IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court No. DA 22-0485

Kathy Westphal and Douglas Westphal,

Plaintiffs and Appellants,

v.

Todd Kissinger, Deborah Kissinger,
Michael Kissinger, and Melissa Kissinger,

Defendants and Appellees,

and,

Linda Romano,

Intervenor and Appellee.

From the Eleventh Judicial District Court, Flathead County, Montana
Cause No. DV-19-310(B)
Honorable Robert B. Allison

APPELLEES' RESPONSE BRIEF

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STATEMENT OF THE ISSUES

Whether the District Court properly denied the Westphals' Motion to Dismiss premised on lack of subject matter jurisdiction because other property owners with easement rights over the Westphals' property are not parties.

STATEMENT OF THE CASE

This case involves claims by Todd and Deborah Kissinger and Linda Romano concerning Douglas and Kathy Westphal's persistent interference with easement roads on their property, including Five Deer Lane. The Kissingers and Ms. Romano do not assert any claims against other neighbors or easement holders on Five Deer Lane. Their claims include declaratory judgment claims that seek to confirm the existence and scope of their easement rights. Those claims seek to restore and confirm the Kissingers' and Ms. Romano's easement rights and would not affect or prejudice any other easement holders' rights for Five Deer Lane.

The Westphals initially sued the Kissingers, including Todd and Deborah's children, Michael and Melissa, claiming they drive too fast and dangerously on the easements, which the Kissingers deny. Todd and Deborah Kissinger filed counterclaims, including a declaratory judgment claim, for interfering with use of the easements, including by building and placing things on and about the easements. The Westphals amended their Complaint to include a declaratory claim against the Kissingers regarding the existence and scope of the easements.

Another neighbor, Linda Romano, intervened to assert claims against the Westphals, including a declaratory judgment claim, for interfering with her use of the easements, as well as breaching an existing Settlement Agreement concerning one of those easements. The Westphals filed counterclaims against Ms. Romano, alleging she drives too fast and dangerously, and seeking declaratory judgment about the existence and scope of her easements.

The Westphals filed multiple motions for summary judgment arguing some of the Kissingers' and Ms. Romano's claims were barred, all of which the District Court denied. The Kissingers and Ms. Romano filed multiple motions for summary judgment, some of which the District Court granted. The District Court held a Pretrial Conference and set the matter for trial. The Westphals then filed a Petition for Writ of Supervisory Control concerning one of the District Court's Orders denying their motions for summary judgment, which this Court denied. The Westphals then filed the Motion to Dismiss at issue in this appeal, claiming the District Court lacked subject matter jurisdiction because the Kissingers and Ms. Romano did not add every single person who has easement rights on the Westphals' property. The District Court denied the Westphals' motion and this appeal followed.

STATEMENT OF THE FACTS

The parties are or were neighbors on Five Deer Lane in Kalispell, Montana. The Westphals live at 1130 Five Deer Lane and Ms. Romano lives at 1184 Five Deer

Lane. Dkt. 104, ¶¶ 1-2. The Kissingers lived at 1150 Five Deer Lane during the timeframe underlying this lawsuit, but have since sold their dream property and moved because they could not tolerate the Westphals' conduct. Dkt. 53, ¶ 2; Dkt. 137. The Kissingers and Ms. Romano use Five Deer Lane to access their properties.[1] Dkt. 116, p. 2. Below is a map of their properties on Five Deer Lane:

Dkt. 25, p. 4.

Five Deer Lane enters the Westphals' property near its southeast corner,

[1] Though the Kissingers have moved, present tense is used herein for simplicity.

proceeds north along its eastern boundary, turns west, then turns north and runs along the shore of a lake as it leaves their property. Dkt 53, ¶ 3; Dkt. 116, p. 2. Near where the road turns north near the lake, a second road splits off of it and runs parallel to Five Deer Lane to the west, then reconnects with Five Deer Lane north of the Westphals' property. *Id.* The road to the west is known as the "upper road" and the portion of Five Deer Lane to the east that runs along the shore of the lake is known as the "lower road." Dkt. 53, ¶ 4. The portion of Five Deer Lane before the split is sometimes referred to as the "main road." *Id.* Below is an aerial photo showing the roads in question, but the overlay depicts Five Deer Lane on the upper road:

Dkt. 27, p. 4.

The Kissingers have an express easement for "ingress/egress" on Five Deer Lane that stems from a 1967 deed. Dkt. 37, Ex. F. Ms. Romano has an express easement for Five Deer Lane that stems from a 1977 deed, which states the easement is 60 feet wide on the main road and 30 feet after Five Deer Lane turns west in the above photo. Dkt. 72, Ex. A (citing easement on Certificate of Survey ("COS") 2503). The easements stem from different sources, but they run along the same path. Dkt. 72, Ex. B (COS 2503 citing "existing" road easement).

Ms. Romano has a prescriptive easement for the upper road, which was the subject of a prior lawsuit which she and five other neighbors had to file against the Westphals to stop them from closing the road. Dkt. 72, Ex. L. There, the District Court granted summary judgment concluding Ms. Romano and the other neighbors had prescriptive easement rights, which led to a settlement agreement. *Id.*, Ex. L and Ex. N. Contrary to the Westphals' assertion, the District Court already determined that case did not involve the location of the lower road, the location of the main road, or the interferences at issue in this case. Dkt. 116, p. 5. That determination is what the Westphals sought to appeal in their Petition for Writ of Supervisory Control, which this Court denied. Dkt. 118; Dkt. 123.

The Westphals were also involved in prior lawsuits with two other neighbors, Monte and Wilhelmine Davis. *Davis v. Westphal*, 2017 MT 276, 389 Mont. 251, 405 P.3d 73. The Davises filed the first suit because the Wetsphals started building a

shop on the Davises' property. *Id.*, ¶ 3. After the Westphals lost that case, they moved the shop to where Five Deer Lane was originally located, then moved Five Deer Lane east so it spills on the Davises' property. *See* Westphal Appx. 3, p. 1.

The Westphals sued the Kissinger family on April 11, 2019, generally alleging the Kissingers drive too fast and dangerously on their property. Dkt. 1, ¶¶ 5-6, 11. Todd and Deborah Kissinger asserted counterclaims because the Westphals interfered with their use of Five Deer Lane and harassed them, including by constructing a berm and placing boulders and other objects in the easement, moving the roadway and narrowing it, throwing rocks at their vehicles, driving vehicles toward them in a threatening manner, and allowing dogs to attack their vehicles. Dkt. 7, ¶¶ 8-10. The Westphals also built a shop in the easement and moved the roadway so that there is no longer room for 60 feet of easement. Dkt. 72, p. 3 (map showing shop sitting within easement). The Kissingers asserted claims against the Westphals for declaratory judgment, tortious interference with easement rights, nuisance, injunctive relief, and punitive damages. *Id.*, pp. 6-7.

The Kissingers also asserted a declaratory judgment claim to confirm they too have a prescriptive easement to the upper road, since the Westphals call the sheriff on them when they use it. Dkt. 58, p. 4. The Kissingers were not parties to the prior lawsuit about the upper road because they did not yet own the property, so a Court has not yet confirmed this easement right. *See* Dkt. 58, p. 2 (discussing timeframe

of Kissingers buying property); Dkt. 72, Ex. L (containing caption showing neither Kissingers nor their predecessors were parties).

The Westphals amended their Complaint to include a claim asking the District Court to declare the width, location, and the parties' respective rights to the easements on the Westphals' property. Dkt. 12, ¶¶ 27-28. The Westphals did not name any additional parties to the lawsuit, including the other property owners with easement rights on the Westphals' property. *See id.*

The Kissingers then amended their Complaint to include claims for breach of contract and trespass, as alternatives to tortious interference with easement rights. Dkt. 53, ¶¶ 23-31.

Ms. Romano intervened on October 23, 2020, asserting claims similar to the Kissingers'. Dkt. 46. Ms. Romano also asserted a claim concerning the Westphals breaching the Settlement Agreement from her prior case. Dkt. 46, ¶¶ 7, 29. After the District Court recognized her prescriptive easement right and the parties settled that prior case, the Westphals defied her rights by lining the road with signs, concrete slabs, logs, rocks, and tall speed bumps. Dkt. 28, pp. 9-10.

The Westphals then asserted counterclaims against Ms. Romano, alleging she breached the Settlement Agreement and drives too fast and dangerously. Dkt. 50. They made those same claims against Ms. Romano, Mr. Klapp, and the other neighbors in the prior lawsuit as well. Dkt. 37, Ex. N, p. 2.

The District Court has denied multiple motions for summary judgment by the Westphals, granted portions of motions for summary judgment by the Kissingers and Ms. Romano, and granted the Kissingers' Motion for Spoliation Sanctions against the Westphals. *See* Dkt. 52; Dkt. 116. Amongst those rulings, in its July 28, 2021 Order, the District Court denied the Westphals Motion for Summary Judgment that sought to dismiss Ms. Romano's claims based on res judicata, collateral estoppel, and the Settlement Agreement. Dkt. 63; Dkt. 116. The District Court determined those defenses do not apply because the subject matter of this lawsuit is not the same as the prior lawsuit. Dkt. 116, pp. 5-6.

A Pretrial Conference was held July 28, 2021, at which time the Court set the case for trial September 7 through 10, 2021. Dkt. 115.

On August 6, 2021, the Westphals filed a Petition for Writ of Supervisory Control regarding the District Court's July 28, 2021 Order. Dkt. 118. This Court denied said Petition on August 17, 2021. Dkt. 123.

On August 18, 2021, with trial approaching, the Westphals filed their Motion to Dismiss, arguing the District Court lacked subject matter jurisdiction. Dkt. 124. The Kissingers and Ms. Romano filed an opposition brief on September 1, 2021. Dkt. 127. The Westphals filed a reply brief on September 15, 2021. Dkt. 129. The District Court denied the motion on August 2, 2022. Dkt. 135. This appeal followed.

STATEMENT OF THE STANDARD OF REVIEW

"A district court's decision to grant or deny a motion to dismiss a claim for lack of subject matter jurisdiction presents a question of law which we review for correctness." *Ballas v. Missoula City Bd. of Adjustment*, 2007 MT 299, ¶ 9, 340 Mont. 56, 172 P.3d 1232. Denial of a motion to dismiss for lack of subject matter jurisdiction is reviewable prior to final judgment, but such review is restricted to whether the district court correctly decided the limited question of subject matter jurisdiction. *Id.*

SUMMARY OF THE ARGUMENT

The only issue the Westphals are permitted to raise on appeal is whether the District Court erred in not dismissing the Kissingers' and Ms. Romano's declaratory judgment claims for lack of subject matter jurisdiction. The Court should reject the Westphals' argument, and affirm that portion of the District Court's Order, for four primary reasons.

First, the alleged failure to join other holders of rights to the easements in question is not a subject matter jurisdiction issue. There is a split of authority on this, and Montana should follow the Courts that read the declaratory judgment statute as the legislature has written it, with no reference to jurisdiction.

Second, even if failure to joint necessary parties were a jurisdictional issue, which it is not, the other easement holders are not necessary parties. The Kissingers

and Ms. Romano are not seeking declarations that would affect those other easement holders, let alone that would prejudice them. The only people who are doing that are the Westphals.

Third, even if the Court determines the District Court lacks subject matter jurisdiction because un-joined easement holders are necessary parties, the remedy should be to allow the Kissingers and Ms. Romano to add them as parties, rather than dismiss their claims.

Fourth, even if the Court determines the District Court lacks subject matter jurisdiction because un-joined easement holders are necessary parties, that rationale only extends to declaratory judgment claims. Failure to join necessary parties is not a jurisdictional issue for non-declaratory judgment claims, and those claims are independent of the declaratory judgment claims in this case.

The Westphals have now been involved in lawsuits with nearly every neighbor who has easement rights on their property. In contrast, no other property owner on Five Deer Lane has had a dispute about the easements on their own land. No matter how many times neighbors file claims against the Westphals for interfering with easement rights, and no matter how many times the District Court rules against the Westphals, they continue to interfere with the easements in new ways. The multiple lawsuits are not re-litigating the same issues; rather, they are a cycle the Westphals fuel by engaging in new acts of interference once each lawsuit

ends. The Westphals should not be permitted to use the fact that they have caused multiple lawsuits against themselves as a basis to defeat claims in this lawsuit.

ARGUMENT

I. The Alleged Failure to Join Other Easement Holders Is Not a Subject Matter Jurisdiction Issue

The District Court has subject matter jurisdiction, regardless of whether the Court determines the Kissingers and Ms. Romano should have added additional easement holders as parties. "Subject matter jurisdiction refers simply to a court's power to hear and adjudicate a case." *Ballas*, ¶ 12. "'The subject matter jurisdiction of Montana district courts derives exclusively from Article VII, Section 4, of the Montana Constitution' and conforming statutes." *Gottlob v. DesRosier*, 2020 MT 210, ¶ 8, 401 Mont. 50, 470 P.3d 188. "District courts thus have subject matter jurisdiction over 'all civil matters and cases at law and in equity.'" *Id.* Because this is a civil matter involving civil claims for declaratory judgment, as well as tortious interference with easement rights, nuisance, breach of contract, and trespass, the District Court has subject matter jurisdiction. *See id.*

Section 27-8-301, MCA, states, in its entirety:

> When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party and shall be entitled to be heard, and if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the

> state shall also be served with a copy of the proceeding and be entitled to be heard

The statute does not mention subject matter jurisdiction or provide any indication that it encompasses a jurisdictional issue. To construe the statute to mean that failure to join such persons deprives the District Court of subject matter jurisdiction would be to insert language the legislature did not include, which is contrary to the rules of statutory interpretation. *See* § 1-2-101, MCA ("In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted."). Therefore, an alleged failure to join necessary parties to a declaratory judgment claim does not deprive the District Court of subject matter jurisdiction.

Moreover, comparing the language of § 27-8-301, MCA to M.R.Civ.P. 12 (h)(3) further confirms the former is not jurisdictional. When a court determines necessary parties to a declaratory judgment claim are absent, § 27-8-301, MCA provides "that the court must join any person who has an interest that a declaratory judgment would affect." *John Alexander Ethen Trust Agreement v. River Res. Outfitters, LLC*, 2011 MT 143, ¶ 49, 361 Mont. 57, 256 P.3d 913 (emphasis added) (citing § 27-8-301, MCA). In contrast, when a court lacks subject matter jurisdiction, M.R.Civ.P. 12(h)(3) requires the Court to dismiss the case.

Other jurisdictions interpret statutes with the same language in that manner, holding that failure to join a necessary party does not deprive the trial court of subject

matter jurisdiction over declaratory judgment claims. *See Jeffrey v. Lea*, 2022 Va. App. LEXIS 662, at *7 n.4 (Va. Ct. App. Dec. 20, 2022) (holding "it is well established that 'the necessary party doctrine does not implicate subject matter jurisdiction" in case involving declaratory judgment) (citing *Glasser & Glasser, PLC v. Jack Bays, Inc.*, 741 S.E.2d 599, 605 (Va. 2013)); *S. Windsor Cemetery Ass'n v. Lindquist*, 970 A.2d 760, 768 (Conn. App. Ct. 2009) ("failure to notify interested persons in a declaratory judgment action does not implicate the court's subject matter jurisdiction.") (citing *Batte-Holmgren v. Comm'r of Pub. Health*, 914 A.2d 996, 1002-1003 (Conn. 2007)); *Hartman v. United Heritage Prop. & Cas. Co.*, 108 P.3d 340, 343 (Idaho 2005) (holding fact that necessary party not joined does not render judgment void for lack of subject matter jurisdiction) (citing *Koehler v. Dodwell*, 152 F.3d 304, 309 n.7 (4th Cir. 1998); *United States v. O'Neil*, 709 F.2d 361, 371 (5th Cir. 1983) (holding failure to join indispensable person is not jurisdictional and therefore cannot void judgment) (citing *Provident Bank & Trust Co. v. Patterson*, 390 U.S. 102, 120-22 (1968)); *Harp v. Ind. Dep't of Highways*, 585 N.E.2d 652, 657-58 (Ind. Ct. App. 1992) (holding right to have question determined under declaratory judgment statute, which is to be "liberally construed and administered," cannot "possibly depend upon whether everyone who may have had an interest which would be affected by the declaration … made parties"); *El Naggar Fine Arts Furniture, Inc. v. Indian Harbor Ins. Co.*, 248 S.W.3d 202, 209 (Tex. Ct. App. 2007); *see also*

BAC Home Loans Servicing, LP v. Buggs, 39 A.3d 1281, 1284 (D.C. 2012) (holding failure to join indispensable party under Rule 19 does not preclude trial court from exercising jurisdiction it otherwise has); *Metro. Prop. & Liab. Ins. Co. v. Acord*, 465 S.E.2d 901, 910 (W. Va. 1995) (holding "it was sufficient that all interested parties in the case had been notified of the pending action, thereby providing them an opportunity to participate in the action if they so desired").

The Court in *Batte-Holmgren* explicitly confirmed that, if the "necessary party" statute does not mention subject matter jurisdiction then it is not a jurisdictional issue, holding, "subject matter jurisdiction is, with certain constitutional exceptions not applicable here, a matter of statute, not judicial rule making." 914 A.2d at 1002-1003. Other Courts cite other rationales supporting this principal. In *Glasser,* the Court held that subject matter jurisdiction is not determined by the presence of necessary parties because "questions of personal jurisdiction and the ability to 'render complete relief'" control that issue. *See* 741 S.E.2d at 370. In *Hartman,* the Court recognized that Fed. R. Civ. P. 19(b), which mirrors M.R.Civ.P. 19(b) and concerns whether a Court should proceed with a case when a person cannot be made a party, "indicates … the requirement that a case shall not proceed absent joinder of all indispensable persons is not a jurisdictional prerequisite …." 108 P.3d at 344. All of these rationales should apply under Montana law.

The Westphals cite no controlling precedent supporting their argument that

failing to join a party with an interest in an easement deprives the court of subject matter jurisdiction. The only Montana state case they cite is *Ramesz v. Town of Eureka, et al.*, DV-09-97, Nineteenth Judicial District Court, Lincoln County. That case is unpublished and unavailable online, no Order or decision since then has relied on it, and the portion of the Order itself concerning subject matter jurisdiction does not rely on any Montana authority. *See, generally*, Dkt. 124, Ex. 4. In fact, the opinion is inconsistent with § 27-8-301, MCA, which implies joinder of necessary parties is not a jurisdictional issue. *See* § 1-2-101, MCA. Moreover, that Court provided no explanation for why such an issue should be treated as jurisdictional. *See* Dkt. 124, Ex. 4, p. 5. Reviewing the relevant briefs, the parties did not even brief the issue. *See, generally,* Dkt. 127, Ex. A (*Ramesz* briefs).

The Westphals also cite *Arnold v. Allianz Global Risks US Insurance Co.* but that case did not suggest failure to join parties deprives the Court of subject matter jurisdiction. 2020 U.S. Dist. LEXIS 43910, *3, 9 (D. Mont. Mar. 12, 2020) (holding federal court lacked subject matter jurisdiction based on lack of diversity, as opposed to joinder of parties issue). It also did not analyze whether every holder of an easement needs to be joined in a declaratory judgment claim concerning the scope of the easement. *See, generally*, *id.* That case merely discussed the general principle that Montana's declaratory judgment statute requires joinder of parties whose interests would be prejudiced by declaratory relief. *Id.* at *6.

The Westphals cite no other Montana authority supporting their argument. Two of the foreign cases they cite, *Gallegos v. Nevada General Insurance Co.*, 248 P.3d 912, 914 (N.M. 2010), and *Home Fire & Marine Insurance Co. v. Schultz*, 458 P.2d 592, 593 (N.M. 1969), have been abrogated, such that New Mexico law actually supports the Kissingers' and Ms. Romano's position. In *Harvey v. Thi of New Mexico*, the Court recognized that *Gallegos* relied on prior cases holding failure to join an indispensable party under Rule 1-019 NMRA in the insurance context created a jurisdictional defect. 2015 U.S. Dist. LEXIS 182699, at *15 (D.N.M. Mar. 31, 2015) (citing *Schultz*, 458 P.2d at 593-94; *Perez v. Gallegos*, 530 P.2d 1155, 1156-57 (N.M. 1974); *Springer Elec. Co-op, Inc. v. City of Raton*, 661 P.2d 1324, 1329 (N.M. 1983)). Subsequent to those cases, "the New Mexico Supreme Court held that the failure to join an indispensable party was not a jurisdictional defect." *Id.* at *16 (citing *C.E. Alexander & Sons, Inc. v. DEC Intern., Inc.*, 811 P.2d 899, 901 (N.M. 1991) ("Under the current rule, we do not consider the test of indispensability to be jurisdictional, and we hereby overrule precedent to the contrary").

The Westphals argue this Court is "more or less imperatively bound" by the holdings they cite from other jurisdictions because of the cross-jurisdictional nature of the Uniform Declaratory Judgment Act ("UDJA"), but even if that is true, they ignore the fact that the numerous other jurisdictions cited above specifically hold that the UDJA statute at issue is not jurisdictional. Incidentally, the Kissingers and

Ms. Romano note that said string cite above is not exhaustive. Moreover, it should be noted that the Westphals cite multiple cases from Nebraska and multiple cases from Oregon, such that they really only cite cases from four other jurisdictions that purportedly support their position. *See* Westphal Br., pp. 19-20.

This Court should follow the rationale of the cases the Kissingers and Ms. Romano cite above because they rely on declaratory judgment statutes with virtually identical language to Montana and they recognize that language does not include any reference, whether express or implied, to subject matter jurisdiction. The Kissingers and Ms. Romano respectfully request that the Court affirm the District Court has subject matter jurisdiction over the declaratory judgment claims in this case and remand the case to the District Court for further proceedings.

II. The Other Easement Holders Are Not Necessary Parties

Even if failure to join necessary parties under § 27-8-301, MCA, is jurisdictional, the District Court correctly denied the Westphals' Motion to Dismiss because no other easement holders are necessary parties. At most, the declaratory judgments that the Kissingers and Ms. Romano seek, if ever applied to non-parties, would confirm said non-parties' easement rights, not prejudice them.

Any dominant tenement may maintain an action for enforcement of an easement. *See* § 70-17-109, MCA. Neither that statute nor any Montana caselaw requires all dominant tenements to maintain an action for one to be brought at all.

Moreover, public policy considerations weigh strongly against such a rule.

For example, if a member of a subdivision wanted to sue to stop another member of the subdivision from blocking an easement to a common area, they would have to join every other member of the subdivision. Such a requirement would exponentially multiply litigation costs, delay relief, and constructively bar easement holders from seeking legal redress for interferences in many cases. It would be illogical and unfair to require the easement holder to join every single neighbor in such a lawsuit, forcing them to incur significantly higher attorney fees and expenses, when only the single servient tenement is interfering with their rights. Such a law would allow the wrongdoer – the servient tenement – to interfere with and diminish easement rights with near impunity, knowing most Montanans do not want to incur such costs and drag all their neighbors into a lawsuit. That is particularly problematic given how common such disputes are.

These policy implications also contravene core Montana law. *See* M.R.Civ.P. 1 ("[the rules of civil procedure] should be construed and administered to secure the just, speed, and inexpensive determination of every action and proceeding."); *Ball v. Gee*, 243 Mont. 406, 413, 795 P.2d 82, 86 (1990) (holding statute making party unable to defend himself due to indigence violated his constitutional rights to access to the courts, equal protection, and substantive due process). They also undermine the principal that the UDJA is to be liberally administered to afford litigants the

ability to resolve disputes about legal rights. *See* § 27-8-301, MCA.

In *Valensi v. Brugh*, much like here, plaintiff sought to establish he had a prescriptive easement across defendant's property. 1999 Mont. Dist. LEXIS 757, at *8-9 (Mont. Dist. Ct. Dec. 9, 1999). Defendant argued plaintiff failed to join other "indispensable" parties – namely owners of other servient estates the same easement crossed. *Id.* The Court rejected defendants' argument because there was no dispute between plaintiff and the other property owners, and the declaration sought would not negatively affect them. The Court held as follows:

> In the present case, Defendant has failed to show a dispute between Plaintiffs and the other servient tenements in regard to Plaintiffs' alleged right of way; therefore, this Court does not find those servient tenements indispensable to this action. Any judgment rendered in this matter will not be rendered against the other servient estates upon which Plaintiffs allege a right of way, and to dismiss the Plaintiffs' cause of action would leave Plaintiffs with a lack of remedy for the interference to an alleged prescriptive easement.

Id.

The Westphals argue it is feasible and not overly burdensome to name all persons with interests in the easements. *See* Westphal Br., p. 17. However, they simultaneously allege at least thirteen other parties need to be added to this case, including four parties for whom they only identify an address because they could not locate a name. *See id.*, pp. 6-7. They also previously alleged that an "exhaustive review of the public records would reveal more persons with interests in these express easements." Dkt. 124, p. 3. Adding thirteen or more parties to the seven

parties that are already in this case would be overly burdensome, and adding properties with no identifiable property owners would not be feasible.

This is a simple dispute with the Westphals concerning the scope of the Kissingers' and Ms. Romano's respective easement rights and whether the Westphals are interfering with them. The Kissingers and Ms. Romano should be permitted to obtain answers on these issues without having to plead in numerous other property owners, exponentially driving up the cost of litigation.

Moreover, the only parties it is mandatory to join are those with an interest in the easement that would be prejudiced by the declaration sought. Section 27-8-301, MCA, regarding "Necessary Parties," states, "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." (emphasis added). The second part of the sentence makes clear the requirement for affected persons to be made parties applies only where the declaration would prejudice the rights of that person. *See id.*

Further, to read the statute to require all persons with any interest whatsoever be made parties would render the second portion of the sentence meaningless and superfluous. It would not be necessary to state "no declaration shall prejudice the rights of persons not parties" if all persons with any interest that could be affected were already parties. Reading the statute so as to remove all effect from the second

part of the sentence is improper. *See* § 1-2-101, MCA ("Where there are several provisions or particulars [in a statute], such a construction is, if possible, to be adopted as will give effect to all."). Parties are only necessary if the declaration sought would prejudice them. *See also Howard v. Dalio*, 249 Mont. 316, 321, 815 P.2d 1150, 1153 (1991) ("If the court determines that a judgment rendered in the person's absence will be adequate to protect his interests, the person is not indispensable.") (quoting *In re Allustiarte*, 786 F.2d 910, 919 (9th Cir. 1986)).

That was the situation in *Ramesz*. There, plaintiffs sought declaratory judgment that they owned 25% of a waterline and that the number of hookups to the waterline should be limited. *See* Dkt. 124, Ex. 4, p. 4. While some of the property owners with purported rights to the waterline were named as parties, at least three additional owners with purported rights to the waterline were not. *See id*. (referencing unnamed property owners). In other words, plaintiffs sought declaratory judgment that, if granted, would negatively affect several property owners whom plaintiffs had not joined as parties. *See id.*, p. 5. In contrast, here, none of the other property owners the Westphals reference will be prejudiced by the declaratory judgments sought.

Ms. Romano is seeking declaratory judgment confirming (1) "the scope and width" of her express easement right across the Westphals' property, and (2) that the Westphals "are prohibited from interfering with such right." Dkt. 104, ¶ 12.

Specifically, she is asserting that, pursuant to the express 60' and 30' easement that benefits her property and burdens the Westphals' property, the Westphals have and continue to interfere and encroach on said 60' and 30' easement. She is not seeking a declaration regarding the scope and width of anyone else's easements across the Westphals' property. *See, generally*, Doc. 104. Even if other property owners have easement rights to the same road, that does not make them indispensable parties. *See John Alexander Ethen Trust Agreement*, ¶ 52 (holding other owners of parcels created by same survey were not indispensable parties because only boundary dispute was between existing parties); *Strahan v. Bush*, 237 Mont. 265, 269, 773 P.2d 718, 721 (1989) (holding other property owners who used private road were not indispensable parties to lawsuit concerning easement where the disputed portion of the easement was not on their land). The only disputed portion of the subject easement road is on the Westphals' property.

The unnamed parties and the Kissingers' and Ms. Romano's interests are aligned – the Kissingers and Ms. Romano simply request that their easement rights over the Westphals' property be confirmed and restored. To the extent unnamed parties are beneficiaries of Ms. Romano's easement, their rights would be unchanged with this declaration. The only effect of the declaration would be the Westphals having to restore Five Deer Lane on their property to what was originally granted. Ms. Romano is seeking a declaration that would benefit them equally by establishing

said easement is 30' and 60' wide, as set forth on COS 2503, as opposed to what the Westphals have narrowed it to, and that the Westphals are prohibited from interfering with it. *See Howard*, 249 Mont. at 321, 815 P.2d at 1153 ("If the court determines that a judgment rendered in the person's absence will be adequate to protect his interests, the person is not indispensable. Joinder is not required where the absent parties' interests are adequately protected by those who are present.") (quoting *In re Allustiarte*, 786 F.2d at 919). In fact, the District Court already ruled in favor of Ms. Romano and recognized the "Westphals make no arguments disputing the existence of the express easement asserted by Romano, only that Romano cannot bring the claim." Dkt. 116, p. 6. Thus, Ms. Romano's declaratory judgment claim never put any nonparty easement holders' rights at risk, and it ultimately served to preserve the status quo.

The Kissingers are seeking a declaration that they have a prescriptive easement to the "upper road" on the Westphals' property.[2] Dkt. 53, ¶ 12. It is inherent that their prescriptive easement claim is not dependent on, or affected by, another dominant tenement's prescriptive easement right. *See Wareing v. Schreckendgust*, 280 Mont. 196, 208, 930 P.2d 37, 44 (1996) (explaining "exclusive" requirement for

[2] Contrary to the Westphals' argument, the Kissingers are not seeking a declaration regarding their express easement rights to the main road. They are only seeking a declaration regarding their prescriptive easement rights to the upper road. *See* Dkt. 53, p. 3.

establishing prescriptive easement means party's "right to use it does not depend on the like right in others"). The Ellicsons', Bells', and Ms. Romano's respective prescriptive easement rights to the upper road are distinct from the Kissingers' and they were established by their own distinct uses personal to their respective properties. The Westphals previously argued that exact point. Dkt. 59, p. 2 (arguing Paul Klapp and Ms. Romano's prescriptive easement claim for the upper road is different matter from Kissingers').

Because the Ellicsons and Bells have prescriptive easement rights pursuant to their own unique uses of the upper road, which exist independent of the Kissingers' and their predecessors' uses and resulting easement rights, the Ellicsons and Bells do not have or claim any interest which would be affected by the declaration the Kissingers' seek.

Moreover, even if declaratory judgment in the Kissingers' favor would incidentally affect the Ellicsons and Bells, it would not prejudice them. To the contrary, it would benefit them because the Kissingers are seeking to prohibit the Westphals from interfering with the upper road by placing cement barriers, logs, boulders, and excessively tall speed bumps on and about it. The Ellicsons and Bells are not necessary parties to the Kissingers' declaratory judgment claim. *See* § 27-8-301, MCA.

The Westphals' current argument is also contrary to their own current position

in this case, as well as their position in multiple prior cases. For example, they too have declaratory judgment claims against both the Kissingers and Ms. Romano concerning the scope of all easements at issue in this case, yet they argue only the Kissingers and Ms. Romano's declaratory judgment claims are improper. *See, generally*, Dkt. 12, p. 5; Dkt. 105, pp. 5-12. Similarly, in each of their prior lawsuits, they litigated the location of easements and roadways, as well as property boundaries, yet did not argue necessary parties were lacking. *See, generally*, Dkt. 127, Ex. C (Amended Complaint in *Klapp, et al. v. Wespthal*, DV-16-679D, Eleventh Judicial District Court, Flathead County); *see Davis, supra*. The Westphals only claim subject matter jurisdiction is lacking when they think it benefits them.

The Westphals, in demonstrating the true purpose of their appeal, argue they are concerned about being named defendants in multiple lawsuits. However, that is not an element of § 27-8-301, MCA, and is not a basis for a lack of subject matter jurisdiction argument. If the Westphals were concerned about multiple lawsuits due to their interferences with Five Deer Lane, they had the opportunity to name the other easement holders as defendants to their Amended Complaint and declaratory judgment action regarding the scope of the easements over their property. In this case, they argue lack of subject matter jurisdiction and contend other easement holders should be named parties because they recognized they were on the losing side of the case when the District Court denied their multiple Motions for Summary

Judgment, granted Ms. Romano's multiple Motions for Summary Judgment, granted part of the Kissingers' Motion for Partial Summary Judgment, and granted the Kissingers' and Ms. Romano's motion for spoliation sanctions. The Court should not reward that tactic, particularly where the law contradicts it.

In summary, the Kissingers' and Ms. Romano's declaratory judgment claims do not seek judgments that would affect, much less prejudice, unnamed easement holders' rights. Requiring them to name all parties the Westphals suggest would be unworkably burdensome and is not required by law. The additional easement holders at issue are not necessary parties, under § 27-8-301, MCA, or otherwise. The Kissingers and Ms. Romano request the Court affirm the District Court and remand the case for further proceedings.

III. The Court Should Not Instruct the District Court to Dismiss the Kissingers' and Ms. Romano's Claims; Instead, at Worst, It Should Allow the District Court, in Its Discretion, to Permit the Kissingers and Ms. Romano to Join Them as Parties

"In considering a motion to dismiss on the ground that an indispensable party is absent, 'the court is given discretion to determine whether the action will proceed or will be dismissed.'" *Blaze Constr. v. Glacier Elec. Coop.*, 280 Mont. 7, 10, 928 P.2d 224, 225 (1996).

Even if the Court determines necessary parties are absent from this case, the appropriate relief is to join them, not to dismiss the claims. As noted previously in this brief, the intent of § 27-8-301, MCA, is to ensure all necessary parties are joined.

See John Alexander Ethen Trust Agreement, ¶ 49 ("Section 27-8-301, MCA, provides that the court must join any person who has an interest that a declaratory judgment would affect") (emphasis added). The intent is not to dismiss such claims and bar relief when the necessary parties are not initially joined. Dismissing the Kissingers' and Ms. Romano's declaratory judgment claims based on § 27-8-301, MCA, would both ignore the remedy prescribed in the statute and impose a remedy omitted from the statute, both of which are impermissible. *See* § 1-2-101, MCA.

If the Court determines other easement holders are necessary parties, the Kissingers and Ms. Romano should be allowed to add them or obtain waivers from them. The Westphals argue doing so would be feasible and not overly burdensome. That is a more just and reasonable option than dismissing these claims.

Moreover, the Westphals' argument that the Kissingers and Ms. Romano would not be prejudiced by their claims being dismissed is disingenuous. If that were to occur, the Westphals would seek to dismiss them based on statute of limitations arguments. Rather than force them to re-file and risk being unable to assert some or all of their claims, they should be permitted to simply add additional parties in the existing lawsuit.

IV. The Kissingers' and Ms. Romano's Non-Declaratory Judgment Claims Should Not Be Dismissed because the Westphals' Arguments Are Limited to Declaratory Judgment Claims

Even if the Court determines the District Court lacks subject matter

jurisdiction over the Kissingers' and Ms. Romano's declaratory judgment claims, that determination should not extend to their other claims. The Westphals' argument that implicates subject matter jurisdiction is specific to declaratory judgment claims. All of the cases they cite rely strictly on language in the UDJA about which persons shall be made parties "[w]hen declaratory relief is sought." *See* § 27-8-301, MCA; *see also*, *e.g.*, *Ramesz*, pp. 4-5 (citing § 27-8-301, MCA and 22A Am. Jur. 2d Declaratory Judgments § 208); *Gallegos*, 248 P.3d at 914 (citing § 44-6-12, NMSA, which is nearly verbatim to § 27-8-301, MCA). There is no authority suggesting failure to join a party outside of the declaratory judgment context deprives the District Court of subject matter jurisdiction.

This Court recognized, in the context of one of the Westphals' prior lawsuits, that common law trespass and related claims are separate from, and independent of, declaratory judgment claims. In *Davis*, the Court held, "Independent of common law trespass and ejectment claims, a modern declaratory judgment action is also available to determine the 'rights, status, and other legal relations' of the parties on any matter in dispute. Statutory declaratory judgment claims merely supplement other claims and remedies independently available at law or in equity." *Davis*, ¶ 20 (emphasis added).

Davis directly contradicts the Westphals' unsupported argument that the Kissingers and Ms. Romano's interference with easement, breach of contract, and

trespass claims should also be dismissed as dependent on declaratory judgments. The law is clear that those easement interference claims are independent of their claims for declaratory judgment. *See Davis*, ¶ 20. Section 27-8-301, MCA, applies strictly to the Kissingers' and Ms. Romano's declaratory judgment actions, and not their tortious interference, trespass, and breach of contract claims.

The District Court has subject matter jurisdiction over the Kissingers' and Ms. Romano's tortious interference, trespass, and breach of contract claims. The Court should affirm the District Court's Order in that regard.

V. The Fact That the Kissingers Have Moved Is Not Relevant

The Westphals argue that the Kissingers should not be able to pursue their declaratory judgment claim against the Westphals because the Kissingers moved to Libby, Montana, in June 2022. *See* Westphal Br., p. 22. The Westphals did not make this argument to the District Court. Therefore, it should not be considered. *See State v. Martinez*, 2003 MT 65, ¶ 17, 314 Mont. 434, 67 P. 3d 207 ("It is a well-established rule that this Court will not address an issue raised for the first time on appeal, nor may a party raise new arguments or change its legal theory on appeal.").

Regardless, the Westphals cite no authority to support their contention that this issue should affect whether the Kissingers are permitted to continue to pursue their claims, and there is none. The Westphals treated the Kissingers horribly while they lived next to them, interfering with their easement rights and harassing them in

innumerable ways. The mere fact that the Kissingers finally moved because they could no longer stand it does not eliminate their ability to continue to pursue compensation for injuries and wrongs the Westphals inflicted upon them.

The Westphals should not be able to use the fact that they drove the Kissingers from their property (and Mr. Davis and other neighbors from their properties as well) as a sword to avoid liability for their wrongdoing. The Kissingers are continuing to pursue their claims because they are entitled to compensation for the harm the Westphals caused them.

CONCLUSION

For the foregoing reasons the Court should affirm the District Court's Order. If the Court does not do so, it should allow the District Court, in its discretion, to permit the Kissingers and Ms. Romano to join the additional parties in question. If the Court orders dismissal of any claims, it should be limited to the Kissingers' and Ms. Romano's declaratory judgment claims.

Dated this 30th day of January, 2023

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this brief is proportionately spaced Times New Roman text typeface of 14 points, is double spaced, and the word count calculated by Microsoft Word 2010, is not more than 7,134 words, excluding the certificate of compliance.

CERTIFICATE OF SERVICE

I, Thomas Alan Hollo, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 01-30-2023:

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