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

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.

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

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

As this is an optional reply brief of the Appellant, an effort will be made to curate the analysis to the salient points. The failure to address a matter in this optional brief is not in any way a concession that the Appellees', Muffie B. Murray and W. Stephen Murray, Held Family Trust and William A. Sarrazin (collectively, "ditch owners") point is well taken.

Left unassailed and unrebutted in the ditch owners' wordy efforts is the fact that on September 15th, 2017, without a hearing, the District Court entered a preliminary injunction which ordered Nathan Judd (Judd) to cease "all activities on his property or any neighboring properties intended by him to replace, impair, move or relocate the 'pasture route' or the 'corral route' described in the Application as secondary easements." (Order Granting Application for Preliminary Injunction, Dkt. #8, p. 1). When these routes were ultimately superimposed on a map of Judd's homestead, it became obvious that Judd's fight was for fee title to his homestead and surrounding curtilage. The stakes - his home - were high for Judd.

He ultimately prevailed on breaking the siege by the ditch owners' – six weeks before trial – relenting on their quest for the "corral route." He was also partially victorious in proving a secondary easement existed down the ditch bank.

Thus, the idea he should be punished or sanctioned for breaking this improperly obtained and eventually abandoned stronghold on his homestead makes no sense. The ditch owners' exuberant brief generates heat, but no light. The fee shifting was not justified under any theory.

As for the idea that the "pasture route" can survive as a prescriptive easement, the ditch owners nearly abandon the idea altogether in their briefing. They cannot adversely possess against themselves. The path to and from the ditch works over the pasture was made by the previous owner and his co-ditch owners.

II. ARGUMENT

A. NATHAN JUDD'S ADMISSIONS THAT ALL HE WAS TRYING TO DO WAS MOVE THE LOCATION OF THE SECONDARY EASEMENT DO NOT FORM THE BASIS OF ANY COGNIZABLE CLAIM.

It is clear from the records and Judd's own admission that he never wanted to stop access by the ditch owners to the ditch. He simply wanted to narrow down their choices so they did not run roughshod over his entire 27-acre parcel – down the ditch bank, over his pasture, and through his corral. At no point in the litigation were his motives on this score ever disguised or withheld from public view. His motive to narrow the occupation of his land by the ditch owners to a single road – down the ditch bank – was never a part of any secret agenda. Up

until six weeks before trial, Judd faced contempt if his use of the land obstructed any access to the ditch even if the ditch owners had two other accesses. For example, if Judd would have blocked the corral route, he faced contempt, even if the pasture route and the ditch route remained open. The ditch owners claimed some right to pass over any area around his curtilage during the course of this litigation, until six weeks before trial. Therefore, any development of any portion of his land triggered an outburst of indignation by the ditch owners.

Yet, he was never held in contempt and not a penny of actual damages were assessed against him.

The issue then becomes what it is about Judd's behavior that caused the ditch owners, and subsequently, the Court so much anxiety? Throughout the record of this case, the ditch owners hold dear to the proposition that Judd should never have tried in any form to narrow and detour the secondary easement.

The ditch owners do not cite any law for the proposition that Judd's behavior is improper other than pointing out that it may have been arguably an act of contempt. For example, the ditch owners state in their brief, at page 10, that they introduced testimony at trial as to "Judd's actions to relocate that access without consent and to excavate in the bed of Cottonwood Creek near the diversion structure." (Response brief, p. 10).

The ditch owners have never pointed to any statute, common law or case law which suggests that it would be improper for Judd to relocate this secondary easement. As it turns out, the Restatement of Property has addressed the issue and states that it is well within the servient landowner's rights to move an easement such as the secondary easement for the ditch. Restatement of Property – Servitudes, § 4.8, states as follows:

> Except where the location and dimensions are determined by the instrument or circumstances surrounding creation of a servitude, they are determined as follows:
>
> (1) The owner of the servient estate has the right within a reasonable time to specify a location that is reasonably suited to carry out the purpose of the servitude.
>
> (2) The dimensions are those reasonably necessary for enjoyment of the servitude.
>
> (3) Unless expressly denied by the terms of an easement, as defined in § 1.2, the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not
>
> (a) significantly lessen the utility of the easement,
>
> (b) increase the burdens on the owner of the easement in its use and enjoyment, or
>
> (c) frustrate the purpose for which the easement was created.

§ 4.8 Location, Relocation, and Dimensions of a Servitude, Restatement of Property – Servitudes.

> The limitations embodied in § 4.8(3) ensure a relocated easement will continue to serve the purpose for which it was created. So long as the easement continues to serve its intended purpose, reasonably altering the location of the easement does not destroy the value of it. For the

> same reason, a relocated easement is not any less certain as a property interest.

M.P.M. Builders, LLC v. Dwyer, 809 N.E.2d 1053, 1058, 442 Mass. 87, 93 (Mass., 2004)(internal citations omitted).

Thus, the finding that Judd behaved in this manner is not a finding that Judd did anything wrong. He had the right all along to move the secondary easement and throughout this case, there has never been any suggestion that any law or case law supports the ditch owners' contention that Judd was wrong in his efforts to do so.

B. WITHOUT CROSS-ACCUSATIONS AS TO WHICH PARTY WAS ENGAGED IN "MISCHARACTERIZATION," LET'S EXAMINE THE FACTS AS TO THE CONTEMPT/SANCTION MOTION.

Judd stated in his opening brief, at p. 15, that the motion for contempt and sanction was held in abeyance by the District Court at the beginning of trial. (Opening Brief, p. 15).

In their opening brief, the ditch owners have stated that this is a mischaracterization of events. (Response Brief, p. 26). The ditch owners go on to say, "[t]he only portion that the Court held in abeyance was the motion for contempt." (Response Brief, p. 26).

Reviewing the written record becomes the only way to solve this issue. When we review the cold transcript of the proceedings, first it is clear that the

motion for contempt and sanctions was the same motion, filed as one document. (Dkt. # 87, Sept. 28, 2018). The morning of trial, Mr. Doak asked the Court about the status of the motion for contempt, and the Court recognized that it was outstanding. The Court said:

> The motion for contempt, I have intentionally - and I guess I should have done something notifying the parties that I'm holding that in abeyance. I have intentionally not made a ruling on that, and ***I am holding it in abeyance***, pending the resolution of the rest of the issues in the case.

TT. 14, ll. 11-14, [Emphasis supplied].

Notably, eight days before trial, it was the ditch owners themselves who established that the phrase "Plaintiff's Motion for Contempt" was a term of art for both motions. (*See*, Trial Position Statement of Plaintiffs, Dkt. #123, filed January 7, 2019, p 3).

The ditch owners' proposed findings, at p. 2, addressed "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." (Dkt. #150). In their proposed findings, the ditch owners urged the Court to characterize what the Court has done as having taken the matter "under advisement." (*Id.*, p. 2). It was clear the ditch owners conflated the two in their proposed findings and successfully urged the Court to do the same, as they

had done in their pretrial filings. (Court's Findings of Fact, Conclusions of Law, and Order, Dkt. #171, p. 2).

Therefore, Judd did not mischaracterize the record in his opening brief. The characterization of events was taken directly from the ditch owners' characterization of events in their proposed findings, and the Court's adoption of the ditch owners' characterization of the contempt/sanction motion.

Having now established that the contempt/sanction motion was either in abeyance or under advisement, it is crystal clear the evidence supports the Court's ruling came in after the matter had been stayed.

The ditch owners justify the sanction by saying Judd attempted to hassle the District Court with exhibits, then continued post-trial motions to relitigate the issues that had already been tried. "Each of these forced the District Court to hear the same argument over and over, costing a considerable amount of money to the ditch owners." (Response Brief, pp. 26-27). How can a matter occurring after a matter is taken under advisement be considered as a basis for the ruling? Even Judd's supposed misconduct during trial was the basis, we are told, for the Court's assessment of attorneys' fees. However, the evidence to support the finding came in the record after the matter was either deemed submitted or held in abeyance.

Judd offers another example of the Court relying on matters occurring after

the matter was taken under advisement in order to justify its sanction ruling. For example, the ditch owners say in their brief:

> 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....

Response Brief, pp. 12-13.

Without belaboring the obvious, the ditch owners did not reference matters occurring in 2019 in their 2018 brief in support of contempt on sanctions. Nor did the ditch owners, in their September 18, 2018 motion, reference the 2019 attempt to disqualify Judge Gilbert, which occurred after the 2018 motion was filed.

The ditch owners claim that John Doubek had a chance to remark that he disagreed with the Court's finding that Judd was a vexatious litigant and, somehow, this substitutes for a complete hearing on the issue where both sides are entitled to present evidence. (Response Brief, p. 27). A stray comment by John Doubek at a hearing on the amount of attorneys' fees does not constitute a re-opening of the attorneys' fees issue.

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C. THE DITCH OWNERS' ATTEMPT TO REBUT THE SERIES OF CONTENTIONS MADE BY JUDD WITH RESPECT TO THE IMPROPRIETY OF AWARDING VEXATIOUS LITIGANT ATTORNEYS' FEES AGAINST HIM ALL MISS THE POINT.

In his opening brief, Judd pointed out that the Court, following a cue by the ditch owners in their proposed findings, relied on case law which in turn had relied on *Foy v. Anderson*, 176 Mont. 507, 580 P.2d 114 (1978). (Opening brief p. 21). The ditch owners have recognized the fact that *Foy* does not support their claim. They go on to say, "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*." (Response Brief, p. 29, [emphasis in original]). Having seemingly abandoned a *Foy* based entitlement to a fee award, Judd will not address this analysis further.

Moreover, Judd, in his opening brief, said that the predicate for awarding Rule 11 sanctions was never met by the ditch owners because, under the new version of the rule, there must be an opportunity to cure. In this case, no letter or demand to cure was ever sent under Rule 11; therefore, it could never have been properly invoked. They seemingly have now abandoned Rule 11 as a basis of fees and note, "[h]owever, the District Court, like the court in *Bayers*, ultimately made its award pursuant to § 37-61-421." (*Id.*).

Judd did fight, hard and fair, and in some material respects, successfully. Perhaps it overstates the case to say he broke the siege in a manner that would have made Pemberton jealous. As in Vicksburg, any break in the encirclement is a great victory.

The ditch owners complain that Judd attempted to move the route of the secondary easement. Such a remedy is available under the Restatement and settled law. It is not a lunatic claim for him to make. The ditch owners claim that the District Court can, in this case, sanction Judd for his complaints to the DNRC. There is no authority for that proposition. The District Court should not sanction Judd for going to church on Easter Sunday in Wilsall, which seems to be a complaint. It is a running joke among clergy and parishioners that the flock gathers large on Easter Sunday.

Clearly, the Court cannot sanction Judd for what his father did which constitutes two of the bullet points listed by the ditch owners. Judd complained about a heifer trespassing on his property which, evidently, was true. Judd attempted to videotape Sarrazin, which is not a contemptuous or sanctionable act. Judd's previous counsel attempted to disqualify Judge Brenda Gilbert two weeks before trial which could have been the basis of an independent sanction, but not one for $270,000, and certainly was not evidence to support a sanction motion

brought in 2018.

D. THE DITCH OWNERS DID NOT PREVAIL ON ALL CLAIMS.

Judd, in his opening brief, stated that the ditch owners kept and maintained, until six weeks before trial, a demand that they have two secondary easements – one going around his house to the left, "the pasture route" and one going around his house to the right, "the corral route" – to get from the county road to the headgate of the ditch. Judd claimed that was unreasonable throughout the litigation. The ditch owners now claim that "[t]hey brought two claims." (Response Brief, p. 30). They now say:

> 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.

(Response Brief, pp. 30-31)(emphasis in original).

The ditch owners state, "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." (*Id*., p. 32). Judd has made "much ado" about the fact that the ditch owners wanted two separate routes over Judd's property to their ditch when only one route would do, and the ditch owners kept and maintained that

position until just before trial, as fully laid out in Judd's opening brief.

The ditch owners' persistence in both a "pasture route" and "corral route" never wavered until the weeks before trial. They sought summary judgment declaring their right to both. (Dkt. # 26, dated October 27, 2017). They insisted on both routes and insisted that no fence or other permanent structure be erected along these routes in "Plaintiffs' Response to Defendant's Motion to Allow Activities". (Dkt. # 31, dated November 27, 2017). They prayed for both routes in their amended complaint. (Dkt. # 45, dated April 5, 2018).

The ditch owners now say they elected to "proceed on only one route in the interest of efficiency and judicial economy." (Response Brief, p. 32). The ditch owners evidently believe that their abandonment of the right to two secondary easements was a magnanimous act of charity towards Judd and the judicial system in general. The Montana Supreme Court has said the opposite when viewing voluntarily dismissed claims.

> This Court has recognized "the natural assumption that one does not simply abandon a meritorious action once instituted." *Sacco*, 271 Mont. at 245, 896 P.2d at 432 (failure to prosecute within statute of limitations reflects favorably for defendant); *Miller*, 200 Mont. at 463, 653 P.2d at 130 (dismissal for lack of speedy trial reflects favorably for defendant). *See also O'Fallon v. Farmers Ins. Exchange* (1993), 260 Mont. 233, 241, 859 P.2d 1008, 1013 (favorable termination is issue for jury when action dismissed without evidence of settlement by defendant); *Prosser and Keeton*, Second Restatement

> of Torts (1976), § 674, comment j ("favorable termination may arise from the withdrawal of the proceedings by the person bringing them").

Plouffe v. Montana Dept. of Public Health and Human Services, 2002 MT 64, ¶ 34, 309 Mont. 184, 196, 45 P.3d 10, 18 (*quoting*, *Sacco v. High Country Independent Press, Inc*., 271 Mont. 209, 245, 896 P.2d 411, 432 (1995)).

The abandonment of the "corral route" by the ditch owners is not just germane to the adjudication of the statutory right to attorneys' fees when adjudicating ditches, but bears significantly on the issue of whether Judd should be adjudicated a vexatious litigant. As fully developed and largely unrebutted in his opening brief, this was a fight for Judd's hearth and home — his curtilage.

E. JUDD IS NOT CONTESTING THAT HE PURCHASED THE PROPERTY SUBJECT TO THE EASEMENT FOR THE HELD DITCH AND APPURTENANT WORKS.

The ditch owners lead off with an argument in their Response Brief at page 36 that the Court properly held, based on overwhelming evidence, that Judd bought the property "subject to" easements for the Held Ditch and appurtenant works. Taking property "subject to" easements does not create an easement.

> "The words "subject to" used in their ordinary sense, mean subordinate to, subservient to or limited by. **There is nothing in the use of the words "subject to", in their ordinary use, which would even hint at the creation of affirmative rights or connote a reservation or retention of property rights.** "Subject to" wording is commonly used in a deed to refer to existing easements, liens, and real covenants that the grantor wishes to exclude from warranties of

title."

Wild River Adventures, Inc. v. Bd. of Trustees of Sch. Dist. No. 8 of Flathead Cty., 248 Mont. 397, 401, 812 P.2d 344, 346–47 (1991), (Emphasis supplied)(internal citations omitted).

Judd has never contested the allegation that he bought the property subject to the ditch and the appropriate and lawful secondary easements associated therewith. He knows he bought the property subject to the Held Ditch. The Held Ditch was obvious, open, and he has never challenged title to the Held Ditch. He did challenge the idea that there was a secondary easement through three different paths largely rendering his fee interest a nullity. The ditch owners argue that "Appellant does not understand how easements work." (Appellee brief, p. 36). They go on to argue "Judd bought his property *subject to* both Appellees' easement in the Held Ditch...*and* Appellees' secondary easement." (*Id.*).

Judd knows how the easement phase works. "Subject to" does not create or reserve any right whatsoever. *Wild Rivers, supra*.

In terms of appurtenant works, there has been some dispute as to whether or not the right to the ditch included the right to the current point of diversion, but that is a matter that will be subject to DNRC litigation, as the Court pointed out in conclusions of law AA, BB, CC and DD. (Dkt. #171, pp. 39-40).

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F. IN THEIR 41-PAGE BRIEF, THE DITCH OWNERS HAVE NOT COME CLOSE TO REBUTTING THE PRINCIPAL ASSERTION BY JUDD THAT A PRESCRIPTIVE EASEMENT FOR THE SECONDARY EASEMENT WAS NOT PROVEN.

The ditch owners spend approximately one and one-half pages rebutting Judd's contention that the ditch owners had not established any prescriptive rights through the pasture to access the ditch for the principal reason that the use was not adverse. In fact, the ditch owners and the Court recognize Judd has a right to water through the ditch. (Dkt. #171, COL EE, pp. 40-41).

This right, appurtenant to the land he bought from Youngberg, was once owned by Youngberg and established the uncontroverted record that Youngberg gave permission to travel over his land to service the ditch for his benefit. In fact, Youngberg was part of the ditch owning team that established, according to the record set out in Judd's opening brief, the supposed historical route.

III. CONCLUSION/RELIEF SOUGHT

The principal points advanced by Judd remain the same and remain unrebutted.

Those principal points can be summarized as:

1. Judd won a major victory in trimming the access over his property to the ditch to the "pasture route" instead of the "pasture route" and "corral

route"; and, further, won a major victory when the District Court recognized that the secondary easement was down the ditch bank.

2. Because the Court failed to view Judd as the partially prevailing party, it held that he should pay attorneys' fees under § 70-17-112, M.C.A., and held that he was a vexatious litigant. The holding that Judd did not prevail on a significant issue was contrary to law and caused the Court clearly to make the wrong ruling as to fee shifting, either as a sanction or under § 70-17-112, M.C.A.

3. The Court's ruling that the "pasture route" is the proper secondary easement should be revised. The Court should declare the ditch route to be the single "secondary easement." In a normal situation, the cost of improving the ditch bank route to make it usable may fall on Judd *(See, R&S Investments v. Auto Auctions, LTD*, 15 Neb. App. 267, 725 N.W.2d 871 (2006), *Roy v. Woodstock Community Trust, Inc*., 195 Vt. 427, 94 A.3d 530 (2014). The ditch owners should bear the cost of improving the ditch route. They have sought and obtained an injunction keeping Judd from improving their ditch bank access and should not be heard to suggest it is in need of repair.

Judd seeks a removal of the finding that a secondary easement exists over

the pasture route and reversal of the award of attorneys' fees and costs.

DATED this 21st day of August, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that the foregoing brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; WordPerfect 9.0 for Windows, and is 3,786 words, excluding certificate of service and certificate of compliance.

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CERTIFICATE OF SERVICE

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