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IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 23-_____

CRAIG BAUGH,

Plaintiff and Appellee,

vs.

H2S2, LLC, a Montana Limited Liability Company,

Defendant and Appellant.

CAUSE NO. DV-21-754(A)

District Judge: Hon. Amy Eddy

NOTICE OF APPEAL

(Of Defendant and Appellant H2S2, LLC)

NOTICE IS HEREBY GIVEN that the Defendant and Appellant above-named, H2S2, LLC, through its undersigned counsel, and pursuant to Rule 4, M.R.App.P., appeals to the Supreme Court of the State of Montana from the final judgment and related rulings in Cause No. DV-21-754(A), in the District Court for the Eleventh Judicial District for Flathead County. Specifically, the rulings appealed by the Defendant/Appellant are the District Court's November 9, 2022 summary judgment ruling entitled *Order Re: Motions for Summary Judgment*

(Docket 132), the District Court's January 24, 2023 ruling on attorney's fees, entitled *Order Re: Plaintiff's Motion for Award of Attorney Fees and Costs* (Docket 166), and the District Court's January 24, 2023 injunction order, entitled *Findings of Fact, Conclusions of Law and Order Re: Plaintiff's Permanent Injunction* (Docket 167). Copies of these District Court orders and rulings from which this appeal is taken are attached to this *Notice of Appeal* and filed herewith.

The District Court has certified its summary judgment rulings as final and appealable pursuant to Rule 54(b), M.R.Civ.P., and as required by Rule 4(4)(b), M.R.App.P., a copy of the District Court's January 24, 2023 certification order, entitled *Order Certifying Judgment as Final for Purposes of Appeal* (Docket 165), is also attached hereto.

As provided in the District Court's Rule 54(b) certification order, the District Court has allowed the Defendant's Rule 59(e) motion to amend the judgment, entitled *Motion to Alter or Amend Judgment Under Rule 59* (Docket 144) to be deemed denied by the passage of time under Rule 59(f), M.R.Civ.P.

THE APPELLANT FURTHER CERTIFIES:

1. **Rule 54(b) Certified Judgment.** That this appeal is from an order certified as final under Rule 54(b), M.R.Civ.P., and accordingly, pursuant to Rule 4(4)(b), M.R.App.P., a copy of the District Court's certification order is attached to this *Notice of Appeal*.

2. **Appellate Mediation.** That the Appellant believes this appeal is not subject to the mandatory mediation process provided in Rule 7, M.R.App.P., and certifies accordingly.

3. **Transcripts.** That all available transcripts of the proceedings in this cause have been ordered from the court reporter contemporaneously with the filing of this *Notice of Appeal*.

4. **Filing Fee.** That submitted with this *Notice of Appeal* is the requisite filing fee as prescribed by § 3-2-403, MCA.

DATED this 21st day of February, 2023.

Respectfully Submitted,

HASH, O'BRIEN, BIBY & MURRAY PLLP

Electronically signed by

/s/ *Donald R. Murray*

By: Donald R. Murray

136 First Avenue West
P.O. Box 1178
Kalispell, MT 59903-1178
Attorneys for the Appellant/Defendant, H2S2, LLC

CERTIFICATE OF FILING and SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing *Notice of Appeal* with the Clerk of the Montana Supreme Court, and that I have served true and accurate copies of the foregoing *Notice of Appeal* upon the Clerk of the District Court, each attorney of record, each court reporter from whom a transcript may be ordered, and each party not represented by an attorney in the above-referenced District Court action (there are none), as follows:

Peg Allison
Clerk of the District Court
11th Judicial District Court
920 South Main, Suite 300
Kalispell, MT 59901-5400

Thomas Sapp
Official Court Reporter
11th Judicial District Court
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Attorneys for Plaintiff and Appellee, Craig Baugh

DATED this 21st day of February, 2023.

HASH, O'BRIEN, BIBY & MURRAY PLLP

Electronically signed by

/s/ Donald R. Murray

By: Donald R. Murray
Attorneys for the Defendant/Appellant, H2S2, LLC

Amy Eddy
DISTRICT COURT JUDGE
Department No. 1
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THE MONTANA ELEVENTH JUDICIAL DISTRICT COURT
FLATHEAD COUNTY

CRAIG BAUGH, *Plaintiff*, vs. H2S2, LLC, a Montana Limited Liability Company, *Defendant*.	Cause No. DV-21-754(A) ORDER RE: MOTIONS FOR SUMMARY JUDGMENT

Pending before the Court are the following motions:

(1) Plaintiff's *Motion for Summary Judgment*, filed August 5, 2022 (Doc. 65). The Defendant filed a *Response* on August 26, 2022 (Doc. 90), to which the Plaintiff filed a *Reply* on September 9, 2022 (Doc. 104).

(2) Defendant's *Motion for Partial Summary Judgment*, filed August 5, 2022 (Doc. 66). The Plaintiff filed a *Response* on September 12, 2022 (Doc. 105), to which the Defendant filed a *Reply* on September 26, 2022 (Doc. 120).

At the request of the parties these motions came before the Court for oral argument on November 9, 2022. Having reviewed the file and being fully apprised, the Court hereby finds as follows:

ORDER

The Plaintiff's *Motion for Summary Judgment* is GRANTED in part, consistent with the below Rationale.

The Defendant's *Motion for Partial Summary Judgment* is DENIED consistent with the below Rationale.

RATIONALE

FACTUAL AND PROCEDURAL BACKGROUND

I. Initial Evidentiary Matters

Rule 56(e), Mont.R.Civ.P., specifically requires:

> (1) In General. A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit. The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits.
>
> (2) Opposing Party's Obligation to Respond. When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must -- by affidavits or as otherwise provided in this rule -- set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

In addition to disregarding self-serving affidavits, the Montana Supreme Court has emphasized:

> Rules 801 and 802 of the Montana Rules of Evidence provide that statements, other than those made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted, are inadmissible unless an exception to the hearsay rule applies. Thus, Rule 56(e) makes clear that statements in affidavits made without personal knowledge, or based on hearsay, are not admissible and cannot be considered on summary judgment.

In re Estate of Harmon, 2011 MT 84A, ¶25, 360 Mont. 150.

Baugh's *Motion in Limine* and *Second Motion in Limine* highlight the insufficiency of the evidence submitted by H2S2 in support of its *Motion for Partial Summary Judgment* and *Response to Motion for Summary Judgment*. The Court agrees that the following supporting evidence attached to H2S2's briefing will not be considered by the Court on summary judgment as it does not meet the requirements of Rule 56(e), M.R.Civ.P.:

(1) *Affidavit of Brent Foley, P.E.*: For purposes of this litigation, Mr. Foley is a hybrid lay and expert witness. He was not disclosed as an expert witness, so while he obviously has some expertise, he may not testify or offer opinions outside of the work he did on the project. *See Norris v. Fritz*, 2012 MT 27, 364 Mont. 63, 270 P.3d 79.

(2) *Affidavit of H2S2, LLC*: This is affidavit is replete with inadmissible hearsay, inadmissible settlement communications, and other matters that are generally irrelevant to the question of the scope of the use of the easement. These matters will be excluded and disregarded by the Court.

(3) Exhibit 1: This exhibit was prepared by Mr. Murray who has previously been warned about becoming a witness in this matter. The exhibit clearly goes beyond being illustrative and is meant for the Court's substantive reliance. It will be excluded and disregarded by the Court.

(4) Exhibit 3: This is a letter from Florian Skyland that clearly does not meet the requirements of Rule 56, M.R.Civ.P.

(5) Exhibits 4 and 5: To the extent they have any relevance, these exhibits similarly do not meet the foundational requirements of Rule 56, M.R.Civ.P.

(6) Exhibit 6: This is the BaseGlamp Road Access Easement prepared by Kathleen McMahon. It contains extensive legal conclusions as well as numerous categories that are irrelevant, including subdivision processes, the physical burden on the road, other uses of the property, consistency with other developments in Flathead County, etc. These categories will be excluded and disregarded by the Court.

Moreover, H2S2 attempts to simply incorporate facts previously articulated by the Court in prior *Orders* into its briefing are likewise inadequate. As pointed out by Baugh, this is, of course, entirely inappropriate as completely different standards apply to applications for temporary restraining orders, motions to dismiss and motions for summary judgment. *See Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Finally, Mr. Murray has previously been warned that he cannot act as both counsel and a material witness in this matter. *Order*, p. 4, fn1, filed 8/16/2022 (Doc. 76). Since he has apparently chosen to remain as counsel, the Court will disregard any testimony, observations or exhibits provided or prepared by Mr. Murray.

The following facts are drawn from the deposition testimony, affidavits and exhibits attached to the parties' briefing—which are properly authenticated, based on personal knowledge, were properly and timely disclosed during discovery, would be admissible as evidence, and were not made in bad faith. Rule 56, Mont.R.Civ.P.

II. Baugh's Purchase and Use of Property

On August 29, 1983, Baugh purchased 20 acres of property located on Lupfer Road, Whitefish, MT. Doc. 65, Ex. 1-2. Baugh lived in a single-family residence on the property. When he purchased the property there was 60-foot easement for ingress and egress across the property to the adjacent "Migallo" property. Doc. 65, Exs. 1-2. On August 31, 1983, Baugh purchased the Migallo property. Doc. 65, Ex. 2-3. This area is rural with virtually no commercial development, private, and known for its recreational access and wildlife.

In 2006, Baugh had the properties surveyed to create Tract 1 and 2 via a boundary line adjustment as reflected on the Certificate of Survey 17458. Doc. 65, Ex. 4; Baugh Sec. Aff., ¶4. Tract 2 did not have access, so Baugh granted an access and utilities easement across Tract 1, which is where Baugh's residence is located, for the benefit of Tract 2. COS 17458 shows a "20' wide access and utilities easement on existing road." Doc. 65, Ex. 4. The "existing road" was a dirt, two-track lane. Doc. 65, Ex. 20. Baugh purposely reduced the width of the easement from the prior 60-foot easement in an attempt to prevent development of a subdivision. Baugh testified that in 2006, he never anticipated the concept of glamping, which only recently has become popular in Flathead County. *Id*.

Baugh obtained a DEQ COSA approval for "one single family dwelling" on Tract 2 and an Approach Permit for a single driveway. Doc. 65, Exs. 5, 6. It was Baugh's intention to ultimately build and sell a single-family residence on the property. Doc. 65, Baugh Aff., ¶¶4, 11. Between 2006 and 2019, Baugh used the easement to cut trees and firewood on Tract 2, as well as monitor ground water at two potential building sites. Doc. 65, Baugh Aff., ¶¶4, 11. H2S2 has conceded that historically the easement was "barely used." Doc. 65, Ex. 10, p. 158: 9-12.

There were no structures on Tract 2 until Baugh built a barn on the property in 2019. Doc. 65, Baugh Aff., ¶¶4, 11. However, after building the barn he realized he did not have the energy or finances to complete the project and he listed the property for sale. Doc. 65, Baugh Aff., ¶¶4, 11. Baugh sought a buyer who would be a good neighbor and good steward for the property. After being unable to find a realtor he could work with, Baugh ultimately listed the property for sale himself. Doc. 65, Baugh Sec. Aff., ¶12. The property was marketed as a single-family residence. Doc. 65, Ex. 19.

Baugh ultimately sold the property to Florian Skyland on October 1, 2019, after Skyland and his wife assured Baugh they intended to live on the property for a long time, were not interested in subdividing or developing it further, and Baugh was convinced they would be good neighbors. Skyland converted the barn to a single-family residence. Skyland ultimately listed the property for sale, which was marketed as a single-family residence. In the fall of 2020, Skyland informed Baugh he was selling Tract 2 to two couples who were interested in putting 1-2 small domes on the property. Baugh asked Skyland to consider placing more covenants in his sales contract to prohibit the cutting of trees or a subdivision, but this did not occur. Doc. 66, Ex. 9.

III. H2S2's Development of Property

Maura Hamilton, Mindy Hamilton, Tim Stidham and Kelly Schmidt are the members of H2S2, LLC. H2S2 purchased Tract 2 from Skyland for the purpose of developing BaseGlamp, an idea that came to them during the pandemic. Doc. 65, Ex. 10, p. 28:20-24. H2S2 was aware of the easement but did not believe it would be an impediment to development. Doc. 65, Ex. 10, p. 47: 3-6. H2S2 has taken the position it has the absolute right to operate any sort of commercial or business venture on Tract 2 using the easement as access. Doc. 65, Ex. 10, p. 158: 3-8.

H2S2 was also aware of the DEQ COSA contemplating development as a single-family residence, but knew it could be the subject of a rewrite. Doc. 65, Ex. 10, p. 52:2-23. It is clear from email communications between them they were aware their plans for development might upset Baugh:

> Neighbor
> -yes, we need to keep this relationship amicable
> -perhaps we need to introduce ourselves, open communication but not tell him too much?
> -Agree to not mess with his side too much until we need to

Doc. 65, Ex. 9.

According to BaseGlamp's undated *Pitch Deck PowerPoint Presentation*, production of which had to be compelled, BaseGlamp seeks "[t]o become the premiere, year-round glamping destination for all travelers visiting Glacier National Park and Flathead Valley by providing a luxury experience in [its] geodesic domes." Doc. 104, Ex. 41. BaseGlamp ultimately wants to develop 32 domes with associated amenities and at the time anticipated the final phase of development being completed in 2023 at which point $3.4 million in booking revenue was anticipated. *Id*. However, development of BaseGlamp has been slower than predicted and completion of future phases is unknown at this time.

On November 19, 2021, BaseGlamp prepared a Fire Access Plan showing 24 glamping domes on the diagram provided. Doc. 104, Ex. 39. On March 9, 2022, H2S2 received a rewrite of the DEQ COSA, which states that "the purpose of his rewrite is to change the use of the tract from a single-family living unit with individual well and wastewater treatment system to multiple rental cabins with public water system and wastewater treatment systems . . ." Doc. 65, Ex. 25, p.2. The Lot Layout attached to the DEQ COSA shows 32 domes.

On July 29, 2022, BaseGlamp was granted a Sales and Use Tax Permit by the Montana Department of Revenue. Doc. 104, Ex. 37. On August 1, 2022, H2S2 completed a Trailer Court/Campground/Youth Camp/Work Camp License Application with the Montana DPHHS Food & Consumer Safety Section for a "General Services Campground" providing "on-site potable water, sewage disposal, solid waste disposal and other services such as laundry or groceries" for 12 "Rustic Cabins." Doc. 104, Ex. 37.

As of June 16, 2022, there were nine domes available for rental, with three more currently being built. Doc. 65, Ex. 10, p. 90: 8-24. Despite documentary evidence to the contrary, H2S2 has asserted it has no plans to expand beyond the 12 domes. Doc. 65, Ex. 10, p. 113:1-11. In addition to the domes, there is a common outdoor cooking area and gazebo, and the barn has been converted into the welcome center with some offices and public spaces. H2S2 also has plans to improve the easement from the 11-12' wide track to a full 14-foot gravel road. Doc. 65, Ex. 10, p. 153:4-17.

Rick Nys, P.E., a Principal Traffic Engineer retained by Baugh, has opined "the impacts of adding 12-32 lodging units would result in a significant increase in traffic on the access easement and Lupfer Road versus the traffic impacts of the historic single family residence uses

in the area." Doc. 105, Ex. 36, p. 5. Mr. Nys observed that based on a Flathead County traffic count study in August/September 2019, Lupfer Road's average daily traffic was 114 vehicles per day, resulting in each of the single-family residences on Lupfer Road generating approximately 4 trips per day—assuming all the traffic was generated by the residences. Doc. 65, Ex. 23, p.2. In contrast, BaseGlamp is expected to generate "significant increases" in traffic on the easement from 4 vehicles per day to 30 vehicles per day (if measured as a Campground/Recreational Vehicle Park) or up to 40 vehicles per day (if measured as a Motel) as BaseGlamp is currently developed. Doc. 65, Ex. 23, p. 2. Mr. Nys also opined traffic would increase to 90 vehicles per day (if measured as a Campground/Recreational Vehicle Park) or up to 107 vehicles per day (if measured as a Motel) *if* BaseGlamp is fully developed. Doc. 65, Ex. 23, p. 2.

Even BaseGlamps's own calculations demonstrate based on the very limited actual data generated by four sets of guests to date, each dome is generating on average 2.5 vehicle trips per day—which comes to 30 vehicle trips per day. Doc. 66, Aff. H2S2, ¶13. BaseGlamp's calculations are consistent with those of its retained expert, Bob Abelin, who opined BaseGlamp would generate between 30-44 vehicle trips per day. Doc. 66, Ex. 7, p. 2. As pointed out by Nys, Abelin appears to be working off of an outdated model. Regardless, even at the low end, 30 vehicle trips per day based on 12 domes is a significant increase over the single-family residence.[1]

IV. Current Conflict

On July 7, 2021, Baugh filed a *Complaint and Application for Temporary Restraining Order and Preliminary Injunction*. (Doc. 1). In Baugh's *Motion for Temporary Restraining Order/Preliminary Injunction*, filed July 21, 2021, it was alleged the access easement was for residential purposes only and H2S2 should be enjoined from using it for commercial use. Doc. 4. The Court granted the Temporary Restraining Order on July 23, 2021, enjoined any commercial use, and set the matter for hearing on July 30, 2021. Doc. 7. On August 8, 2021, the Court issued an *Order* dissolving the *Temporary Restraining Order* and denying the request for a preliminary injunction as the easement did not restrict commercial use and the Court could not determine at that juncture whether the easement would be overburdened. Doc. 16. This decision was based in part on representations by H2S2 that it would be using the property for residential purposes with some seasonal renting of the domes. Doc. 16, ¶9. Of course, at this point, use of the dominant tenement has undisputably been converted from residential single-family use to commercial use.

Baugh's *First Amended Complaint*, filed August 9, 2021, seeks a declaratory judgment that, "that H2S2 LLC cannot access its development over the Easement because the current and proposed use of the Easement was not contemplated by the original parties to the Easement, would be inconsistent with the historical use of the Easement, and would constitute an improper burdening of the Easement, meaning it would overburden the Easement." (Doc. 19, ¶19). Baugh has argued that the development to date has caused increased traffic, dust, litter, noxious weeds, etc. Of course, some of this has simply been ordinary construction traffic which is to be expected

[1] H2S2 introduced Exhibit 12 at oral argument, which is two pages of hashtags where Baugh attempted to measure vehicle trips per day. The Court would note these measurements primarily include time where BaseGlamp was not in operation and are not complete counts.

and is only temporary. Baugh also brought a Trespass claim against H2S2 based on H2S2 or its agents leaving construction equipment, litter, and construction supplies, as well as building fires on his property. Baugh conceded at the Preliminary Injunction Hearing that conduct had ceased at that time, and the evidence provided in support of this claim seems to support that position.

On June 13, 2022, H2S2 filed its *Answer and Amended Counterclaim*, bringing claims against Baugh for a declaratory judgment as to the use of the easement, wrongful restraint, tortious interference, civil conspiracy and punitive damages. (Doc. 51). H2S2 believes that the neighbors are working together to prevent development of BaseGlamp. This includes contributing to Baugh's litigation fund and attempting to block H2S2 from gaining additional property that could provide alternative access. H2S2 also points to behavior of other neighbors, primarily Steve Fox and George McMahon which has been disruptive to H2S2.

As is evident from the record, the litigation has been acrimonious and spawned numerous discovery disputes. However, other than the amount of damages suffered by the parties and the extent of the coordination between the neighbors, there are no genuine issues of material fact precluding summary judgment.

LEGAL STANDARD

Summary Judgment is appropriate when the moving party demonstrates the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. M. R. Civ. P. 56(c)(3); *Dubiel v. Mont. Dep't of Transp*., 2012 MT 35, ¶ 10, 364 Mont. 175, 272 P.3d 66. If this burden is met, "The burden then shifts to the party opposing summary judgment to 'present substantial evidence essential to one or more elements of its case to raise a genuine issue of material fact,' or to show why the undisputed facts do not entitle the moving party to judgment." *Weber v. State*, 2015 MT 161, ¶ 12, 379 Mont. 388, 352 P.3d 8 (quoting *Dollar Plus Stores, Inc. v. R-Mont. Assocs., L.P.*, 2009 MT 164, ¶ 27, 350 Mont. 476, 209 P.3d 216). The nonmoving party cannot satisfy its burden with "mere denial, speculation, or conclusory assertions." *Phelps v. Frampton*, 2007 MT 263, ¶ 16, 339 Mont. 330, 170 P.3d 474 (citations omitted). All reasonable inferences which can be drawn from the evidence presented must be drawn in favor of the non-moving party. *Vettel-Becker v. Deaconess Med. Ctr. of Billings, Inc.*, 2008 MT 51, ¶26, 341 Mont. 435; 177 P.3d 1034.

LEGAL ANALYSIS

I. Scope of the Express Easement for Access

The law regarding easements and interpretation of easement is well-established in Montana.[2] "An easement is a non-possessory interest in land that gives rights to a person to use another's land for a specific purpose or as a servitude imposed on the land as a burden." *Ganoung v. Stiles*, 2017 MT 176, ¶15, 388 Mont. 152, 398 P.3d 282 (citations omitted). "An express easement is created by a written instrument." *Id*. When interpreting a written instrument, the

[2] For this reason, the Court declines to address the *extensive* legal authority relied upon by the Defendant from Maine, Virginia, New Hampshire, Idaho, Washington, Connecticut, Alaska, Alabama, and Massachusetts.

terms of the grant determine the extent or scope of an express easement. Mont. Code Ann. §70-17-106. Under Montana law, an express easement is generally considered to either have specific terms governing the scope of the easement, or general terms.[3] Whether the express easement terms are general or specific governs the Court's determination of how to interpret the scope of the easement.

(A) Express Easements Specific in Nature

"Where an easement is specific in nature, the breadth and scope of the easement are strictly determined by the actual terms of the grant." *Quarter Circle JP Ranch, LLC v. Jerde*, 2018 MT 68, ¶10, 391 Mont. 104, 414 P.3d 1277 (quoting *Mason v. Garrison*, 2000 MT 78, ¶21, 299 Mont. 142, 998 P.2d 531). Accordingly, if the grant "is specific in its terms, it is decisive of the limits of the easement." *Quarter Circle*, ¶10. In such situations, "it is not the proper role of the judiciary to insert modifying language into clearly written and unambiguous instruments where the parties to the instrument declined to do so." *Quarter Circle*, ¶10 (internal citations omitted); *see also* Mont. Code Ann. §1-4-101.

(B) Express Easements General in Nature

"Where an easement is general in its terms, 'courts must look beyond the language of the deed in determining the breadth and scope of the servitude, which need only be such as is reasonably necessary and convenient for the purpose for which the easement was created.'" *Quarter Circle*, ¶11 (quoting *Mattson v. Mont. Power Co.*, 2009 MT 286, ¶17, 352 Mont. 212, 215 P.3d 675). Stated differently, when an express grant is general in terms, "an exercise of the right, with the acquiescence and consent of both parties, in a particular course or manner, fixes the right and limits it to that particular course or manner." *Ganoung*, ¶15 (citations omitted). In determining the scope of an easement with general terms the Court must consider:

> the situation of the property, surrounding circumstances, and historical use to define the breadth and scope of an easement when a grant is not specific. The right-of-way may not be used in a way different than an established use or that burdens the servient estate to a greater extent than contemplated at the time of the easement's creation. Although, as conditions change, so too may the use by the dominant tenement so long as the changes are 'evolutionary but not revolutionary.

Ganoung, ¶15 (internal citations omitted).

"[I]n the absence of clear specifications defining scope no use may be made of a right-of-way different from the use established at the time of the creation of the easement so as to burden

[3] The Montana Supreme Court has also analyzed the scope of express easements in at least one case on whether the terms of the express easement were not general or specific, but simply whether they were ambiguous. *See Whitefish Congregation of Jehovah's Witnesses, Inc. v. Caltabiano*, 2019 MT 228, ¶28, 397 Mont. 284, 449 P.3d 812. However, in *Clark v. Pennock*, 2010 MT 192, ¶17, 357 Mont. 338, 239 P.3d 922, the Montana Supreme Court equated an ambiguity in the express easement as meaning the easement was not specific. Accordingly, the Court legal analysis simply relies on the general terms versus specific terms framework.

the servient estate to a greater extent than was contemplated at the time the easement was created." *Guthrie*, ¶48. "[A] rebuttable presumption arises that the parties anticipated such sues as might reasonably be required by a normal development of the dominant tenement." *O'Keefe v. Mustang Ranches HOA*, 2019 MT 179, ¶30, 396 Mont. 454, 446 P.3d 509 (finding that use of the roadway to view and access adjacent property was "reasonably attendant or contemplated with a connected roadway network commonly serving an 86-lot rural residential subdivision." *O'Keefe*, ¶30; *Leffingwell Ranch, Inc. v. Cieri*, 276 Mont. 421, 916 P.2d 751 (1996) (finding that division of dominant tenement into 174 individual parcels would improperly burden an easement that had historically been used to access 2-3 homesteads); *Guthrie*, ¶33 (finding that increasing use of an easement that had historically been used sporadically undisputedly altered the nature of the use and overburdened the easement). However, an increased burden is not assumed—there must be evidence supporting the servient owner's claim. *Leichtfuss v. Dabney*, 2005 MT 271, ¶53, 329 Mont. 129, 122 P.3d 1220 (finding there was no substantial evidence in the record to support a claim of increased traffic).

(C) Is H2S2's Express Easement for "Access" Specific or General in Nature?

The parties differ sharply as to whether the express grant of "access" in this case is specific or general, and a review of the controlling Montana Supreme Court precedent demonstrates this is not necessarily a straightforward determination but instead turns on the specific question before the Court:

In *Guthrie v. Hardy*, 2001 MT 122, 305 Mont. 367, 28 P.3d 467, the Montana Supreme Court found an "unrestricted" easement for "access" was general in its terms as to the scope of its use—whether it was intended for primary or secondary access for future development. *Guthrie* reaffirmed the long-standing rule that:

> If the easement is not specifically defined, it need only be such as is reasonably necessary and convenient for the purpose for which it was created. It is sometimes held . . . where the grant or reservation of an easement is general in its terms, that an exercise of the right, with the acquiescence and consent of both parties, in a particular course or manner, fixes the right and limits it to that particular course or manner.
> *Strahan v. Bush* (1989), 237 Mont. 265, 268, 773 P.2d 718, 720 (citations omitted). Under such circumstances, the question of what may be considered reasonably necessary and convenient in light of the easement's intended purpose is determined with a view to the situation of the property and the surrounding circumstances. See *Mason,* 2000 MT 78 at P22; *Strahan,* 237 Mont. at 268, 773 P.2d at 720; Section 70-17-106, MCA (extent of a servitude is determined by the terms of the grant or the nature of the enjoyment by which it was acquired). See also 25 Am.Jur.2d, Easements and Licenses § 83 at 654 (1996) (stating guiding principle that no definite rule can be stated as to what may be considered a reasonable use of an easement as distinguished from an unreasonable use; rather, the question is usually one of fact to be determined in the light of the situation of the property and the surrounding circumstances).

Guthrie, ¶47.

In *Woods v. Shannon*, 2015 MT 76, 378 Mont. 365, 344 P.3d 413, there was an express easement over an existing road for "ingress and egress" in a residential subdivision. *Woods*, ¶4. *Woods* held that based on the factual circumstances of the case, the easement granted for the purpose of "ingress and egress" was specific in nature. *Woods*, ¶14. The Montana Supreme Court went on to find:

> An express easement for the purpose of ingress and egress, with no other restriction, entitles the holder of the easement and his or her "family, tenants, and invitees . . . to use the road 24 hours a day by any form of transportation that does not inflict unreasonable damage or unreasonably interfere with the enjoyment" of the land crossed by the easement, also termed the servient estate. Restatement (Third) of Prop.: Servitudes § 4.10 illus. 1 (2000). A private easement, such as this, is not open to use by the general public, but may be used by the easement holder's family members, guests, tenants, employees, and tradesmen or others with whom he or she is transacting business. *City of Missoula v. Mix*, 123 Mont. 365, 373-74, 214 P.2d 212, 216-17 (1950). Further, the holder of an easement "has not only the right but the duty to keep it in repair," and thus is permitted to perform maintenance, repair, and improvements. *Guthrie v. Hardy*, 2001 MT 122, ¶ 59, 305 Mont. 367, 28 P.3d 467. An easement may be extinguished when the holder of the easement uses the easement in a way that overburdens the servient estate or is incompatible with the nature of the easement. Section 70-17-111(1)(c), MCA; *Steed v. Solso*, 2010 MT 264, ¶ 30, 358 Mont. 356, 246 P.3d 697.
>
> Shannon's current uses of the easement appear to include maintaining the easement by removing vegetation and driving an ATV on the easement. These uses are within the scope of the grant permitting use of the easement for ingress and egress and are consistent with the nature of the easement.

Woods, ¶¶15-16.

Significant to the holding in *Woods* was the fact the easement was between two residential lots in the same subdivision that was being used by the property owners. The Court declined to address whether any "hypothetical future uses" would overburden the easement. *Woods*, ¶16.

Ganoung also considered the scope of an "easement for access" between properties that had been held in the same family for generations, but was divided as the family expanded and sought to develop one of the properties into a subdivision. Having determined that "access" was a general term, *Ganoung* found "the historical use and access to the respective parties' properties was for the common purposes of horse pasture, hunting, and recreation." *Ganoung*, ¶16. *Ganoung* ultimately held the "request for two easements sixty feet in width to allow for development of a subdivision is not historically supported, not reasonable or convenient for the purpose for which the easements were created, and would be 'revolutionary' not 'evolutionary.'" *Ganoung*, ¶21.

In *Quarter Circle*, the question was whether the terms of the express easement "for ingress and egress . . . for the purpose of conducting farming and ranching operations and activities" included residential purposes. *Quarter Circle*, ¶¶2, 4. Quarter Circle held:

> The language of the easement here contains no express language indicating whether the parties intended the trail/road to be used to support residential use of the property. Further, the phrase granting access over the trail/road "for the purpose of conducting farming and ranching operations and activities" is not further defined to include or exclude residential purposes. *Because use of the trail/road for residential purposes is not strictly determined by the actual terms of the grant, the easement is not 'specific' for purposes of this particular question*.

Quarter Circle, ¶12 (internal citations omitted) (emphasis added).

Finally, in *Whitefish Congregation of Jehovah's Witnesses, Inc. v. Caltabiano*, 2019 MT 228, 397 Mont. 284, 449 P.3d 812, the Montana Supreme Court also found that an express easement for "access and utilities" was ambiguous, i.e., general in terms, and found the district court had not erred in relying on extrinsic evidence to determine the access easement meant ingress/egress for all purposes. In making this determination the court had looked to conditional use permits, subdivision approval documents, including preliminary plat approval, and certificates of survey in establishing the intended use of the easement.

The Court finds the analysis and holding of *Quarter Circle* dispositive of this issue. The express easement in this case does not address whether H2S2's use of the easement for BaseGlamp is permitted, making the terms of the easement general and not specific "for purposes of this particular question." *Quarter Circle*, ¶12.[4] Accordingly, the Court will address "the situation of the property, surrounding circumstances, and historical use" to determine whether H2S2's use falls within the scope of the easement.

(D) Is H2S2's Use Within the Scope of the Grant of the Express Easement for Access?

(1) Situation of the Property

As outlined above, the Baugh and H2S2 properties are situated in a rural area with virtually no surrounding commercial development, including campgrounds.

[4] The Court acknowledges this holding is different than what the Court found based on the limited record when dissolving the *Temporary Restraining Order* when the Court found the grant of access was specific in nature. Doc. 17, ¶6.

(2) Surrounding Circumstances

There is no evidence in the record Baugh contemplated the type of extensive commercial development proposed by H2S2.[5] While H2S2 correctly points out that had Baugh intended to limit the type of development being proposed by H2S2, it would have been easy to include such a restriction into the easement grant. Baugh agrees that had he contemplated this type of development he would have put further restrictions on the easement, and, in fact, years later attempted to do so but Florian would not agree to any change. However, at the time the easement was created, Baugh specifically restricted the width to attempt to prevent subdividing of Tract 2, and 16 years ago had not contemplated the commercial use of the property, let alone for glamping.

(3) Historical Use

The historical use of the property has been limited to access for a single-family residence. *See Tungsten Holdings, Inc. v. Kimberlin*, 2000 MT 24, 298 Mont. 176, 994 P.2d 1114 ("In determining historical uses at the time of severance [in context of easement created by implication], the relevant uses are those that benefit the dominant tenement.").

There are no genuine issues of material fact precluding summary judgment. The Court finds H2S2's use of the easement does not fall within the scope of the grant of the easement for access. In making this determination, the Court finds the commercial use is different than the established use for access to a single-family residence, the use will burden Baugh's property to a greater extent than what was contemplated when the easement was granted, and that while use of the easement may change over time, H2S2's particular change in use is "revolutionary" not "evolutionary." *Ganoung*, ¶15. Moreover, BaseGlamp has clear future plans to continue to expand development of the property. Doc. 65, Ex. 10, p. 96.

Accordingly, Baugh's *Motion for Summary Judgment* on his declaratory judgment claims regarding the scope of the easement is GRANTED in part. H2S2's *Motion for Partial Summary Judgment* on its declaratory judgment claims regarding the scope of the easement is DENIED.

H2S2 is enjoined from using the easement for access to BaseGlamp. The Court will not restrict H2S2's use of the easement to a single-family residence as requested by Baugh as the law is clear that use of an easement may change over time in a manner that is evolutionary, but not

[5] H2S2 argues that Florian, the predecessor to H2S2, indicated to Baugh that he was considering placing two rentals on the property. However, H2S2 has provided no admissible evidence of this communication. Baugh denies Florian ever telling him these plans and Florian never made any effort to develop the property in this was. However, the Court finds even if true, this is not a genuine issue of material fact precluding summary judgment. If Florian had developed the property in that manner, it likely could have been considered "evolutionary" and not "revolutionary." This situation is not analogous to that in *McCauley v. Thompson-Nistler*, 2000 MT 215, 301 Mont. 81, 10 P.3d 794, where at the time the easement was executed, it was "clear all parties were contemplating further development of their respective properties and that agriculture or mining were no longer the principal uses of the properties." *McCauley*, ¶54.

revolutionary. The Court appreciates the lack of clarity moving forward, but there is no bright line answer in these types of cases and any other ruling at this point would be speculative.

II. Trespass

> Modern common law trespass is an intentional tort claim for damages caused by an unauthorized entry or holdover upon real property of another. The essential elements of a modern common law trespass claim are: (1) an intentional entry or holdover (2) by the defendant or a thing; (3) without consent or legal right. Because the legal harm is the interference with another's right to exclusive possession of property, an unauthorized tangible presence on the property of another constitutes a trespass regardless of whether the intrusion caused any other harm. A civil trespass encompasses both the initial unauthorized entry upon the property of another *and* the subsequent failure to cease or abate the intrusion.
>
> While civil trespass is an intentional tort, intentional trespass does not require proof of specific intent, i.e., that the tortfeasor intended to enter or remain upon property owned or controlled by another. The intent element of civil trespass only requires proof that the tortfeasor intentionally entered or remained, or caused a third party or thing to enter or remain, upon the property of another regardless of the tortfeasor's knowledge, lack of knowledge, or good faith mistake as to actual property ownership or right.

Davis v. Westphal, 2017 MT 276, ¶¶15-P16, 389 Mont. 251, 405 P.3d 73 (internal citations omitted).

There is no genuine issue of material fact H2S2 caused a common law trespass to be committed on Baugh's property during the course of construction. While H2S2 objects it did not intend to trespass, such a position is contrary to Montana law on this claim and counsel for H2S2 conceded it is a "very low bar" to prove a trespass. The only question remaining for trial is the amount of harm caused by the trespasses, if any.

Accordingly, Baugh's *Motion for Summary Judgment* as to the Trespass claim is GRANTED in part.

III. Wrongful Restraint

H2S2 has brought a counterclaim for wrongful restraint, claiming damages for the period of time the Temporary Restraining Order was in effect, including attorney fees and costs. Mont Code Ann. §27-19-306(4); *Northern Border Pipeline Co. v. State*, 237 Mont. 133, 772 P.2d 839 (1989). The measure of damages in an action on the injunction bond is the amount which will compensate for all the detriment proximately caused by the injunction during the time it is operative or which in the ordinary course of things would be likely to result therefrom. *Sheridan County Elec. Co-op v. Ferguson*, 124 Mont. 543, 227 P.2d 597 (1951). H2S2 has requested damages for the period of time the temporary restraining order was in effect.

The *Temporary Restraining Order* originally prohibited commercial use, but upon review, commercial use is not specifically prohibited by the easement language and the *Temporary Restraining Order* was dissolved. The *Third Affidavit of H2S2*, ¶1(Doc. 95) outlines the type of harm sustained during this period of time. This evidence is sufficient to withstand summary judgment.

Accordingly, Baugh's *Motion for Summary Judgment* is DENIED as to this issue. The only question remaining for trial is the amount of harm caused by the wrongful restraint during the period the *Temporary Restraining Order* was in place, if any.

IV. Tortious Interference with Prospective Economic Advantage

To succeed on a claim for intentional interference with prospective economic advantage, there must be actions which:

(1) were intentional and willful;
(2) calculated to cause damage to the plaintiff's business;
(3) done with the unlawful purpose of causing damage or loss, without right or justifiable cause on the part of the actor; and
(4) resulted in actual damages or loss.

Maloney v. Home & Inv. Ctr., Inc., 2000 MT 34, ¶ 41, 994 P.2d 1124, 1132.

The inquiry is focused on whether a third party acted with intention to disrupt another parties' economic relationship or their responsible prospects of entering such a relationship. *Wingfield v. Dep't of Pub. HHS*, 2020 MT 120, ¶ 8, 463 P.3d 452, 454. Additionally, the actions of the alleged tortfeasor must be unlawful or without justifiable cause. The factors the Court may consider when determining whether an actor's conduct is improper, are:

(1) the nature of the actor's conduct;
(2) the actor's motive;
(3) the interests of the other with which the actor's conduct interferes;
(4) the interests sought to be advanced by the actor;
(5) the social interests in protecting the freedom of action of the actor and the contractual interests of the other;
(6) the proximity or remoteness of the actor's conduct to the interference, and
(7) the relation between the parties.

Pospisil v. First Nat'l Bank, 2001 MT 286, ¶13, 37 P.3d 704, 707.

If the alleged tortfeasor had a right to act as they did, their conduct does not amount to intentional interference with prospective economic advantage. *Wingfield*, ¶ 11. In the present case, Baugh had a right to act as he did in defending the scope of the easement. H2S2 provides no evidence otherwise.

In fact, in responding to Baugh's *Motion for Summary Judgment* on this counterclaim, H2S2 literally provided no evidence to create a genuine issue of material fact. *See* Doc. 94, p. 21. Instead, H2S2 generally cites to its *Third Affidavit of H2S2*, ¶¶2-8 (Doc. 95). In reviewing the *Third Affidavit*, ¶2 is nothing but a recitation of inadmissible hearsay from unnamed individuals with the DEQ and Flathead County Health Department; ¶3 discusses the conduct of Steve Fox from which there is no connection to Baugh; ¶4 is again a recitation of inadmissible hearsay and complaints of others assisting in funding this litigation (which is not wrongful conduct); ¶5 is a again primarily a recitation of inadmissible hearsay, and simply meeting with neighbors to prevent development is not wrongful; ¶¶6-7 is similarly a recitation of inadmissible hearsay with no supporting documentation, and, again, the fact someone wants to purchase adjacent property to prevent additional access from being developed is not wrongful, nor is refusal to sell property to H2S2 so it could obtain additional access; and ¶8 describes the conduct of George McMahon, which while patently offensive, has no connection to Baugh.

There are no genuine issues of material fact precluding summary judgment. Accordingly, Baugh's *Motion for Summary Judgment* is GRANTED as to this counterclaim.

V. Civil Conspiracy

The necessary elements of a conspiracy include: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result thereof. *Sullivan v. Cherewick*, 2017 MT 38, ¶24, 391 P.3d 62, 68 (quoting *Schumacker v. Meridian Oil Co.*, 1998 MT 79, ¶18, 288 Mont. 217, 956 P.2d 1370). The fourth element requires one or more unlawful overt acts, and "it is the unlawful act—and not the conspiracy itself—that gives rise to a civil conspiracy cause of action." *Id*, ¶ 26. Further, "if the object of an alleged 'conspiracy' is lawful, and the means used to attain that object are lawful, there can be no civil action for conspiracy. *Duffy v. Butte Teachers' Union*, 168 Mont. 246, 251, 541 P.2d 1199, 1202 (1975).

In the present case, Baugh had a right to act as he did—it is not an unlawful overt act—in defending the scope of the easement, which may of course also prevent the development of BaseGlamp but does not make the conduct wrongful. H2S2 provides no evidence otherwise, instead merely resorting to testimony by Mr. Murray and reference to confidential settlement negotiations.

There are no genuine issues of material fact precluding summary judgment. Accordingly, Baugh's *Motion for Summary Judgment* is GRANTED as to this counterclaim.

VI. Punitive Damages

H2S2 brought a claim for punitive damages against Baugh for actual malice. (Doc. 51). Pursuant to Mont. Code Ann. §27-1-221(1), "reasonable punitive damages may be awarded when the defendant has been found guilty of actual fraud or actual malice." A "defendant is guilty of actual malice

if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the plaintiff and:

(a) deliberately proceeds to act in conscious or intentional disregard of the high probability of injury to the plaintiff; or

(b) deliberately proceeds to act with indifference to the high probability of injury to the plaintiff.

Mont. Code Ann. §27-1-221(2).

"All elements of the claim for punitive damages must be proved by clear and convincing evidence. Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. It is more than a preponderance of evidence but less than beyond a reasonable doubt." Mont. Code Ann. §27-1-221(5). H2S2 has put forth no evidence, let alone clear and convincing evidence, that Baugh has acted with actual malice.

There are no genuine issues of material fact precluding summary judgment. Accordingly, Baugh's *Motion for Summary Judgment* is GRANTED as to this counterclaim.

CONCLUSION

The parties have 10 days from the date of this *Order* to file a joint *Final Pretrial Order* conforming to this *Order*. The Court anticipates it will take no more than 2-3 days for the parties to put on evidence of damages arising from Baugh's Trespass claim and H2S2's Wrongful Restraint claim. The parties should be prepared to begin trial on Wednesday, January 4, 2023, at 9:00 a.m.

DATED AND ELECTRONICALLY SIGNED AS NOTED BELOW.

Electronically Signed By:
Hon. Judge Amy Poehling Eddy
Wed, Nov 09 2022 11:26:14 AM

Amy Eddy, District Judge
Department No. 1
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THE MONTANA ELEVENTH JUDICIAL DISTRICT COURT
FLATHEAD COUNTY

CRAIG BAUGH, *Plaintiff,* vs. H2S2 LLC, a Montana Limited Liability Company, *Defendants.*	Cause No. DV-21-754(A) ORDER RE: PLAINTIFF'S MOTION FOR AWARD OF ATTORNEY FEES AND COSTS

Pending before the court is Plaintiff's *Motion for Award of Attorney Fees and Costs* and *Brief in Support* filed December 2, 2022. (Doc. 142). The Defendant filed a *Response* on December 16, 2022 (Doc. 150). The Plaintiff filed a *Reply* on December 30, 2022 (Doc. 155). Having reviewed the file and being fully apprised, the Court hereby finds as follows:

ORDER

Consistent with the following Rationale, the Court GRANTS Plaintiff's *Motion for Award of Attorney Fees and Costs*.

RATIONALE

I. Background

Plaintiff Baugh and Defendant H2S2 are neighboring landowners. Baugh's real property is the servient tenement and H2S2's real property the dominant tenement respecting an express easement which traverses Baugh's property by way of a 20-foot-wide easement. The parties have been engaged in ongoing and acrimonious litigation over the scope of this easement, specifically H2S2's use of the easement to access its commercial business, BaseGlamp. [1]

Baugh's *Fist Amended Complaint* sought declaratory judgment that H2S2 cannot use the easement to access its development BaseGlamp because such use overburdens the easement. (Doc.

[1] For a more extensive background of the facts in this case see this Court's November 9, 2022, *Order Re: Motions for Summary Judgement*. (Doc. 132).

19). H2S2 filed its *Answer and Amended Counterclaim*, bringing claims against Baugh for a declaratory judgment as to the use of the easement, wrongful restraint, tortious interference, civil conspiracy and punitive damages. (Doc. 51). Both parties filed Motions for Summary Judgment.

On November 9, 2022, this Court issued an *Order Regarding Motions for Summary Judgment* (Doc. 132) where the Court granted Baugh's *Motion for Summary Judgment* in part, finding that H2S2's use of the easement for access to BaseGlamp overburdened the scope of the easement. Additionally, the Court Granted Baugh's *Motion for Summary Judgment* regarding H2S2's counterclaims for tortious interference with prospective economic advantage, civil conspiracy, and punitive damages, disposing of those claims. (Doc. 132)

Plaintiff now seeks an order from the Court awarding him reasonable attorneys' fees and costs necessarily incurred in protecting the scope of the easement at issue and defending against H2S2's counterclaims of intentional interference, civil conspiracy, and punitive and exemplary damages. Defendant opposes this motion.

II. Legal Standard

The Montana Supreme Court reviews for correctness a district court's conclusion regarding the existence of legal authority to award attorney fees. *City of Helena v. Svee*, 2014 MT 311, ¶ 7, 339 P.3d 32, 35. If legal authority exists, the Montana Supreme Court reviews the grant or denial of attorney fees for abuse of discretion. *Mungas v. Great Falls Clinic, LLP*, 2009 MT 426, ¶ 42, 221 P.3d 1230, 1238. An abuse of discretion occurs when the court acts arbitrarily without conscientious judgment or exceeds the bounds of reason. *Harmon v. Fiscus Realty, Inc*., 2011 MT 232, ¶ 7, 362 Mont. 135, 261 P.3d 1031.

III. Legal Analysis

Montana follows the American Rule, which prohibits a party to a civil action from award of attorney fees absent a specific contractual or statutory provision. *Mungas,* at ¶43. There are equitable exceptions to this rule, but they are to be construed narrowly "lest they swallow the rule." *Svee*, at ¶18.

Baugh moves for attorney fees and costs under Mont. Code Ann. §27-8-313 to recover the cost of bringing the declaratory action, and under the *Foy* exception to the American Rule to recover the cost of defending against H2S2's counterclaims of intentional interference, civil conspiracy, and putative/exemplary damages

A. Is award of Attorney Fees Necessary and Proper Under Mont. Code Ann. §27-8-313?

Attorney's fees may be awarded as supplemental relief under §27-8-313 if necessary and proper:

> Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. . . If the application be deemed sufficient, the court shall, on

> reasonable notice, require any adverse party whose rights have been adjudicated by a declaratory judgment or decree to show cause why further relief should not be granted forthwith.

Mont. Code Ann. §27-8-313; *Mungas*, at ¶43,

The award attorney fees under §27-8-313 is only appropriate if equitable considerations support the award. *Mungas*, at ¶45. Thus, the threshold determination for an award of attorney fees is whether the equities support an award, and the next step is to apply the "tangible parameters" test to determine whether a grant of attorney fees is necessary and proper. *Mungas*, at ¶43.

While a district court has discretion to award attorney fees, such awards in declaratory judgment actions are rarely upheld by the Montana Supreme Court. *See Mont. Immigrant Justice Alliance v. Bullock*, 2016 MT 104, ¶¶ 50-52, 371 P.3d 430, 444; *Beebe v. Bd. of Dirs. of the Bridger Creek Subdivision Cmty. Ass'n,* 2015 MT 183, ¶27, 352 P.3d 1094. "[W]e have determined that an award of fees to the prevailing party is not warranted in every garden variety declaratory judgment action, and in order to avoid eviscerating the American Rule, the reach of §27-8-313, MCA, is narrow." *Bullock*, at ¶48 (internal quotations omitted).

1. Do the Equities Support an Award of Attorney Fees?

Baugh asserts that the equities support an award of attorney fees because he and the members of H2S2 are not similarly situated and there is no genuine dispute about H2S2's rights with respect to the easement. Baugh argues that because he is a 76-year-old retired construction worker and artist who lives on a fixed income and averages less than $15,000 per year in retirement income, and H2S2 members are sophisticated and educated medical professionals with enough income to afford several rental properties and develop the commercial business at issue, they are not dealing with one another on equal footing.

H2S2 argues that the determination of whether the parties are similarly situated is not a comparison of relative wealth or income. They assert that the parties are similarly situated as they are both adjacent landowners who were able to access the justice system, pointing out that Baugh has received significant help funding this litigation and has downplayed his relative wealth and sophistication. Additionally, H2S2 argues that they have asserted meritorious claims and the parties were genuinely disputing their easement rights.

The equities generally do not support an award of attorney fees "if similarly situated parties genuinely dispute their rights." *Hughes v. Ahlgren*, 2011 MT 189, ¶16, 258 P.3d 439, 442. In *Mungas*, the court held that the equities did not support an award of attorney fees where the parties, who disputed the meaning of several partnership agreements, were both "relatively sophisticated, well-educated, well-informed physicians who dealt with each other on an equal footing." Similarly, in *Hughes*, the court held that the equities did not support an award of attorney fees where two neighboring landowners were similarly situated, dealt with one another on equal footing, and were genuinely disputing their property rights. *Hughes v. Ahlgren*, 2011 MT 189, ¶¶18-20, 258 P.3d 439, 442.

Conversely, in *Svee*, Svee sought attorney fees after successfully bringing an action for declaratory judgment against the City of Helena who sought to enforce an ordinance which the court found exceeded their zoning authority. The court overturned the district court's decision to decline to award attorney's fees, finding that the parties were "clearly not similarly situated or on equal footing" because

> The Svees sought to accomplish a low-cost repair of their roof in response to a notice from their insurance company about cancellation of their coverage. By so doing, they were named as defendants in both criminal and civil actions filed by the municipal government, in comparison to whom they had significantly less resources to litigate the alleged violation of the ordinance. As such, the equitable threshold consideration is satisfied.

Svee, at ¶21.

The Court in *Bullock* found that "*Svee* did not change the law regarding awards of attorney fees in declaratory judgment actions; it merely represents one of the rare instances in which equitable considerations necessitated an award." *Bullock*, ¶ 52.[2] *See also Beebe*, ¶30 (characterizing the circumstances in *Svee* as "extraordinary considerations").

The extraordinary considerations in *Svee* are not present here. Like in *Hughes*, Baugh and H2S2 are neighboring landowners who were genuinely disputing their property rights. While Baugh may have less wealth and resources than members of H2S2, Baugh is still a sophisticated individual with resources and the support of others in the community who have helped fund his litigation. Additionally, the Court finds that both parties were genuinely disputing their rights to the easement, and that while the Court generally ruled in favor of Baugh, Baugh did not obtain the exact relief sought—which was a limitation to residential use. Thus, the equities do not support an award of attorney fees.

2. Are Attorney Fees Necessary and Proper under the Tangible Parameters Test?

Because the Court has found that the equities do not support an award of attorney fees, there is no need to apply the tangible parameters.

B. Does the *Foys* Exception permit the award of attorney fees for defending H2S2's Counterclaims?

In *Foy v. Anderson*, 176 Mont. 507, 580 P.2d 114 (1978), the Montana Supreme Court recognized an equitable exception to the American Rule in very limited circumstances. "A court, under its equity powers, may award attorney fees to make an injured party whole in the limited

[2] Another rare instance where the Montana Supreme Court upheld the award of attorney fees under §27-8-313 occurred in *Renville v. Farmers Ins. Exch.*, 2004 MT 366, 105 P.3d 280. The district court reasoned that Renville had accrued substantial attorney's fees in order to recover a small damages award, and the Supreme Court agreed that the attorney's fees award prevented the anomalous result of Renville having been better off had she never brought the claim. *Horace Mann Ins. Co. v. Hanke*, 2013 MT 320, ¶ 36, 312 P.3d 429, 436.

circumstance where a party has been forced to defend against a wholly frivolous or malicious action. *Egan Slough Cmty. v. Flathead Cty. Bd. of County Comm'rs*, 2022 MT 57, ¶85, 506 P.3d 996, 1019 (internal quotations omitted). A court determines such awards on a case-by-case basis. *Id*.

Baugh argues that H2S2's counterclaims of intentional interference, civil conspiracy, and punitive/exemplary damages were both without merit and malicious, expanded the scope of litigation and forced Baugh to incur attorneys fee to prove the obvious. H2S2 asserts that their counterclaims had merit and were not frivolous or malicious and came as a result of Baugh's own decisions and conduct.

As noted by the Court in its *Order Re: Motions for Summary Judgment*, H2S2 came forward with *no evidence* to support its claims for Tortious Interference with Prospective Economic Advantage, Civil Conspiracy or Punitive Damages. See Doc. 132, pp. 14-16. Accordingly, while the Court cannot find the filing of the counterclaims malicious, they were frivolous based on the extensive record before the Court which revealed no evidence supporting these claims.

Accordingly, the Court finds Baugh is entitled to his attorney's fees incurred in defending against the Tortious Interference with Prospective Economic Advantage, Civil Conspiracy and Punitive Damage counterclaims under the *Foy* exception to the American Rule. Counsel for Baugh has until **February 6, 2023**, to file an *Affidavit of Fees* and H2S2 will then have 14 days from the date of filing of the *Affidavit of Fees* to file any objection. The Court sets a hearing on the matter for **February 28, 2023, at 8:30 a.m.**

DATED AND ELECTRONICALLY SIGNED AS NOTED BELOW.

Electronically Signed By:
Hon. Judge Amy Poehling Eddy
Tue, Jan 24 2023 11:58:11 AM

Amy Eddy
DISTRICT COURT JUDGE
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THE MONTANA ELEVENTH JUDICIAL DISTRICT COURT
FLATHEAD COUNTY

CRAIG BAUGH, *Plaintiff*, vs. H2S2, LLC, a Montana Limited Liability Company, *Defendant*.	Cause No. DV-21-754(A) ORDER CERTIFYING JUDGMENT AS FINAL FOR PURPOSES OF APPEAL

Pursuant to Rule 54(b), M.R.Civ.P. and Rule 6(6), M.R.App.P., the Court hereby certifies its (1) *Order Re: Motions for Summary Judgment*, filed 11/9/2022 (Doc. 132); (2) H2S2's "deemed denied" *Motion to Alter or Amend Judgment Under Rule 59*, filed December 2, 2022 (Doc. 144); and (3) *Findings of Fact, Conclusions of Law, and Order Re: Plaintiff's Permanent Injunction*, filed January 24, 2023, as final for purposes of appeal.

PROCEDURAL AND FACTUAL BACKGROUND

When Baugh originally filed his *Complaint and Application for Temporary Restraining Order and Preliminary Injunction*, he requested the following Count I: Declaratory Judgment in regard to the scope of the easement he had previously granted across his property:

> This Complaint is for the purpose of having the Court grant to Baugh a Declaratory Judgement, declaring that H2H2 LLC's *proposed commercial use* of the Easement was not contemplated by the original parties to the Easement, would be inconsistent with the historical, residential use of the Easement, the situation of the property, and surrounding circumstances, and would constitute an improper overburdening of the Easement.

Doc. 1, pp. 3-4, ¶14 (emphasis added).

Baugh also sought a preliminary injunction restraining H2S2:

> from using the Easement for *commercial use*, including the construction and operation of a commercial vacation rental campground and/or glamping base,

> which is both beyond the scope of the Easement and overburdens the Easement, and therefore applies for a temporary restraining order and preliminary injunction against Defendants, pursuant to §§ 27-19-101 and -201, MCA.

Doc. 1, p. 4, ¶17 (emphasis added).

Baugh's *Complaint* sought to specifically prohibit the use of the easement for any commercial use. Doc. 1, pp. 4-5, ¶¶1, 3. Following the Preliminary Injunction Hearing on July 30, 2021, the Court concluded that the Easement did not include a restriction to only residential purposes and the Court would not insert one. Doc. 16, p. 3, ¶7. While the very limited historic use of the Easement was residential, Baugh had not in fact put in a residential restriction on the Easement or other restrictive covenants across the property when he sold it.

The Court further found that based on the record before it, it could not determine whether the proposed future use of the Easement by H2S2 would overburden the Easement. Doc. 16, p. 4, ¶9. Significantly, at that point in time H2S2 had testified it had purchased the property for residential purposes, as well as seasonal rental of 12 geodomes. Doc. 16, p. 2, ¶9. The Court accordingly denied Baugh's *Application for Preliminary Injunction* as there was no evidence of irreparable injury—the statutory subsection Baugh had relied upon. Mont. Code Ann. §27-19-201(2).

Following the Preliminary Injunction Hearing, Baugh then filed a *First Amended Complaint* on August 9, 2021, deleting any reference to H2S2's *proposed commercial use* (emphasized above) and instead simply referring to H2S2's "development." *See* Doc. 19, p. 4, ¶19; p. 5, ¶27. Similarly, Baugh's amended Prayer for Relief sought to specifically restrict the use of the easement for a single-family residence. Doc. 19, p. 6, ¶¶1, 4.

Following a year of discovery, it became clear H2S2 had not purchased the property for residential purposes, as well as seasonal rental of 12 geodomes. Doc. 16, p. 2, ¶9. Instead, H2S2 had constructed 12 geodomes and had plans to ultimately construct 32 geodomes for year-around rental at what would come to be known as BaseGlamp. BaseGlamp now

> seeks "[t]o become the premiere, year-round glamping destination for all travelers visiting Glacier National Park and Flathead Valley by providing a luxury experience in [its] geodesic domes." Doc. 104, Ex. 41. BaseGlamp ultimately wants to develop 32 domes with associated amenities and at the time anticipated the final phase of development being completed in 2023 at which point $3.4 million in booking revenue was anticipated. *Id.*

Doc. 132, p. 5.

Accordingly, on August 5, 2022, Baugh filed a *Motion for Summary Judgment* on all claims and counterclaims. Doc. 65. H2S2 simultaneously filed a *Motion for Partial Summary Judgment* limited to whether H2S2's development of BaseGlamp would overburden the Easement. Doc. 66. Following extensive briefing and oral argument, the Court issued its *Order Re: Motions for Summary Judgment* finds as follows in regard to the scope of the Easement:

> H2S2 is enjoined from using the easement for access to BaseGlamp. The Court will not restrict H2S2's use of the easement to a single-family residence as requested by Baugh as the law is clear that use of an easement may change over time in a manner that is evolutionary, but not revolutionary. The Court appreciates the lack of clarity moving forward, but there is no bright line answer in these types of cases and any other ruling at this point would be speculative.

Doc. 132, pp. 12-13.

The matter was set to go to trial on Wednesday, January 4, 2023, at 9:00 a.m. on the balance of the claims between the parties (trespass and wrongful restraint). As the parties had previously filed separate *Final Pretrial Orders*, the Court ordered the parties to file a joint *Final Pretrial Order* within 10 days so that it could conform to the Court's *Order Re: Motions for Summary Judgment*. Doc. 132, p. 16. ***Shockingly***, the parties again filed separate *Final Pretrial Orders* prompting the Court to issue an *Order Vacating Trial*:

> Instead of filing a joint *Final Pretrial Order*, the parties once again filed separate *Final Pretrial Orders* on November 22, 2022, which, again, is not in compliance with this Court's direction, the *Rule 16 Scheduling Order* or Rule 5, U.D.C.R. For this reason, the Court has directed the Flathead County Clerk of District Court to reject these filings. The civil jury trial currently set to begin Wednesday, January 4, 2023, is hereby VACATED. Once the parties submit a joint *Final Pretrial Order*, the trial will be rescheduled.

Doc. 140.

Following the Court's *Order Vacating Trial*, on December 2, 2022, Baugh filed a *Motion for Permanent Injunction* (Doc. 141) and *Motion for Award of Attorney Fees and Costs* (Doc. 142), which the Court has since ruled upon. On December 8, 2022, H2S2 filed a *Motion to Alter or Amend Judgment Under Rule 59* (Doc. 144), which will be deemed denied on February 6, 2023, pursuant to Rule 59(f), M.R.Civ.P.

LEGAL ANALYSIS

Rule 6(6), M.R.App.P. provides that a district court may direct entry of final judgment under Rule 54(b) only upon an express determination that there is no just reason for delay and, "[i]n so doing, the district court must balance the competing factors present in the case to determine if it is in the interest of sound judicial administration and public policy to certify the judgment as final, and the court shall, in accordance with existing case law, articulate in its certification order the factors upon which it relied in granting certification . . ."

The factors the Montana Supreme Court normally considers regarding a Rule 54(b) certification include:

(1) the relationship between the adjudicated and unadjudicated claims;

(2) the possibility that the need for review might or might not be mooted by future developments in the trial court;
(3) the possibility that the reviewing court might be obliged to consider the same issue a second time;
(4) the presence or absence of a claim or counterclaim which could result in a set-off against the judgment sought to be made final; and
(5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, triviality of computing claims, expense, and the like.

Kohler v. Croonenberghs, 2003 MT 260, P15, 317 Mont. 413, 77 P.3d 531 (internal citation omitted).

Additionally, a Rule 54(b) certification must be guided by the following principles:

> (1) the burden is on the party seeking final certification to convince the district court that the case is the "infrequent harsh case" meriting a favorable exercise of discretion; (2) the district court must balance the competing factors present in the case to determine if it is in the interest of sound judicial administration and public policy to certify the judgment as final; (3) the district court must marshall and articulate the factors upon which it relied in granting certification so that prompt and effective review can be facilitated.

Kohler, at P16.

While there are remaining claims between the parties that are not resolved, these claims are peripheral, likely involve nominal damages and do not embody the primary dispute between the parties which is the scope of the easement. The primary dispute has been resolved by the Court on summary judgment in favor of Baugh, H2S2's motion to alter or amend that judgment will be deemed denied, and the Court has entered a permanent injunction enjoining H2S2 from using the easement to access BaseGlamp.

As demonstrated by the balancing of the factors articulated in *Kohler*, it is in the interest of sound judicial administration and public policy to certify the above identified orders as final for purposes of appeal:

First, Baugh's unadjudicated claim involves a claim for trespass. This claim is viable based on the Court's ruling, but if the Court's ruling on the scope of easement is reversed, the trespass claim would be likely be dismissed. H2S2's unadjudicated claim is for wrongful restraint based on the time period where the Court imposed a temporary restraining order which was subsequently dissolved. Whether or not the Court's ruling on the scope of the easement is affirmed will likely drive the amount of damages associated with this claim.

Second, there is no possibility the need for review will be mooted by future developments in this Court.

Third, there is no possibility the issues being certified as final for purposes of appeal would have to be considered more than once.

Fourth, there are no remaining claims which would result in a set-off considering the nature of the claims being certified as final for purposes of appeal.

Finally, the miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, triviality of computing claims, expense, and the like weigh in favor of immediate appeal. Depending on the outcome of the appeal, the non-adjudicated claims will likely not go to trial as there are likely only nominal damages associated with the claims. Delaying resolution of the primary issue—which is the scope of the easement—will only result in further conflict between the parties and increased litigation costs and expenses. Additionally, H2S2 is currently prohibited from using the easement to access its development.

DATED AND ELECTRONICALLY SIGNED AS NOTED BELOW.

CERTIFICATE OF SERVICE

I, Donald R. Murray, hereby certify that I have served true and accurate copies of the foregoing Notice - Notice of Appeal to the following on 02-21-2023:

Michelle Tafoya Weinberg (Attorney)
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Service Method: eService

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Electronically signed by Taniken Rauch on behalf of Donald R. Murray
Dated: 02-21-2023