

DA 23-0124

IN THE SUPREME COURT OF THE STATE OF MONTANA

2024 MT 314

CRAIG BAUGH,

Plaintiff and Appellee,

v.

H2S2, LLC, a Montana Limited Liability Company,

Defendant and Appellant.

APPEAL FROM: District Court of the Eleventh Judicial District,
In and For the County of Flathead, Cause No. DV-21-754(A)
Honorable Amy Eddy, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Donald R. Murray, Hash, O'Brien, Biby & Murray PLLP, Kalispell,
Montana

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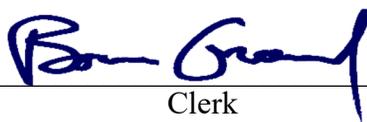
For Appellee:

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Submitted on Briefs: September 27, 2023

Decided: December 23, 2024

Filed:


Clerk

Justice Dirk Sandefur delivered the Opinion of the Court.

¶1 We address the following restated issues:

1. *Whether the District Court erroneously granted summary judgment that H2S2's proposed commercial use exceeded the authorized scope of the express easement?*
2. *Whether the District Court erroneously awarded Baugh prevailing party attorney fees under our Foy equitable exception to the American Rule?*

We affirm in part, and reverse in part.

PROCEDURAL AND FACTUAL BACKGROUND

¶2 In 1983, Craig Baugh acquired by warranty deed a 20-acre tract of land generally located on Lupfer Road in Flathead County, between U.S. Highway 93 and the north end of Whitefish Lake.¹ He thereafter lived in a single-family home on the otherwise undeveloped property. In 1993, Baugh separately acquired by warranty deed another 20-acre tract ("Migallo Property") adjoining the south boundary of the original Baugh tract.²

¹ When acquired in 1983, the original 20-acre Baugh tract was designated as Lot 7 in the previously platted or surveyed "Lupfer Road Meadows Subdivision," and was burdened by a record roadway (Lupfer Road) which cut across the tract inside its northwest corner. To the south, the original Baugh tract adjoined the north boundary of Lupfer Road Meadows Lot 8. The original Baugh tract was then further burdened by a record 60' roadway easement running along and inside its west boundary and which provided appurtenant unspecified roadway ingress and egress to Lot 8 from its northwest corner to intersection with Lupfer Road inside the northwest corner of the original Baugh tract (Lot 7). Whether and when the referenced Lupfer Road Meadows Subdivision was platted or surveyed as a pre- or post-1973 Montana Subdivision and Platting Act "division of land" or "subdivision" as defined by §§ 11-3861(2.1) and (12), RCM (1975) (now §§ 76-3-103(4) and (16), MCA), is not clear from the record on appeal. In any event, the 1983 warranty deed under which Baugh acquired the property did not convey it by reference to a Lupfer Road Meadows Subdivision plat or certificate of survey, only as a described aliquot subpart of Section 1, Township 31 North, Range 23 West, M.P.M., in Flathead County.

² The so-called Millagro Property was then designated as Lot 8 in the previously platted or surveyed "Lupfer Road Meadows Subdivision," n.1 *supra*. Similar to the earlier acquisition of the

Both properties are located in a remote, forested, mountainous area at the western base of the continental divide of the Rocky Mountains. In 2006, in accordance with his plan to build a single-family home and accompanying barn on part of his property for third-party sale, Baugh consolidated and then subdivided the 40-acre aggregate of his 1983 and 1993 acquired properties into two new adjoining 20-acre tracts (Tract 1 and Tract 2) by unreviewed certificate of survey (COS (17458)).³

¶3 The 2006 COS consolidated Baugh's existing 20-acre tracts, and then subdivided the 40-acre aggregate into two approximately equal tracts (Tract 1 and Tract 2) adjoined along the east border of Tract 1 and west border of Tract 2.⁴ Without further specification or explanation, the COS clearly depicted a "20' wide access and utility easement on existing road." As depicted, the express easement ran east from the northwest corner of Tract 1, inside and along the north boundary of Tract 1, before slightly dipping-down on a distinct curve south further into Tract 1, then back north, and then continuing east in

original Baugh tract, the 1993 warranty deed under which Baugh acquired the Millagro Property did not convey it by reference to a Lupfer Road Meadows Subdivision plat or certificate of survey, only as a described aliquot subpart of Section 1, Township 31 North, Range 23 West, M.P.M., in Flathead County.

³ Except as subject to review for compliance with applicable water supply, sewage and solid waste disposal, and stormwater drainage standards under Title 76, ch. 4, part 1, MCA, various qualifying minor "divisions of land," and aggregations of "tracts of record," by filed "certificate of survey" are generally exempt under the Montana Subdivision and Platting Act from local government subdivision review and approval. *See* §§ 76-3-103(1), (4), (16), (17)(a), -207(1)(a), (d)-(e), -302, -404, and -601 through -623, MCA.

⁴ The Tract 1/Tract 2 borderline runs north-south from the mid-points of the north and south boundaries of the 40-acre aggregate, but slightly juts in and out of the north half of Tract 2, resulting in a Tract 1 (20.564 acres) that is slightly larger than Tract 2 (19.024 acres).

Tract 1 roughly parallel to its north boundary to west boundary line of Tract 2. While it clearly and unequivocally specified the location, path, width, and “access and utility” purpose of the easement by express reference and depiction, the COS included no express or otherwise manifest indicia of any intended restriction on use of the easement.⁵

¶4 Between 2006 and 2019, Baugh occasionally harvested small amounts of timber from Tract 2, but did not alter the natural state of the property, or use it for any other purpose. In 2019, in furtherance of his original 2006 plan, Baugh prepared a building site and constructed a barn on Tract 2. He abandoned his original plan to build an accompanying single-family residence on the property due to insufficient funds.

¶5 Later in 2019, Baugh listed Tract 2 for sale by owner on *Zillow*, an internet real estate marketing platform. His listing advertised the property for possible use for a “single family dwelling” and/or as a “horse property.” Baugh quickly sold the property in 2019 to Florian Skyland, who later converted the existing barn to a single-family home, and briefly lived there with his wife before she took off. The clear and unambiguous warranty deed under which Baugh transferred Tract 2 to Skyland included no express or other manifest

⁵ In the context of this dispute, Baugh now asserts that he intended the easement only for his contemplated single-family use of Tract 2. Consistently, and contemporaneous with his subdivision by certificate of survey, Baugh applied for and obtained Montana Department of Environmental Quality water/sanitation approval for a sanitation/septic system sufficient to accommodate the contemplated single-family use of the property. See Title 76, ch. 4, part 1, MCA (required MDEQ review of subdivisions for compliance with applicable water supply, sewage and solid waste disposal, and stormwater drainage standards).

indicia of any intended use restriction on the property or its accompanying access easement across Tract 1.⁶

¶6 At some point in late 2019 or early 2020, Skyland notified Baugh of his intent to sell Tract 2 to two couples who planned to place “one or two small domes” on the property. The record is unclear what further, if anything, Skyland knew about how or for what the prospective buyers planned to use the property, but he did not further elaborate in any event. In 2020, Skyland sold and conveyed Tract 2 to H2S2, LLC, a limited liability company comprised of two associated married couples then employed as medical professionals, and who had moved to Montana at some point in the five years prior. Virtually identical in language and form to the clear and unambiguous warranty deed under which he acquired the property from Baugh, Skyland’s warranty deed to H2S2 similarly included no express or other manifest indicia of any intended use restriction on the property or its accompanying access easement across Tract 1.⁷

¶7 In May 2021, H2S2, acting through its principal members and retained civil engineering firm, applied to the Montana Department of Environmental Quality for water, wastewater, and stormwater system approval⁸ for construction and operation of a 32-unit short-term “glamping” business on Tract 2, to wit:

⁶ Baugh now asserts that he sold the property to Skyland in reliance on Skyland’s pre-purchase assurance that he would use the property only for single-family living.

⁷ Baugh subsequently testified below that he urged Skyland to include a single-family use restriction in the transfer deed, but he did not.

⁸ See Title 76, ch. 4, part 1, MCA.

The proposed [Base Glamp Glacier] development consists of [the] existing [converted barn] home to serve as an office building along with construction of 32 short-term . . . cabins. The existing home is currently served by an existing individual well and wastewater treatment system. Upon development, the existing well will serve the entire development as a public . . . , non-community, water supply system. The proposed cabins and office will be served by two (2) new multi-year wastewater treatment system . . . Main access to the property will continue from Lupfer Road.

. . . .

The proposed Phase 1 on-site subsurface wastewater treatment system will service twelve (12) cabins. . . . The proposed Phase 2 on-site subsurface wastewater treatment system will service eight cabins.

As indicated in subsequent discovery responses in this litigation, H2S2 contemplated that its domed Phase 1 luxury cabins would have the total maximum capacity to sleep up to 30 people per night. The plan was to allow guests to have drinks in the cabins, but generally prohibit food storage, cooking, or meals in the cabins.

¶8 Upon learning of the planned commercial glamping development use of Tract 2, Baugh contacted H2S2 agents and raised concerns about the planned commercial use and increased vehicular traffic across his Tract 1 property. Unsatisfied with H2S2's response, Baugh filed a lawsuit on July 9, 2021, seeking declaratory judgment and associated injunctive relief enjoining the planned commercial use of the Tract 2 easement across his property. The District Court initially granted Baugh's requested temporary restraining order pending hearing, but ultimately denied his request for a similar post-hearing preliminary injunction on the stated ground that the source COS and subsequent instruments of conveyance did not expressly or otherwise indicate any intended residential use restriction on the express access easement.

¶9 In October 2021, in answer to Baugh’s complaint, H2S2 asserted in essence that no record restriction precluded its planned commercial use of Tract 2 or its appurtenant easement across Tract 1, nor would the planned use exceed or overburden the unrestricted scope of the express access easement. H2S2 counterclaimed for compensatory and punitive damages based on what it viewed as Baugh’s wrongful restraint and interference with its lawful use of its unrestricted access easement. Following discovery, the District Court held a hearing on the parties’ cross-motions for M. R. Civ. P. 56 summary judgment (Baugh) and partial summary judgment (H2S2).

¶10 In pertinent essence, Baugh primarily asserted that extrinsic evidence proved that he intended the subject easement to be limited in use and scope to ingress and egress attendant to single-family use of Tract 2, and that H2S2’s planned commercial use and attendant vehicular traffic increase would thus unlawfully exceed and overburden the authorized use and scope of the easement. He further asserted that the planned use would unreasonably interfere with the quiet enjoyment of his adjoining and subservient property. Citing *O’Keefe v. Mustang Ranches HOA*, 2019 MT 179, 396 Mont. 454, 446 P.3d 509, *inter alia*, H2S2 countered that the express easement was a specific, clear, unambiguous, and unrestricted roadway access easement, thus precluding consideration of any extrinsic evidence and entitling H2S2 to use it as planned. H2S2 further factually asserted that its planned commercial “glamping” use would in any event analogously approximate the vehicular access that would be attendant with a single-family residential use of Tract 2. In November 2022, the District Court granted summary judgment to Baugh that H2S2’s

planned commercial use of the easement would unreasonably exceed and overburden the more limited single-family residential use intended on creation. Citing *Quarter Circle JP Ranch, LLC v. Jerde*, 2018 MT 68, ¶¶ 2, 4 and 12, 291 Mont. 104, 414 P.3d 1277, the Court reasoned that the express easement was only a generally-stated access easement, thus requiring resort to extrinsic evidence to determine its originally intended scope of use. Based on cited Rule 56 record facts indicating the historical circumstances and uses of Tract 1 and Tract 2, the Court concluded that there was no genuine issue of material fact that H2S2's planned commercial use would significantly exceed the scope and intensity of easement use intended upon creation. The Court thus permanently enjoined H2S2's contemplated use of the express access easement.

¶11 In light of its easement use ruling in favor of Baugh, the District Court further granted summary judgment in his favor on H2S2's related compensatory and punitive damages claims. Based on its assertion that H2S2 made no evidentiary showing in support of its asserted tort and punitive damages claims, the Court concluded that those claims were "frivolous," and that Baugh was thus entitled to recover prevailing party attorney fees from H2S2 under our *Foy* equitable exception to the jurisprudential American Rule.

STANDARD OF REVIEW

¶12 Summary judgment rulings are subject to de novo review for conformance with applicable M. R. Civ. P. 56 standards and requirements. *Dick Anderson Constr., Inc. v. Monroe Prop. Co.*, 2011 MT 138, ¶ 16, 361 Mont. 30, 255 P.3d 1257. Summary judgment is proper only when there is no genuine issue of material fact and the moving party is

entitled to judgment as a matter of law. M. R. Civ. P. 56(c)(3). A genuine issue of material fact exists only if the Rule 56 factual record manifests a non-speculative record fact that is materially inconsistent with proof of an essential element of an asserted claim or defense at issue. *Mt. W. Bank, N.A. v. Mine & Mill Hydraulics, Inc.*, 2003 MT 35, ¶ 28, 314 Mont. 248, 64 P.3d 1048.

¶13 The party seeking summary judgment has the initial burden of showing a complete absence of any genuine issue of material fact on the Rule 56 record and that the movant is accordingly entitled to judgment as a matter of law. *Weber v. Interbel Tel. Coop.*, 2003 MT 320, ¶ 5, 318 Mont. 295, 80 P.3d 88; *Thelen v. City of Billings*, 238 Mont. 82, 85, 776 P.2d 520, 522 (1989). The burden then shifts to the opposing party to either show the existence of a genuine issue of material fact or that the moving party is nonetheless not entitled to judgment as a matter of law. *Osterman v. Sears, Roebuck & Co.*, 2003 MT 327, ¶ 17, 318 Mont. 342, 80 P.3d 435 (citing *Bruner v. Yellowstone Cnty.*, 272 Mont. 261, 264, 900 P.2d 901, 903 (1995)). To meet the responsive Rule 56 burden of demonstrating that genuine issues of material fact preclude summary judgment, the non-moving party must in proper form, and by more than mere denial, speculation, or pleading allegation, point out “specific” record facts showing the existence of a genuine issue of material fact. M. R. Civ. P. 56(e)(2). *See also Grimsrud v. Hagel*, 2005 MT 194, ¶ 14, 328 Mont. 142, 119 P.3d 47; *Osterman*, ¶ 34; *Old Elk v. Healthy Mothers, Healthy Babies, Inc.*, 2003 MT 167, ¶¶ 15-16, 316 Mont. 320, 73 P.3d 795; *Klock v. Town of Cascade*, 284 Mont. 167, 174,

943 P.2d 1262, 1266 (1997); *Mysse v. Martens*, 279 Mont. 253, 262, 926 P.2d 765, 770 (1996); *Eitel v. Ryan*, 231 Mont. 174, 178, 751 P.2d 682, 684 (1988).

¶14 The court must view the Rule 56 factual record in the light most favorable to the non-moving party and draw all reasonable inferences in favor thereof. *Weber*, ¶ 5; *Gamble Robinson Co. v. Carousel Properties*, 212 Mont. 305, 311-12, 688 P.2d 283, 286-87 (1984). The Rule 56 factual record includes “the pleadings, the discovery and disclosure materials on file, and any [filed] affidavits.” M. R. Civ. P. 56(c)(3). In assessing what reasonable inferences may be drawn in favor of the non-moving party, “the court must consider the entire record.” *Jarvenpaa v. Glacier Elec. Co-op., Inc.*, 271 Mont. 477, 480, 898 P.2d 690, 692 (1995) (citing *Smith v. Barrett*, 242 Mont. 37, 40, 788 P.2d 324, 326 (1990)). On de novo review, this Court is then “free to examine the entire record” to determine whether a party was entitled to summary judgment on application of the governing law to facts not subject to genuine material dispute on the Rule 56 record. *Hudson v. McDonald*, 229 Mont. 426, 429, 747 P.2d 221, 223 (1987) (citing *Shimsky v. Valley Credit Union*, 208 Mont. 186, 189-90, 676 P.2d 1308, 1310 (1984)). The lower court has no duty, however, to anticipate or speculate as to the existence of contrary material facts. *Gamble*, 212 Mont. at 312, 688 P.2d at 287 (internal citations omitted). Whether a genuine issue of material fact exists or whether a party is entitled to judgment as a matter of law are conclusions of law reviewed de novo for correctness. *Ereth v. Cascade Cnty.*, 2003 MT 328, ¶ 11, 318 Mont. 355, 81 P.3d 463.

DISCUSSION

¶15 1. *Whether the District Court erroneously granted summary judgment that H2S2’s proposed commercial use exceeded the authorized scope of the express easement?*

¶16 “Easements arise by express grant or reservation in a written instrument of conveyance, written declaration of covenant, operation of law (implication from necessity or prior use), or prescription.” *O’Keefe v. Mustang Ranches HOA*, 2019 MT 179, ¶ 16, 396 Mont. 454, 446 P.3d 509 (citations omitted). “An affirmative easement is a nonpossessory interest in land authorizing one to use the property of another for a particular purpose.” *O’Keefe*, ¶ 16 (citing *Blazer v. Wall*, 2008 MT 145, ¶ 24, 343 Mont. 173, 183 P.3d 84). An appurtenant easement “benefit[s] a particular parcel of land” (dominant estate or tenement) “to the burden of another” (servient estate or tenement), “and perpetually runs with title to both.” *O’Keefe*, ¶ 16 (citing *Blazer*, ¶ 24—statutory citations omitted); *Leichtfuss v. Dabney*, 2005 MT 271, ¶¶ 37-38, 329 Mont. 129, 122 P.3d 1220. *See similarly* § 70-17-103, MCA (dominant and servient tenements).⁹ Easements are “servitudes” on the

⁹ Easements are either *appurtenant* or *in gross*. *O’Keefe*, ¶ 16 (citing *Blazer*, ¶ 24—statutory citations omitted). “Easements in gross burden a parcel of land to the personal benefit of an individual and thus” have no dominant estate or tenement and “do not perpetually run with title” to the burdened or servient estate or parcel. *O’Keefe*, ¶ 16 and n.8 (citing *Blazer*, ¶ 24—statutory citations omitted). Because “an easement burdening or benefitting an estate” in land “less than a fee simple ends when that estate expires,” it is more accurate to note that an appurtenant easement “runs with the estate in land to which it is appurtenant” and then “follows ownership of [that] estate for as long as that estate exists.” *Leichtfuss*, ¶¶ 37-38 (emphasis omitted). “[W]hether an expressly created easement is appurtenant . . . necessarily depends on . . . the intention” of the grantor as manifest in the source instruments of conveyance or covenant. *Broadwater Dev., L.L.C. v. Nelson*, 2009 MT 317, ¶ 34, 352 Mont. 401, 219 P.3d 492 (citations omitted). *See also* §§ 70-17-104, -201, -203(1), MCA. However, “[e]xcept as otherwise provided by the originating instrument of conveyance or covenant, an easement created by express grant or reservation is presumed appurtenant to the servient and dominant estates.” *O’Keefe*, ¶ 16 (citing *Broadwater Dev.*, ¶ 34).

burdened/servient estate. *Burlingame v. Marjerrison*, 204 Mont. 464, 469-70, 665 P.2d 1136, 1139 (1983) (citations omitted). *See also* §§ 70-17-101 and -102, MCA. An easement created by a written instrument of conveyance or covenant is an express easement. *Woods v. Shannon*, 2015 MT 76, ¶ 10, 378 Mont. 365, 344 P.3d 413. A conveyance of an interest in real property “by reference to a record subdivision plat, certificate of survey (COS), or attached map incorporates the plat, certificate, or map into the instrument as if set forth therein in its entirety.” *O’Keefe*, ¶ 18 (citations omitted). As with the construction, interpretation, and application of written contracts and their express terms, the construction and interpretation of the meaning and application of written instruments of conveyances of real property interests, including any referenced subdivision plat, certificate of survey, or map, is a question of law. *Ash v. Merlette*, 2017 MT 305, ¶ 11, 389 Mont. 486, 407 P.3d 304; *Micklon v. Dudley*, 2007 MT 265, ¶¶ 10-11, 339 Mont. 373, 170 P.3d 960; *Mattson v. Montana Power Co.*, 2009 MT 286, ¶ 18, 352 Mont. 212, 215 P.3d 675.

¶17 Permissible uses of an express easement include only those which do not substantially exceed the nature, scope, and extent or intensity of use intended by the grantor at the time of the express grant as determined by:

- (1) the express language of the source instruments of conveyance, including any subdivision plat, certificate of survey, or map referenced therein; *or as necessary*
- (2) resort to extrinsic evidence and implication from the totality of the prevailing circumstances under which the express grant or restriction was made or imposed.

See § 70-17-106, MCA (“extent of a servitude” is generally “determined by the terms of the grant or the nature of the enjoyment by which it was acquired”); *Guthrie v. Hardy*, 2001 MT 122, ¶¶ 46-48 and 52, 305 Mont. 367, 28 P.3d 467 (question is whether the language of the express grant or reservation of easement in the source instrument of conveyance specifically and clearly authorizes the use or scope of use at issue or rather is only “general” in relation thereto—“where the creating words . . . make the scope and the location of an easement perfectly clear . . . no need for further inquiry”—absent “clear specification” of defining scope of express easement “no use may be made . . . different from the use established at the time of the creation” to avoid burdening servient estate “more than ‘contemplated at the time’ of creation—citations omitted”); *Mattson*, ¶ 17 (citing *Guthrie*, ¶¶ 46-47); *Woods*, ¶¶ 10-12 and 14-16 (citing §§ 70-17-106 and -111(1)(c), MCA; *Clark v. Pennock*, 2010 MT 192, ¶ 25, 357 Mont. 338, 239 P.3d 922; Restatement (Third) of Property (Servitudes) § 4.1 illus.1 (2000)); *Quarter Circle JP Ranch, LLC v. Jerde*, 2018 MT 68, ¶¶ 10-12, 391 Mont. 104, 414 P.3d 1277 (question is whether the use or scope of use at issue is clearly and specifically authorized within the express language of the source instrument of conveyance or whether the source language is only “general” in relation thereto—citing § 70-17-106, MCA; *Ganoung v. Stiles*, 2017 MT 176, ¶ 15, 388 Mont. 152, 398 P.3d 282; *Mattson*, ¶ 17; *Guthrie*, ¶¶ 46-48; *Mason v. Garrison*, 2000 MT 78, ¶ 21, 299 Mont. 142, 998 P.2d 531); *O’Keefe*, ¶ 29 (citing § 70-17-106, MCA; *Woods*, ¶¶ 12 and 14; *Clark*, ¶¶ 25 and 27; Restatement (Third) of Property (Servitudes) § 4.1 cmt. d (2000)); Restatement (Third) of Property (Servitudes) § 4.1(1) cmt. a (2000) (“servitude should be

interpreted to give effect to the [original] intention” as “ascertained from the language used in the instrument, or the circumstances surrounding [its] creation” in order “to carry out the purpose for which it was created”—originally “expressed intention . . . is of primary importance”).

¶18 However, resort to extrinsic evidence is permissible only to the extent that the use, scope, and extent or intensity of use intended by the grantor of an express easement is not clearly and unambiguously express or discernible on the face of the pertinent instruments of conveyance. *O’Keefe*, ¶ 29 (citing *Woods*, ¶ 14, and *Clark*, ¶ 27). *Accord Quarter Circle*, ¶¶ 10-12; *Ganoung*, ¶ 15; *Woods*, ¶¶ 10-12, and 14; *Clark*, ¶¶ 25 and 27; *Mattson*, ¶ 17; *Guthrie*, ¶¶ 46-48 and 52; *Mason*, ¶ 21. *See also* § 70-17-106, MCA; Restatement (Third) of Property (Servitudes) § 4.1 cmt. d (2000)); Restatement (Third) of Property (Servitudes) § 4.1(1) cmt. a (2000). As applicable to the intent of the grantor, the construction and interpretation of a written instrument granting or restricting an interest in real property is governed by the rules generally applicable to the construction and interpretation of contract terms and conditions. *See* §§ 70-1-507, -513, and 70-17-104, MCA; *Mattson*, ¶ 18 (citations omitted).

¶19 If not specifically defined, described, or otherwise clearly and unambiguously discernable on the face of the pertinent instruments of conveyance, the intended use, scope, and extent or intensity of use of an express easement is that reasonably necessary and convenient to the purpose intended by the grantor, as indicated by extrinsic evidence manifesting the historical situation, use, and any other pertinent circumstances of the

property at the time of the pertinent source grant. *O’Keefe*, ¶ 29 (citing *Woods*, ¶ 12; *Clark*, ¶ 25); *Quarter Circle*, ¶¶ 10-11 (citing § 70-71-106, MCA; *Ganoung*, ¶ 15; and *Mattson*, ¶ 17); *Mattson*, ¶ 17 (citing *Guthrie*, ¶ 47); *Guthrie*, ¶ 47 (citing § 70-17-106, MCA (“extent of a servitude is determined by the terms of the grant *or* the nature of the enjoyment by which it was acquired”), and *Strahan v. Bush*, 237 Mont. 265, 268, 773 P.2d 718, 720 (1989), *et al.*—internal punctuation omitted); *Leffingwell Ranch, Inc. v. Cieri*, 276 Mont. 421, 430, 916 P.2d 751, 757 (1996) (quoting *Strahan*, 237 Mont. at 268, 773 P.2d at 720); Restatement (Third) of Property (Servitudes) § 4.1(1) cmts. a, d, f, and h (2000). Pertinent extrinsic considerations *inter alia* include the “nature and character of the dominant and servient estates, the prior and subsequent use of the properties, the character of the surrounding area, the nature and character of any common plan of development for the area, and the consideration, if any, paid for the easement.” *O’Keefe*, ¶ 29 (citing *Woods*, ¶ 12; *Clark*, ¶ 27; and Restatement (Third) of Property (Servitudes) § 4.1 cmt. d (2000)).

¶20 Upon creation of an easement by express grant, “a rebuttable presumption arises that” the grantor “anticipated such uses as might reasonably be required by . . . normal,” i.e., gradual and evolutionary, “development of the dominant tenement,” but only to the extent that such subsequent evolving use is (1) not “revolutionary” in scale, type, extent, or intensity to that originally intended, and (2) does not unreasonably interfere with the servient estate owner’s lawful use and enjoyment of the servient estate. *See O’Keefe*, ¶¶ 30 and 32 (citations omitted); *Ganoung*, ¶ 15 (“as conditions change so too may the use by the dominant tenement so long as the changes are ‘evolutionary but not

revolutionary’” — internal punctuation and citation omitted). *See similarly Quarter Circle*, ¶¶ 10-12; *Woods*, ¶¶ 10-12 and 14-16; *Clark*, ¶ 25; *Mattson*, ¶ 17; *Guthrie*, ¶¶ 46-48 and 52; Restatement (Third) of Property (Servitudes) § 4.1(1) cmts. a, d, f, and h (2000)). The historical situation, use, and other pertinent circumstances of the property at the time of the source grant at issue are typically questions of fact, *Guthrie*, ¶ 47, but may be determined as a matter of law to the extent not subject to genuine material dispute on the Rule 56 record. *See M. R. Civ. P. 56.*

¶21 Here, upon de novo review of the District Court’s summary judgment ruling for conformance to applicable M. R. Civ. P. 56 standards, there is no genuine issue of material fact, or related issue of law, regarding the following preliminary matters:

- (1) Baugh’s 2006 COS clearly and unambiguously created an express 20’ wide easement for “access and utility” use appurtenant to and for the benefit of Tract 2 over the burdened estate (Tract 1), on and along the “existing road[way]” as clearly and unambiguously depicted and described on the COS;
- (2) there is no factual or legal dispute regarding the particular location and pathway of the express easement over and across the burdened estate (Tract 1); and
- (3) the manifest purpose of the expressly referenced “access” was and remains for vehicular and non-vehicular ingress and egress over and across the burdened and servient estate (Tract 1) to and from the benefitted and dominant estate (Tract 2) along and across the location and pathway clearly and unambiguously depicted and described in the 2006 COS.

Against that preliminary factual and legal backdrop, the pertinent source instruments of conveyance of the express access easement are Baugh’s 2006 COS No. 17458 as referenced in his 2019 warranty deed to Florian Skyland. As a matter of law, Skyland

neither acquired any greater access right to convey, nor purported to convey any greater appurtenant access right to H2S2, over and across Tract 1. H2S2 thus acquired only the same appurtenant express access easement created and conveyed by Baugh to Skyland under the 2019 Baugh-to-Skyland warranty deed and referenced COS.

¶22 As recognized by the District Court, the source instruments of conveyance of the express access easement are insufficient to specifically define, describe, depict, or otherwise clearly manifest the originally intended scope, extent, or intensity of the easement in relation to H2S2’s planned use attendant to the contemplated 12-32 unit commercial “glamping” use of Tract 2.¹⁰ The District Court thus correctly resorted to pertinent extrinsic evidence to determine the intended authorized use and scope of use of the easement. Based on the Rule 56 factual record presented, the District Court further correctly concluded that there is no genuine issue of material fact that H2S2’s planned use of the easement attendant to the contemplated 12-32 unit commercial “glamping” use of Tract 2 would be inconsistent with and significantly exceed the grantor’s intended use and scope of use of the easement over and across Tract 1. Nor has H2S2 demonstrated on the

¹⁰ Compare, e.g., *Woods*, ¶¶ 3-4 and 14-15 (express “ingress and egress” roadway easement benefitting single-family residential property over adjoining single-family residential property *in platted residential subdivision* not “ambiguous” in re extended family recreational vehicle use based on principle that unrestricted “ingress and egress” generally permits 24/7 use by resident dominant estate owner, and “family, tenants, and invitees,” by “any form of transportation that does not inflict unreasonable damage or unreasonably interfere with the enjoyment” of servient estate—citing (Third) of Prop.: Servitudes § 4.10 illus. 1 (2000)). Unlike in *Woods*, the issue here involves whether the express roadway “access” easement created by relocation of common boundary line by certificate of survey involving adjoining record rural residential tracts was facially vague as applied to H2S2’s dissimilar contemplated multi-unit commercial development use of the easement.

Rule 56 factual record that its planned use of the easement attendant to the contemplated 12-32 unit commercial “glamping” use would merely be a gradual, non-revolutionary evolution of the use and scope of use intended upon its creation. We therefore hold that the District Court correctly concluded as a matter of law that H2S2’s contemplated use of the subject express easement over and across adjoining Tract 1 would significantly and thus unlawfully exceed the permissible use and scope of use of the easement.

¶23 2. *Whether the District Court erroneously awarded Baugh prevailing party attorney fees under our Foy equitable exception to the American Rule?*

¶24 Under the common law American Rule, the prevailing party may not recover from the non-prevailing party the attorney fees incurred to prevail except as otherwise provided by contract or statute. *Goodover v. Lindsey’s*, 255 Mont. 430, 445, 843 P.2d 765, 774 (1992); *Bitney v. School Dist. No. 44* (1975), 167 Mont. 129, 137, 535 P.2d 1273, 1277; *Ehly v. Cady*, 212 Mont. 82, 100, 687 P.2d 687, 696 (1984); *Joseph Russell Realty Co. v. Kenneally*, 185 Mont. 496, 505, 605 P.2d 1107, 1112 (1980). We have nonetheless recognized a narrow equitable exception under which a prevailing party may recover attorney fees from the non-prevailing party if the non-prevailing party “forced” the prevailing party “into the action” “through no fault of” his or her “own” to defend against an action or claim that was *utterly frivolous and without merit*. *Goodover*, 255 Mont. at 447, 843 P.2d at 775-76; *Foy v. Anderson*, 176 Mont. 507, 580 P.2d 114 (1978). *Accord Abbey/Land, LLC v. Glacier Constr. Partners, LLC*, 2019 MT 19, ¶ 63, 394 Mont. 135, 433 P.3d 1230; *DeVoe v. City of Missoula*, 2012 MT 72, ¶¶ 24-26 and 29, 364 Mont. 375, 382-83, 274 P.3d 752; *Jacobsen v. Allstate Ins. Co.*, 2009 MT 248, ¶ 21, 351 Mont. 464,

215 P.3d 649. As an equitable remedy, application of the *Foy* exception of course depends on careful consideration of the particular equities in each case. *Devoe*, ¶¶ 25 and 29. However, in order to prevent an expansive or creeping application of this narrow exception from gradually swallowing the general rule, we have strictly limited application of the *Foy* exception to its “narrowly drawn” elements. *Abbey/Land*, ¶ 63; *Jacobsen*, ¶ 21; *Terra W. Townhomes, L.L.C. v. Stu Henkel Realty*, 2000 MT 43, ¶ 40, 298 Mont. 344, 996 P.2d 866 (citing *Tanner v. Dream Island, Inc.*, 275 Mont. 414, 429, 913 P.2d 641, 650-51 (1996)); *Goodover*, 255 Mont. at 446-47, 843 P.2d at 775-76; *State ex rel. Wilson v. Dept. of Natural Resources*, 199 Mont. 189, 202, 648 P.2d 766, 772 (1982). By definition, the *Foy* equitable exception thus does not apply if the prevailing party is the one who commenced or asserted the subject action or claim and was thus not *forced into* the action to defend against the frivolous claim. *Goodover*, 255 Mont. at 447, 843 P.2d at 775-76; *Masonovich v. School District No. 1*, 178 Mont. 138, 141, 582 P.2d 1234, 1235-36 (1978).¹¹ Within the framework of the narrowly drawn elements of the exception, lower court grants or denials of prevailing party attorney fees under our equitable *Foy* exception are subject to review for an abuse of discretion. *Devoe*, ¶¶ 26 and 29.

¹¹ *But see El Dorado Heights Homeowners' Ass'n v. Dewitt*, 2008 MT 199, ¶¶ 2-13 and 26-30, 344 Mont. 77, 186 P.3d 1249 (affirming *Foy* equitable exception attorney fees award to plaintiff in subdivision covenants dispute where defendant frivolously reneged and sought judicial rescission of court-approved stipulation, thus forcing plaintiff to incur additional attorney fees that would not otherwise have been necessary in the action). *El Dorado Heights* is distinguishable upon its unique procedural posture and resulting satisfaction of the second *Foy* exception requirement articulated in *Masonovich* and *Goodover*.

¶25 Here, the District Court based its *Foy* exception attorney fees award on its conclusion that H2S2 failed to affirmatively present any evidence in support of its compensatory and punitive damages counterclaims. However, as manifest on the face of the pleadings and briefing here and below, the common essence of H2S2’s counterclaims was that Baugh forced H2S2 into this litigation to defend against what H2S2 viewed as a clearly erroneous, if not frivolous, attempt to block and interfere with its lawful use of its property and *facially unrestricted* appurtenant access easement. While Baugh ultimately prevailed on the merits, losing on the merits is not the mark or measure of an action or claim that is utterly frivolous and without merit. Contrary to the District Court’s characterization, the record clearly manifests that the central matter at issue common to both Baugh’s claim for declaratory and injunctive relief, and H2S2’s responsive claims, was a bona fide dispute on the merits of the permissible use and scope of use of the *facially unrestricted* express easement at issue.

CONCLUSION

¶26 We hold that the District Court correctly granted summary judgment to Baugh regarding the disputed easement use, and thus correctly permanently enjoined H2S2’s contemplated use of the easement attendant to its planned commercial “glamping” use of Tract 2. We further hold, however, that the District Court erroneously awarded *Foy* exception prevailing party attorney fees to Baugh under the circumstances here, and we thus hereby reverse that attorney fees award.

¶27 Affirmed in part, reversed in part, and remanded for entry of a corresponding final judgment.

/S/ DIRK M. SANDEFUR

We Concur:

/S/ MIKE McGRATH

/S/ JAMES JEREMIAH SHEA

/S/ BETH BAKER

/S/ INGRID GUSTAFSON