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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

MARK and JENNIFER HANNA, husband and wife,

Appellants,

v.

ALLAN AND GINA MARGITAN, husband and wife, and HAROLD L.
and PATRICIA CROWSTON, husband and wife, DAN R. BOND and
JANE DOE BOND, husband and wife, DAN M. BOND and JANE DOE
BOND, husband and wife, RYKEN LIVING TRUST and Trustees CARL
and CAROLE RYKEN, STEVE and SHANNON MOSER, husband and
wife, and AVISTA CORPORATION, INLAND POWER AND LIGHT
CO.,

Respondents.

REVISED BRIEF OF RESPONDENTS RYKEN LIVING TRUST
AND TRUSTEES CARL RYKEN AND CAROLE RYKEN

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I. INTRODUCTION

The Respondents, the Ryken Living Trust and Trustees Carl Ryken and Carole Ryken (collectively “Rykens”) file this revised brief in response to the revised brief filed by the Appellants, Mark Hanna and Jennifer Hanna (collectively “Hannas”) on June 25, 2015. The Rykens join the positions advanced by Avista Corporation in its brief to this Court and incorporates the arguments set forth therein.

The Hannas filed this lawsuit asking the Superior Court to declare that privately-granted easements encumbering the Hannas’ properties were extinguished by operation of the Land Use Petitions Act (“LUPA”), RCW Chapter 36.70C when Short Plat SP 1227-00 (“Short Plat”) was recorded in 2002. The Hannas contend that *all* easements, even easements dating back to 1941 or easements created by prescriptive use, were extinguished as a matter of law because they were not shown on the Short Plat. The Hannas further contend that the owners of the properties benefited by those easements had to file an appeal under LUPA within 21 days of approval of the Short Plat to “add” these easements to the Short Plat.

A non-exclusive privately-granted easement for ingress and egress to the Rykens’ property had been properly created and properly recorded with Spokane County by the Rykens’ predecessors in interest in 1995. The

Rykens purchased their property in 2002 shortly after the adoption of the Short Plat. The easement was part of the legal description in the Statutory Warranty Deed by which the Rykens purchased the property. By purchasing their property, the Rykens became the successors in interest to this easement for ingress and egress purposes.

The Hannas' claim is not based on any actual legal authority. Instead, it is based on the pre-conceived and incorrect notion that LUPA displaces long established Washington law regarding privately-granted and recorded easements. The Hannas' theory that the Short Plat and LUPA somehow extinguished privately-granted easements is based on the flawed premise that the Rykens are now seeking to amend or alter the Short Plat in derogation of LUPA. To the contrary, the Rykens are simply defending their valid privately-granted easement rights against the Hannas' baseless assault to terminate this property interest. Despite years of litigation, numerous briefs filed in Superior Court, briefing before this Court, and thousands of dollars in attorney fees needlessly incurred by all of the parties to this action, the Hannas have not provided any legal authority to support their claim. The trial court correctly dismissed the Hannas' claim against all of the Respondents at summary judgment because there is no legal basis or authority providing that LUPA operates

to extinguish valid privately-granted easements that were properly created and recorded under Washington law. Since there is no basis in law for the Hannas' claim against the Rykens, the trial court properly awarded attorney fees and costs to the Rykens pursuant to RCW 4.84.185. Both decisions of the Superior Court should be affirmed.

II. ASSIGNMENT OF ERRORS AND ISSUES PERTAINING TO ASSIGNMENTS OF ERRORS

The Hannas list a number of assignments of error they contend the trial court made in granting summary judgment and set forth corresponding issues related to these assignments of errors. While comment is generally not required, it is necessary here because a number of the assignments of errors and corresponding issues asserted by the Hannas are simply incorrect and are being asserted in an attempt to change the real issue that is the subject of this appeal.

A. Assignment of Errors

First, in moving for summary judgment, the Rykens did not ask, and the trial court did not conclude, that privately granted easements may be “added” to the Short Plat without amending the Short Plat or that “private easements” were beyond the purview of LUPA. (Assignment of Error Nos. 1, 5 and No. 6) As discussed more fully below, the trial court granted the Rykens’ summary judgment on the basis that the approval of

the Short Plat in 2002 had no legal effect on the Rykens' privately-granted easement recorded in 1995 under long-standing Washington law and that there is a complete absence of legal authority for the Hannas' claim. (CP 814-818)

Similarly, the trial court did not conclude that privately-granted easements recorded before adoption of the Short Plat did not constitute a "collateral attack" on a final "land use decision" under LUPA. (Assignment of Error No. 7) This pre-supposes that LUPA actually applies to privately-granted easements. Again, the trial court concluded that the recording of the Short Plat had no legal effect on the Rykens' privately-granted easement and that LUPA did not "extinguish" that easement. (CP 814-818)

The trial court did not conclude that the Short Plat includes not only the 40 foot wide easement depicted on the face of the Short Plat, but also includes all recorded pre-existing easements and post-recorded easements without amending the Short Plat. (Assignment of Error No. 8) Again, the trial court correctly ruled that the Hannas' claim that such easements, including the Rykens', were extinguished as a matter of law under LUPA had no legal basis and dismissed the claim upon summary judgment. (CP 814-818) The Hannas continue to confuse easements

dedicated in plat and easements created and recorded between private parties. Privately-granted easements are not dedicated easements in a plat.

Finally, the trial court did not conclude that it had jurisdiction to hear the Rykens' motion under LUPA or that roads not dedicated to the public could be depicted on the Short Plat pursuant to RCW 58.17.165. (Assignment of Error Nos. 3, 9 and 10) The trial court dismissed the Hannas' claim because the Hannas provided absolutely no legal authority that easements privately-granted and not dedicated as part of a platting process are "extinguished" under LUPA as a "land use decision". CP 814-818).

B. Issues Related to Assignment of Errors

As with the Assignments of Error, a number of the Issues Related to the Assignments of Error raised by the Hannas are simply incorrect or irrelevant to this appeal.

First, this case does not deal with LUPA, "public" or "private" easements dedicated pursuant to a "land use decision", the platting process or dedication of public roads under RCW Chapter 58.17. (Issue Nos. 1-3) This case deals with privately-granted easements for ingress and egress that were properly created and properly recorded under Washington law and the Hannas contention that these easements were "extinguished"

under LUPA. As discussed more fully below, the issue before the trial court and properly decided by the trial court was that the recording of the Short Plat had no legal effect on these privately-granted easements.

Second, this case has nothing to do with a “land use decision” as defined by LUPA, jurisdiction requirements of LUPA, or time limits for appeals imposed under LUPA. (Issue Nos. 4-11) As discussed more fully below, LUPA simply does not apply. While the adoption of the Short Plat was a “land use decision” as defined by LUPA, privately created and recorded easements are not “land use decisions”, are not subject to LUPA and are not “extinguished” because they were not depicted on the Short Plat. The Hannas do not provide any legal authority to support their claim. The trial court correctly concluded that the adoption of the Short Plat had no legal effect on the validity of the privately-granted easements under Washington law.

This case has nothing to do with adding easements to a Short Plat or amending the Short Plat. (Issue Nos. 15-16) As discussed more fully below, Spokane County simply approved the Short Plat that was presented to the County and which included the 40 foot dedicated easement. The Short Plat does not show privately-granted easements on its face because it does not need to for such easements to exist. Similarly, the trial court did

not add any easements to the Short Plat. The trial court correctly concluded that the approval of the Short Plat had no legal effect on the Rykens' privately-granted easement or any other privately-granted and recorded easement.

Essentially, the Hannas confuse the very nature of easements. As discussed more fully below, both public and private easements may be dedicated on a plat in connection with the platting process. Easements may separately be created under Washington law for ingress and egress and for utilities between property owners. That was what was done in this case. The Rykens purchased property with an existing recorded privately-granted easement providing for ingress and egress. There is absolutely no authority in Washington that a privately-granted easement constitutes a "land use decision" under LUPA and, therefore, must be depicted on a plat or it is extinguished upon approval of that plat.

III. STATEMENT OF THE CASE

Despite the Hannas' attempt to state otherwise, the sole issue before this Court is whether the trial court properly granted summary judgment holding that the previously recorded privately-granted easements were not extinguished by the adoption of the Short Plat and that LUPA has no application to such easements.

The Rykens own real property located at 14310 West Charles Road, Nine Mile Falls, Washington, 99026. (CP 588) This property abuts Long Lake in northwest Spokane County and is within the area of the Short Plat that was eventually adopted and recorded in March, 2002. (CP 588; CP 664-372) The property now owned by the Rykens is benefited by an easement created by express grant and reservation from Marion G. Bond to Drew A. and Carol A. Bond (predecessors in interest to the Rykens) to access the Long Lake shoreline. (CP 184; CP 588-589) This easement was recorded on August 18, 1995 under Spokane County Auditor's File No. 9508180129. (CP 184; CP 588-589) The easement was created and recorded long before the Short Plat was adopted in this case.

On May 31, 2002, the Rykens purchased the property from Drew and Carol Bond after adoption of the Short Plat. s. (CP 588) The easement created and recorded in 1995 was included in the legal description in the Statutory Warranty Deed by which the Rykens purchased the Property. (CP 588; 592-595) On February 8, 2007, the Rykens conveyed the Property to the Ryken Living Trust. (CP 588) By purchasing the Property, the Rykens became the successors in interest to the non-exclusive easement appurtenant to the Property, which granted ingress and egress

across Spokane County Tax Parcels 17274.9108 and 17274.9030 to access the Long Lake shoreline (CP 588)

The Short Plat was conditionally approved by Spokane County on May 12, 2000. (CP 684-691). The final Short Plat was recorded on March 19, 2002. (CP 364-372) The Hannas make much of the fact that the various privately-granted and recorded easements were not depicted on the final Short Plat or approved by Spokane County as part of the Short Plat. The Hannas claim that the approval of the Short Plat resulted in Spokane County intentionally “removing” the pre-existing easements and that the only easement that exists is the 40 foot wide easement depicted on the Short Plat. Spokane County did not intentionally “remove” any easements. There is nothing in the Findings of Fact, Conclusions and Decision prepared by Spokane County or the actual written Short Plat to support the contention that the pre-existing privately-granted and recorded easements were intentionally “removed”. (CP 364-372) As discussed more fully below, Spokane County did not need to approve or take any other action as to the pre-existing and properly recorded easements when the Short Plat was created.

The Hannas initiated this lawsuit on October 12, 2012 against Allan and Gina Martigan seeking declaratory relief that the easements

recorded between 1941 and 2002 (before the property was platted) were extinguished by the Short Plat. (CP 1-15). After almost two years of litigation, the Hannas filed an Amended Complaint in June 30, 2014 adding other property owners and easement holders in the neighborhood of the Short Plat, including the Rykens, seeking among other things, a judgment that all easements (both recorded and prescriptive) before and after adoption of the Short Plat were extinguished because they were not depicted on the Short Plat. (CP 316-331).

Prior to the filing of the Amended Complaint and before the Rykens were brought into this litigation, the Hannas and Martigans moved for summary judgment. In their brief to this Court, the Hannas assign an enormous amount of importance to the order signed by Judge Linda Tompkins on May 24, 2013 that resulted from the summary judgment hearing. (CP 258-263) The Hannas contend that this order somehow precludes the trial court from later considering and granting the Rykens' motion for summary judgment in January 2015. (CP 803-805) The Rykens concede that the May 24, 2013 order states that the Short Plat depicts a 40 foot easement on its face, that adoption of the Short Plat was a "land use decision" under LUPA and that the Short Plat was recorded and has not been amended. (CP 258-263).

However, the May 23, 2013 summary judgment order has no impact on the facts and law relating to the summary judgment order which is now the subject of this appeal and the trial court was not precluded from entering the order which is now the subject of this appeal. The Hannas have not fully explained to this Court what actually occurred in connection with the first summary judgment motion and what the May 2013 summary judgment order actually states. Judge Tompkins' order clearly states that the Hannas asked her to rule that all easements recorded before and after adoption of the Short Plat had been extinguished (CP 258). The May 23, 2013 order signed by Judge Tompkins clearly denied this motion. The order states: "Plaintiffs' motion is DENIED in part as to whether the Short Plat extinguishes pre-existing easements." (CP 260). As such, contrary to the Hannas' position, Judge Tompkins never made any substantive ruling on the issues which are the very basis of the Hannas' claim dismissed at the later summary judgment hearing which is now the subject of this appeal. Judge Tompkins specifically denied the Hannas motion to rule that all easements were "extinguished" by adoption of the Short Plat except for the 40 foot easement depicted on that Short Plat. (CP 260). That issue was dealt with over a year later after the Hannas added the Rykens (and the other parties) to this lawsuit and the Defendants moved for summary

judgment in December, 2014. (CP 619-635; CP 636-638) The Rykens' motion and the subsequent order entered as a result of that motion dealt squarely with the Hannas' claim that the Short Plat extinguished the Rykens' pre-existing easement which was not ruled upon in the May 23, 2013 order. The trial court did not "sidestep" or "ignore" any ruling in the May 23, 2013 order because there was no substantive ruling as to that issue in the prior order. The only substantive ruling came when the trial court dismissed the Hannas' claim that all easements were "extinguished" under LUPA in the order that is the subject matter of this appeal. (CP 811-818)

In addition to confusing the issues actually on appeal, the Hannas make a number of inaccurate allegations that warrant discussion. First, the Hannas allege in their brief that the Rykens (and all of the Respondents for that matter), sought a court order "...including their easements in the Short Plat." (Appellant's brief pg. 21). The Hannas also allege that Spokane County intentionally "excluded" all pre-existing and after-recorded easement as a "land use decision" when the Short Plat was adopted and that the trial court "restored" those easements to the Short Plat in the order on summary judgment. (Appellant's brief pg. 22). This is simply not the case. Spokane County did not "exclude" any pre-existing and recorded

easements with the adoption of the Short Plat and never made any decision in its Findings and Conclusions do to so. Instead, Spokane County approved the Short Plat that was placed before it. (CP 364-372) Spokane County did not “exclude” or otherwise act upon any of the privately-granted and recorded easements.

Similarly, by granting the Rykens’ motion for summary judgment dismissing the Hannas claims, the trial court did not “restore” any easements. At summary judgment, the Rykens asked the Court to dismiss the Hannas’ claims that their easement for ingress and egress that was privately granted and properly recorded in 1995 was “extinguished” as a “land use decision”. (CP 636-638; 619-635). The trial court’s order dismissing the Hannas’ claim at summary judgment did not change any “land use decision” or “restore” any easements. Instead, the summary judgment order properly concluded that the Hannas’ claim failed because the recording of the Short Plat had no legal effect on the Rykens’ privately granted easement recorded in 1995. (CP 811-818)

Disregarding misstatement of facts and legal issues, the only real issue is whether the trial court correctly granted summary judgment dismissing the Hannas’ claim that the Short Plat extinguished valid and recorded privately-granted easements. The Hannas have never provided

any legal authority that the adoption of the Short Plat extinguished easements and that claim was properly dismissed at summary judgment. The trial court properly dismissed the Hannas' claim because the Hannas completely confuse the application of LUPA to privately-granted easements. That decision should be affirmed.

Similarly, the trial court's decision awarding the Rykens attorney fees and costs pursuant to RCW 4.84.185 should be affirmed as the claim asserted against the Rykens was frivolous and without basis in law. The Hannas raise two issues on appeal.

First, the Hannas claim that the trial court did not make adequate written findings to award attorney fees under RCW 4.84.185 and argue that remand is necessary for entry of additional written findings. The trial court's order awarding attorney fees pursuant to RCW 4.84.185 states the following:

“..the Court having reviewed the pleadings on file herein and having heard the arguments of counsel and having considered all of the evidence to determine whether the claims asserted in this matter by the Plaintiffs against the Rykens were frivolous and advanced without reasonable cause, and the Court hereby specifically finding that the claims asserted by the Plaintiffs against the Defendant Ryken were frivolous and advanced without reasonable [cause]....(CP 1092)

As to the amount of the attorney fees awarded, the trial court specifically found, after considering the Declaration of Peter A. Witherspoon filed on

February 17, 2015 (CP 855-868) and Supplemental Declaration of Peter A. Witherspoon filed on March 27, 2015 (CP 1011-1083) filed in support of the Rykens' motion, that the attorney fees and costs incurred were reasonable. (CP 1093)

While the Hannas argued to the trial court (and now argue to this Court) that their action against the Rykens was not frivolous, the Hannas made no objection to the actual amount fees awarded to the trial court. The Rykens motion for attorney fees was supported by two declarations of Peter A. Witherspoon which provided specific detail of the hourly rate of each individual working on the matter, the work completed for each time entry and the time expended on each entry. (CP 855-868; CP 1011-1083) In response to the Rykens' motion and the declarations containing specific detail concerning the fees and costs incurred supporting the motion, the Hannas simply argued to the trial court that (1) the total amount was "unreasonable" because the Rykens' attorney represented a single client and the other attorneys represented multiple clients (CP 988), (2) the Rykens only had to address a "single summary judgment motion". (CP 988) and (3) the amount awarded should be somewhere between the lowest and highest amount of fees incurred by all attorneys. (CP 988). Apart from these general objections, the Hannas provided no argument, no

affidavits and no other specific objections that the hourly rate was excessive, that the work completed was duplicative, or that the work completed was unnecessary. In their motion for reconsideration to the trial court, the Hannas did not address any issue regarding the amount of the attorney fee award. (CP 1095-1097; CP 1098-1104) In their appeal to this Court, the Hannas offered no objection to the amount of the fees awarded nor devoted any argument in their brief as to the amounts awarded. As discussed more fully below, the written findings of the trial court were sufficient to sustain an award under RCW 4.84.185 as the trial court specifically found that the Hannas' lawsuit was frivolous and advanced without reasonable cause. In addition, the trial court correctly found that the amount of attorney fees and costs awarded in this matter were reasonable. In the alternative, since the Hannas failed to object or contest the reasonableness of the attorney fees awarded, written findings were not required.

Second, the Hannas argue that they raised several rational and persuasive arguments that LUPA extinguished valid and recorded privately-granted easements as a matter of law. As discussed at length in this brief, the Hannas have not provided any legal basis for their claim

asserted against the Rykens. The trial court's decision awarding attorney fees pursuant to RCW 4.84.185 should be affirmed.

IV. ARGUMENT

A. Summary Judgment Standard

When reviewing an order for summary judgment, the Court engages in the same inquiry as the trial court. *Wilson Court Ltd. Partnership v. Tony Maroni's Inc.*, 134 Wn.2d 692, 698, 952 P.2d 590 (1998). An order on summary judgment will be affirmed if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 698. Summary judgment will be sustained on any theory established in the pleadings and supported by proof. *Washington State Bank v. Medalia Healthcare L.L.C.*, 96 Wn.App. 547, 553, 984 P.2d 1041 (1999).

Summary judgment is proper if the record demonstrates that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Civil Rule 56(c). If no genuine issue of material fact upon which reasonable persons could disagree exists, the court should grant the motion for summary judgment. *Lundgren v. Kieren*, 64 Wn.2d 672, 677, 393 P.2d 625 (1964). While all facts and inferences are to be considered in the light most favorable to the non-moving party,

to avoid an adverse summary judgment, the non-moving party must offer specific, detailed evidence that raises a genuine issue of fact. *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993); *Charbonneau v. Wilbur Ellis Co.*, 9 Wn. App. 474, 477, 512 P.2d 1126 (1973). Mere denials, argumentative assertions, or unsupported conclusory allegations will not defeat summary judgment. *Island Air, Inc. v. Labar*, 18 Wn. App. 129, 136, 566 P.2d 972 (1977). Instead, the non-moving party must submit sufficient affidavits setting forth specific facts which have the effect of disputing the facts of the moving party. *Id.* Such disputing facts must create a genuine issue of material fact, i.e., one upon which the outcome of the litigation (or litigation of specific issues) depends. *Id.* Because the parties do not dispute the facts, the instant litigation involves purely legal questions that were correctly determined by the Superior Court and should be affirmed here. *See Knight, Vale & Gregory v. McDaniel*, 37 Wn. App. 366, 368, 680 P.2d 448 (1984) citing *Yeats v. Estate of Yeats*, 90 Wn.2d 201, 204, 580 P.2d 617 (1978) (“The facts surrounding entering into the agreement and the acts constituting violation of the covenant are undisputed. Therefore, resolution of the issue by summary judgment was appropriate.”).

B. The Adoption Of The Short Plat Did Not Extinguish Privately-Granted Easements.

Ignoring the numerous factual misstatements and misrepresentation of the procedural history noted above, the Hannas' main contention is that the Short Plat constitutes a "land use decision". Since the privately granted easement that was recorded in 1995 is not depicted on the Short Plat and the Rykens did not appeal the approval of the Short Plat within 21 days of its approval under LUPA, the Hannas contend that this easement was extinguished and cannot be "added" to the Short Plat without amending that Short Plat. The Hannas position is based on a complete misunderstanding of Washington law regarding easements and LUPA.

1. Easements

An easement is generally described as the privilege to use the land of another. *State ex rel. Shorett v. Blue Ridge Club*, 22 Wn.2d 487, 494, 156 P.2d 667 (1945). An affirmative easement gives the right or privilege to use another's land in a particular manner, such as a right of way across another's land. *Washington Real Property Deskbook*, §7.2(3) Wash. St. Bar Assoc. (4th ed. 2009). A grant of an easement must be in writing, signed by the parties to be bound and acknowledged. RCW 64.04.020. The easement must be recorded in the County where the property is

situated or it may be void against any subsequent owners. RCW 65.08.070. Once recorded, an easement is an irrevocable interest in land that passes to successors in interest by the conveyance of the property to which it is appurtenant. Real Property Deskbook *Washington Real Property Deskbook*, §7.7(1) Wash. St. Bar Assoc. (4th ed. 2009); *Cowan v. Gladder*, 120 Wash. 144, 145, 206 P. 923 (1922). Unless the instrument that creates the easement so provides, an easement may not be terminated without the consent of the owner of the easement. *Washington Real Property Deskbook*, § 7.8(2) Wash. St. Bar Assoc. (4th ed. 2009), *Cowan v. Gladder* (supra).

In addition to an easement created by written agreement and recorded with the County, an easement may also be acquired by prescription by the exclusive and uninterrupted use and enjoyment of the easement property. *Washington Real Property Deskbook*, §7.4(2)(a); Wash. St. Bar Assoc. (4th ed. 2009); *Miller v. Jarman*, 2 Wn.App. 994, 471 P.2d 704 (1970). Easements may also be implied by prior use or implied by necessity. *Washington Real Property Deskbook*, §7.5. Wash. St. Bar Assoc. (4th ed. 2009). As discussed more fully below, the Rykens' predecessors in interest expressly granted and recorded a valid private easement for ingress and egress in 1995 benefitting the property now

owned by the Rykens. By purchasing their property in 2002, the Rykens continue to have the use and benefit of this easement for ingress and egress.

2. LUPA

The fatal defect in the Hannas' claim is their attempt to abrogate basic and long-standing real property law in Washington regarding easements by applying the requirements of LUPA without any supporting legal authority. Initially, the Hannas correctly state that LUPA is triggered and only applies when a "land use decision" (as defined by LUPA) has been made. RCW 36.70C.040, *Horan v. City of Federal Way*, 110 Wn.App. 204, 209, 39 P.3d 366 (2002). A "land use decision" is defined by LUPA as follows:

(2) "Land use decision" means a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on:

(a) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used, but excluding applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public property; excluding applications for legislative approvals such as area-wide rezones and annexations; and excluding applications for business licenses

(b) An interpretative or declaratory decision regarding the application to a specific property of zoning or other

ordinances or rules regulating the improvement, development, modification, maintenance, or use of real property; and

(c) The enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property. However, when a local jurisdiction is required by law to enforce the ordinances in a court of limited jurisdiction, a petition may not be brought under this chapter.

Where a local jurisdiction allows or requires a motion for reconsideration to the highest level of authority making the determination, and a timely motion for reconsideration has been filed, the land use decision occurs on the date a decision is entered on the motion for reconsideration, and not the date of the original decision for which the motion for reconsideration was filed. RCW 36.70C.020(2)¹.

It is at this point that the Hannas' argument unravels. Their entire argument is based on the contention that, since there is no exclusion under RCW 36.70C.030 for "private easements", it **must** mean that privately-granted easements are controlled by LUPA. The very statute that the Hannas rely upon in making this argument specifically has no application. RCW 36.70C.030 only states that: (1) LUPA replaces the writ of certiorari for appeal of land use decisions; (2) LUPA does not apply to judicial review of land use decisions of a local jurisdiction that has review procedures by a quasi judicial body; (3) LUPA does not apply to judicial

¹ See also *Horan*, 110 Wn.App. at 209 (A land use decision is "...final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination.")

review of writs of mandamus or prohibition; and (4) LUPA does not apply to claims provided by law for monetary damages or compensation. RCW 36.70C.030. The Hannas also ignore that a privately-granted and properly recorded easement (or, for that matter, an easement by prescription or necessity) is not a “land use decision” as defined by LUPA because it does not relate to any final determination by a government body or an appeal of a final determination of any “land use decision” defined by statute. RCW 36.70C.020(2). In short, the Hannas fail to provide *any* authority that privately-granted easements between parties properly recorded as required by Washington law are subject to LUPA and can be extinguished by LUPA.

The Hannas are also correct that the approval of the final Short Plat was a “land use decision”. However, the Hannas then take the monumental leap (without any legal support) that previously existing easements privately granted and properly recorded must be extinguished because there was no appeal of the adoption of the Short Plat within the timeline required under LUPA. The Hannas’ claim that the privately-granted easements were extinguished by the application of LUPA is incorrect for three principal reasons.

a. The Easements In This Matter Were Created By Private Agreement Rather Than By Dedication Through The Platting Process.

First and foremost, the Rykens' easement was created before the approval of the Short Plat. The fatal flaw in the Hannas' claim is that the Hannas fail to distinguish the *creation* of a privately-granted easement from the *dedication* of an easement in a plat. "'Dedication' is the deliberate appropriation of land by an owner for any general and public uses, reserving to himself or herself no other rights than such as are compatible with the full exercise and enjoyment of the public uses to which the property has been devoted." RCW 58.17.020(3). "The intention to dedicate shall be evidenced by the owner *by the presentment for filing of a final plat or short plat showing the dedication thereon*" *Id.* (emphasis added); *Rainier View Ct. Homeowners Ass'n, Inc. v. Zenker*, 157 Wn. App. 710, 719-20, 238 P.3d 1217 (2010) (citing RCW 58.17.165). ("A party may create a private easement by including the grant in a plat."). The dedication of an easement in a plat is a "land use decision".

The Rykens' easement was not created by dedication in a plat. Because the Rykens' easement was not created through a plat dedication, the easement was not extinguished by the Short Plat and was not a "land

use decision” as defined by LUPA. Here, *only one* easement was “dedicated” in the Short Plat which is the 40 foot easement depicted on the Short Plat. Contrary to the Hannas’ claim, Spokane County did not intentionally remove any pre-existing easements. Instead, the Short Plat simply approved the easement that was dedicated in that platting process. In contrast, all of the easements contested by the Hannas were *privately granted and recorded* in accordance with Washington law.

b. Privately-Granted Easements Are Only Extinguished According To Terms Of Grants And Intent Of Grantors And Grantees.

Second, the Hannas’ claim fails because of the very nature of a privately granted easement and Washington law relating to the duration of a privately granted easement. Unless the instrument that created an easement so provides, the law in Washington does not recognize the termination of the easement based merely on a lack of reference in a short plat, especially without the consent of the easements’ owners, such as the Rykens. “[T]he law disfavors termination of easements” *Littlefair v. Schulze*, 169 Wn. App. 659, 665-66, 278 P.3d 218 (2012). “[A]n easement can be extinguished only in some mode recognized by law.” 1 Wash. Real Property Deskbook, § 10.6(2), at 10–27 (3d ed. 1997) (citing 28 C.J.S. Easements § 52 (1941)). “Unless the instrument that creates the

easement so provides, an easement may not be terminated without the consent of the owner of the easement.” *Id.* (citing *Cowan v. Gladder*, 120 Wash. 144, 145, 206 P. 923 (1922)). “The extent and duration of the easement is to be determined from the terms of the grant.” *Zobrist v. Culp*, 95 Wn.2d 556, 561, 627 P.2d 1308 (1981) (citing Restatement of Property § 482 (1944)). For example, subdividing a property *does not* extinguish a pre-existing easement that runs on the property. *See Schwab v. City of Seattle*, 64 Wn. App. 742, 746, 750, 826 P.2d 1089 (1992) (appeals court affirmed trial court’s holding that “the subdivision of the Andrews property did not extinguish the original easement so that Wallis continued to have an easement across Schwab’s property . . .”).

In *Kirk v. Tomulty*, 66 Wn. App. 231, 238-39, 831 P.2d 792 (1992), the court found that “[e]ven though the map attached to the *short plat application did not depict the entire easement, a comparison of the description of the easement with the property description contained in their deeds alone would have revealed that the easement extended all the way to the boundary . . .*” (emphasis added). Here, like in *Kirk*, the Short Plat does not depict the full extent of the easements existing before the creation of the Short Plat. The Short Plat depicts only one easement, which was dedicated therein. Therefore, the instruments that created the

privately-granted easements are the focus to determine the easements' existence and true measure. "We determine the original parties' intent to an easement from the instrument as a whole." *Rainier View Ct. Homeowners Ass'n, Inc.*, 157 Wn. App. at 719-20 (citing *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003)).

In sum, because the law disfavors the termination of easements, easements *not* created by dedication in a platting process can only be terminated according to the terms of the instruments and the intent of the parties creating such easements. See 17 Wash. Prac., Real Estate § 2.12 (2d ed.) (citing *Cowan*, 120 Wash. at 145) ("An easement or profit may be terminated at any time *if its then holder or holders execute a proper instrument releasing it to the grantor or his successor*. Since an easement is an interest in land that should be created by an instrument in deed form, *it must be released in the same manner*" (emphasis added)). Thus, because the disputed easements here are privately-granted, as contrasted with being dedicated in a plat, without more, the lack of reference to the easements in the Short Plat cannot serve to extinguish such easements.

c. Easements Appurtenant To Benefitted Properties.

Third, inclusion of the private easements in the Short Plat was not necessary to preserve them because the easements are appurtenant and

thus tied to the lands that they are intended to benefit. See *Kirk*, 66 Wn. App. at 238-39 and *Clippinger v. Birge*, 14 Wn. App. 976, 986-87, 547 P.2d 871 (1976) (“Easements appurtenant *become a part of the realty* which they benefit.” (emphasis added)). “There is a strong presumption in Washington that easements are appurtenant.” *Kirk*, 66 Wn. App. at 238-39 (citing *Pioneer Sand & Gravel Co. v. Seattle Constr. & Dry Dock Co.*, 102 Wash. 608, 618, 173 P. 508 (1918)). “An easement appurtenant is an *irrevocable* interest in land which has been obtained for duly given consideration.” *Id.* (emphasis added) (citing *Bakke v. Columbia Vly. Lumber Co.*, 49 Wn.2d 165, 170, 298 P.2d 849 (1956)). An important characteristic of an easement appurtenant is that it passes to the successors in interest of the benefited land “regardless of whether it is specifically mentioned in the instrument of transfer.” *Id.* It is “not necessary that [the easement] be specifically mentioned in the instrument conveying the property to which it is appurtenant” *Id.* (citing *Loose v. Locke*, 25 Wn.2d 599, 603, 171 P.2d 849 (1946)); *Clippinger*, 14 Wn. App. at 986-87 (citing Restatement of Property § 487 (1944)) (“Unless limited by the terms of their creation or transfer, they follow possession of the dominant estate through successive transfers.”). “Th[is] rule applies even when the dominant estate is subdivided into parcels, with each parcel continuing to

enjoy the use of the servient tenement.” *Clippinger*, 14 Wn. App. at 986-87 (citing Restatement of Property § 488 (1944)). Therefore, the existence and continuation of the easements here are not governed by the Short Plat but by the ownership of the dominant and servient estates underlying each easement in conjunction with the terms of the instruments creating the easements and the intent of the easements’ grantors and grantees.

The Hannas’ entire claim is based upon the faulty premise that the Short Plat somehow affects privately-granted easements. Yet, unless the language of an easement grant so provides, a short plat cannot effectuate the termination of a privately-granted easement that was not created through dedication in such a plat. Here, *none* of the disputed easements were so created. *See Zobrist*, 95 Wn.2d at 561 (“The extent and duration of the easement is to be determined from the terms of the grant.”).

C. The Balance Of The Hannas’ Claims Lack Legal Basis

Undeterred by the lack of any competent authority, the Hannas make five additional arguments in their brief attempting to support their claim that the privately-granted easements were “extinguished”. None of these claims have any legal basis.

1. The Twenty-One-Day Deadline For Appeal Of A Decision Under LUPA Is Inapplicable As Are Issues Raised Concerning Jurisdiction Of The Court And “Collateral Attacks”.

First, the Hannas contend that, since the Rykens and other Respondents did not seek review of the Short-Plat approval within 21 days of its approval, they cannot now “collaterally attack” this “land use decision”. The Hannas then argue that because no appeal was made within 21 days, the trial court and this Court do not have jurisdiction to proceed.

Because the easements in dispute were privately-granted, as opposed to having been dedicated in a plat, they were not created by the Short Plat. Because they were not created by the Short Plat, the easements were not affected by the Short Plat’s approval because the creation and existence of these easements are not defined as “land use decisions” regulated by LUPA. Because the easements were not affected by the Short Plat’s approval, *there was no LUPA-applicable land-use decision relating to the easements*. Consequently, the continuation of the Rykens’ easement did not depend upon an appeal of the Short Plat’s approval before LUPA’s twenty-one-day response deadline. LUPA was simply not involved in the continuation or termination of that easement.

Asche v. Bloomquist, 132 Wn. App. 784, 796, 133 P.3d 475 (2006) is instructive as it explains LUPA’s purpose: “With some exceptions,

LUPA is the exclusive means of obtaining judicial review of *land use decisions.*” (emphasis added) (citing RCW 36.70C.030(1)). Nowhere in RCW 36.70C.020(2) is the private grant of an easement considered a “land use decision”. Without a land use decision, LUPA does not apply, the 21 day appeal provision does not apply, nor do issues regarding amending a plat come into play.

Since LUPA does not apply and the 21 day appeal provision imposed by LUPA does not apply, the Hannas’ arguments related to “collateral attacks” and jurisdiction also have no application to this case. Privately-granted easements are not “land use decisions” nor was there a “land use decision” regarding easements by approval of the Short Plat. Similarly, the Rykens’ predecessor in interest had no reason to appeal the approval of the Short Plat (the only “land use decision” in this matter) because their privately granted easement was not addressed or dealt with by the Short Plat. The cases cited by the Hannas relating to collateral attacks on final LUPA decisions and the Court’s jurisdiction to hear an appeal of land use decisions are simply inapplicable.

2. LUPA Does Not Preempt Washington Law Concerning The Creation, Recording And Validity Of Easements.

For the first time on appeal, the Hannas allege that the adoption of LUPA completely overrides all prior common law related to easements. This argument fails for three reasons.

First, legal theories raised for the first time on appeal will generally not be considered by the appellate court. RAP 2.5(a); *River House Development, Inc. v. Integrus Architecture, P.S.*, 167 Wn.App. 221, 230, 272 P.3d 289 (2012). The Hannas never raised an argument that the adoption of LUPA replaced all common law relating to privately-granted easements at the trial court. That argument should not be considered now.

Second, the Rykens do not claim that LUPA conflicts with Washington law regarding easements. Instead, the Rykens' easement was not created by a "land use decision" as defined by LUPA, LUPA has no application, and the law in Washington concerning the creation, recording and validity of privately-granted easements continues to apply.

Third, the Hannas once again provide no authority that LUPA has supplanted Washington law regarding the creation, recording or validity of privately-granted easements. In general, the Hannas are correct that, under Washington law, a statute that is enacted as a substitute for prior common law that plainly and unambiguously replaces that common law will be so

enforced. *State ex rel. Madden v. Public Utility Dist. No. 1*, 83 Wn.2d 219, 221-223, 517 P.2d 585 (1974). However, like their arguments that LUPA extinguished all privately-granted easements, the Hannas take this general proposition and, without a single shred of authority, summarily conclude that it must mean LUPA replaced years of Washington law regarding the creation, validity and enforcement of privately-granted easements. The Hannas provide no authority whatsoever that LUPA was plainly and unambiguously enacted to replace Washington case law and statutory law relating to the creation, recording or validity of privately granted easements. Such authority simply does not exist. As noted by the Hannas, the purpose of LUPA was to reform the process for judicial land use decisions made by local jurisdictions to establish a uniform and expedited procedure for an appeal of those decisions. *Chelan County v. Nykreim*, 146 Wn.2d 904, 917, 52 P.3d 1 (2002). Privately-granted easements are not “land use decisions”.

3. The May 23, 2013 Summary Judgment Order Has No Substantive Application.

The Hannas claim that, since the May 23, 2013 order on summary judgment was not appealed and no motion for reconsideration was filed under Civil Rule 59(b), the Rykens cannot challenge the terms of that order and the trial court was precluded from entering the summary

judgment order ultimately dismissing their claim. This argument fails because Judge Tompkins' order did not make any substantive final judgment that has any impact on the matters now on appeal before this Court.

As noted in Judge Tompkins' May 23, 2013 order, the Hannas had asked the Court to enter summary judgment and declare as a matter of law that only a single easement existed on the Short Plat and, as a result, all pre-existing and after-created recorded easements were extinguished because there was no appeal of a land use decision by adoption of the Short Plat. Judge Tompkins' order contains no such judgment or ruling. To the contrary, the order specifically denied the Hannas' motion for summary judgment as to whether adoption of the Short Plat extinguished pre-existing easements. The Hannas' claim that this somehow precluded a subsequent order on summary judgment or somehow impacts this appeal under Civil Rule 59(b) is without merit. The May 23, 2013 order specifically reserved the issue of whether the adoption of the Short Plat extinguished pre-existing easements. That issue was disposed of by the summary judgment order entered by Judge Clarke on January 22, 2015, dismissing the Hannas' claim. (CP 811-818) As such, CR 59(b) and the cases cited by the Hannas have no application. Other than stating that the

adoption of the Short Plat was a “land use decision” and that it depicts a 40 foot easement on its face, the May 23, 2013 order has absolutely no impact on the issues before this Court.

4. The Rykens Did Not Seek An Order “Adding” Easements To The Short Plat.

The Hannas argue that RCW 58.17.215, Spokane County Code 12.100.122, and the case *M.K.K.I., Inc. v. Krueger*, 135 Wn. App. 647, 145 P.3d 411 (2006) preclude adding easements to a Short Plat. The Rykens are not seeking and have never sought to “add” easements to the Short Plat. By dismissing the Hannas’ claim at summary judgment, the trial court did not “add” easements to the Short Plat. The Hannas again confuse the distinction between dedicated easements and privately-granted easements.

In *M.K.K.I.*, the easements were created and conveyed – *dedicated* - in a short plat, so their *validity was derived from the short plat*. In contrast, the easements here were conveyed in private agreements and are, therefore, not related to nor affected by the Short Plat. *M.K.K.I. does not* stand for the conclusion that privately-granted easements become invalid if the property owner fails to properly follow LUPA’s land-use-decision appeal process. Similarly, RCW 58.17.215 and the Spokane County Code do not apply because the Rykens have not sought, and the court did not

order, that their easement be “added” to the Short Plat or that the Short Plat should be “altered”.

5. RCW 58.17.165 Applies To Dedications, Not Privately Granted Easements.

The Hannas argue that the Rykens’ easement for ingress and egress is a “road”, and that RCW 58.17.165 requires that all “roads” not dedicated to public use must be placed on the face of the Short Plat. The Hannas claim that because the “road” is not depicted on the Short Plat, it is invalid.

The Hannas argument is based on a portion of the sentence contained in RCW 58.17.165 which states that “[r]oads not dedicated to the public must be clearly marked on the face of the plat.” From this sentence, the Hannas once again erroneously extrapolate that **all** easements not clearly marked on the face of the Short Plat were extinguished. The Hannas’ reasoning is based on a misreading of the statute in its plainest terms. The statute, and the sentence used by the Hannas, concerns *dedications in plats*, e.g., “[i]f the plat or short plat is subject to a *dedication* . . . [e]very plat and short plat containing a *dedication* . . . [a]n offer of *dedication*” RCW 58.17.165. What the statute, in fact, states is that, if there are roads dedicated in the plat that are not for public use, that must be clearly marked on the plat. There was

only one easement dedicated in the Short Plat, and such easement's existence is not in dispute. Therefore, because all of the disputed easements here were privately-granted and not dedicated, the Hannas' reliance on RCW 58.17.165 is misplaced.

D. The Trial Court Properly Awarded Fees Pursuant To RCW 4.84.185.

The trial court awarded the Rykens attorneys fees and costs pursuant to RCW 4.84.185 because the Court found the Hannas' claim was frivolous and advanced without reasonable cause. At the trial court level, and here on appeal, the Hannas have not taken issue with the amount of attorney fees incurred by the Rykens in the litigation. The Hannas do not dispute the hourly rate that was charged. The Hannas do not claim that any of the work completed by the Rykens' attorney was unnecessary or duplicative. Instead, the Hannas argue that the claim asserted against the Rykens was not frivolous or, in the alternative, that the trial court did not enter proper written findings under RCW 4.84.185 requiring remand to the trial court to enter such findings. Neither of these arguments have any merit.

1. An Award Of Attorney Fees Pursuant to RCW 4.84.185 is Reviewed For Abuse of Discretion.

RCW 4.84.185 authorizes the trial court to award the prevailing party in a frivolous action reasonable expenses including attorney fees. A lawsuit is frivolous if, when considering the action in its entirety, it cannot be supported by any rational argument based in fact or law. *Wright v. Dave Johnson Ins., Inc.* 167 Wn.App. 758, 785, 275 P.3d 339 (2012), *review denied*, 175 Wn. 2d 1008, 285 P.3d 885 (2012). The trial court's award of attorney fees and costs pursuant to RCW 4.84.185 is reviewed under an abuse of discretion standard. *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn.App. 201, 218, 304 P.3d 914 (2013) As such, the trial court's decision will not be disturbed on appeal absent a clear showing of abuse of discretion. *Fluke Capital & Management Services Co. v. Richmond*, 106 Wn.2d 615, 625, 724 P.2d 356 (1986); *Lockhart v. Greive*, 66 Wn.App. 735, 744, 834 P.2d 64 (1992). A Court abuses its discretion when it is exercised on untenable grounds or for untenable reasons. *Highland School District No. 203 v. Racy*, 149 Wn.App. 307, 312, 202 P.3d 1024 (2009). The Court of Appeals will limit its inquiry to whether the judge's exercise of discretion was manifestly unreasonable or based on untenable grounds or reasons. *Reid v. Dalton*, 124 Wn.App. 113, 125, 100 P.3d 349 (2004) *review denied* 155 Wn.2d

2005. “Out of deference to the trial court’s ‘personal and sometimes exhaustive contact with the case we limit our inquiry to whether the judge’s exercise of her discretion was manifestly unreasonable or based on untenable grounds or reasons.” *Id.* at 125 citing *Skimming v. Boxer*, 119 Wn.App. 748, 754, 82 P.3d 707 (2004).

In considering a motion for attorney fees pursuant to RCW 4.84.185, the Court is charged with awarding those fees actually incurred by a party in prosecuting or defending a frivolous claim. The amount of attorney fees awarded under RCW 4.84.185 is also within the discretion of the trial court. *Reid v. Dalton*, 124 Wn.App. at 125, *Zink v. City of Mesa*, 137 Wn.App. 271, 277, 152 P.3d 1044 (2007). (“A trial judge has broad discretion in determining the reasonableness of a fee award.”) *Highland School District No. 203 v. Racy*, 149 Wn.App. 307, 317, 202 P.3d 1024 (2009). (“The trial court has discretion under RCW 4.84.185 both to impose sanctions for frivolous litigation and to determine the amount of reasonable attorney fees.”)

In determining the reasonableness of the attorney fee award, courts have used several methods in calculating reasonable attorney fees. For example in *Zink v. City of Mesa*, the court used the loadstar method: multiplying the reasonable hourly rate by the number of hours reasonably

spent on the lawsuit while excluding any wasteful or duplicative hours and any hours for unsuccessful theories or claims. *Zink v. City of Mesa*, 137 Wn.App. at 277. The Court held that an explicit hour by hour analysis of each lawyer's time sheets is unnecessary as long as the Court considers relevant factors and gives reasons for the amount awarded. *Id.* at 277 citing *Progressive Animal Welfare Society v. University of Wash.*, 54 Wash.App. 180, 187, 773 P.2d 114 (1989), *rev' d on other grounds*, 114 Wash.2d 677, 790 P.2d 604 (1990).

Division III of the Court of Appeals has held that the trial court was not required to use the loadstar method in determining the amount of attorney fees to be awarded under RCW 4.84.185. *Highland School District No. 203 v. Racy*, 149 Wn.App at 314-316. While the Court noted that the loadstar methodology may be used, the overriding principle in an award of fees under RCW 4.84.185 is that the trial court must have an objective basis for the award. *Id.* at 316. In *Highland*, the trial court held that the hourly rate actually charged by the attorney for the client was the hourly rate that would be used despite the argument that a higher amount should have been used under the loadstar method. In upholding this ruling, the Court of Appeals noted that the plain language of RCW 4.84.185 speaks in terms of payment for reasonable expenses and attorney fees that

are incurred in the defense of a frivolous claim or action. *Id.* at 316. “Whether a fee is reasonable is not dependent on whether the client or the opposing party is the one paying it.” *Id.* At 316. As such, where the fee award is limited to the amount actually incurred, the attorney fee will be deemed reasonable. *Highland* at 317.

The overriding principle in these cases is that, while duplicative hours or hours for unsuccessful theories or claims will not be awarded, it is within the discretion of the Court to award fees that were *actually incurred* in defense of a frivolous claim as long as those fees are reasonable. In this case, the trial court based its decision on two detailed declarations submitted by the the Rykens’ attorney setting forth each specific task and the amount of time expended for each task and the Court found that the attorney fees were reasonable. The Hannas raised no objection other than a generalized complaint that the Rykens’ attorney fees were too high. This is not a sufficient basis to remand this matter for further proceedings as the record clearly supports the trial court’s award.

2. The Trial Court’s Findings That The Lawsuit Was Frivolous Under RCW 4.84.185 Were Sufficient.

The Hannas contend that the trial court’s findings were not adequate requiring remand for additional findings. The trial court specifically found finding that the Hannas lawsuit against the Rykens was

asserted frivolously and advanced without reasonable cause. Remand is not necessary.

An action is “frivolous” under RCW 4.84.185 when the trial court finds, after considering the action in its entirety, that it cannot be supported by any rational argument based in fact or law. *Grainville Condominium Homeowners Association v. Kuehner*, 177 Wn.App. 543, 556, 312 P.3d 702 (2013). In this case, the trial court’s order specifically found that the claims asserted by the Hannas against the Rykens were frivolous and advanced without reasonable cause. Under RCW 4.84.185, this is all the trial court was required to do. The Hannas cite no authority that the trial court’s finding that the lawsuit was frivolous is deficient.

3. The Cases Relied On By The Hannas Do Not Apply And The Trial Court’s Finding That The Rykens’ Attorney Fees Were Reasonable Was Sufficient.

The cases cited by the Hannas in their brief are inapplicable because they do not deal with findings necessary for a trial court to award attorney fees under RCW 4.84.185. Instead, the cases either deal with a different statutory basis for fees or with the adequacy of findings related to the *amount* of fees awarded. In this case, the trial court’s findings as to the amount of fees were adequate and remand is not necessary. Even if the findings were not sufficient, remand is not necessary because the Hannas

never disputed the amount of fees awarded nor the evidence supporting the basis of that award.

The first case relied on by the Hannas, *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 331 P.3d 40 (2014) has no application to this case as it dealt with findings necessary for an award of attorney fees by the trial court pursuant to RCW 23B.13.310(2)(b). That statute allows fees and costs if the court finds that the party against whom the fees and costs are assessed acted “arbitrarily, vexatiously, or not in good faith” with respect to the rights provided by RCW Chapter 23B.13. In *SentinelC3*, the Supreme Court found that the trial court did not enter *any* findings of fact finding that the other party has acted arbitrarily, vexatiously and not in good faith: it simply granted one party’s request for attorney fees and costs and did not explain the amount of the award.

Similarly, *224 Westlake, LLC v. Engstrom Properties, LLC*, 169 Wn.App. 700, 281 P.3d 693 (2012), dealt with the findings supporting an award of attorney fees pursuant to a contractual agreement between the parties and not RCW 4.84.185. In addition, that case dealt with the *amount* of fees awarded rather than a finding relating to whether the lawsuit was frivolous. In *224 Westlake*, the court held that the record as to the amount of fees was inadequate requiring remand because the prevailing party

simply attached two documents of less than one page stating the total hours claimed by five attorneys, a law clerk and a paralegal. The summary did not list the detail of the work performed by each timekeeper, the dates of performance of the work, or any detail as to what work was performed. Without this basic information, the appellate court held that the prevailing party did not meet its burden of demonstrating that the attorney fees incurred were reasonable and the Court remanded the case for additional findings. In the present action, the Rykens' motion was supported by two declaration detailing the time and expenses incurred during the entire litigation.

In Mahler v. Szucs, 135 Wn.2d 398, 957 P.2d 632 (1998), the trial court awarded fees based on *Olympic S.S. v. Centennial Insurance Company*, 117 Wn.2d 37, 811 P.2d 673 (1991) as the insured was compelled to assume the burden of a legal action to obtain benefits of an insurance contract. The portion of the *Mahler* opinion relied on by the Hannas did not deal with a required finding that a lawsuit was frivolous and advanced without reasonable cause pursuant to RCW 4.84.185. Instead, the portion of the *Mahler* relied on by the Hannas simply addresses findings and conclusions required to substantiate the *amount* of attorney fees and costs that were awarded. In *Mahler*, the Court stated that

the purpose of written findings on an attorney fee award is to alert the appellate court as to the basis for the amount of fees awarded by the trial court. *Mahler v. Szucs*, 135 Wn.2d at 435.

Finally, while *Highland Sch. District No. 203 v. Racy*, 149 Wn.App. 307, 202 P.3d 1024 (2009) did deal with an attorney fee award under RCW 4.84.185, it has no application to this case. *Highland* stands for the proposition that RCW 4.84.185 does not require that the trial court find that one party acted in bad faith or brought suit for purposes of delay or harassment in order to award fees under the statute. As noted above, the trial court can impose an award of fees in action that is frivolous and advanced without reasonable cause which is what the trial court did here. The portion of the opinion relied on by the Hannas simply states that while the “loadstar” method of calculating an amount of an award is preferable, it is not required under RCW 4.84.185 as long as the trial court has an objective basis for the amount of the award.²

As to the amount of fees awarded to the Rykens, the Hannas never disputed the hourly rate charged by the Rykens’ attorney, never disputed the amount of time expended in the case, and never alleged that any of the

² The case, *Eller v. East Sprague Motors*, 159 Wn.App. 180, 244 P.3d 447 (2010) and cases cited therein have no application to the Rykens as the Hannas claim that they stand for the proposition that attorney fees under RCW 4.84.185 are not awarded if some claims are “colorable” and proceeded to trial. All of the claims against the Rykens were dismissed at summary judgment.

time contained in the declarations supporting the Rykens' motion for attorney fees was unnecessary, duplicative or otherwise improper. The only objection raised by the Hannas in response to the motion was a general complaint that the total amount awarded to the Ryken was "unreasonable" because their attorney represented a single client and only had to address a single summary judgment motion. The Hannas argued to the trial court that, if attorney fees were awarded, the court should simply find a reasonable balance between the highest and lowest attorney fees requested by the various defendants as the amount to be awarded to the Rykens.

Apart from this generalized objection, the Hannas never asserted any issue to the trial court (or to this Court) that the amount of the fees incurred by the Rykens was unreasonable, excessive or unrelated to the defense of the claim. Essentially, the Hannas argue that only nominal fees can ever be justified in a frivolous litigation award because, by definition, a claim without merit should be quickly and easily disposed of. This argument has been raised and rejected. *Reid v. Dalton*, 124 Wn.App. 113, 100 P.3d 349 (2004). The fact that the Hannas' claims were frivolous does not mean that they were (or could be) simply and quickly disposed of by the Court. *Id.* at 127. During the course of this litigation and in defending

their legitimate real property interests, the Rykens incurred substantial attorney fees and costs. The issue is whether the fees incurred were the direct result of the litigation. The Rykens provided detailed evidence of the attorney fees and costs incurred in this matter to the trial court. The Hannas provided no specific objection or evidence to the contrary. The trial court found that the attorney fees and costs were reasonable. There was no abuse of discretion in this case and the written findings entered by the trial court were adequate.

Even if the Hannas are correct that the written findings as to the amount of fees and costs were not sufficient, that issue is moot and remand is not necessary because they failed to make any objection as to the reasonableness of the fees awarded by the trial court or to this court on appeal. As noted above, the Supreme Court has held that the purpose of written findings on an attorney fee award is to alert the appellate court as to the basis for the amount of fees awarded by the trial court. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (supra). That purpose is satisfied in this case without the need to resort to written findings because the Hannas never objected to or challenged the reasonableness of the amount of fees awarded. Since the Hannas did not and do not challenge the trial court's computation of fees or the reasonableness of that award, it

is not an issue in this appeal and there would be no purpose in remanding the case for the entry of written findings at an additional expense to the parties.

In this case, the trial court did not abuse its discretion in the amount of attorney fees awarded to the Rykens. The Rykens provided detailed evidence of attorney fees and costs actually incurred in defending the Hannas' claims and found that they were reasonable. The Hannas did not provide any argument, evidence or specific objection. The findings entered by the trial court were sufficient and, even if they were not, remand is not necessary because the Hannas did not dispute them.

4. The Hannas' Lawsuit Against The Rykens Was Not Supported By Any Law Or Rational Argument.

The Hannas claim that attorney fees should not have been awarded because they raised "several rational and persuasive arguments" that LUPA applied to exclude properly prepared and recorded private easements. As previously discussed at length in this brief, the arguments raised by the Hannas to avoid imposition of attorney fees and costs pursuant to RCW 4.84.185 are improper, misleading and devoid of merit. A restatement of those arguments and the reasons why those arguments have no merit is unnecessary here. The Hannas have not set forth any authority that supports their contention that LUPA extinguished decades

of Washington law regarding properly prepared and recorded private easements or that the mere non-depiction in the recorded Short Plat is sufficient to extinguish the Rykens' easement or any of the other easements at issue.

E. This Court Should Award Attorney Fees Incurred On Appeal

The trial court awarded the Rykens attorney fees pursuant to RCW 4.84.185 on the issues that have been presented to this Court on appeal. The Rykens also request that this Court award the Rykens attorney fees and costs on appeal as this appeal is not based in established law or a good faith extension of existing law and is frivolous.

V. CONCLUSION

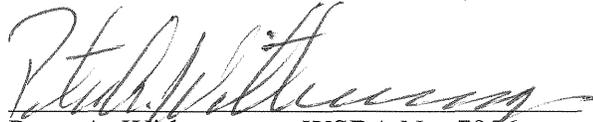
Because the Rykens' easement was privately-granted and not created through dedication in a plat, the easement was not extinguished by a lack of depiction in the final recorded Short Plat. The easement was properly drafted and recorded in 1995, is appurtenant to the land that it benefits and can only be terminated according to the terms of the grant. The Hannas have failed to put forth any case, statute, or regulation that supports their contention that mere non-depiction in the recorded Short Plat, without more, is sufficient to extinguish the Rykens' easement or any

of the other easements at issue. As the easements here were privately-granted and not dedicated in a plat, LUPA does not apply.

Based on the foregoing, the Rykens request that this Court uphold the Superior Court's order affirm the order granting summary judgment, affirm the Superior Court's award of attorney fees and costs pursuant to RCW 4.84.185, and award the Rykens their attorney fees and costs incurred in this appeal.

RESPECTFULLY SUBMITTED this 22nd day of July, 2015.

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CERTIFICATE OF SERVICE

I, Peter A. Witherspoon, hereby certify that a true and correct copy of the foregoing was served by the method indicated below to the following this ^{11th} 22 day of July, 2015.

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