

**IN THE SUPREME COURT OF THE STATE OF MONTANA
NO. DA 22-0485**

Kathy Westphal and Douglas Westphal,

Plaintiffs and Appellants,

vs,

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

Defendants and Appellees,

and,

Linda Romano,

Intervenor and Appellee.

PLAINTIFF AND APPELLANTS' REPLY BRIEF

On Appeal From The District Court Of The Eleventh Judicial District Of The State
Of Montana, Cause No. DV-19-310(B)

Judge: Robert B. Allison

For Plaintiffs and Appellants, Kathy
Westphal and Douglas Westphal

Evan F. Danno, Esq.
DANNO LAW FIRM, P.C.
725 South Main Street
Kalispell, MT 59901
Telephone: (406) 755-4100
Fax: (406) 755-3434
E-mail: evan@dannolawfirm.com

For Defendants and Appellees, Todd
Kissinger, Deborah Kissinger, Michael
Kissinger, and Melissa Kissinger, and
Intervenor, Linda Romano,

Marcel A. Quinn
Thomas A. Hollo
HAMMER, QUINN & SHAW PLLC
P.O. Box 7310
Kalispell, MT 59904-0310
Telephone: (406) 755-2225
Fax: (406) 755-5155
marcelquinn@attorneysmontana.com
tomhollo@attorneysmontana.com

Christopher Di Lorenzo
MOORE, COCKRELL, GOICOECHEA
& JOHNSON, P.C.
P.O. BOX 7370
Kalispell, MT 59904-0370
Telephone: (406) 751-6000
Fax: (406) 756-6522
cdilorenzo@mcgalaw.com

TABLE OF CONTENTS

I. STATEMENT OF ISSUES FOR REVIEW ON APPEAL 5

1. Whether the District Court erred by failing to dismiss defendants' declaratory judgment claims concerning the easements through Westphals' property, for lack of subject matter jurisdiction, on the ground they failed to join as parties, all persons who have, or claim any interest in the easements that would be affected by the declarations.

2. Whether this Court should let the defendants join the other persons with interests in the easements after they were not allowed to provide their positions in this case about the width and location of the easement.

| | | |
|------|--|----|
| II. | STATEMENT OF THE CASE | 5 |
| III. | STATEMENT OF FACTS..... | 8 |
| IV. | SUMMARY OF THE ARGUMENT | 11 |
| V. | ARGUMENT..... | 13 |
| 1. | Failing To Join The Persons Who Will Be Affected By The Declaratory Judgment Is A Matter Of Subject Matter Jurisdiction. ... | 13 |
| 2. | The Defendants And Intervenor Are Not Protecting The Non-Joined Persons’ Interests In The Easements. The Declarations They Seek Actually Damage Their Interests and Investments. | 20 |
| 3. | The Court Should Not Allow Amendment To Add The Other Interested Parties At This Late Date, Because Easement Issues Have Already Been Decided In their Absence, With No Opportunity To Protect Their interests..... | 23 |
| 4. | The Court Should Disregard Defendants’ Attempts To Disparage The Westphals. | 24 |
| VI. | Conclusion. | 25 |
| | Certificate of Service. | 26 |
| | Certificate of Compliance. | 27 |

TABLE OF AUTHORITIES

| <u>CASES</u> | <u>PAGE</u> |
|--|--------------------|
| <i>Arnold v. Allianz Glob. Risks US Ins. Co.</i> (D. Mont. 2020) | 15 |
| <i>Bretton Ridge Homeowners Club v. DeAngelis</i> , 51 Ohio App.3d 183, 555 N.E.2d 663 (Ohio App. 1988) | 15 |
| <i>Diamond State Ins. Co. v. Hard Times, Inc.</i> , 2014 WL 12591678, *2 (D. Mont. Oct. 21, 2014) | 15 |
| <i>Gallegos v. Nevada General Ins. Co.</i> , Opinion Number: 2011-NMCA-004, | |

| | |
|--|--------|
| Docket No. 29,280, New Mexico Court of Appeals, November 23, 2010, (Dkt. 91 hereto, Exh. 1) | 14 |
| <i>Home Fire & Marine Ins. Co. v. Schultz</i> , 80 N.M. 517, 518, 458 P.2d 592, 593 | 15 |
| <i>John Alexander Ethen Trust Agreement v. River Res. Outfitters, LLC</i> , 2011 MT 143, 361 Mont. 57, 256 P.3d 913. | 17, 22 |
| <i>In re Marriage of Lance</i> (1984), 213 Mont. 182, 186-87, 690 P.2d 979, 981 ... | 23 |
| <i>In Re Estate of Big Spring</i> , 360 Mont. 370, 395, 255 P.3d 121, 137, (2011) | 13, 23 |
| <i>Ramesz v. Town of Eureka, et. al.</i> , Lincoln County Cause # DV-09-97, (Dkt. 124, Exh. 4) | 13 |
| <i>Miller v. Shenk</i> , 272 Or App 12, 18,354 P.3d 732 (Or. App. 2015) | 15 |
| <i>Monroe v. United States Fidelity & Guaranty Co.</i> , 603 N.E.2d 855, 858-59 (Ill. Ct. App. 1992). | 15 |
| <i>Shepoka v. Knopik</i> , 197 Neb. 651, 250 N.W.2d 619 (Neb. 1977) | 15 |
| <i>Skandha v. Kennedy</i> , 92 Mass.App.Ct. 1123, 102 N.E.3d 427(Table) (Mass. App. 2018) | 15 |
| <i>Stanley, Adm. v. Mueller</i> , 211 Or. 198, 315 P.2d 125 (1957) | 15 |
| <i>State ex rel. Dewberry v. Kulongoski</i> , 187 P.3d 220, 220 Or. 345, 220 Or. App. 345 (Or. App. 2008) | 15 |
| <i>Taylor Oil Co., Inc. v. Retikis</i> , 575 N.W.2d 870, 254 Neb. 275 (Neb. 1998) ... | 15 |
| <i>Vance v. Ford</i> , 187 Or. App. 412, 424, 67 P.3d 412 (2003) | 15 |

STATUTES

PAGE

| | |
|-----------------------|--------------------|
| 27-8-301, M.C.A. | 13, 16, 17, 18, 19 |
|-----------------------|--------------------|

| | |
|-----------------------|---|
| 27-2-407, M.C.A. | 8 |
|-----------------------|---|

| | |
|---|--------------------|
| <u>RULES AND OTHER AUTHORITIES</u> | <u>PAGE</u> |
|---|--------------------|

| | |
|---|--------|
| Rule 12(h)(3), M.R.Civ.P. | 14, 23 |
| M.R.Civ.P. 19(a)(1)(B)(I) | 17 |
| 22A Am. Jur. 2d Declaratory Judgments §208 | 13 |

APPELLANTS' REPLY BRIEF.

I. STATEMENT OF ISSUES FOR REVIEW ON APPEAL.

1. Whether the District Court erred by failing to dismiss defendants' declaratory judgment claims concerning the easements through Westphals' property, for lack of subject matter jurisdiction, on the ground they failed to join as parties, all persons who have, or claim any interest in the easements that would be affected by the declarations.

2. Whether this Court should let the defendants join the other persons with interests in the easements after they were not allowed to provide their positions in this case about the width and location of the easement.

II. STATEMENT OF THE CASE.

Westphals appeal that part of the District Court's August 2, 2022, Order And Rationale On Pending Motions (Dkt. 135, Appendix 1 (Appx.)), that denied their Motion To Dismiss Romano's and Kissingers' Declaratory Judgment Claims For

Lack Of Subject Matter Jurisdiction. In their counterclaims and claims in intervention for declaratory judgments on the width and location of the easement on Five Deer Lane, Kissingers and Romano, (hereafter collectively, “the Defendants”), failed to name, as parties, the other persons who have interests in the easements that will be affected by the material changes in the easements they seek. (i.e., to move the road and define the easement). Therefore, Westphals moved to dismiss Kissingers’ and Romano’s declaratory judgment claims. Judge Allison denied Westphals’ Motion, ruling that the court has subject matter jurisdiction to decide the declaratory judgment claims, and they do not have to join the other interested persons. Appx. 1, Dkt. 135). Westphals believe Judge Allison erred by failing to dismiss the DJA easement claims, and are asking this court to reverse his ruling.

The other (un-named) persons with interests in the easements on Five Deer Lane, above the Westphals, are not exhaustive. (Dkt. 124, Exhs. 2 and 6, Plaintiffs’ brief to dismiss easement claims. Also see, Appx. 8, map showing ownerships). Unless they are joined in this case, each of these persons could bring additional cases concerning the easements. However, this is the fourth lawsuit the Westphals have already had over the easements. All interested persons need finality in one lawsuit.

Further, the Defendants intend to move the road, which would affect the other persons interests in the easements, because some of the other persons’ already relied

on the road and easement location, and significantly widened and improved the road. The new road works fine for everyone, and the other persons undoubtedly do not want it moved. They do not want their old, windy, chuckhole filled, 10-12' road back. And, they do not want their current investments in the road discarded because a disgruntled neighbor has a vendetta against the Westphals.

In their Answer Brief, the Defendants claim the issue is not a matter of subject matter jurisdiction, and they will adequately protect the un-named persons' interests. That is not true as illustrated by the fact that Kissingers no longer even live there, and they state all they want is damages from the Westphals. Romano also will not protect the other persons' interests. She never mentioned preserving their interests in this case, and has not even tried to join them. Her goal of moving the road is not in the un-named persons' interests and should not be allowed without their input.

The absent persons own the controlling interests in the easement location of Five Deer Lane, because they own hundreds of acres. The defendants are not the only persons necessary to litigate the location and scope of Five Deer Lane. Romano only owns 8.9 acres, which pales in the face of the controlling interests of the un-named persons around her.

The defendants also would not be prejudiced by dismissal of their easement claims. They have an adequate remedy to refile and name the other persons with

interests in the easements, that would be affected by the declaratory judgments they seek. Their claims would not be barred by the statute of limitations as they claim, because they would have one year to refile under the saving statute, §27-2-407, MCA. Thus, the District Court should be reversed, the easement declaratory judgment claims should be dismissed, along with the claims that are dependent on the Declaratory judgments, trespass on the easement, tortious interference with the easement, and breach of contract.

III. STATEMENT OF FACTS.

The Plaintiffs (Westphals), are deaf. (Dkt. 95, Exh. 1, Declaration 2 of Kathy Wilson Westphal). They bought their land on Five Deer Lane in July, 2011. (Dkt. 93.1, Exh. 7, Declaration 1 of Kathy Wilson Westphal). They started building a large shop on their east property line. Unfortunately, the property line was mis-marked, and they started building it halfway over the neighbors' property line. The neighbors at that time, Davises, sued them to remove the shop. They removed the shop onto their own property, and moved the main road (Five Deer Lane) to the east of their shop along the Davis' property line. Linda Romano was given notice of the Westphals' plans before they started work, and never complained about it.

Then, after the shop was moved, the Davis' claimed they had to move their shop again, because it was partly in the original Five Deer Lane easement location.

Judge Eddy ruled against the Davises, and said that Westphals can leave their shop and the road where it is, because the Davises acquiesced in, and consented to the new location of the road and Westphals' shop. (Appx. 3, January 11, 2019, Order, pg. 3).

Judge Eddy found that "Allowing the Davis' to amend their complaint at this late date would not be reasonable, would not promote the ends of justice, and would pose undue prejudice to the Defendants." (Appx. 2, pg. 2).

Then, the Davises filed a separate lawsuit, claiming the Westphals were encroaching on the 60' Five Deer Lane easement. That case was consolidated with the Davises' prior case, and also dismissed by Judge Eddy. (Appx. 3, January 11, 2019, Order). Thus, the location of the main Five Deer Lane and the Westphals' shop was allowed to stay where it was in 2018, and 2019, by both Judge Dan Wilson in Cause No. DV-16-679(D), and by Judge Amy Eddy in Cause No. DV-16-486(A). (Dkt. 124, Exh. 3, Wilson's Order (1), Dkt. 63.1, Exh. 4, Wilson's Order (2), dismissing the case, Appx. 6, Settlement Agreement in Cause No. DV-16-679(D), and Appx. 7 hereto, map attached to the settlement agreement showing Westphals' shop and infrastructure).

At the same time as the Davises' lawsuit, Linda Romano, Paul Klapp, (her husband), and a few other people above the Westphals' property, sued the Westphals for declarations concerning the location of Five Deer Lane, and for a prescriptive

easement across the north part of Westphals' property. (Dkt. 63, Exh. 3, Romano's Second Amended Complaint in DV-16-679(D), Judge Wilson). As to one issue in that case only, (Count 3, Prescriptive Easement), Judge Wilson held that Romano and the others have a 10' prescriptive easement. Then, the parties settled all the other issues in that case, including the location of the upper road, the lower road (which is the main Five Deer Lane Road), the location of the Westphals' shop, the location of Five Deer Lane, infrastructure, fences to be built, etc. (See Appx. 6 and 7, Settlement Agreement and map of Five Deer Lane and the Westphals' shop, and Dkt. 63, Exh. 4, (Appx. 5), Judge Wilson's Order dismissing the rest of that case with prejudice). Thus, the easement issues should have been over by 2019.

However, in October, 2016, Kissingers bought property above the Westphals on Five Deer Lane. They were speeding through the Westphals' property creating a hazard. The Westphals have trained dogs to alert them to hazards, because they are deaf. The Kissingers did not care about that, and one of them ran over one of Westphals' dogs. Thus, the Westphals filed this action against the Kissingers seeking a 10 mile per hour speed limit through their property, and for vet bills for their dog. This action against the Kissingers originally had nothing to do with the easement locations through Westphals' property. Supposedly that was all settled.

Linda Romano, however, who also owns land above the Westphals on Five Deer Lane, and is friends with the Kissingers, was allowed to intervene in this action, and filed declaratory judgment claims against the Westphals seeking material changes in the location of the easements through the Westphals', and for various other rulings such as what is the scope of those easements. (Dkt. 104, Romano's Amended Complaint). She failed, however, to join all persons with interests in those easements that would be affected by the declarations. The Kissingers joined in Romano's claims in intervention, and also failed to join all persons whose interests in the easements would be affected.

Persons other than Kissingers and Romano have interests in the 30' and 60' easements Romano has placed at issue.(See, Dkt. 124, Exhibit 2, and Appx. 8).

Kissingers also claimed they have a prescriptive easement to the upper road through the Westphals' property. (Dkt. 7, Kissingers' counterclaim). Kissingers also failed to join all persons whose interests in that easement would be affected. *Id.* (Dkt. 124, Exhibit 3, Judge Wilson's March 20, 2017 order in DV-16-679).

IV. SUMMARY OF THE ARGUMENT.

Kissingers and Romano failed to name, as parties, all persons with interests in the easements that will be affected by the declaratory judgments they currently seek. Therefore, Westphals moved to dismiss Kissingers' and Romano's declaratory

judgment easement claims, for lack of subject matter jurisdiction. Judge Allison denied Westphals' motion, and ruled that the Court has subject matter jurisdiction over the easement claims in this case. (Dkt. 135). The Court also held Westphals waived their necessary party claims, which is incorrect because Westphals raised those defenses in their Answer to Kissinger's Third Amended Counterclaims. (Dkt. 128, pp. 2-3). Plus, parties cannot waive lack of subject matter jurisdiction.

It would also be extremely prejudicial to the Westphals to allow these easement claims to go forward without naming the other persons with interests in the easements. Each of these persons could bring another case concerning the easements, but this is already the fourth case. The easement issues should be finally resolved. Thus, the parties' easement claims should be dismissed. If they really want to resolve the easement issues, they should file a new case naming all parties from the outset whose interests would be affected by the declaratory judgments.

As to Kissingers' claimed prescriptive easement, adding Kissingers and their 40 acres to the existing 10' prescriptive easement would affect the other easement holders, Ellicsons and Bells (now Sheets). Kissingers failed to make them parties. Thus, the District Court also lacked subject matter jurisdiction to issue declaratory judgments on the prescriptive easement through Westphals' property. If a Court lacks subject matter jurisdiction, all proceedings conducted by the district

court are void. *In Re Estate of Big Spring*, 360 Mont. 370, 395, 255 P.3d 121, 137, (2011). The Court should not enter a void judgment. Therefore, the easement claims in this case should have been dismissed, and the District Court should be reversed. If the defendants want to litigate the parameters of the Five Deer Lane easement, and the upper road, they should file a new lawsuit naming all interested parties from the outset.

V. ARGUMENT.

1. Failing To Join The Persons Who Will Be Affected By The Declaratory Judgment Is A Matter Of Subject Matter Jurisdiction.

The only Montana case on the issue is a District Court case by Judge Stewart Stadler. He ruled on the plain language of §27-8-301, MCA, which provides: “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...” *Ramesz v. Town of Eureka, et.al.*, Lincoln County Cause # DV-09-97. (Emphasis added). In that case, Judge Stadler stated “Failure to join all interested parties or to provide reasonable notice deprives the Court of subject matter jurisdiction to render a declaratory judgment. 22A Am. Jur. 2d Declaratory Judgments §208. Because the Court does not have subject matter jurisdiction over plaintiffs’ declaratory judgment action, it obviously cannot issue orders that depend on the outcome of declaratory judgment” (October

5, 2011, Order on motion for summary judgment, (Dkt. 124, Exh. 4). Judge Stadler later amended that order and dismissed the case on April 5, 2012, stating the court was required to dismiss the action by Montana Rule of Civil Procedure 12(h)(3) which states that “[I]f the court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action.” The rule affords no leeway for discretion and the action is accordingly dismissed. (Emphasis added). (Dkt. 124, Exh. 5, DV-09-97, Order Amending October 5, 2011, Order on the Town of Eureka’s Motion For Summary Judgment and Dismissing the Case). Judge Stadler’s ruling in Ramesz is persuasive. Other states and the Montana Federal District Court follow Judge Stadler’s interpretation of the UDJA.

The point of the cases cited by the Westphals in their opening brief is that absent persons need to be joined in declaratory judgment actions if their interests would, or could be materially affected.

In their Answer Brief, the defendants claim Westphals only cite four jurisdictions that follow the rule that failing to join parties whose interests would be affected in a declaratory judgment action is jurisdictional. Actually, Westphals cite more than a few other jurisdictions, and the Montana Federal District Court. The nonexhaustive list cited by Westphals illustrates that Montana should follow the jurisdictional rule to keep the UDJA, in fact, uniform. See, *Gallegos v. Nevada*

General Ins. Co., Opinion Number: 2011-NMCA-004, Docket No. 29,280, New Mexico Court of Appeals, November 23, 2010, at. Pg. 3, (Dkt. 91 hereto, Exh. 1), *Home Fire & Marine Ins. Co. v. Schultz*, 80 N.M. 517, 518, 458 P.2d 592, 593, *Monroe v. United States Fidelity & Guaranty Co.*, 603 N.E.2d 855, 858-59 (Ill. Ct. App. 1992), *Arnold v. Allianz Glob. Risks US Ins. Co.* (D. Mont. 2020), *Diamond State Ins. Co. v. Hard Times, Inc.*, 2014 WL 12591678, *2 (D. Mont. Oct. 21, 2014), *Shepoka v. Knopik*, 197 Neb. 651, 250 N.W.2d 619 (Neb. 1977), *Skandha v. Kennedy*, 92 Mass.App.Ct. 1123, 102 N.E.3d 427(Table) (Mass. App. 2018), *Taylor Oil Co., Inc. v. Retikis*, 575 N.W.2d 870, 254 Neb. 275 (Neb. 1998), *Bretton Ridge Homeowners Club v. DeAngelis*, 51 Ohio App.3d 183, 555 N.E.2d 663 (Ohio App. 1988), *Miller v. Shenk*, 272 Or App 12, 18,354 P.3d 732 (Or. App. 2015), *Vance v. Ford*, 187 Or. App. 412, 424, 67 P.3d 412 (2003), *State ex rel. Dewberry v. Kulongoski*, 187 P.3d 220, 220 Or. 345, 220 Or. App. 345 (Or. App. 2008), *Stanley, Adm. v. Mueller*, 211 Or. 198, 315 P.2d 125 (1957).

The Defendants claim there is a split of authorities on the issue, and this Court should adopt their line, which they claim failing to join the other interested parties is not jurisdictional, and further, naming the other persons with interests in the easements in this case is not necessary. The defendants are incorrect. This is not just a dispute between neighbors, the Defendants are seeking declarations to define and

move the road. Thus, they placed the un-named persons' legal interests in the easements at issue, but failed to join them.

This case started out by Westphals, against Kissingers, because Kissingers burned out on their hoses, ran over one of their trained service dogs, and Westphals wanted a 10 mph speed limit on the road through their property. Romano was allowed to intervene, and then Kissingers joined in her claims. Their claims then expanded to moving the road, which affects the interests of the un-named persons who have legal interests in the easements. The defendants did not contact them, and made no effort to join them. Romano moved for summary judgment on her easement issues, however, of which some were granted. (Dkt. 116, Order on Romano's easement). Thus, the other persons had no opportunity to protect their interests.

In their answer brief, defendants attempt to show there is a split of authority construing the UDJA on the issue of whether failing to join persons with interests in a declaratory judgment is jurisdictional. However, a closer look shows they are mostly Relying on cases that are construing indispensable and necessary party rules. Section 27-8-301, MCA, provides:

"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...."

Nowhere does §27-8-301 mention “necessary” or “indispensable” parties. Thus, the defendants’ argument violates the rule they purport to rely on, that courts should not add language to statutes. (Defendants’ Brief, pg. 12). Thus, their cited cases from other jurisdictions relying on necessary or indispensable party statutes are off point. Yet they urge this Court to follow their cases, and add that language to §301.

Section 301 of the UDJA is much more encompassing. It requires joinder of **all persons “... who have or claim any interest which would be affected by the declaration....”**, without using the words “necessary” or “indispensable.” Thus, the defendants are misconstruing the UDJA.

For example, the defendants rely on *John Alexander Ethen Trust Agreement v. River Res. Outfitters, LLC*, 2011 MT 143, 361 Mont. 57, 256 P.3d 913. That case involved a common boundary line dispute between two landowners. The District Court held the parties’ property line meandered along the west bank of Flint Creek. In affirming the District Court, this Court held that no neighboring landowners had any legal interest in the disputed acres. Thus, the court did not err by not joining them. *Id.*, ¶52. The issue was decided under Rule 19 (a)(1), M.R.Civ.P., not §27-8-301, MCA. The defendants’ other cited cases similarly were decided under necessary

party or indispensable party rules, not the jurisdictional issue herein raised by the UDJA.

The defendants' arguments by example are also off point. One member of a subdivision suing another member for blocking a common area would not affect anyone else's interest in the common area. Whereas, in our case, the defendants want the road moved, which would affect the non-named parties' interests and investments in the road. If, in the defendants' example, the party sued another subdivision owner to remove the common area and destroy it, that would affect the other subdivision owners' interests, requiring their joinder.

The bottom line is, if other persons' rights and interests are not affected by the declarations, they do not need to be joined. That is not the case here.

The defendants claim the declaratory judgments they seek, to move the road, would not negatively impact or prejudice the unnamed parties with interests in the easement. That is not the case here, where moving the road would destroy the work already put into improving the road, and change the road's alignment, from straight, to who knows what? (See Dkt. 63.1, Exh. 5, photos of the road).

Contrary to the defendants' assertions, defining the location and scope of Five Deer Lane would affect all of the people above the Westphals. Therefore, they should have been joined. The defendants amended their counterclaims three times, and had

ample opportunity to join the non-named persons, but they did not even try. They ignored the plain language of §301, and never even filed a motion to amend to add the other interested persons.

Contrary to the defendants' assertions, There are not that many people at issue, and they all have a keen interest in the road. However, the location of the road was already approved twice in *Davis v. Westphals*, by Judge Eddy, and in *Klapp, Romano, et.al.*, by Judge Wilson, and the Westphals relied on those rulings and moved their shop. Now these defendants want to tear it down, and destroy the Westphals' lives. The defendants' claims are about harassment. This is highlighted by the fact that the Kissinger's do not even live there anymore, and actually have no interest in the easements, yet they insist on continuing their claims. The defendants in this case are not the persons who should be defining location and scope of Five Deer Lane. They are only interested in their personal vendettas.

Here, the Court should have dismissed Romano's and Kissingers' easement claims because they also failed to join as parties, all persons with interests in the easements which would be affected by the declarations. Declarations concerning whether these easements still exist through Westphals' and the scope of these easements would affect every person with interests in these easements. Since they

were not named as parties, the court lacked subject matter jurisdiction over the easement issues.

2. The Defendants And Intervenor Are Not Protecting The Non-Joined Persons' Interests In The Easements. The Declarations They Seek Actually Damage Their Interests and Investments.

The Defendants' claims that they will adequately protect the other persons with interests in the easement through the Westphals' property, and they are not necessary parties, are incorrect. First, Five Deer Lane and the Westphal's shop have already been moved, and all persons (except Kissinger's and Linda Romano), with access through the Westphal's property have relied on the road's current location. In fact, Kissingers no longer even live there. The new owner of Kissingers' property has already put a lot of time and work into improving Five Deer Lane in its current location. They leveled and widened the road after Kissingers moved out, and the Westphals donated the gravel. This took hundreds of yards of pit run and gravel, and cost thousands of dollars.

The new owners of the former Davis property, the easterly adjacent owner to Westphals, have also improved the road through the Westphals', and to ensure that Romano has an open 60 foot easement through there, they put any required additional feet of road on their property. Thus, the entire road through the Westphals' is better and wider than Linda Romano or the Kissinger's ever had it before. (See, Dkt. 63.1,

Exh. 5, photos of road). It is straight and wide. Far better than any other part of Five Deer Lane For several miles down to the main road. Plus, Romano is guaranteed at least 60' of easement width in its current location.

Only Romano and Kissingers want to move the road and Westphals' shop. Westphals already moved it though, and Romano and Kissingers acquiesced in Westphals moving their shop and the road the entire time. During the entire time they drove through Westphals to their homes practically every day. They never voiced any concerns over moving the road or the shop. In fact, Romano's case against the Westphals over the easements through Westphals' property was also in progress. After the Westphals moved their shop, Romano settled with the Westphals, and entered a settlement agreement. Appx. 6. The parties attached a map to that settlement agreement for clarity, which shows the location of Five Deer Lane and Westphal's shop and improvements. Appx. 7. In the settlement agreement, Romano agreed to settle all claims that were, or could have been brought against the Westphals at that time, including the main Five Deer Lane. The settlement agreement map even shows fences the Westphals planned to build to keep their dogs out of the road.

The 10' upper road was illegally built in the first place by Romano's husband. The only reason they got a prescriptive easement over the upper road, is because they

had driven on it for over five years by the time the Westphals blocked it off and told them to stay on the main road. The main road is way better than the upper road, but Romano likes to use the upper road to aggravate the Westphals. Romano and the other plaintiffs in the first lawsuit paid the Westphals for the settlement agreement, which included funds to install speed bumps, signs, and Gates. They even agreed to the model of speed bumps that were installed. Romano kept driving outside of the 10 foot upper road, however, so the Westphals put rocks and concrete blocks outside some of the the right-of-way to prevent Romano from doing that. The Westphals have not encroached on her 10' easement as the defendants claim.

The easement declaratory judgment claims also encompass the main road, however, and thus affect the other persons with interests in the easements. The Defendants failed to name those persons with interests in their claims to move the road and shop. Thus, those claims should be dismissed.

3. The Court Should Not Allow Amendment To Add The Interested Parties At This Late Date, Because Easement Issues Have Already Been Decided In their Absence, With No Opportunity To Protect Their interests.

The Defendants' claim that they should be allowed to add the other persons with interests in the easements is also incorrect. First, once a court discovers that it lacks subject matter jurisdiction, it must dismiss the case, or at least the issues that it lacks SMJ over. Rule 12(h)(3), M.R.Civ.P.; *In re Marriage of Lance* (1984), 213

Mont. 182, 186-87, 690 P.2d 979, 981. Any other orders it issues, or has already issued are void. *In Re Estate of Big Spring*, 360 Mont. 370, 395, 255 P.3d 121, 137, (2011). Here, the Court cannot now add the other persons because it has already issued void summary judgment orders on the easements. Dkt. 116, Order on Romano's Motion For Summary Judgment. The other persons with interests had no opportunity to state their positions before the Court issued those orders. Only starting over on the easement claims can fix that. It is highly doubtful the Defendants would re-file this case naming the other interested parties, however when their primary goal is to damage the Westphals' lives, and the Kissingers no longer even live there.

As to Romano, she does not need to move the road, and the other interested parties would disagree with her position. They do not want the road moved. Romano has been driving in and out of there for years on the improved road which is better than she ever had. Her only interest in this case is to harass the Westphals. However, this is really a non-issue, because the Kissingers' and Romano's non-easement claims are not subject to dismissal. Those claims are personal to only the Kissingers and Romano, and they will get their day in court on their claims that don't affect the other parties' rights in the easements, such as nuisance, and breach of the settlement agreement between Romano and Westphals.

4. The Court Should Disregard Defendants' Attempts To Disparage The Westphals.

The issue in this case, subject matter jurisdiction, is a question of law. Yet, the Defendants set forth pages of false allegations against the Westphals in an attempt to jade the Court against them. Those allegations are irrelevant to the declaratory judgment claims of the location and scope of Five Deer Lane and the upper road. We will suffice it to say the Westphals are deaf, and they are hard workers. They build things themselves and have a sawmill for their own wood. This was to be their dream home in retirement. They get along well with the other neighbors except these two who ganged up on them. Plus, Kissingers did not sell their 40 acre private piece at the end of the road due to the Westphals. They sold it on April 6, 2022, during the pandemic for \$855,000. They bought it in 2016 for \$299,000. (Zillow). The new owner and the Westphals get along fine. The new owner already improved Five Deer Lane and Westphals donated the gravel. Anyway, the defendants are incorrect. The Westphals are not bad people.

VI. Conclusion.

The Defendants failed to join the other parties with interests in the location and scope of the easements they seek declaratory judgments for. Thus, the Westphals request this Court to reverse the District Court for denying Westphals' motion to dismiss the easement declaratory judgment claims, and direct it to dismiss Linda Romano's and the Kissingers' express and prescriptive easement claims, and all

claims dependent on those claims, including Romano's claims for tortious interference with easement, breach of contract, and trespass, and Kissingers' claims for declaratory judgment for a prescriptive easement, tortious interference with easement rights, breach of contract, and trespass.

The Defendants also cannot adequately protect the un-named interested persons' interests in the easements, because their interests are personal, and contrary to the other interested persons' rights. Kissingers moved and do not even have any interest in the easements.

If the defendants want to bring such claims, for starters, they must name, as parties, all persons who have or claim any interest which would be affected by the declarations they seek. Otherwise, the un-named person's interests in the easements and roads will not be protected, and there will be no finality to the easement issues through the Westphals' property. All of these persons would be subject to additional, unnecessary litigation expenses and inconsistent rulings. In fact, we already have three inconsistent rulings. In *Davis v. Westphal*, Appx. 2, 3, Judge Eddy ruled the Westphals' shop and the road can stay where they are. Now, Judge Allison's ruling is inconsistent and contrary to Judge Eddy's ruling. Judge Allison's ruling is also contrary to Judge Wilson's ruling. Appx. 5, and Appx. 6.

It is interesting to note that one of the first things the Defendants did in this case was substitute Judge Amy Eddy, because they knew she had already ruled in favor of the Westphals on the location of the road and their shop. (Dkt. 8, 9). From the outset, they were hoping to get an inconsistent ruling from the District Court. Such conduct should not be condoned by this Court.

Dated February 13, 2023.

DANNO LAW FIRM, P.C.

/s/ Evan F. Danno

CERTIFICATE OF SERVICE

The undersigned certifies that on February 13, 2023, this Brief was E-filed with the Montana Supreme Court.

/s/ Evan F. Danno

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11, Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately-spaced Times New Roman text typeface of 14 points; is double-spaced; and is not more than 5,000 words, not averaging more than 280 words per page, excluding the Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance and Appendix.

DANNO LAW FIRM, P.C.

/s/ Evan F. Danno

CERTIFICATE OF SERVICE

I, Evan F. Danno, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 02-13-2023:

Christopher Cameron Di Lorenzo (Attorney)

PO Box 7370

Kalispell MT 59901

Representing: Deborah Kissinger, Melissa Kissinger, Michael Kissinger, Todd Kissinger, Linda Romano

Service Method: eService

Marcel A. Quinn (Attorney)

Hammer, Quinn & Shaw PLLC

PO Box 7310

100 Financial Drive

Suite 100

Kalispell MT 59904-0370

Representing: Deborah Kissinger, Melissa Kissinger, Michael Kissinger, Todd Kissinger, Linda Romano

Service Method: eService

Thomas Alan Hollo (Attorney)

100 Financial Dr Ste 100

Kalispell MT 59901

Representing: Deborah Kissinger, Melissa Kissinger, Michael Kissinger, Todd Kissinger, Linda Romano

Service Method: eService

Electronically Signed By: Evan F. Danno

Dated: 02-13-2023