA. The issue before this court is whether substantial evidence supports the jury's factual finding. We answer in the affirmative.

On November 27, 2000, in response to the Fullers' first view complaint, RHCA's View Committee issued findings and recommendations which called for removal of twelve trees, including Tree #10 and Tree #11.[20]

On December 18, 2000, Joseph Hummel, the View Committee chairman, submitted a memorandum to the Board amending the earlier recommendations by calling for removal of four non-easement trees: Trees #2, #10, #11, and #12.

At trial, Hummel admitted the View Committee recommended the removal of the trees in part to persuade the Murrells to negotiate a settlement with the Fullers and that when Hummel submitted the recommendation, he knew RHCA did not have authority to remove non-easement trees.

In late December 2000, Mrs. Murrell contacted Ric Dykzeul, a landscape designer and consultant recommended by RHCA manager Peggy Minor. The Murrells retained Dykzeul to assist in their negotiations with the Fullers and RHCA.

At the January 4, 2001 Board meeting, the Board requested Dykzeul prepare a written report reviewing "the suggestions made by [the View Committee] regarding the Murrell[s'] trees and their view impairment from the Fuller residence." Sometime more than a week before the report was prepared, Mrs. Murrell asked Dykzeul to "continue with the request for the View Committee based on what she wanted."

Dykzeul's report dated January 24, 2001, was addressed to the Board, the "Fuller Family, " and the "Murrell Family." He stated that he felt his "suggestions

will greatly enhance the Fuller[s'] view to the ocean and at the same time take into consideration how important the privacy issue of the trees to the extreme left of the view corridor is to the Murrell[s]." Among his suggestions, Dykzeul suggested removal of Tree #10 (an Aleppo pine) and Tree #11 (an Incense Cedar).

At the February 1, 2001 Board meeting, Dykzeul presented his report to the Board. The Board resolved to adopt the December 18, 2000 recommendations, including removal of Tree #10 and Tree #11, with certain amendments not here relevant. At trial, Minor testified the decision regarding which trees were to be trimmed or removed was reached by RHCA, the Fullers, and the Murrells.

At trial, the Murrells called Dykzeul as a hostile witness (Evid. Code, § 776). Dykzeul admitted that on January 24, 2001, he met with Hummel at the Fuller property and arrived at certain "decisions regarding what... recommendations would be included in [his] report." Dykzeul testified he had worked before with Hummel personally and in his capacity as a View Committee member but he had not met Dr. Murrell. As for Mrs. Murrell, Dykzeul testified "[s]he objected to any tree - to anything happening to her trees, however, I think she accepted what was going - was going to accept what the City was telling her to do."

At the 7:30 a.m. March 1, 2001 Board meeting, the Board discussed the tree cutter company's plans for trees on the Murrell property for that day. At trial, Hummel testified that at this meeting Mrs. Murrell "acknowledged that there was an agreement" concerning trimming of trees as had been discussed and "expressed her cooperation to fulfill that agreement." But Hummel conceded that about an hour afterward at the Murrell property, Mrs. Murrell repeatedly refused to allow the tree cutters to trim Trees #1, #3, and #12.

At trial, Mrs. Murrell testified that she did not agree to allow RHCA to remove trees from her property. She testified that upon arriving home after the March 1, 2001 meeting, Tree #10 and Tree #11 already had been removed. Upset, she refused to allow Trees #1, #3, or #12 to be trimmed or Tree #2 to be removed. Dr. Murrell, who arrived home because of the tree trimming dispute, agreed to allow Tree #2 to be cut in half rather than removed.

During the July 15, 2004 Board meeting, Croft advised the Board that RHCA could not remove non-easement trees without the Murrells' consent. Dr. Murrell testified that at this meeting he first discovered RHCA had no such authority.

No evidence was presented that Dr. Murrell personally agreed, consented to, or acquiesced in the removal of Tree #10 and Tree #11. The jury was entitled to credit Mrs. Murrell's testimony that she did not agree (give her consent) that RHCA could remove any tree on the Murrell property. That evidence exists which might lend itself to arriving at a contrary conclusion is of no import. Nothing in the testimony of Mrs. Murrell was inherently improbable or impossible. (*People v. Swanson* (1962) 204 Cal.App.2d 169, 172 ["Contradictions and inconsistencies alone will not necessarily constitute inherent improbability."].) It was therefore in the sole province of the jury, as the trier of fact, to determine the credibility of witnesses and the weight to accord the testimony of any witness. (*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1204 ["[T]he credibility of witnesses is generally a matter for the trier of fact to resolve. Accordingly, the testimony of a witness offered in support of a judgment may not be rejected on appeal unless it is physically impossible or inherently improbable and such inherent improbability plainly appears."].)

At trial, RHCA requested admission of Dykzeul's cover letter that was faxed along with his report to Mrs. Murrell. The letter read:

"Mrs. Murrell, [¶] Here are my suggestions for tree removal and pruning. Please review and comment. [¶]... [¶] If you are happy with these suggestions let me know A.S.A.P. and I will deliver them to Peggy Minor for review prior to the meeting."

RHCA contends the trial court committed prejudicial error in excluding the cover letter as hearsay because the letter was admissible "as circumstantial evidence of Dykzeul's state of mind - specifically, his objective of representing the Murrells' interests in creating the report." Exclusion of this letter was neither error nor abuse of discretion.

"The reviewing court applies the deferential abuse of discretion standard to any ruling by the trial court on the admissibility of evidence." (*People v. Curl* (2009) 46 Cal.4th 339, 359.) "No evidence is admissible except relevant evidence." (Evid. Code, § 350.) """Relevant evidence is defined in Evidence Code section 210 as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." The test of relevance is whether the evidence tends "'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive. [Citations.]" [Citation.] The trial court has broad discretion in determining the relevance of evidence [citations] but lacks discretion to admit irrelevant evidence. [Citations.]"" [Citation.]" (*People v. Hamilton, supra,* 45 Cal.4th at p. 913.)

Contrary to RHCA's claim, evidence of the cover letter was irrelevant because Dykzeul's state of mind was not at issue. The trial court therefore did not abuse its discretion in excluding this letter.

VI. B210814 APPEAL AND CROSS-APPEAL

Fullers v. Murrells (BC327629) and *Murrells v. RHCA* (BC325047)

Attorney fees were awarded to the Fullers and the Murrells pursuant to Civil Code section 1354 for prevailing on their respective claims to enforce the CC&R's.[21] In BC327629, the Fullers, who prevailed in full against the Murrells, moved for attorney fees in the amount of $488, 904.69 and costs. In BC325047, the Murrells, who prevailed against RHCA on two causes of action, sought an award of attorney fees in the amount of $647, 974.29, plus additional costs in the amount of $18, 724.12.

The trial court (Judge Ettinger) referred these fees and costs matters to a referee, who made factual findings and recommendations to the court. The court awarded the Murrells against RHCA $399, 930.88 as fees and $29, 552.63 as costs, or a total award of $429, 842.91, and then awarded the Fullers against the Murrells $333, 525.00 as fees and $11, 978.44 as costs, or a total award of $345, 504.44.

On appeal, the Murrells challenge the $333, 525 attorney fees award in favor of the Fullers as improper and inflated.[22] They challenge, as inadequate, the $399, 930.88 attorney fees award to them from RHCA. They also contend the court erred in failing to award additional costs in the total amount of $18, 724.12. In its cross-appeal challenging the $399, 930.88 attorney fees award, RHCA contends the Murrells are not the prevailing party and the award is improper and excessive. The contentions of each party fail.

The Fullers requested $488, 904.69 from the Murrells as incurred attorney fees, which included fees for paralegal time. This request was supported by approximately 100 pages of an itemized billing statement, which detailed time spent, tasks performed, and billing rates. In a declaration, Mr. Ashkan Y. Shakouri, an Albright firm associate, attested to the veracity and authenticity of the statement.

Under the "Apportioned Attorney Fees" heading in this statement, the Fullers reduced their claimed incurred fees by $119, 675.14, of which amount $112, 200.14 represented apportionment by half of the attorney fees incurred by the Fullers and RHCA for the Albright firm's representation of the Fullers in BC327629 and RHCA in BC325047. Mr. Clifton W. Albright, the Albright firm's managing partner, stated in his declaration that although the Albright firm represented the Fullers in BC327629 and RHCA in BC325047, the Albright firm "did not actively represent... RHCA until the time of trial in September of 2007" because Mr. Joseph P. Gallo, RHCA's insurance counsel, represented RHCA from January 2005 until trial. He explained "[t]his allocation [of time] allowed [the Albright firm] to spend most of its time and resources (up until preparing for and attending trial in September 2007) prosecuting the Fullers' case against the Murrells in... BC327629."

The Murrells filed opposition to the fees motion, and the Fullers filed a reply.

The Murrells sought recovery of $647, 974.29 in attorney fees from RHCA. They also sought an award of additional costs under Civil Code section 1354 for a variety of miscellaneous items.[23]

On May 7, 2008, the trial court (Judge Ettinger) appointed as referee "ADR Services neutral Eugene C. Moscovitch, " who had been mutually agreed upon by all parties, to make recommendations to the court on the issues of attorney fees and costs. (See Code Civ. Proc., § 639.)

On July 14, 2008, the referee issued his findings and recommendations in a 27 page report (Report).[24]

In the Report, the referee noted the issues regarding attorney fees and costs were before him "[i]n the aftermath of four (4) years of protracted and costly litigation, culminating in a jury trial with multiple verdicts reflecting somewhat mixed results both in terms of awarded damages and equitable relief" and required "his review of the twenty-two (22) individual filings and voluminous exhibits that have been submitted by counsel on the issue of fees and costs alone, " which "paper bonanza closely parallels the spirit and effect of much of the preceding twenty-eight (28) red wells of pleadings generated since the filing of these complaints."

Specifically, the referee pointed out: "The consolidated trial yielded three (3) separate and slightly conflicting results: 1) verdict FOR the Murrells on the issues of Breach of Fiduciary Duty and Breach of the CC&R's against RHCA in the sum of $30, 000.00 BUT a negative jury finding for the Murrells re: their claims of nuisance and trespass [and] malicious conduct by RHCA, and 2) a verdict FOR the Fullers against the Murrells on the issues of Breach of the CC&R's, Breach of Oral [Agreement] and Commission of Private Nuisance in the sum of $10, 000.00 and 3) a finding by the court re Declaratory Relief allowing RHCA to enter the Murrells' property at any time in the future (upon reasonable notice) to remove and/or cut back any trees or shrubs [in its easement] which are blocking or impeding the Fuller[s'] view, so long as it is not done 'arbitrarily or capriciously'."

On the issue of a prevailing party under Civil Code section 1354, the referee found "the Murrells can hardly be depicted as the clear winners in this litigation, and despite their recent after-the-fact attempt to recast the litigation as turning primarily upon the issue of easement versus non-easement privileges, this is, at best, a very mixed result." The referee was not persuaded by either the Fullers' position that the Murrells were not a

"prevailing party" because they "'won only two out of twenty-five'" of their claims in the entire litigation or the Murrells' position that their award of $30, 000, in contrast to the Fullers' award of only $10, 000, crowned them the prevailing party. Rather, "[i]n the opinion of the referee, this has never been a battle waged for the recovery of monetary damages. At its[] core was always the equitable issue of whether, without the Murrells[']permission, RHCA on behalf of the Fullers and in the exercise of [its] charter responsibilities, could enter the Murrell property and perform ordinary maintenance (upon reasonable notice) to resurrect and then maintain, the property rights of the Fullers as to an unobstructed view."

The referee made no recommendation on the existence of a prevailing party in view of the judgment on jury verdict entered by the court in which the court apparently already ruled the Murrells were the prevailing party in BC325047 and the Fullers were the prevailing party in their action, BC327629, for the purpose of recovery under Civil Code section 1354.

On the issue of the fees sought, the referee noted "the parties engaged in an unbridled litigation war which escalated out of control. Now, two of the three sides seek to be reimbursed for these activities. The solution lies not in deciphering the chicken and egg sequence of 'who is responsible for the huge run-up of fees in this case, whether by failures to cooperate during discovery or frustration of the settlement process', but rather in a thorough review of which fees were and were not 'reasonable' in the context of the litigation and which, if any, can be properly attributed to legitimate fee reimbursable activities for reimbursement purposes." The referee pointed out determination of what fees are "reasonable" is "complicated by the multiplicity of actions, the early conclusion of a part of the litigation against an already reimbursed individual director [Crocker] by summary judgment, the variance of the billing rates among counsel, the possible duplication of effort occasioned by overlapping responsibilities of counsel within the Fuller/RHCA camp, and the evolving animosity and apparent lack of cooperation among counsel which itself may have increased the cost of this litigation several fold."

In passing on the Murrells' request for attorney fees for BC325047, the referee analyzed the requested fees in the same categories, approximately 32, that were addressed by their counsel. The referee determined certain fees had to be apportioned between one or both of the other consolidated cases; some fees were not attributable to BC325047; and other fees were excessive or not recoverable. The referee then concluded the Murrells were entitled to an award of attorney fees in the amount of $399, 930.88.

With respect to the Fullers' nearly $500, 000 fees request in BC327629, the referee first addressed the appropriate billing rate for the Albright firm's attorneys and paralegals, which the Fullers claimed were $450 per hour for Mr. Albright, $295 per hour for Mr. Derek S. Yee, and $125 per hour for paralegals. The referee rejected the hourly rate sought to be charged, because the "Fullers' counsel failed to present any evidence that associates and/or partners in [a] similar size downtown Los Angeles law firm actually charge similar rates for [a] similar type of case (with the exception of the award of [Albright firm's] fees charged in... BC358599)" and counsel "presented no evidence that they specialize in HOA-related real estate disputes, justifying these somewhat inflated non-insurance based hourly fees." The referee concluded the billing rates should be reduced to $350 per hour for Mr. Albright and Mr. Yee, $175 per hour for junior associate time (three years' experience or less), and $95 per hour for paralegal time.

The referee recommended the court strike the Fullers' request for $12, 550 in their fees request for work performed on their summary judgment motion on the cross-complaint, which request the Fullers acknowledged was submitted by mistake. After apportioning certain fees, the referee concluded that, excluding the time spent on the attorney fees motion, the Fullers were entitled to an award of fees in the total amount of $321, 525, which consisted of an award of attorney fees in the total amount of $302, 050 and paralegal time in the amount of $19, 475.

The Fullers sought recovery of attorney fees for preparation of their fees motion in the amount of $17, 178 and an additional $3, 865 for preparing a reply to the Murrells' opposition and in preparation for the motion hearing. The referee found the total request of $21, 043 to be "excessive particularly in light of their not having provided the court with fully comprehensive data, " and reduced the amount to $12, 000.

The referee recommended the Fullers recover a total award of attorney fees from the Murrells in the total amount of $333, 525, i.e., $321, 525 plus $12, 000 in connection with the fees motion.

The Murrells filed objections to the Report.

On July 18, 2008, at the conclusion of the hearing, the trial court approved the Report in its entirety. On the same date, the court entered an order adopting the Report.

"Ordinarily, an award of attorney fees under a statutory provision, such as [Civil Code] section 1354... is reviewed for abuse of discretion." (*Rancho Santa Fe Assn. v. Dolan-King*, *supra*, 115 Cal.App.4th at p. 46.)[25] "'The "experienced trial judge is the best judge of the value of professional services rendered in his court...."'" (*PLCM Group, Inc. v. Drexler*, *supra*, 22 Cal.4th at p. 1095.)

In determining whether an award of attorney fees is appropriate under Civil Code section 1354, the trial court first must determine the existence of a prevailing party.

The court "analyze[s] which party... prevailed on a practical level" instead of applying "a rigid interpretation of the term 'prevailing party.'" (*Heather Farms Homeowners Assn. v. Robinson* (1994) 21 Cal.App.4th 1568, 1574.) We affirm the court's ruling on this issue in the absence of an abuse of discretion. (*Ibid.*)

In the contract context, the abuse of discretion standard applies to the trial court's apportionment of fees incurred in conjunction with a contract cause of action authorizing an award of attorney fees and those fees incurred as to other causes of action. (See *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1111.) "Where a cause of action based on the contract providing for attorney's fees is joined with other causes of action beyond the contract, the prevailing party may recover attorney's fees under [Civil Code] section 1717 only as they relate to the contract action." (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129.) But attorney "fees need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed." (*Id.* at pp. 129–130.)

These principles are equally applicable to an award of attorney fees sought under Civil Code section 1354. We therefore conclude that in determining the amount of attorney fees to be awarded to the prevailing party pursuant to section 1354, the trial court must first ascertain the amount of fees to which a party is entitled and then apportion the fees, unless unwarranted, to those attributable to the section 1354 cause of action from those incurred in conjunction with other causes of action. The trial court's ruling whether to apportion fees and the apportionment of attorney fees is reviewed under the deferential abuse of discretion standard. "[W]e will not overturn its ruling" if "the trial court acted well within its discretion." (*Korech v. Hornwood* (1997) 58 Cal.App.4th 1412, 1423.)

The Murrells contend the trial court erred and abused its discretion in awarding $333, 525 in attorney fees to the Fullers (BC327629).[26] They argue the trial court erred by applying "disparate" standards in making the two fee awards and further erred in adopting the referee's recommendations because the referee "for the most part, accepted at face value the Albright Firm's unsupportable allocation of fees" and "neither the Referee nor the trial court reduced or apportioned the hours sought by the Fullers." We disagree.

We note that Judge Ettinger, a well experienced judge, was a percipient witness to the abilities and skill levels of counsel for all parties, not only as to their performance during the several weeks' jury trial and the court trial but also in the making and arguing earlier motions for directed verdict, JNOV, and new trial. (See *Lipka v. Lipka* (1963) 60 Cal.2d 472, 480 [fees award amount based on judge's "own experience and from the facts and circumstances of the case, as they appeared from the pleadings and other papers" permissible].)

We are unpersuaded by the Murrells' claim that Judge Ettinger improperly applied "disparate" standards in determining the attorney fees awards to them and to the Fullers. They point out their own motion "presented a detailed accounting of each and every time entry from counsel's billings broken out into numerous categories of recoverable and unrecoverable fees. In contrast, other than a very limited 50–50 split of certain fees during the period from July 2007 to January 2008, the Fuller Fee Motion provided no allocation between recoverable and unrecoverable fees nor did it "apportion the purported fees they incurred among any categories of legal work and make little if any effort to differentiate between fees for one client (or case) and fees for another." The Murrells chastise the referee for "going through [their] carefully organized and analyzed categories of fees dramatically cutting fees from various of the categories there identified" but, contrariwise, in assessing the Fullers' fees motion, the referee "did nothing further to allocate (between compensable and noncompensable work) the unapportioned hours which made up the vast majority of time for which the Albright Firm sought compensation."

The initial failing of the Murrells' position lies in their bare assertion that the trial court failed to make the requisite allocation and apportionment assessments, which they fail to delineate as to each particular item that should have been allocated as noncompensable and which hours should have been apportioned to other matters. On this silent record and in the face of no contrary showing by the Murrells, this court must presume the trial court performed its official duty to determine whether any allocation was warranted, and in so doing, determined no allocation was necessary. (See, e.g., *Schwartz v. Poizner* (2010) 187 Cal.App.4th 592, 599.)

And the Murrells have forfeited their claim of error by failing to support it in their briefing with argument and applicable authority demonstrating the duty of the referee to make on the record specific findings as to why each particular item was not subject to allocation or apportionment to other matters and that in failing to do so, the trial court abused its discretion in adopting the referee's findings and recommendations with respect to these two awards. (*Boyle v. CertainTeed Corp.*, *supra*, 137 Cal.App.4th at pp. 649–650 [challenge to presumption of correctness requires pertinent "argument and legal authority on each point raised, " not just "bare assertion of error"].)

Judge Ettinger neither erred nor abused his discretion in awarding the Fullers $333, 525.00 as attorney fees, which is $155, 380.69 less than the $488, 906.69 requested. In determining the appropriate amount of fees, Judge Ettinger did not include fees attributable solely to RHCA and apportioned the work performed by

the Albright firm jointly on behalf of the Fullers and RHCA, which resulted in a reduction of the requested fees. Judge Ettinger made no apportionment among the Fullers' three claims based on his conclusion apportionment was unwarranted because these claims were inextricably intertwined.

The Murrells attack this apportionment reduction in the requested fees as "unreasonable in the extreme" and seek further reduction. They challenge, as unjustified, the $1, 400 billing entry for Mr. Albright's visit to the Fuller property in 2006 to ascertain the condition of the Fullers' view. They speculate that this visit necessarily pertained only to BC358599, because this visit was in temporal proximity to removal of Pine Tree #1. We decline to credit this speculation. (See, e.g., *People v. Mendoza* (2000) 24 Cal.4th 130, 174 ["argument is based on speculation, not evidence, and we therefore reject it"].)

The Murrells also challenge the apportionment reduction because Judge Ettinger did not reduce the fees awarded by another $114, 500, namely, $50, 000, which they claim was spent on other consolidated cases; $40, 000, which they claim was "related to settlement discussions"; and $24, 500, which they claim "is obviously attributable to... RHCA." But the Murrells have failed to demonstrate that the apportionment reduction was insufficient.

The Fullers met their initial burden of presenting prima facie evidence that the services subject to a fees motion were necessarily incurred by presenting an itemized and verified statement of such services. (*Hadley v. Krepel*, *supra*, 167 Cal.App.3d at p. 682.) The burden thus fell on the Murrells to challenge specific items as unwarranted or not recoverable. (See, e.g., *Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.*, *supra*, 163 Cal.App.4th at p. 564 [general claims that fees sought are unrelated or excessive not suffice]; *Farber v. Bay View Terrace Homeowners Assn.* (2006) 141 Cal.App.4th 1007, 1015–1016 [mere claim fees unrecoverable insufficient; duty to present contrary evidence and explain why].)

"[T]he verified time statements of the attorneys, as officers of the court, are entitled to credence in the absence of a clear indication the records are erroneous." (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 396.) The Murrells' claim of inadequate reduction is based solely on speculation and on wholesale complaints which are not specifically delineated and addressed. Judge Ettinger therefore did not abuse his discretion in not striking the above three fee categories, which were verified by Mr. Shakouri in his declaration.

The Murrells contend Judge Ettinger committed reversible error by failing to apportion fees among the Fullers' three claims. We disagree. Judge Ettinger acted well within his broad discretion.

Apportionment of attorney fees lies within the sound discretion of the trial court, which discretion is abused only if the court """"exceeds the bounds of reason, all of the circumstances before it being considered."' [Citation.]"' [Citations.]" (*Bell v. Vista Unified School District* (2000) 82 Cal.App.4th 672, 687.) Apportionment of attorney fees is not always required where such fees were incurred for services rendered on issues common to a claim for which fees are authorized and a claim for which fees are not authorized. (*Reynolds Metal Co. v. Alperson*, *supra*, 25 Cal.3d at pp. 129–130; *Fed-Mart Corp. v. Pell Enterprises, Inc.* (1980) 111 Cal.App.3d 215, 227.) No apportionment is warranted where these claims are """inextricably intertwined, """ because this state of affairs renders it "'impracticable, if not impossible, to separate the multitude of conjoined activities into compensable and noncompensable time units.'" (*Abdallah v. United Savings Bank*, *supra*, 43 Cal.App.4th at p. 1111.)

Judge Ettinger expressly found that no apportionment among claims was warranted because the claims were "factually interdependent and rest[ed] upon proving the same set of legal issues, " which rendered it "impractical, if not impossible to separate the attorney's time into compensable and noncompensable units." This finding is supported by substantial evidence. In BC327629, the Fullers asserted three legal theories for damages against the Murrells: (1) breach of the CC&R's; (2) breach of oral agreement; and (3) nuisance. There is no dispute that attorney fees are authorized for the prosecution of a CC&R's violation claim under Civil Code section 1354 and that such fees are not authorized for the other two claims. Nonetheless, the record reflects that all three claims are indeed inextricably intertwined. The oral agreement claim is grounded in the Fullers' position that in the spring of 2001, the Murrells promised to trim and maintain their trees at the agreed-upon levels to enforce the Fullers' view entitlement under the CC&R's, and the Fullers promised in return to forbear from prosecuting their view complaint for removal of Pine Tree #1 pursuant to the CC&R's. Similarly, the factual underpinning of the nuisance claim was the Fullers' position that the Murrells' trees were interfering with the Fullers' view to which they were entitled under the CC&R's. And the damages sought on each of these claims were identical, and the jury was instructed the Fullers could recover damages for one claim although the claim was based on three legal theories.

The Murrells' final contention is that Judge Ettinger erred in awarding the Fullers fees incurred with respect to three miscellaneous matters. We find neither error nor abuse of discretion. As the Fullers' attorney, the Albright firm was obligated to procure coverage under their homeowners policy for enforcement of the CC&R's. Judge Ettinger also was not remiss in awarding $1, 736 in fees for the time the Albright firm spent determining

whether the Fullers' action against the Murrells was covered under the indemnity agreement between the Fullers and RHCA. The Murrells' claim that awarding fees for attendance of two attorneys at mandatory settlement conference and during mediation fails for lack of particular argument supported by applicable authority. The mere participation of more than one attorney at an event does not compel the inference of a duplication of effort and that an award of fees for more than one attorney's participation is improper.

RHCA contends the Murrells' entire fees award must be reversed because the trial court erred in taking into account the breach of fiduciary duty claim in declaring the Murrells the prevailing party.[27] RHCA further contends that even if this were not the case, the matter must be remanded for recalculation of the amount awarded, because the court took into account an inapplicable factor - the breach of fiduciary duty claim - and failed to consider the diminutive success achieved. We disagree.

RHCA owed the Murrells the fiduciary duty to enforce the CC&R's and not to misapply the CC&R's. The Murrells sued RHCA for misapplying the CC&R's. Contrary to RHCA's claim, the breach of fiduciary cause of action thus was inextricably intertwined with the breach of the CC&R's cause of action. As such, the trial court properly considered the breach of fiduciary claim in determining whether the Murrells were the prevailing party under Civil Code section 1354, which authorizes an award of attorney fees to the party prevailing in an action to enforce CC&R's. For the same reason, the trial court properly considered the breach of fiduciary duty cause of action in determining the amount of the attorney fees award.

RHCA concedes "the trial court properly... evaluate[d] whether all of the fees claimed by the Murrells related to their successful causes of action" and that "the trial court acknowledged" its duty to determine whether these fees were reasonable in view of the degree of success achieved by the Murrells. RHCA faults the court for failing to carry out its duty "by evaluating whether the $399, 930.88 attorney fee award was reasonable in light of the Murrells' $30, 000 recovery." The record does not support RHCA's dereliction of duty claim. And in the absence of evidence to the contrary, we must presume the trial court, having articulated its duty, performed this duty by taking into account the award of the Murrells' recovery. (*Schwartz v. Poizner*, *supra*, 187 Cal.App.4th at p. 599; *Jacobson v. Simmons Real Estate* (1994) 23 Cal.App.4th 1285, 1290 ["Absent any indication to the contrary, we presume the trial court regularly performed its official duty and was sufficiently prepared to rule on the fee request."].)

The Murrells contend the trial court's attorney fees award of $399, 930.88 against RHCA was inadequate. We disagree

The Murrells contend the referee "improperly apportioned... fifty percent (50%) of attorneys' fees related to [their] Category 18 ('[p]reparation of motions in limine, reply papers, opposition papers to motions in limine brought by the RHCA, associated applications, and other legal work related to same')." (Boldface omitted.) They argue the $46, 405 in fees in that category had excluded specifically fees associated with motions in limine in BC358599 and with the Murrells' cross-complaint in BC327629. They further argue "Category 28 specifically [takes into account], as unrecoverable, time related to the Murrells' counsel's preparation of 'opposition to motions in limine brought by cross-defendants the Fullers.' Likewise, Category 31 [also factors in] unrecoverable time '[a]ddressing trial preparation issues related solely to the Murrells' complaint in... BC358599, including, preparation of motions in limine which only related to that action.'"

The thrust of the Murrells' position is that Judge Ettinger had no choice but to adopt the Murrells' self-proclaimed apportionments. Such is not the law. Rather, the trial court was imbued with broad discretion in determining whether or not to accept the Murrells' fee allotments. The court may, but is not required to, "adopt the referee's recommendations, in whole or in part, after independently considering the referee's findings and any objections and responses thereto filed with the court." (Code Civ. Proc., § 644, subd. (b); *Holt v. Kelly* (1978) 20 Cal.3d 560, 563.) That Judge Ettinger did not rubber-stamp the Murrells' offered apportionment of fees therefore does not equate with an abuse of discretion.

The Murrells next contend no basis exists for the determinations of the referee and Judge Ettinger to allocate the fees incurred by them for trial preparation and during trial 50 percent to BC325047 and 50 percent to BC327629. They argue that in "Categories 17 and 19, the Murrells generously apportioned such time 85% to BC325047 and 15% to BC327629." This contention suffers from the same fatal flaw as their previous contention.

Similarly flawed is the Murrells' contention that because they "specifically excluded non-recoverable work and entries from Category 20, " which pertains to "work related to the judgment and post-judgment in BC325047, the [r]eferee and trial court [improperly] deducted 15% from $36, 875.00" claimed in that category. Again, it was within the province of Judge Ettinger to determine whether additional fees should be excluded and whether the amount of any allowed fees were nonetheless excessive. No abuse of discretion therefore is shown in this regard.

The Murrells contend the trial court abused its discretion in adopting the referee's recommendation that "30% or $9, 897.75 of the background

investigation/complaint preparation fees sought by the Murrells and 30% of the demurrer fees or $3, 323.25" should be attributed to tasks performed regarding Crocker based on the fact he along with RHCA were defendants in the Murrells' complaint (BC325047) and the demurrers concerned Crocker as well as RHCA. Contrary to the Murrells' position, their claims against Crocker were not inextricably intertwined with their claims against RHCA. A plain reading of the record in the Murrells' appeal from the summary judgment in favor of Crocker (B190152) and the record in this appeal (B210814) reveal the claims against RHCA were distinct and separate from those against Crocker. The Murrells once more fail to show any abuse of discretion on the part of Judge Ettinger.

The Murrells challenge the trial court's apportionment of 40 percent of the $46, 900 attorney fees claimed in category 2 arising from multiple mediations and settlement discussions with RHCA as unjustified. They argue "[t]he Murrells unquestionably had to attend and address themselves to all settlement conferences and other discussions in the consolidated cases on account of the case against RHCA in BC325047." We disagree. The referee and Judge Ettinger were entitled to reject their claim of absolute necessity and determine for themselves whether any particular mediation and settlement discussion pertained to BC325047 and RHCA, and if so, to what extent such discussion was attributable to other matters.

The Murrells also challenge the apportionment for discovery in categories 7, 8, and 9 as unjustified. The referee deducted for each category, respectively, $5, 805.00, $1, 518.00, and $6, 538.50, or a total of $13, 861.50. They contend "the [r]eferee ignored the fact that the Murrells had specifically allocated to non-recoverable Categories 24 and 27, discovery in BC327629 (the Fuller case and Murrell Cross-Complaint)" and "the fact that any discovery directed at... Crocker was reasonable and necessary for the Murrells' case against the RHCA." This claim of error suffers from the same infirmity as their contentions above in that neither the referee nor Judge Ettinger were duty-bound to accept the Murrells' allocation and position that discovery as to Crocker was inextricably intertwined with their claim against RHCA. No abuse of discretion is shown.

The Murrells contend the referee's recommendation of a fees award of "no less than $16, 000" as to category 21 was based on a prejudicial mistake by the referee. Category 21 comprised 32 items which pertain to tasks related to preparation of the Murrells' fees motion and are reflected in a spreadsheet which delineates the date, attorney, description, time spent, and category, among other things, for each fee sought. An aggregate amount of $21, 467.50 was sought as fees for this category. The Report reflects that as to this category, the referee wrote: "The Murrells request $21, 467.50 in attorney's fees for preparation of the Motion for Attorney's Fees." In recommending a reasonable fee amount, the referee found "[s]ince the mathematical analysis prepared by the Murrells was of significant use... in evaluating the recoverable fees in this case, and was obviously of a highly time consuming nature, the request[] should be granted in the amount of no less than $16, 000." The Murrells point out that in the declaration of their counsel, he increased the amount sought as to category 21 to $28, 867.50, which is based on "Additional Fees Incurred: $1, 650.00" and "Additional Anticipated Fees: $5, 750.00."

The Murrells claim Judge Ettinger's "award of $16, 000 when the fees incurred totaled $28, 867.50 is improper." We disagree. Judge Ettinger was well aware that the referee recommended an award of "no less than $16, 000" but declined to exercise his discretion to exceed that amount. The Murrells cite nothing in the record to support an inference that Judge Ettinger did not know the Murrells sought $28, 867.50, not $21, 467.50. No prejudice therefore flowed to the Murrells from the referee's mistake.

Finally, the Murrells contend Judge Ettinger failed to correct an obvious typographical error in the calculation of the $12, 298.50 fees awarded for category 15, which they invite this court to remedy. They argue "it appears that the [r]eferee used 40% of the $30, 746.25 figure sought by the Murrells (after the 50% reduction), not 40% of the $61, 492.50 in attorney fees at issue in Category 15. When the 40% is multiplied by the $61, 492.50, the recoverable fees for this category are $24, 597.00, not $12, 298.50."

At the July 18, 2008 hearing, Judge Ettinger stated he had considered the "motions for attorneys' fees, motions to tax costs, and a recommendation from the post verdict referee, and objections of the Murrells to the recommendation." Following argument, Judge Ettinger ruled that having read the referee's recommendations, he found "them, including all the commas, periods, and exclamation points-I subscribe to it, I endorse it, and I am adopting it in every particular." After applauding the legal work performed by the parties, Judge Ettinger stated that he believed in his "heart of hearts, that much of it was unnecessary."

Mr. Light, the Murrells' counsel, told the judge that he had a question which was not "a substantive one in that sense"; rather, the fee "for category 15... looks like a typographical error on the calculation, and I was wondering if that would get fixed." He explained that the referee "says we get 40 percent of our fees that were incurred and not 50 percent, which is what we said; but then he calculated it based on the [$]30, 000 not the [$]61, 000 and change; and so basically... he is just doing [the calculation] as if the [$]30, 000 is what we asked for, not the [$]60, 000."

After Mr. Albright, counsel for RHCA, stated it was not a "typographical error, " Judge Ettinger agreed, adding "but to satisfy your curiosity, when this session is

ended and at the first break, I am going to call the referee to ask that question." He clarified that "[t]he order is what it is. I do not intend to modify it, with the exception that if counsel is correct as to category 15 and the number $12, 298.50 is a typo, I will correct that typo." No modification of the order has been made.

The presumption is that Judge Ettinger called the referee and confirmed that this figure was not a "typo." The Murrells, having agreed to this procedure, have forfeited any claim of error in this regard.

The Murrells also contend the trial court erred in failing to award additional costs under Civil Code section 1354 in the total amount of $18, 724.12 ($9, 633.87, photocopy charges; $2, 765.25, fax charges; and $6, 325.00, expert witness expenses). There was no error.

Initially, we point out the request was untimely. A party claiming costs "must serve and file a memorandum of costs within 15 days after the date of mailing of the notice of entry of judgment...." (Cal. Rules of Court, rule 3.1700(a)(1).) On January 4, 2008, judgment was entered. On January 9, 2008, the notice of entry of judgment was served. On January 18, 2008, the Murrells filed a memorandum of costs requesting $50, 642.14 (Code Civ. Proc., § 1032). The Murrells did not file their motion for an additional $18, 724.12 as costs under Civil Code section 1354 until March 3, 2008.

We further determine the Murrells forfeited their claim of error by failing to secure a ruling on the matter from Judge Ettinger. As the Murrells acknowledge, and the record reflects, neither the referee nor Judge Ettinger addressed their request for $18, 724.12 as costs under Civil Code section 1354. Although the Murrells filed objections to the referee's Report, they did not point out the absence of a ruling on this request, nor did the Murrells seek reconsideration of Judge Ettinger's order on the ground that he did not rule on their request. We deem the Murrells to have forfeited their claim of error. In the absence of a final ruling, we have nothing before us to review. (See, e.g., *People v. Wilson* (2008) 44 Cal.4th 758, 798–799; *People v. Samayoa* (1997) 15 Cal.4th 795, 827–828; cf. *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 517.)

In any event, the Murrells are not entitled to recover as costs the items sought to be reimbursed under Civil Code section 1354. Section 1354, subdivision (c) provides: "[T]he prevailing party shall be awarded reasonable attorney's fees and costs." Section 1354 does not define "costs." We therefore seek guidance elsewhere. "Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." (Code Civ. Proc., § 1032, subd. (b).) Those items "allowable as costs under Section 1032" are described in Code of Civil Procedure section 1033.5, subdivision (a), and those items "not allowable as costs, except when expressly authorized by law" are described in subdivision (b) of that same section.

Telephone charges and "photographing charges, except for exhibits" are not allowed as costs. (Code Civ. Proc., § 1033.5, subd. (b)(3).) An award of costs may include "[f]ees for expert witnesses ordered by the court" but not "[f]ees for experts not ordered by the court." (*Id.*, subds. (a)(8), (b)(1).) The additional costs here sought are: $9, 633.87 (photocopy charges), $2, 765.25 (fax charges), and $6, 325.00 (expert witness expenses). The Murrells do not claim these photocopy charges are for exhibits, nor do they claim these fees are for expert witnesses ordered by the court. The claimed fax charges are a form of telephone charges, and thus, also expressly excluded. The trial court properly did not include any of these charges and fees as costs.

VII. CONCLUSION

The summary judgment against the Murrells and in favor of RHCA regarding its removal of Pine Tree #1 located on the easement portion of the Murrell property is affirmed, as is the award of attorney fees in favor of RHCA in connection with this summary judgment in BC358599. In the consolidated cases BC325047 and BC327629, we affirm in full the judgments based on the jury verdicts awarding the Murrells $30, 000 against RHCA and the Fullers $10, 000 against the Murrells and on the court declaration that RHCA "may remove and/or cut back trees from within the easement on the Murrells' property and cut back trees not growing in the easement in order to maintain and improve the view of the Fullers so long as such actions are not done arbitrarily and capriciously." We also affirm the order awarding attorney fees in the amount of $333, 525 to the Fullers from the Murrells and the order awarding attorney fees in the amount of $399, 930.88 to the Murrells from RHCA.

DISPOSITION

The judgments and orders on appeal are affirmed. Each party shall bear own costs on appeal.

I concur: JOHNSON, J.

ROTHSCHILD, J., Concurring and Dissenting.

I concur in the majority opinion except as to the following points: (1) I do not agree that the judgment against the Murrells on the Fullers' claim for breach of the CC&Rs is supported by substantial evidence; (2) I do not agree that, if the judgment were reversed as to that claim, the judgment in favor of the Fullers on their claim for declaratory relief concerning the CC&Rs would be sufficient to warrant an award of attorney fees, so I would reverse that award as well; and (3) I do not agree with the trial court's reasoning, which the majority opinion adopts, that because the Rolling Hills Community Association (RHCA) removed Pine Tree #1 "pursuant to Board decision, after investigation and discussion" and allowed input from the Murrells, the RHCA therefore did not

breach its fiduciary duty to the Murrells.

Notes:

[1] Numbers prefaced with "BC" designate a case in the Los Angeles Superior Court.

[2] Numbers prefaced with "B" designate an appeal or a cross-appeal.

[3] In BC325047, Harold J. Light represented the Murrells. Initially, Albright, Yee & Schmidt (Albright firm) represented RHCA on the Murrells' complaint. In January 2005, Scottsdale (RHCA's then-insurance carrier) accepted coverage and selected Joseph P. Gallo to defend RHCA, which he did, without active participation of the Albright firm, until September 2007, the time of trial. Mr. Gallo also represented RHCA on the cross-complaint. Sidney Croft, RHCA's in-house counsel, represented Crocker.

[4] In BC327629, the Albright firm represented the Fullers on their complaint. On the Murrells' cross-complaint, the Fullers were represented by Veatch Huang, who was provided by their insurance company. Mr. Light represented the Murrells.

[5] In BC358599, Mr. Light represented the Murrells. The Albright firm represented RHCA.

[6] In BC358599, the trial court (Judge Richey) denied production of this letter and then denied reconsideration of its order. Because we later reject the Murrells' claim of error in this regard, we deny the Murrells' request filed February 21, 2008, for judicial notice of the letter. (*Steadman v. Osborne* (2009) 178 Cal.App.4th 950, 954.)

We also deny RHCA's request filed June 5, 2008, for judicial notice of two ex parte applications to enjoin RHCA from removing Pine Tree #1 and the related rulings denying the applications because they lack relevancy. We deny the Murrells' related request for judicial notice filed June 25, 2008, and deny the renewed request in their reply brief for the same reason.

[7] RHCA also supplied the declaration of Peggy Minor, RHCA's then-manager, in which she authenticated exhibits 1 through 29 attached to her declaration. Exhibit 1 was a copy of the CC&R's. In her declaration, Minor stated that "[i]n mediating the dispute between the Fullers and the Murrells [RHCA] followed the specific guidelines and procedures promulgated under Resolutions 166 and 181 and the CC&R's." She further stated that [i]t is the policy of [RHCA's] Board to hold private executive meetings where any discussion during that meeting might affect pending litigation."

[8] In its entirety, section 15 of article I provides: "No tree on any building site, having a height of twelve (12) feet or over above the ground, shall be trimmed, cut back, removed or killed except with the written approval of the Board of Directors of the Association. The Association shall have the right at any time to enter on or upon any part of said property for the purpose of cutting back trees or other plantings which, in the opinion of the Association, is warranted to maintain and improve the view of, and protect, adjoining property. The Association shall have sole authority and right to trim, remove, replace, plant or replant, or direct and determine the type of such planting, or otherwise care for the trees, shrubs and plantings in or along any easements or rights-of-way granted to or reserved by Palos Verdes Corporation and/or the Association on or adjacent to any said lots, subject to any County or other official having superior jurisdiction."

[9] In contrast, we note that section 2(e) of article V provides that RHCA "with respect to easements subject to its jurisdiction, shall have the right of ingress and egress thereto and therefrom, and the right, privilege and easement of doing whatever may be necessary in, under and upon said locations for the carrying out of any of the purposes for which said easements and rights-of-way are reserved." Implicit in the phrase "doing whatever may be necessary" is the authority to remove a tree located on RHCA's easement if that tree interferes with or its removal would enable RHCA to carry out any of the enumerated purposes for the easement. It does not follow, however, that pursuant to section 2(e) this is the only situation for which RHCA is authorized to remove a tree located on its easement.

[10] Judge Umhofer was retired but assigned to preside over this matter.

[11] Our above disposition affirming the summary judgment in favor of RHCA moots the Murrells' third position that no award of attorney fees is appropriate because RHCA is not entitled to summary judgment.

[12] In a footnote, the Murrells challenge the $400 hourly rate of Mr. Albright and the $350 hourly rate of fellow partner Mr. Derek Yee, who was admitted to the bar in 1988, as "not reasonable under the circumstances here presented." We deem their challenge, akin to an afterthought, unsupported by record references, supporting argument, and applicable authority, to be forfeited.

[13] The trial court granted a nonsuit on the Murrells' cross-complaint against the Fullers (BC327629).

[14] We deem RHCA's request filed August 13, 2010, to be for judicial notice of the attached copy of the July 31, 2008 minute order denying RHCA's motion to correct the judgment. We grant the request.

[15] We deem forfeited the Murrells' claim of instructional error by the giving of a modified version of CACI No. 300, which advised the jury that consideration

for the agreement was "the Fullers forbearing on pursuing their view complaint with [RHCA] and not seeking enforcement of [RHCA's] decision to remove" Pine Tree #1. To the extent the Murrells contend the trial court further erred in refusing the Murrells' proposed special jury instruction numbers 32 through 36 on their statute of frauds defense, we deem this claim of error also forfeited. Neither claim of error is supported by pertinent argument or applicable authority. (See, e.g., *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1198–1199 [perfunctory assertion unsupported with legal argument or authority deemed without foundation and rejected]; *Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns* (1992) 7 Cal.App.4th 27, 35 ["well-settled rule that '"[a] point which is merely suggested by [a party's] counsel, with no supporting argument or authority, is deemed to be without foundation and requires no discussion." [Citation.]' [Citation.]"].)

[16] By failing timely to object and request a curative admonition, the Murrells forfeited any claim of error regarding counsel's misstatement. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 794–795; *Cope v. Davison* (1947) 30 Cal.2d 193, 202.) We note that in his closing argument, counsel for the Murrells corrected the misstatement, and the jury was instructed that statements and arguments by the attorneys are not evidence (CACI No. 106).

[17] The Murrells' reference to RHCA's removal of Pine Tree #1 without their consent is of no help. In BC358599, they sued RHCA for trespass based on such removal and lost, and, as discussed earlier, we affirmed the judgment in that matter. And RHCA had a right to remove Pine Tree #1 because it was located on RHCA's easement, which necessarily gave RHCA the right to enter that portion of the Murrell property without their permission.

[18] The eucalyptus tree referred to in several of these writings is not at issue on appeal.

[19] The trial court excluded the letter under Evidence Code section 352 on the ground its admission would "prolong this case by having a back-and-forth between the testimony by lawyers as to the motivation of why they wrote a letter and everything else." We review the propriety of the ruling, not the underlying reasons. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19; *Oakdale Village Group v. Fong* (1996) 43 Cal.App.4th 539, 547.)

[20] Only Pine Tree #1 was located on the Murrell property encumbered by the RHCA easement.

[21] Civil Code section 1354, subdivision (c) provides that "[i]n an action to enforce the governing documents [of a common interest development], the prevailing party shall be awarded reasonable attorney's fees and costs."

[22] The Murrells do not challenge the order awarding the Fullers costs.

[23] The Murrells originally sought $50, 642.14 as costs. RHCA moved to tax these costs. The trial court reduced the costs awarded to $29, 552.63. These costs are not in dispute.

[24] We note the Report refers to the "consolidated cases BC325047 and BC358599." We deem this reference also to include BC327629, which was consolidated with these cases.

[25] As we have already determined, the Murrells forfeited their claim that this court should apply a more stringent standard of review.

[26] The Murrells' alternative claim that the entire award to the Fullers must be reversed is moot. As discussed above, we already rejected the underlying premise that the jury verdict in favor of the Fullers was infirm.

In any event, even if the evidence were insufficient to support the verdict on the Fullers' breach of the CC&R's cause of action, an award of attorney fees in favor of the Fullers is supported by the trial court's decision in their favor on their declaratory relief cause of action to enforce the CC&R's. (See Code Civ. Proc., § 22; see also *Salawy v. Ocean Towers Housing Corp.* (2004) 121 Cal.App.4th 664, 672, 673 ["'action to enforce'" includes actions for "declaratory relief"].)

[27] RHCA alternatively contends the fee and cost award must be reversed because the jury verdict in favor of the Murrells must be reversed in its entirety or even if this court merely concludes RHCA did not breach the CC&R's. This contention is moot in view of this court's earlier dispositions adverse to RHCA's position. RHCA does not challenge the cost award on the merits.
