

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. 22-0257

CHARLES SPRAGUE, by and through Paulette Sprague, and PAULETTE
SPRAGUE,

Plaintiffs, Counterclaim Defendants, and Appellees,

v.

TIM BEARD,

Defendant, Counterclaim Plaintiff, and Appellant.

APPELLANT'S OPENING BRIEF ON APPEAL

On Appeal from the Montana First Judicial District
Court, Lewis and Clark County,
The Honorable Michael McMahon Presiding

APPEARANCES:

Mark Lancaster
Element Law Group, PLLC
PO Box 1144
Helena, MT 59624-1144
Phone: (406) 513-1075
mark@elementlawgroup.com

COUNSEL FOR DEFENDANT,
COUNTERCLAIM PLAINTIFF,
AND APPELLANT

David B. Gallik
Gallik Law Office, PLLC
1124 Billings Ave
Helena, MT 59601
Phone: (406) 443-0009
dave@galliklaw.com

COUNSEL FOR DEFENDANT,
COUNTERCLAIM DEFENDANT and
APPELLEE

TABLE OF CONTENTS

<u>CONTENT</u>	<u>PAGE</u>
TABLE OF AUTHORITIES.....	iv
CASES.....	iv
STATUTES.....	v
RULES.....	v
ISSUES ON APPEAL.....	1
STATEMENT OF THE CASE	2
FACTS RELEVANT TO ISSUES PRESENTED FOR REVIEW.....	4
STANDARD OF REVIEW.....	7
SUMMARY OF ARGUMENT.....	9
ARGUMENT	
I. The District Court erred in Finding Tim had Permissive use of the Browns Gulch Road, Especially in Disregarding an Unequivocal Judicial Admission of Charles Regarding Tim’s Lack of Permission.....	11
II. The District Court’s Ultimate Permanent Injunction Against Tim is Overbroad and Not Based on the Evidence.....	15
III. The Trial Evidence Does Not Support the Court’s Ultimate Conclusions Regarding Trespass Liability, nor Damages as Awarded.....	18
A. The Evidence does not Support a Finding of Trespass Liability.....	19

i.	The District Court Misconstrued Tim’s Road Maintenance Action, Largely Relying on Improper and Tainted Testimony.....	20
ii.	The Other Key Finding Supporting Liability, Delay in Removal of Obstructions, was Prejudicially Skewed by Tim’s Valid Testimony on the Topic Being Stricken in Error.....	26
iii.	The Court’s Findings Regarding Tim’s Obstructions Being a Trespass, Rather than Valid Road Work, Erroneously Discount Evidence of all Other Work Done by Tim on the Browns Gulch Road.....	28
B.	The Court’s award of damages for Tim’s Trespass is not warranted.....	29
IV.	Did the District Court Err in Failing to Award Statutory Mandatory Attorney Fees to Tim After He Prevailed on a Civil Assault Claim for Which Paulette had Asserted a Defense of Justifiable Use of Force.....	31
CONCLUSION.....		35
CERTIFICATE OF COMPLIANCE.....		36
CERTIFICATE OF SERVICE.....		37
APPENDIX.....		38
App. Pt. 1 - “Judgment,” filed April 13, 2022, Dkt. 121(Pages 2 to 3 of 111 pages in Appendix)		
App. Pt. 2 - “Bench Trial Findings of Fact, Conclusions of Law and Order,” filed March 30, 2022, Dkt. 119(Pages 5 to 68 of 111 pages in Appendix)		
App. Pt. 3 - “Court Errata,” filed April 27, 2022, Dkt. 122(Pages 70 to 72 of 111 pages in Appendix)		

App. Pt. 4 “Final Pretrial Order,” filed November 15, 2021, Dkt. 98
.....(Pages 74 to 96 of 111 pages in Appendix)

App. Pt. 5 “Order on Various Motions,” August 17, 2021, Dkt. 95
.....(Pages 98 to 111 of 111 pages in Appendix)

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>Bilesky v. Shopko Stores Operating Co., LLC</i> , 2014 MT 300, 377 Mont. 58, 338 P.3d 76.....	8, 12, 14, 15
<i>Bitterrooters for Planning v. Bd. of Cnty. Comm'rs</i> , 2008 MT 249, 344 Mont. 529, 189 P.3d 624.....	8
<i>Branstetter v. Beaumont Supper Club, Inc.</i> , 224 Mont. 20, 727 P.2d 933 (1986).....	19
<i>Ducham v. Tuma</i> , 265 Mont. 436, 877 P.2d 1002, (1994).....	19, 25, 29
<i>French v. Ralph E. Moore, Inc.</i> , 203 Mont. 327, 661 P.2d 844 (1983).....	29
<i>Glaspey v. Workman</i> , 234 Mont. 374, 763 P.2d 666 (1988).....	9, 31
<i>Guthrie v. Hardy</i> , 2001 MT 122, 305 Mont. 367, 28 P.3d 467....	16, 18, 19, 29, 30
<i>In re Szafryk</i> , 2010 MT 90, 356 Mont. 141, 232 P.3d 361.....	9
<i>Laden v. Atkeson</i> , 112 Mont. 302, 116 P.2d 881, (1941).....	16, 19
<i>Lyndes v. Green</i> , 2014 MT 110, 374 Mont. 510, 325 P.3d 1225.....	7
<i>Masters Grp. Int'l, Inc. v. Comerica Bank</i> , 2015 MT 192, 380 Mont. 1, 352 P.3d 1101.....	8, 19, 25, 27
<i>McKay v. Wilderness Dev., LLC</i> , 2009 MT 410, 353 Mont. 471, 221 P.3d 1184.....	30
<i>Renner v. Nemitz</i> , 2001 MT 202, 306 Mont. 292, 33 P.3d 255.....	11, 12
<i>Simpkins v. Speck</i> , 2019 MT 120, 395 Mont. 509, 443 P.3d.....	12, 13
<i>Sletteland v. Roberts</i> , 2003 MT 17, 314 Mont. 76, 64 P.3d 979.....	9
<i>Tags Realty, LLC v. Runkle</i> , 2015 MT 166, 379 Mont. 416, 352 P.3d 616.....	19

<i>Yellowstone Cnty. v. Billings Gazette</i> , 2006 MT 218, 333 Mont. 390, 143 P.3d 135.....	31, 35
--	--------

<u>STATUTES</u>	<u>PAGE</u>
Mont. Code Ann. § 27-1-722(4).....	31, 32, 34, 35
Mont. Code Ann. § 27-8-313.....	34
Mont. Code Ann. § 27-19-102.....	15
Mont. Code Ann. § 45-3-101.....	32
Mont. Code Ann. § 45-3-104.....	31, 32, 33

<u>RULES</u>	<u>PAGE</u>
Mont. R. App. P. 8(1).....	2
Mont. R. App. P. 12(9).....	2

ISSUES ON APPEAL

Appellant Tim Beard (“Tim”) appeals certain errors in the final dispositive orders entered by the District Court after a bench trial in this matter. In the proceedings that led to those orders Tim opposed Plaintiffs and Appellees Charles Sprague (“Charles”) and Paulette Sprague (“Paulette” and collectively with Charles the “Spragues”). These errors justify reversal and a remand to the District Court for further consideration. Tim raises the following issues on appeal:

1. Did the District Court err in concluding that Tim had permission from the Spragues to use a segment of roadway over which he claimed a prescriptive easement, despite a judicial admission by Charles that “Tim Beard has never been given permission to cross my property past the ‘first turnoff’”?
2. Did the District Court abuse its discretion in granting an injunction against Tim that is excessively restrictive and not rationally related to the evidence presented at trial?
3. Did the District Court err in concluding that Tim had trespass liability to Paulette, and if so, were damages calculated correctly?
4. Did the District Court abuse its discretion in not awarding a mandatory statutory award of attorney fees for Tim having rebutted a claim of justifiable use of force to prevail on a civil assault claim?

STATEMENT OF THE CASE

This is an appeal of a civil tort and declaratory judgment lawsuit tried by bench trial, resulting in findings of fact and conclusions of law, and a subsequent judgment.

Sprague initially filed suit against Tim seeking injunctive, declaratory, and compensatory relief in tort based on a trespass theory, and punitive damages. Dkt. 1¹, ¶¶ 14-36, pp. 2-5. Tim filed a counterclaim, later amended, seeking declaratory judgment regarding his own access easement rights, and a civil assault claim against Charles. Dkt. 24, ¶¶ 28-37 and 52-55, pp. 9-12. Certain additional causes of action/legal theories were stated in Tim's amended pleading, but those were withdrawn prior to trial, as noted below.

Charles died on January 29, 2021, with Paulette subsequently being substituted into his interest, by way of an order that also ruled on several motions pending at that time. Dkt. 95, p. 11. That order recognized as moot an easement by necessity claim filed by Tim, dismissed certain of his other claims without objection, and denied a motion for summary judgment on all other counts.

This Court held a final pretrial conference on November 9, 2021. At that conference the Court made it clear that the parties were not to make arguments at

¹ Pursuant to the "intelligible abbreviation" convention allowed by Mont. R. App. P. 12(9), in this brief "Dkt." refers to the serial numbering system employed by the Clerk of District Court in tracking filings in a District Court docket, as discussed in Mont. R. App. P. 8(1).

trial, but were only to make trial arguments by the lodging of proposed findings of fact and conclusions of law. Hrg. Transcr. 13:7-20, Nov. 9, 2021. After that conference, the Court issued a final pretrial order. Dkt. 98. The parties both filed proposed pretrial findings and conclusions (Paulette's at Dkt. 106, Tim's at Dkt. 102).

This matter was tried by bench trial over two days, February 22 and 24, 2022, with both sides completing their cases in chief, after which the case was taken under advisement. Both parties were allowed to present post-trial findings and conclusions, which the parties both did on March 18, 2022 (Paulette's at Dkt. 115 and Tim's at Dkt. 116). Paulette further amended her proposed findings and conclusions on March 30, 2022. Dkt. 118.

On that same date, March 30, 2022, the District Court issued written findings of fact and conclusions of law. Dkt. 119. In so doing, the Court reiterated that the parties had made arguments through the presentation of proposed findings of fact and conclusions of law. Dkt. 199, p. 10. The District Court subsequently filed a judgment on April 13, 2022. Dkt. 121. On April 27, 2022, the Court issued a minor correction to its findings of fact and conclusions of law, in the form of a "Court Errata" clarifying one fact. Dkt. 122. This appeal followed.

FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

Paulette and Tim are neighboring landowners on the Browns Gulch Road, north of Helena, Montana. Dkt. 119, findings of fact ¶¶ 1-4, p. 11-12.

The roadway segments of the Browns Gulch Road at issue here, heading generally downhill from north to south and generally downhill, follow the lowest points of a drainage called Browns Gulch. Dkt. 119, p. 9; Dkt. 122, amended finding of fact ¶ 188, amended p. 40. The Browns Gulch Road, as it proceeds downhill from its point of divergence from a road known as the Ward Road (identified and defined at Dkt. 119, p. 10), crosses real property administered by the federal Bureau of Land Management (the “BLM”). Dkt. 119, finding of fact ¶ 25, p. 15). From there it crosses property owned by Paulette (the “Sprague Property”), following the bottom of the natural drainage of the land. Dkt. 122, amended findings of fact ¶¶ 188-191, amended p. 40.

A parcel of real property owned by Tim (the “Beard Property”) is adjacent to the Sprague Property, generally to the east. Dkt. 119, findings of fact ¶¶ 2-3, pp. 11-12.

South of the Sprague Property, the Browns Gulch Road crosses and accesses the property of certain non-party property owners, with a parcel owned by family with the surname Hopler (the “Hopler Property”) and a parcel owned by a woman with the surname Watt (the “Watt Property”). Dkt. 119, findings of fact ¶ 25, p. 15.

The Hopler Property and Watt Property are dominant tenements to a granted express easement over the segment of the Browns Gulch Road crossing the Sprague Property. Dkt 119, findings of fact ¶ 84, p. 25; Trial Ex. H (offered and admitted into evidence per Tr. Transcr. 332:6-14, Feb. 22, 2022).

Tim, since at least the 1990s has done road maintenance work in the area of the Browns Gulch Road. Dkt. 119, findings of fact ¶ 90, p. 25. Tim initially did so with one or more members of the Hopler family, and then eventually on his own. Dkt. 119, findings of fact ¶ 102, p. 27. Sometimes his work was wholly gratuitous and sometimes he received cash from the Hopler family as a manner of thanks and to offset his costs. Dkt. 119, findings of fact ¶ 175, p. 38.

The layouts of the Beard and Sprague Properties are best shown on Trial Exhibit 1, which is a labeled aerial photograph with colored roadways, referenced by several witnesses (offered and admitted into evidence at Tr. Transcr. 19:2-7, Feb. 22, 2022). Notable on that exhibit is the Browns Gulch Road, as well as a deviation from it marked in blue that then proceeds east on to the Beard Property known as the “fishhook” at trial. (Dkt. 119, p. 10).

Tim historically used two roadways to access the Brown Gulch Road, the principal roadway being at the northmost point of his property, crossing a small area of the Sprague Property, and then proceeding across BLM land on to the other roads of Montana. Tr. Transcr. 324:22-325:4, Feb. 22, 2022. His second road, the

fishhook, leaves his property on its western boundary with the Sprague Property, onto the Browns Gulch Road, and generally allowing access to the Watt Property and the Hopler Property, and beyond it more BLM land and the Missouri River. Tr. Transcr. 366:20-367:11, Feb. 24, 2022.

In 2010 a wildland fire burned through the area and created significant erosion on the Browns Gulch Road. Dkt 119, findings of fact ¶¶ 76-77, pp. 23-24. Tim spent several years from that point repairing that erosion damage on the Browns Gulch Road, in segments, with the final segment to be repaired being the segment over the Sprague Property. Tr. Transcr. 359:25-361:20; 423:19-424:13, Feb. 24, 2022.

Tim is disabled, having suffered an acute injury from an automobile accident in 2010 that gives him both speech and memory problems, particularly with “dates and names.” Dkt. 119, findings of fact ¶ 89, p. 25; Tr. Transcr. 305:24-307:14, Feb. 22, 2022. As the Court noted at one point during trial, Tim has “a tremendous problem with his memory.” Tr. Transcr. 463:22 -25, Feb. 24. 2022.

At some point Tim and Charles went from having an amicable relationship to a contentious one. Dkt. 119, findings of fact ¶ 120, p. 30. On several instances after that point, Charles discharged firearms at or into the Beard Property. Tr. Transcr. 405:16-409:9, Feb. 24, 2022; Dkt. 119, findings of fact ¶ 158, p. 36.

On three instances, two in September of 2019, and one in July of 2020, Tim pushed or dumped piles of rock and other material into areas of the Browns Gulch Road that crosses the Sprague Property. Dkt. 119, findings of fact ¶ 193, p. 41. The intent and consequence of him doing so were litigated in detail in this case, as discussed herein.

On July 13, 2020, at the time when Tim placed the third above-referenced pile of rock and other material in the Browns Gulch Road on the Sprague Property, Charles confronted Tim with a firearm, attempting to trap Tim on the Sprague Property, and then trespassed onto Tim's property when Tim tried to escape the confrontation. Dkt. 119, findings of fact ¶ 223, p. 46. As a result of Charles' actions, Tim had a well-founded fear for his life. Dkt. 119, findings of fact ¶ 226, p. 46.

STANDARD OF REVIEW

Findings of fact are reviewed for clear error. *Simpkins v. Speck*, 2019 MT 120, ¶ 7, 395 Mont. 509, 443 P.3d 428. A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the District Court at trial misapprehended the effect of the evidence, or if our review of the record convinces the Supreme Court that a mistake has been committed. *Id.*

Conclusions of law are reviewed for correctness. *Lyndes v. Green*, 2014 MT 110, ¶ 14, 374 Mont. 510, 325 P.3d 1225.

A permanent injunction order is reviewed to determine whether a manifest abuse of discretion occurred. *Simpkins*, ¶ 8. A manifest abuse of discretion is one that is obvious, evident, or unmistakable. *Bitterrooters for Planning v. Bd. of Cnty. Comm'rs*, 2008 MT 249, ¶ 12, 344 Mont. 529, 189 P.3d 624.

Evidentiary rulings are reviewed for an abuse of discretion.

A district court abuses its discretion when it acts arbitrarily without conscientious judgment, or it exceeds the bounds of reason. If a district court abuses its discretion in an evidentiary ruling, the Supreme Court must then determine whether the demonstrated abuse of discretion constitutes a reversible error. Reversible error occurs where the impact of [the evidentiary issue] is conceivably outcome-determinative, and there is a reasonable possibility the [...] evidence might have contributed to the [outcome].

Masters Grp. Int'l, Inc. v. Comerica Bank, 2015 MT 192, ¶ 35, 380 Mont. 1, 352 P.3d 1101 (internal citations and quotations omitted).

This Court reviews a District Court's determinations regarding judicial admissions for an abuse of discretion particularly based on the specific facts and circumstances in a case, with that discretion being "not unlimited." *Bilesky v. Shopko Stores Operating Co., LLC*, 2014 MT 300, ¶¶ 10 and 14, 377 Mont. 58, 338 P.3d 76.

Whether a statement constitutes a judicial admission depends upon the circumstances of each case. Whether a statement is one of fact or law, for the purpose of determining if the statement should be considered a judicial admission, is a question of law we review for correctness.

Id., ¶ 10 (internal citations omitted).

Attorney fees awards are reviewed for abuse of discretion. *In re Szafryk*, 2010 MT 90, ¶ 19, 356 Mont. 141, 146, 232 P.3d 361, 365. A district court abuses its discretion if its fee award is based on an inaccurate view of the law or if a finding of fact is clearly erroneous. *Sletteland v. Roberts*, 2003 MT 17, ¶ 9, 314 Mont. 76, 64 P.3d 979. If an award of fees is mandated by statute, it is an abuse of discretion not to award them. *Glaspey v. Workman*, 234 Mont. 374, 377, 763 P.2d 666, 668 (1988).

SUMMARY OF THE ARGUMENT

The District Court erred in four key respects, each of which separately calls for reversal and remand for subsequent proceedings.

The District Court engaged in clear error in finding that Tim did not have a prescriptive easement over the Browns Gulch Road on the basis that Charles has impliedly given him permission to travel that road. The District Court, in reaching this finding, had to choose between several conflicting and confused statements made by Tim (a man with a clearly disabling cognitive injury) on that issue, coming to the wrong ultimate finding. More to the point, the District Court also ignored a judicial admission by Charles in the form of a filed statement under oath confirming that Tim “never” had permission to use the road segment at issue.

The District Court abused its discretion in issuing a permanent injunction with the specific terms ordered here, particularly with time limitations in which Tim can

perform road work each year that are not founded in the evidence. While Tim does not oppose a permanent injunction with clear terms that articulate rules regarding work he might do, it is necessary to remand this matter for reconsideration of an injunction that better fits the facts, historical context, and needs of the people affected by it.

The District Court engaged in clear error in concluding that Tim had trespass liability, in the form of roadway obstructions, by failing to impartially review the evidence. In particular, the District Court erroneously relied on the testimony of a witness, Leslie Fischer (“Leslie”), who was caught improperly reading documentation not in evidence during her direct examination and then tainted her credibility by lying about whether she had been doing so. Separately, when Tim attempted to answer a few questions material to his defense, particularly an open-ended cross examination question regarding delay in removing instructions, the District Court improperly cut off and struck his responsive and explanatory testimony. As a result, the District Court confused the facts of how Tim moved some roadway materials, erroneously finding that he acted wrongfully. The evidence objectively shows that that Tim’s obstructive conduct was reasonable and not actionable trespass, as it was in furtherance of a valid easement. Even if a trespass award is proper, the damages amount was in an amount that should shock the conscience of this Court based on the evidence of the effect of any such trespass.

Finally, the District Court erred in not awarding Tim an award of attorney fees, mandated by statute, as the prevailing party in an assault claim against which Paulette asserted the use of force was justified. While it was error not to award these fees, it was also error for the District Court to not even have analyzed the issue.

ARGUMENT

I. The District Court erred in Finding Tim had Permissive use of the Browns Gulch Road, Especially in Disregarding an Unequivocal Judicial Admission of Charles Regarding Tim's Lack of Permission.

The District Court erred in denying Tim's claim to an implied easement by prescription over the segment of the Browns Gulch Road on the Sprague Property, by disregarding a clear and unequivocal admission by Charles that Tim's use of that road segment was not done with permission.

A prescriptive easement is a form of implied easement recognized under Montana law. To establish a prescriptive easement, a plaintiff party must show that the roadway encumbered by the easement has been used in a manner that is open, notorious, exclusive, adverse, continuous and uninterrupted, for a period of five years. *Renner v. Nemitz*, 2001 MT 202, ¶ 19, 306 Mont. 292, 33 P.3d 255.

For any cause of action involving proof of facts, any facts material to a claim can be conclusively admitted for the purpose of litigation under the doctrine of judicial admission:

[T]he following criteria must all be met in order for a statement to constitute a judicial admission:

- 1) There must be a statement made to the court. The statement can be made at any stage of the proceedings. Statements made outside the litigation proceedings are not made to the court, and thus cannot be judicial admissions.
- 2) The statement must be made by a party, or the party's attorney.
- 3) The statement must be a statement of fact, and not a statement of opinion or law.

Bilesky, ¶ 13.

In making its findings of fact and conclusions of law, the District Court ruled against Tim regarding his claim of a prescriptive easement over any part of the segment of the Browns Gulch Road on the Sprague Property. The basis to do so was a finding that Tim's use was permissive, not adverse (failing the fourth element for a prescriptive easement as set forth above). *Renner*, ¶ 19.

The Court's basis in doing so was to look to several statements by Tim during his deposition and at trial regarding permission Charles had given Tim to use "the road." Dkt. 119, findings of fact ¶ 17, p. 14; findings of fact ¶¶ 114-117, p. 29. Conversely, Tim at other times worked to clarify that neither Paulette nor Charles had given him permission to use the roadways for which he sought a prescriptive easement. Tr. Transcr. 389:18-390:4, February 24, 2022.

In finding that Tim had contradicted himself, and that he had conceded that his road usage was permissive, the District Court took some inferential leaps to define the meaning of the terminology "the road" used in examination of Tim. Dkt. 119, findings of fact ¶ 117, p. 29. The District Court relied on these findings, that

Tim had implied received permission from Charles, to conclude that Tim’s use of the Browns Gulch Road over the Sprague Property had been permissive (Dkt. 119, conclusions of law ¶ 36, p. 53), and on that basis the District Court concluded his prescriptive easement over that area failed. Dkt. 119, conclusions of law ¶ 40, p. 54; conclusions of law ¶ 73, p. 60.

Tim now asserts that this was a clear error, both because Tim’s deposition testimony was far from clear regarding the status of his permission over the specific area for which he sought a prescriptive easement, but also because the Court had to disregard a clear admission by Charles that Tim “never” had permission to use the roadway for which Tim claimed an easement.

Paulette never granted permission to anyone to use the segment of Browns Gulch Road crossing the Sprague Property, meaning only Charles could have done so. Dkt. 119, findings of fact ¶ 85, p. 25.

Long before trial, specifically in the context of opposing a motion filed by Tim, Charles filed a sworn statement under oath discussing permissive use of the Browns Gulch Road on the Sprague Property. Dkt. 53. In his declaration Charles confirmed that “Tim Beard has never been given permission to cross my property past the ‘first turnoff.’”² *Id.*, ¶ 10, p. 10.

² That first turnoff was the northmost 90’ or so of the Browns Gulch Road, over which Tim has an express granted easement from the Spragues. Dkt. 119, findings of fact ¶ 5, p. 12; ¶ 12, p. 13.

Tim's prescriptive easement claim was for an area far larger than that "first turnoff," meaning that Charles' sworn and filed statement should be dispositive of the issue of permissive used over a claimed prescriptive easement. As a sworn statement in dispositive motion practice in this case, it was an abuse of discretion not to view Charles' statement as a conclusive judicial admission. *Bilesky*, ¶ 14.

Tim suggests that the District Court's error in not finding so is especially problematic in light of Tim's susceptibility to confusion due to his head injury. His deposition was a very contentious and confusing event, in which he repeatedly stated that he was confused. Cross examination on the point was no different. Tr. Transcr. 469:3-475:14; 483:5-484:10, February 24, 2022.

Prior to trial, Tim had argued the effect of his deposition confusion in detail, and included all material points of his deposition transcript, in a brief he filed opposing summary judgment by Paulette. Dkt. 64, pp. 4-8 and 12-14. Rather than reiterate those arguments during trial (again recognizing that arguments were not allowed at trial), Tim instead referred the Court only to certain portions of Tim's deposition. Tr. Transcr. 475:15-24, February 24, 2022. Tim then reiterated the argument in his post-trial proposed findings of fact and conclusions of law. Dkt. 116, Ex. A, proposed findings of fact ¶ 32, p. 11 (of that Ex. A); proposed conclusions of law ¶ 54-57, p. 33-34 (of that Ex. A). Per the holding in *Bilesky* regarding a judicial admission potentially occurring at any stage, this acceptably

preserved the record of Charles' position on permission, while allowing a bench trial to move past a point of difficulty. *Bilesky*, ¶ 13.

Tim asserts that the District Court made a clear error in inferring permission from statements made by Tim, a confused person with a cognitive disability, while disregarding a clear statement about permission from the person most fit to grant or deny it. Tim therefore respectfully requests that this Court reverse the conclusion that Tim did not prevail on his prescriptive easement claim, and that the matter be reversed and remanded to the District Court for further consideration, as necessary, regarding the effect of Charles' judicial admission.

II. The District Court's Ultimate Permanent Injunction Against Tim is Overbroad and Not Based on the Evidence.

The District Court's ultimate injunction was unreasonably broad, in a manner not well founded in trial evidence, and a more tailored injunction is proper.

A court's ability to issue an injunction is broad, in several circumstances, including where:

- (1) pecuniary compensation would not afford adequate relief;
 - (2) it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief;
 - (3) the restraint is necessary to prevent a multiplicity of judicial proceedings...
- [...]

Mont. Code Ann. § 27-19-102.

As the District Court correctly noted, in issuing an injunction, it acts within its discretion in issuing an injunction if it meets each of the following standards:

An order granting an injunction must

- (1) set forth the reasons for its issuance;
- (2) be specific in its terms;
- (3) describe in reasonable detail, and not by reference to the complaint or any other document, the act or acts sought to be restrained; and
- (4) be binding only upon the parties to the action; their officers, agents, employees, and attorneys; and those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Guthrie v. Hardy, 2001 MT 122, ¶ 58, 305 Mont. 367, 380, 28 P.3d 467, 476-77. Dkt. 119, conclusions of law ¶ 75, pp. 60-61.

In the context of secondary roadway easement rights the District Court further correctly observed that a dominant tenant with a primary easement right for access has a secondary right “to enter upon the servient estate and make repairs necessary for the reasonable and convenient use of the easement, doing no unnecessary injury to the servient estate,” and that “[s]uch secondary easements can be exercised only when necessary and in such a reasonable manner as to needlessly increase the burden upon the servient tenement.” *Laden v. Atkeson*, 112 Mont. 302, 306, 116 P2d 881, 884 (1941); Dkt. 119, conclusions of law ¶ 72, pp. 59-60. Tim asserts that a material holding on this point from *Guthrie* also frames this issue: “the general rule is that the owner of the easement has not only the right but the duty to keep it in repair.” *Guthrie*, ¶ 59.

Tim’s assertion of error in the District Court’s ultimate injunction is relatively minor, calling for a modification to an otherwise acceptable injunction.

Reassessment of the specific terms of a permanent injunction is proper, so that Tim can remain available to the owners of the Hopler Property and the Watt Property as they exercise their right to use and repair the Browns Gulch Road. There is no evidence from the owner of the Watt Property one way or another, but Woody Hopler (“Woody”), caretaker of the Hopler Property (Tr. Transcr. 553:4-554:21, February 24, 2022), testified that his family had long relied on Tim to do road maintenance, that they would likely do so in the future, and that he did good work. Dkt. 119, findings of fact ¶¶ 175-182, pp. 38-39.

The District Court’s ultimate injunction, in restricting the periods during the year when the owners of the Watt Property or the Hopler Property could utilize Tim’s repair work to only a few weeks a year, to June 15 through 25 and October 15 through 25, placed an excessive restriction on their secondary easement rights. Dkt. 119, p. 63. There was no evidence presented to show why the periods were of special significance, and they do not contemplate either the possibility of inclement weather, or of unavailability of Tim. Timing of weather is a particular problem as heavy rains caused the Browns Gulch Road to wash out in 2010, making it unusable for the Hopler family. Dkt. 119, findings of fact ¶¶ 170-171, p. 38. The date restrictions in the District Court’s injunction therefore place an unfounded burden on the owners of the Watt Proper and Hopler Property owners, to the degree they wish to continue using Tim’s services. While, of course, the Watt and Hopler Property owners might

have someone other than Tim engage in road work, having him do it is very convenient. He is immediately local, experienced in the work, and does the work for minimal or no cost. Dkt. 119, findings of fact ¶¶ 175-182, pp. 38-39.

The District Court's ultimate injunction does not contemplate any practical factors that could affect the practical complications of road work, particularly weather. It also does not contemplate future changes to it, such as if Paulette were to sell her real property. Tim asks that this Court remand the matter to the District Court, for issuance of an injunction that allows more freedom for the owners of the Watt Property and the Hopler Property to meet the standard of having "not only the right but the duty to keep [their easement over the Sprague Property] in repair" if they continue to use Tim's services. *Guthrie*, ¶ 59.

III. The Trial Evidence Does Not Support the Court's Ultimate Conclusions Regarding Trespass Liability, nor Damages as Awarded.

The District Court's findings of fact regarding Tim's trespass liability to Paulette improperly minimized Tim's testimony in favor of other evidence taken under tainted circumstances (and, as the District Court noted, having its own credibility problems), while disregarding the unrebutted evidence regarding Tim's work on other segments of the Browns Gulch Road.

A. The Evidence does not Support a Finding of Trespass Liability.

The evidence presented at trial does not support a finding of trespass liability, as the Court's decision to award liability was closely decided based on a mistake by the District Court, based on a difficult presentation of evidence.

Trespass is an intentional tort claim for damages caused by an unauthorized entry or holdover upon real property of another. *Tags Realty, LLC v. Runkle*, 2015 MT 166, ¶ 15, 379 Mont. 416, 352 P.3d 616. The essential elements of a trespass claim are: (1) an intentional entry or holdover; (2) by the defendant or a thing; (3) without consent or legal right. *Branstetter v. Beaumont Supper Club, Inc.*, 224 Mont. 20, 24, 727 P.2d 933, 935 (1986).

Action in furtherance of a valid easement is privileged from trespass liability. *Ducham v. Tuma*, 265 Mont. 436, 441, 877 P.2d 1002, 1005 (1994).

The rights of a dominant tenant in an express easement have the right to burden or even injure (so long as any injury is not unnecessary) a servient tenement. *Laden*, 112 Mont. at 306, 116 P2d at 884; *Guthrie*, ¶ 59.

“Reversible error occurs where the impact of clearly inadmissible evidence is conceivably outcome-determinative, and there is a reasonable possibility the inadmissible evidence might have contributed to the [ultimate decision of fact]. *Masters Grp. Int'l, Inc.*, ¶ 35

i. The District Court Misconstrued Tim’s Road Maintenance Action, Largely Relying on Improper and Tainted Testimony.

The unrebutted evidence shows that Tim had, for years (and particularly after the fire in 2010), engaged in road maintenance over the full run of the Browns Gulch Road. The final stretch of significant post-fire repairs in which he engaged was on the segment crossing Paulette’s Parcel, that segment being necessary to access the Hopler Property and the Watt Property. Tr. Transcr. 423:19-424:13, February 24, 2022. Tim’s work was done with the express permission from Woody. Dkt. 119, findings of fact ¶ 177, p. 39.

The District Court erroneously relied on the testimony of witnesses called by Paulette, especially her daughter Leslie, to substantiate certain instances of trespass by Tim. While the District Court engaged in some careful analysis to show that Leslie’s testimony was possibly mistaken in several respects, (Dkt. 119, findings of fact ¶¶ 43-46, p.18-19), it also relied on her testimony to support findings material to Paulette’s claims of Tim’s trespass and its effect on Paulette. Dkt. 119, findings of fact ¶ 47-48, p. 19.

Tim asserts that findings stemming from Leslie’s testimony are erroneous because her testimony was influenced, and therefore tainted, by the use of improper documents designed to elicit a prejudicial record. During direct examination of her in Paulette’s case in chief, Leslie was found to have been using documentation not offered into evidence during her examination. Tr. Transcr. 105:2–111:11, Feb. 22,

2022. Among the documents available to her during this testimony was an outline of dates claiming that events occurred, which she admitted she had prepared, and a more comprehensive “script” of evidence beneficial to Paulette’s case that Leslie stated was prepared by Paulette (which she claimed not to have used during her testimony). Tr. Transcr. 110:17-111:4, Feb. 22, 2022. Those two documents were admitted into evidence expressly to preserve a record in case of appeal as Exhibit 23 and 24. Tr. Transcr. 115:5-8, February 22, 2022.

Leslie at first admitted, when asked by the Court if she was reading something, that she was “reading notes I have here.” Tr. Transcr. 105:10-13, Feb. 22, 2022. Shortly after, on voir dire examination by Tim’s counsel regarding what she was reading, Leslie was initially evasive as to whether she had been reading Exhibit 23 during her testimony, but then expressly denied it (despite having admitted she was reading, directly to the Court, a few minutes before that). Tr. Transcr. 110:4-8, Feb. 22, 2022.

Tim moved at that time to have Leslie’s testimony stricken, with that motion having been denied, even as the Court admonished counsel, the parties, and Ms. Fischer, about fairness in the process of development of an evidentiary record. Tr. Transcr. 113:9-116:22, February 22, 2022.

In discussing Tim’s motion to strike her testimony, the Court specifically noted that she “testified she did not look at Exhibit 23, 24, or 25 during her

testimony,” even as she did improperly have them. Tr. Transcr. 113:12-17, Feb. 22, 2022. The District Court, then determined that she remained competent to testify about her memory, with photographs, that being the basis not to strike her testimony. Tr. Transcr. 113:23-114:19, Feb. 22, 2022. The Court at that time did also allow Tim to discuss any other prejudicial effect, raising an ongoing objection that her testimony was tainted (with Exhibit 24 being strongly argumentative document). Tr. Transcr. 114:23-115:4, Feb. 22, 2022. The Court finally denied Tim’s motion to strike her testimony, with an admonishment that she could not look at any other documents not in evidence. Tr. Transcr. 115:9-116:6, Feb. 22, 2022.

Tim asserts it was error for the Court not to have either stricken her testimony, or to have viewed it as insufficient to support any findings of fact, particularly those that support a holding of trespass liability (or any other theory or remedy). This is due not only to her having had inadmissible documentation in front of her during her direct examination, but because she disqualified herself as a reliable witness by lying about her own courtroom conduct: whether she had been reading a document on the witness stand. First she admitted to the Court she had been reading, but then a moment later, still on the witness stand, she denied that fact when asked again by Tim’s counsel. Tr. Transcr. 105:10-110:8, Feb. 22, 2022.

Looking to more objective testimony, Tim did concede that he placed certain piles of dirt and other material on the segment of Browns Gulch Property crossing

the Sprague Property, even as he disputed the characterization of that activity as wrongful. Dkt. 119, findings of fact ¶ 129, p. 31. His testimony was more detailed than that finding of fact describes, as Tim explained during cross-examination that he moved dirt into piles for several reasons, including deadfall removal as well as clearance of working area (or as Tim put it, areas both in the roadway and next to it where he needed “room to work”). Tr. Transcr. 503:19-504:21, Feb. 24, 2022. Prior to that point, during his direct examination, he described in detail what materials he used, why, and how and why he placed them in piles, specifically in the context of countering the testimony of Leslie and witness Nick O’Dell that suggested his work was not of good quality. Tr. Transcr. 374:7-382:6, Feb. 24, 2022.

The ultimate findings of fact supporting trespass focused on one specific picture, showing a log half buried in a dirt pile, which the Court viewed as being inconsistent with needing room to work. Dkt. 119, findings of fact ¶ 129, p. 31.

The District Court found it made “no logical sense” that Tim would move a log into the roadway with a grader, partially covered with dirt, as shown on Exhibit 9.3 (that photograph being admitted per Tr. Transcr. 54:23-55:5, Feb. 22, 2022). Dkt. 119, findings of fact ¶ 129, p. 31.

The problem is that Tim testified he pushed the dirt and log into the pile with a loader (pushing logically leading to the creation of piles), not that he took special and wrongful action to drag a log into a pile with a grader (with other testimony

clarifying a grader makes a roadway smooth, rather than creating piles). Tr. Transcr. 277:9-12, Feb. 22, 2022. Tim was clear about the specific log that caught the District Court's attention, testifying that "I shoved it up there with a loader." Tr. Transcr. 504:10-21, Feb. 24, 2022. The District Court confusing the nature of what Tim actually did with regard to that one specific log, as the key finding supporting trespass liability, was clear error.

There was significant deadfall all along the Browns Gulch Road since 2010. Dkt. 119, findings of fact ¶ 112, p. 28. Tim's work, both in the roadway, and the soft areas around it, required the moving of any material in the that area that could affect his work. (Tr. Transcr. 375:20-378:23, February 24, 2022). Therefore, if there was deadfall, or other material of any sort, pushing it out of the way so that fill materials (large rocks or small) could be placed is a logical thing to do. If a piece of deadfall were caught up in the bucket of a loader, pushing material around to clear space for placement of fill or large rocks to support the roadbed, it would explain the situation as being in line with ordinary road repair and maintenance. It could also all be graded later, as a final step.

As to a log being slightly covered with dirt (the point of fact most troubling to the District Court), Tim stated that he treated the log like all other deadfall he had found doing other work on the Browns Gulch Road, and that there was dirt on it because he had used a loader (not a grader) to move the whole pile (dirt, log, and

other debris) out of the area where he was working. Tr. Transcr. 504:5- 504:25, Feb. 24, 2022.

Tim “needed room to work,” (Tr. Transcr. 378:10-23), because his work called for placement of material such as “big rocks” in the ditch next to the road where the ground is soft, as well as placement of gravel and other materials in the actual roadway. Tr. Transcr. 375:20-378:23, February 24, 2022.

Tim did attempt to provide additional explanation on cross-examination, but his testimony was stricken. Tim freely admitted to having moved the log along with the dirt with a loader, and was confused as to why he was being accused of a wrongful act in doing so (his statement of confusion and attempted explanation being stricken by the District Court on motion from Paulette’s attorney). Tr. Transcr. 503:21-24, 505:7. In this instance, as in another instance detailed below, Tim was prejudiced by the District Court striking his otherwise responsive testimony. This compounded the reversible error here, as Tim’s explanations for his actions could easily have led the District Court to reach different findings of fact, showing no trespass liability. *Masters Grp. Int’l, Inc.*, ¶ 35.

If his work was as he claimed, removing material so he could work on the roadway as he always had, it would fall within the permission given by Woody for Tim to do road work, and constitute no trespass. *Ducham* at 441, 877 P.2d at 1005. The District Court erred in finding dispositive that Tim was pulling a log into the

roadway as part of grading the road, when he was actually pushing material around so it could be prepared for later grading. Because the totality of the evidence shows that dirt being on that log was normal and appropriate for Tim's road work on the dominant easement of the Watt Property and the Hopler Property, findings supporting his trespass liability were in error.

ii. The Other Key Finding Supporting Liability, Delay in Removal of Obstructions, was Prejudicially Skewed by Tim's Valid Testimony on the Topic Being Stricken in Error.

Paulette may point out that the District Court also held that a six-week obstruction, occurring in September and October of 2019, was an unreasonable interference with the Browns Gulch Road (and everyone entitled to use that segment of it), and therefore a trespass (even if Tim were doing work otherwise validly done on behalf of a dominant tenant). Dkt. 119, findings of fact ¶ 195, p. 41. Again, on this specific point, Tim asserts that an evidentiary error (again in the form of the District Court striking his responses to a question on cross-examination) led to an erroneous finding and an incorrect conclusion.

Tim, again on cross examination, attempted to explain why that happened during the six-week obstruction period in September and October of 2019, but his testimony was stricken. He was asked a very open-ended question, "[w]hy would you leave the log that goes entirely across the road where it's at? What was your purpose of doing that?" Tr. Transcr. 503:3-6, Feb. 24. 2022. Tim attempted to

answer by explaining a work stoppage due to a “he” (clearly Charles from the context) shooting firearms in Tim’s direction. Tr. Transcr. 503:6-8, Feb. 24, 2022. Paulette’s counsel moved to strike the answer as non-responsive, which the District Court granted without asking for discussion or argument from Tim’s counsel. Tr. Transcr. 503:11-13, Feb. 24, 2022. On subsequent re-direct, Tim was asked about why he did not complete the work, but did not continue his prior, stricken answer, instead answering the question in the broader context of work to have been performed pursuant to a spoken order from the District Court disposing of the initial temporary restraining order (Dkt. 9), compelling the parties to reach a road maintenance agreement. Tr. Transcr. 593:4-594:8, Feb. 24, 2022.

Tim now asserts that if he had been able to fully answer the original, open-ended cross-examination question, about the delay in the six weeks of starting on September 4, 2019, that the Court would have come to a different conclusion about whether the duration of that obstruction was unreasonable. Again, on one specific point of evidence that was ultimately the basis for liability against Tim, clear error occurred, and but for that error, it is likely no liability would have been found. *Masters Grp. Int’l, Inc.*, ¶ 35.

iii. The Court's Findings Regarding Tim's Obstructions Being a Trespass, Rather Than Valid Road Work, Erroneously Ignore Evidence of all Other Work Done by Tim on the Browns Gulch Road.

At the risk of an inappropriate metaphor in a case involving fallen timber, Tim asserts that the District Court missed the forest for the trees in concluding that Tim had engaged in a trespass. The overall evidence does not support the idea that Tim placed these piles for any purpose other than road work, and certainly not as an act of trespass to spite Charles or Paulette.

Paulette, on cross-examination, conceded that the only purpose that would exist to do road work on the segment of the Browns Gulch Road crossing the Sprague Property would be to “open up access to the” Watt Property and the Hopler Property. Tr. Transcr. 286:22-25, Feb. 22, 2022.

If Tim intended to obstruct the road to spite the Spragues (rather than to just do road work), it would also have meant that he had suddenly and illogically decided to undermine years' worth of his work to improve the Browns Gulch Road, in the long segments above and below those piles. He had long engaged in this other work in a manner that drew thanks from at least the Hoplers. Dkt. 119, findings of fact ¶¶ 178-180, p. 39. The piles of dirt and debris on the Sprague Property, if obstructive instances of trespass to Charles and Paulette, would therefore be *equally or more obstructive* when accessing the Watt Property or the Hopler Property. This would have been toxically contrary to Tim's purposes in doing road work in the first place:

opening the Browns Gulch Roach. Tr. Transcr. 593:4-11, Feb. 24, 2022. The only evidentiary record of the position of these landowners, Woody's testimony, shows gratitude for Tim's work on the whole run of Browns Gulch Road. Dkt. 119, findings of fact ¶¶ 175-180, pp. 38-39.

The totality of the evidence, particularly recognizing that Leslie's testimony was demonstrably not credible, and that Tim's attempts to answer questions were stricken, shows that Tim only acted to reasonably repair a road subject to an express easement, at the behest of the dominant tenant (as he had done for years). *Guthrie*, ¶ 59. This was therefore not a trespass, because the actions were privileged pursuant to an express granted easement. *Ducham* at. 440, 877 P.2d at 1005.

Tim therefore asserts that the evidence at trial did not support the conclusion of trespass liability, and ask this Court to reverse that conclusion and vacate the award against him for that tort claim.

B. The Court's award of damages for Tim's Trespass is not warranted.

To the degree that a finding of trespass liability remains against Tim, he asserts that the setting of the amount of the award here is not supportable. A prevailing plaintiff on a civil trespass claim is entitled to damages for the "discomfort and annoyance to the occupant, in addition to damages to the land or for loss of use of the land itself." *French v. Ralph E. Moore, Inc.*, 203 Mont. 327, 333, 661 P.2d 844, 847 (1983). A judgment for damages, specifically the amount, must be

supported by evidence. *McKay v. Wilderness Dev., LLC*, 2009 MT 410, ¶ 74, 353 Mont. 471, 221 P.3d 1184. Additionally, a damages award that is supported by the record is still subject to reversal if it “shocks the conscience” of the appellate court. *Id.*, ¶ 77.

Tim asserts now that, even if he is liable for the tort of trespass, an award of \$15,000 is not supported by the evidence and too high to be conscionable in the circumstances. While a finder of fact has broad discretion to set an award of compensatory “discomfort and annoyance” damages for a civil trespass, the valuation here does not appear to have been tied to any specific evidence showing a measurable loss to Paulette or Charles.

Paulette’s “discomfort and annoyance” here occurred solely in a roadway over which others, the owners of the Watt Property and the Hopley Property, had dominant easement rights. As discussed above, it was their “right” and “duty” to occasionally repair and maintain that roadway. *Guthrie*, ¶ 59. At least one dominant tenant, Woody, understood Tim’s work to have been generally appropriate and in line with the Hopley family’s own road maintenance. Dkt. 119, findings of fact ¶ 102, p. 27.

So (and again, only if he remains liable for trespass to Paulette), Tim respectfully requests that the award of damages against him for Trespass be reversed

and remanded to the District Court for a hearing to more precisely set a damages award to reflect what amount of “discomfort and annoyance” Tim caused Paulette.

IV. Did the District Court Err in Failing to Award Statutory Mandatory Attorney Fees to Tim After He Prevailed on a Civil Assault Claim for Which Paulette had Asserted a Defense of Justifiable Use of Force.

After determining that Charles (and due to his death, Paulette) was liable to Tim for a civil assault, as an unjustified use of force, the District Court erred in not analyzing and awarding Tim mandatory statutory award of reasonable attorney fees.

The prevailing party in a civil assault action, in which the defendant party to that assault claim asserts that the force was allowable under “Title 45, Chapter 3, Part 1” of the Montana Code Annotated, “is entitled to costs and reasonable attorney fees.” Mont. Code Ann. § 27-1-722(4). It is an abuse of discretion not to award fees if they are mandated by statute. *Glaspey* at 377, 763 P.2d at 668. Denial of a request for attorneys’ fees “without rationale, is "not an exercise of discretion, but is an abuse of that discretion.” *Yellowstone Cnty. v. Billings Gazette*, 2006 MT 218, ¶ 30, 333 Mont. 390, 143 P.3d 135.

As noted by the District Court, the use of force to prevent a trespass is judged by a reasonableness standard, with the actor using force constrained to “conduct [...] necessary to prevent or terminate the other person's trespass on or other tortious or criminal interference with [...] real property. Mont. Code Ann. § 45-3-104. The right to use force that is "likely to cause death or serious bodily harm" is authorized

"only if the person reasonably believes that the force is necessary to prevent the commission of a forcible felony." *Id.* A "forcible felony" is "any felony which involves the use or threat of physical force or violence against any individual." Mont. Code Ann. § 45-3-101. Dkt. 119, conclusions of law ¶¶ 52-53, p. 56.

Paulette, in making her arguments prior to trial, asserted the defense of justifiable use of force to Tim's assault claim, particularly as to the events of July 13, 2020, sufficiently to invoke Mont. Code Ann. § 27-1-722(4). She asserted that Tim took actions to goad Charles into assaulting Tim (as she argued, "the criminal assault charge against Charles Sprague was purposefully orchestrated by Beard, taunting Charles Sprague"). Dkt. 106, p. 10.

Because Tim prevailed on his assault claim after Paulette unsuccessfully asserted that the assault was justified is arguably enough to say that attorneys' fees are mandatory. Complicating matters, however, is that the District Court determined that Charles was *and* was not justified in his use of force, but ultimately not justified. Dkt. 119, conclusions of law ¶¶ 54-57, p. 56-57. To be specific, the District Court concluded that Charles was justified in the use of force when confronting Tim on July 13, 2020, so long as Charles was on his own property, but his use of force was not justified once Charles came on to Tim's property.

As a first point of error, Tim asserts it was error to conclude that Charles' use of force was necessary to prevent or terminate the other person's trespass on or other

tortious or criminal interference with [...] real property” while on his own property confronting Tim on July 13, 2020. Mont. Code Ann. § 45-3-104.

In its numbered findings of fact, the District Court used strong language to indicate that Charles’ actions on July 13, 2020, even on his own property, were not reasonable. As the Court found, “Charles intentionally verbally threatened Beard, brandished a weapon, **endeavored to trap Beard on his property**, and ultimately trespassed on Beard’s property with a handgun.” Dkt. 119, findings of fact ¶ 223, p. 46 (emphasis added). As the evidence more specifically showed, Tim testified that Charles pointed a gun at him at this point (Tr. Transcr.429:8-430-6), which the District Court found (in its conclusions of law) not to be competent or credible (Dkt. 119, conclusions of law ¶ 54, p. 56). Witness Cory Harpster, also present during the confrontation on July 13, 2020, testified that he saw Charles, while sitting in his automobile during this confrontation, with a firearm “down low in his waist as if he were ready to use it.” Tr. Transcr. 526:1-5, Feb. 24, 2022.

Affecting a determination of the reasonableness of Charles’ actions, the District Court also found that Charles had a history of both bullying Tim and making others fear for their safety. Dkt. 119, findings of fact ¶¶ 163-164, pp. 36 and 37.

There is no evidence that Tim took any action to threaten violence to Charles, taunt him as Paulette claimed, or to take action (on July 13, 2020, or otherwise) other than the same roadwork activity he had done in the area for years. As such, there

was no basis for Charles or Paulette to assert that brandishing a firearm, or taking the much more egregious step of “endeavoring to trap Beard,” was a reasonable use of force while on the Sprague Property in the moments before he moved on to the Beard Property. Sprague engaged in an uninterrupted and wrongful course of conduct starting on the Sprague Property and ending on Tim’s. Dkt. 119, findings of fact ¶ 223, p. 46. So, to the degree that the District Court might have concluded use of force to be justified but then not justified during that continuous course of conduct on July 13, 2020, such that neither party could prevail on an assault claim, the evidence (and specific findings of fact) support only the conclusion that no use of force was justified for Charles, whether he aimed a firearm at Tim or not.

To conclude on a “sticking point” of procedure related to this assertion of error, the District Court technically erred in not analyzing denial of an award of attorney fees under Mont. Code Ann. § 27-1-722(4) one way or another. The District Court’s limited analysis of attorney fees instead focused only on a claim for fees as discretionary “further relief” in the context of a declaratory judgment under Mont. Code Ann. § 27-8-313, a different standard under a different statute than the award discussed in Mont. Code Ann. § 27-1-722(4).

Under precedent established for other types of attorney fees awards, Tim asserts that the Court declining to analyze that claim for fees under Mont. Code Ann. § 27-1-722(4), specifically, not providing “rationale” for the conclusions, was an

abuse of discretion. *Yellowstone Cnty.*, ¶ 30. A lack of analysis by the District Court makes it difficult or impossible for Tim to more specifically illustrate his objections to the otherwise mandatory award being declined.

Tim, as the prevailing party in an assault claim in which a defense was raised indicating the assault was justified, respectfully requests that this Court remand the case to the District Court with instructions to issue an attorney fees award in Tim's favor under the provisions of Mont. Code Ann. § 27-1-722(4), including any related necessary proceedings.

CONCLUSION

Tim asserts that the District Court erred in these key aspects, particularly in making conclusions that were not founded in the evidence, or in restricting Tim's ability to properly explain himself during the presentation of evidence. As such, he respectfully requests that this Court remand this matter to the District Court with instructions, for subsequent proceedings that correct these errors.

DATED this 23rd day of December, 2022.

ELEMENT LAW GROUP, PLLC

/s/ Mark Lancaster

Mark Lancaster

*Counsel for Defendant, Counterclaim
Plaintiff, And Appellant Tim Beard*

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief is proportionally spaced typeface of 14 points and does not exceed 10,000 words, as set forth in Mont. R. App. P. 11(4)(a), excluding for the purpose of that count any “table of contents, table of citations, certificate of service, certificate of compliance, or any appendix containing statutes, rules, regulations, and other pertinent matters” Per Mont. R. App. P. 11(4)(d).

Dated this 23rd day of December, 2022.

/s/ Mark Lancaster
Mark Lancaster

CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing APPELLANT’S OPENING BRIEF ON APPEAL with the Clerk of the Montana Supreme Court and that I have served true and accurate copies of the foregoing as follows:

BY ELECTRONIC SERVICE THROUGH EFILING*:

David B. Gallik
Gallik Law Office, PLLC
1124 Billings Ave
Helena, MT 59601
Courtesy Copy to: dave@galliklaw.com

*A bound paper copy will be served by mail once approved for filing.

Dated this 23rd day of December, 2022.

/s/ Mark Lancaster
Mark Lancaster

APPENDIX

App. Pt. 1 - “Judgment,” filed April 13, 2022, Dkt. 121
(Pages 2 to 3 of 111 pages in Appendix)

App. Pt. 2 - “Bench Trial Findings of Fact, Conclusions of Law and Order,” filed
March 30, 2022, Dkt. 119
(Pages 5 to 68 of 111 pages in Appendix)

App. Pt. 3 - “Court Errata,” filed April 27, 2022, Dkt. 122
(Pages 70 to 72 of 111 pages in Appendix)

App. Pt. 4 “Final Pretrial Order,” filed November 15, 2021, Dkt. 98
(Pages 74 to 96 of 111 pages in Appendix)

App. Pt. 5 “Order on Various Motions,” August 17, 2021, Dkt. 95
(Pages 98 to 111 of 111 pages in Appendix)

CERTIFICATE OF SERVICE

I, Mark Lancaster, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 12-23-2022:

David B. Gallik (Attorney)
1124 Billings Avenue
Helena MT 59601
Representing: Charles Sprague, Paulette Sprague
Service Method: eService

Electronically Signed By: Mark Lancaster
Dated: 12-23-2022