**IN THE SUPREME COURT OF THE STATE OF MONTANA**
**CASE NO. DA 20-0105**

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**NATHAN G. JUDD,**

Appellant/Defendant and Counter Plaintiff

vs.

**MUFFIE B. MURRAY** and **W. STEPHEN MURRAY, HELD FAMILY TRUST,** and **WILLIAM A. SARRAZIN**,

Appellees/Plaintiffs and Counter Defendants.

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On Appeal from the Montana Sixth Judicial District Court, Park County, The Honorable Brenda R. Gilbert, Presiding, District Court Cause No. DV 17-114

# APPELLEES' ANSWER BRIEF

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## II. STATEMENT OF THE CASE

This case began as a garden variety easement dispute, which was turned toxic, unilaterally and unreasonably, by the Appellant Nathan Judd ("Appellant" or "Judd"). Now, on appeal, after multiple changes in counsel and numerous post-trial motions, Judd has decided to once again twist facts, obfuscate straightforward issues, and play mental gymnastics with the law. What actually happened is as follows:

Judd bought a property in Park County adjacent to Clyde Park (the "Judd Property") *subject to* a primary easement in what is known as the Held Ditch and appurtenant headgate and appropriations works, and a secondary easement to open, maintain, and operate the ditch works with vehicles and machinery reasonably sized to the tasks. The easements are for the benefit of Muffie and Stephen Murray and the Held Family Trust, who irrigate property across U.S. Highway 89 west of the Judd property, and William "Bill" Sarrazin, long-time tenant of the Held Trust property (collectively, the "Appellees" or the "Murray Parties").

The Held Ditch has been a means of conveying water in the Shields Valley since the 1800's (T. 142-145 & Pltfs.' Ex. 5)[1] and has conveyed water over the

[1] All citations designated "T." refer to the Transcript of Proceedings filed with the Clerk of the Supreme Court March 27, 2020, in which the transcript of trial begins at Page 115.

Judd property by the same course since before 1950. (T. 153-156 & Pltfs.' Ex. 13-14). That physical course is, itself, the "primary easement." (T. 240-241). In addition, since the 1970s, Appellees have accessed the ditch headgate and works from the driveway and across the pasture on the Judd Property multiple times per year to inspect, clean, maintain, and operate the ditch and appurtenant works. (T. 164-169, 241, 294-95, 340-41, 360-62). This is their "secondary easement."

Since 2016, Judd has intentionally impaired Appellees' secondary easement, and in September 2017, began interference with their primary easement. Appellees Muffie and Stephen Murray initially brought one claim against Judd to declare and enforce their secondary easement. (Dkt. # 1). Joined by the Held Trust and Sarrazin as co-plaintiffs they later added a claim to protect the ditch works and enforce and protect their rights in the primary easement. (Dkt. # 45). Judd filed a counterclaim against Appellees Murrays, contending they had wronged him by participating in proceedings before the Park Conservation District ("PCD"); and asserted third-party claims against Appellee Sarrazin claiming defamation and trespass. (Dkt. # 44).

The District Court dismissed Judd's counterclaim with prejudice, on grounds the Murrays' participation in the PCD proceedings was statutorily and constitutionally privileged (Dkt. # 59) and held trial on Appellees' claims for interference with their secondary easement and for interference with their ditch

works, as well as on Judd's third-party claims against co-plaintiff/appellee Bill Sarrazin. (Dkt. Nos. # 135-136). Appellees prevailed on all counts. (Dkt. # 171, FOF COL ¶¶ X-Z, BB-FF, HH). Sarrazin prevailed on Judd's third-party claims. (Dkt. # 171, FOF COL ¶¶ V, W). The District Court's dismissal of Judd's counterclaims was a matter of law, and none of its determinations on the first and second counts of Appellees' Amended Complaint, or determinations of the third-party claims against Sarrazin were based on affidavits. The District Court took testimony of witnesses and introduced, upon unopposed motion, the deposition of John Youngberg in lieu of live testimony at trial. (Dkt. # 124 and T. 123). The Youngberg Transcript was admitted as Plaintiffs' Exhibit 53 at trial. During trial, the District Court held in abeyance whether to hold Judd in contempt for pre-trial violations of the Court's prior orders. (T. 123).

Following trial, after all parties had ample opportunity to brief and argue the same, the District Court awarded Appellees attorneys' fees as explicitly contemplated and authorized by M.C.A. §70-17-112, the easement statute controlling in this case. (Dkt. # 171, FOF COL ¶¶ RR-SS). As an alternative ground, the District Court awarded attorneys' fees to Appellees under M.C.A. § 37-61-421 on account of Judd's vexatious conduct throughout the dispute, which forced Appellees to spend considerable extra time and money responding. (Dkt. # 171, FOF COL ¶¶ AA, TT-UU).

Judd turned what should have been a straightforward case to enforce longstanding ditch rights into a quagmire of unnecessary litigation at great expense in attorneys' fees and costs. He was determined liable for those fees and costs under M.C.A. §§ 70-17-112 and 37-61-427, and such determinations must be affirmed. Moreover, contrary to the scattershot points in Appellant's Opening Brief, the District Court carefully weighed the evidence and testimony adduced at trial and adopted detailed Findings of Fact and Conclusions of Law ("FOFCOL"); (Dkt. # 171, FOF COL entered June 7, 2019); then carefully considered evidence at a hearing concerning the attorneys' fees and costs before entering Judgment. (Dkt. # 220, T. 567). The District Court had the opportunity to view the parties and assess their demeanor at two evidentiary hearings before trial: September 28, 2017 (T. 23-48) and October 2, 2018 (T. 53-113 ); and during the trial on January 15-16, 2019. The District Court also conducted an evidentiary hearing regarding attorneys' fees on December 16, 2019 (T. 571-663). The Court issued an Order including Findings of Fact and Conclusions of Law October 26, 2018 (Dkt. # 100); its post-trial FOFCOL June 7, 2019 (Dkt. # 171); and its Findings of Fact, Conclusions of Law and Order Concerning Attorneys' Fees January 23, 2020 ("FOFCOL on Fees") (Dkt. # 216). The Court did not err on the facts or the law and did not abuse its discretion in any respect. The District Court's findings of fact, conclusions of law, and judgment must be affirmed in all respects.

## III. STATEMENT OF THE FACTS

Judd bought his property just north of Clyde Park in Park County from the Youngberg Family Trust in December, 2016. (T. 541) At that time, he bought the property, "as is," subject to an easement in the Held Ditch and appurtenant works for the benefit of Muffie and Stephen Murray (the "Murrays") and the Held Family Trust ("Held"), and William "Bill" Sarrazin as Held's longtime tenant. (T. 349-356). The Held Ditch has conveyed water by the same course for more than 30 years over the Judd Property. (T. 153-156 & Pltfs' Ex. 13 & 14, T. 324-25, T. 354). Judd was made aware of the Held Ditch and ditch owners' access thereto before he purchased his property. (Pltfs' Ex. 53, Trans. Of John Youngberg Depo., pp. 41-42).

Muffie and Stephen Murray have owned their property in the NE¼ of Section 28, T.2N., R.9E., west of Highway 89, for more than 15 years. (T. 128 & Pltfs' Ex. 1). Their pastures have been irrigated in part by water from Cottonwood Creek via the Held Ditch under a water right with an 1887 priority. (T. 141-45, 158, & Pltfs' Ex. 5). The Held Trust owns property adjoining the Murrays in the SE¼ of Section 28, irrigated in part by water from Cottonwood Creek via the Held Ditch under water right with an 1887 priority. (T. 322-323 & Pltfs' Ex. 3). Appellee Bill Sarrazin has leased the Held Property for more than 30 years. (T.

414). Sarrazin also owns property to the east and north of the Judd Property along Cottonwood Creek. (T. 347).

Before 2017, the Appellees accessed the Held Ditch and headgate during the irrigation season with a vehicle and/or necessary equipment on the driveway towards the house on the Judd Property, through a gate west of the house, and north across the pasture to the west bank of Cottonwood Creek where the headgate is located (the "Pasture Route"). (T. 27, 164-69, 294, 360). For many years prior to 2017, Helds and Sarrazin might also access the headgate with an ATV via a route that went through the corral east of Judd's house and along the west bank of Cottonwood Creek (the "Corral Route"). (T. 27, 164-169, 294, 360). Appellees never sought permission to cross the Judd (formerly Youngberg) Property via either route. (T. 169-70, 295, 360). They did so with vehicles and equipment in an open, notorious, continuous, exclusive, and interrupted manner for more than five years before Spring 2017. (T. 161, 360, 364, Pltfs' Ex. 53 pp. 14-15).

About June 1, 2017, Murrays' employees, Rick Held and Sarrazin met at the gate to the Pasture Route with a backhoe to cross the Judd Property to open the Held Ditch for the 2017 irrigation season. (T. 303, 334, 371, 258). They were confronted by Judd and told that he would not permit access across the pasture, nor any other part of the Judd Property, with equipment or vehicles for maintenance, repairs, or operation of the Held Ditch and headgate, and would only permit access

on foot. (T. 305, 371). Judd called the Sheriff. (T. 304). Appellees were forced to open the headgate and make repairs to the Held Ditch for the 2017 irrigation season on foot and by hand. (T. 305, 371). Shortly thereafter the Murrays' personnel and Sarrazin were again denied vehicular access by Judd when they went to deliver bales to the point of diversion on Cottonwood Creek, despite explaining their legal rights and providing Judd with a copy of M.C.A. §70-17-112. (T. 175). They tried to have a friendly conversation with Judd about their right to use the historic easement. Judd refused. He told them that any future access would be considered trespassing and threatened to again call the Sheriff. (T. 184-85). Appellees found that Judd had strung electric fences across the pasture and placed equipment across gates, blocking vehicular access to the Held Ditch and works. (T. 186-88).

At no point did Judd attempt to have a civil conversation with Appellees regarding access to the Held Ditch. Throughout the summer of 2017, Judd flatly prohibited *any* vehicular access across the Judd Property via *any* route for the maintenance, operation, or repair of the Held Ditch and appurtenances. (T. 181-189, 199). Appellees' attempts to resolve the issue proved fruitless, and they were forced to retain counsel to enforce their rights. In July 2017, they began to incur attorneys' fees as a result of the dispute with Judd. (T. 195-96). Appellees Muffie and Stephen Murray filed their original complaint August 30, 2017, under M.C.A.

§ 70-17-112 for interference with their secondary easement to maintain and operate the Held Ditch and works. (Dkt. # 1)

In September 2017, after the original complaint was filed and served, Judd communicated his intent to commence construction of a new route for access along the Ditch and to change the appropriations works, all without the consent of Appellees, and to charge them with the expenses related thereto. (T. 196, & Pltf. Ex. 52). Judd then, on about September 9, 2017, began cutting trees near the Held Ditch east of Highway 89 on property belonging to Ken Youngberg, who objected and called the Sheriff. (T. 375-76) Judd stopped upon order of a Sheriff's Deputy who suggested he refrain from action interfering with Appellees' ditch easement and access. (T. 375-76). Judd thereafter communicated to Appellees that he would permit "one-time access" on prior notice with equipment to close the Held Ditch for the 2017 season, but only over the new path he was clearing from the Highway 89 right-of-way over Ken Youngberg's property and that he would not cease other work along the ditch. (T. 18-19, 202, 211). Judd's "one-time access" proposal was flatly rejected, and Appellees demanded he cease removing trees or engaging in other actions that might jeopardize the Ditch and appurtenances. (T. 211 & Pltfs' Ex. 47).

Notwithstanding the pendency of the Murrays' suit, the suggestions of the Sheriff's Deputy, and the demands of Appellees, between September 9 and 15,

2017, Judd began excavating in the bed of the Cottonwood Creek channel immediately adjacent to the Held Ditch diversion structure, jeopardizing the Ditch works. (T. 209-211). The Murrays promptly filed their Application for Preliminary Injunction to stop Judd's unilateral easement relocation and creek excavation to protect the Ditch works and preserve the status quo until trial. (T. 212-213& Dkt. # 4 ). On September 15, 2017, the District Court entered its Order Granting Application for Preliminary Injunction, therein setting a hearing for September 28, 2017 on the Application. (Dkt. # 8).

Judd's counsel moved to continue the September 28 hearing and filed a "Notice of Limited Appearance". (Dkt. Nos. 9 and 10). On September 27th, the District Court entered its Order Regarding Hearing, which changed the *scope* of the September 28 hearing, but expressly stated the hearing would go forward. (Dkt.# 16). At the September 28, 2017 hearing, Appellees introduced testimony and exhibits to show Appellees' historically-used secondary easement over the Pasture Route, as well as Judd's actions to relocate that access without consent and to excavate in the bed of Cottonwood Creek near the diversion structure. (T. 25-30).

Following the hearing on September 28th, the Court entered its "Order Amending Title of Order Entered 9/15/17, Issuing Temporary Restraining Order and Scheduling Hearing," (Dkt. # 20) and set a hearing on Appellees' Application

for Injunction for November 15, 2017. (Dkt. # 20). Judd's Answer and Affirmative Defenses to the Murrays' original complaint was not filed until October 12, 2017 (Dkt. # 21); and no response to Murrays' Application for Injunction was filed. Appellees filed a motion for partial summary judgment on October 27, 2017. (Dkt. # 25).

By unopposed motion filed November 9, 2017, Judd's new counsel Karl Knuchel requested an extension to respond to Murrays' motion for partial summary judgment and to continue the November 15 injunction hearing (Dkt. # 28). By Order entered November 13, 2017, the Court granted an extension until January 16, 2018 for response; and vacated the November 15 hearing to "be rescheduled for a later date and time." (Dkt. # 29).

Judd then filed "Defendant's Motion to Allow Activities on Non-Disputed Areas of Property." (Dkt. # 30). In such motion—the first in many attempts to test the injunction pending trial—Judd sought leave to (1) erect temporary fencing to restrain his horse; (2) to build a lean-to for the horses in a location that "will not affect . . . the disputed area"; and (3) to "remove blown over trees on an as needed basis." (Dkt. # 30).

Concerned that Judd's "Motion to Allow Activities" might actually be a "Trojan Horse," Appellees filed a Response (Dkt. # 31). The Court's November 29 Order granted Judd's Motion to Allow Activities—with express conditions that

Judd not "affect or prevent use of the disputed pasture route," and not cut any trees down in the bed of Cottonwood Creek or "that are over, across or obstructing the Held Ditch, the head gate, the point of diversion, the 'pasture route', or the 'corral route'. . ." (Dkt. # 32).

Unfortunately, the road to trial was anything but ordinary, a fact the Appellant completely ignores in his Brief. There were ongoing proceedings before the PCD concerning Judd's unpermitted excavation actions in Cottonwood Creek in violation of the Montana Streambed Preservation Act. (T. 270-275) Appellant then provoked a conflict with Appellees Held and Sarrazin in August 2018 (T. 84-87), leading to his August 31st Motion for Order of Protection (which was denied after an evidentiary hearing) (Dkt. Nos. 79 and 100). Judd's failure to respond to written discovery and timely identify proposed experts, trial witnesses and exhibits necessitated Appellees' filing objections and motions in limine and for sanctions to avoid prejudice at trial. (Dkt. Nos 87, 106, 107, 111, 112, 116 and 117). Judd's Motion to Reset the Case as a Jury Trial and last-minute Motion to Add Youngberg Trust as a Third-Party Defendant also required response by Appellees. (Dkt. Nos. 104, 110, 118, 119 and 130).

The actions of Judd and his agents to disturb, harass, and unnecessarily cause expense to Appellees continued through 2018 and into 2019. Such actions, referenced in "Plaintiffs' Combined Joint Motion for Citation for Contempt, and

For Attorneys' Fees and Costs Incurred Due to Defendant's Unreasonable and Vexatious Multiplication of the Proceedings," filed September 28, 2018 at Dkt. 87 ("Motion for Contempt and Fees"), include:

- Judd's continuing attempts in Spring 2018 to shift the Murray Parties' secondary access to his preferred newly cleared route along the ditch in violation of the Court's September 28, 2017 Injunction Order;

- Judd's complaints to the Montana DNRC about the water volume taken by the Held Ditch owners and the accuracy of their water box measuring device (complaints the DNRC did not find meritorious)—followed by a call to the Sheriff when the Held Ditch owners showed up (invited by the ditch rider) at the DNRC inspection;

- Judd's contentions to the DNRC—rejected by DNRC—that the Held Ditch headgate and diversion structure were "mislocated" and must be moved off his property due to a (DNRC corrected) point of diversion description in the old Murray and Held water rights abstracts;

- Judd appearing on Easter Sunday, 2018 at a Wilsall church, where he sat directly behind Sarrazin's wife, when Judd had not previously attended that church; then attending the church again June 3, 2018;

- Judd's father threatening a member of the PCD Board *and* the Appellees' trial expert DeWitt Dominic with the comment "you'll pay for this" following a PCD inspection on the Judd Property;

- Judd's luring Sarrazin by text message April 30, 2018 to come onto the Judd Property to retrieve a wayward heifer, while concurrently complaining to the Sheriff's Dept. that the cows were trespassing;

- Judd videotaping Sarrazin, his daughter, and granddaughter while they were on Sarrazin's property across Cottonwood Creek;

- Judd or his father submitting a complaint to the Montana Department of Environmental Quality alleging that Sarrazin was by his cattle causing

pollution in Cottonwood Creek in violation of the Montana Water Quality Act;

- Judd hauling tons of rocks (over the Pasture Route) onto his property in late July 2018 and spreading them in a line along the Creek to impede access to the Held Ditch works via the Pasture Route, then leaving the state for weeks on alleged fire-fighting duty;

- Judd's father, with his apparent knowledge, first attempting to set up disqualification of the Appellees' co-counsel Maggie Stein by seeking legal advice from her; then filing in July 2018 a specious grievance against Murray co-counsel Jon Doak with the Montana Office of Disciplinary Counsel, which grievance was dismissed; but regarding which dismissal Judd sought review with the Commission on Practice—again determined to be without merit and dismissed; and

- Judd's attempt just two weeks before trial in January 2019 to disqualify District Court judge Brenda Gilbert.

As a result of all these distressing actions, the Appellees' filed their motion pursuant to M.C.A. § 37-61-421 and Rule 11, M.R.Civ.P. (Dkt. # 87).

Trial was held on the merits in January 2019, and the trial court found for the Murray Parties on both their counts under § 70-17-112. (Dkt. # 171, FOFCOL ¶¶ 33-48). Judd's counterclaim and third-party claim were dismissed. (Dkt. # 171, FOFCOL ¶¶ 33-48). The Court awarded the Appellees attorneys' fees as clearly contemplated by the easement statute. (Dkt. #171, FOFCOL¶ SS). The Court then awarded additional attorneys' fees and costs under M.C.A. § 37-61-421, for fees and costs incurred while responding to Judd's vexatious and unreasonable multiplication of the proceedings. (Dkt. # 171, FOFCOL ¶ TT).

As stated by the district court in its FOFCOL, Judd's "conduct has been consistently manipulative, has created false claims of emergency and urgency, and has repeatedly and unnecessarily added fuel to the flame of the contentious nature of this case and have further caused added expense to the [Murray Parties] in terms of attorneys' fees and costs." (Dkt. # 171, FOFCOL ¶ TT). Unfortunately, Judd's crusade against the Appellees did not end with the Court's order. As Appellant readily admits, after trial "Judd introduced affidavit after affidavit in an attempt, largely unsuccessful, to convince the Court that the secondary easement to service the ditch should be down the ditch bank…" (Opening Brief at 10). In short, Appellant attempted to re-litigate the case post-trial. His statement that "the Court, at ditch owners' urgings, enlarged the trial record with dozens of affidavits and transcripts" is unfounded. (*Id.* at 10). The various post-trial motions and affidavits were initiated by Judd, and all were rightfully denied. (Dkt. Nos. 154, 155, 157, 158, 161, 165, 166, 167, 191, 192, 193, 194, 195 and 196). To now point a finger at the Murray Parties for increasing the attorneys' fees and costs is outrageous. As the saying goes, Judd has four fingers pointing back at him.

## IV. STANDARD OF REVIEW

The Court reviews the findings of a district court sitting without a jury to determine if the court's findings were clearly erroneous. *See* Rule 52(a), M.R.Civ.P.; *Byrum v. Andren*, 2007 MT 107, ¶ 14, 337 Mont. 167, 171, 159 P.3d

1062, 1067. A district court's findings are clearly erroneous if substantial credible evidence does not support them, if the district court has misapprehended the effect of the evidence, or if a review of the record leaves the Court with the definite and firm conviction that a mistake has been committed. *Id.*; *Ray v. Nansel,* 2002 MT 191, ¶ 19, 311 Mont. 135, 140, 53 P.3d 870, 874. Evidence must be viewed in the light most favorable to the prevailing party. *Id.* The Court reviews a district court's conclusions of law to determine whether those conclusions are correct. *In re Estate of Harms*, 2006 MT 320, ¶ 12 , 335 Mont. 66, 66, 149 P.3d 557, 560.

The issue before the Court regarding whether a party prevailed under MCA § 70-17-112, the controlling statute in this case, is reviewed to determine whether that decision is correct. *Espy v. Quinlan*, 200 MT 193, ¶14 , 300 Mont. 441, 445, 4 P.3d 1212, 1214. "Manifest abuse of discretion" is the appropriate standard for reviewing the granting of a preliminary or permanent injunction." *Shammel v. Canyon Res. Corp.,* 2003 MT 372 ¶ 11, 319 Mont. 132, 136, 82 P.3d 912, 916.

The amount of legal fees and costs awarded is reviewed for abuse of discretion. *Ray v. Nansel*, 311 Mont. at 140.

## V. SUMMARY OF THE ARGUMENT

Appellant Judd prevailed on no claims tried under and pursuant to MCA § 70-17-112. The Murray Parties prevailed on all of them. They are and were thus

entitled to the injunctive relief afforded them under that statute and to their attorneys' fees and costs expended to establish their rights under the statute.

Appellant Judd was also determined—correctly under the facts and law—to have vexatiously and unreasonably multiplied and complicated the proceedings in the case, materially increasing the Appellees' attorneys' fees, and thus justifying an award of attorneys' fees to the Murray Parties under MCA § 37-61-421. This Court has previously shown little patience for the frivolous, vexatious and unreasonable tactics the district court attributed to Mr. Judd in this case and the trial court did not abuse its discretion in so concluding.

Appellant Judd did not timely request a jury trial and would not have been entitled to one on the Appellees claims for declaratory and injunctive relief even if he had timely requested a jury trial thereon. He put forth nothing triable by jury on counterclaims or third-party claims. His jury trial points fail on appeal.

The parties are left with the Judgment entered by the district court February 10, 2020 (Dkt. # 220), pursuant to FOFCOL entered June 7, 2019 (Dkt. # 171), after trial January 15-16, 2019, and FOFCOL on Fees entered January 23, 2020 (Dkt. # 216), after a hearing on attorneys' fees on December 16, 2019. The record clearly reflects that final judgment was not entered until *more than a year after trial because of Mr. Judd's obfuscation, delays and changes in counsel*. The Appellees incurred tens of thousands in attorneys' fees during that post-trial period

because of Appellant's actions. His appeal on spurious grounds is more of the same.

## VI. ARGUMENT

### A. THE COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING THE MURRAY PARTIES ARE ENTITLED TO ATTORNEYS' FEES AND COSTS PURSUANT TO MCA § 37-61-421 INCURRED AS A RESULT OF JUDD'S CONDUCT WHICH UNREASONABLY AND VEXATIOUSLY MULTIPLIED THE PROCEEDINGS.

#### 1. *Appellant's allegation of procedural defects on the attorneys' fees issue is unfounded and irrelevant.*

Judd's argument on appeal is essentially that he has not been afforded adequate due process—notice and an opportunity to be heard—in this case. Nothing could be farther from the truth. In fact, Judd's unrelenting agenda to re-try issues at every step of the way in these proceedings is exactly how Appellees' incurred the attorneys' fees and costs that Judd now faces. The Appellant willfully ignores the facts and law, and Appellees must again set the record straight.

##### *a. The district court did not abuse its discretion when it awarded statutorily authorized attorneys' fees and costs.*

Legal authority to award attorneys' fees and costs to the prevailing party in actions to enforce or protect their irrigation ditch easements and secondary easements for access is clear under MCA § 70-17-112(5). See *Byrum v. Andren*,

337 Mont. at 159, P.3d at 1076, *Engel v. Gampp*, 2000 MT 17, ¶ 40; 298 Mont. 116, 127, 993 P.2 701, 709; *Sharon v. Hayden*, 246 Mont. 186, 188, 803 P.2d 1083, 1085 (1990).

Appellees brought suit on two counts in this case pursuant to MCA § 70-17-112: one for impairment and obstruction of their secondary easement, and one for interference with their primary easement. (Dkt. # 45). Appellant filed a counterclaim against the Appellees for their statutorily and constitutionally protected participation in PCD proceedings, and third-party claims against co-plaintiff/appellee Bill Sarrazin for defamation and trespass. (Dkt. # 44). The District Court dismissed Judd's counterclaim against the Appellees with prejudice (Dkt. # 59); and held trial on the Appellees' two claims and on Judd's third-party claims against Sarrazin. The Appellees won on both counts under § 70-17-112, and Sarrazin won on Judd's third-party claims. (Dkt. # 171, FOFCOL). Judd was not the prevailing party on anything. (Dkt. # 171, FOFCOL).

The controlling statute in this case, § 70-17-112, expressly authorizes fee-shifting. The statute requires that attorneys' fees be awarded to the prevailing party in a case involving interference with a ditch easement and/or appurtenant secondary easement to maintain the ditch. This Court has held that a prevailing party is the "one who has an affirmative judgment rendered in [its] favor at the conclusion of the case." *Avanta Fed. Credit Union v. Shupak*, 2009 MT 458 ¶14,

354 Mont. 372, 387, 223 P.3d 863, 874. As further discussed in Section B, an affirmative judgment was rendered for the Appellees after trial, and they were the prevailing parties on both their counts raised pursuant to § 70-17-112.

*b. The district court did not abuse its discretion when it granted additional statutorily authorized attorneys' fees and costs incurred as a result of Appellant's vexatious and unreasonable multiplication of these proceedings.*

In addition to the attorneys' fees authorized under the easement statute, it is within the district court's discretion to award attorneys' fees under M.C.A § 37–61–421, which provides: "[a]n attorney or party to any court proceeding who, in the determination of the court, multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney fees reasonably incurred because of such conduct." *In re Estate of Bayers*, 2001 MT 49, ¶ 9, 304 Mont. 296, 300, 21 P.3d 3, 5. Section 37–61–421 was adopted in 1985 to provide redress against persons who abuse the judicial process for their convenience, tactical reasons, personal gain, or the satisfaction of vengeful motives. *See Estate of Bayers,* 2001 MT 49 at ¶ 9, *citing "Hearing on* HB *541 Before the House Judiciary Committee",* 49th Legis. (1985) (statement of Judge Michael Keedy, 11th Judicial District).

This Court has generally deferred to the discretion of the district court regarding awards under § 37–61–421, "because it is in the best position to know whether parties are disregarding the rights of others and which sanction is most

appropriate." *Id.; see also McKenzie v. Scheeler*, 285 Mont. 500, 506, 949 P.2d 1168, 1172 (1997); *Larchick v. Diocese of Great Falls-Billings*, 2009 MT 175, ¶ 39, 350 Mont. 538, 550, 208 P.3d 836, 847.

As this Court has stated, "[t]he point in court proceedings at which the vexatious conduct occurs is not the issue. *Rather, it is the unreasonable multiplication of court proceedings that is germane*." *In re Estate of Bayers*, 2001 MT 49 at ¶ 9 (emphasis added). This Court has upheld awards for attorneys' fees under § 37–61–421 for, among other things, discovery violations, such as the failure to appear at a hearing and refusal to provide discovery responses, *In re Marriage of Rager*, 263 Mont. 361, 366, 868 P.2d 625, 628 (1994), and the withholding of requested discovery information. *Tigart v. Thompson,* 244 Mont. 156, 159–60, 796 P.2d 582, 585 (1990). The Court has also approved of fees awarded after a trial, in the course of an appeal. *Bayers,* 2001 MT 49 at ¶¶ 12-17.

In *Bayers*, this Court found that the appellant's inadequate responses to discovery requests in an estate case forced a needless multiplication of the proceedings. The Court affirmed the lower court's findings that the appellant was "'playing games' and 'pushing [counsel's] buttons by forcing [the] matter forward." *Id.* at ¶ 16. There, not only did this Court affirm the district court's findings, it also held that the appellees were entitled to recover fees spent defending the matter on appeal:

> "Unfortunately, McGimpsey's inclination to prolong this matter unreasonably and vexatiously did not end in the District Court. McGimpsey forced this matter forward on appeal, unnecessarily requiring the respondents to expend additional attorney fees defending the order of the District Court. As already noted, § 37–61–421, MCA, permits the Court to require an attorney who unreasonably multiplies the proceedings to satisfy personally the expenses and attorney fees reasonably incurred because of such conduct. We conclude that McGimpsey should be responsible under this statute for respondent's expenses and attorney fees incurred on appeal as well as below."

*Id.* at ¶¶ 12-17.

In the instant case, Appellant Judd has consistently been evasive and combative—before legal proceedings were commenced, throughout motion practice and discovery, in refusals to respond to simple direct examination, and post-trial.

The exhaustive record of district court proceedings in the instant case speaks for itself, but does not even include Judd's contentious and manipulative behavior outside of these proceedings. Such actions include, but are certainly not limited to: Judd's Spring 2018 attempt to shift secondary access, in violation of the district court's September 28, 2017 order (T. 221-224); Judd's August 2018 spurious complaints to the DNRC regarding water use in Cottonwood Creek (T. 523); Judd's August 2018 provocation of Rick Held and Sarrazin and September 2018 attempts to relocate the Murrays' secondary access onto the property of nonparty Ken Youngberg; Judd's April 2018 harassment of Sarrazin in his place of worship;

Judd's continued bullying of Sarrazin throughout May and June 2018 via complaints to the DEQ and DPHHS regarding Sarrazin's cattle; Judd's attempts to set up disqualification of Murrays' co-counsel Maggie Stein via his father, Mike Judd's, attempts to elicit legal advice from her and communicate with her on social media; and Mike Judd's complaints against Murrays' co-counsel Jon Doak to the ODC. (Dkt. # 87).

Judd's litany of vexatious actions, including multiple motions and attempts to introduce previously available evidence post-trial—all of which were denied—unreasonably multiplied these proceedings and increased the attorneys' fees incurred by the Appellees. (Dkt. Nos. 154, 155, 157, 158, 161, 165, 166, 167, 191, 192, 193, 194, 195 and 196). The District Court did not abuse its discretion in determining they are now entitled to recover those fees.

*c. Appellant's argument alleging various procedural deficiencies in the District Court's finding of vexatious litigation are misplaced.*

Judd argues on appeal that the district court's finding of vexatious litigation was procedurally "error-ridden" in five distinct ways. Judd's analysis of all five of these alleged procedural errors fails to make a distinction between those counts pled by the parties—and therefore subject to trial on the merits—and the separate determination of unreasonable and vexatious multiplication of proceedings by a litigant under § 37–61–421, made at the discretion of the District Court upon

motion practice at any point in the proceeding. As discussed above, this Court in *Bayers* not only considered the litigant's pre-trial conduct when it affirmed the district court's determination of vexatious litigation, but also considered conduct post-trial and in the course of the appeal. *Bayers,* 2001 MT 49 at ¶¶ 12-17. The fact that conduct throughout the course of litigation and appeal can be considered in the determination of a claim under § 37–61–421 necessarily means that Appellant's application of procedural and evidentiary standards for trial are misplaced. The distinction Judd fails to make is that the conduct considered in a determination of vexatious litigation is not evidence to be presented at trial, but is a *pattern of behavior* that can be considered in totality over the course of litigation. *See e.g. Bayers*, 2001 MT 49 at ¶ 9; *McKenzie v. Scheeler*, 285 Mont. 500, 506, 949 P.2d 1168, 1172 (1997); *In re Estate Boland*, 2019 MT 236, ¶ 52, 397 Mont. 319, 340, 450 P.3d 849, 863, *reh'g denied* (Nov. 5, 2019), *cert. denied sub nom. Boland v. Boland*, No. 19-1206 (U.S. June 15, 2020) (district court did not abuse discretion when *record* demonstrated "multitude of cases, repetitive motions, unnecessary delay and costs, factual contentions lacking in evidentiary support, and legal maneuvers unwarranted by existing law").

The District Court was correct in concluding that Judd's post-trial pleadings should be rejected as evidence that was available pre-trial because the evidence related specifically to those counts subject to trial on the merits as opposed to the

Court's consideration of post-trial conduct by Judd in its evaluation pursuant to § 37–61–421.

Judd argues on appeal that the statutory award for attorneys' fees and costs was somehow determined without sufficient notice or an opportunity for him to object. That argument is disingenuous and wrong. At every step in these proceedings, Judd was heard—over, and over, and over again.

*In re Estate of McDermott*, 2002 MT 164, ¶¶ 36-38, 310 Mont. 435, 445, 51 P.3d 486, 493, is particularly instructive on this point. *McDermott* involved a challenge to an award of attorneys' fees. There, the appellant argued that

> "the District Court should have held a hearing following submission of the bill instead of 'simply rubber-stamp[ing] the affidavit of counsel for respondents....'. In support of his position, Junior cite[d] *Lindey's, Inc. v. Goodover* (1994), 264 Mont. 489, 872 P.2d 767, for the proposition that due process requires notice and a hearing before attorney fees may be awarded."

*In re Estate of McDermott*, 2002 MT 164 at ¶ 36.

First, the Court noted that, although a hearing is necessary to provide a party a sufficient opportunity to defend against the imposition of Rule 11, M.R. Civ. P. sanctions, the *McDermott* district court did not rely on Rule 11 for the award of attorney fees and costs. *Id.* at ¶ 37. Like in our case, the district court's award was under the Montana "vexatious" statute, § 37–61–421. Furthermore, in *McDermott*, "Junior was on notice that fees would be awarded, and had an opportunity to challenge the amount." *Id*. at ¶ 37.

> **"***Junior filed a brief in opposition to Respondents' request for an award of fees. Thus, he was heard by the Court with respect to the propriety of a fee award.* Subsequently, Respondents submitted a bill of expenses together with supporting affidavit. At this point, Junior had the opportunity to be heard with respect to the amount of the requested fees and expenses. However, in the three weeks following the submission of the affidavit and bill of expenses, Junior filed no objections to the bill of expenses. The District Court was therefore justified in entering an order approving the bill of expenses as submitted."

*Id.* at ¶ 38 (emphasis added).

In this case, Judd filed a response brief (Dkt. # 94) in opposition to the Appellees' Motion for Contempt and Fees. (Dkt. # 87). But now Judd claims that he "had no notice that these various Court rulings were on the horizon." (Appellant's Opening Brief at 18). This allegation is ridiculous. First, Judd was "heard" by the court in briefing on the Motion (Dkt. Nos. 87-90, 94-96, 99). Judd also takes issue with the fact that the Appellees' Motion for Contempt and Fees (Dkt. # 87) was held in abeyance by the district court at trial. (Opening Brief at 15). This is a mischaracterization. The only portion that the Court held in abeyance was the motion for contempt. (T. 123). The district court did not make a determination as to the § 37–61–421 award until after trial, in its FOFCOL entered June 7, 2019. Post-trial, Judd attempted to hassle the District Court and the Appellees with his exhibits (*see* Dkt. Nos. 141-143, 146-149), then continued to file post-trial motions to re-litigate issues that had been tried. (*See* Dkt. Nos. 155, 157, 165). Each of those forced the District Court to hear the same arguments over

and over and required a reply from the Appellees, costing a considerable amount of money to the Appellees. Once the FOFCOL were entered June 7, 2019, Judd's most recent counsel withdrew, slowing determination of fees and entry of judgment. With new counsel, he filed yet another motion to relitigate issues. (*See* Dkt. Nos. 191-195).

The facts in this case are even more supportive of the fee award than those in *McDermott*. The District Court held a lengthy hearing on the attorneys' fees issue on December 16, 2019, where both sides presented expert testimony. Judd called his own expert to testify as to the reasonableness of the fees award. (Dkt. # 216; T. 629) At one point, Judd's expert John Doubek remarked that he disagreed with the Court's finding that Judd was a vexatious litigant. (T. 652-653). In sum, Judd was able to, and did, object.

Judd argues on appeal the well-established principle that "[m]otions for reconsideration do not exist under Montana law," *Jonas v. Jonas,* 2010 MT 240N, ¶ 10, 2010 WL 4527053, at *2; (Appellant's Opening Brief at 18-19). But that did not stop him. The record is packed with Judd's unreasonable pleadings, re-trying issues that had already been heard and decided, multiple times. Judd makes note in his brief that he was represented by counsel at every stage of the proceedings. This is true. Appellant Judd changed counsel *four* times, and each time added considerable delay and expense to the case.

Judd's relentless quest to be heard has cost, and continues to cost, the Appellees considerable amounts of money. At some point, enough is enough.

**2. *The cases cited by Appellant on the fees issue are inapposite.***

Appellant cites *State ex rel. Wilson v. Department of Natural Resources and Conservation of State of Mont., Water Resources Div.*, 199 Mont. 189, 191, 648 P.2d 766, 767 (1982) ("*Wilson v. DNRC*") for the proposition that the Supreme Court "reversed a holding awarding attorneys' fees in a far more egregious case [than this one.]" (Appellant's Opening Brief at 19). First of all, *Wilson v. DNRC* involved a different statute and a different cause of action. In *Wilson*, there was no on point statutory authority to mandate an award of attorneys' fees, rather, the award was based on a district court's general equitable power to award fees. The *Wilson* Court in its analysis stated that "the long-established rule in Montana is that, in the absence of some special agreement between the parties or *statutory authorization*, attorney's fees are not recoverable by the successful litigant." *Wilson v. DNRC*, 199 Mont. at 196, *citing Nikles v. Barnes* 153 Mont. 113, 454 P.2d 608 (1969); *Kintner v. Harr*,146 Mont. 461, 408 P.2d 487 (1965). The fee award in the instant case is explicitly contemplated by MCA § 70-17-112; and further supported in the court's discretion by MCA § 37-61-421.

The Appellant also cites *Foy v. Anderson*, 176 Mont. 507, 580 P.2d 114 (1978), for the position that, under its equitable power, a district court can award

attorney fees to a party who, through no fault of her own, is forced to hire an attorney to defend an action that is frivolous or utterly without merit. *Foy* creates an equitable exception to the principle that "*in the absence of a specific contractual or statutory grant*, […] the prevailing party in an action is not entitled to an award of attorney fees either as costs of the action or as an element of damages. *Foy v. Anderson*, 176 Mont. 507, 511, 580 P.2d 114, 116 (1978) (emphasis added). But the Appellees do not need to rely on *Foy* nor the District Court's equitable powers to support an award for attorneys' fees because in the instant case the *controlling statute authorizes attorneys' fees*.

Appellant points out that *Ponderosa Pines Ranch, Inc., v. Hevner*, 2002 MT 184, 311 Mont. 82, 53 P.3d 281, is improper because it involved Rule 11 sanctions, and Appellant claims that Rule 11 was never invoked in this case. Actually, Appellees stated in their Motion for Contempt and Fees that Judd's behavior was violative of Rule 11 (Dkt. # 87 at p. 24). However, the District Court, like the court in *Bayers*, ultimately made its award pursuant to § 37–61–421.

### B. THE DISTRICT COURT DID NOT ERR IN CONCLUDING THE MURRAY PARTIES ARE ENTITLED TO ATTORNEYS' FEES AND COSTS PURSUANT TO MCA § 70-17-112 WHEN THEY PREVAILED ON ALL THEIR CLAIMS.

Under MCA § 70-17-112 and applicable Montana case law, the Appellees prevailed and are entitled to attorneys' fees and costs. Contrary to the numerous

tangential assertions in Appellant's Opening Brief, he was not the prevailing party on *any* claim. The Appellees were clear on what they wanted. They brought two claims: one for impairment of their secondary easement, and one for interference with their appropriations works. An affirmative judgment was rendered after trial, and the Appellees were the prevailing party on both counts.

In his Opening Brief, Judd mischaracterizes the common law and jurisprudence under MCA §70-17-112. Under *Espy v. Quinlan*, a party gets attorneys' fees if it prevails on all claims, not all "issues," raised pursuant to the statute. 2000 MT 193, ¶ 28, 300 Mont. 441, 448-449, 4 P.3d 1212, 1217.

Strained definitions are needless in the instant case. Put simply, a party wins when it "obtains the relief it sought to procure through litigation." *Citizens for Balanced Use v. Mont. Fish*, 2014 MT 214, ¶ 17, 376 Mont. 202, 209, 331 P.3d 844, 848; see *MC, Inc. v. Cascade City-Cty Bd. Of Health*, 2015 MT 52, ¶ 19, 378 Mont. 267, 279, 343 P.3d 1208, 1217. This Court has held that the prevailing party is the "one who has an affirmative judgment rendered in [its] favor at the conclusion of the case." *Avanta Fed. Credit Union v. Shupa*k, 2009 MT 458 ¶14, 354 Mont. 372, 387, 223 P.3d 863, 874.

In their initial Complaint, Murrays asserted a single count for obstruction of Murrays' secondary access via *any* route, protected under MCA § 70-17-112, to open, maintain, operate and repair the Held Ditch and appurtenant works on Judd's

property with reasonably necessary vehicles or equipment. (Dkt. # 1). In Fall 2017, Judd attempted to forcibly relocate the secondary access, and then directly interfered with the *primary easement* for the Held Ditch appropriations works by excavating without the required permit to build a "plunge pool" immediately downstream from the Held Ditch diversion structure. Such actions forced the Murrays to seek a temporary restraining order and preliminary injunction to (1) preserve pending trial secondary access to maintain and operate the Ditch and (2) prevent Judd's forcible relocation of secondary access or destruction of the Ditch works pending case disposition.

The Appellees Amended Complaint (Dkt. # 45), was not only for impairment of Plaintiffs' secondary access, as suggested by Judd, but also based upon Judd's intentional September 2017 interference with the primary easement for the Ditch works, which is expressly prohibited by MCA § 70-17-112.

Concurrently with the filing of the Appellees' Amended Complaint, Judd filed his counterclaim against the Appellees and his third-party complaint against Bill Sarrazin, alleging trespass and defamation. (Dkt. # 44).

The Court dismissed the counterclaim against the Appellees in June 2018 with prejudice (Dkt. # 59); found for the Appellees, after trial, on both counts of the Amended Complaint; and found for Co-Plaintiff/Appellee Sarrazin and against

Appellant Judd after trial on all counts of the third-party complaint. (Dkt. # 171, COL). In short, Appellant Judd prevailed on *nothing*.

In *Espy*, the defendant Quinlan brought a counterclaim against Espy alleging interference with a road easement. The district court found that the counterclaim had nothing to do with the ditch easement and was not brought to enforce the provisions of § 70–17–112. This Court specifically noted that "because Espy successfully prevailed on all claims raised pursuant to § 70–17–112, MCA, he is entitled to his attorney's fees and costs pursuant to § 70–17–112(5), MCA, *regardless of the fact that he was not the prevailing party on Quinlan's counterclaim.*" *Espy v. Quinlan*, 2000 MT 193, ¶ 28, 300 Mont. 441, 449, 4 P.3d 1212, 1217. So even if Judd had prevailed on his counterclaim, which he did not, he would still not be the prevailing party on any claim raised pursuant to § 70–17–112.

Judd makes much ado about the fact that Appellees decided, prior to trial, to streamline the issues and proceed on one *route*, the Pasture Route, rather than both the Pasture and Corral Route in their claim for a secondary easement. Appellees did not *lose* on their secondary easement claim. Any issue regarding the Corral Route was withdrawn by Appellees—not determined adversely to them—prior to trial. (Dkt. Nos. 112, 123, T. 598). Appellees elected to proceed on only one route in the interest of efficiency and judicial economy. As the District Court noted in its

FOFCOL on Fees, it makes no sense to penalize Appellees for streamlining this litigation, by holding that they did not "prevail" because they voluntarily withdrew the Corral Route prior to trial. (Dkt. #216, FOFCOL on Fees ¶¶ G-I).

Judd engages in mental gymnastics to arrive at the conclusion that the District Court agreed with him that the secondary easement is along the ditch bank. (Appellant's Opening Brief at 28). The District Court made no such findings, explicit or implicit. The *primary* easement is the ditch and its banks as the District Court concluded (Dkt. # 171, FOFCOL ¶ X). The District Court also expressly rejected Judd's contention that the secondary easement must be along the Ditch. (Dkt. # 171, FOF COL ¶¶76, LL). The secondary easement is through the pasture. (Dkt. # 171, FOFCOL ¶¶ 70-74, L-T, YY). The district court correctly held that the Appellees prevailed and are entitled to their fees and costs. (Dkt. # 171, FOFCOL ¶ SS).

### C. THE COURT DID NOT ERR IN CONCLUDING JUDD WAS NOT ENTITLED TO A JURY TRIAL WHEN HE DID NOT TIMELY OR ADEQUATELY MAKE DEMAND.

#### 1. *Judd did not make timely demand.*

Rule 38(b), M.R.Civ P. provides for a right to a jury trial under specified circumstances. However, none of those circumstances applied to this case. Rule 39(a)(2), M.R.Civ.P. makes clear that a court may determine that a jury demand

does not extend to all issues present in the case. Under Rule 38(b), the party may demand a jury trial no later than 14 days after "the last pleading directed to the issue is served."

Judd failed to make a timely jury demand. The Murrays filed their original Complaint August 31, 2017. (Dkt. # 1). Judd filed his Answer October 12, 2017. (Dkt. # 23). It contained no jury demand. On March 12, 2018 after a scheduling conference that Judd attended with his counsel, the District Court entered a Non-Jury Trial Preparation Order setting the matter for a non-jury trial commencing September 5, 2018. (Dkt. # 42). Judd never objected to that order.

Appellees filed their Amended Complaint on April 6, 2018. (Dkt. # 45). On the Amended Complaint, the Murrays were joined by Held Trust and Sarrazin as co-plaintiffs, who *had not* been parties previously. Judd filed an Answer to Plaintiffs' Amended Complaint on April 25, 2018 (Dkt. # 47), which under Rule 38 would be considered the last pleading directed to the issues identified in the Amended Complaint. Judd's Answer did not include a jury demand. Thus, Judd waived his right to a jury trial with regard to any issues identified in the Murrays' original Complaint, the Murray Parties' Amended Complaint, and any Answer thereto. Rule 38(b)(d) M.R.Civ. P.; *Rocky Mountain Bank-Kalispell v. Culbertson*, 2012 MT 196N, ¶ 7, 2012 WL 3848448, *2.

Judd's jury demand vis-à-vis his Counterclaim and Third-Party Complaint is also moot. The Counterclaim was dismissed by the Court in an order dated June 28, 2018 granting Murrays' Motion to Dismiss Counterclaim. (Dkt. # 59). The Third-Party Complaint was responsive to the original Complaint filed in August, 2017, *not* the Amended Complaint of April 6, 2018. (Dkt. # 44). The Murrays' original Complaint was superseded by the Amended Complaint on which Murrays, Held Trust, and Sarrazin were all plaintiffs. As discussed above, Judd made no jury demand in his "last pleading directed to the issue served," which would have been the Amended Complaint. *See* Rule 38(b)(1), M.R.Civ.P.

Judd ultimately waited until November 14, 2018—more than three months after an order for a Non-Jury Trial was issued, to bring a demand for a jury trial. (Dkt. # 104). The Court correctly determined that Judd did not make a timely jury demand. (T. 121-122).

**2. *The claims in this case sound in equity and do not warrant a jury trial.***

The claims outlined in the Murrays' original Complaint and the Murray Parties' Amended Complaint sought only injunctive and declaratory relief, which typically do not warrant a jury trial. *State Ex. Rel. Farm Credit Bank of Spokane v. District Court of the Third Judicial District*, 267 Mont. 1, 24, 881 P. 2d 594, 608 (1994); *see also Gray v. City of Billings*, 213 Mont. 6, 13; 689 P.2d 268, 271-272 (1984). "There is not, and has never been, a right to a jury trial in purely equitable

actions in Montana." *Supola v. Montana Dep't of Justice, Drivers License Bureau*, 278 Mont. 421, 425, 925 P.2d 480, 482 (1998) (internal citations omitted). For this reason alone, Judd's demand for a jury trial on the matters in the Amended Complaint, which sound firmly in equity, must be denied.

### D. THE COURT PROPERLY HELD BASED ON OVERWHELMING EVIDENCE THAT THE JUDD PROPERTY WAS PURCHASED SUBJECT TO EASEMENTS FOR THE HELD DITCH AND APPURTENANT WORKS.

In various sections of his Opening Brief, Appellant sows confusion and mischaracterizes the distinction between the primary easement along the ditch and the secondary easement through the pasture. Appellant alleges that the District Court somehow made an "implied finding" that Judd proved a "secondary easement" ran along the Held Ditch bank. (*See* Opening Brief at 28). This argument not only twists the court's findings, but again demonstrates that Appellant does not understand how easements work. Judd bought his property *subject to* both Appellees' easement in the Held Ditch and appurtenant headgate and appropriations works, *and* Appellees' *secondary* easement established by prescription through the pasture of the Judd property in order to maintain, operate, inspect, and repair the Held Ditch works.

Ditches are easements that attach to land, and a ditch right is a property right separate and distinct from a water right. M.C.A. § 70-15-101; *Lincoln v. Pieper*,

245 Mont. 12, 15, 798 P.2d 132, 134 (1990). An easement for an irrigation ditch can be established by grant or by prescription, and if not specifically defined in scope or location, need only be such as is reasonably necessary and convenient for the purpose for which it was created. *Ponderosa Pines Ranch, Inc. v. Hevner*, 2002 MT 184, ¶ 15, 311 Mont. 82, 86, 53 P.3d 381, 384; *Anderson v. Stokes*, 2007 MT 166, ¶41, 338 Mont. 118, 134, 163 P.3d 1273, 1285 (2007). The Held Ditch has conveyed water over the Judd Property by the same course since at least the 1950s. (T. T. 153-156 & Pltfs.' Ex. 13-14) The appurtenant works have been on the Judd Property and in use by Appellees and their predecessors in title openly, notoriously, continuously, exclusively, adversely to the owners, and without interruption for more than five years prior to Judd's purchase of the property. (T. T. 164-169, 241, 294-95, 340-41, 360-62). Moreover, Montana law recognizes that ditch owners/users have a *secondary easement* protected by MCA § 70-17-112—appurtenant to their primary easement for the ditch and works—to inspect, maintain, repair and operate the ditch and works. *Engel v. Gampp, supra,* 2000 MT 17 at ¶43; *Laden v. Atkeson*, 112 Mont. 302, 302,116 P.2d 881, 883 (1941). The secondary easement may also be established by grant or prescription. *See Rafanelli v. Dale*, 278 Mont. 28, 34, 924 P.2d 242, 246 (1996); *Swandal Ranch Co. v. Hunt*, 276 Mont. 229, 233, 915 P.2d 840, 843 (1996).

As this Court has stated, a servient owner's actions cannot make the easement more "inconvenient, costly, or hazardous to use." *Musselshell Ranch Co. v. Seidel-Joukova*, 2011 MT 217, ¶ 20, 362 Mont. 1, 9, 261 P.3d 570, 575, *citing* Korngold, *Private Land Use Arrangements: Easements, Real Covenants, and Equitable Servitudes* at § 4.06 (a); *e.g. Hatfield v. Ark. Western Gas Co.,* 5 Ark. App. 26, 632 S.W.2d 238, 241 (1982) ("[t]he owner of the servient estate can do nothing tending to diminish its use or make it more inconvenient or create hazardous conditions"); *Beiser v. Hensic,* 655 S.W.2d 660, 663 (Mo.App. E.D.1983).

This Court has found that the placement of a chained gate across an easement unreasonably interfered with the dominant owners' easement rights. *Musselshell Ranch*, 2011 MT 217 at ¶ 20, *citing Flynn v. Siren,* 219 Mont. 359, 711 P.2d 1371 (1986). In *Flynn*, the Court found dispositive evidence "establish[ing] that the placing of the gate on the easement created a traffic hazard; that the gate, as installed, was too small to allow the passage of some farm machinery; and that the gate would have reduced [business traffic]." *Id.* at ¶ 20; *see also Burgan v. Brien,* Cause No. DV 14-50 (MT 22nd Jud. Dis.) "Memorandum and Order Denying Defendants' Motion for Summary Judgment of Easement Claims in Favor of Plaintiffs" (Feb. 26, 2015) at 6-9 (Court rejected contention of servient owner that secondary easement to ditch must be along ditch banks because

"traversing the bank next to the ditch to get to the headgate would be nearly impossible. Obstacles such as a bog interfere with safely accessing the headgate.")

Judd alleges that the District Court found that Appellees' secondary easement is along the ditch bank. *See e.g.* Opening Brief at 28, 31, 35. Presumably Judd is referring to the District Court's conclusion that, "Plaintiffs and their personnel may without prior notice to Judd access the Held Ditch and works on foot along the Ditch banks when and as reasonably necessary to clean, inspect and repair the same, and may bring with them whatever hand tools they consider necessary to the tasks." (Dkt. #171, FOFCOL ¶ AAA). Appellees' do not contest the fact that an easement exists along the ditch bank that they can access on foot—this is the primary easement. (Dkt. #171, ¶ X). However, the trial court expressly found—citing witness testimony Judd ignores—that they cannot access the headgate and appurtenant works along the ditch bank with the vehicles and equipment suited to the tasks reasonably necessary to maintain, operate, inspect, and repair the Ditch and works. (Dkt. # 171, ¶¶ 76-79, T. 203-204, 262, 297-300, 311). That is why they have historically used their *secondary* easement via the Pasture Route. (T. 240, 297-300, 338, 340-344, 360-364). As testified to at trial, Appellees have no way drive along the ditch with the necessary equipment without creating hazardous conditions. (T. 203-204, 311, 340-344, 360-364); *See Musselshell Ranch Co. v. Seidel-Joukova*, 2011 MT 217 at ¶ 20.

### E. THE COURT DID NOT ERR IN DETERMINING AFTER TRIAL THAT THE MURRAY PARTIES HAD ESTABLISHED THE ROUTE OF THEIR SECONDARY EASEMENT OVER THE PROPERTY TO OPEN, MAINTAIN AND OPERATE THE HELD DITCH BY PRESCRIPTION WHEN THEY PROVED USE OVER THE JUDD PROPERTY FOR MORE THAN FIVE CONTINUOUS YEARS PRIOR TO JUDD'S OWNERSHIP.

In addition to their primary easement along the ditch, Appellees established at trial their secondary easement by prescription via the Pasture Route for ingress and egress to the Held Ditch.

A prescriptive easement is created by operation of law, and the party claiming one must establish open, notorious, exclusive, adverse, continuous, and uninterrupted use for the five-year statutory period. *Rafanelli v. Dale*, *supra*, 278 Mont. at 34. Judd claims that Appellees' use of the easement was not adverse, but by permission. He never proved that contention—his to prove—at trial. Under Montana case law, to show that use was 'adverse,' the party claiming the easement need not prove actual hostility to the owner of the servient tenement, but only that the use is 'exercised under a claim of right and not as a mere privilege or license revocable at the pleasure of the owner of the land; such claim must be known to, and acquiesced in, by the owner of the land. *Rafanelli*, *supra*; *see Lyndes v. Green,* 2014 MT 110, ¶ 21-23, 374 Mont. 510, 515-517, 325 P.3d 1225, 1229-30 (no need to prove actual hostility).

No testimony at trial demonstrated that Appellees used the Pasture Route by permission—on the contrary, testimony from the Appellees and their employees proves that they accessed the Ditch works with vehicles and equipment as reasonably necessary to open, inspect, maintain and operate the ditch during the irrigation season, for more than five years prior to 2017. (Dkt. # 171, FOFCOL ¶¶ 71; T. 164-169, 241, 294-95, 340-41, 360-62). The District Court so concluded, and its conclusions must be affirmed.

## VII. CONCLUSION/RELIEF SOUGHT

**1.** Appellees respectfully request this Court to affirm the District Court's findings, conclusions, and judgment in all respects.

**2.** Appellees respectfully request this Court to affirm the District Court's award of attorneys' fees and costs pursuant to § 70-17-112.

**3.** Appellees respectfully request this Court to affirm the District Court's award of attorneys' fees and costs pursuant to § 37-61-421.

**DATED** this 19th day of July, 2020.

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## CERTIFICATION OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this foregoing brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is standard double spaced; and the word count calculated by Microsoft Word Version 16.38, is 9968 words, excluding certificate of service and certificate of compliance.

*/s/ Maggie W. Stein*
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## CERTIFICATE OF SERVICE

I, Maggie W. Stein, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 07-19-2020:

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Billings MT 59103-1899
Representing: Held Family Trust, Muffie B. Murray, W. Stephen Murray, William Bill Sarrazin
Service Method: Conventional

Electronically Signed By: Maggie W. Stein
Dated: 07-19-2020