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No. 50113-9-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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MATTHEW and AMY JOHNSON, and  
MARK and KATHERINE SCHOMAKER

Appellants,

v.

LAKE CUSHMAN MAINTENANCE CO.

Respondent

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APPELLANTS' REPLY

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Carmen Rowe  
Attorney for Appellants

Gryphon Law Group PS  
1673 S. Market Blvd. #202  
Chehalis, WA 98532  
WSBA No. 28468

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## **I. INTRODUCTION AND STATEMENT OF THE CASE**

Was the Easement valid? There is no evidence that Lake Cushman Company had authority to grant the Easement. The Court has the discretion to consider this issue, as it goes to LCMC's right to maintain this action and in rendering a proper decision.

If the Easement is valid, could a reasonable person find that there was no intent to convey "exclusive" use to LCMC in what is tantamount to a fee simple interest? Yes. Intent is the paramount consideration when interpreting a deed. Intent is a question of fact.

When taken in the light most favorable to Johnson and Schomaker, the facts support any one of the alternate interpretations of this Easement that do not deprive Johnson and Schomaker of the use of their own property. LCMC's interpretation is the most dubious and least likely to prevail, but that is not yet the question. The question is whether a reasonable person could agree with Johnson and Schomaker's interpretation. The answer is yes.

## **II. ASSIGNMENTS OF ERROR**

LCMC heavily critiques Johnson and Schomaker for assigning error to the trial court's lack of findings of fact on key points. LCMC asks the Court to disregard the related arguments, but LCMC's complaint does not negate the merits of the arguments. Following the trial court's decision by following its findings and

conclusions is a pragmatic way to walk through the multiple issues. A road map, as it were. Missing findings of fact are also instructive where the trial court *did* in fact enter several findings.

LCMC drafted the order containing the findings. LCMC opened the door. When asking the trial court to enter these findings and conclusions, LCMC documented the court's analysis. Missing pieces are worthy topics of discussion in this Court's review.

Most of the assignments of error also note that several findings of fact are actually conclusions of law, and the Court will consider them as such. See Assignments of Error Nos. 2-6; *Willener v. Sweeting*, 107 Wn.2d 388, 394 (1986) ("a conclusion of law erroneously described as a finding of fact is reviewed as a conclusion of law")(additional citation omitted).

### **III. STATEMENT OF PRIMARY FACTS AND LEGAL RELEVANCE**

Johnson and Schomaker submitted facts raising significant questions as to the validity and scope of the Easement, and their lawful use of their underlying servient property. LCMC does not demonstrate that a reasonable person could not find Johnson and Schomaker's facts more credible, or reach different conclusions than the ones LCMC promotes, especially when viewing the facts in the light most favorable to Johnson and Schomaker. LCMC argues

alternate interpretation of those facts. The trial court should have resolved factual questions before making determinations of law.

**A. Use of the Easement: Why this discussion is appropriately before the Court.**

LCMC openly admits that the facts relating to use of the Easement are disputed. *See, e.g.* Respondent's Brief at 5 (from the second full paragraph: "[t]hose disputed facts" ... "regarding historical use" ... "contested by LCMC" ... "constituted the primary issues of fact reserved for trial.>"). Each party submitted substantial evidence with contrary views on use of the Easement and how that pertains to the original intent of the parties and purpose of the Easement. There is without question a genuine dispute of facts.

The next question is, are these disputed facts material to the legal issues? The answer is a resounding yes.

Discussion about use in this appeal is not about negligence. This appeal is about interpretation of an easement in a deed. Interpretation rests on circumstances and intent, which are factual questions relying in significant part on evaluating use.<sup>1</sup>

The case also includes issues that the trial court did not reach, but should have. One is whether Johnson and Schomaker's use fell within their right as servient leaseholders to use the land so long as it did not preclude LCMC's use of the Easement.

LCMC would like to shut that conversation down. But it cannot be ignored. Key questions to the above issues all involve use: How is the Easement used by LCMC members, how was it used historically, and how does this use impact intent and scope?

**B. Use of the Easement: Interpretation of the deed.**

Use is a fact materially relevant to interpretation of the Easement. Courts place paramount importance on ascertaining intent when interpreting the scope of an easement. Intent turns on a factual determination based on circumstances, which includes consideration of use of the easement and actions of the parties.

Courts will not only look to the plain language of the deed, but also the circumstances. *See, e.g., Ray v. King County*, 120 Wn. App. 564, 574 (2004)(in addition to language of deed court looks at circumstances surrounding the deed's execution and the subsequent conduct of the parties).

The dictionary definition of "exclusive" does not answer the question of, exclusive as to what? There are more than one reasonable interpretations in the context of this Easement, such as LCMC had exclusive use of the Easement, or that the exclusive use of the Easement was for road and park purposes. Answering that question turns in significant part to the use of the Easement.

1. Purpose of the Easement: a factual discussion of circumstances relating to intent and interpretation of Easement.

LCMC extensively argues evidence of the alleged purpose of this Easement. Evaluation of evidence is a question of fact. LCMC also recognizes that purpose is relevant to understanding the Easement and why exclusive should (or should not) mean what LCMC says it does. Consideration of purpose is consideration of intent, and intent is a fact question.

a. Purpose of the Easement remains in question.

LCMC fails to establish the purpose of the Easement as a matter of law. Even if it had, whether that purpose supports LCMC's interpretation of the Easement is a question of fact.

LCMC claims that its role to "manage and care for" the parks means that it should have unlimited use of the Easement. CP 293; CP 249 and 251-258. But reasonable minds could differ.

LCMC argued in its summary judgment motion that it had the "legal right *and obligation* to develop the *entire park area* located on the [E]asement". CP 183 (emphasis added). It backed off a bit in its response brief, stating that LCMC had the "legal right and *probably* an obligation to develop the entire park [E]asement." Respondent's Brief at 26 (emphasis added). There is no evidence proving an "obligation", only argument of counsel. Whether LCMC had an obligation to develop part of all the Easement is for the finder of

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fact. The underlying scope of the Easement – what is meant by “park and road purposes” – also requires a determination of intent, a fact question based on circumstances and use.

Johnson and Schomaker presented evidence sufficient to create a question of fact indicating that Lake Cushman Company did not intend for LCMC to commandeer the Easement to the exclusion of the servient leaseholders. If Lake Cushman Company meant for the Easement to be exclusively part of the Park, it could have platted that land as such or carved out a separate parcel as it did in other cases. See CP 49, 77-78 and 79-82 (Johnson Declaration); CP 259-60 (other parks and golf course). LCMC’s argument that Lake Cushman Company could not create a separate lot because Lake Cushman Company was limited to four lots is unavailing. Lake Cushman Company did not have to use a Short Plat. A reasonable person could conclude that Lake Cushman Company did not intend to dedicate this land solely to use as a park by way of an easement, else it would have simply transferred fee title as it did in other areas.

- b. Whether Johnson and Schomaker’s use of their servient estate can be compatible with the purpose of the Easement is a fact question.

A reasonable person could conclude that Johnson and Schomaker’s alternate interpretations of “exclusive” still allow

LCMC to fulfill its purpose (whatever that may be), or exercise its rights under the Easement (whatever those may be). LCMC claims that “[a]n exclusive easement makes common sense when you consider the use or purpose of the easement is for a park.” Respondent’s Brief at 26. But “common sense” conclusions are questions for the fact-finder.

It is up to the fact-finder to determine whether *any* use by Johnson and Schomaker is *absolutely* incompatible with LCMC’s use of the Easement (which is currently *de minimus*), the only circumstances where Washington or other law has interpreted an “exclusive” easement as LCMC would interpret this one, outside unique arenas such as associations, railroad right-of-ways or highly unique circumstances. *See, e.g., Blackmore v. Powell*, 150 Ca. App. 4<sup>th</sup> 1593 (2007), cited by LCMC (after a factual analysis, the court found there can be no use of the garage by the servient owner that would not interfere with its use by the dominant estate holder, thus warranting exclusive use as to that portion, but only that portion, of the “exclusive” easement).

The trial court’s error in imposing an injunction is based on a fact question as to whether Johnson and Schomaker’s current use actually interferes with LCMC’s use (a point on which LCMC presented no evidence at summary judgment); or if Johnson and

Schomaker's unknown future use will necessarily interfere with LCMC's hypothetical future use. Until there is an actual interference (in and of itself a factual question), there can be no injunction. *Thompson v. Smith*, 59 Wn.2d 397, 408-409 (1962)(improper to prevent servient owner's use of concrete pad when the roadway not being used by the dominant easement owner).

2. Historical use: a factual discussion relating to conduct of the parties in determining intent.

Historical use of the parties goes to the circumstances surrounding the deed's execution, a core element of ascertaining intent. Unavailability of original parties (if that is in fact true) does not absolve LCMC of its burden on summary judgment or allow it to escape the necessary factual analysis.

Johnson and Schomaker submitted substantial evidence of conduct and use inconsistent with the trial court's interpretation of the Easement, creating questions of fact. For example, there is historical use by Johnson and Schomaker's predecessors, the Brandts, parties (as LCMC would argue it) by extension of being successors to Lake Cushman Company. Five months after the Easement was recorded, the Brandts leased the Property at issue and shortly after built several substantial improvements on part of their Property underlying the Easement (a boat garage, fence and gate). CP 47-50, 123, 164, 297-299. Later owners continuously and

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exclusively used these areas and the lower drive to access these areas. CP 45-50, 113, 118, 123. LCMC never contested these facts. LCMC does not argue and there is no evidence that LCMC or any other party objected to these improvements or their exclusive use until this litigation. A reasonable person could conclude that if the original parties meant to exclude the leaseholders from using half of their property (and in the case of this fence/gate/boat-house, to the exclusion of anyone *but* the leaseholders), they would have taken some action at some point in the last 30-plus years.

There is a discussion on use (or non-use) of LCMC and its members in the following years. This is not about “overburdening”; the point is just the opposite. LCMC members make minimal use of only a very small portion of the Easement, a use that has only decreased over time. Appellants’ Brief at 12-14 (*ref.* CP 50, 112-3, 118, 250, 285-86, 299). A reasonable person could conclude that the Easement was never intended to completely bar Johnson and Schomaker from using half of their leasehold given the minimal apparent use LCMC makes of the Easement.

**C. Use of the Easement: Johnson and Schomaker’s use as servient owners of the leasehold.**

There is the question of whether Johnson and Schomaker’s current use fell within their legal right to use the underlying property as servient owners, as they did not unduly impair or prevent use of

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the easement. The trial court did not address this issue. It should have; and when it does, it is a question of fact. *Thompson*, 59 Wn.2d at 408 (proper use by the servient owner is a question of fact that depends on the extent and mode of use of the easement in question).

The court seeks to ensure a due and reasonable enjoyment for both the servient and dominant estate holders. *Thompson*, 59 Wn.2d at 408. Again the relevant analysis is of intent, considering the manner in which the easement has historically been used and occupied. *Evich v. Kovacevich*, 33 Wn.2d 151, 162 (1949).

**D. Use of the Easement: LCMC's claim of prescriptive easement.**

LCMC also asserted a claim for prescriptive easement. While not part of the summary judgment decision, such a claim would rely entirely on factual determinations with respect to historical and present use of the area by LCMC members.

**IV. LEGAL ARGUMENT**

**A. Standard of Review – recap.**

The court cannot grant summary judgment when LCMC did not meet its burden to prove the absence of any genuine issue of material fact on the several points in the necessarily analyses. CR 56(c). LCMC does not change this result in its response.

**B. Evidence before the trial court: Testimony subject to LCMC's Motion to Strike.**

A preliminary matter is consideration of the underlying testimony. Whether the trial court properly struck the testimony remains relevant in evaluating the trial court's decision. Both declarants established they had personal knowledge based on their use and years of ownership. LCMC also relies upon the premise that testimony regarding use addresses only the underlying negligence claim. That is inaccurate, as addressed above.

**C. There are questions of fact regarding the validity of the Easement.**

1. Lack of authority to grant easement.

a. New issues on appeal.

LCMC challenges this Court's ability to consider the question of whether Lake Cushman Company had the authority to grant the Easement. It is well within this Court's discretion to consider this question as necessary to a proper decision, as all other arguments flow from it and without such authority, the Easement is invalid and LCMC has no right to maintain its claims in this action. *Schmidt v Coogan*, 181 Wn.2d 661, 669-70 (2014), *Bennett v. Hardy*, 113 Wn.2d 912, 918-19 (1990), and *Mariner's Cove Beach Club, Inc. v. Kairez*, 93 Wn. App. 866, 889-90 (1999).

The appellate rules do not require this Court to decline to consider issues inadequately raised with the trial court. RAP 2.5(a);  
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*Schmidt*, 181 Wn.2d at 669-70, citing also to RAP 1.2(a). It is also proper to recognize an exception to RAP 9.12 where the question goes to whether the party had the right to maintain the action, as is the case here. *Mariner's Cove*, 93 Wn. App. at 889-90 (party had no right to maintain action where not authorized to do so); *Bennett*, 133 Wn.2d at 918-19. LCMC's right to maintain its action to enforce the Easement rests upon rights in the Easement. If the Easement is invalid, LCMC has no such right.

Appellate courts are also urged to decide cases on the merits, and the rules liberally interpreted to serve this end; thus, this Court's discretion to consider new claims of error not raised in the trial court. *Schmidt*, 181 Wn.2d at 669-70 (considering new claims as necessary for a proper decision, despite decades of litigation and several reviews on appeal); see also *Falk v. Keene Corp.*, 113 Wn.2d 645, 659 (1989)("[a]n appellate court has inherent authority to consider issues which the parties have not raised if doing so is necessary to a proper decision").

This is a legal issue that requires no factual resolution. LCMC briefed this issue in some depth. The necessary evidence (the Primary Lease, the Easement and the Short Plat) is part of the record and, indeed, already the subject of substantive arguments on both sides. These factors support this Court's discretion to

consider the issue of the Easement's invalidity due to the grantor's lack of authority. *Mariner's Cove*, 93 Wn. App. at 890.

b. Lake Cushman Company's lack of authority to grant easement.

LCMC claims that it established the appropriate chain of authority as the Easement was issued "pursuant to" the Primary Lease. But it misses the first link: The Primary Lease allowed easements *conditioned* upon written authority from the City to enter into them. Appellants' Brief at 25-26, Section VI (C)(1).

LCMC reaches to a 1960 New York case and a Florida secondary source to support its argument, but falls short. In *Nemmer Furniture Co. v. Select Furniture Co.*, 25 Misc.2d 895, 208 N.Y.S.2d 51 (1960), the court discussed the scope of a licensor's authority under a contract granting a license. The case does not speak to what happens when the grantor gave a right of access – under whatever label – when it had no authority to do so.

The Florida secondary authority suggests that a tenant *may* have the limited right to grant a right of way or a license, but this is a generalized statement. In *Von Meding v. Strahl*, the Michigan Supreme Court noted an important distinction: this does not extend to rights-of-way *conveyed by deed*: "A right of way cannot very well by [sic] granted by deed, estoppel or otherwise, by anyone but the landowners." 219 Mich. 598, 606, 30 N.W.2d 363 (1948).

There is no authority for the proposition that the City of Tacoma's right to enforce the Primary Lease precludes Johnson and Schomaker's rights as servient leaseholders to challenge use of an invalid easement.

2. Easement not validly created by Short Plat.

If Lake Cushman Company had no right to execute the Easement, the Short Plat does not make the invalid grant valid. *Von Meding*, 219 Mich. at 608-9. LCMC attempts to distinguish *Von Meding* based on the fact Lake Cushman Company is not a "stranger" to the property. But *von Meding's* holding is not limited to "strangers" to title. One of the would-be-grantors attempted to convey an easement over land that he himself had an easement right to. The existing easement right is analogous to Lake Cushman Company's leasehold rights. The holding was simple: someone with a right to land, but not the landowner, cannot transfer easement rights; and subsequent recorded documents cannot validate such a transfer. *Id.* at 609.

There also remains the question of fact as to whether the easement in the Short Plat is sufficiently certain and definite to create an easement. *Rainier View Court Homeowners Ass'n, Inc. v Zenker*, 157 Wn. App. 710, 719-20 (2010). *McPhaden v. Scott*, 95 Wn. App. 431, 435 (1999). If the easement in the Short Plat is valid,

the question of its scope is a separate discussion determining intent.

3. Easement invalid as there is a common grantor/grantee.

Johnson and Schomaker provided argument and authority that in this case, disregard of the corporate form is appropriate specifically notwithstanding the fact that there is a commonality of ownership or governance; and it is a question of fact. *Truckweld Equipment Co., Inc. v. Olson*, 26 Wn. App. 638, 643-44 (1980).

D. Questions of fact as to the meaning and scope of “exclusive” in the Easement.

The only thing unambiguous about the term “easement” in this deed is that it is ambiguous. LCMC argues that it obtained what is tantamount to a fee simple interest in half of Johnson and Schomaker’s property. A reasonable person could disagree. A court can only grant summary judgment if reasonable persons could reach but one conclusion, with all facts and reasonable inferences viewed in the light most favorable to Johnson and Schomaker. *Kesinger v. Logan*, 113 Wn.2d 320, 325 (1989)(evidence did not support claimed easement).

1. Interpretation of deeds: Plain meaning of a word.

The court will look first to the plain language of the deed; but the court will also consider the circumstances. *Ray*, 120 Wn. App.

at 574 (2004)(in addition to language of deed court looks at circumstances surrounding the deed's execution and the subsequent conduct of the parties); see also *Tacoma Mill Co. v. Pac. Ry. Co.*, 89 Wash. 187, 210-11 (1916)(from quoted Oregon decision: "strict, plain, common meaning of the words themselves" come in "where external circumstances do not create any doubt or difficulty as to the proper application of those words.")(internal quotation omitted).

Even armed with the dictionary definition of "exclusive" (Respondent's Brief at 21), the question remains – exclusive as to what? That only LCMC had the right to use the Easement for park and road purposes?

LCMC recognized that "exclusive" is not a self-defining term. It argued in its summary judgment motion that " '[t]he degree of exclusivity of rights conferred by an easement ... is highly variable' ", and can mean "[a]t one extreme" keeping anyone *e/se* from using the easement at all, or "[a]t the other extreme." excluding even the servient owner. CP 181-182 (internal citations omitted). That is exactly the point: there is a spectrum of possible interpretations. A finder of fact must determine where on that spectrum this Easement falls under the specific circumstances of this case. This is not a summary judgment determination.

2. Interpretation of deeds: Question of intent.

In construing a deed, “[t]he intent of the parties is of paramount importance and the court’s duty to ascertain and enforce.” *Brown v. State*, 130 Wn.2d 430, 437 (1996). Intent is a factual question; only once the fact-finder determines intent can the court then apply the law to determine the legal consequences of that intent. *Neimann v. Vaughn*, 154 Wn.2d 365, 374-5 (2005).

The analysis turns upon a “review [of] extrinsic evidence to show the original parties’ intent, the circumstances of the property when the easement as conveyed, and the practical interpretation given the parties’ prior conduct or admissions.” *Rainier View Court Homeowners Ass’n Inc. v. Zenker*, 157 Wn. App 710, 720 (2010), citing *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880 (2003); see also LCMC’s case *Ray*, 120 Wn. App. at 573-4.

3. Alternate reasonable interpretations.

LCMC says Johnson and Schomaker’s proposed alternate interpretations are “strained”, but its own discussion shows just how much more naturally they apply. LCMC argues that because an easement cannot be converted to allow for other uses that this means that “exclusive” would be unnecessary. Respondent’s Brief at 20. But a reasonable person could find that the grantor simply meant to emphasize the limited nature of the Easement. That direction as to use of *the Easement* does not inherently limit the

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servient owner's use. To suggest it does ignores the principle rule that a servient owner can use their property so long as they do not unreasonably interfere with the dominant owner's use.

LCMC claims that interpreting this Easement as "exclusive" to LCMC means the Court would ignore the term "its successors and assigns." The interpretation stands for the simple proposition that only LCMC – which would legally include successors and assigns – can use the Easement.

4. Construction of deed against grantor.

In urging the Court to interpret the Deed against the grantor, LCMC encourages this Court to skip to the last step in the process and ignore the necessary intervening factual analysis. Construction against the grantor is an approach of last resort only if any other attempt to resolve an ambiguity fails. *Ray*, 120 Wn. App. at 586-87 and 587 n.67, quoting 17 William B. Stoebuck, *Washington Practice: Real Estate: Property Law* § 7.9 at 463 (1995); *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme N.W., Inc.*, 168 Wn. App. 56, 65 (2012).

5. Interpreting the deed as excluding Johnson and Schomaker from using their leasehold is inconsistent with Washington law governing a servient owners' allowed use of affected property.

The fact that cases affirm the theoretical possibility of an absolute exclusive easement is quite different than a century of APPELLANTS' REPLY BRIEF

caselaw that has yet to find one actually exists. The scenarios where courts impose this stringent interpretation of “exclusive” are very narrow, distinct circumstances, such as limited common elements in associations, railroad right-of-ways and some utilities. Washington law does not support application of this extreme interpretation to *this* Easement.

The general rule of law in Washington is that “[s]ervient owners have a right to use their land ‘for purposes not inconsistent with its ultimate use for the reserved purpose.’ ”, to the point of rather significant use. *Thompson*, 59 Wn.2d at 407-409. The measure is not the nature of the servient owner’s use, but rather whether it directly interferes with actual current use. *Id.* The question of what is a proper use is a question of fact. *Id.* at 408.

LCMC cites *Hayward v. Mason* for the proposition that there may *in theory* be an exclusive easement that excludes even the servient owner from any use of the affected property. 54 Wash. 649 (1909). But *Hayward* applied the basic rule of law that “‘the owner of the servient estate may use his property in any manner and for any purpose consistent with the enjoyment of the easement’.”

LCMC’s reference in its moving papers to condominium law (CP 182) is apt to demonstrate the distinction between this Easement and peculiar types of easements such as within an

association. *Bogomolov v. Lake Villas Condominium Ass'n of Apartment Owners*, 131 Wn. App. 353 (2006). By statutory definition, limited common areas are those “allocated ... for the exclusive use of one or more but fewer than all units.” RCW 64.34.020(27). Condominiums are also governed by contract, and the *Bogomolov* Declaration specifically stated that any use of these areas were exclusive to the unit owner. See also LCMC’s cited case *Blackmore*, 150 Cal. App. 4<sup>th</sup> 1593 (a parking spot and parcel specifically allocated to a unit gives the owner of that unit exclusive rights to use them).

6. LCMC’s cited caselaw does not support LCMC’s argument, and frequently rebuts LCMC’s position.

LCMC cites several cases to urge application of its extreme interpretation of “exclusive”, but none help LCMC. *Hayward*, for example, simply recognizes that there can, in theory, be an exclusive easement. 54 Wn. 649 (1909). *Hayward* evaluated whether a conveyance transferred a fee simple estate (which would mean exclusive) or an easement (which would not). Evaluating circumstances (a question of fact) was part of the analysis.

In *Hoffman v. Skewis*, the court considered whether a “private” easement in the context of a private condemnation statute meant that only the condemnor could use that land. The court found it did not. 35 Wn. App. 673 (1983). *Hoffman* affirms the basic

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principle that the servient owner can use the property so long as it does not destroy full use of the road by the condemnee. *Id.* at 676.

LCMC cites to several railroad right-of-way cases, but these fall under a specialized body of caselaw. *Ray*, 120 Wn. App. at 574 (2004); *Brown v. State*, 130 Wn.2d at 438 (1996). Even so, these cases rely heavily on the factual “deed-by-deed” evaluation of circumstances and intent. See, e.g., *Brown* at 439; *Ray* at 573-4.

In *Berger v. Comcast of Pennsylvania/Washington/W. Virginia, LP.*, No. CV-08-320-LRS (E.D. Wash. 2011)(as amended October 25), LCMC again turns to a highly unique area of law (telecommunications), and the court noted a particularly unique easement at that.

LCMC then started travelling, but failed to find a case to support it. In *Rollinwood Homeowners Ass’n Inc. v. Jarman*, the North Carolina appellate court found that the association exclusively owned *the easement*; but also affirmed that the servient owner could use the land so long as he did not unduly interfere with the association’s use. 92 N.C. App. 724, 728, 375 S.E.2d 700 (1989). The court emphasized the importance of intent, making its findings after a factual determination of intent and use.

In *Blackmore*, the California appellate court addressed the extent of “exclusivity” required in the case of an easement for

garage and parking purposes. 150 Cal. App. 4<sup>th</sup> 1593. This was not a question of law. *Id.* at 1599 (determining whether a particular use by the servient owner is an unreasonable interference with the dominant owner's use of the easement " 'is a question of fact for the trial of fact'.") (internal citation omitted). The court's holding was limited to finding that the dominant owners had the right to build, and exclusive use of, the physical garage. The court imposed the most extreme level of "exclusive" use on the physical garage only, "only a small portion of the easement" – not the parking or other areas within the easement. *Id.* at 1600. The *Blackmore* court affirmed that an analysis "of a so-called 'exclusive' easement" depends upon the circumstances of the case. *Id.* The court noted that a conveyance purporting to transfer an unlimited use or enjoyment would be in effect a conveyance of ownership, not of an easement; but, "[i]n contrast, an easement incorporating a right of exclusive use may fall short of ownership in fee *when the easement is restricted in scope.*" *Id.* (emphasis added).

LCMC's cited Massachusetts' trial court decision dealt with a limited common element in a condominium, a parking spot and patio. *McNamara v. Ferraz* No. 15 MISC 000048 HPS, Mass. Land Ct.), *aff'd* 89 Mass. App. Ct. 1135, 55 N.E.3d 433 (2016), *review denied* 476 Mass. 1103, 63 N.E.3d 387 (2016).

These cases simply emphasize that there are multiple applications of the term “exclusive” with respect to an easement, that determining which applies relies on the factual questions of intent and circumstances, that servient owners nearly always have the right to use their property so long as they do not interfere with the use of the easement, and that “exclusivity” as you might find in an association or railroad right-of-way is generally disfavored.

E. **Trial court failed to define “park and road purposes” as necessary to determine validity and scope of Easement.**

The trial court ended its analysis with the summary conclusion that LCMC could use the Easement and Johnson and Schomaker could not. Johnson and Schomaker set out several questions of material fact with respect to what “park and road purposes” means, with examples of use to support them. The court cannot determine the scope of the easement until there is a determination of the underlying facts as to the particular use of the Easement. *Littlefair v. Schulze*, 169 Wn. App. 659, 665 (2012).

F. **Trial court erred in quieting title in the Easement to LCMC to the exclusion of any use of Johnson and Schomaker as leaseholders, and issuing an injunction against any future use.**

LCMC states that it asked for a permanent injunction in its complaint. But LCMC’s summary judgment did not seek every remedy LCMC set out. A preliminary injunction does not by

necessity extend to a permanent injunction. Even if LCMC had properly requested a permanent injunction, there remains questions of fact regarding the parties' respective rights and whether any current or future use by Johnson and Schomaker constitutes an unreasonable interference.

**G. Questions of fact regarding trespass, timber trespass and waste; lack of findings.**

The trial court made only a cursory finding that Johnson and Schomaker's trespass, timber trespass and waste claims should be dismissed. LCMC presented evidence that LCMC had the right to fell timber; but also recognized that Johnson and Schomaker had rights in cutting, too. Interference with their rights by way of timber trespass, trespass and waste is a question of fact.

**H. Trial court did not have authority to issue an injunction against future legal claims.**

LCMC says that the trial court could quiet title. Johnson and Schomaker dispute the trial court's order to quiet title on summary judgment, but do not dispute this basic authority. But declaring the state of title is different than the extreme measure of prohibiting any future legal claim that is not barred by *res judicata*.

**V. CONCLUSION**

LCMC does not, and cannot, overcome the fact that there are numerous questions of material fact to resolve before ever

reaching any of the legal findings the trial court made, all of which are in dispute. This is not a summary judgment case.

Respectfully submitted this 8<sup>th</sup> day of November, 2017.

By:

GRYPHON LAW GROUP PS

A handwritten signature in blue ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

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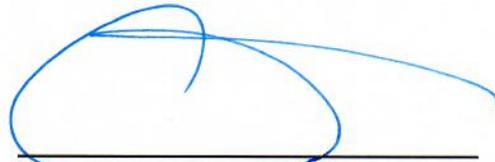
Carmen R. Rowe WSBA 28468

## CERTIFICATE OF SERVICE

I certify that on the below date, I sent a copy of the above pleading via the Court's electronic service system to Robert Johnson, attorney for Respondent, at the following email address per agreement of counsel to accept service of pleadings via email:

Robert Johnson  
[rjohnson@rwjpllc.com](mailto:rjohnson@rwjpllc.com)

Dated this 8th day of November, 2017.



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Carmen R. Rowe WSBA 28468

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<sup>1</sup> Johnson and Schomaker include here the legal relevance of discussing use in this appeal to give context to the factual discussion. See Section IV for full legal citations and analysis.

**GRYPHON LAW GROUP PS**

**November 08, 2017 - 10:17 PM**

**Transmittal Information**

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**Superior Court Case Number:** 15-2-00335-0

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