

IN THE SUPREME COURT OF THE STATE OF MONTANA
Cause No. DA 22-0279

CREMER RODEO LAND AND LIVESTOCK COMPANY,
Plaintiff and Appellee,

v.

LINDA MCMULLEN,
Defendant and Appellant.

APPELLANT'S OPENING BRIEF

On Appeal from the Montana Sixth Judicial District Court, Sweet Grass County,
Cause No. DV 2016-23, The Honorable Brenda Gilbert, Presiding

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STATEMENT OF ISSUES

In 1991, Sweet Grass County abandoned an old county road called the “Lien Road” that runs through Linda McMullen’s and Cremer Rodeo Land and Livestock Company’s ranches. Cremer Rodeo and the Lien family (Linda’s predecessor) agreed, beforehand, to allow each other to continue using the road for ranch purposes. That arrangement remained in place until 2013 when Linda revoked permission after Cremer Rodeo shot the locks off her gates.

In 2016, Cremer Rodeo sued Linda. It claimed prescriptive rights over the Lien Road. At the May 2021 trial, every Cremer Rodeo shareholder testified that Cremer Rodeo’s use of the Lien Road following the abandonment was based on the 1991 agreement with the Liens. The district court disregarded those admissions and granted Cremer Rodeo a prescriptive easement over the Lien Road.

Trial was originally set for May 2020. The district court vacated that trial on the first day to allow Cremer Rodeo to amend its complaint to add a second prescriptive easement claim over the “Medley Road.” The Medley Road is a separate road that connects with the Lien Road on Linda’s property.

The district court allowed the amendment—and concluded it related back to the original filing by Cremer Rodeo—even though Cremer Rodeo did not justify why its motion was untimely, despite demonstrable prejudice to Linda, and despite

a new claim over a new road with a different history of use. The district court granted Cremer Rodeo a prescriptive easement over the Medley Road as well.

The issues are:

1. Whether the district court erred in granting Cremer Rodeo prescriptive easements over the Lien and Medley Roads.
2. Whether the district court abused its discretion when it granted Cremer Rodeo leave to amend.
3. Whether the district court erred when it determined the amended complaint related back to the original filing.
4. Whether the district court erred in denying Linda's motion for summary judgment regarding the Lien Road.

STATEMENT OF THE CASE

I. Nature of the Case.

This is a prescriptive easement case. Cremer Rodeo's amended complaint sought prescriptive easements over the Lien and Medley Roads as they cross Linda's property. Dkt. 91.

II. Procedural Background.

Cremer Rodeo filed its complaint in November 2016. Dkt. 1. It sought a

prescriptive easement over only the Lien Road. *Id.*; App. 4, p. 2.¹ In 2018, Linda sought summary judgment that Cremer Rodeo's claim failed because it was based on permissive use. Dkt. 40–42. The district court denied the motion. App. 5.

Trial was originally set for May 2020. Dkt. 73. The day the trial was set to begin, the district court vacated that trial and allowed Cremer Rodeo to amend its complaint to add a new prescriptive easement claim over the Medley Road, concluding it related back to the original filing. App. 3.

A three-day bench trial was held in May 2021 on both the Lien and Medley Road claims. The district court entered findings of fact and conclusions of law and a final judgment granting Cremer Rodeo prescriptive easements over both roads. App. 1; App. 2. Linda appeals.

STATEMENT OF FACTS

I. The location and history of the Lien and Medley Roads.

The portions of the Lien and Medley Roads at issue are located on property owned by Linda that she calls the “Lien pasture.”² Linda began leasing the Lien pasture in 1990 from the Lien family. Trial Tr. 262:16–22, 264:15–21. In 2000, she

¹ Cremer Rodeo also brought a quiet title claim, but it was dismissed. Dkt. 35; Dkt. 95.

² The property is described as Sections 3 and 10, Township 3 North, Range 16 East.

purchased it from them. Trial Ex. D, E.

Trial Ex. T, depicted below, shows a general approximation of the Lien and Medley Roads through Linda's property (called "Alfred Lien" on the map).



The Lien Road continues to the north and south on Cremer Rodeo land. The Medley Road runs to the west onto Cremer Rodeo land to what Cremer Rodeo calls the "Medley pasture."

The Lien Road was a county road from 1927 to 1991. Dkt. 111, p. 2. In August 1991, Sweet Grass County abandoned it. *Id.* The Medley Road was never a county road. App. 1, ¶ 9.

II. Cremer Rodeo and the Lien family agreed to allow each other to continue using the Lien Road following its abandonment.

Elaine Allestad was a Sweet Grass County Commissioner in 1991. Trial Tr. 463:2–16. She voted to abandon the Lien Road because she understood from the area ranchers, including the Cremer and Lien families, they agreed to allow each other to continue using the road after abandonment. *Id.*, 464:1–465:7, 476:18–477:1, 482:19–484:2.

All of Cremer Rodeo’s shareholders³ testified the Cremers, the Liens and the Tollefsons (another neighboring rancher) agreed in 1991 to allow each other to continue using the Lien Road after it was abandoned. Trial Tr. 22:11–13, 64:21–65:7, 499:13–22 (Ronda’s testimony); *id.*, 98:2–4 (George’s testimony); *id.*, 124:21–125:3, 130:24–131:13 (Matt’s testimony); *id.*, 204:19–22 (Rod’s testimony).

In fact, Jake Johnston and Leo Cremer testified it was “Cremer family knowledge” that the Cremers, the Liens and the Tollefsons agreed to allow each other to use the Lien Road after it was abandoned. *Id.*, 172:25–173:10; *id.*, 233:3–8. No witness testified otherwise.

III. The neighbors in the area also customarily allowed the use each other’s roads.

³ The shareholders include: George Cremer (the family patriarch), Ronda Johnston, Matt Cremer and Leo Cremer (George’s children), and Jake Johnston (Ronda’s son). Rod Johnston (Ronda’s husband) is not a shareholder.

The agreement following the abandonment of the Lien Road was a continuation of the neighborly custom in the area. George testified neighbors were customarily allowed to use each other's roads. Trial Tr. 93:20–94:6, 97:17–20. George testified he used the Lien and Medley Roads because his neighbors “let [him] go down those roads,” *id.*, 98:10–16, and that “[a]ll them homesteads out there used that road.” *Id.*, 82:21–23.

Matt testified there was no change to his ability to use the Lien Road after the abandonment because there was “pretty much a general consensus to all the neighbors that we weren't trying to keep the neighbors out[.]” *Id.*, 113:8–14, 124:21–24. Ronda agreed. *Id.*, 68:11–14.

That custom extended to Linda (and the Liens before her). Matt testified Linda (and the Liens) were allowed to use Cremer Rodeo's roads, *id.*, 125:4–14, and Linda testified Cremer Rodeo could use hers. *Id.*, 331:4–14; *see also id.*, 287:17–20. Linda shared her gate combination with Cremer Rodeo. Cremer Rodeo shared theirs with others too. *Id.*, 127:7–128:23. That was, as both Linda and Matt testified, the “neighborly thing to do.” *Id.*, 127:7–128:12, *id.*, 331:4–14.

IV. The Lien and Medley Roads were not regularly used.

Linda knows the Lien pasture well. She ranched it for over 30 years. Trial Tr. 262:16–22. She works there often, and she and her ranch hands are there every

day for weeks on end in the spring. *Id.* 263:5–14. Linda never personally witnessed a Cremer on the Lien or Medley Roads. *Id.*, 285:4–6.

Jason Smith (Linda’s son) spent most of his life on the ranch. *Id.*, 401:24–25. He was homeschooled there and always worked on the ranch. *Id.*, 281:7–10, 401:24–402:12. Jason also knows the Lien pasture well. *Id.*, 405:2–9. He and Linda keep stock there nearly year-round. *Id.*, 406:7–14. Jason has only seen a Cremer Rodeo employee on the Lien Road twice. *Id.*, at 408:23–409:10, 411:6–15.

Linda testified that in 1990, when the Lien Road was still a county road, it was an obvious two-track. *Id.*, 273:18–24. The Medley Road, however, was “hardly noticeable” then. *Id.*, 274:9–11. After the 1991 abandonment, the Lien Road was used “very little,” and Linda only occasionally saw evidence of tracks, which allowed the grass to start growing back. *Id.*, 279:5–18.

In 2005, Linda removed the cattleguard on the south end of the Lien Road and installed a steel gate with a combination padlock (which she shared with Matt). *Id.*, 279:19–280:16, 281:20–282:14. Afterwards, she saw evidence of only occasional use of the Lien Road. She saw no evidence of use on the Medley Road. *Id.*, 282:24–283:11.

Linda testified the Lien Road is now “all grassed in.” *Id.*, 299:21–24. The Medley is also “full of grass,” and it would be obvious if someone had driven on it.

Id., 305:4–306:2. Jason likewise testified the northern and southern sections of the Lien Road are mostly “overtaken by grass.” *Id.*, 406:15–407:21, 408:13–18.

Linda witnessed no evidence that any person has maintained the Lien or Medley Roads since 1990. *Id.*, at 307:7–14. Jason has never seen evidence of road work on the Medley Road prior to 2013. *Id.* 422:14–21, 424:5–12.

Linda also presented testimony from current and former ranch hands spanning from the late 1990s to present. They testified they were in the Lien pasture regularly and never saw a Cremer Rodeo employee or family member on the Lien or Medley Roads.⁴ Marlin Rhoades, who worked for Linda between 2004 and 2006, did not know there was a road running west from the Lien Road toward Cremer Rodeo property (where the Medley Road should be). *Id.*, 368:18–25. Nate Arno testified “it never registered” to him the Medley Road area on Linda’s land

⁴ See Trial Tr. 455:8–25, 458:7–10, 461:5–10 (Jim Price’s testimony); *id.*, 348:21–349:6, 3502–14, 353:21–24, 354:8–16 (Bob Green’s testimony); *id.*, 361:17–25, 363:7–22, 365:3–14, 367:16–368:7 (Marlin Rhoades’s testimony); *id.*, 373:9–15, 377:16–25, 380:2–9, 381:7–382:14, 387:2–19 (Pat Connolly’s testimony); *id.*, 427:24–428:9, 429:23–430:19, 431:10–17, 449:13–16, 436:1–21, 437:1–20, 436:22–25, 438:17–24, 437:21–438:1 (Nate Arno’s testimony).

was even a roadway until he had hayed across it in 2011. *Id.*, at 435:14–20.⁵

Pat Connolly worked for Linda off and on for almost 20 years. *Id.*, 373:9–15. Pat never saw a Cremer family member or employee on the Lien Road on Linda’s property while he worked for Linda. *Id.*, 381:7–382:14.

Pat also worked for Cremer Rodeo from 2001 to 2005. *Id.*, 374:5–25. Pat testified he used the Lien Road on Linda’s property “[v]ery seldom” while he worked for Cremer Rodeo. *Id.*, 382:15–19. Pat testified the Lien Road on Linda’s land was not used “regularly” by Cremer Rodeo employees because they used other roads to access the Medley pasture. *Id.*, 384:23–387:1. Pat was the only former Cremer Rodeo employee to testify at trial.

Cremer Rodeo’s shareholders also each testified. They testified Cremer Rodeo regularly used the Lien and Medley Roads for ranch purposes without

⁵ Nate works for the Montana Department of Natural Resources and Conservation implementing forest restoration projects. *Id.*, 427:12–23. He often works with road packages and easements and knows the difference between well-used roads and roads only used occasionally. *Id.*, 437:7–20. Nate testified, based on his professional experience, the Lien and Medley Roads were not well-used. *Id.*, 438:1–16.

Linda's (or her predecessor's) permission.⁶ Indeed, Jake and Rod testified they used the Lien and Medley Roads on Linda's property every other day, hundreds of times a year, for over twenty years. Trial Tr. 174:4-22; *id.*, 209:8-11.

On cross examination, however, they conceded their use was not that frequent. For example, Ronda conceded her use was only occasional, *id.*, 70:13-20, 70:21-71:8, and admitted she "normally" uses a two-track road on Cremer Rodeo property. *Id.*, 50:22-51:8. Matt acknowledged his cowboys knew of other routes off Linda's land and admitted he did not know which route they regularly used. *Id.*, 120:25-121:18, 135:4-136:6. Matt also explained Cremer Rodeo's branding operation in the Medley is only two days each year. *Id.*, 121:21-122:3.

Jake admitted he did not use the Lien Road every time he went to the Medley and only used the Medley Road on occasion. *Id.*, 170:11-15, 164:4-15. Rod conceded (through impeachment) he did not use the Medley Road for caking cows. *Id.*, 200:1-201:14. He further conceded his road maintenance was "very

⁶ See, e.g., Trial Tr. 41:9-42:8, 47:13-24, 53:20-55:3 (Ronda's testimony); *id.*, 79:1-21; 81:3-13, 82:9-83:5, 84:12-85:6, 87:11-14 (George's testimony); *id.*, 109:19-110:2, 107:14-24, 112:12-18, 118:2-16, 105:22-107:5, 146:11-17 (Matt's testimony); *id.*, 174:4-22, 168:22-24, 153:23-154:6, 158:3-10 (Jake's testimony); *id.*, 184:9-10, 185:7-11, 185:12-19, 186:4-15, 187:24-188:6, 189:12-190:13, 191:9-192:6, 213:17-21, 209:8-11 (Rod's testimony); *id.*, 222:18-223:2, 224:5-10, 229:20-230:18 (Leo's testimony).

occasional.” *Id.*, 215:17–19.⁷ Leo clarified that since 1989 he had, in fact, only used the roads a couple of times. *Id.*, 224:5–10, 232:16–23, 233:25–234:17.

The photographic evidence presented at trial also squarely contradicted Cremer Rodeo’s testimony that the Lien and Medley Roads were used hundreds of times a year.

The photographs below depict the condition of the Lien Road at the northern boundary of Linda’s property. The photo on the left (Trial Ex. C, p. 30) shows the condition of the road in 1991 at the time of the abandonment. The photo on the right (Trial Ex. N-4) shows that same location just before the lawsuit was filed in 2016.



Ronda testified the 1991 photo shows a well-defined, used road. Trial Tr.

⁷ Matt and George offered the only other testimony about road maintenance, which was, at best, only random. Trial Tr. 106:12–107:7, *id.*, 81:3–9.

71:9–13. She agreed, however, the 2016 photo does not show a road that was used every other day for over twenty years. *Id.*, 71:14–25.

Jake similarly agreed on cross examination the Lien Road was not well-used, had grown in, and did not look like it had been used over 200 times a year, as previously claimed. *Id.*, 175:7–177:9.

Jake also agreed a 2016 photograph of the Medley Road (Trial Ex. P, shown below, looking east into Linda’s property), only shows the “remnants” of a road and does not depict a well-used road. *Id.*, 177:12–178:4.



Leo likewise admitted, after looking at both Trial Ex. C, p. 30 and Trial Ex. N-4, that the prairie essentially reclaimed the Lien Road. *Id.*, 235:8–236:22. Leo agreed the 2016 photo did not show a road that had been used every other day for

over twenty years. *Id.*, 236:23–237:1. Leo had a hard time recognizing the Lien Road because, as he admitted, he had not used that road for over 20 years. *Id.*, 237:2–18.

Linda testified a 2014 photograph at the north end of the Lien Road (Trial Ex. N-2, p.3, shown below) shows the grass laid down and depicts the condition of the grass when someone drives on the Lien Road. Trial Tr. 314:12–19.



Linda testified at length about the photographs shown in Trial Exhibits N-1, N-2, N-3, N-4 and P and explained they all show the Lien and Medley Roads simply were not used with any regularity. *See generally* Trial Tr. 314:23–330:5.

V. Cremer Rodeo did not assert a claim of right over the Lien or Medley Roads until 2014.

Linda did not know of any claim or disputes regarding the Lien or Medley Roads, nor were any disclosed to her, when she purchased the Lien pasture in 2000. Trial Tr. 266:5–267:17; Trial Ex. D, E.

The neighborly use arrangement entered in 1991 between the landowners remained unchanged until 2013. In 2013, Linda found the lock shot off the gate at the Lien Road’s southern entrance. *Id.*, 286:17–23, 308:9–21. Linda testified the tracks were “obvious” and went up the road to the northern gate (to Cremer Rodeo’s property). *Id.*, 287:1–18. Linda replaced the lock. She had no idea who had shot the lock. *Id.*, 288:4–20.

Two months later, she found the lock shot off again. The tracks again went north. There were no tracks to the Medley. *Id.*, 288:21–298:23. After both instances, Linda filed a report with the sheriff. Trial Ex. G. She also informed Matt Cremer. Trial Tr. 289:24–290:21.

In August 2013, Linda again had her lock shot off. The tracks again went north and south and not west to the Medley pasture. *Id.*, 291:3–19. Linda again called Matt and told him she was revoking “everyone’s permission” to use the road. Matt said that was “absolutely fine.” *Id.*, 293:2–13, 294:14–18. Matt said nothing about Cremer Rodeo having a “right” to use either road. *Id.* 293:14–16.

After that third incident, Linda removed the cattle guards where the Medley

Road enters her land and at the northern end of the Lien Road. *Id.*, 293:22–294:9. She also replaced the combination locks with key locks. *Id.* At the southern entry, Linda removed the gate and fenced across the road. *Id.*, 294:10–13.

In 2014, Linda found her fence torn out and replaced with a makeshift gate. The locks were also shot off the gates at the west and northern entrances. *Id.*, 294:22–295:6. She again called Matt. This time, however, Matt admitted he tore down Linda’s fence. *Id.*, 295:7–24. Matt then told Linda he thought Cremer Rodeo had a right to use the Lien Road. *Id.* That was the first Linda had ever heard, since 1990, that Cremer Rodeo claimed it had a right to cross her property. *Id.*, 295:25–296:3.

The following year, in 2015, Linda again found her fence torn down and a makeshift gate installed. *Id.*, 296:16–297:4. Linda again called Matt. Matt said he removed the fence because needed to get his branding corral to the Medley. *Id.*, 297:5–24.

Later that year, Linda and Jason met with Matt, Ronda and Jake. Matt said they wanted an agricultural easement to get their branding corrals to the Medley pasture once a year in the spring. *Id.*, 297:25–299:13. Linda declined but offered use of a different road on her property that was well-used. She did not want them to use the Lien and Medley Roads because they were grassed in, and she wanted to keep

them that way. *Id.*, 299:17–301:23.

Matt never responded to her offer. He instead threatened to have the County re-open the Lien Road as a public road. *Id.*, 302:6–18. After that meeting, Linda dug trenches across all the accesses on the Lien and Medley Roads on her property. *Id.*, 302:19–303:10.

Ronda testified Cremer Rodeo had never, prior to filing this lawsuit, told Linda it thought it had any right over the Lien or Medley Roads. Trial Tr. 68:24–69:16. She testified Cremer Rodeo did not want to “provoke” her. *Id.* Matt testified the first time he said anything to Linda was in 2014, a year after Linda revoked permission to use the Lien Road. *Id.*, 130:24–131:13, 295:25–296:3.

At trial, Rod finally confessed to shooting the lock off Linda’s gate in 2013. *Id.*, 212:2–213:12. That was the first time Linda learned a Cremer had shot her locks off and started this dispute. *Id.*, 332:5–21.

STANDARD OF REVIEW

A district court’s factual findings are reviewed under the “clearly erroneous” standard. *Pedersen v. Ziehl*, 2013 MT 306, ¶ 10, 372 Mont. 223, 311 P.3d 765. A district court’s findings are clearly erroneous if:

they are not supported by substantial evidence, if the district court has misapprehended the effect of the evidence, or if a review of the record leaves the Court with the definite and firm conviction that a mistake has been

committed.

Id. The evidence is viewed in a light most favorable to the prevailing party. *Id.* A district court's conclusions of law are reviewed to determine whether those conclusions are correct. *Id.*

The grant or denial of leave to amend is reviewed for an abuse of discretion. *Loomis v. Luraski*, 2001 MT 223, ¶ 41, 306 Mont. 478, 36 P.3d 862. "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." *Kershaw v. Mont. Dept. of Transp.*, 2011 MT 170, ¶ 11, 361 Mont. 215, 257 P.3d 358. Whether an amendment relates back is a legal question that is reviewed de novo. *Citizens Awareness Network v. Montana Bd. of Env't Rev.*, 2010 MT 10, ¶ 13, 355 Mont. 60, 227 P.3d 583.

A district court's ruling on a motion for summary judgment is reviewed de novo, using the same Rule 56(c) criteria used by the district court. *Pub. Lands Access Ass'n v. Bd. of County Com'rs of Madison County*, 2014 MT 10, ¶ 15, 373 Mont. 277, 321 P.3d 38.

SUMMARY OF ARGUMENT

ARGUMENT I: The district court's findings that Cremer Rodeo's use of the Lien and Medley Roads was not permissive and that it established the adversity

and open and notorious elements were clearly erroneous.

Cremer Rodeo admitted its use of the Lien Road began as permissive pursuant to an agreement with Linda's predecessor. Cremer Rodeo also admitted its use of both the Lien and Medley Roads was pursuant to neighborly custom. That permission remained in place, and Cremer Rodeo's use did not change, until 2013. Moreover, Cremer Rodeo presented no evidence, other than mere use, asserting a claim of right until 2014—just two years before it initiated this action.

Cremer Rodeo accordingly did not meet its burden of proof to establish a prescriptive easement over either road. The district court incorrectly determined otherwise.

ARGUMENT II: The district court abused its discretion when it granted Cremer Rodeo's untimely amendment allowing Cremer Rodeo to bring a claim over the Medley Road a year after the Lien Road was to be tried. It did not apply this Court's standards regarding untimely motions to amend. Namely, it disregarded Cremer Rodeo's failure to justify its late amendment and the demonstrable prejudice to Linda in delaying trial to defend the new claim.

ARGUMENT III: The district court incorrectly determined Cremer Rodeo's amendment related back. The amendment was not based on the "same operative facts" as the original complaint. The amendment involved a different

road with a different history of use.

ARGUMENT IV: The district court incorrectly denied Linda’s motion for summary judgment regarding the Lien Road. Linda established—based on Cremer Rodeo’s admissions—Cremer Rodeo’s use began in 1991 as permissive and continued as permissive until 2014—just two years before it brought this case. Cremer Rodeo did not raise genuine issues disputing its use was permissive. The district court incorrectly concluded disputed facts remained for trial.

ARGUMENT

I. The district court’s decision granting Cremer Rodeo prescriptive easements over the Lien and Medley Roads was clearly erroneous.

To establish a prescriptive easement, Cremer Rodeo was required to prove, by clear and convincing evidence, “open, notorious, exclusive, adverse, continuous, and uninterrupted use for five years.” *Lyndes v. Green*, 2014 MT 110, ¶¶ 17, 374 Mont. 510, 325 P.3d 1225. Clear and convincing evidence requires a “clear preponderance of proof[.]” *Wareing v. Schreckendgust*, 280 Mont. 196, 206, 930 P.2d 37, 43 (1996). It must be “more than a mere preponderance but not beyond a reasonable doubt.” *Id.*, 930 P.2d at 43.

The failure to prove any element for the full statutory period is fatal to the entire claim. *Ray v. Nansel*, 2002 MT 191, ¶¶ 22–23, 311 Mont. 135, 53 P.3d 870.

A. The district court disregarded clear, uncontradicted evidence that Cremer Rodeo’s use of the Lien Road began, and continued as, permissive until 2014.

A prescriptive easement is premised on the adverse and hostile use of another’s land. *Brown & Brown of MT, Inc. v. Raty*, 2012 MT 264, ¶ 19, 367 Mont. 67, 289 P.3d 156. A prescriptive easement claim is defeated by undisputed proof that the use was permissive. *Lyndes*, ¶ 17; *Pederson*, ¶ 13.

Generally, use beginning as permissive is presumed to continue as such and cannot ripen into a prescriptive right:

if permissive use is shown, no easement can be acquired since the theory of prescriptive easements is based on adverse use. If a use begins as a permissive use it is presumed to continue as such. In fact, if the use begins as a permissive use, it cannot ripen into a prescriptive right, no matter how long it may continue, unless there is a distinct and positive assertion of a right hostile to the owner.

Pederson, ¶ 15 (internal quotations and citations omitted).

Moreover, “periodic express grants of permission are not required to maintain the permissive character of the use, especially where the use remains essentially the same.” *Larsen v. Richardson*, 2011 MT 195, ¶ 59, 361 Mont. 344, 260 P.3d 103. Nor is a new grant of permission required if land ownership changes. *Pedersen*, ¶ 26 (permission from previous owner continues after a sale where the character of use remains the same).

Cremer Rodeo's prescriptive claim over the Lien Road could not have begun until August 1991, after the Lien Road was abandoned.⁸

The uncontradicted evidence at trial demonstrated Cremer Rodeo's use of the Lien Road began as permissive. Every single witness who had knowledge of the abandonment—including every Cremer Rodeo shareholder—testified the neighbors along the Lien Road (the Cremers, the Liens, and the Tollefsons) agreed to allow each other to continue using the Lien Road on each other's land following the 1991 abandonment.

George and Matt testified there was an understanding between the neighbors along the Lien Road, beginning in 1991, they could use each other's roads. Trial. Tr. 98:2–4; *id.*, 124:21–125:3, 130:24–131:12. Ronda likewise testified the Cremers and Liens allowed each other, following the 1991 abandonment, to continue using the Lien Road. *Id.*, 65:2–7. Rod also admitted there was “an agreement amongst the landowners in the area [beginning in 1991] to allow each other to go across the Lien Road.” *Id.*, 204:19–22.

Even Elaine Allestad, a County Commissioner who voted to abandon the

⁸ A party cannot obtain a prescriptive easement while the property is owned by the government. *Burcalow Family, LLC v. Corral Bar, Inc.*, 2013 MT 345, ¶ 18, 372 Mont. 498, 313 P.3d 182.

Lien Road, testified she voted to abandon the road because she understood the Cremers and the Liens agreed to allow each other to continue using the road after it was abandoned. Trial Tr. 464:1–465:4, 476:18–477:1, 482:19–483:2, 483:19–484:2.

Most importantly, both Jake and Leo testified the permission the neighbors along the Lien Road granted to each other following the abandonment was “common Cremer family knowledge.” *Id.*, 172:25–173:10; *id.*, 233:3–8.

There was no evidence at trial that that agreement, or Cremer Rodeo’s use, changed until 2013 when Linda’s locks were shot off for the third time and she revoked permission to use the Lien Road. Trial Tr. 291:3–294:18. While Rod was evidently the culprit, he did not confess until testifying under oath at trial. *Id.*, 212:2–213:12. It was not until the following year, in 2014, when Matt Cremer finally said, for the first time, he thought Cremer Rodeo had a “right” to use the Lien Road. *Id.*, 130:24–131:13, 295:25–296:3.

The district court’s findings of fact and conclusions of law did not substantively address, or even acknowledge, any of that evidence. *See generally* App. 1. The district court instead determined Cremer Rodeo never asked permission, App. 1, ¶ O, and Linda failed to provide evidence Cremer Rodeo’s use began as permissive. *Id.*, ¶ N. Those conclusions are incongruous with the evidence. Even when viewed in a light most favorable to Cremer Rodeo, they are

not supported by substantial evidence, they misapprehend the evidence, and they are plainly mistaken.

First, the finding Cremer Rodeo did not ask permission cannot be squared with Cremer Rodeo's own testimony. Every shareholder testified there was an agreement between the neighbors to allow each other to continue using the Lien Road on each other's land after the abandonment and that Cremer Rodeo's use of the Lien Road following the abandonment was premised on that agreement. That is, by definition, a license. And a license is, by definition, permission. *Morrison v. Higbee*, 204 Mont. 515, 521, 668 P.2d 1025, 1028 (1983).

Second, the testimony about Cremer Rodeo's permission was elicited by Linda. She drew the admissions on cross examination from every Cremer Rodeo shareholder. She then corroborated those admissions through the direct testimony of Elaine Allestad. That evidence was unchallenged and uncontradicted.

The district court's findings that Cremer Rodeo's use was not permissive were clearly erroneous. Its conclusion that Cremer Rodeo established a prescriptive easement over the Lien Road was therefore incorrect. *Pedersen*, ¶ 15 ("if permissive use is shown, no easement can be acquired").

B. Evidence clearly and convincingly established Cremer Rodeo's use of the Lien and Medley Roads was by neighborly custom.

Use of another's property based on "neighborly accommodation or

courtesy” does not give rise to a prescriptive easement. *Pederson*, ¶ 15. Neighborly accommodation defeats a prescriptive easement when the use arises from that accommodation. *Lyndes*, ¶ 20. When the use is by “express or implied permission of the owner, continuous use of the way by the neighbor is not adverse and does not ripen into a prescriptive right.” *Amerimont, Inc. v. Gannett*, 278 Mont. 314, 319, 924 P.2d 1326, 1330 (1996). Moreover, evidence of a local custom, “coupled with the existence of gates,” demonstrates permissive use. *Rathbun v. Robson*, 203 Mont. 319, 323, 661 P.2d 850, 852 (1983).

The district court determined Linda failed to provide evidence Cremer Rodeo’s use began as a neighborly custom, and, even if there was such a custom, it “occurred” after Linda purchased her property. App. 1, ¶ W. Again, the district court’s finding is not supported by the evidence, it misapprehends the evidence, and is plainly wrong.

Cremer Rodeo’s witnesses and Linda **both** testified there was a local custom to allow neighboring ranchers to use each other’s roads. George testified allowing neighbors to use each other’s roads was the norm and commonly understood by the landowners in the area. Trial Tr. 93:23–94:6; *see also id.*, 93:20–22, 97:17–20. Linda likewise testified all the neighbors in the area “help each other out” and allow the use of each other’s roads. *Id.*, 282:16–17.

The testimony was also clear that custom applied to both the Lien and Medley Roads, and it existed long before Linda purchased her land. George testified all the homesteaders used the Medley Road, *id.*, 82:21–23, and that he used the Medley (and Lien) Road because his neighbors “let [him] go down those roads.” *Id.*, 98:10–16. Matt likewise testified there was “general consensus to all the neighbors” that after the abandonment they could continue using the Lien Road. *Id.*, 113:8–14; *see also id.*, 22:11–13, 68:11–14 (Ronda explaining that allowing neighbors to use each other’s roads was common).

That custom was reciprocal. Matt testified Linda (and the Liens) were free to use Cremer Rodeo’s roads, *id.*, 125:4–14, while Linda testified Cremer Rodeo could use hers. *Id.*, 331:4–14. Linda shared her gate combination with Matt, *id.*, 127:7–128:12, and Matt shared Cremer Rodeo’s combinations with others. *Id.*, 128:20–23. That was, as both Linda and Matt explained, the “neighborly thing to do.” *Id.*, 127:7–128:12; *id.*, 331:4–14.

The district court’s failure to address this evidence was clear error. The evidence conclusively established there was a neighborly custom between the neighbors along the Lien and Medley Roads that all the neighbors were allowed to use each other’s roads. Cremer Rodeo’s use of the Lien and Medley Roads was pursuant to that neighborly custom and is therefore, as a matter of law, permissive.

Lyndes, ¶ 20. The district court’s conclusion Cremer Rodeo established easements over the Lien and Medley Roads was incorrect.

C. Cremer Rodeo did not present any evidence, let alone clear and convincing evidence, that its use of the Lien and Medley Roads was adverse or open and notorious.

To be “adverse,” a plaintiff’s use “must be exercised under a claim of right and not as a mere privilege or license revocable at the pleasure of the landowner, and such claim must be known to and acquiesced in by the landowner.” *Heller v. Gremaux*, 2002 MT 199, ¶ 13, 311 Mont. 178, 53 P.3d 1259. The notice requirement is critical because, as this Court has repeatedly held, “a landowner should not be forced to give up title to property without notice of the alleged adverse claim and the opportunity to know that his title is in jeopardy.” *Amerimont*, 278 Mont. at 324, 924 P.2d at 1333; *Larsen*, ¶ 59.

As such, “mere use” is “not sufficient to give rise to the presumption of a grant, and generally some circumstance or act, in addition to use, tending to indicate that the use was not merely permissive, is required” to demonstrate the adversity element. *Heller*, ¶ 14; *Larsen*, ¶ 57.

Likewise, “open and notorious” means a “distinct and positive assertion of a right hostile to the rights of the owner and brought to the attention of the owner.” *Amerimont*, 278 Mont. at 323, 924 P.2d at 1333. The required assertion of a hostile

right “must be brought to the attention of the owner . . . and the use must continue for the full prescriptive period.” *Letica Land Co., LLC v. Anaconda-Deer Lodge County*, 2015 MT 323, ¶ 35, 381 Mont. 389, 362 P.3d 614.

The district court generically found Cremer Rodeo established the adversity and open and notorious elements. *See* App. 1, ¶¶ P–Q, X. It broadly determined Cremer Rodeo’s use of the roads, its road maintenance and “other circumstances” were open and notorious “enough” to put Linda on “inquiry” notice Cremer Rodeo’s use was hostile and under a claim of right. *Id.* The district court’s determination was wrong and is not supported by substantial evidence.

Linda testified she had no notion, from 1990 until 2014, that Cremer Rodeo thought it had any “rights” over her land. Trial Tr. 295:25–296:3; *see also id.*, 266:5–267:17; Trial Ex. D, E. Ronda testified Cremer Rodeo did not tell Linda before 2016 it thought it had a right over the Lien and Medley Roads because it did not want to “provoke” her. Trial Tr. 68:24–69:16. Matt similarly admitted he first told Linda in 2014—only two years before the lawsuit was filed—Cremer Rodeo had a some right. *Id.*, 130:24–131:13, 295:25–296:3. Just one year earlier, in 2013, however, Rod did not confess to shooting Linda’s lock off. *Id.*, 212:2–213:12.

Fear of provoking Linda, and fear of owning up to its own hostile acts, is not a “distinct and positive assertion” of a hostile right brought to Linda’s attention

that would put her on notice of any claim. *Amerimont*, 278 Mont. at 323, 924 P.2d at 1333.

The district court's reliance on Cremer Rodeo's "road maintenance" is equally unconvincing. True, regular road maintenance may be evidence of adverse use. *Hitshew v. Butte/Silver Bow County*, 1999 MT 26, ¶ 18, 293 Mont. 212, 974 P.2d 650. Cremer Rodeo, however, presented no such evidence. The district court relied on bits of testimony establishing nothing more than random, minor maintenance. App. 1, ¶¶ 32, 36.

Matt, for instance, testified Cremer Rodeo threw rocks in holes on the Lien Road "a few time[s]" and did the same on the Medley Road "here and there." Trial Tr. 106:12–107:7. George could only recall "some work [on the Medley Road] . . . with an old horse grader" from the late 1930s or early 1940s when he was only five or six years old. *Id.*, 81:3–19. Rod conceded on cross examination his road maintenance was "very occasional." *Id.*, 215:17–19.

Linda, on the other hand, testified the idea someone had maintained either the Lien or Medley Roads was "laughable." *Id.*, 307:7–14. Since 1990, she had never seen any sign either road had been maintained. *Id.* Jason likewise testified he had never seen any evidence of maintenance prior to 2013. *Id.*, 422:14–21, 424:5–12. Two of Linda's former ranch hands, dating back to 2004, did not even know the

Medley Road existed given its condition. *Id.*, 368:18–25; *id.*, 435:14–20.

The photographic exhibits introduced at trial told the true tale. *See* Trial Ex. C, N-1, N-2, N-3, N-4, P. Using those photos as a guide, Linda testified they showed the Lien and Medley Roads were simply not used. Trial Tr. 314:23–330:5. Jake admitted a 2016 photograph of the Medley Road (Trial Ex. P) looking into Linda’s property showed only the “remnants” of a road. Leo likewise testified, based on a comparison of the Lien Road’s condition in 1991 and 2016 (Trial Ex. C, p. 30 and N-4), the prairie had essentially reclaimed the road. *Id.*, 235:8–236:22.

There simply was not any evidence—let alone substantial evidence—Cremer Rodeo regularly maintained either road.

What’s left then is Cremer Rodeo’s mere use. “Mere use” is not, as a matter of law, sufficient to give rise to a presumption of adverse use. *Heller*, ¶ 14; *Larsen*, ¶ 57. Even so, every witness called by Linda testified they rarely, if ever, saw anyone from Cremer Rodeo using either the Lien or Medley Roads. *See* n. 4, *supra*.

The district court’s finding Cremer Rodeo presented “clear and convincing” evidence of the adversity and open and notorious elements is not supported by substantial evidence. The district court’s conclusion Cremer Rodeo established prescriptive easements over the Lien and Medley Roads was therefore

clearly erroneous. *Ray*, ¶¶ 22–23.

II. The district court abused its discretion when it granted Cremer Rodeo leave to amend its complaint to add a prescriptive easement claim over the Medley Road.

Montana Rule of Civil Procedure 15 governs amendments to the pleadings. Rule 15(a) states that leave to amend should be freely given when “justice so requires.” Mont.R.Civ.P. 15(a)(2). That does not mean, however, a court must “automatically” grant a motion to amend. *Stundal v. Stundal*, 2000 MT 21, ¶ 13, 298 Mont. 141, 995 P.2d 420; *Lindey’s, Inc. v. Prof. Consultants, Inc.*, 244 Mont. 238, 242, 797 P.2d 920, 923 (1990).

This Court has consistently required a party seeking an untimely amendment to offer “meaningful justification” for its delay. *Bitterroot Int’l Sys., Ltd. v. Western Star Trucks, Inc.*, 2007 MT 48, ¶¶ 53–54, 336 Mont. 145, 153 P.3d 627; *Loomis*, ¶¶ 41–43; *Stundal*, ¶¶ 16–17; *Rolan v. New W. Health Servs.*, 2017 MT 270, ¶ 24, 389 Mont. 228, 405 P.3d 65. It has also consistently acknowledged that the opposing party is “substantially prejudiced” if a late amendment requires additional discovery and if prior effort and expense would be “wasted” if the new claim were allowed. *Lindey’s*, 244 Mont. at 242–243, 797 P.2d at 923; *Farmers Co-op Ass’n v. Amsden, LLC*, 2007 MT 286, ¶ 14, 339 Mont. 445, 171 P.3d 690.

The district court did not apply, or even acknowledge, those standards. Nor

did it acknowledge that Cremer Rodeo’s motion was untimely, or explain why it disregarded the prejudice of restarting discovery and delaying trial. It instead imposed a new standard, shifting the burden to Linda to show that she had sufficiently challenged a potential attempt by Cremer Rodeo—before it sought leave to amend—to add a new claim at trial. The district court’s failure to apply governing law was an abuse of discretion.

A. The district court vacated the original trial on the first day and granted Cremer Rodeo’s untimely motion to amend its complaint.

Cremer Rodeo’s original complaint, filed in November 2016, asserted a single prescriptive easement claim over the Lien Road. Dkt. 1; App. 4, p. 2. Discovery revealed in 2017 that Cremer Rodeo thought it also had a prescriptive easement over the Medley Road. Supp. App. 2, Ex. 1, 78:7–80:22. During the following 30 months, from November 2017 to the beginning of the originally scheduled trial in May 2020, Cremer Rodeo did nothing to amend its pleading.

On the first day of trial, before Cremer Rodeo began its case, Linda objected—consistent with her pretrial statement of issues (Dkt. 77)—that Cremer Rodeo should not be allowed to try its Medley Road claim because that claim was

not raised by the pleadings. App. 4, p. 1; Supp. App. 1, 6:18–9:6.⁹ Her objection was no mere technicality. Linda had blocked the Medley Road over five years earlier. While she was not eager to be sued, a new lawsuit would have preserved a potentially dispositive affirmative defense (reverse-adverse possession). Supp. App. 1 at 7:9–23.

The district court took a short recess, reviewed the pleadings, and agreed Cremer Rodeo’s complaint did not state a claim regarding the Medley Road. Supp. App. 1 at 9:8–13:6. Rather than proceed, however, the district court gave Cremer Rodeo the option whether to vacate trial or proceed on the Lien Road claim alone. Cremer Rodeo opted to vacate trial. *Id.* The district court then allowed Cremer Rodeo two weeks to seek leave to amend. App. 4, p. 2.

Cremer Rodeo filed a three-sentence motion. Dkt. 87. The motion offered no justification why it was untimely, nor did it cite any supporting authority. *Id.*

The district court granted the motion, but it did not cite a single supporting case or even acknowledge, let alone apply, this Court’s Rule 15(a) standard. App. 3, p. 4. The district court did not even acknowledge the motion was untimely, or that Cremer Rodeo failed to justify why its motion was late. *See id.*

⁹ Trial was set for May 19–22, 2020. The technical first day of trial, May 19, was vacated because of a technical malfunction. App. 4.

The district court instead imposed a new standard shifting the burden to Linda. It characterized Linda's reliance on this Court's timeliness jurisprudence as a "complain[t]," and faulted Linda for not sufficiently opposing the amendment before Cremer Rodeo sought leave add the new claim. *Id.* The district court then concluded, without explanation, the amendment would not cause "undue prejudice" and that it should be allowed because the Medley Road was mentioned during discovery and was no surprise. *Id.*

B. The district court failed to require Cremer Rodeo to demonstrate why its motion could not have been raised earlier and improperly shifted the burden to Linda.

This Court places the burden on the movant to offer "meaningful justification" for an untimely amendment, particularly those sought on the eve of trial. *Bitterroot Int'l Systems*, ¶¶ 53–54; *Stundal*, ¶¶ 14–17; *Loomis*, ¶¶ 42–43; *Rolan*, ¶ 23.

In *Rolan*, for example, the defendant moved to amend its answer to include a new affirmative defense three years into the litigation. *Rolan*, ¶ 6. The district court granted the motion, *id.*, despite the plaintiff's showing of undue prejudice and the defendant's failure to offer any reasonable justification for the delay. *Id.*, ¶ 21. *Rolan* reversed. *Id.*, ¶ 24. The Court drew from cases where it affirmed denials of motions to amend, *id.*, ¶¶ 18–20, and held the plaintiff's "showing of undue

prejudice . . . combined with [defendant's] failure to reasonably justify the delay” should have led the district court to deny the motion. *Id.*, ¶ 23.

In *Stundal*, two years after a dissolution proceeding began and one month before trial, the petitioner sought leave to include a new claim. *Stundal*, ¶ 4. The district court denied her motion. *Id.*, ¶ 8. *Stundal* affirmed because the petitioner offered “no reason” why she did not seek leave to amend until a month before trial or why she took no action to do so during the two years in which she knew of the facts supporting the new claim. *Id.*, ¶¶ 14–17.

This Court reached the same result for the same reason in *Loomis*. The plaintiffs sought to add a new easement theory ten days before trial (and after two years of litigation). *Loomis*, ¶ 42. This Court affirmed the district court’s refusal to allow the new claim because the plaintiffs offered “no reason” why they could not have raised the new theory earlier. *Id.*, ¶ 43.

Even when some justification is offered, this Court still requires that it be “meaningful.” *Bitterroot Int’l Systems*, ¶ 54. The defendant in *Bitterroot Int’l Systems* argued that amending its answer three months before trial and five years after the amended complaint was filed was justified because its delay was an “oversight.” *Id.*, ¶¶ 47, 51. This Court rejected that excuse because the defendant had not meaningfully explained “how such an obvious defense escaped its attention

for nearly five years.” *Id.*, ¶¶ 53–54.¹⁰

Here, the district court rejected, without acknowledging, that long-standing framework. App. 3. It did not even acknowledge that Cremer Rodeo’s motion was untimely, let alone that Cremer Rodeo failed to file a supporting brief or otherwise justify its delay. *Id.* The motion should have been denied for that reason alone, notwithstanding that Cremer Rodeo could not have justified the delay since it had known since 2017 the Medley Road claim was not included in the complaint.

Stundal, ¶¶ 14–17; *Loomis*, ¶¶ 42–43.

But the district court applied a different standard. It weighed whether the new claim was a surprise to Linda and whether she had sufficiently objected to the new claim prior to the start of trial. App. 3.

This Court, however, has rejected the district court’s “surprise” analysis. *Bitterroot Int’l Systems*, ¶¶ 53–54 (rejecting argument that proposed amendment was “no surprise” where moving party failed to justify why it had not been raised

¹⁰ Denials of amendments sought on the eve of trial are regularly affirmed. See *Yellowstone Conf. of the United Methodist Church v. D.A. Davidson, Inc.*, 228 Mont. 288, 293, 741 P.2d 794, 797–798 (1987); *In re Estate of Kurth*, 2016 MT 188, ¶ 25, 384 Mont. 261, 378 P.3d 1151; *Meadow Lake Estates Homeowners Ass’n v. Shoemaker*, 2008 MT 41, ¶ 31, 341 Mont. 345, 178 P.3d 81; but see *McGuire v. Nelson*, 162 Mont. 37, 41–42, 508 P.2d 558, 560 (1973) (reversing grant of motion to amend made on the first day of trial).

earlier). Moreover, this Court has never required the non-moving party to preemptively object to an untimely motion to amend. *See, e.g., Stundal*, ¶¶ 14–17; *Loomis*, ¶¶ 42–43; *Bitterroot Int’l Systems*, ¶¶ 53–54. Even so, Linda expressly flagged the issue several times during the three years before trial. *See* Supp. App. 2, Ex. 1, 78:7–80:22; *id.*, Ex. 2, pp. 54–56; Dkt. 70; Dkt. 77.

The district court’s disregard of the *Stundal*, *Loomis*, *Rolan* and *Bitterroot Int’l Systems* standard, and its shift of the burden to Linda, was an abuse of discretion. *Rolan*, ¶ 24; *see also McGuire*, 162 Mont. at 41–42, 508 P.2d at 560.

C. The district court also failed to acknowledge the demonstrable prejudice stemming from the late amendment.

It is inappropriate to allow an amended pleading when the party opposing the amendment would incur substantial prejudice. *Peuse v. Malkuch*, 275 Mont. 221, 227, 911 P.2d 1153, 1156 (1996). This Court has consistently held “undue prejudice” exists when the non-moving party has expended “substantial effort and expense” that would be “wasted” if a new theory were allowed. *Farmers Co-op Ass’n*, ¶ 14. Likewise, “substantial prejudice” exists when:

[g]ranting the amendments would [require] additional discovery and time to determine the sufficiency of the claims alleged in the amended complaints, . . . [that would cost] additional time, energy and money to resolve the case.

Lindey’s Inc., 244 Mont. at 242–243, 797 P.2d at 923; *see also Estate of Kurth*, ¶ 25

(it is unduly prejudicial to allow a late amendment after a party had already spent two years conducting discovery on one legal theory).

To determine whether an amendment would cause undue prejudice, “a court should balance the prejudice suffered by the opposing party against the sufficiency of the moving party’s justification of the delay.” *Rolan*, ¶ 16 (citation and internal quotations omitted).

The district court did not address or even acknowledge that standard. It instead concluded, without explanation, the amendment would not cause prejudice. App. 3, p. 3. The district court was wrong.

First, the substantial time, effort and energy Linda spent, and the significant fees she incurred, to prepare for the original trial was “wasted” because trial was vacated, and Linda incurred those same costs again when trial resumed the next year. Second, the additional discovery for the Medley Road claim cost Linda even more time, energy, effort, and required even more fees, to defend that claim. Those types of losses are, according to this Court, unduly prejudicial. *Farmer Co-op Ass’n*, ¶ 14; *Lindey’s Inc.*, 244 Mont. at 242–243, 797 P.2d at 923.

The district court’s failure to acknowledge that demonstrable prejudice was an abuse of discretion. *Farmers Co-op Ass’n*, ¶ 14. Moreover, the district court’s failure to balance the prejudice suffered by Linda against the sufficiency of Cremer

Rodeo’s justification for the delay was likewise an abuse of discretion. *Rolan*, ¶ 24.¹¹

III. The district court incorrectly determined Cremer Rodeo’s amended complaint related back to the original filing date.

An amendment to a complaint relates back to the original filing date only when the amendment asserts a claim that “arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading[.]” Mont.R.Civ.P. 15(c)(1)(B).

To determine whether a proposed amendment arises out of the same conduct, transaction or occurrence as the original pleading, courts focus on whether the amended and original pleading are based on the “same operative facts.” *Smith on behalf of Smith v. Butte-Silver Bow Cty.*, 266 Mont. 1, 10, 878 P.2d 870, 875 (1994) *abrogated on other grounds in Citizens Awareness Network*, ¶ 13, n. 2.

The district court concluded, without analysis of the facts alleged in the amended and original complaint, that the amendment asserted a claim that arose out of the same conduct, transactions and occurrences because the dispute over the

¹¹ The district court could not have conducted that balancing test because Cremer Rodeo offered no justification for its delay. The district court should have determined there was no justification because Cremer Rodeo’s failure to file a supporting brief was an admission its motion was without merit. *In re Marriage of Grounds*, 256 Mont. 397, 403, 846 P.2d 1034, 1038 (1993); *Lumber Enterprises, Inc. v. Hansen*, 257 Mont. 11, 17, 846 P.2d 1046, 1050 (1993).

two roads was “interrelated[.]” App. 3, p. 3. The district court then determined the amendment related back. *Id.*

The district court was mistaken. Whether causes of action are “interrelated” is not the correct standard. The applicable standard is more exacting. The amendment claim must instead be based on the “same operative facts” as the original complaint. *Smith, supra*. Cremer Rodeo’s amendment did not meet this standard.

The two claims involved two different roads with completely different histories of alleged use. The road at issue in the original complaint, the Lien Road, was a former county road. Dkt. 1, ¶¶ 9–13. The Medley Road was not. Dkt. 91, ¶ 34; App. 1, ¶ 9. Cremer Rodeo also admitted the roads are different. *See* Supp. App. 2, Ex. 1, 35:7–24, 78:7–80:22.

The conduct Cremer Rodeo alleged perfected the two prescriptive easements was also very different. Cremer Rodeo alleged its prescriptive claim over the Lien Road began in 1991 when the road was abandoned as a public roadway. *Id.* at 113:3–12, 136:5–25; *see also* Dkt. 1. The amendment, however, alleged Cremer Rodeo perfected its prescriptive easement over the Medley Road decades before the Lien Road was abandoned. Dkt. 91, ¶ 38.

The district court’s findings bear this out. The district court found that

Cremer Rodeo's claim regarding the Lien Road was based on use beginning in 1991, while its claim regarding the Medley Road was based on use beginning in 1940. App. 1, ¶¶ 16–17; *see also id.*, ¶¶ 39–40 (same). The district court also found that Cremer Rodeo maintained and/or improved the Medley Road beginning in the 1930s, long before 1991. *Id.*, ¶¶ 25, 32.

As in *Smith*, “[i]t is clear that the original complaint and proposed amendment do not share the same operative facts.” *Smith*, 266 Mont. at 10, 878 P.2d at 875–876 (emphasis added). The district court was incorrect as a matter of law when it concluded the amended complaint related back.

IV. The district court erred when it denied Linda's motion for summary judgment that Cremer Rodeo's use of the Lien Road was permissive.

Discovery revealed what Linda established at trial: Cremer Rodeo's use of the Lien Road began, and continued, as permissive until 2014 pursuant to an agreement with its neighbors. In 2018, Linda moved for summary judgment that Cremer Rodeo's claim over the Lien Road should be dismissed.¹² Dkt. 40–42, 48. The district court denied the motion. App. 5.

A. Cremer Rodeo did not raise any genuine issues disputing its use was permissive.

¹² Cremer Rodeo's claim over the Medley Road was not pled at that time.

Linda’s motion established, based on Cremer Rodeo’s admissions, that Cremer Rodeo’s use of the Lien Road began in 1991 (after the abandonment) following an agreement between the neighbors to allow each other to use the road for ranch purposes. *See* Supp. App. 3, Ex. E, 101:12–16 (Cremer Rodeo testifying the Lien Road was abandoned because Cremer Rodeo “would allow the ranching community to [continue] using that road”); *id.*, 107:21–108:1 (Cremer Rodeo admitting Linda’s predecessor “agreed not to keep [Cremer Rodeo] from driving on the road”).

Two former County Commissioners corroborated Cremer Rodeo’s testimony. *Id.*, 260:7–262:15 (Cremer Rodeo testifying Commissioner Allestad was “adamant” the Liens and Cremers “allow” each other access as a condition of the abandonment); *id.*, Ex. I (same); *id.*, Ex. H, ¶ 3 (Commissioner Norm Starr affidavit stating he believed the landowners worked out an agreement among themselves for access). Cremer Rodeo verified they worked out that agreement. *Id.*, Ex. E, 106:3–11 (Cremer Rodeo testifying it was comfortable with a “handshake” deal with the neighbors).

Cremer Rodeo’s response did not dispute—or even address—those undisputed facts. *See generally* Dkt. 43. It simply argued, repeatedly, it always used the road and never asked for permission.

Linda also established Cremer Rodeo's use continued as permissive because it never asserted an adverse or hostile right until 2014. Supp. App. 3, Ex. E, 215:9–23 (Cremer Rodeo admitting it never provided Linda notice it was asserting a claim of right to the Lien Road); *id.*, Ex. J, 127:14–128:6 (Matt testifying he did not “know how” Linda would know Cremer Rodeo had asserted hostile and adverse use of the Lien Road).

Cremer Rodeo's response pointed to no evidence of any overt act or event that constituted an assertion of a hostile right. *See* Dkt. 43. In fact, Cremer Rodeo conceded it never asserted “its right” to use the Lien Road until 2014. *Id.*, p. 7. Cremer Rodeo simply argued Linda “did not try to stop” its use. *Id.*, p. 4.

B. The district court disregarded Cremer Rodeo's admissions that its use was permissive.

The district court determined there were disputed facts. App. 5, p. 5–6. The district court concluded Commissioner's Starr's affidavit was insufficient to establish Cremer Rodeo and its neighbors in fact worked out an agreement regarding use the Lien Road. *Id.*, p. 5. It also determined Cremer Rodeo's deposition testimony—which stated they did not request permission—created a factual dispute. *Id.*, p. 6.

The district court was mistaken. Linda did not solely rely on Commissioner Starr's affidavit. Linda presented undisputed testimony from **Cremer Rodeo** that

it admitted both it and the Lien family had, in fact, reached an agreement to allow each other to continue using the Lien Road after the abandonment. Supp. App. 3, Ex. E, 101:12–16, 106:3–11, 107:21–108:1. That is, by definition, permissive use. *Morrison*, 204 Mont. at 520–521, 668 P.2d at 1027–1028.

Cremer Rodeo’s “bald assertions” it never asked permission were not—and could not be—squared with those admissions and were therefore “insufficient to withstand a motion for summary judgment.” *Peterson v. Eichhorn*, 2008 MT 250, ¶¶ 19–20, 344 Mont. 540, 189 P.3d 615. Regardless, periodic express grants of permission are not required to maintain the permissive nature of the use where the use itself does not change. *Larsen*, ¶ 59.

The district court (and Cremer Rodeo) did not address the adversity element. Even so, Cremer Rodeo’s contention Linda “did not try to stop” Cremer Rodeo’s use is not the applicable standard—particularly where the use is permissive. The burden was on **Cremer Rodeo** to prove, by clear and convincing evidence, each element of its prescriptive easement claim. *Lyndes*, ¶ 17.

Specifically, Cremer Rodeo was required to show, to defeat summary judgment, “some circumstance or act, in addition to use, tending to indicate that the use was not merely permissive[.]” *Larsen*, ¶ 59. Cremer Rodeo presented no such evidence.

Cremer Rodeo's use prior to 2014 then, "cannot ripen into a prescriptive right[.]" *Pedersen*, ¶¶ 15; *Larsen*, ¶¶ 60–62 (prescriptive easement claim fails where the use begins and continues as permissive). Its assertion of an adverse right beginning in 2014 was, as a matter of law, insufficient to establish a prescriptive easement because Cremer Rodeo commenced this action in 2016—well short of the five-year statutory period. *Pedersen*, ¶ 27. The district court erred when it denied Linda's motion for summary judgment.

CONCLUSION

This Court should:

- Reverse the district court's judgment granting Cremer Rodeo prescriptive easements over both the Lien and Medley Roads and remand to the district court to enter judgment dismissing Cremer Rodeo's claims with prejudice.

If the Medley Road claim is not dismissed, this Court should:

- Reverse the district court's order granting Cremer Rodeo leave to amend and remand to the district court to enter an order dismissing Cremer Rodeo's prescriptive easement claim over the Medley Road.

If the leave to amend is affirmed, this Court should:

- Reverse the district court's order to the extent it allowed the

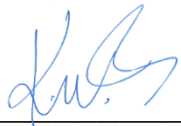
amendment to relate back to the original filing date and remand to the district court for further proceedings regarding Linda's reverse-adverse possession affirmative defense related to the Medley Road.

If the Lien Road claim is not dismissed, this Court should:

- Reverse the district court's order denying Linda's motion for summary judgment and remand to the district court to enter judgment dismissing the Lien Road claim with prejudice.

Respectfully submitted, this 15th day of August, 2022.

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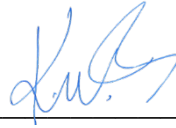
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Equity Text A text typeface of 14 points; is double spaced (except that footnotes and quoted and indented material are single spaced); with left, right, top and bottom margins of 1 inch; and that the word count calculated by Microsoft Word does not exceed 10,000 (9,740) words, excluding the Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance.

DATED this 15th day of August, 2022.

GOETZ, GEDDES & GARDNER, P.C.

By: _____



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1	4/4/2022	Findings of Fact, Conclusions of Law and Order	Dkt. 133
2	4/27/2022	Judgment	Dkt. 134
3	6/29/2020	Decision & Order Granting Plaintiff's Motion to Amend Complaint	Dkt. 90
4	5/20/2020	Order Vacating Trial	Dkt. 86
5	8/31/2018	Decision & Order Denying Defendant's Motion for Summary Judgment	Dkt. 54

CERTIFICATE OF SERVICE

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