102632-3

No. 57283-4-II

WASHINGTON STATE COURT OF APPEALS
DIVISION II

JORDAN MCCULLOUGH,

Appellant,

vs.

MARK ANDERSON,

Respondent.

APPELLANT'S PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Appellate Cases

Washington Court Rules

A. IDENTITY OF PETITIONER

Petitioner Jordan McCullough, Plaintiff in the superior court and Appellant before the Court of Appeals, respectfully requests the Supreme Court accept review in this matter.

B. COURT OF APPEALS DECISION

Petitioner McCullough respectfully requests Supreme Court review of the Court of Appeals unpublished Opinion entered on August 22, 2023, along with its Order denying Petitioner's Motion for Reconsideration entered November 8, 2023.[1]

C. INTRODUCTION & ISSUES PRESENTED

The liberalization of parole evidence rules in *Berg* and related cases has its limits, particularly in the domain of property law and recorded instruments. While this Court has applied the *Berg* rule in certain instances—namely, disputes over the meaning of restrictive covenants in residential

[1] *See* App. 1-16.

subdivisions—two longstanding principles endure. First, that subsequent purchasers of real estate cannot be charged with knowledge of extrinsic facts unless they were under some duty of inquiry. Second, that ambiguities in recorded instruments must be construed against the drafter and in favor of the free use of land (at least in non-subdivision contexts). While this Court has repeatedly affirmed these principles in passing, confusion persists among lower courts and litigants as to when exactly extrinsic evidence is admissible to decide ambiguities in recorded instruments. This appeal presents a prime opportunity to resolve the issue.

This case concerns the interpretation and effect on a subsequent purchaser of ambiguous language in an easement agreement as to whether the servient owner is wholly excluded from the entire easement area. The superior court's grant of summary judgment below represents a direct challenge to longstanding protections afforded under Washington law to subsequent good-faith purchasers of real estate. The superior

court erroneously relied on non-public extrinsic evidence to interpret an ambiguously worded ingress/egress easement agreement as binding on a subsequent owner of the servient estate (McCullough) who had no knowledge of the evidence at the time of his purchase. In so holding, the superior court ignored decades of precedent requiring strict construction of recorded documents, and further ignored the critical distinction repeatedly recognized by this Court between original parties and subsequent purchasers.

On appeal, the Court of Appeals erroneously sidestepped the core issues by finding instead, for the first time on appeal, that the easement language was somehow not ambiguous after all. As explained below, the Court of Appeals decision is unsupported by both the easement text and applicable law.

The Court should accept review because the critical issues in this appeal require unambiguous answers to guide lower courts and property owners alike. These questions include, inter alia:

(1) What are the limits of the *Berg* rule in allowing the use of extrinsic evidence to interpret recorded instruments outside the context of residential subdivisions?

(2) What are the limits of the *Berg* rule in allowing the use of extrinsic evidence to interpret recorded instruments to bind subsequent purchasers who had no part in drafting the instrument and were not original parties?

(3) To what extent is inquiry notice relevant to the question of whether a subsequent purchaser must be bound by extrinsic evidence to interpret a recorded instrument when the instrument is not a covenant in a residential subdivision?

(4) What risk, and by extension consequences, should the drafter or original party bear in the later enforcement of poorly drafted language in a recorded instrument when the dispute is with a subsequent purchaser who had nothing to do with the drafting?

(5) Does strict construction in favor of the free use of land continue to apply in the interpretation of recorded instruments which are not covenants for a residential subdivision?

Property owners, neighbors, sellers, and prospective buyers across the state are and will continue to be affected by the uncertainty and risk of not knowing how Washington courts will answer the foregoing questions. In contrast, answering these critical questions will inform the public on several critical points, such as: (a) the care to be taken in drafting recorded

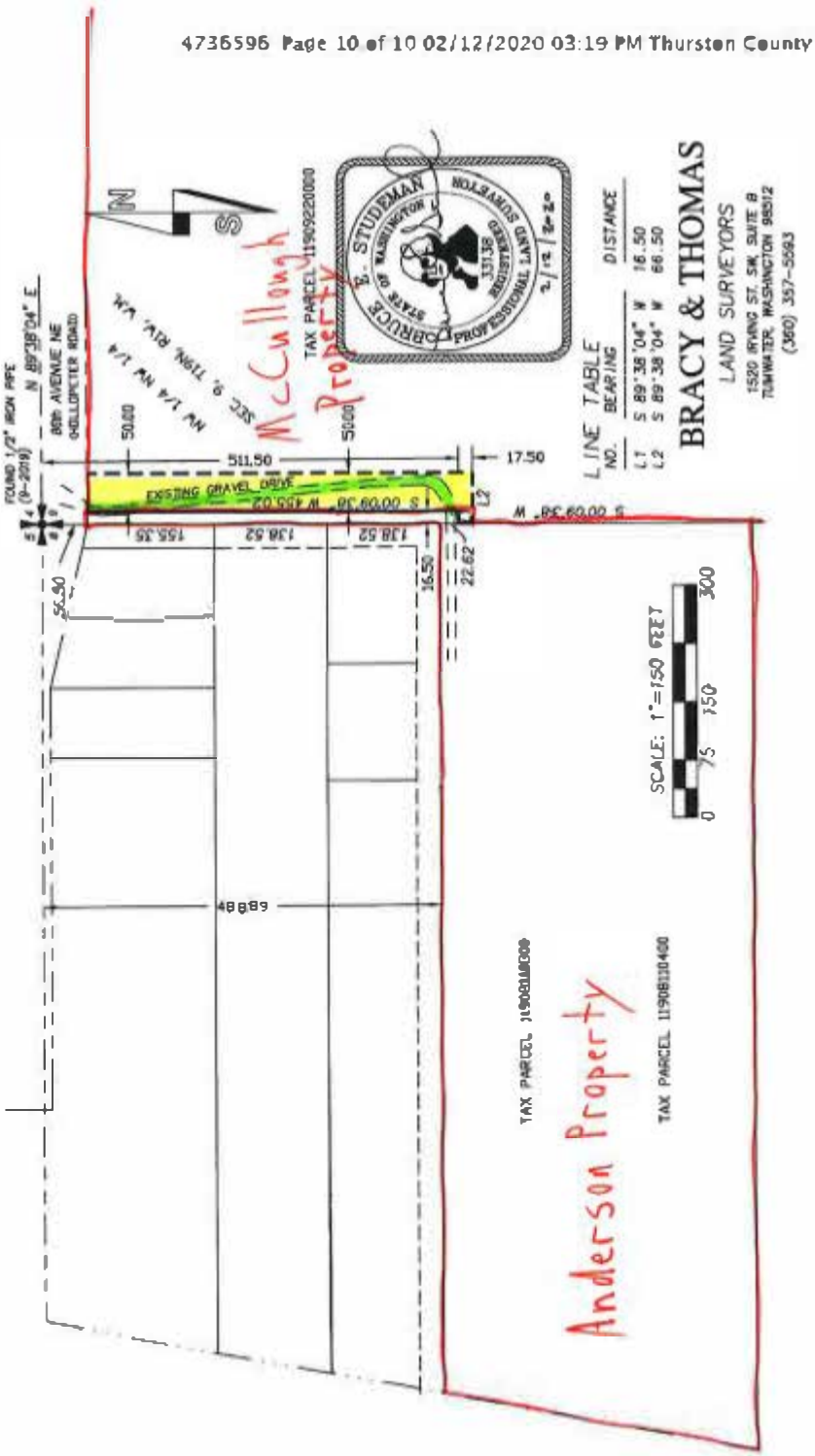
instruments to make clear the drafters' intent; (b) the burden placed on prospective purchasers to somehow ascertain the details of private communications regarding original parties' subjective intent; and (c) how litigants and prospective litigants should assess their chances of prevailing in a dispute over the interpretation of recorded instruments.

Accordingly, for the reasons set forth herein, this Court should accept review under RAP 13.4(b)(1), (2), and (4) because the Court of Appeals' opinion is directly at odds with both this Court's and other appellate court's decisions, and because the issues are of substantial public interest.

D. STATEMENT OF CASE

McCullough and Anderson own adjoining real property in Thurston County, as depicted below: [2]

[2] CP 105, 107. This illustration, an excerpt from a survey prepared in anticipation of the Agreement, contains labeling from counsel to aid the Court's understanding of the area. The red lines and labels denote boundaries of both properties. The yellow highlighting shows the rectangular easement area, and the green highlighting shows the "existing driveway."


BRACY & THOMAS
LAND SURVEYORS
1520 IRVING ST. SW, SUITE B
TUMWATER, WASHINGTON 98512
(360) 357-5583
LINE TABLE
NO. BEARING DISTANCE
L1 S 89°38'04" W 16.50
L2 S 89°38'04" W 66.50
STUDEMAN
STATE OF WASHINGTON
33138
REGISTERED LAND SURVEYOR
PROFESSIONAL
2/12/2020
N
S
SEC. 9, T19N, R1W, W.M.
NW 1/4 NW 1/4
80th AVENUE NE
(HELLOPETER ROAD)
FOUND 1/2" IRON PIPE
N 89°38'04" E
50.00
511.50
17.50
EXISTING GRAVEL DRIVE
S 00°09'38" W 455.02'
L2
N 89°38'04" E 66.50'
155.35
138.62
138.62
56.50
16.50
22.62
488.89
SCALE: 1"=150'
0 75 150 300
1339
TAX PARCEL 11908110400
TAX PARCEL 11908110300
TAX PARCEL 11909220000
McCullough Property
Anderson Property

1. Factual Background

Anderson and McCullough each purchased between 2019 and 2020 from a common owner, Betty J. Simpson, who was under a guardianship at the time. Anderson bought his property first in September 2019—two primary parcels totaling about 10 acres ("Anderson Property"). CP 6. McCullough bought his property, consisting of 39.45 acres, in June 2020 ("McCullough Property"). CP 99-103. The McCullough Property lies immediately to the east of the Anderson Property. *See id.* A longstanding gravel driveway leads along the western edge of the McCullough Property, running from 86th Ave. NE on the north, southward several hundred feet to the Anderson Property ("Driveway"). *See id.*

On September 6, 2019, 13 days before Anderson purchased his property, Anderson was involved in negotiating a deeded easement with the Simpson guardianship covering the existing Driveway. CP 45-47. The negotiations continued for several months after Anderson's purchase until a written

easement agreement was finally recorded February 12, 2020. CP 74-79.

Throughout the negotiations, Anderson was represented by legal counsel, aware of the case of *Johnson v. Lake Cushman Maint. Co.*, 5 Wn.App. 2d 765, 784, 425 P.3d 560 (2018), which was published in August 2018.[3] The guardianship's legal counsel initially proposed a non-exclusive easement with provisions expressly reserving the servient owner's reservation of rights to use the Driveway and the servient owner's right to grant further access to third parties. CP 65-67. In response, Anderson's counsel did not request any language in the Agreement which would exclude the servient owner from the easement area. *Compare* CP 37 *with* CP 74-75. Anderon's counsel did, however, request the guardianship

[3] *See* CP 301-07. *Johnson* will be discussed at length herein. Generally speaking, however, *Lake Cushman* held that a recorded document creating an "easement for the exclusive use of the Lake Cushman Maintenance Co., its successors and assigns, for park and road purposes over . . . [t]hat portion of Lot 62 in the Plat of Lake Cushman No. 14," did not operate to unambiguously exclude the lessee of the servient estate.

change the word "non-exclusive" to "exclusive," and that the paragraphs reserving grantor's right to grant further access over the Driveway to third parties, be removed. CP 66-67.

In its final form, the Agreement kept a recital concerning the parties' intent, as follows:

> Grantor desires to grant to Grantee a perpetual, exclusive easement for ingress, egress, and utilities *over and across a certain driveway now existing*[4] on the Grantor Property that provides access to the Grantee Property.

CP 74-75. The body of the Agreement also contained an integration clause, stating, "This Agreement sets forth the entire and complete agreement between the Parties with respect to the subject matter hereof . . . The Recitals to this Agreement and the Exhibits attached to this Agreement are incorporated herein by this reference." CP 76-66.

[4] The meandering Driveway at the time of the Agreement was significantly narrower than the 50' wide easement in the Agreement. The recital language that the easement was for the existing driveway is significant because at a minimum it creates a factual question of whether the parties intended the entirety of the 50' strip to be burdened or whether they only described the 50' rectangular easement in order to avoid the burden of a meets and bounds survey of the Driveway.

Leading up to McCullough's purchase of the McCullough Property, he performed a significant amount of due diligence before consummating the purchase. CP 101-03, 125-27. From the time McCullough initially became interested in the summer of 2019 through the June 2020 closing of his purchase, all the available information he obtained confirmed his right to use the Driveway as the primary means of accessing the property. CP 103, 127. This information included, inter alia:

- Listing agent Dan Sweeney was the same for both the Anderson Property and the McCullough Property. Both the original and second listing of the McCullough Property stated that the McCullough Property was accessible by driving "North on Johnson Pt. Road, to Left on 86th," which invariably leads to the driveway. CP 36-37, 102-103, 123-24.

- The listing price for the McCullough Property was not reduced when it was re-listed following the recordation of the Agreement. CP 129, 131.

- The Driveway provided the sole physical means of access onto the McCullough Property. CP 100-01.

- The southern end of the Driveway had an existing road spur (improved with roadbase and drainage culverts underneath) leading onto the McCullough Property,

affirming the Driveway was intended to serve both properties. CP 100.

- McCullough was granted permission from Sweeney to tour the McCullough Property using Sweeney's directions in the listing. CP 101.
- McCullough had his realtor, Jessica Grubb, inquire regarding the easement agreement both before and after it was finalized. Grubb relayed information from both Sweeney and First American Title Company indicating its effect, which had no exclusion of the servient owner. CP 101-03, 125-27.

At no point in time prior to closing was Grubb or McCullough informed by Sweeney, First American Title Company, or anyone else that the recorded easement was intended or otherwise operated to exclude the owner of the McCullough Property from the easement area. CP 103, 127. In fact, the easement was repeatedly affirmed to grant Anderson only a limited right to use the area for the specific purposes of ingress, egress, and utilities. *See id.*

2. Procedural History

On October 6, 2021, McCullough filed suit against Anderson in Thurston County Superior Court seeking

declaratory relief that the easement did not operate to wholly exclude him (*i.e.*, the servient estate) from easement area. CP 4-10. Anderson moved for summary judgment dismissal and cited, as his primary support, extrinsic evidence that his counsel sought to negotiate the easement to exclude the servient estate entirely. CP 49-57. McCullough countered that such extrinsic evidence was inadmissible since he was a good-faith subsequent purchaser who was under no duty of inquiry to discover the behind-the-scenes, privileged communications surrounding the drafting of the easement language. CP 178-94.

By Order entered August 19, 2022, the superior court granted summary judgment in favor of Anderson. CP 249-50. In so doing, the superior court ruled the easement was, on its face, ambiguous but nevertheless considered extrinsic evidence of the original parties' intent (over McCullough objection) to construe the term "exclusive" in favor of Anderson.[5] Notably, the superior court relied on the indemnity provision within the

[5] *See* RP (Vol. I) 40:4-42:1.

easement to support its finding that the easement language regarding exclusivity was, in fact, ambiguous.[6] McCullough timely appealed. CP 251-54.

In its unpublished Opinion filed August 22, 2023, the Court of Appeals upheld the superior court, in part, but did so on entirely different grounds. Specifically, the Court of Appeals concluded that the term "exclusive" was not ambiguous when read in the context of other provisions of the easement agreement. *See* App. 9-11. Remarkably, the Court of Appeals cited the indemnity provision as somehow supporting total exclusivity notwithstanding the superior court's exact opposite conclusion—the superior court previously held the very same language demonstrating ***un***-exclusive intent as to the servient estate. App. 10. The Court of Appeals also cited the maintenance provision's assignment of responsibility to the grantee as further proof of total exclusivity—evidently ignoring the fact the easement was granted without any monetary

[6] *Id.* at 39:15-40:3.

compensation whatsoever in the first instance and that maintenance is typically conferred to the dominant estate. *See* App. 10. McCullough's motion for reconsideration was subsequently denied. App. 16.

In short, the Court of Appeals sidestepped the central issues presented by this dispute and ruled instead, for the first time on appeal, that the easement's exclusivity was somehow not ambiguous based on a flawed and incomplete reading of two other provisions within the easement agreement.

E. ARGUMENT

Per recent Washington law, mere use of the term "exclusive" in a recorded easement is facially ambiguous as to whether it allows concurrent, non-interfering use by the servient owner. *See Johnson v. Lake Cushman Maint. Co.*, 5 Wn. App. 2d 765, 784, 425 P.3d 560 (2018). This holding is in-line with authority from other jurisdictions considering similar easement

language and concepts of exclusivity.[7]

In the present case, the easement agreement's mere use of the term "exclusive" creates the same conundrum identified in *Johnson* and related cases—an ambiguity as to whether the servient estate can make concurrent, non-interfering use of the easement area. *See* CP 75. The heart of this appeal, therefore, is how to resolve such an ambiguity under the circumstances.

As explained below, the superior court erred in invoking the *Berg* rule to admit extrinsic evidence to resolve the ambiguity against McCullough because (1) the easement is not a restrictive covenant incorporated within a residential

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[7] *See, e.g.*, *Latham v. Garner*, 105 Idaho 854, 857, 673 P.2d 1048 (Idaho 1983) (use of the word "exclusive" did not unambiguously create an easement precluding use by the servient estate); *Apitz v. Hopkins*, 863 N.W.2d 437, 440 (Minn. Ct. App. 2015) (adopting *Latham's* reasoning); *VanMatre v. Davenport*, 537 S.W.3d 287, 290 (Ark. Ct. App. 2017) ("The owner of the servient tenement may make any use thereof that is consistent with, or not calculated to interfere with, the exercise of the easement granted."); *Weggeland v. Ujifusa*, 384 P.2d 590, 591 (Utah 1963) ("The accepted rule is . . . that the easement conveyed should be so construed as to burden the servient estate only to the degree necessary to satisfy the purpose described in the grant.").

subdivision as was the case in *Hollis*, (2) McCullough was not a party to the original easement and was under no duty of inquiry to discover the original parties' subjective intent, and (3) any ambiguity should have been construed against the drafter (Anderson) and in favor of the free use of land.

Of course, to reach the above issues, this Court must first reverse the Court of Appeals' opinion, which as explained further below, sidestepped the thorny issues raised in favor of a quick and ultimately unsupported holding.

1. An Original Party Cannot Utilize *Berg*-style Extrinsic Evidence to Construe an Easement Against a Subsequent Purchaser

The leading issue presented by this appeal is the limits to which the *Berg* rule—which liberalized the admission of parole evidence in interpreting contracts—applies when construing recorded instruments affecting real property.[8] This Court has activated the *Berg* rule in limited real-estate contexts involving subdivisions. For example, in *Riss v. Angel*, 131 Wn.2d 612,

[8] *See generally Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990).

934 P.2d 669 (1997), the Court held the following:

> [W]here construction of restrictive covenants is necessitated by a dispute *not involving the maker of the covenants*, but rather among homeowners in a subdivision governed by the restrictive covenants, rules of strict construction against the grantor or in favor of the free use of land are inapplicable. The court's goal is to ascertain and give effect to those purposes intended by the covenants. Ambiguity as to the intent of those establishing the covenants may be resolved by considering evidence of the surrounding circumstances. . . . The court will place special emphasis on arriving at an interpretation that protects the homeowners collective interests.

Id. at 623 (emphasis added, internal citations omitted). In so holding, *Riss* acknowledged a critical distinction when construing a restriction between similarly situated subsequent owners, on the one hand, and the strict construction which applies as between an original maker (Anderson) and a subsequent purchaser (McCullough), on the other hand.

Later, in *Hollis v. Garwell, Inc.*, 137 Wn.2d 683, 974 P.2d 836 (1999), the Court allowed *Berg*-style extrinsic evidence to construe a restrictive covenant but, again, only because the dispute involved a residential subdivision wherein

the parties were *all* subsequent purchasers (*i.e.*, "not involving [a] maker of the covenants"). *See id.* at 696-700.

The distinguishing factors identified in *Riss* and *Hollis* were consistent with concurrent decisions by lower courts. For example, in *Olson v. Trippel*, 77 Wn. App. 545, 893 P.2d 634 (1995), the appellate court rejected application of the *Berg* rule in construing an easement in a non-subdivision context because:

> To hold otherwise would be to require that a subsequent purchaser investigate not only the chain of title, but also the "context" within which each conveyance in the chain was executed. That would be *an impractical burden, perhaps an impossible one, and would virtually destroy the utility of the real estate recording system*.

Id. at 553 (emphasis added).

Hollis, *Olson*, and *Riss*, read together, stand for the limited proposition that extrinsic evidence may be admitted to interpret restrictive covenants within a residential subdivision in disputes not involving an original party.

Easements—like the one at issue in this case—bear

similarities to restrictive covenants in that both are recorded instruments which burden a servient estate in some way. That said, when *Riss* rejected the strict construction of restrictive covenants in disputes "not involving the maker of the covenants, but rather among homeowners in a subdivision governed by the restrictive covenants," it considered the policy goal of placing "special emphasis on arriving at an interpretation that protects the homeowners' collective interests." *Riss*, 131 Wn.2d at 623-24 (citing *Lakes v. Mercer Island Assoc.*, 61 Wn. App. 177, 810 P.2d 27 (1991)).

The policy goal in *Riss*—protecting a collective of homeowners within a subdivision whose property values mutually depend upon adherence to the original intent of covenants and restrictions—is not implicated in a private easement between two adjoining landowners. In the case of homeowners' collective interests in a subdivision, the presumption of the free use of land can operate to the collective detriment of the community. Here, however, only one property

is burdened by the easement in question, and in this case, the burden sprang into existence without any monetary consideration. This occurred not as part of a subdivision to protect a community of future homeowners, but rather as a standalone private contract to benefit a single dominant tenement owner.

To the extent the easement agreement here could be viewed as a restrictive covenant, the policy goal behind admitting extrinsic evidence in *Riss* and *Hollis* is not served; those cases applied the context rule to permit extrinsic evidence for the benefit of a community of subsequent purchasers, who bought on the assumption that the restrictive covenants would protect the look and feel of the neighborhood. Here, admission of extrinsic evidence would merely save Anderson from his own sloppy drafting at McCullough's expense.

In sum, the Court should accept review and clarify that extrinsic evidence is not admissible to construe ambiguous language in a recorded instrument when (a) the dispute involves

an easement as opposed to a restrictive covenant within a subdivision, (b) the party seeking to introduce the extrinsic evidence was themselves an original party or "maker" of the easement, and (c) the party against whom the extrinsic evidence is offered is themselves a good-faith subsequent purchaser who, as explained below, was not subject to inquiry notice regarding the extrinsic evidence in question.

2. Inquiry Notice Should Remain the Threshold for Admitting Extrinsic Evidence Under the Circumstances of this Case

Under the circumstances of this case, extrinsic evidence should only be considered in construing the easement if Anderson first establishes that McCullough was under a duty of inquiry to discover such extrinsic facts. *See Olson*, 77 Wn. App. at 551. It is black-letter law in Washington that "a person purchasing real property may rely on the record title to the property, in the absence of knowledge of title in another, or of facts sufficient to put him on inquiry." *Lind v. Bellingham*, 139 Wash. 143, 147, 245 P. 925 (1926). The burden of establishing

a duty of inquiry rests with the party asserting it. *See Paganelli v. Swendsen*, 50 Wn.2d 304, 309, 311 P.2d 676 (1957). To meet this burden, the purchaser must be shown to know of "information, from whatever source derived, which would excite apprehension in an ordinary mind and prompt a person of average prudence to make inquiry." *Id.* The facts of the *Olson* case demonstrate why this time-honored standard is and remains the best approach under circumstances such as these.

In *Olson*, owners of several lots entered into an easement agreement in 1965 establishing an access easement over various lots. The 1965 easement stated that it was appurtenant. In 1967, after one of the original parties, the Trippels, acquired one of the other lots, they entered into a substitute easement agreement which changed the location and made no mention of whether it was appurtenant. After one of the benefitted lots changed hands several times, the Trippels began blocking access to the successor owner of a benefitted lot, the Olsons. After the Olsons sued the Trippels, the Trippels offered

extrinsic evidence in the form of four affidavits purporting to support the Trippels' position that the 1967 easement was intended to be personal to the original grantees and not appurtenant to the benefited parcel. Over the Olsons' objection, the trial court admitted the Trippels' affidavits, holding that "evidence of the intent of the parties is always admissible and [the affidavits are] not in violation of any parol evidence rule." This court on appeal reversed the trial court, rejecting the Trippels' contention that their affidavits were admissible under the "context rule." Said the *Olson* court: "Assuming without holding that the context rule may be applied in a dispute between an original grantor and an original grantee of real estate . . . it cannot be applied in a dispute between an original party and a subsequent purchaser who is not under a duty of inquiry." The *Olson* court went on to hold:

> *[I]n a dispute involving a subsequent purchaser of real estate, as opposed to a dispute between the original grantor and grantee, the inquiry rule displaces the context rule.* Further, we hold that the Trippels have failed to show that the Olsons

> were under a duty of inquiry. Finally, we hold that the trial court erred by considering [the Trippels'] four affidavits, all of which recited facts that the Olsons were not bound to know or consider.

Id. at 553 (emphasis added).

Here, there was no showing by Anderson that McCullough was under a duty of inquiry, nor did the superior court require such a showing before considering extrinsic evidence of the original parties' subjective intent.[9] Accordingly, the superior court's ruling on summary judgment should be reversed and this case should be remanded.

3. Strict Construction Against the Drafter and in Favor of the Free Use of Land Should Prevail in this and Similar Case

The inapplicability of the *Berg* rule combined with the lack of any duty of inquiry should mandate strict construction of any ambiguity against the drafter of an easement agreement (Anderson) and in favor of the free use of land.

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[9] For the sake of brevity, this Petition does not recount McCullough's good-faith inquiries that were nevertheless undertaken; however, such a showing was made both before the superior court and on appeal, and will be recounted in due course should this Court accept review.

It has long been established in Washington that a drafter or "maker" of a recorded instrument affecting real property is responsible for ensuring that claimed limitations on use are expressly laid out in the deed. "Restrictions on the right to use land will not be extended to forbid any use not clearly expressed. Doubts must be resolved in favor of the free use of land." *Holmes Harbor Water Co., Inc. v. Page*, 8 Wn. App. 600, 604, 508 P.2d 628 (1973). Moreover, a defendant cannot be held to strict compliance with an uncertain prohibition. *Id.*

In *Matthews v. Parker*, 163 Wn. 10, 17, 299 P. 354, 356 (1931), the Court noted it was settled law that, "in the interpretation of maps and plats, all doubts as to the intention of the owner *or maker* should be resolved against him." (emphasis added). Where a drafter of a deed creates an ambiguity therein, the agreement is construed against the drafter. *See Hanson Industries, Inc. v. County of Spokane*, 114 Wn.App. 523, 531, 58 P.3d 910, 916 (2002).

To be clear, application of the above principles does not

confer upon a subsequent purchaser *carte blanche* to advocate *any* interpretation they desire. Indeed, the interpretation proffered by a subsequent purchaser must still fall within the range of reasonable constructions which a court could draw from the ambiguous language in question. But when choosing between two reasonable interpretations, courts should strictly construe any ambiguity against the drafter and in favor of the free use of land.

In the present case, McCullough's proffered construction—that "exclusive" does not operate to exclude the servient estate's concurrent, non-interfering use—meets the above criteria. Pursuant to *Johnson*, mere use of the term "exclusive" could be reasonably interpreted to allow the servient estate's concurrent use. *Johnson*, 5 Wn. App. 2d at 785. Moreover, McCullough's interpretation clearly embodies the free use of land preference whereas Anderson's does not. Accordingly, Anderson's proffered interpretation should be ultimately rejected, and McCullough's accepted.

4. The Court of Appeals' Opinion is Not Supported by the Easement Language or Applicable Law

The Court of Appeals' unpublished Opinion should be reversed because it contradicts its own precedent and is unsupported by the language of the easement agreement. To recount, the Court of Appeals sidestepped the above issues presented by this case and instead ruled, for the first time on appeal, that the term "exclusive" was unambiguous in excluding the servient estate when read in the context of two other provisions found elsewhere in the easement agreement. *See* App. 9-11. But, in fact, neither the indemnity nor the maintenance provisions cited by the Court of Appeals supports its threadbare conclusion.

The indemnity provision requires *both* the grantor and grantee to indemnify one another under certain circumstances. *See* CP 75. As the superior court correctly noted, this reciprocal language supports the conclusion the grantor must retain some modicum of usage over the easement area—if the

grantor was excluded entirely, there would be no conceivable reason for the grantor to ever indemnify the grantee.[10] The Court of Appeals' reliance on the very same indemnity language to conclude the opposite is, respectfully, illogical.

The maintenance provision assigns sole responsibility for costs on the grantee; however, this does not support the Court of Appeals' conclusion that the easement was meant to entirely exclude the grantor. *See* CP 75. First, the Court of Appeals entirely ignored the undisputed fact the grantee paid no monetary consideration whatsoever for the supposedly wholly exclusive easement rights—a notable fact given the sheer size of the total easement area. *See id*. Thus, the one-way maintenance obligations imposed on the grantee could just as easily been a substitute for the lack of monetary consideration. Second, the maintenance provision expressly limits the grantee's one-way obligations to just "the [existing] Driveway" as opposed to the entire easement area, which comprises a

[10] *See* RP (Vol. I) 39:15-40:3.

much larger physical area. *See id.* The grantor presumably retains at least shared responsibility for maintenance and repair of the non-driveway portion of the easement area. Accordingly, the maintenance agreement just as easily supports the opposite conclusion drawn by the Court of Appeals—that the grantor is not wholly excluded from the easement area.

As explained above, the Court of Appeals' analysis in construing the easement language to support its conclusion was flawed. The Court of Appeals' prior decision in *Johnson* was sound, and it should have applied to the same rationale here—the mere use of the term "exclusive" is ambiguous as to whether it includes the servient estate. Instead, the Court of Appeals engaged in a contorted and circumscribed analysis of other provisions in the easement agreement to avoid grappling with the real issues presented by this appeal. This Court should accept review and reverse the Court of Appeals' Opinion construing the easement as unambiguous and thereby reach the real issues that underly this case.

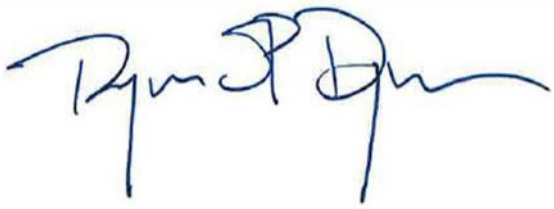
F. CONCLUSION

For the foregoing reasons, Petitioner Jordan McCulough respectfully requests the Court accept review of this matter.

Pursuant to RAP 18.17(b), I certify that the foregoing motion brief contains 4,808 words, exclusive of the title sheet, table of contents, appendices, table of authorities, pictorial images, signature block, this certificate of compliance.

Respectfully submitted this 8th day of December 2023.

BERESFORD BOOTH PLLC



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CERTIFICATE OF FILING AND SERVICE

I, Jenny Stone, am over the age of eighteen years of age and am competent to testify that on December 8, 2023, I electronically filed the Petition for Review with Appendix and this certificate of filing and service, with the Washington State Court of Appeals, Division II using the electronic filing system which will send electronic notification of such filing to the following attorneys listed below and I also transmitted copies as follows:

Via Court of Appeals E-Service; Electronic Mail; and U.S. First Class Mail, postage prepaid to:

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Dated and Signed this 8th day of December, 2023

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APPENDIX

Filed
Washington State
Court of Appeals
Division Two

August 22, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JORDAN McCULLOUGH, an unmarried individual, Appellant, v. MARK ANDERSON, an unmarried individual; ALL OTHER PERSONS OR PARTIES UNKNOWN CLAIMING ANY RIGHT, TITLE, ESTATE, LIEN, OR INTEREST IN THE REAL ESTATE DESCRIBED HEREIN, Defendants.	No. 57283-4-II UNPUBLISHED OPINION

GLASGOW, C.J.—The guardianship estate of Betty Simpson (the estate) owned three abutting parcels of land. Mark Anderson bought two waterfront parcels and secured an ingress, egress, and utilities easement on the third. The easement was necessary for Anderson to be able to access his parcels from the road. The recorded easement stated that the easement was "exclusive."

Jordan McCullough then bought from the estate the third servient inland parcel of land. After Anderson told McCullough that Anderson was the only person with the right to use the easement, McCullough sued Anderson, arguing that the easement did not exclude McCullough as owner of the servient parcel where the easement was situated.

The trial court granted summary judgment to Anderson and dismissed McCullough's complaint. The trial court held that under *Johnson v. Lake Cushman Maintenance Co.*,[1] the

[1] 5 Wn. App. 2d 765, 425 P.3d 560 (2018).

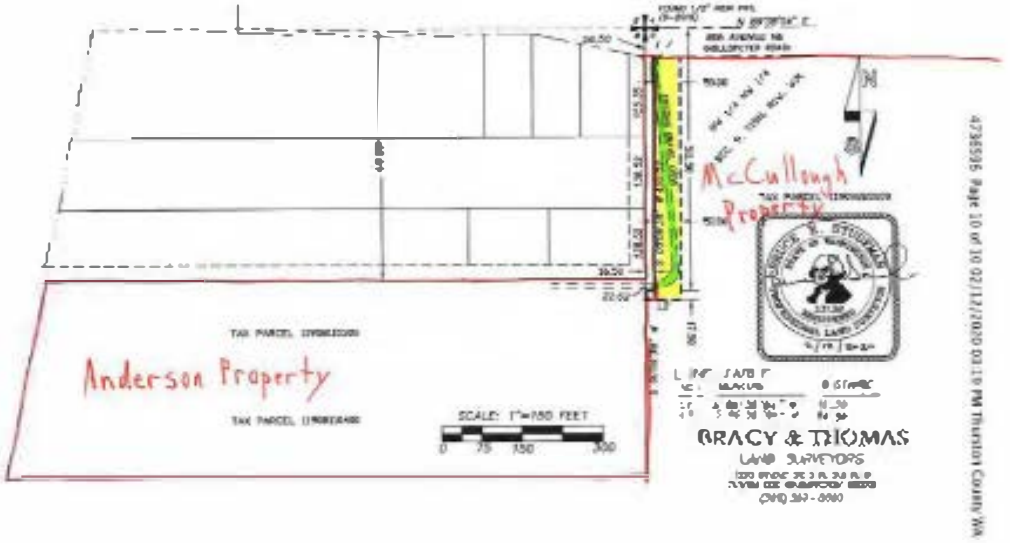
language of the easement was ambiguous, and considering extrinsic evidence, there was no genuine issue of fact that Anderson and the estate intended to exclude the owner of the servient estate from the easement. The trial court also awarded Anderson attorney fees and costs under RCW 4.84.185, reasoning that *Johnson* was dispositive and the extrinsic evidence was clear, making McCullough's claim frivolous.

McCullough appeals, arguing that the trial court erred in granting Anderson's summary judgment motion and awarding Anderson attorney fees and costs. We affirm the trial court's summary judgment order dismissing McCullough's complaint, but we reverse the award of attorney fees and costs below because McCullough's action was not frivolous. We also deny Anderson's request for attorney fees on appeal.

FACTS

I. BACKGROUND

The estate owned three abutting parcels of land in Thurston County. The two smaller parcels bordered the water. The largest parcel was situated inland. The inland parcel shared part of its western border with the waterfront parcels. A map is shown below



archived at https://perma.cc/G5PT-SH9P. A paved road, 86th Avenue NE, ran parallel to the inland parcel's northern border. The inland parcel included a gravel driveway that started at 86th Avenue NE, ran along the inland parcel's western edge, and ended at the northeast corner of one of the waterfront parcels.

The estate listed the three parcels for sale. A prospective buyer made an offer on the inland parcel and then rescinded the offer, noting that the driveway to the waterfront parcels encroached on the inland parcel and the situation could cause conflict. As a result, the estate stopped listing the inland parcel for sale. The other two parcels remained available for purchase.

II. ANDERSON'S PURCHASE AND EASEMENT

Anderson offered to buy the waterfront parcels, but he later reconsidered because part of the driveway to access the parcels was inside the inland parcel. The estate agreed to grant Anderson an easement to access the waterfront parcels. Anderson then purchased the two waterfront parcels.

After Anderson's purchase, the estate hired an attorney to draft the easement. Anderson's attorney and the estate's attorney participated in the drafting process. The first draft of the easement stated, "Grantor desires to grant to Grantee a perpetual, *non-exclusive* easement for ingress, egress, and utilities, over and across" the driveway. Clerk's Papers (CP) at 70 (emphasis added).

After Anderson reviewed the first draft of the easement, his attorney told the estate's attorney that Anderson wanted "an exclusive easement." CP at 62. Anderson's attorney wrote, "Last thing he wants is the upland owner using his easement." *Id.* The estate relented, changing the easement language to make it exclusive and requiring Anderson to indemnify the estate for any cause of action or liability arising out of use of the driveway because the estate would "not have a right to use the easement." CP at 82.

The final easement stated, "Grantor desires to grant to Grantee a perpetual, *exclusive* easement for ingress, egress, and utilities, over and across" the driveway. CP at 75 (emphasis added). The easement contained no express reservation of rights provision benefitting the grantor and no nonexclusive easement provision. The indemnity provision stated that Anderson would indemnify the estate "for, from and against all causes of action, litigation, cost, loss, liability, damage and expense . . . for injury or death to persons . . . and damage to or loss of property . . . arising out of or in any way connected with the use of" the driveway by Anderson and his permittees unless the damages resulted "from the sole negligence of the" estate. *Id.*

The easement also contained an integration clause, which provided that the easement set "forth the entire and complete agreement between the" parties with respect to the easement and that the agreement superseded any "prior agreements, commitments, or representations, express or implied, between the" parties. CP at 76. The easement provided that no provisions would "be construed against or interpreted to the disadvantage of any" party to the easement "by any court . . . by reason of such [p]arty having been deemed to have structured, written, drafted[,] or dictated such provisions." *Id.* And the easement contained a legal description of the area it covered.

The estate recorded the easement with Thurston County.

III. MCCULLOUGH'S PURCHASE

McCullough first considered purchasing the inland parcel shortly before the estate withdrew the parcel for sale. McCullough continued to monitor the parcel after the withdrawal, eventually hiring a real estate broker to represent him in purchasing the parcel. The real estate broker told McCullough that the estate planned to relist the inland parcel after granting the waterfront parcels' owner an easement for the part of the driveway that was inside the inland

parcel's borders. McCullough then toured the inland parcel. He arrived there using instructions from the listing, which directed him to access the property using the same driveway.

For several months, McCullough's real estate broker continued following up with the estate's listing agent about the inland parcel. The listing agent periodically updated the real estate broker "on the status of . . . the proposed easement and provided an image of the proposed easement survey." CP at 126.

The estate relisted the inland parcel for sale shortly after it recorded the easement. McCullough offered to purchase the inland parcel a few days later. Around the same time, McCullough obtained a copy of the easement. After reading it, McCullough thought "it simply granted access and utility rights . . . across the existing gravel driveway." CP at 102. Nevertheless, he asked his real estate broker to follow up with the listing agent and the estate's title company "regarding the scope and effect of the easement." *Id.* The real estate broker told McCullough that, based on her conversations with the listing agent and the title company, "the easement was 'exclusive' in that it prevented the" waterfront property "from being subdivided in such a way that multiple parcels could then rely on the easement and potentially overburden it." *Id.* The real estate broker also said, "On any easement, the person who owns the land can always use the land without restriction." CP at 120. McCullough's purchase of the inland parcel closed later that year.

IV. McCULLOUGH'S LAWSUIT

Sometime after McCullough purchased the inland parcel, he and Anderson met on the driveway. McCullough asked what the term "exclusive" meant as used in the easement. CP at 47. Anderson said only he could use the easement and McCullough did not have a right to use it.

McCullough hired an attorney who contacted Anderson's attorney about the easement. In a letter, Anderson's attorney told McCullough's attorney that, under *Johnson v. Lake Cushman Maintenance Co.*, 5 Wn. App. 2d 765, 425 P.3d 560 (2018), the easement would either be found unambiguous or "extrinsic evidence [would] exclude [McCullough's] use of the easement." CP at 273. Anderson's attorney also sent part of the first draft of the easement, part of the final draft of the easement, and an email from the attorney who drafted the easement. In the email, the drafting attorney said that "the grantor [would] not have a right to use the easement." CP at 277. McCullough's attorney later withdrew.

McCullough hired a second attorney. Anderson's attorney sent McCullough's new attorney a letter stating, "I assume Mr. McCullough shared with you my letter addressed to his former attorney[.] My client's legal position remains unchanged." CP at 278. Referencing *Johnson*, the letter added, "It was specifically negotiated between Grantor and Grantee that Grantor would not have use of the easement." *Id.*

McCullough then sued Anderson. He sought a declaratory judgment quieting title to the inland parcel "free-and-clear of any claim" that the easement excluded him from the easement area. CP at 9. He sought an order that the easement did not exclude him from the easement area as long as his use did not interfere with Anderson's rights of ingress and egress. And he sought a restraining order or injunction prohibiting Anderson from excluding him from the easement area.

Anderson moved for summary judgment, arguing that the easement was unambiguous and that even if it were ambiguous, indisputable extrinsic evidence showed that he and the estate intended the easement to exclude everyone except the waterfront property's owner. McCullough opposed Anderson's summary judgment motion, declaring that before he purchased the inland

parcel, neither his real estate broker, the estate's listing agent, the title company, "[n]or anyone else [disclosed] that the recorded easement was intended or otherwise operated to exclude [him] from the easement area." CP at 103. However, Anderson submitted a declaration stating that he was "never contacted by Mr. McCullough or any agent of his" about "what the term 'exclusive' meant as used in the recorded easement." CP at 46. The estate's listing agent said the same in their declaration.

During the summary judgment hearing, McCullough briefly argued for the first time that there was a genuine issue of material fact concerning the easement's physical dimensions. McCullough contended there was "some contradiction as to what area was actually even intended to have the easement." Verbatim Rep. of Proc. (VRP) (Aug. 19, 2022) at 24. Neither Anderson nor the trial court addressed this brief line of argument.

At the end of the hearing, the trial court granted Anderson's motion for summary judgment. The trial court concluded that the use of the word "'exclusive'" was ambiguous as to whether it meant that McCullough was excluded from using the easement area. *Id.* at 39. However, looking to the extrinsic evidence, the trial court concluded that there was no genuine issue of fact because the evidence showed the parties intended to create "an exclusive easement for the grantee to the exclusion of the grantor." *Id.* at 40.

Anderson moved for an award of attorney fees and costs under RCW 4.84.185. That statute allows a court to award attorney fees and costs if the court finds that an action "was frivolous and advanced without reasonable cause." RCW 4.84.185. At a hearing, the trial court said it would grant the motion. The trial court explained that "the *Johnson* case existed before" McCullough purchased the inland parcel, and *Johnson* clearly provided that if there was ambiguity around

whether the term "'exclusive'" in an easement excluded the grantor, a court would look to the intent of the parties that made the agreement. VRP (Sept. 30, 2022) at 24. The trial court added that McCullough was on notice about *Johnson* at the time of the purchase, so there was "no reason why" he could not have inquired about the easement, given that any ambiguity would be resolved by looking to the intent of the parties who drafted the easement. *Id.* at 25.

The trial court's order awarding attorney fees and costs stated that based on the parties' pleadings and "[l]etters and email exchanges transmitted to McCullough's attorneys" before the filing of the lawsuit, the court found that McCullough's "lawsuit was frivolous and advanced without reasonable cause." CP at 349-50.

McCullough appeals the grant of summary judgment and award of attorney fees and costs.

ANALYSIS

I. EASEMENT

We review a trial court's grant of summary judgment de novo. *Johnson*, 5 Wn. App. 2d at 776. Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c).

A. Easement Exclusivity

McCullough argues that the trial court erred when it granted Anderson's summary judgment motion because the easement "on its face contemplates use of the [d]riveway by the servient owner." Br. of Appellant at 12. McCullough explains that "construction of the [easement] as a whole precludes an interpretation" that would exclude him "from using his own property." *Id.*

at 13. And he contends that even if the easement were ambiguous as to whether it excluded him, Anderson was "a 'maker' of the easement document," so Anderson should not have been able to "rely upon extrinsic evidence . . . to cure an ambiguity he helped create, to the detriment of a subsequent purchaser of the servient estate." *Id.* at 24. McCullough also contends that he did not have a duty to inquire about the exclusivity provision.

We conclude that while *Johnson* held that the term "exclusive" is ambiguous, considering this entire easement in context, the easement unambiguously excludes even the owner of the servient estate.

"'An easement is a property right separate from ownership that allows the use of another's land without compensation.'" *Johnson*, 5 Wn. App. 2d at 778 (internal quotation marks omitted) (quoting *Hanna v. Margitan*, 193 Wn. App. 596, 606, 373 P.3d 300 (2016)). An easement burdens "the servient estate," and a "'successor in interest to the servient estate takes the estate subject to [that] easement[] if the successor had actual, constructive, or implied notice of the easement.'" *Id.* (internal quotation marks omitted) (quoting *Hanna*, 193 Wn. App. at 606).

Washington law recognizes the validity of an easement that excludes the grantor. *Id.* at 783. In determining whether an easement excludes the grantor, we discern "the original parties' intent" by examining "the instrument as a whole." *Rainier View Ct. Homeowners Ass'n v. Zenker*, 157 Wn. App. 710, 720, 238 P.3d 1217 (2010). "If the plain language of the instrument is unambiguous, then we will not consider extrinsic evidence of intent." *Johnson*, 5 Wn. App. 2d at 783. But if the instrument is ambiguous, "we may consider extrinsic evidence of the parties' intent." *Id.* "A written instrument is ambiguous if 'its terms are uncertain or capable of being

understood as having more than one meaning.'" *Id.* (internal quotation marks omitted) (quoting *Rainier View*, 157 Wn. App. at 720).

We held in *Johnson* that "the mere inclusion of the phrase 'for the exclusive use'" in an instrument does not unambiguously create an easement that excludes the grantor. *Id.* at 784. Rather, the phrase suggests three possibilities: the grant of an easement to the grantee "to the exclusion of all others, except the grantor;" the grant of an easement "excluding all others, including the grantor;" or "the grant of a fee simple estate." *Id.* at 785. Because the phrase "'for the exclusive use'" in an easement "is susceptible to conflicting interpretations," that phrase by itself is ambiguous. *Id.* at 784-85. Even so, in this case, reading the entire easement in context shows that the document unambiguously excluded McCullough from accessing the driveway. The easement stated, "Grantor desires to grant to Grantee a perpetual, exclusive easement for ingress, egress, and utilities, over and across" the driveway. CP at 75.[2] In addition to using the phrase "exclusive easement," the easement provided that the grantee would bear sole "responsibility for the construction, repair, and maintenance of the" driveway. *Id.* And the easement assigned responsibility for indemnification almost entirely to the grantee. These provisions are consistent with an exclusive easement allowing access only for the grantee because only the grantee is responsible for repair, maintenance, and liability arising from use of the easement. Unlike the instrument in *Johnson*, which contained only a statement that the easement was "'for the exclusive use'" of the grantee, 5 Wn. App. 2d at 783, the language of the easement agreement here contained

[2] Although the easement in *Johnson* used the phrase "'for the exclusive use,'" 5 Wn. App. 2d at 784, the easement in this case granted an "exclusive easement." CP at 75. We note that Black's Law Dictionary defines the term "exclusive easement" as an "easement that the holder has the sole right to use." BLACK'S LAW DICTIONARY 645 (11th ed. 2019).

other indications of the parties' intent to create an easement that excluded the servient property's owner.

Because reading the entire easement in context shows that the easement unambiguously excluded McCullough from the driveway, we need not consider extrinsic evidence of the parties' intent. We affirm the trial court's order granting summary judgment to Anderson.

B. Easement Dimensions

McCullough argues that there is a genuine issue of material fact concerning the physical dimensions of the easement. Below, McCullough raised this issue only briefly in oral argument on summary judgment. We decline to consider this argument.

"On review of an order granting or denying a motion for summary judgment," we "consider only evidence and issues called to the attention of the trial court." RAP 9.12. Raising an issue during oral argument without raising it in a written motion or response generally does not properly bring the issue to the trial court's attention. *See White v. Kent Med. Ctr., Inc.*, 61 Wn. App. 163, 168-69, 810 P.2d 4 (1991). And "'[p]assing treatment of an issue . . . is insufficient to merit judicial consideration.'" *Cf. In re Guardianship of Ursich*, 10 Wn. App. 2d 263, 278, 448 P.3d 112 (2019) (declining to address a party's assignment of error to the trial court's denial of its motion for reconsideration) (quoting *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998)).

Here, we will not consider McCullough's argument regarding the easement's physical dimensions because he did not properly call the issue to the trial court's attention. McCullough did not make any claims relating to the easement's dimensions in his complaint, and he never sought to amend the complaint. Although McCullough briefly raised the issue verbally at the summary judgment hearing, he did not present legal argument related to this issue or raise the issue in his

memorandum opposing Anderson's summary judgment motion. He offered no facts to support his claim that there is a genuine dispute about the physical dimensions of the easement. Nor did he offer any legal argument to support his contention that the court should rely on anything other than the legal description recited in the easement. The trial court lacked the opportunity to rule on the issue with the benefit of argument from both sides. And McCullough did not attempt to provide support for his assertion by raising it in a motion for reconsideration.

Under these circumstances, we conclude that McCullough did not properly raise this issue before the trial court, and therefore, we decline to address it on appeal.

II. ATTORNEY FEES AND COSTS UNDER RCW 4.84.185

McCullough argues that the trial court abused its discretion in awarding Anderson attorney fees and costs under RCW 4.84.185. McCullough contends that his "lawsuit was not frivolous but was instead supported by rational, [good-faith] arguments based in both law and fact." Br. of Appellant at 43. Anderson responds that the "law on interpreting easements was settled and the facts clear before McCullough filed suit," pointing out that his attorney sent McCullough's attorneys information about the applicable law and the extrinsic evidence showing the intent of the parties to the easement. Br. of Resp't at 47. We agree with McCullough and reverse the trial court's order awarding Anderson attorney fees and costs.

"We review a trial court's award under RCW 4.84.185 for an abuse of discretion." *Dave Johnson Ins. v. Wright*, 167 Wn. App. 758, 786, 275 P.3d 339 (2012). "A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds." *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn. App. 201, 218, 304 P.3d 914 (2013).

Under RCW 4.84.185, a court "may, upon written findings by the judge that the action . . . was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including" attorney fees. For example, in *Hanna*, Division Three held that the trial court abused its discretion by requiring the Hannas to pay an opposing party's attorney fees and costs, reasoning that the Hannas' argument had "some statutory support" and "was supported by a rational argument on the law and facts." 193 Wn. App. at 614. The Hannas had unsuccessfully argued that "once a short plat is recorded, a party cannot alter the subdivision by granting a private easement without formally amending the short plat." *Id.* at 607. Although the court disagreed, it explained that under the statute the Hannas cited in support of their argument, "an easement that is not depicted on a short plat is arguably an 'alteration.'" *Id.* at 614.

Here, the trial court abused its discretion when it awarded Anderson attorney fees and costs. McCullough's argument below, which was similar to his argument on appeal, centered around the idea that *Johnson* was not directly applicable to his case. Specifically, he argued that extrinsic evidence should not be used to determine the meaning of the term "'exclusive'" in the easement because his status as a successive owner made him different, analyzing the duty of a prospective buyer to inquire about the scope of an easement. CP at 179. Although McCullough's argument was unsuccessful, like the statutory argument in *Hanna*, the argument was rational. McCullough directly addressed our recent holding in *Johnson* and then pointed out ways in which the easement burdening his property was different from the easement in that case. Attorneys frequently argue in good faith for a different result when facts are different. McCullough also reasonably argued that the courts should account for his status as a subsequent purchaser who was not directly involved

in negotiation of the easement. Even though we conclude that the entire easement in context unambiguously excludes the owner of the servient estate, we also conclude that the trial court abused its discretion in awarding attorney fees and costs under RCW 4.84.185 to Anderson because McCullough's arguments were not frivolous.

ATTORNEY FEES ON APPEAL

Anderson argues that attorney fees "are warranted for [his] efforts to respond to McCullough's frivolous appeal." Br. of Resp't at 54. RAP 18.9(a) allows us to grant a respondent attorney fees and costs when the appellant "files a frivolous appeal." An appeal is not frivolous where it results in an appellate court reversing a trial court's order awarding attorney fees and costs under RCW 4.84.185. *Biggs v. Vail*, 119 Wn.2d 129, 138, 830 P.2d 350 (1992). For the same reasons we reverse the trial court's award of attorney fees and costs to Anderson, we do not award Anderson attorney fees and costs on appeal.

CONCLUSION

We reverse the award of attorney fees and costs under RCW 4.84.185. We otherwise affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Glasgow, C.J.

We concur:

Lee, J.

Price, J.

Filed
Washington State
Court of Appeals
Division Two

November 8, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JORDAN MCCULLOUGH, an unmarried individual, Appellant, v. MARK ANDERSON, an unmarried individual; ALL OTHER PERSONS OR PARTIES UNKNOWN CLAIMING ANY RIGHT, TITLE, ESTATE, LIEN, OR INTEREST IN THE REAL ESTATE DESCRIBED HEREIN, Respondent.	No. 57283-4-II ORDER DENYING MOTION FOR RECONSIDERATION

The opinion in this matter was filed on August 22, 2023. On September 11, 2023, appellant, Jordan McCullough, filed a motion for reconsideration. The respondent, Mark Anderson, filed a response to the motion and the appellant replied. After consideration, it is hereby

ORDERED that the motion for reconsideration is denied. Respondent's request for fess is also denied.

Glasgow, C.J.

BERESFORD BOOTH PLLC

December 08, 2023 - 2:02 PM

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