DA 19-0015

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 253N

KEVIN and HEIDI DETTMERING,

Plaintiffs and Appellees,

v.

FLATHEAD COUNTY, a political Subdivision of the State of Montana,

Defendant,

and

JOHN and ANNE PASSARGE,

Defendants and Appellants.

APPEAL FROM: District Court of the Eleventh Judicial District,
In and For the County of Flathead, Cause No. DV-12-1414A
Honorable Amy Eddy, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

Jenifer S. Reece, Reece Law, PLLC, Bozeman, Montana

For Appellees:

Paul A. Sandry, Jennifer McDonald, Johnson, Berg and Saxby, PLLP
Kalispell, Montana

Submitted on Briefs: October 2, 2019

Decided: October 22, 2019

Filed:

Clerk

Justice Dirk M. Sandefur delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 John and Anne Passarge (Passarges) appeal the November 2018 judgment of the Montana Eleventh Judicial District Court, Flathead County, adjudicating that a disputed driveway constructed by Kevin and Heidi Dettmering (Dettmerings) is now in compliance with pertinent Flathead County regulations as required by the court's prior 2016 order and underlying 2006 settlement agreement regarding various easement and road access issues. We affirm.

¶3 After the Dettmerings purchased property located kitty-corner to Passarges' property outside of Columbia Falls, Montana, in 2002, a dispute and litigation ensued between the parties regarding various easement and road access issues. The litigation settled in 2006 pursuant to a settlement agreement that in pertinent part authorized the Dettmerings to construct a contemplated driveway within the boundaries of two previously disputed easements across Passarges' property "subject to approval by Flathead County." At the time, the parties believed that the roadway to which the contemplated future

driveway would connect (Parker Hill Road) was a county road governed by Flathead County road regulations.[1]

¶4 The dispute flared up again in 2011-12 when Passarges asserted, *inter alia*, that a new driveway recently constructed by Dettmerings did not comply with county road approach regulations as contemplated in the 2006 settlement agreement. Dettmerings then sued Passarges for declaratory enforcement of their rights under the agreement. Passarges counterclaimed for termination of Dettmerings' easements based on alleged overburdening and for compensation for loss allegedly caused by the substandard driveway construction. Upon bench trial in 2016, the District Court determined, *inter alia*, that the driveway was properly located within Dettmerings' easements and that it did not unreasonably overburden those easements. It further found that water runoff from the driveway detrimentally affected Passarges' use of their property but that they otherwise failed to prove their asserted damages claim(s). However, based on its finding that the new driveway did not comply with county road regulations as agreed, the court ordered Dettmerings to bring the driveway into compliance within one year "so as to minimize injury to the Passarges' property"[2] as certified by an "engineering firm mutually agreed to by the parties."[3]

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[1] As later determined or ascertained in related litigation with Flathead County, Parker Hill Road was in fact not a county road and therefore not technically subject to Flathead County regulations governing county road approaches.

[2] See *Dettmering v. Passarge* (*Dettmering I*) No. DA 16-0723, 2017 MT 161N, ¶ 6.

[3] See October 2016 District Court findings of fact, conclusions of law, and judgment.

¶5 On October 30, 2017, Dettmerings filed a notice and motion for adjudication of their compliance with the 2016 order. Passarges filed a response contesting the motion. In February 2018, late on Friday afternoon before the previously scheduled Monday hearing, Dettmerings filed a notice acquiescing that their driveway in fact did *not* comply with county road regulations but asserting their intent to bring it into compliance as depicted in an attached exhibit. At the ensuing Monday hearing, the District Court vacated the proceeding pursuant to Dettmerings' acquiescence and stated its intent to award related attorney fees to Passarges upon subsequent affidavit and hearing determination.

¶6 On November 19, 2018, the attorney fees hearing primarily focused on the predicate issue of whether and when Dettmerings complied with the court's 2016 order regarding the disputed driveway. The District Court admitted various documentary exhibits into evidence and heard the testimony of three different roadway experts (one presented by Dettmerings and two presented by Passarges) regarding the physical characteristics of the disputed driveway in relation to county road approach regulations. At the close of hearing, the court made the following oral findings of fact on the hearing record:

> The [c]ourt will also find that consistent with the testimony here today that the Dettmering approach . . . does meet the requirements of the Flathead County regulations consistent with the testimony of Terrance Stoneh[oc]ker from TD&H Engineering, which both parties stipulated to use in order to bring the driveway into conformity.
>
> The other experts testified in substantial conformity with Mr. Stoneh[oc]ker to the extent their testimony is even relevant considering the stipulation of the parties. Looking to the requirements, there is – I'm looking at the May 30th letter of 2018 from Mr. Stoneh[oc]ker, number 1, there's no dispute as to that.

> Number 2, there's not a culvert, there's no dispute, nor is one required, nor is there any testimony that one is necessary for purposes of improving the drainage onto the road.
>
> Number 3, that there is a 3 percent [grade/slope] away.
>
> Number 4, the approach in some manners can be used so a car could pull up to Parker Hill Road at a 90-degree angle, which is the purpose of the 90-degree angle; it's a safety requirement.
>
> The approach is 24 feet wide, it's unpaved, natural vegetation, back slope, and a single ditch.

On December 10, 2018, the court issued formal written findings of fact, conclusions of law, and judgment awarding Passarges' $3,024 in attorney fees related to the aborted February 2018 hearing.[4] The written judgment included the court's predicate finding of fact and conclusion of law that the disputed driveway "compli[es] with Flathead County Regulation[s] and the intent of the parties' 2006 Stipulation." Passarges timely appeal.

¶7 Passarges assert that the District Court erroneously construed or applied its 2016 order, and the underlying 2006 settlement agreement, by failing to require strict compliance with the pertinent county road regulations. Without reference to its oral findings of fact, they further assert that the court erroneously found that the disputed driveway complies with Flathead County regulations and the intent of the parties' 2006 agreement. They assert that the court's ultimate written finding is clearly erroneous as unsupported by sufficient evidence and predicate findings. They assert that the hearing

[4] The court awarded attorney fees pursuant to our equity exception to the American Rule.

record contrarily indicates that the driveway does not comply with county road regulations or, at most, only partially. We disagree.

¶8 We review conclusions and applications of law de novo for correctness. *In re Marriage of Bessette*, 2019 MT 35, ¶ 13, 394 Mont. 262, 434 P.3d 894; *Steer, Inc. v. Mont. Dep't of Revenue*, 245 Mont. 470, 475, 803 P.2d 601, 603 (1990). In the wake of the revelation that Flathead County road regulations did not directly apply because the Parker Hill Road was not a county road as contemplated in 2006, the court's 2016 order required Dettmerings to bring their driveway into compliance with Flathead County road regulations "so as to minimize injury to the Passarges' property" as certified by an "engineering firm mutually agreed to by the parties." Neither party appealed that aspect of the 2016 order in *Dettmering I*. Passarges, therefore, cannot challenge it now. Nothing in the language of the 2016 order, or underlying 2006 settlement agreement, specifically required strict compliance with the pertinent Flathead County road regulations. We hold that the District Court did not erroneously construe or apply its 2016 order, or the parties' underlying 2006 settlement agreement, as pertinent here.[5]

¶9 We review lower court findings of fact only for clear error. *Ray v. Nansel*, 2002 MT 191, ¶ 19, 311 Mont. 135, 53 P.3d 870. Findings of fact are clearly erroneous only if

[5] We similarly find no basis upon which to conclude that the District Court erroneously construed or applied Flathead County road approach regulations. As noted by the court at the hearing, neither party offered into the record a copy of the pertinent county road regulations as published or issued by Flathead County. Passarges' arguments instead rely on the regulations as referenced in the county road approach permit form filled-out and submitted to the County by Dettmerings in 2010. Passarges have not demonstrated that the District Court erroneously construed them even as referenced in the record.

not supported by substantial evidence, the court misapprehended the effect of the evidence, or, based on our review of the record, we have a definite and firm conviction that the lower court was mistaken. *Larson v. State*, 2019 MT 28, ¶ 16, 394 Mont. 167, 434 P.3d 241; *Interstate Prod. Credit Ass'n of Great Falls v. DeSaye*, 250 Mont. 320, 323, 820 P.2d 1285, 1287 (1991). Lower court findings of fact are presumed correct on appeal. *Hellickson v. Barrett Mobile Home Transp., Inc.*, 161 Mont. 455, 459, 507 P.2d 523, 525 (1973). The appellant thus has the burden of demonstrating asserted errors in accordance with the applicable standard of review. *In re Marriage of McMahon*, 2002 MT 198, ¶ 7, 311 Mont. 175, 53 P.3d 1266; *Hellickson*, 161 Mont. at 459, 507 P.2d at 525.

¶10 Under the law of this case as established by the 2016 order, *Dettmering I*, and as litigated by the parties thereunder at the November 2018 hearing, the central issue was whether and when Dettmerings brought the disputed driveway into compliance with county road regulations as required by the 2016 order. As pertinent here, the 2016 order required Dettmerings to construct the disputed driveway in accordance with Flathead County road regulations "so as to minimize injury to the Passarges' property" as certified by an "engineering firm mutually agreed to by the parties." It is beyond genuine material disputed on the hearing record that, at some point in the wake of the 2016 order, the parties stipulated and designated *Thomas Dean & Hoskins, Inc.* (TD&H) as the engineering firm to make the necessary compliance "certification" required by the order. It is further beyond genuine material dispute on the record that, upon inspection in October 2017, TD&H (by and through licensed professional engineer Terrence Stonehocker) initially found the

disputed driveway did not comply with Flathead County regulations requiring that county road approaches: (1) have a 3 percent landing grade/slope; (2) intersect county roads at a 90-degree angle; and (3) connect to county roads at a width of 24 feet. Finally, based on Stonehocker's May 30, 2018 correspondence[6] to Dettmerings and his subsequent hearing testimony, it is beyond genuine material dispute that, upon inspection in May 2018, TD&H ultimately found that further corrective work by Dettmerings had corrected the previously noted deficiencies and that the driveway was thus in compliance with pertinent Flathead County road regulations as ordered.

¶11 Passarges dispute TD&H's particularized findings and ultimate certification based on the hearing testimony of their independently retained experts (licensed professional engineer/surveyor Rick Breckenridge and licensed surveyor Jeff Larsen). However, they gloss over the testimony of their experts that was consistent with the TD&H findings. Moreover, Passarges ultimately assert no more than conflicts in the evidence, the resolution of which lie within the broad discretion of the District Court to resolve based on its first-hand assessment of relative weight and credibility. Upon our review of the evidentiary record, the District Court's ultimate written findings of fact and more detailed oral findings are supported by substantial record evidence regardless of the conflicting evidence highlighted by Passarges. We further find no basis upon which to conclude that the court misapprehended the effect of the evidence and have no definite and firm conviction that

[6] The District Court admitted Stonehocker's May 30 correspondence into evidence at the November 2018 hearing without objection or qualification.

the court was otherwise mistaken. We hold that the District Court's finding that the disputed driveway ultimately complied with pertinent Flathead County road regulations as required by its 2016 order is not clearly erroneous.

¶12 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent.

¶13 We affirm.

/S/ DIRK M. SANDEFUR

We concur:

/S/ JAMES JEREMIAH SHEA
/S/ BETH BAKER
/S/ LAURIE McKINNON
/S/ JIM RICE