

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court No. 20-0540

LYNN MEHRING, FKA LYNN M. SANDEFER

Plaintiff / Appellee

vs.

JEFFREY A. GOUDREAU and LINDSEY B. GOUDREAU

Defendants / Appellants

ON APPEAL FROM THE ELEVENTH JUDICIAL DISTRICT COURT,
FLATHEAD COUNTY, HON. AMY P. EDDY, PRESIDING

Flathead County Cause No. DV-19-1039(A)

APPELLEE'S OPENING BRIEF

Appearances:

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STATEMENT OF FACTS

Appellant's Fact Statement is their District Court argument, augmented with counsel's new testimony and outright denying reality from exhibits. Here follows the District Court's view of the facts.

Appellant Goudreau (Goudreau) and Respondent Lynn Mehring (Mehring) are adjacent neighbors on property north of Meadowlake Golf Course and Development in Columbia Falls, Montana. Mehring retained ten acres immediately north of Goudreau, connected by an existing road, the subject of this litigation. The road runs north up the west side of Goudreau's property (see photograph exhibit 15C and aerial Photo "n"¹), then continues northeasterly through Mehring's property to the water tower used and maintained by Meadowlake.

The subject properties were once part of a larger, 40 acre tract owned by Sheppard. In 1978 COS 4534 (Exhibit 3) created what became the Goudreau ten acres. A year later, COS 5355 (Exhibit 5) recorded, further dividing the 40 acres into three additional tracts. This survey depicted a thirty foot road and utility easement along the west boundary of COS 4534's west boundary, running north to a parcel in COS 5355.

¹ The District Court incorporated stipulated exhibits "a" through "n" in Finding of Fact No. 1. "n" was Goudreau's aerial photo submitted for demonstrative purposes. It shows only one road.

Mehring (formerly, Lynn Sandefer & her husband) purchased the entire forty acres in 1991. Immediately prior to purchase, their seller (Sheppard) entered an Agreement and Reciprocal Grant of Easement (Exhibit 5) (“Reciprocal Easement”). By its terms, Sheppard’s (and later Sandefers & Goudreau) acquired access through what became Meadow Lake Golf Course and Sheppards granted Meadow Lake an easement for a road and pipeline to a future water storage tower. This easement included an exhibit, a copy of a partial section map showing the roadway and proposed waterline:



The District Court annotated the exhibit to outline the subject 40 acres. Finding of Fact No. 5. The court noted that the exhibit illustrated the waterline's proposed location and the historical road. The subject road is the only road serving each property, a fact Goudreau did not dispute until this appeal.² Meadowlake constructed their pipeline and water tower and utilized the road for access to it. When Mehring and her husband purchased in 1991, they observed and believed there was only one road through the ten-acre parcel (illustrated above) as roughly depicted in the 1991 Reciprocal Agreement.³ There was and is only one road through the ten acres and to the water tower, as Goudreau's own exhibit "n" illustrated. The map attached to Mehring's preliminary title commitment (Exhibit 6) showed the same road. Meadowlake copied this map in drawing their map attached to the 1991 Agreement (Exhibit 5). The road commenced at the southwest corner of COS 4534, runs north along the west boundary (as depicted in COS's 5335 & 12120 and the aerial & GIS photos) before turning northeast, as roughly depicted in the 1991 Reciprocal Agreement, shown above. Mehring's 1991 preliminary title commitment (Exhibit 6) listed and the Sheppard to Sandefer (Mehring) warranty deed granted title "TOGETHER WITH AND SUBJECT TO" the Reciprocal Agreement easements and that depicted on COS 5335. Each

² Goudreau's Answer to Complaint, pretrial order contentions and proposed findings and conclusions do not dispute the single, historical road in the shown location.

³ Finding of Fact No. 6, Stipulated Affidavit of Lynn Mehring.

easement was expressly incorporated into Mehring's title chain since 1991.

Finding No. 7.

Mehring (Sandefer) reconfigured boundaries in 1995 by COS 12120 (Exhibit 8). Surveyor James Burton illustrated the same 30-foot road and utility easement along the west boundary of (what became Goudreau) south ten acres showing legal access to the north 10 acres: now Tract 2 of COS 12120. Finding No. 8. Sandefers divorced. Lynn Sandefer deeded the two ten-acre parcels (Tract 2 of COS 12120 and Tract 2 of COS 4534) to Lynn Mehring in 1997. Exhibit 9. The deed expressly incorporated the easements from the 1991 easement agreement AND the easement showing on COS 5355 and 12120. Again, all during this time, there is only one road traversing the two, ten-acre parcels: the same road showing in Goudreau's aerial photo (court's exhibit "n"). Finding No. 9.

The District Court examined Exhibit 13, the topographical map and noted that the historical road was in the only location practical. Both a stream and steep terrain lay west of the road. Finding No. 10.

Mehring contracted to sell to Goudreau in 2014 by agreement in Exhibit 11. Goudreau's agreed: "The *existing easement*, shown on COS 5355 & 12120 will remain, granting easement to the Seller's adjacent property [emphasis added]." The court noted: "The text does not reference a *future* road, but clearly implies and is consistent with Mehring's understanding that the surveyed easement is the

existing road.” Finding No. 11. The court noted that surveys frequently err in depicting roads in their actual location. Here, the surveys (the exhibit in the Reciprocal Agreement and COS’s 5335 & 12120) referred to the road’s general location. Finding No. 12. Mehring gave Goudreau a warranty deed, subject to each of the easements listed above.

Mehring continued to use the road to her retained ten acres to the north, along the same and only road. Goudreau built their home. The parties communicated regarding the road by text message (Exhibit 13), and the court found that the text message confirmed that Goudreau believed Mehring’s reserved easement was along the same road. Finding No. 16 & 17. However, shortly after listing her north ten acres for sale, Goudreau blocked the road with a chain and lock. Mehring sought and obtained a temporary restraining order reopening the road. Finding No. 21. This litigation followed.

In lieu of trial, the parties submitted stipulated facts and exhibits to the court. On October 5, 2020 the court entered its Findings of Fact, Conclusions of Law and a Decree of Quiet Title, confirming Mehring’s easement through the Goudreau property. Goudreau appeals.

STANDARD OF REVIEW

Most of Goudreau’s recitation of law is correct. Goudreau omitted that this court will view the evidence in the light most favorable to the prevailing party

when determining whether substantial credible evidence supports the district court's findings. *Pedersen v. Ziehl*, 2013 MT 306 ¶ 10, 372 Mont. 223, 311 P.3d 765.

SUMMARY OF ARGUMENT

This is a traditional easement dispute where the parties shared a common road and easement until the servient tenement objected to its use. No new theories apply. What is unique, is that Goudreau opted to waive trial and submit the case on stipulated facts. The parties did so, but Goudreau now regrets that and attempts to retry the case on appeal with counsel's new testimony and new argument not raised below. Goudreau now denies the lower court's facts and evidence, some from stipulated exhibits. The District Court upheld Mehring's easement on overwhelming evidence, that it was (1) expressly reserved, (2) across an obvious road historically used and (3) that any surveyor error illustrating the road on a survey was "reformed" to the parties' intentions.

ARGUMENT

1. Goudreau may not raise new evidence or argument for the first time on appeal.

Add to this, counsel's statements are not evidence. *Soltys v. Costello*, 520 F.3d 737,745 (7th Cir. 2008). Throughout their brief, Goudreau's counsel unabashedly testifies to new or different facts than what district court reviewed. For example,

counsel speculates as to her client’s mental state when they purchased (Goudreau Brief at pp 14, 25 & 26), that Mehring did not “change the location of their road because it would not have provided the same access to their parcels to the west” (*Id.* at page 19), that easement descriptions on surveys was accurate (*Id.* at 20)⁴ and adds words to her client’s text message in order to change its meaning (*Id.* at 24). None of this is evidence. *Singleton v. Johnson*, 929 A.2d 1224, 1231 (Pa. Commw. Ct. 2007) and none of it was presented to the District Court.

Goudreau several times argues against use of extrinsic evidence. They stipulated to all evidence below, making no objections. They did not contend or argue in their pretrial order contentions or their proposed findings and conclusions that any evidence should be excluded as extrinsic. This is a new argument on appeal and cannot be considered for the first time. *Schlemmer v. North Central Life Insurance Co.*, 2001 MT 256, ¶ 22, 307 Mont. 203, 37 P.3d 63.

2. The District Court relied on overwhelming, stipulated evidence.

A. Goudreau requested to waive trial and agreed to stipulated facts.

Goudreau repeatedly cries foul, that the district court relied on facts not stipulated and that “their agreement” was violated. First and foremost, the only “record” is (1) Mehring’s unrefuted affidavit of October 22, 2019 supporting the

⁴ Despite repeated requests, Goudreau’s counsel declined to ever visit the property in person.

issuance of the Temporary Restraining Order, (2) Mehring counsel's appearance and fact recitation to the court the morning of trial,⁵ and (3) the stipulated facts and exhibits. There is no other record, no "bystander's bill" and nothing corroborating counsel's claims. And while not part of the record, Mehring's counsel cannot allow patently false claims to prevail without answer. On August 31, 2019 Goudreau counsel wrote Mehring counsel, proposing to submit the case without trial on stipulated facts. The parties agreed and exchanged the following email:

(Snyder to Dowdall):

I will appear in court tomorrow, either in court or chambers and advise Judge Eddy that we will stipulate to submit my exhibits 3-15. You will submit your two labelled, demonstrative exhibits just emailed to me today. I will submit uncontested affidavit statements of Lynn Mehring and Lynn Sandefer that they each understood the surveyed road to be the actual road. We agree that surveys frequently draw road easements with the actual roadway not where it is depicted. We neglected to discuss the distance between Goudreau's house and the road. I still need that in evidence.

⁵ The court recorded this appearance electronically. Goudreau did not obtain or submit a transcript for their appeal.

(*Dowdall to Snyder*) Sounds good. I will call my client.⁶

Mehring's counsel e-filed her proposed findings and conclusions on September 22, 2019, with Goudreau counsel receiving a copy. Goudreau counsel received that and submitted her proposed findings and conclusions September 25. Goudreau's counsel even obtained a short extension for submission due to e-filing malfunction. The case was submitted, but Goudreau made no motion or objection to correct any misunderstanding or claim extra facts were submitted. The court entered its Findings, Conclusions and Decree on October 7, 2019. Goudreau made no Rule 60 motion as to any extra facts and made no record of any objection. They raise the issue for the first time on appeal and with counsel's new testimony in her brief. This Court should not consider new argument or evidence not presented to the District Court and not part of the record on appeal. *Anderson v. Stokes*, 2007 MT 166, ¶ 57, 338 Mont. 118, 163 P.3d 1273. As shown below, the district court received and ruled upon the exact facts of stipulation.

B. Goudreau disputes facts on appeal, not contested below.

Mehring is surprised to learn for the first time on appeal that Goudreau now disputes that there was a single road through the two properties. Goudreau did not dispute this in the Answer to the Complaint, nor in their contentions in the pretrial

⁶ This email is also "not of record." It is merely submitted in rebuttal to a false claim of misconduct.

order, and not even in their own proposed findings and conclusions. The parties exchanged aerial photos showing the road. Goudreau stipulated to photos (Exhibits 15F, G & H) showing the historical road where it continued north of Goudreau's parcel. Per agreement, Lynn Mehring submitted her September 21, 2020 affidavit attesting to the historical road (repeating her testimony of October 22, 2019). Goudreau counsel now testifies that there's no evidence the road ever existed until Goudreau constructed it. (Goudreau Brief at 13 & 18). That's a new claim and evidence on appeal, not presented to the District Court and not part of the record. Counsel testifies: "the only road in existence was diagonally across Goudreau's property. The parties did not agree to submit this as an agreed fact." (Goudreau Brief at 45). That's a surprise, given the evidence of the road in the photos and Goudreau's own witnesses from Meadowlake.⁷ It is doubtful they'd have testified they had no road to their water tower, but we needn't speculate. Counsel's new statements here are not evidence. The record is.

Mont.R.Appellate.Civ.P 8(1).

⁷ Goudreau had Lynn Mehring's affidavit attesting to the road's history when the case commenced in 2019. Goudreau's Answer of November 15, 1999 admitted Goudreau chained the road "to protect the water tower." (Answer, page 2, line 21). They had a discovery response from May, 2020. The parties mediated on July 14 (counsel was to then visit the property and road.) Their proposed findings did not deny the road to the water tower. Goudreau and counsel's new claim on appeal is a mystery.

Even assuming there was some, good faith dispute as to stipulated evidence (which Mehring denies), then Goudreau was required to resolve this in District Court, not surprise everyone on appeal. Rule 8(6) provides:

Correction or modification of the record. If any difference arises as to whether the record accurately discloses what occurred in the district court, the difference shall be submitted to and settled by the district court within the time provided for transmission of the record or within such time as the district court may for good cause permit, and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court, on motion of a party or upon its own motion, either before or after transmission of the record to the supreme court, may order that the omission or misstatement be corrected and, if necessary, that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the supreme court.

Goudreau did nothing. The record is now only what is before this court. Goudreau seeks to retry their case on appeal by disputing the record and adding their counsel's new testimony.

C. The Findings of Fact were each based upon stipulated exhibits and evidence.

Mehring's Exhibits three through fifteen and her affidavit were stipulated into evidence. It painted the picture of a single, historical road, not contested below. The road was mostly described in the 1991 Reciprocal Easement Agreement (Exhibit 5, page 2 above) and was referenced in two other surveys. The title chain from Shepperd to Sandefer to Mehring to Goudreau each contained "together with

and subject to clauses.” The Mehring to Goudreau buy-sell described the easement Mehring would reserve, the Mehring to Goudreau deed excepted out the prior easements in its “subject to” clause, specifically listing the 1991 Agreement and “all other” easements listed in the preliminary title commitment (Exhibit 10).

Meadowlake’s water tower is at the road’s terminus on Mehring property.

Photograph Exhibit 15H depicts the road running northeast to the water tower, exactly as shown in the 1991 Easement Agreement. The parties shared and drove the same road for years.

If this weren’t sufficiently clear, Goudreau himself acknowledged the easement in his text message to Mehring, Exhibit 13. Goudreau’s counsel starkly adds words to her client’s admission to change its meaning to a different easement or location not then in existence. Goudreau Brief at 24. The trial court correctly read it for its literal meaning – the existing road and easement. The topographical survey (Exhibit 13) illustrated why the road existed in its current location, rather than straight up Goudreau’s entire west boundary as illustrated in COS 5355 & 12120. Easement locations on surveys are frequently in error as to a road’s actual location. Mehring believed that the surveyed depiction was correct; she did not know the road turned northeast before crossing the Goudreau north-south boundary until Goudreau blocked the road and disputed her easement. Each of these facts were before the court. Goudreau, while arguing different legal conclusions,

contested and objected to nothing in evidence until this appeal. This Court will not put a district court in error for failing to address an issue or an argument that was not made before it. *Prescott v. Innovative Res. Group, LLC*, 2010 MT 35, ¶ 14, 355 Mont. 220, 225 P.3d 1253. Goudreau’s appeal is replete with “no evidence,” “not stipulated” or “not true,” other times admitting stipulated facts, but denying the court’s inferences.

For example, Goudreau admits the stipulation that surveys incorrectly depict roads (Goudreau Brief at 20), but then denies that COS 5535 and 12120 do so. Goudreau offered no contrary testimony, so the District Court legitimately found that with the parties’ use and communication, the surveys mostly described the road. Elsewhere, Goudreau admits the topographical survey (Goudreau Brief at 18), but denies that the court could reason that a stream and hillside indicate the road was built where practical to do so. For asserted claims of “extra evidence,” their actual claim is that the court shouldn’t have found or concluded what it did. They attempt to retry their case with counsel’s added testimony they didn’t present below.

3. Substantial Evidence Supported the Findings.

This Court will consider all of the evidence *and all of the inferences drawn* therefrom in a light most favorable to the prevailing party. *C. Haydon Ltd. v. Montana Min. Properties, Inc*, 286 Mont. at 138, 151, 951 P.2d 46, 54 (1997).

To repeat, the evidence below was uncontested. So the question isn't whether there was contrary evidence, rather, whether there was evidence supporting the findings. The court had evidence of a single road. It led to a water tower the subject of a 1991 Agreement. That Agreement illustrated the road and pipeline. Goudreau argued below and here that the 1991 Agreement was only for a waterline, not also a road for egress and ingress. Perhaps, but how does one install the pipeline or access their water tower? The 1991 Agreement's exhibit didn't just label the pipeline; the dotted line illustrated the existing road (see page 2 above), the same historical road Mehring attested to.

Throughout her twenty-three-year ownership, Mehring used but one road – the only road. Her ex-husband deeded her two ten-acre parcels **TOGETHER WITH AND SUBJECT TO THE** roads and easements described in the 1991 Agreement and two record surveys. No, the surveys weren't exactly precise in their description, but they documented the easement. Mehring negotiates, Goudreau agrees and her deed to them again subjects his title to her easement. He acknowledged the easement. The District Court's findings methodically traced each fact from each exhibit or testimony. Goudreau today says Mehring's testimony is insufficient and that documents don't prove what they say. But the testimony of single witness is sufficient to establish a fact. *Eustance v. State*, 2005 MT 34, ¶ 11, 326 Mont. 77, 107 P.3d 478. **Goudreau offered no contrary**

evidence. Where evidence is uncontradicted, the burden of proof is met and the court's findings are supported. *Hunter v. State*, 264 Mont. 84, 87-88, 869 P.2d 787, 789-90 (1994). The lower court easily found a historical road and easement referenced in multiple record documents and used and acknowledged by the parties. This isn't substantial, it's overwhelming evidence.

On appeal, Goudreau surprisingly denies there was an historical road. And their counsel testifies that he built the road (Goudreau Brief at 13 & 18). If Goudreau wanted to contest facts, they should not have waived trial with stipulated evidence they now dispute.

4. The Court entered Correct Conclusions of Law

The district court confirmed Mehring's easement on three, independent theories: (1) that it was expressly granted and reserved, or (2) that it was from an obvious road, or (3) that the court could reform the easement (as depicted on COS 5355 and 12120) to its intended location. As with its findings, the court methodically reasoned and supported each conclusion from the findings and evidence.

Below and on appeal, Goudreau defended against an easement incorporated by reference, which Mehring didn't claim and the court didn't discuss. This is irrelevant. On appeal, Goudreau disputes the use of extrinsic evidence, not argued

below. It is difficult to understand just what Goudreau's assigned legal error is today, other than to just seek retrial of facts on appeal.

A. The court correctly confirmed an express easement.

The court first noted that the road, by whomever and whenever constructed was placed in the choicest location. (Conclusion No. 14). COS 5335 (1979) depicted the easement up the west boundary. Indeed, the road runs up the west boundary for a space, but then turns northeast prior to crossing the north boundary. The court noted that, consistently, the 1991 Agreement depicted the road running northeasterly and concluded that, as there was but one road, this was the same road and easement. (Conclusion No. 14.) As this was the only travelled way, the court interpreted the depicted easements as the actual road, citing, *Wiegele v. West Dry Creek Ranch, LLC*, 2019 MT 254, ¶ 33, 397 Mont. 414, 450 P.3d 879.

(Conclusion No. 18.) This is the very easement conveyed and reserved in the 1991 Sheppard to Sandefer (Mehring) warranty deed. The court correctly noted the easement repeated in the Sandefer to Sandefer (Mehring) deed (now also referencing COS 12120 showing the easement) in 1997, and again across and along the only existing road. (Conclusion No. 17). And finally, Mehring gave Goudreau title "subject to" these easements in 2015. The title chain could not be clearer: the expressed easement granted and reserved was repeatedly part of the

title record since 1991. *Broadwater Development, L.L.C. v. Nelson*, 2009 MT 317, ¶ 12, 352 Mont. 401, 219 P.3d 492.

Goudreau appeals this conclusion, repeating their “no evidence” claim that the road didn’t exist until (per counsel’s testimony) Goudreau built it. They ignore the 1991 Agreement which illustrated the road. They apparently believe Meadowlake constructed a pipeline and water tower without ever touching the ground and never accessing it. They ignore Mehring’s undisputed testimony that the road existed when they purchased in 1991. They cannot explain why, if Goudreau built the road, there was a pre-existing road all the way to the water tower north of him (which surely he did not build) in photo Exhibit 15H.

Next, Goudreau hyper-focuses on the 1991 Agreement,⁸ claiming there was only the pipeline, not a road easement, that Mehring was not a dominant tenement to it and that “subject to” does not mean “reserving unto _____ a road easement across the existing road.” The 1991 Agreement necessitated and resulted in historical egress and ingress which Goudreau did not dispute below. New on appeal, they claim there was no road.

⁸ Goudreau also repeatedly quotes the 2007 Amendment. This document was not in evidence – neither party submitted it as an exhibit. Aside from its complete irrelevance, it is improperly quoted on appeal.

“Subject to” text with an easement appears in 310 Montana cases.

Technically, no, “subject to” is not the same as “reserving unto.” In *Wild River Adventures, Inc. v. Board of Trustees*, 248 Mont. 397, 812 P.2d 344 (1991) it was not under that case’s unique facts. *Id.* at 402; 812 P.2d at 347. Similarly, Justice Nelson’s lengthy treatise in *Blazer v. Wall*, 2008 MT 145, 343 Mont. 173, 183 P.3d 84 followed *Wild River* in reviewing an ambiguous survey, AND WHERE the principal issue (in Justice Nelson’s words) was the “torturous body of easement-by-reference jurisprudence.” *Id.* at ¶¶ 63 & 65. But here, Mehring and Goudreau present an “easement in the title chain” case, not an incorporation by reference from an ambiguous survey. *Wild River* and *Blazer* don’t apply. *Wiegele v. West Dry Creek Ranch* does.

Similar to Mehring & Goudreau, in *Wiegele* this court reviewed a previous easement agreement. *Id.* at ¶ 43. Identically, a later deed in *Wiegele* conveyed title “together with and subject to” the terms of the 1981 easement. *Id.* at ¶ 45, just as the Sandefer to Mehring and Mehring to Goudreau deeds did. Next, this court noted that “The 1981 Easement Agreement on its face does not grant an express easement for the Wiegeles.” *Id.* at ¶ 47. Here, Goudreau repeats (many times) that the 1991 Reciprocal Easement Agreement with Meadowlake did not give Mehring an easement across her own property along the existing road. But Mehring did except out identical “together with and subject to” language in the

deeds of 1997 and again in the deed to Goudreau, all while the sole access was across the same road depicted in the 1991 Reciprocal Agreement. Again identically, Weigele's access was over an existing road.

But the District Court found that its incorporation into later conveyances, *and the circumstances surrounding those incorporations in the later conveyances*, demonstrated a mutual intent by the parties to ensure access over existing roads described in the 1981 Easement Agreement to the public lands in Section 36.

Wiegele at ¶ 47 (emphasis added). An express easement today isn't governed by magic words in a vacuum. Rather, the intent of the parties **determined by circumstances surrounding the conveyances** is key. Just as in *Wiegele*, the lower court looked at the single-use road, its partial description in record surveys and the 1991 Agreement, the parties' buy-sell agreement, Mehring's expressed intent and historical use and Goudreau's own statements, all stipulated into evidence. The lower court's findings were not clearly erroneous and should be affirmed. *Wiegele* at ¶ 48.

The District Court was correct when it concluded that, taken together, the conveyance documents established an express easement for the Wiegeles . . .

Wiegele at ¶ 48. Judge Eddy made the same conclusion below as this court upheld in *Wiegele*. Mehring has an express easement across the existing road as

determined both from the conveyance documents and the facts and circumstances at the time.

B. Easement Across Obvious Road

Judge Eddy made clear that there were three, independent theories upholding Mehring's easement. Upholding the express easement was the first. Judge Eddy next found that the easement prevailed across the obvious road. Upon the same facts and evidence, this theory held that, even if expressly described, the easement was intended to follow an existing road obvious by visual inspection. (Conclusion No. 20) This not only followed the fact that surveys frequently do not accurately describe roads, *Wiegele* also confirms this principal. *Id.* at ¶ 33. Goudreau does not dispute or appeal this conclusion. By this theory alone, the lower court's conclusion and this case should be affirmed.

C. Easement Reformed to Intended Location

Thirdly, Judge Eddy concluded that, even if the prior theories didn't hold, the court could reform the easement to its intended location. As Goudreau repeatedly notes, Mehring did not need an easement across her own property for the twenty-three years she owned it. Only Meadowlake did for their water tower from the 1991 Agreement. Here again, the court notes there's only one road from 1991 through litigation. The only "surveyed easement" from COS 5355 and 12120 shows the road running up the west side of what will become Goudreau's parcel,

which is partially correct from the GIS map, photos and Mehring's affidavit. Goudreau agreed Mehring would reserve an easement in their buy-sell. His text message (Exhibit 13) confirmed he thought the easement was along the existing road. If indeed, as Goudreau vigorously claims the easement ONLY ran up the western boundary without veering northeast, then they were each mistaken as the lower court concluded. Conclusion No. 26. On appeal, Goudreau doesn't dispute the court's authority to "reform the contract" under MCA §28-2-611, or that easements can be reformed under *Thibodeau v. Bechtold*, 2008 MT 412, ¶ 29, 347 Mont 277, 198 P.3d 785.

Mehring cannot determine what Goudreau appeals. Their appeal states, "The District Court did not find that the easement on the Certificates of Survey were flawed or mistaken." Goudreau Brief at 46. (Actually, the court did in Conclusion No. 25, 26 & 29.) But two sentences later, Goudreau claims "The Court incorrectly found the description of the location of each of the easements to be a mutual mistake and that surveys frequently do not describe easements in the actual location of the road." Goudreau Brief at 46. Goudreau then switches to arguing extrinsic evidence, then testifies as to what they *might have known*, that they might have asked for road construction cost and could have located their house differently. *Id.* at 47. Then, "There was no mutual mistake of fact that

allowed the Court to move Mehring's access easement to the waterline easement."

Id. at 47. This author cannot make sense of Goudreau's appeal here.

The court didn't move the easement or road and not to the waterline easement. The court did conform the easement to the obvious, commonly used road which even Goudreau acknowledged was the only road in the only practical location. Conclusion No. 26 & 32. Goudreau does not appeal the legal basis for the conclusion. While not clear, it appears they only contest stipulated evidence and offer new testimony.

CONCLUSION

This case presents no new facts or law. It's a simple case on clear evidence where the court upheld a recorded easement to its intended location. This case would not have seen the courtroom but for Goudreau chaining and blocking the only road. The court easily found an express easement, or one conforming to the existing road, or conforming to the parties' intention. Days before trial, Goudreau's counsel proposed to waive trial and submit the case on stipulated evidence. Goudreau saw and read the stipulated facts and submitted proposed findings and conclusions. They made no objection to the stipulated evidence nor to Mehring's proposed findings. The court ruled and they still made no objection or motion as required. They appeal and now claim they didn't really agree to the facts, their counsel attests to new facts and they retry the case on appeal. Upon

well settled law, the facts were supported by overwhelming and undisputed (at least below) evidence. The case should be affirmed.

DATED March 15, 2021

/s/
Randall A. Snyder
Counsel for Respondent Mehring

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief contains 5,042 words, is double-spaced text (except quoted or footnote material), printed in fourteen point, Times New Roman of not more than 10.5 characters per inch and is proportionately spaced, with one inch top, bottom and side margins, twenty-three pages in length.

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CERTIFICATE OF MAILING

I do hereby certify that on March 15, 2021, the following were served a true and complete copy of the foregoing Appellee's Response Brief by electronic service and mailing to:

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CERTIFICATE OF SERVICE

I, Randall A. Snyder, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 03-15-2021:

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Dated: 03-15-2021