IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 21-0306

YELLOWSTONE COUNTY,

Plaintiff and Appellant,

v.

KENNETH HANNEN

Defendant and Appellee.

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, Cause No. DV 20-0020
Hon. Donald Harris

ANSWER BRIEF OF DEFENDANT/APPELLEE KENNETH HANNEN

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3. Did the District Court abuse its discretion when it granted Hannen his attorney fees?

II. STATEMENT OF THE CASE

On January 8, 2020, the County filed a Complaint for Declaratory Judgment asserting that it possesses a 30-foot road easement running the entire length of the eastern boundary of Hannen's property along Piccolo Lane. This purported road easement would travel directly through Hannen's house and garage. For that reason the County requested the right to remove these structures as "encroachments."

Prior to filing its Complaint the County hired an engineering firm, KLJ Engineers, to determine whether any such road easement existed. KLJ concluded that while it believed there was an easement where Piccolo Lane currently sits, there was no easement extending beyond Piccolo Lane through Hannen's house and garage. Upon receipt of KLJ's report, the County attempted to trick Hannen into conveying the larger road easement through his house and garage by asking him to sign a conveyance document with the false assurance that he would not be providing

anything to the County it did not already possess. Only after Hannen refused to sign the conveyance document did the County file its Complaint arguing that it has possessed an easement through his house all along.

Both parties moved for summary judgment. These motions were denied, as the District Court determined that genuine questions of material fact exist. A bench trial took place on March 1, 2021. Hannen moved for Rule 52(c), M.R.Civ.P., judgment on partial findings after the County's case-in-chief. That motion was granted. Hannen then sought and received attorney fees and costs pursuant to §27-8-313, MCA. The County now appeals the denial of its Motion for Summary Judgment, the granting of Hannen's Motion for Judgment on Partial Findings, and the award of attorney fees.

III. STATEMENT OF FACTS

The County's Complaint asserts that 1952, 1974, and 1996 certificates of survey ("COSs") "indicate[] a 30-foot road easement on the east side of [Hannen's property] for Piccolo Lane." Doc. 1 at 1. Claiming that "[t]here have been several pedestrian accidents on Piccolo Lane, including one fatality," the County stated that it would like to place a sidewalk along Piccolo Lane within the alleged easement. *Id*. at 2. After acknowledging that "it appears two of the buildings on [Hannen's property] are within the easement," the County requested that the District Court declare, pursuant to §§27-8-101 through 27-8-313, MCA, not only that a supposed

road easement exists for the installation of sidewalks, but also that "any structures in the easement are encroachments on to Piccolo Lane that the County may remove." *Id*. at 2-3. These "structures" are Hannen's house and garage. Tr. 139:7-20.

A. PROPERTY HISTORY

Hannen owns approximately 4.5 acres of land in Lockwood, Montana, bordered on the south by U.S. Highway 87 and on the east by Piccolo Lane ("Hannen Property"). Tr. 97:17–98:14. His personal residence sits on this property. *Id*. at 139:7-13. It was built in 1934. *Id*. at 87:8-9. Piccolo Lane was constructed in the mid 1940's. *Id*. at 123:18-19.

Pertinent to this action, on March 28, 1947, Gabriel and Mary Piccolo, the then-owners of land which included the Hannen Property, conveyed their property via warranty deed to Glenn and Gerry Breedlove ("Breedlove Deed"). Tr. 36:10–37:4; Breedlove Deed (Trial Ex. 1; Appx. "1"). The Breedlove Deed includes no reference to an easement, a road, or the County possessing any interest in the conveyed lands. Breedlove Deed; Tr. 37:5-10.

Approximately four years after the execution of the Breedlove Deed, on June 16, 1952, Peter Yegen, Jr., who was not an owner of the land, caused Plat of Survey No. 512 to be recorded in the office of the Yellowstone County Clerk and Recorder as Document No. 492826 ("1952 COS"). Tr. 7:20–8:5, 145:18-24; 1952 COS (Trial

Ex. 3; Appx. "2"). The 1952 COS splits Breedlove's land into two tracts, Tract "A" and Tract "B." 1952 COS. The Hannen Property is included within Tract B.

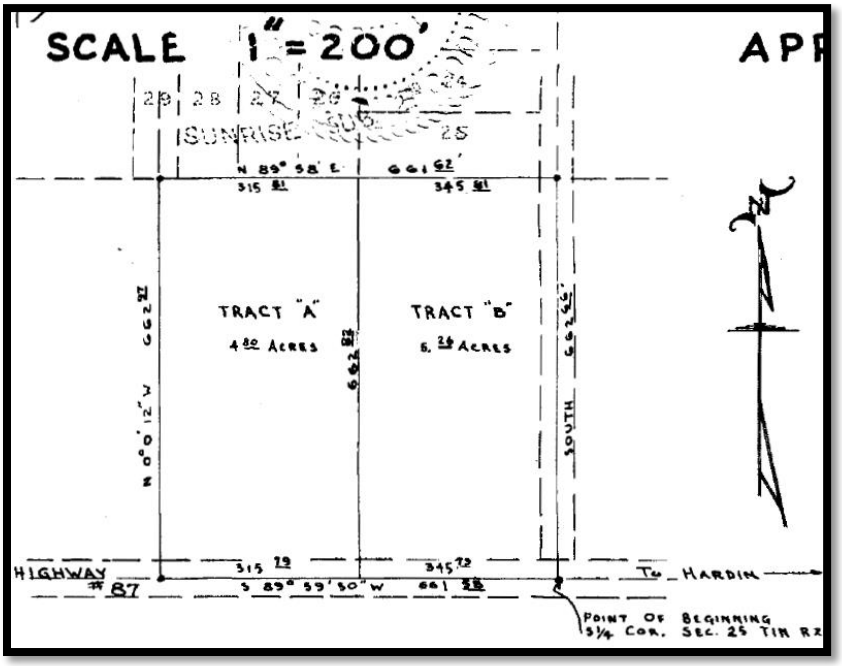

Figure 1 – From 1952 COS

The 1952 COS depicts an unlabeled dashed line just west of the eastern boundary of Tract B, running north/south parallel to that boundary. *Figure 1*. The word "easement" appears nowhere on the 1952 COS. 1952 COS; Tr. 144:23–145:6. As admitted by Yellowstone County Public Works Manager Tim Miller at trial, there is no indication on the 1952 COS of: the location of any then-existing structures in reference to the unlabeled dashed line; the duration of an easement; dominant and servient tenements; the dimensions of an easement; or whether any easement was in gross or appurtenant. Tr. 145:25–146:14; 1952 COS. There is no dedication on the 1952 COS creating a road or easement. Tr. 146:15-18; 1952 COS. And, the County was not a party to any deeds referencing the 1952 COS. Tr. 146:19-22. Importantly, Miller also conceded that there was nothing indicating an intent to convey an easement on the 1952 COS. *Id*.

at 145:7-13. Yellowstone County Clerk and Recorder Jeff Martin agreed. *Id*. at 57:16-22.

Breedlove then transferred Tract B via warranty deed to Charles and Anetta Boyles ("Boyles Deed"). Tr. 8:10-21; Boyles Deed (Trial Ex. 4; Appx. "3"). The deed was recorded on June 25, 1952, and references the 1952 COS in the legal description of the land transferred. Boyles Deed. This deed includes no reference to an easement, a road, or the County possessing any interest in the conveyed lands. *Id*.; Tr. 46:1-10.

On April 27, 1953, the Boyles conveyed their interest in Tract B to Hannen's father, Kenneth M. Hannen ("Hannen, Sr."), via warranty deed ("Hannen, Sr., Deed"). Tr. 9:1-12; Hannen, Sr., Deed (Trial Ex. 5; Appx. "4"). Like the Boyles Deed, the legal description contained in the Hannen, Sr., Deed references the 1952 COS. Hannen, Sr., Deed. This deed also includes no reference to an easement, a road, or the County possessing any interest in the conveyed lands. *Id*.; Tr. 49:10-21.

On September 6, 1974, Hannen, Sr., caused Amended Certificate of Survey No. 512 to be recorded with the Yellowstone County Clerk and Recorder as Document No. 971276 ("1974 COS"). Tr. 50:23–51:5; 1974 COS (Trial Ex. "6"; Appx. "5"). The purpose of the 1974 COS was to survey off for sale a half-acre parcel located on the southwest corner of Hannen, Sr.'s, property. 1974 COS. The COS identified the surveyed half acre as "Tract B-1," and the remainder of Hannen,

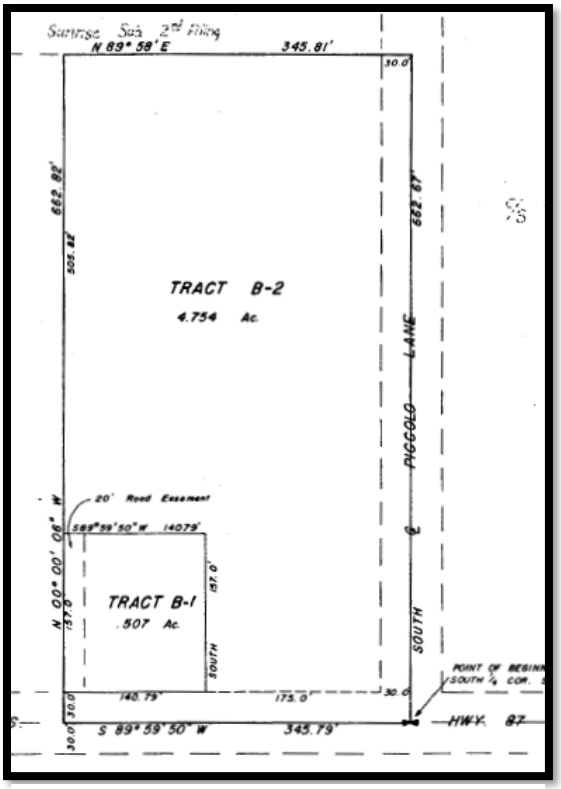

Figure 2 – From 1974 COS

Sr.'s, property as "Tract B-2." *Id*. While the word "easement" does appear on the 1974 COS, it is only in relation to a "20' Road Easement" on the west side of Tract B-1 and not with regard to Piccolo Lane on the east side of Tract B-2. *Id*.; Tr. 147:3-5. Similar to the 1952 COS, the 1974 COS depicts an unlabeled dashed line running north/south parallel to the eastern boundary of Tract B-2. The eastern boundary is labeled as the center line of Piccolo Lane. Miller agreed that the 1974 COS lacked: the location of any then-existing structures in reference to the unlabeled dashed line; the duration of an easement; dominant and servient tenements; or whether any easement was in gross or appurtenant. Tr. 147:23 – 148:9; 1974 COS. There also is no dedication on the 1974 COS creating a road or easement, no indication that the owner of Tract B-2 (Hannen, Sr.) ever saw the 1974 COS, nor did a deed from the time period of the 1974 COS reference the 1974 COS. *Id*. at 147:19-22, 148:10-16; 1974 COS. As with the 1952 COS, Miller testified there is no indication of intent on the 1974 COS. Tr. 147:14-18. Again, Martin agreed. *Id*. at 57:16-22.

Hannen, Sr., passed away, and on September 28, 1992, Hannen succeeded to ownership of Tracts B-1 and B-2 as identified in the 1974 COS pursuant to a Deed of Distribution from the Estate of Hannen, Sr. ("Deed of Distribution"). *Id*. at 10:24–11:11; Deed of Distribution (Trial Ex. 8; Appx "6"). This deed includes no reference to an easement, a road, or the County possessing any interest in the conveyed lands. Deed of Distribution. The Deed of Distribution was not executed in conjunction with a division of land. *Id*.; Tr. 56:4-8. Neither Hannen nor Hannen, Sr.'s, estate, of which Hannen was the personal representative, intended to transfer, bequeath, gift, or otherwise give to the County an easement or any interest in the conveyed land. Deed of Distribution; Tr. 56:9-15.

On March 5, 1996, in conjunction with a boundary line relocation between Tract B-1 and B-2, Hannen caused to have recorded the Amended Certificate of Survey No. 512 ("1996 COS"), which relocated the northern boundary line of Tract B-2 north such that it gained an additional one-tenth acre in size, and renamed the tracts "Tract B-1-B" and "Tract B-2-A." Tr. 109:16-25, 149:7-11; 1996 COS (Tr. Ex. 9; Appx. "9"). Hannen now owns the tract identified as Tract B-2-A of the 1996 COS. Tr. 153:15-17. Like the 1952 and 1974 surveys, the 1996 COS depicts an unspecified dashed line running north/south parallel to the eastern boundary of Tract

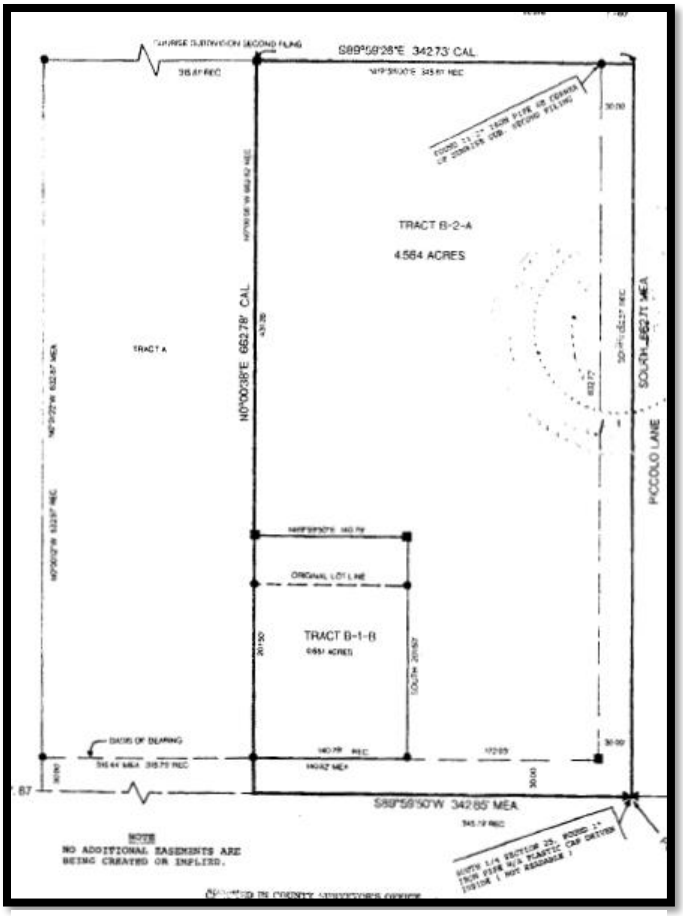

Figure 3. From 1996 COS

B-2-A. *Figure 3*. The words "Piccolo Lane" appear just to the east of the eastern boundary, but not within the area of the dashed line. *Id*. There is no reference to the creation of an easement; indeed, the 1996 COS contains explicit language stating "NO ADDITIONAL EASEMENTS ARE BEING CREATED OR IMPLIED." *Id*. Nor is there reference to the County possessing any interest in the surveyed lands. *Id.* The 1996 COS only contains an unspecified measurement for the dashed line of 30 feet from the center of Piccolo Lane. *Id*. There is no expression of any intent that Hannen or the surveyor may have had with regard to the dashed line that traverses the eastern boundary of Tract B-2-A. *Id.*

It is undisputed that the 1996 COS did <u>not</u> create an easement. Both Clerk and Recorder Martin and Public Works Director Miller testified as such. Tr. 57:1-5, 149:16-22. It has never been referenced in any deed. *Id*. at 57:6-15, 148:24–149:2. Not only that, but just like the other two COSs at issue, the word "easement"

is never used in reference to the disputed dashed line, there is no indication of the location of any then-existing structures in reference to the dashed line, no reference to any duration of an easement, no dominant and servient tenements, no indication of whether an easement was in gross or appurtenant, and no dedication creating a road or an easement. 1996 COS; Tr. 149:23–150:25. And, consistent with his opinions about the 1952 and 1974 COSs, Miller agreed that there is nothing indicating an intent to create an easement on the 1996 COS. Tr. 150:2-6. Martin concurs. *Id*. at 57:16-22.

Figure 4. From Aerial Photo

An aerial photo of the Hannen Property ("DO5424") with the dashed line overlayed traveling through Hannen's house ("1947") and garage can be seen on the schematic at *Figure 4*. (Trial Ex. 11; Appx. "8").

B. PRE-LITIGATION

1. KLJ Survey

In 2017, the County retained KLJ Engineers ("KLJ") to conduct a survey, review the pertinent COSs, and determine the location of any easements along Piccolo Lane. *Id*. at 152:19–153:14, 155:8-15. According to Miller, the resulting survey plat dated January 2017 ("KLJ Survey") determined that the County did not have a 30-foot easement running through Hannen's house and garage as now claimed. *Id*. at 152:19–153:14, 156:18–157:3; KLJ Survey (Trial Ex. 512; Appx. "9"). Instead, it showed that the County only has an easement over Hannen's property where Piccolo Lane currently sits, presumably prescriptive in nature.[1] *Id*. Notably, KLJ determined that the easement did not extend west of Piccolo Lane, let alone into Hannen's house and garage. Tr. 156:25–157:3; KLJ Survey. In doing so, it referred to Hannen's property as "Tract B-2-A," indicating that it must have reviewed the 1996 COS in coming to its conclusions. Tr. 155:2-11.

2. Miller Letter

Approximately two years after receipt of the KLJ Survey, Miller sent a February 8, 2019, letter to Hannen ("Miller Letter"). Tr. 135:24–136:7; Miller Ltr. (Trial Ex. 511; Appx. "10"). This letter was drafted with the assistance of the Yellowstone County Attorney's Office and was reviewed by the Yellowstone

[1] Hannen does not admit that any such easement exists. This does, however, demonstrate that the County knew a 30-foot easement through Hannen's house did not exist.

County Commissioners prior to being sent. Tr. 136:12–137:11. The letter asked Hannen to sign an "easement document" to "reinforce the existence" of a 30-foot road easement on the eastern boundary of Hannen's property "for Piccolo Lane." Miller Ltr. at 1. The 1996 COS that KLJ reviewed in concluding that a 30-foot easement did not exist was attached to the letter in support of the County's claim that a 30-foot easement did exist. *Id*. at 2; Tr. 139:21-24. Pursuant to the letter, the attached "easement document" simply "acknowledges the easement as depicted on [the 1996 COS] and the previous surveys," and "does not provide the County with anything more than what it already received from [the 1996 COS] and the previous surveys." Miller Ltr. at 1; Tr. 138:17-25. The letter threatened litigation if Hannen refused to sign the "easement document," recognizing that two buildings may be located in the easement. Miller Ltr. at 1. The two buildings of concern were Hannen's house and garage. Tr. 139:7-20.

The attached "easement document," titled "Public Road Easement for Piccolo Lane," was drafted by the County Attorney's Office and reviewed by Miller prior to mailing. Miller Ltr. at 3; Tr. 139:25–140:13. It stated that "[f]or valuable consideration [Hannen][2] … conveys to the public, through Yellowstone County, ... an easement in gross across [his land] for use as a public road." Miller Ltr. at 3. Regarding the reference to "valuable consideration," Miller testified that the County

[2] Hannen is incorrectly referred to as "Keith" Hannen in the document. It was meant to read "Kenneth" Hannen. Tr. 141:5-8.

did not offer Hannen anything in exchange for signing the document other than the prospect of not being sued.[3] Tr. 141:1-4. Additionally, as explicitly set forth in the document, Miller admitted that Hannen was actually being asked to convey the disputed easement to the County for the first time. *Id*. at 141:18–142:7. Miller testified that there are no similar documents wherein Hannen explicitly conveyed an easement to the public. *Id*. at 143:6-9. Hannen refused to sign the "easement document." *Id*. at 143:10-14.

The fourth and final page of the letter, titled "Acknowledgement and Acceptance of Conveyance," is where each of the Yellowstone County Commissioners was to "acknowledge[] receipt of th[e] easement and accept[] the easement on behalf of the public." Miller Ltr. at 4; Tr. 143:19-24. This acceptance, according to Miller, is required for the creation of a public road easement and has never occurred. Tr. 143:25–144:7.

C. LITIGATION

The County's "easement by reference" theory of easement creation is not found in its January 8, 2020, Complaint. Doc. 1. Hannen first became aware of this theory upon receipt of the County's June 9, 2020, response to Hannen's first

[3] The County has never offered to purchase or otherwise compensate Hannen for a right of way for the use of Piccolo Lane, despite knowing for at least a decade that he disagrees with its claimed easement. *Id*. at 133:6-18; 134:6-10.

discovery requests. Ex. "D" to Doc. 18 (Ans. Rog. 7). The County additionally made a number of critical admissions in response to initial discovery, including:

1. No deed explicitly grants the claimed easement to the public or the County.

2. None of the three COS's at issue "contain language that grants an easement to the public for Piccolo Lane."

3. No document, period, "explicitly grant(s) the claimed easement to the public or the County."

Ex. "D" to Doc. 18 (Resp. RFA 1, 11, 14).

Armed for the first time with knowledge of the County's flawed easement creation theory and the County's admissions, Hannen filed for summary judgment on July 16, 2020. Doc. 18. The County filed its own motion for summary judgment. Doc. 20. The District Court concluded that questions of fact remained and denied both parties' motions for summary judgment. Doc. 41.

The County's discovery responses were also incomplete and evasive, requiring Hannen to move to compel. Importantly, the County refused to provide any evidence to support its own claim that "there have been several pedestrian accidents on Piccolo Lane, including one fatality," arguing that such evidence was not discoverable. Doc. 27 at 3:2-7, 8:5-14; Doc. 35 at 6:17–7:18. It did so while continuing to allege there were accidents on Piccolo Lane. Doc. 34 at 8 ("The accidents on Piccolo Lane will neither prove the County has an easement over the land nor lead to relevant information as to whether the County has an easement over

the land."). Only after being ordered by the District Court to produce the clearly discoverable materials did it become known that the County could point to no report of any pedestrian accident (fatality or otherwise) on Piccolo Lane. And, instead of producing the documents that were ordered produced (accidents and fatalities specific to Piccolo Lane), the County produced all reports of Lockwood-area pedestrian accidents and fatalities, none of which occurred on Piccolo Lane. Ex. "I" to Doc. 61 (Ans. Rog. 16 & Resp. RFP 18); Ex. "J" to Doc. 61; Hrng. Tr. 33:1-24 (Appx. "11").

D. TRIAL

The District Court held a bench trial on March 1, 2021. The County elicited testimony from Yellowstone County Geographic Information Systems Department Director Michael Powell, Martin, Miller, and Hannen.

Hannen's counsel moved for Rule 52(c) judgment on partial pleadings at the close of the County's case-in-chief, setting forth a detailed analysis of the numerous reasons the County had not met its burden. Tr. 164:12–187:6. The District Court issued an oral order granting Hannen's motion in its entirety. *Id*. at 188:25–190:6. It later issued written findings, conclusions and order. Doc. 59.

IV. STATEMENT OF THE STANDARD OF REVIEW

A. SUMMARY JUDGMENT

Grants or denials of summary judgment are reviewed *de novo* for conformance with Rule 56, M.R.Civ.P. *Babcock v. Casey's Mgmt., LLC*, 2021 MT 215, ¶5, ___ Mont. ___, 494 P.3d 322. Summary judgment is proper when the pleadings, discovery and disclosure materials, and affidavits of record manifest "no genuine issue as to any material fact" and a party "is entitled to judgment as a matter of law." *Id*. (citing Rule 56(c)(3), M.R.Civ.P.). A genuine issue of material fact is "an issue of inconsistent fact, material to the elements of a claim or defense at issue," "not amenable to judgment as a matter of law." *Id*. Whether a genuine issue of material fact exists or whether a party is entitled to judgment as a matter of law are conclusions of law reviewed *de novo* for correctness. *Id*.

B. JUDGMENT ON PARTIAL FINDINGS

Findings of fact issued granting or denying a motion for judgment on partial findings "must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibly." *McCann v. McCann*, 2018 MT 207, ¶13, 392 Mont. 385, 425 P.3d 682; Rule 52(a)(6), M.R.Civ.P. A finding of fact is clearly erroneous if it "is not supported by substantial evidence, if the court misapprehended the effect of the evidence or if, upon reviewing the record, this Court is left with the definite and firm

conviction that the district court made a mistake." *McCann*, ¶13. Conclusions of law are reviewed *de novo*. *Id*.

C. ATTORNEY FEES

If legal authority exists to award attorney fees, such an award is reviewed for an abuse of discretion. *McCann*, ¶14. "A district court abuses its discretion when it acts arbitrarily, without employment of conscientious judgment, or in excess of the bounds of reason, resulting in substantial injustice." *Id*.

V. SUMMARY OF THE ARGUMENT

The District Court correctly concluded that neither Hannen nor predecessor landowners voluntarily conveyed to the County (without prompting, the receipt of consideration, or even notice to the County of the alleged conveyance) a public road easement traveling through their house and garage. This is true for two primary reasons. First, this Court has refused to recognize the County's theory of easement creation – a public road easement created by reference in a deed to a certificate of survey. Second, even if public road easements were recognized to be created "by reference," the County failed to establish the minimum requirements for the creation of an such an easement.

The District Court also did not abuse its discretion in awarding Hannen his attorney fees in this case where the County, after being told by an outside contractor it hired that the claimed public road easement did not exist, informed Hannen the

easement did exist and requested that he sign an easement document to "reinforce the existence" of the non-existent easement. The County then brought the underlying lawsuit requesting not only that the District Court determine the existence of a public road easement through Hannen's house, but also requesting authority to tear down his house and garage. So desperate was the County to take Hannen's private property that it falsely claimed that it should prevail in its quest to build a sidewalk because "there have been several pedestrian accidents on Piccolo Lane, including one fatality."

VI. ARGUMENT

A. THE DISTRICT COURT DID NOT ERR IN DENYING THE COUNTY'S MOTION FOR SUMMARY JUDGMENT.

Hannen asserts there were no genuine questions of material fact and summary judgment should have been granted in his favor. However, under no circumstances did the undisputed facts applied to existing law support a finding that the County was "entitled to judgment as a matter of law." Rule 56(c)(3), M.R.Civ.P. As such, the District Court's denial of the County's Motion for Summary Judgment was proper, even if Hannen disagrees with the specific grounds for the denial.[4] *Abbey/Land v. Glacier Constr. Partners*, 2019 MT 19, ¶72, 394 Mont. 135, 433 P.3d

[4] The County's Notice of Appeal does not designate the District Court's November 20, 2020, Order Denying Motions for Summary Judgment. This provides an alternate basis for the denial of this portion of the County's appeal. Rule 4(4)(a), M.R.App.P.; *Wittich Law Firm v. O'Connell*, 2013 MT 122, ¶31, 370 Mont. 103, 304 P.3d 375 (This Court "will not consider an order not designated in the notice of appeal.").

1230 ("If we reach the same conclusion as the district court, but on different grounds, we may affirm the district court's judgment.")

1. The Creation of Public Road Easements by Reference is Not Recognized.

This Court has "only recognized the creation of *privately-held* easements under [its] easement by reference cases." *Our Lady of the Rockies, Inc. v. Peterson*, 2008 MT 110, ¶61, 342 Mont. 393, 181 P.3d 631 (emphasis in original). It has "never applied the doctrine to creation of a public road." *Id*. Faced with this fatal flaw in its case, the County, relying on the *Our Lady of the Rockies* dissent, argued "[t]here is no basis to exclude the creation of public easements through an easement by reference." Doc. 20 at 5, 21-23. However, the County's position completely ignores the very logical bases supporting this Court's decision to not recognize the creation of public easements by reference.

Initially, there is a danger in enabling a grantor to circumvent statutory procedures and unilaterally create a public road, "thereby saddling the public authority with responsibility for the new public road[.]" *Our Lady of the Rockies*, ¶61. The County responds to this concern by arguing that in this case it wants the easement; therefore, there is no danger to the public authority. Appellant's Br. at 23. This turns the logic of *Our Lady of the Rockies* on its head. In effect, the County is suggesting that public road easements by reference should be allowed when they benefit the governmental entity, but disallowed when they do not. Not only would

this create inconsistent application of the law, but from a practical standpoint it would be unworkable.

Easements by reference are created the moment a deed references a survey or plat adequately describing an easement and showing a clear an unmistakable intent. *Blazer v. Wall*, 2008 MT 145, ¶¶40-43, 343 Mont. 173, 183 P.3d 84. They are not dependent on later "acceptance" by some entity. As a practical matter, such "acceptance" may not occur until decades after the subject deed was signed and recorded, if it occurs at all, leading to extended uncertainty for landowners and purchasers.

Further, just as *Our Lady of the Rockies* found with regard to the creation of public roads in 1896, the creation of public roads today are still "governed by specific provisions of law which generally require[] an official action on the part of the public authority." ¶61. Similar provisions exist to this day. *See e.g.* §§7-14-2107, 7-14-2601, 7-14-1603, MCA. Implicit in the statutes and Montana case law "is that county roads cannot be created without the county's intent, expressed through its board of commissioners, to do so." *Pedersen v. Dawson Cnty.*, 2000 MT 339, ¶20, 303 Mont. 158, 17 P.3d 393. This requirement for commissioner approval is presumably why the County included an "Acknowledgement and Acceptance of Conveyance" page for the Yellowstone County Commissioners to sign had Hannen signed the "easement document" thereby conveying a public road easement in the

first instance. As admitted by Public Works Director Miller, without these requirements being followed, a county road cannot be established. *Pedersen*, ¶22; Tr. 143:25–144:7.

Moreover, public road easements cannot logically be created by reference because the minimum requirements for the creation of an easement by reference cannot be met for public road easements. As will be discussed in more detail below, an express easement by grant or reservation (including an easement by reference) arises only upon severance of the dominant and servient estates from common (single) ownership. *Our Lady of the Rockies* at ¶54; *O'Keefe v. Mustang Ranches HOA*, 2019 MT 179, ¶17, 396 Mont. 454, 446 P.3d 509. Further, easements by reference require that the identities of the dominant and servient tenements be "ascertainable with reasonable certainty" from the transaction documents. *Davis v. Hall*, 2012 MT 125, ¶20, 365 Mont. 216, 280 P.3d 261. These two requirements simply cannot occur with regard to an in gross public road easement because there is no dominant estate for such easements.[5]

2. There is No Adequate Description or Clear and Unmistakably Communicated Intent.

Even if this Court decides for the first time to recognize the creation of a public road easement by reference, the claimed public road easement still fails. A

[5] This is not in dispute. Doc. 20 at 6 (Per the County: "As a public road, it has an in gross easement, with no dominant tenement[.]")

question central to the validity of an easement established by reference is whether the alleged easement has been "adequately described." *Davis,* ¶20. In order for an easement to be adequately described on a certificate of survey, certain requirements must be met. First, the documents of conveyance must give the owner of the property being burdened by the servitude "knowledge of its use or its necessity." *Id.* Second, the identities of the dominant and servient tenements must be "ascertainable with reasonable certainty" from the transaction documents. *Id.* Additionally, the intent to create the easement must be "clearly and unmistakably communicated on the referenced plat or certificate of survey using labeling or other express language." *Our Lady of the Rockies,* ¶57 (emphasis added). "This is the minimal requirement to the establishment of the easement." *Id*. (emphasis added). It "may not be inferred or implied from an unlabeled or inadequately described swath of land or other such depiction appearing on a plat or certificate of survey." *Id*.

None of the certificates of survey or deeds at issue "adequately describes" the purported easement. To be sure, the word "easement" does not show up in any deed, and is never used with reference to the land at issue on a certificate of survey. Nor does any document indicate whether the claimed easement is appurtenant or in gross, or the duration, scope, beneficiary, or description of the easement. Further, there is no reference to a duration, scope, or beneficiary. And, to come to the conclusion that there is a description of the boundaries of the claimed easement, one must

assume that a thing not marked as an easement is, in fact, an easement. This the law does not allow.

At no time does the County even attempt to argue that Hannen or any predecessor landowner's intent was "clearly and unmistakably communicated," or that the County is relying on anything other than inference or implication. This is not a surprise. The County admitted it could not meet these requirements: "The County admits a document does not explicitly grant the easement to the public or the County. The County denies documents do not implicitly grant the easement to the public and the County." Ex. "D" to Doc. 18 (Ans. RFA No. 14). This reliance on implication, alone, is dispositive of the entire dispute. *Our Lady of the Rockies*, ¶57 ("An easement may not be inferred or implied…") And, if there were any doubt, both Miller and Martin admitted there was no evidence of intent at trial.

Additionally, here, regarding "clear and unmistakable" intent, remember that the purported public road easement travels through Hannen's house and garage. As this Court has recognized, it is "unlikely that a prudent landowner would reserve an easement for the benefit of the public at large." *Loomis v. Luraski*, 2001 MT 223, ¶33, 306 Mont. 478, 36 P.3d 862. It is absurd to assert Hannen would reserve a public road easement through his own house and garage.

The County references the fact that Piccolo Lane is identified on two of the certificates of survey. As an initial matter, Piccolo Lane is only identified in the

1974 and 1996 certificates of survey. It is not on the 1952 COS. And, where it is labeled, it is done only to identify where the center line of Piccolo Lane sits (1974 COS) and roughly where Piccolo Lane sits without reference to the center line (1996 COS). Neither of these references pertain to the dashed line at issue, but instead simply show where Piccolo Lane rests. Further, even if these references did pertain to the dashed line, the mere labeling of something within a dashed line as a "road" or "lane" does not satisfy the "clear and unmistakable" intent requirement. *Our Lady of the Rockies*, ¶62 ("We therefore do not agree with OLR's contention that the mere depiction of a road labeled 'ROAD' . . . clearly and unmistakably communicates an intent to reserve a 'public' road.")

Additionally, the fact that a dashed line 30 feet north of Highway 87 runs east/west along the southern edge of Hannen's Property is not evidence that a 30-foot easement has been created by reference on the eastern edge of Hannen's Property. Appellant's Br. at 18. Any such "easement" pertaining to U.S. Highway 87 would have been explicitly created elsewhere, such as in an Act of Congress, and simply depicted on the certificates of survey. An easement for U.S. Highway 87 would not have been created by reference to a certificate of survey. Tr. 31:18-21. As such, the argument that the dashed line on the southern edge of Property depicts an easement, so therefore the dashed line on the eastern edge of the Property creates an easement is fatally flawed.

It is telling that the County points to no decision in which a purported easement, let alone a public road easement through a person's house, is created by reference to a certificate of survey without using the word "easement."[6] Quite the opposite; the easement decisions cited by the County in its brief show that at the very least, the property in question must be identified using the word "easement." *Bache v. Owens*, 267 Mont. 279, 282, 883 P.2d 817, 819 (1994) (area labeled "P.R.E." and "P.U.E.," defined as "private roadway easement" and "public utility easement"); *Blazer*, ¶ 3 ("30' EASEMENT ROAD"); *Broadwater Dev., LLC v. Nelson*, 2009 MT 317, ¶26, 352 Mont. 401, 219 P.3d 492 ("60' Emergency Public Access & Utility Ease."); *Halverson v. Turner*, 268 Mont. 168, 885 P.2d 1285 (1994) ("30' ROAD EASEMENT") (original decision and certificate of survey at Appx. "12"); *Kelly v. Wallace*, 1998 MT 307, ¶15, 292 Mont. 129, 972 P.2d 1117 ("subject to … sixty foot access and utility easements as depicted on the hereunto affixed plat"); *Loomis*, ¶33 ("[a] reservation of a right-of-way and easement over and across the West thirty (30) feet of the property conveyed for the purpose of establishing a public road and easement for utilities"); *Pearson v. Virginia City Ranches Ass'n*, 2000 MT 12, ¶10, 298 Mont. 52, 993 P.2d 688 ("bridle path easement"); *Walker v. Phillips*,

[6] As mentioned above, the 1974 COS does include the word "easement," but only with regard to an entirely separate "20' Road Easement." This only supports Hannen's argument. Had his father intended to create a 30-foot public road easement through his own house on the eastern edge of the property by way of the 1974 COS, he surely would have labeled the dashed line in question "30' Public Road Easement."

2018 MT 237, ¶16, 393 Mont. 46, 427 P.3d 92 ("30' Private Road & Utility Easement"); *Yorlum Properties Ltd. v. Lincoln Cty.*, 2013 MT 298, ¶5, 372 Mont. 159, 311 P.3d 748 ("30' Private Easement") (original opinion with schematic at Appx. "13").

Finally, the County cannot prevail even if there seems to be no explanation for the dashed line other than to signify a public road easement. *Tungsten Holdings, Inc. v. Parker*, 282 Mont. 387, 390, 938 P.2d 641 (1997) ("[t]he mere fact that [a lot's] long and narrow configuration gives it the appearance of a roadway or that the developers may have intended it as [a] roadway is not sufficient.") The County may point out that the word "road" was not used to describe the tract in *Tungsten*. But, as previously mentioned, this is not enough. *Our Lady of the Rockies*, ¶62.

3. There Was No Severance of the Dominant and Servient Estates from Common Ownership.

This Court has repeatedly held that an express easement by grant or reservation arises only upon severance of the dominant and servient estates from common (single) ownership. *Our Lady of the Rockies* at ¶54; *O'Keefe*, ¶17; *Yorlum*, ¶14; *Blazer*, ¶40; *Ruana v. Grigonis*, 275 Mont. 441, 913 P.2d 1247, 1253. Even assuming public road easements somehow did have dominant and servient estates, which they do not, the properties that were divided in the pertinent certificates of survey cannot arguably be the dominant and servient estates for the alleged public road easement. The 1952 COS splits the land into Tracts "A" and "B." The 1974

COS subdivides a half-acre parcel on the southwest corner of the Property. The 1996 COS merely resulted in a lot line relocation for the half-acre parcel. None of these divisions of land (to the extent the 1996 relocation could even be considered a division) can arguably be said to have divided the purported easement's dominant and servient estates from single ownership. Accordingly there is no "decisive" transaction document to establish the easement in the first case. *Blazer,* ¶ 38. Further, the 1974 COS was only referenced in one deed, the 1992 Deed of Distribution. And, the 1992 Deed of Distribution did not result in any division of property, but conveyed both tracts identified on the 1974 COS to Hannen.

The County argues that the Supreme Court's division requirement "serve[s] no purpose" and points out that neither Title 70, Chapter 17, Part 1 of the Montana Code, nor §76-3-304, MCA, "require a division of land to create an easement by reference." Appellant's Br. at 19-20. These arguments ring hollow. As this Court has noted, property must be divided for an easement to be created "because it is fundamental that one property owner cannot have an easement across his or her own land." *Ruana,* 913 P.2d at 1252. Further, the fact that the referenced statutes do not require a division of land to create an easement by reference should not come as a surprise. These statutes also do not spell out with specificity the prohibition on creation of public road easements by reference, the "clearly and unmistakably communicated" intent requirement, or the other common law requirements for the

creation of easements by reference. *O'Keefe*, ¶18 (outlining the interplay between the base statutory requirements and more particular common law requirements). Section 76-3-304 does not provide an end-run around the common law requirements for the creation of an easement by reference. *Id*.

Finally, the County, acknowledging that this Court has repeatedly set forth the division of land requirement, disavows these pronouncements on the basis that this Court "has never decided a case based on the requirement that a division of land occur[.]" Appellant's Br. at 20. That is not true. In *Ruana*, for example, the Court ruled that the claimed easement was not created "when the properties in question were split," thereby precluding one of the properties from benefiting from the easement. 913 p.2d at 1253.

4. **The County is a Stranger to the Deeds.**

An issue the County chooses to ignore in its briefing throughout this litigation is that it is a stranger to the deeds which it alleges convey an easement in its favor. An easement by reference cannot be created in favor of a stranger to the deed. *Our Lady of the Rockies*, ¶53. A court may depart from the general rule where intent can be clearly shown. *Id.* The four factors required to show such intent include 1) the express language of the deed, 2) testimony by the grantors stating their intent, 3) the fact that the grantor received less value for the property conveyed because of the existence of the easement, and 4) the sufficiency of the description of the location

of the easement and whether or not the reservation names a dominant tenement. *Kelly*, ¶49. None of these criteria can be met. Accordingly, the County is a stranger to the operative deeds and cannot claim an interest in any easement arising therefrom.

B. THE DISTRICT COURT WAS CORRECT IN GRANTING HANNEN'S MOTION FOR JUDGMENT ON PARTIAL FINDINGS.

The County failed to present evidence at trial to meet any of the requirements for the establishment of an easement by reference. Following the County's case in chief, counsel for Hannen orally moved for Rule 52(c), M.R.Civ.P., judgment on partial findings arguing in great detail that: (1) the creation of public road easements by reference is not recognized in Montana; (2) the intent to create the claimed easement was not clearly and unmistakably communicated; (3) the alleged easement was not adequately described; (4) the dominant and servient estates were not split from single ownership; and (5) the County cannot meet the criteria necessary to obtain an easement created by deeds to which it was not a party. Tr. 164:9–185:2.

The County's lackluster response was wholly deficient; only responding to the first of the above-referenced arguments, incorrectly adding that §76-3-304, MCA, somehow solely establishes the creation of the disputed easement regardless of the caselaw stating otherwise. *Id.* at 187:8–188:14. The District Court, after

having personally observed the County's entire case, ultimately agreed with Hannen. Tr. 188:25–190:13; Doc. 59.

1. The District Court's Findings of Fact are Not Clearly Erroneous.

The County argues that the District Court "erred" in finding: (1) it is unclear what the dashed line appearing on the three COSs means; (2) the KLJ survey concluded an approximately 15-foot-wide easement existed; (3) there was no evidence of intent to convey a public road easement; and (4) the alleged easement was not created with a division of land. County's Br. at 17–19. However, none of these findings are "clearly erroneous," and each should be left undisturbed.

a. It is unclear what the dashed line indicates.

The County fails to recognize that while unlabeled dashed lines on a certificate of survey sometimes depict an easement that was properly created elsewhere by clear and unambiguous language, such lines do not create easements, even if certificates of survey containing unlabeled dashed lines are later referenced in a deed. This is because, as discussed above, unlabeled dashed lines fall far short of the "adequate description" and "clear and unmistakable" intent requirements for the creation of an easement by reference. It truly is "unclear" what the dashed line in this case represents, even if it resembles how a properly created easement may later be depicted on a certificate of survey.

The County argues that Martin, Powell, and Miller each testified that "dash lines on the surveys indicated an easement for Piccolo Lane." Appellant's Br. at 17. That is not exactly true. They each testified that based on their experience reviewing certificates of survey, dashed lines oftentimes depict easements.[7] But, they agreed this is a far cry from dashed lines creating easements. For example, Martin agreed on cross examination that there is a distinction between a document that creates an easement and a document that merely depicts an easement. Tr. 30:10-14. Powell explained that when he sees dashed lines, he believes that is what an easement will look like, but he agreed that he was providing no opinion as to creation. *Id*. at 90:22–91:7. Miller agreed that typically easements denoted on certificates of survey with dashed lines are created by explicit written language elsewhere, and that he was unaware of the requirements for the creation of an easement by reference. *Id*. at 151:25–152:18. Accordingly, Martin, Powell, and Miller's statements regarding the depiction of an easement based on dashed lines has nothing to do with whether or not an easement was actually created by reference.

Moreover, it is undisputed that dashed lines on certificates of survey are used to identify things other than easements. Martin admitted as much on cross examination, pointing to the many non-easement dashed lines appearing on the County's Trial Exhibit 2, a certificate of survey for the neighboring Sunrise

[7] Their familiarity with how easements established elsewhere can be depicted on certificates of survey cannot and should not be bestowed upon Hannen.

Subdivision. *Id*. at 29:16–30:9, 46:13–47:4; Appx. "14." In other words, the use of dashed lines in a certificate of survey does not, in and of itself, indicate an easement.

Finally, the County's argues that Hannen should have simply moved the "easement" when he had the land surveyed in 1996. Appellant's Br. at 5. This was not established at trial as the County claims. *Id*. Instead, the County attempted repeatedly to get Hannen to admit as much, but was denied at every turn because, as the District Court put it, "what's missing from the foundation is whether [Hannen] knew at the time the survey was being done, anything about dotted lines." Tr. 113:14–117:7.

b. The KLJ Survey concluded an approximate 15-foot easement existed.

It is undisputed that the portion of Piccolo Lane resting on Hannen's Property (the southbound lane) occupies approximately the easternmost 15 feet of the Property. Appellant's Br. at 18; FOF 2. Miller testified that the KLJ Survey concluded that the easement on the east side of Hannen's Property covers the area of the now-existing Piccolo Lane. Tr. 156:11-24. He further agreed that the easement depicted on the KLJ Survey is not found west of Piccolo Lane. *Id*. at 156:25–157:3. Therefore, pursuant to the KJL Survey an approximately 15-foot easement exists on Hannen's Property, not a 30-foot easement. Even the most cursory review of the KLJ Survey and attendant legal description proves this to be true. Appx. "9." It is, frankly, a mystery how the County now claims that the District

Court clearly erred by repeating exactly what its own witness testified to. The Court's decision in this regard should not be disturbed.

c. There was no evidence of intent to convey a public road easement.

This topic has already been discussed above. Not only do the certificates of survey and deeds offer no evidence of a "clear and unmistakable" intent to create a public road easement through Hannen's house and garage, Martin and Miller each admitted there was no such evidence of intent. Substantial evidence supports this finding.

d. The alleged easement was not created with a division of land.

This topic has also been previously analyzed, above. There was no severance of the dominant and servient estates from common (single) ownership. *Our Lady of the Rockies* at ¶54; *O'Keefe*, ¶17; *Yorlum*, ¶14; *Blazer*, ¶40; *Ruana*, 913 p.2d at 1253. The County points to the fact that there was a division of land in the 1974 COS, but is silent on the fact that the division has nothing to do with the disputed easement. It therefore does not meet the criteria necessary for the creation of an easement by reference. Additionally, the only deed that referenced the 1974 COS, the 1992 Deed of Distribution, was not signed in conjunction with the division of land shown on the 1974 COS. Setting aside the fact that the Deed of Distribution was executed 18 years after the filing of the 1974 COS, it is patently absurd to infer that a personal

representative of an estate intended to convey an easement through his own house and garage by signing a deed, drafted by his attorney, that reference an almost two decades old certificate of survey.

2. The District Court's Conclusions of Law are Correct.

The County challenges the following conclusions of law: (1) public road easements cannot be created by reference; (2) the dashed lines are insufficient to establish a 30-foot public road easement; and (3) it is not reasonable to conclude based upon an unlabeled dashed line that Hannen intended to grant the County a public road easement through his house and garage. The District Court did not err in making any of these conclusions.

a. Public road easements cannot be created by reference.

This matter has already been analyzed, above. The District Court was correct that this Court, per *Our Lady of the Rockies*, has for good reason only recognized the creation of private road easements by reference.

b. The dashed lines are insufficient to establish a 30-foot public road easement.

This was also discussed, above. The County presented no evidence at trial to support the notion that unlabeled dashed lines provide the "adequate description" or "clear and unmistakable" intent to explicitly create an easement by reference. Indeed, the County's witnesses only testified that dashed lines can sometimes depict

easements created elsewhere. None of the witnesses testified that dashed lines on certificates of survey can create easements.

c. It is not reasonable to conclude based upon an unlabeled dashed line that Hannen intended to grant the County a public road easement through his house and garage.

The County persists with its repugnant argument that Hannen fully intended to give the County a public road easement through his house and garage, without the receipt of compensation, and without even letting the County know of the conveyance. Hannen says he most certainly did not, and there is no language, let alone "clear and unmistakable" language, suggesting otherwise. The County's response is essentially, "yes you did, and thank you very much; while we're at it we would like to tear down your house." Hannen has already covered the myriad of ways this argument fails, above, including the County's own testimony at trial that there is no evidence of intent.

D. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN AWARDING ATTORNEY FEES.

The District Court properly awarded Hannen attorney fees in the amount of $42,672.00 and costs totaling $1,111.29 pursuant to §§27-8-311 and 27-8-313, MCA. Doc. 65 at 5. The County now argues that the Court erred by utilizing §27-8-313 for the award of attorney fees, and should have utilized §25-10-711. Hannen had requested attorney fees under either statute. Doc. 61 at 10-16. Since the District

Court determined fees were appropriate under §27-8-313, it did not analyze §25-10-711. Doc. 65 at 5. Had the District Court done so, the County argues, attorney fees would not have been awarded. This argument fails for two reasons. First, the District Court properly utilized §27-8-313, MCA, and attorney fees were appropriately awarded. Second, even if §25-10-711, MCA, should have been utilized, the award was still appropriate under the circumstances of this case. Regardless of the applicable statute, Hannen seeks remand back to the District Court to determine the appropriateness of an award of fees expended on appeal.

1. The District Court Did Not Abuse its Discretion in Awarding Fees Under §27-8-313.

The County filed its Complaint for Declaratory Judgment "[p]ursuant to Sections 27-8-101 through 27-8-313 of the Montana Code Annotated." Doc. 1 at 2 (emphasis added). It never amended its Complaint. The County now brazenly argues that that the District Court erred by subjecting it to the very statute by which it sought to avail itself. Presumably, when the County brought its claim against Hannen and specifically cited §27-8-313 in its Complaint, requesting "whatever other relief [the District Court] deems appropriate," it believed it would reap the benefits of the "supplemental relief" provisions of that statute. Now, when faced with having to pay Hannen his attorney fees under the very same statute, it cries foul. The District Court did not abuse its discretion applying the very statute the County relied on in its action.

The County cites §1-2-102, MCA, as sole authority for the proposition that its voluntary submission to §27-8-313 should be disregarded and §25-10-711 should be employed instead. It cites no caselaw in support. This is because there is nothing "inconsistent" with utilizing the Act and statutes under which the County brought its claim to determine whether attorney fees are appropriate.

And, the District Court did not abuse its discretion in determining that the attorney fee requirements of §27-8-313 were met. "[C]ourts have discretion under §27-8-313, MCA, to grant further supplemental relief, including monetary or coercive relief, when 'necessary or proper' to afford complete relief under the circumstances." *VanBuskirk v. Gehlen*, 2021 MT 87, ¶28, 404 Mont. 32, 484 P.3d 924 (citing *Trs. of Ind. Univ. v. Buxbaum*, 2003 MT 97, 315 Mont. 210, 69 P.3d 663). As set forth in *City of Helena v. Svee*, 2014 MT 311, 377 Mont. 158, 339 P.3d 32, a decision in which an award of attorney fees against a governmental entity was upheld, the threshold question for an award of fees is "whether the equities support an award." ¶20. One such consideration is "whether the parties are similarly situated." *Id.* In *Svee*, the Court concluded that an individual homeowner was "clearly not similarly situated or on equal footing" as compared to a governmental entity. ¶21.

The situation here is no different. The County does not contest that it has more resources than Hannen. Appellant's Br. at 33. The District Court noted, after

watching Hannen testify, that he "is not a sophisticated or well-informed litigant capable of defending against the County's easement claim without counsel." Doc. 65 at 2; Hannen Testimony (Tr. 95:5 – 121:25). The equitable considerations set forth in *Svee* clearly satisfy this threshold question.

The next step is to apply the tangible parameters analysis. *Svee*, ¶22. The analysis is met in this case because: (1) the County claimed to possess that which Hannen possessed – namely an easement and the right to tear down Hannen's house[8]; (2) Hannen was compelled to contest the County's easement claim; and (3) by prevailing, Hannen changed the status quo created when the County claimed it possessed the easement that had existed for decades. *Id*.; Doc. 65 at 4.

Applying the required liberal construction with an eye toward providing complete relief, the District Court did not abuse its discretion in awarding Hannen his attorney fees.[9] Additionally, Hannen intends to seek his §27-8-313 attorney fees on appeal as well. *VanBuskirk*, ¶29. As such, Hannen respectfully requests this Court remand the matter back to the District Court for the limited purpose of determining the appropriateness of an award of fees on appeal.

[8] The County now conveniently takes the position that it "does not intend to tear down Hannen's house or garage." Appellant's Br. at 34. That belies its own unamended Complaint, which seeks a determination that "any structures in the easement are encroachments on to Piccolo Lane that the County may remove." Doc. 1 at 2-3.

[9] Given the egregiousness of the County's actions coupled with *Buxbaum's* liberal construction and complete relief language, Hannen suggested to the District Court that an award of treble damages would not be unreasonable. Doc. 61 at 20:13-15. That continues to be true.

2. Alternatively, Attorney Fees are Appropriate Under §25-10-711, MCA.

The County urges this Court to employ the more stringent requirements of §25-10-711, MCA. As discussed above, there is no reasonable basis to save the County from statutory provisions to which it voluntarily invoked in its Complaint. However, even if this Court were to do so, attorney fees are still warranted under §25-10-711.

In a civil action brought by or against a political subdivision of the state, the opposing party is entitled to costs and reasonable attorney fees if the party prevails against the political subdivision and the district court finds that the political subdivision's claim was frivolous or pursued in bad faith. §25-10-711(1), MCA. "A claim is frivolous or in bad faith pursuant to §25-10-711(1)(b) when it is outside the bounds of legitimate argument on a substantial issue on which there is a bona fide difference of opinion." *Ostergren v. Dep't of Revenue*, 2004 MT 30, ¶ 23, 319 Mont. 405, 85 P.3d 738.

The County's entire claim was frivolous and brought in bad faith. Initially, the County, shortly after receipt of the KLJ Survey concluding, based on the 1996 COS, that any easement across Hannen's property was not 30 feet wide and did not travel through Hannen's house or garage, wrote Hannen a letter claiming that based on the 1996 COS it possessed a 30-foot wide easement traveling through his house and garage. It attached an "easement document" to the letter, and told Hannen that

by signing the document he would not be providing the County anything it did not already have, but would simply be "reinforcing" the existence of an already-existing easement. The County threatened legal action if Hannen did not sign. Clearly, this was an attempt by the County to hoodwink an unsophisticated landowner into conveying an easement it knew did not exist. Luckily, Hannen refused to sign the document which admittedly was a conveyance document providing the County with the alleged easement through his house and garage for the first time.

Undeterred, the County brought a declaratory judgment action against Hannen claiming pedestrian accidents and a fatality on Piccolo Lane, and seeking permission to remove his house and garage from the purported easement. At the time of filing it knew, or based on minimal research reasonably should have known, that its entire theory of the case was "outside the bounds of legitimate argument on a substantial issue on which there is a bona fide difference of opinion." *Ostergren*, ¶23. Notably, the County's theory of creation of a public road based on the easement by reference doctrine is not recognized by this Court. Additionally, the County knew, or based on minimal research reasonably should have known, that unlike the document it tried to dupe Hannen into signing, none of the pertinent certificates of survey or deeds include any language of grant or conveyance, let alone the required "clear and unmistakable" language.[10] Moreover, the County was aware at the time

[10] If the County was not aware of these shortfalls when it filed its Complaint, it certainly became aware of them when Hannen filed his Motion for Summary Judgment in July 2020. Doc. 18.

it filed its Complaint that its explicit claim of pedestrian accidents and fatality on Piccolo Lane was untrue. And when pressed for evidence to support the accidents and fatality claim, the County engaged in discovery abuse, ultimately releasing non-responsive documents which showed there were no such accidents or fatality on Piccolo Lane. The only possible reason to falsely assert accidents and a fatality on Piccolo Lane was to somehow guilt, shame, or otherwise improperly induce Hannen and/or the District Court into siding with the County.

Based on the above it should come as no surprise that the County now attempts to cast blame on Hannen and the District Court for the County's own continued bad faith. Appellant's Br. at 31. First, it faults Hannen for not filing a motion to dismiss for failure to state a claim or a motion for judgment on the pleadings, asserting that such "failure" constituted a violation of Rule 3.2 of the Montana Rules of Professional Conduct. *Id.* This unfounded allegation of attorney misconduct is particularly odious because the County's Complaint does not indicate its theory of the case – that a public road easement was created "by reference." Doc. 1. Instead, soon after Hannen's counsel first learned of the County's faulty theory by way of written discovery responses dated June 9, 2020, Hannen filed his July 16, 2020, Motion for Summary Judgment. Doc. 18.

Second, the County argues that if its claim was frivolous or brought in bad faith, then the District Court violated Rule 2.5 of the Montana Code of Judicial

Conduct by not granting Hannen's Motion for Summary Judgment. Appellant's Br. at 31. This breathtaking assertion should be taken for exactly what it is, an improper challenge or threat to this Court: If you deem the County's behavior frivolous or in bad faith, then you are necessarily concluding that the Honorable Donald Harris violated the Montana Code of Judicial Conduct. That is a false choice. The District Court did not deny Hannen's motion on its merits. Instead, it simply determined that in its opinion factual disputes existed and additional information was necessary. In other words, the County's claim can be frivolous or brought in bad faith, and the District Court can deny Hannen's motion without the Court being somehow guilty of a violation of the Code of Judicial Conduct.

Third, it cannot be overlooked that on appeal the County argues that it should not be subject to the provisions of §27-8-313 despite the fact that it specifically availed itself of that statute when asking the District Court to allow it to tear down Hannen's house. This only adds to the County's bad faith.

Finally, the fact that the County's claim was "outside the bounds of legitimate argument" is perhaps most clearly demonstrated by its failure to submit any evidence whatsoever at trial, as set forth in the Court's Findings and Conclusions, to support the minimum requirements for the establishment of an easement by reference. It's not a close call; the County's claim was frivolous or made in bad faith pursuant to §25-10-711 and attorney fees and costs are alternatively warranted

under that statute. As with an award under §27-8-313, should this Court determine that fees are appropriate under §25-10-711, Hannen respectfully requests the Court remand the matter to the District Court for the consideration of an award of fees on appeal.

VII. CONCLUSION

One would think that a governmental entity such as the County would have rock-solid evidence before endeavoring to take a private citizen's property and seeking to remove his house, especially without compensation. Instead, the County relies on a theory not recognized by this Court, pointing to an unlabeled dashed line in support of its nonsensical claim. The District Court issued Hannen a resounding victory. This should not be disturbed. Hannen respectfully requests this Court deny the County's appeal in its entirety, remanding the matter back to the District Court for the limited purpose of determining the appropriateness of an award of attorney fees on appeal.

DATED this 25th day of October, 2021.

HEDGER FRIEND, PLLC

By: /s/Benjamin O. Rechtfertig
Benjamin O. Rechtfertig
Attorney for Defendant/Appellee

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e), M.R.App.P., I certify that this Answer Brief of Defendant/Appellee Kenneth Hannen is printed with proportionally spaced Times New Roman text typeface of 14 points; is double-spaced; and the word county as calculated by Microsoft Word is 9,997 (not more than 10,000 words), excluding the Table of Contents, Table of Authorities, Certificate of Service, and Certificate of Compliance.

DATED this 25th day of October, 2021.

By: /s/Benjamin O. Rechtfertig
Benjamin O. Rechtfertig

CERTIFICATE OF SERVICE

I, Benjamin O. Rechtfertig, hereby certify that I served true and accurate copies of the forgoing Answer Brief of Defendant/Appellee Kenneth Hannen on October 25, 2021, upon the following:

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Service Method: eService

DATED this 25th day of October, 2021.

By: /s/Benjamin O. Rechtfertig
Benjamin O. Rechtfertig

CERTIFICATE OF SERVICE

I, Benjamin O. Rechtfertig, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Response to Motion to the following on 10-25-2021:

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Dated: 10-25-2021