IN THE SUPREME COURT OF MONTANA
Cause No. DA 21–0402

KNUDSEN FAMILY LIMITED PARTNERSHIP,
Defendant, Counterclaimant, and Appellant,

v.

THOMAS MANN POST NO. 81 OF THE AMERICAN LEGION, DEPARTMENT OF MONTANA, a Montana public benefit corporation, and the TOWN OF CULBERTSON, a political subdivision of the State of Montana, et al.,
Plaintiffs, Counterdefendants, and Appellees.

APPELLANT'S OPENING BRIEF

On appeal from the Montana Fifteenth Judicial District Court, Roosevelt County
Cause No. DV 16–13, the Honorable David Cybulski, Presiding

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STATEMENT OF ISSUES

1. Whether the scope of the Town of Culbertson's water pipeline easement includes public access across Knudsen Family Limited Partnership property to the Legion Park Parcel.

2. Whether summary judgment in favor of Appellees was appropriate and supported by the evidence.

3. Whether the District Court erred in granting attorneys' fees without a hearing.

STATEMENT OF THE CASE

This case involves questions about the existence and scope of alleged easement rights of the Thomas Mann Post No. 81 of the American Legion, Department of Montana ("Legion") and the Town of Culbertson ("Town") across real property owned by the Knudsen Family Limited Partnership ("KFLP") in Roosevelt County. The Legion claims the existence of an access easement by implication, prescription, or public right-of-way across KFLP property. The Legion asserts its alleged easement consists of a historical route that crosses public access routes owned by the Town and Roosevelt County.

KFLP disputes the existence of the Legion's easement, asserting that no single historical route has been used to access the Legion property and access has always been by permission of the landowner of the servient estate. Additionally, KFLP

challenges the claims of the Legion and the Town that the Town's easement, which the Town and Legion claim provides partial public access to the Legion property, is for anything other than a water pipeline and access to the pipeline. KFLP disputes that the Town owns this easement in fee and that the easement allows the public ingress and egress to the Legion property.

KFLP appeals the District Court's award of summary judgment to the Legion and the Town on its Amended Verified Complaint and KFLP's Counterclaims. KFLP also appeals the District Court's award of fees and costs to the Legion. KFLP requests that this Court reverse the District Court's award of summary judgment to the Town and remand for entry of judgment in favor of KFLP that the Town's easement is limited in scope to a right of way for a water pipeline and access to the pipeline, and not public access to the Legion Park Parcel. KFLP further requests that this Court reverse summary judgment in favor of the Legion and remand to the District Court for trial on the issues of the existence, location, and scope of the Legion's alleged easement. Finally, KFLP requests that the Court reverse the award of costs and fees.

STATEMENT OF FACTS

1. The Legion and the Town initiated this lawsuit seeking to enforce alleged easement rights across KFLP property. (*See generally* Dist. Ct. Doc 3.)

2. KFLP owns the following real property in Roosevelt County, Montana:

> Township 27 North, Range 56 East, M.P.M.:
> Section 4: NW¼NW¼, Lots 1 and 3, portions of Lots 2 and 5
>
> Township 28 North, Range 56 East, M.P.M.:
> Section 33: E½SW¼, W½SE¼

(Dist. Ct. Doc. 32 at Ex. B.) Prior to KFLP's ownership, this property was owned by Wayne and Janice Knudsen, who acquired the property from Archie Lewis, who acquired it from James and Edna Swindle. (Dist. Ct. Doc. 3 at ¶¶ 9, 11.)

3. The Town possesses the following easement across KFLP property ("Town Strip"):

> A right of way only (together with the right of access thereto at all reasonable times and places) for that certain pipeline of the second party over and upon the northeast quarter of the southwest quarter or section thirty-three (33), township twenty-eight (28) north, range fifty-six (56) east, M.M., and being a strip of land twenty (20) feet wide, to-wit, ten (10) feet wide on each side of the center line of the water main pipe of the Town of Culbertson, as the same is now located and constructed, and which line is described as follows – Beginning at a point on the line between the southwest quarter of section thirty-three (33) and the southeast quarter of section thirty-three, township and range aforesaid, which said point is seventeen hundred sixty-three 9/10 (1763.9) feet north of the quarter section corner at the southeast corner of the southwest quarter of Section thirty-three (33), township twenty-eight (28) north, range fifty-six (56) east, M.M., thence north fifty-five degrees thirty one minutes (55˚-31') west, a distance of fifteen hundred sixty-one 1/10 (1561.1) feet upon the said northeast quarter of the southwest quarter of said section thirty-three (33).

(Dist. Ct. Doc. 32 at Ex. A.)

4. Although the easement instrument explicitly states that the conveyance was a right of way only for a water pipeline (*id.*), the Town seeks fee title to the Town Strip. (Dist. Ct. Doc. ¶¶ 6, 10, 36, 47–50.)

5. Additionally, the Legion asserts the right to use the Town Strip for public access to a parcel of land owned by the Legion, ("Legion Park Parcel"), described as follows:

> Commencing 330 feet South of the Northeast corner of Lot 2 (being the NW¼NE¼) of Section Four, in Township Twenty-seven North of Range Fifty-six East, P.M.M., thence West a distance of 1155 feet, thence South a distance of 1320 feet, thence East a distance of 1155 feet, thence North a distance of 1320 feet to the point of beginning.

(Dist. Ct. Doc. 3 at ¶¶ 7, 10, 34–42; Dist. Ct. Doc. 46 at Ex. A.) The Legion Park Parcel was gifted to the Legion by James and Edna Swindle in October 1944 by quitclaim deed. (*Id.* at ¶ 7; Dist. Ct. Doc. 46 at Ex. A.)

6. The Swindles did not convey an express easement to the Legion for access to the Legion Park Parcel. The Legion seeks quiet title and declaratory judgment that it owns an easement across KFLP property for public access to the Legion Park Parcel, by implication, prescription, or public right-of-way. (*See generally* Dist. Ct. Doc. 3.)

7. KFLP denies that the Legion possesses the easement it claims. (*See generally* Dist. Ct. Doc 5.) Specifically, KFLP denies that the Legion has historically used a single route to access the Legion Park Parcel and asserts that

access to the Legion Park Parcel has always been permissive. (Dist. Ct. Doc. 33 at ¶¶ 5–11; Dist. Ct. Doc. 34 at ¶¶ 5, 8–11; Dist. Ct. Doc 59 at ¶¶ 6–10.) KFLP also denies that the Town Strip provides public access to the Legion Park Parcel. (Dist. Ct. Doc. 5 at ¶¶ 10, 34–42, 47–50.)

8. On March 31, 2020, KFLP filed a Motion for Partial Summary Judgment regarding the Town's claim of fee ownership in the Town Strip, seeking a declaration that the Town's easement is a right of way for a water pipeline (with access thereto), not for public access to the Legion Park Parcel. (Dist. Ct. Docs. 31 and 32.)

9. On May 21, 2020, the Legion filed its Brief in Opposition to KFLP's Motion for Partial Summary Judgment and a Cross-Motion for Summary Judgment. (Dist. Ct. Docs. 43 and 44.) The Town filed its briefs on May 22, 2020. (Dist. Ct. Docs. 53 and 54.) The cross-motions were fully briefed on August 5, 2020.

10. On February 18, 2021, the District Court issued a three-page Order granting the Legion and the Town judgment as a matter of law on their Amended Verified Complaint and KFLP's Counterclaims. (Dist. Ct. Doc. 72.)

11. The Legion submitted a Bill of Costs and Application for Attorneys' Fees as supplemental relief pursuant to Montana's Uniform Declaratory Judgements Act. (Dist. Ct. Docs. 73, 76–78, 82–83.) KFLP filed a Motion to Tax Costs and opposed an award of fees to the Legion. (Dist. Ct. Docs. 74–75, 81, and 85.)

12. KFLP requested a hearing on the attorneys' fees issue in its briefing and again on April 20, 2021. (Dist. Ct. Doc. 81; April 20, 2021 e-mail, attached as **Appendix A**.)

13. On July 22, 2021, without holding a hearing, the District Court adopted *verbatim* the Legion's proposed order awarding fees. (Dist. Ct. Doc. 86.)

14. On August 13, 2021, the Legion filed a Motion for Entry of Final Judgment and provided a proposed order. (Dist. Ct. Doc. 87.) KFLP did not object to entry of final judgment and submitted its proposed final judgment, restating the contents of the District Court's February 18, 2021 Order on summary judgment motions. (Dist. Ct. Doc. 88.) The District Court adopted the Legion's proposed order in full, issuing a 17-page Final Judgment. (Dist. Ct. Doc. 90.)

15. Appellant timely filed its Notice of Appeal.

STANDARD OF REVIEW

The Montana Supreme Court reviews a District Court's decision granting summary judgment *de novo* and applies the same criteria as a district court. *Cook v. Hartman*, 2003 MT 251, ¶ 17, 317 Mont. 343, 77 P.3d 231 (citing *Minnie v. City of Roundup*, 257 Mont. 429, 431, 849 P.2d 212, 214 (1993)). Summary judgment is appropriate where the movant shows there are no genuine issues of material fact, and the movant is entitled to judgment as a matter of law. *Id.* (citing *Lemont Land Corp. v. Rogers*, 269 Mont. 180, 183, 887 P.2d 724, 726 (1994)). The "moving party

has the burden of showing a complete absence of any genuine issue as to all facts considered material in light of the substantive principles that entitle the moving party to judgment as a matter of law and all reasonable inferences are to be drawn in favor of the party opposing summary judgment." *Id.* (quoting *Kolar v. Bergo*, 280 Mont. 262, 266, 929 P.2d 867, 869 (1996)).

Lower court findings of fact are reviewed for clear error. *VanBuskirk v. Gehlen*, 2021 MT 87, ¶ 12, 404 Mont. 32, 484 P.3d 924 (citing *Ray v. Nansel*, 2002 MT 191, ¶ 19, 311 Mont. 135, 53 P.3d 870). Findings of fact are clearly erroneous when not supported by substantial evidence or review of the record manifests that the court misapprehended the evidence or was otherwise clearly mistaken. *Id.* (citing *Larson v. State*, 2019 MT 28, ¶ 16, 394 Mont. 167, 434 P.3d 241; *Interstate Prod. Credit Assn. of Great Falls v. DeSaye*, 250 Mont. 320, 323, 820 P.2d 1285, 1287 (1991)). Lower court conclusions and applications of law are reviewed for correctness. *Id.* (citing *In re Marriage of Bessette*, 2019 MT 35, ¶ 13, 394 Mont. 262, 434 P.3d 894; *Steer, Inc. v. Mont. Dept. of Revenue*, 245 Mont. 470, 475, 803 P.2d 601, 603 (1990)).

The question of whether an attorney fees award is necessary and proper supplemental relief is reviewed for an abuse of discretion. *Id.* at ¶ 13 (citing *Billings High Sch. Dist. No. 2 v. Billings Gazette*, 2006 MT 329, ¶¶ 23–38, 335 Mont. 94, 149 P.3d 565). An abuse of discretion occurs if a court exercises discretion based

on a clearly erroneous finding of material fact, an erroneous conclusion or application of law, or otherwise acts arbitrarily, without conscientious judgment or in excess of the bounds of reason, resulting in substantial injustice. *Id.* (citing *In re Marriage of Bessette*, ¶ 13; *Larson*, ¶ 16; *In re D.E.*, 2018 MT 196, ¶ 21, 392 Mont. 297, 423 P.3d 586; *City of Missoula v. Mountain Water Co.*, 2018 MT 139, ¶ 9, 391 Mont. 422, 419 P.3d 685).

SUMMARY OF ARGUMENT

The District Court erred in entering judgment as a matter of law in favor of the Legion and Town on their Amended Verified Complaint and KFLP's counterclaims. The District Court's three-page Order on Motions for Summary Judgment contains broad, sweeping, and contradictory conclusions of law that are based upon disputed facts. The District Court then adopted, *verbatim*, a 17-page Final Judgment drafted by the Legion's counsel that contains legal conclusions and factual findings that do not appear in the Order on Motions for Summary Judgment, and which are unsupported by the record.

Specifically, the District Court committed clear error when it expanded the scope of the Town's written easement for a water pipeline to include public ingress and egress to the Legion Park Parcel. The District Court's conclusion on this issue should be reversed and the Court should find as a matter of law that the Town holds a nonpossessory right of way for a water pipeline and access to the pipeline, as stated

on the face of the written instrument, and does not provide public access to the Legion Park Parcel.

Next, the District Court erroneously concluded that the Legion holds, simultaneously, an implied easement by existing use, an easement by necessity, and a prescriptive easement across its proposed access route. However, the Legion cannot hold both an implied easement by existing use and an easement by necessity over the same property, as the legal elements contradict one another. Similarly, the Legion cannot possess an implied easement and also a prescriptive easement, as one is permissive and the other requires a showing of adverse use. The District Court's conclusion that the Legion possesses all three types of easement was error and an improper resolution of a disputed fact. Rather, many issues of disputed material facts made summary judgment improper on the issue of whether the Legion possesses an easement, the scope of the easement, and the location of the easement. The District Court's Orders on whether the Legion possesses an easement across KFLP Property should be vacated and remanded for a trial on the merits.

Finally, the District Court erred in granting the Legion's attorneys' fees without holding a hearing. Contrary to the District Court's Order that stated no hearing was requested, KFLP twice requested a hearing on fees. Additionally, Montana law is clear that awarding attorneys' fees without an evidentiary hearing is

error. The District Court's Order awarding attorneys' fees should therefore be reversed.

ARGUMENT

I. KFLP IS ENTITLED TO JUDGMENT AS A MATTER OF LAW THAT THE TOWN STRIP IS LIMITED TO THE SCOPE GRANTED IN THE WRITTEN INSTRUMENT AND DOES NOT PROVIDE PUBLIC ACCESS TO THE LEGION PARK PARCEL.

The District Court's findings regarding the Town Strip are clearly erroneous because they exceed the specific scope of the written easement instrument. An easement is a nonpossessory interest in land – a right which one person has to use the land of another for a specific purpose or a servitude imposed as a burden upon the land. *Mattson v. Mont. Power Co.*, 2009 MT 286, ¶ 16, 352 Mont. 212, 215 P.3d 675 (citing *Blazer v. Wall*, 2008 MT 145, ¶ 24, 343 Mont. 173, 183 P.3d 84). It is a right which one person has to make limited uses of another's property for a particular purpose; it is neither a grant of title to the property nor a possessory interest. *Id.* at ¶ 51 (citing *Blazer*, ¶ 24; *Taylor v. Mont. Power Co.*, 2002 MT 247, ¶ 24, 312 Mont. 134, 58 P.3d 162; *Restatement (Third) of Property: Servitudes* § 1.2 cmt. d). An easement cannot be created except by an instrument in writing, by operation of law, or by prescription. *Id.* at ¶ 16 (citing *Blazer*, ¶ 26).

The construction of a writing granting an interest in real property is governed by the rules of contract interpretation. *Id.* at ¶ 18 (citing *Mary J. Baker Revoc. Trust v. Cenex Harvest States, Coops, Inc.*, 2007 MT 159, ¶ 18, 338 Mont. 41, 164 P.3d

851; accord *Wills Cattle Co. v. Shaw*, 2007 MT 191, P 19, 338 Mont. 351, 167 P.3d 397; Mont. Code Ann. § 70-1-513). The construction and interpretation of a contract is a question of law. *Id.* (citing *Baker Revoc. Trust*, ¶ 19). A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful. *Id.* (citing Mont. Code Ann. § 28-3-301). When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone if possible. *Id.* (citing Mont. Code Ann. § 28-3-303). The language of a contract is to govern its interpretation if the language is clear and explicit and does not involve an absurdity. *Id.* (citing Mont. Code Ann. § 28-3-401). "[T]he function of the law is to ascertain and give effect to the likely intentions and legitimate expectations of the parties who create servitudes." *Id.* at ¶ 49 (citing *Restatement (Third) of Property: Servitudes* Ch. 4 Intro. Note). "[I]t is not the proper role of the judiciary to insert modifying language into clearly written and unambiguous instruments where the parties to the instrument declined to do so." *Creveling v. Ingold*, 2006 MT 57, ¶ 12, 331 Mont. 322, 132 P.3d 531; *see also* Mont. Code Ann. § 1-4-101 ("In the construction of an instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.").

Where an easement is specific in nature, the breadth and scope of the easement are determined by the actual terms of the deed. *Id.* at ¶ 17; *Mason v. Garrison*, 2000 MT 78, ¶ 21, 299 Mont. 142, 998 P.2d 531 (citing *Bridger v. Lake*, 271 Mont. 186, 191, 896 P.2d 406, 408 (1995); *Titeca v. State of Montana*, 194 Mont. 209, 214, 634 P.2d 1156, 1159 (1981)). In other words, if the grant or reservation is specific in its terms, it is decisive of the limits of the easement. *Id.* (citing *Guthrie v. Hardy*, 2001 MT 122, ¶ 46, 305 Mont. 367, 28 P.3d 467). The extent of a servitude is determined by the terms of the grant or the nature of the enjoyment by which it was acquired. Mont. Code Ann. § 70-17-106(1). A servitude granted, either by the terms of the grant or by the nature of the enjoyment, to a local, state, or federal government body for administrative purposes does not create a right to use the servitude for any other purpose unless specifically provided for in writing in the grant. § 70-17-106(2). The holder of a written servitude may not use the servitude to grant additional rights and privileges to a successor or assignee unless the successor or assignee is specifically provided for in writing in the grant. § 70-17-106(3).

Here, the written instrument conveying the Town Strip is clear and specific: the conveyance was for "A right of way only (together with the right of access thereto at all reasonable times and places) for that certain pipeline of the second party [. . .]." (Dist. Ct. Doc. 32 at Ex. A.) The District Court's findings omit the deed

language stating the scope and purpose of the easement and include only the legal description. (Dist. Ct. Doc 90 at ¶ 6.) The District Court found:

> Taken together, the Town Strip and the County Strip constitute a publicly-owned roadway, established in part by prescriptive public use, running from the Northwest corner of the NE¼SW¼ of Section 33, Township 28 North, to the South quarter corner of said Section and also constitute, at least partially, the path of the original Access Road to the Legion Park Parcel.

(*Id.* at ¶ 27.) There is no evidence in the record to support a finding that the Town Strip constitutes a public roadway or part of a public roadway. The written instrument conveying the Town Strip is clear that the property interest conveyed is a right of way only for a water pipeline and access to the pipeline. The District Court apparently ignored this specific language contained in the express conveyance. Instead, the District Court erroneously broadened the scope of the Town's easement to include fee ownership and public access to the Legion Park Parcel. Nowhere on the face of the deed is such use stated or contemplated. Nor is the Town granted a possessory, fee interest. The deed specifically conveys "A right of way only [. . .]." The District Court's interpretation of the Town Strip deed was incorrect. Therefore, its judgment in favor of the Town on its claims to fee ownership in the Town Strip should be reversed and judgment as a matter of law should be entered in favor of KFLP that the Town Strip is a non-possessory right of way for a water pipeline and access to the pipeline, as stated on the face of the written instrument, and does not provide public access to the Legion Park Parcel.

II. THE DISTRICT COURT'S AWARD OF SUMMARY JUDGMENT TO THE LEGION WAS ERRONEOUS BECAUSE MULTIPLE ISSUES OF DISPUTED FACT EXIST AND THE COURT'S DECISION WAS NOT SUPPORTED BY THE EVIDENCE.

In evaluating a motion for summary judgment, the evidence must be viewed in the light most favorable to the non-moving party, and all reasonable inferences that might be drawn from the offered evidence should be drawn in favor of the party opposing summary judgment. *Baker Revoc. Trust*, ¶ 17 (citing *Redies v. Attorneys Liability Protection Soc.*, 2007 MT 9 ¶ 26, 335 Mont. 233, 150 P.3d 930; *Porter v. Galarneau*, 275 Mont. 174, 179, 911 P.2d 1143, 1146 (1996)). Summary judgment is an extreme remedy that should never be a substitute for a trial on the merits if a controversy exists over a material fact. *Id.* (citing *In re Dorothy W. Stevens Revoc. Trust*, 2005 MT 106, ¶ 13, 327 Mont. 39, 112 P.3d 972, *Mont. Metal Buildings, Inc. v. Shapiro*, 283 Mont. 471, 474, 942 P.2d 694, 696 (1997)).

"[I]t is inappropriate for a district court to enter 'findings of fact' when addressing a summary judgment motion. Rather, the court simply should set forth the undisputed facts relevant to the legal issues raised, as well as any disputed facts which may preclude entry of summary judgment." *Corporate Air v. Edwards Jet Center*, 2008 MT 283, ¶ 28, 345 Mont. 336, 190 P.3d 1111 (citing *Wurl v. Polson School Dist. No. 23*, 2006 MT 8, ¶ 11, 330 Mont. 282, 127 P.3d 436). This is so because, at the summary judgment stage, "the parties are not arguing over what happened or presenting conflicting evidence; they merely need to know which of

them, under the uncontested facts, is entitled to prevail under the applicable law. In such a case, the district court judge need not weigh evidence, choose one disputed fact over another, or assess credibility of the witnesses. He or she must identify the applicable law, apply it to the uncontroverted facts, and determine who wins the case." *Id.* (citing *Cole v. Valley Ice Garden, L.L.C.*, 2005 MT 115, ¶ 4, 327 Mont. 99, 113 P.3d 275). Accordingly, to the extent a District Court resolves factual issues at the summary judgment stage, it errs. *Id.*

In this case, multiple material issues of fact are present regarding the existence of the Legion's claimed easement, the scope of the easement, the location of the easement, and the nature of the use of the easement. The District Court erroneously resolved numerous fact issues in favor of the Legion. Indeed, the District Court adopted the Legion's proposed final judgment *verbatim*. Not only do multiple issues of disputed fact render summary judgment inappropriate, but also several of the District Court's findings contained in the Final Judgment are not supported by evidence and are not even discussed or addressed in its summary judgment Order. (Contrast Dist. Ct. Doc. 72 with Dist. Ct. Doc. 90.) As such, summary judgment should be reversed, and this matter should be remanded for trial.

A. THE EXISTENCE OF THE LEGION'S CLAIMED EASEMENT IS DISPUTED.

In the Order on Motions for Summary Judgment, the District Court found that the Legion possesses "an easement by necessity, implication, and prescription."

(Dist. Ct. Doc. 72 at 2.) In support of this conclusion, the District Court stated that 70 years of use confirms the existence of all three types of easement, and that while the amount of use has varied it has never ceased in its entirety. The District Court's conclusion that all three types of easement exist simultaneously is not feasible and is based upon disputed facts that were erroneously resolved in favor of the Legion.

"An easement by implication is created by operation of law at the time of severance, rather than by written instrument." *Albert G. Hoyem Trust v. Galt*, 1998 MT 300, ¶ 17, 292 Mont. 56, 968 P.2d 1135 (citing *Big Sky Hidden Village Owners Assn. v. Hidden Village, Inc.*, 276 Mont. 268, 277, 915 P.2d 845, 850 (1996)). "There are only two types of implied easements: (1) an intended easement based on a use that existed when the dominant and servient estates were severed, and (2) an easement by necessity." *Id.* An implied easement from existing use, "arises only if, prior to the time the title or tract is divided, a use exists on the 'servient part' that is reasonably necessary for the enjoyment of the 'dominant part,' and a court determines that the parties intended the use to continue after division of the property." *Id.* at ¶ 22 (citing *Graham v. Mack*, 216 Mont. 165, 174, 699 P.2d 590, 596 (1984)). "For use to give rise to an implied easement from existing use, it must be apparent and continuous at the time the tract is divided." *Id.* at ¶ 23 (citing *Graham,* 216 Mont. at 174, 699 P.2d at 596). The proponent of an implied easement from existing use is required to produce evidence that shows "manifest, obvious or

permanent use" of the purported easement. *Id*. (quoting *Ruana v. Grigonis*, 275 Mont. 441, 453, 913 P.2d 1247, 1255 (1996)). An implied easement from existing use also requires that the use "is reasonably necessary for the enjoyment of the dominant parcel." *Id.* at ¶ 25 (citing *Graham*, 216 Mont. at 174, 699 P.2d at 596.).

The second type, "easements by necessity[,] are 'considered with *extreme* caution' because they deprive the servient tenement owner of property rights 'through *mere* implication.'" *Ashby v. Maechling*, 2010 MT 80, ¶ 19, 356 Mont. 68, 229 P.23d 1210 (citing *Graham*, 216 Mont. at 174, 699 P.2d at 596) (emphasis in the original). The two essential elements of an easement by necessity "are unity of ownership and strict necessity." *Id.* "The element of strict necessity requires that there is no practical access to a public road from the landlocked parcel," and it "must exist at the time the tracts are severed from the original ownership *and* at the time the easement is exercised." *Id*. at ¶ 22 (citing *Kelly v. Burlington Northern*, 279 Mont. 238, 244, 927 P.2d 4, 7 (1996); *Watson v. Dundas*, 2006 MT 104, ¶ 32, 332 Mont. 164, 163 P.3d 973). Where another means of practical access exists, there will be no easement by necessity. *Galt*, ¶ 28. Implied easements from existing use and easements by necessity cannot exist at the same time: "The presence of an implied easement from existing use necessarily defeats the strict necessity requirement of an easement by necessity." *Id.* at ¶ 29.

Likewise, a prescriptive easement cannot exist at the same time as either of the above-described implied easements because use cannot be based upon express or implied permission of the owner. *Public Lands Access Assn. v. Boone & Crockett Club Found.*, 259 Mont. 279, 284, 856 P.2d 525, 528 (1993) (quoting *Wilson v. Chestnut*, 164 Mont. 484, 491, 525 P.2d 24, 27 (1974)). A party seeking to establish a prescriptive easement must show: (1) open, (2) notorious, (3) exclusive, (4) adverse, (5) continuous, and (6) uninterrupted use of the easement claimed for the full statutory period of five years. *Wareing v. Schreckendgust*, 280 Mont. 196, 206, 930 P.2d 37, 43 (1996) (internal citations omitted). The proponent must prove each element "by clear and convincing evidence." *Id.* at 206, 930 P.2d at 43. All elements must be proven because "one who has legal title should not be forced to give up what is rightfully his without the opportunity to know that his title is in jeopardy and that he can fight for it." *Public Lands*, 259 Mont. at 283, 856 P.2d at 527 (quoting *Downing v. Grover*, 237 Mont. 172, 175, 772 P.2d 850, 852 (1989)). "To be adverse, the use of the alleged easement must be exercised under a claim of right and not as a mere privilege or license revocable at the pleasure of the owner of the land; such claim must be known to, and acquiesced in by, the owner of the land." *Id.*, 856 P.2d at 527 (quoting *Keebler v. Harding*, 247 Mont. 518, 521, 807 P.2d 1354, 1356–1357 (1991)). "If the owner shows permissive use, no easement can be acquired since the theory of prescriptive easement is based on adverse use." *Id.*, 856 P.2d at 527

(quoting *Rathbun v. Robson*, 203 Mont. 319, 322, 662 P.2d 850, 852 (1983)). Further, use that was at one time "based upon mere neighborly accommodation or courtesy is not adverse and cannot ripen into a prescriptive easement." *Id.* at 284, 856 P.2d at 528. Simply put, where use of a way by a neighbor was by express or implied permission, the use is not adverse and does not ripen into a prescriptive right. *Id.*, 856 P.2d at 528 (citing *Wilson*, 164 Mont. at 491, 525 P.2d at 27).

The Legion advanced several alternative easement theories in its pleadings and its motion for summary judgment. The District Court ruled that the Legion possesses implied easements by existing use and necessity, as well as a prescriptive easement. (Dist. Ct. Doc. 72 at 2; Dist. Ct. Doc. 90 at ¶¶ 29–33.) However, as outlined above, all three types of easement cannot exist at the same time. For example, an implied easement requires a showing that the parties intended a specific use to continue after division of the parcels. *Galt*, ¶¶ 22–25. Thus, the use must be permissive. This is in direct opposition to the elements required to show the existence of a prescriptive easement, which requires adverse use. *Public Lands*, 259 Mont. at 283, 856 P.2d at 527 (citations omitted). Further, the holder of an implied easement cannot hold both types of implied easement at the same time. *Galt*, ¶ 29. Therefore, as a matter of law, the District Court's holding that the Legion possesses all three types of easement across KFLP property is clearly erroneous.

Not only can the Legion not simultaneously hold all three types of easement, but the facts upon which the Legion relies to support one type of easement defeat the existence of another type of easement. For example, the Legion states that its proposed access road also served as the Swindles' driveway. (Dist. Ct. Doc. 44 at ¶ 14; Dist. Ct. Doc 90 at ¶ 10.) This fact supports permissive use, thereby defeating the Legion's argument of a prescriptive easement. The Legion asserts the Swindles intended the proposed access route to serve as public access to the Legion Park Parcel, relying on statements in newspaper articles. What the Swindles intended is disputed, and a newspaper article does not establish their intent. The article does not contain direct quotes from the Swindles – it is merely the opinion of the author. (Dist. Ct. Doc. 44 at ¶ 4; Dist. Ct. Doc. 45 at ¶ 7.) Such evidence is inadmissible hearsay and is not probative of the Swindles' intent in conveying the parcel or their intent related to access to the parcel. *See* Mont. R. Evid. 801, 802. Thus, the conclusion that the Swindles intended the proposed access route to be an ongoing, implied easement, is unsupported. The Legion provided no admissible evidence that the Swindles and the Legion intended the claimed access road to serve as access to the parcel or to continue after division – an element required to show an implied easement from existing use. *Galt*, ¶¶ 22–25. However, the District Court found in the Final Judgment that the "nature of the gift" by the Swindles was sufficient to meet the intent element. (Dist. Ct. Doc. 90 at ¶ 29.)

Finally, the Legion failed to establish the elements of a prescriptive easement by clear and convincing evidence. There is no discussion in the Final Judgment that the Legion's use was open, notorious, and adverse to the servient tenement. (Dist. Ct. Doc. 90 at ¶¶ 31–33.) Instead, the Legion's factual allegations, and the District Court's conclusions, that the Swindles intended an easement to exist, or otherwise permitted the use, necessarily defeat a prescriptive easement. The District Court's findings that implied easement by existing use, implied easement by necessity, and prescriptive easement exist simultaneously was error and an improper resolution of disputed facts in favor of the Legion. The Court's Judgment should therefore be reversed and this matter remanded for trial.

B. WHETHER THE LEGION HAS HISTORICALLY USED A SINGLE ACCESS ROUTE – AND THE LOCATION, SCOPE, AND NATURE OF THE USE OF THE ROUTE – IS DISPUTED.

Even if the Legion could be said to have an easement (which KFLP disputes as discussed above), the location, scope, and nature of the use of such an easement are likewise disputed. Many genuine issues of material fact exist which made summary judgment in appropriate in this case. The route and map described in the Court's Final Judgment do not appear and are not discussed in the Court's Order on Summary Judgment, and the Court made no findings regarding the route in that Order. (Contrast Dist. Ct. Doc. 90 at ¶ 9 with Dist. Ct. Doc. 72.) Additionally, there is no evidence in the record to support the conclusion that the Legion possesses a

30' easement, and this also is not discussed in the Court's summary judgment Order. (Contrast Dist. Ct. Doc. 90, ¶ 12 with Dist. Ct. Doc. 72.) It is unclear how the District Court reached this conclusion. The District Court's conclusion that the route discussed in the Final Judgment is the same access road used at the time of conveyance is also not addressed in the summary judgment Order and is a disputed fact. (Contrast Dist. Ct. Doc. 90 at ¶ 11 with Dist. Ct. Doc. 72; *see also* Dist. Ct. Doc. 58 at ¶¶ 3–9.)

KFLP disputes that a single access route has always been used by the Legion. In fact, KFLP has moved the route without any objection or legal challenge from the Legion. (Dist. Ct. Doc. 59 at ¶ 9.) Further, KFLP has discovered evidence of other routes used to access the Legion Park Parcel, including signs with arrows pointing to the park that had fallen down and were not located on the route proposed by the Legion. (*Id.* at ¶ 10.) The newspaper articles relied upon by the Legion purporting to support the "historical" access route do not discuss the route used to access the Legion Park Parcel. (Dist. Ct. Doc. 58 at ¶¶ 2–3.) In fact, one article suggests that the Legion had to request permission to access the Legion Park Parcel over the proposed route, supporting a conclusion that the Legion did not and does not possess an easement and has relied on permissive use. (*Id.*) Similarly, the characterization that the parties recognized historical use of the Legion's proposed access route in a 1994 discussion is disputed. (Dist. Ct. Doc. 90 at ¶ 21.) Rather, the 1994 agreement

supports the conclusion that there was not one route and that the route changed multiple times over the years at the servient landowners' request. (Contrast Dist. Ct. Doc. 90 at ¶ 21 with Dist. Ct. Doc. 58 at Ex. C.)

Indeed, the Legion admits that the access route has changed over time. The route changed at least once during Archie Lewis's ownership. KFLP also changed the route by erecting a farming pivot and redirecting access due to issues with members of the public taking and using KFLP farming equipment without permission. (Dist. Ct. Doc. 32, Ex. D at ¶¶ 8–11.) As discussed above, evidence of other access routes has been discovered on KFLP property. (Dist. Ct. Doc. 58, Ex. C.) Nonetheless, the Court concluded that the deed conveying the KFLP property from Archie Lewis to Wayne and Janice Knudsen was "subject to the Access Road" even though nothing in the deed mentions or describes the access road – there is simply no evidence to support this conclusion. (*See* Dist. Ct. Doc. 90 at ¶ 19.)

Moreover, KFLP contends that use of the access route was always permissive, which the Legion disputes. Contrary to the District Court's characterization that use of the Legion Park Parcel has been continuous, the Legion rarely uses the park and the facilities have fallen into disrepair. There is conflicting evidence about who was allowed to use the access route when and under what circumstances. KFLP introduced evidence that the public and Legion invitees, such as the Boy Scouts, were allowed to use the access route only with permission from Archie Lewis, the

successor in interest to the Swindles. (Dist. Ct. Doc. 58, Ex. B.) Wayne and Janice Knudsen similarly did not allow the public or the Legion to access the Park through the property without their express permission. (*Id.* at Ex. C.) When KFLP took title, members of the public were required to obtain Miles Knudsen's permission for access. (*Id.*) In sum, the existence, location, scope, and nature of the use of the Legion's claimed easement are all disputed. Summary judgment for the Legion was therefore improper.

III. ENTRY OF JUDGMENT ON ATTORNEYS' FEES WAS IN ERROR BECAUSE A HEARING WAS REQUESTED AND NEVER HELD.

Finally, the District Court erred in awarding attorneys' fees to the Legion without holding a hearing. The Montana Supreme Court has consistently held that it is improper to award attorney fees based solely on the affidavit of counsel without holding an evidentiary hearing on the matter. *Rossi v. Pawiroredjo*, 2004 MT 39, ¶ 29, 320 Mont. 63, 85 P.3d 776 (citing *Stark v. Borner*, 234 Mont. 254, 258, 762 P.2d 857, 860 (1988)). "[A]n award of fees, like any other award, must be based on competent evidence. [. . .] Furthermore, the proper determination of a legal fee is central to the efficient administration of justice and the maintenance of public confidence in the bench and bar." *Id.* (citing *First Sec. Bank v. Tholkes*, 169 Mont. 422, 429, 547 P.2d 1328, 1332 (1976) (citation omitted)). Without consideration of evidence introduced in the District Court at an evidentiary hearing to demonstrate the proper amount of attorney fees, an award of attorney fees is improper. *Id.*

Here, KFLP twice requested a hearing, both on the issue of whether a fees award was appropriate in this case and on the reasonableness of fees. (Dist. Ct. Doc. 81; App. A.) However, the District Court's July 22, 2021 Order awarding fees (which was drafted by the Legion's counsel) erroneously stated that no party requested a hearing. (Dist. Ct. Doc. 86 at ¶ 8.) Because Montana law is clear that an attorneys' fees award cannot be made without an evidentiary hearing, the Court's failure to hold such a hearing before awarding fees was clear error. Additionally, because summary judgment in favor of the Town and Legion was also error (as discussed at length above), the attorneys' fees award should be vacated pending a trial on the merits.

CONCLUSION

The District Court erroneously expanded the scope of a written easement, improperly resolved disputed material facts in favor of the Legion, and ignored KFLP's request for a hearing on attorneys' fees. KFLP requests that this Court reverse the District Court's award of summary judgment to the Town and remand for entry of judgment in favor of KFLP that the Town's easement is limited in scope to a right of way for a water pipeline and access to the pipeline, and not public access to the Legion Park Parcel. KFLP further requests that this Court reverse summary judgment in favor of the Legion and remand to the District Court for trial on the

issues of the existence, location, and scope of the Legion's alleged easement. Finally, KFLP requests that the Court reverse the award of costs and fees.

Respectfully submitted this 17th day of November, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Mont. R. App. P. 11(4)(e), I certify that this Brief is printed with proportionately spaced size 14 Times New Roman font, is double-spaced, and contains 6,627 words, excluding the cover page, table of contents, table of authorities, certificate of service, and certificate of compliance, as calculated by Microsoft Word.

Dated this 17th day of November, 2021.

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APPENDIX

CERTIFICATE OF SERVICE

I, Emily Jones, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 11-17-2021:

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