

IN THE SUPREME COURT OF THE STATE OF MONTANA  
Cause No. DA 23-0054

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THE MARY ELLEN DUKE TRUST, dated March 13, 1997, MILLARD COX,  
MINA COX, and TROUT CREEK RANCH,

Plaintiffs and Appellees.

v.

LEE LOU, LLC, a Montana limited liability company,

Defendant and Appellant.

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On Appeal from the Montana Twenty-Second Judicial District Court, Stillwater  
County, Cause No. DV 21-70, Hon. Matthew Wald

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**APPELLANT LEE LOU, LLC'S OPENING BRIEF**

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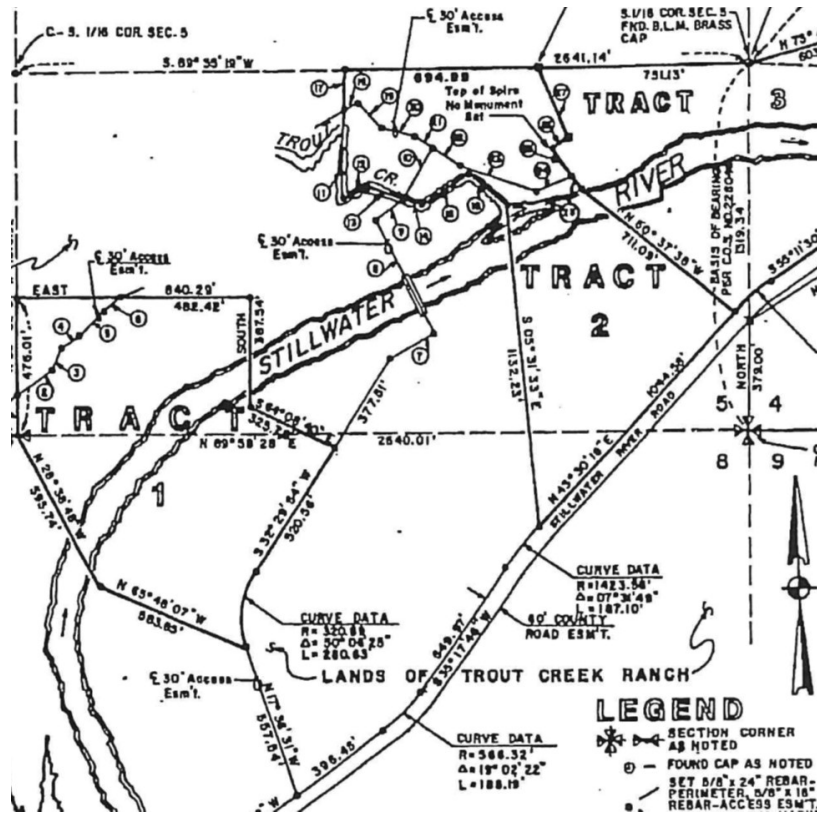
## **STATEMENT OF THE ISSUES**

The issue raised by this appeal is whether the District Court erred in concluding that Tract 3 of Certificate of Survey No. 260286, on file and of record in the office of the Clerk and Recorder of Stillwater County under Document No. 260286, does not benefit from a 30' easement for ingress and egress.

## **STATEMENT OF THE CASE**

This case concerns a dispute over the existence and use of a 30' Access Easement depicted on Certificate of Survey No. 260286, which was created from a survey performed in November 1989 and filed and recorded in the office of the Clerk and Recorder of Stillwater County under Document No. 260286 on January 22, 1990 (the "Certificate of Survey"). *Appellant's App. 2*. This case arose out of Lee Lou, LLC's use of the 30' Access Easement depicted on the Certificate of Survey by tangents 7-10 and 18-24 across Tract 1, the Lands of Trout Creek Ranch, and Tract 2 (collectively, the "Trout Creek Ranch Property") to Tract 3 (the "Easement"), which is shown in the following image of the Certificate of Survey:





*Appellant's App. 2.* On September 27, 2021, the Mary Ellen Duke Trust, Millard Cox, Mina Cox, and Trout Creek Ranch (collectively, "Trout Creek Ranch") filed a Complaint to Quiet Title seeking to prevent Lee Lou, LLC ("Lee Lou") from accessing Tract 3 via the Trout Creek Ranch Property. On October 12, 2021, Lee Lou filed an Answer and Verified Counterclaim and Third-Party Complaint to Quiet Title seeking to vindicate its right to access Tract 3 via the Trout Creek Ranch Property. The parties stipulated to Lee Lou's use of the Easement to conduct maintenance and winterization activities for an existing cabin located on Tract 3 during the pendency of litigation through the Stipulation for Access to Property and Withdrawal of Motion for TRO and Injunction filed on October 21, 2021.

On May 13, 2022, Lee Lou filed a Motion for Partial Summary Judgment and Brief in Support. On June 3, 2022, Trout Creek Ranch filed a Combined Response Brief in Opposition to Lee Lou's Motion for Partial Summary Judgment and Brief in Support of their Motion for Summary Judgment. On June 21, 2022, Lee Lou filed its Reply to Trout Creek Ranch's Objection to Lee Lou's Motion for Partial Summary Judgment and its Response to Trout Creek Ranch's Motion for Summary Judgment. On July 11, 2022, Trout Creek Ranch filed their Reply Brief in Support of Trout Creek Ranch's Motion for Summary Judgment. On December 30, 2022 the District Court granted Trout Creek Ranch's Motion for Summary Judgment and denied Lee Lou's Motion for Partial Summary Judgment. This appeal followed when Lee Lou filed its Notice of Appeal on January 23, 2023.

### **STATEMENT OF THE FACTS**

In a series of contemporaneous transactions occurring on or about April 17, 1990, A. St. George Duke and Mary Ellen Duke (the "Dukes"), Millard Cox and Mina J. Cox (the "Coxes"), and Robert A. Roehder ("Roehder") acquired title to certain real property in Stillwater County from A. Joe Jenni, Jr., Callie W. Jenni, and Robert W. Jenni (the "Jennis"). *Appellant's Apps. 3, 6, 7 and 8*. The Jennis conveyed certain property to the Dukes, the Coxes, and Roehder collectively and also conveyed certain tracts separately to the Dukes, the Coxes, and Roehder. *Appellant's Apps. 3, 6, 7 and 8*. The tracts that were conveyed separately were the tracts

identified and described in the Certificate of Survey. *Appellant's Apps. 2, 3, 7 and 8.* Tract 1 was conveyed to the Coxes and Tract 2 was conveyed to the Dukes. *Appellant's Apps. 7 and 8.* Tract 3 was conveyed to Roehder by a Warranty Deed dated April 17, 1990 and recorded in the office of the Clerk and Recorder of Stillwater County at Book 102, Page 484 on May 30, 1990 (the "Tract 3 Deed"). *Appellant's App. 3.*

In May and June 1990, the Dukes, the Coxes, and Roehder executed and recorded a series of quit claim deeds concerning Tract 1, Tract 2, and Tract 3. *Appellant's Apps. 9-14.* In each of the quit claim deeds, each property owner quitclaimed their interest in the two other tracts to the respective owner thereof. *Appellant's Apps. 9-14.*

Zinvest, LLC acquired Tract 3 via Tax Deed dated August 27, 2019 and filed and recorded in the office of the Clerk and Recorder of Stillwater County under Document No. 376272. *Appellant's App. 4.* Lee Lou acquired Tract 3 from Zinvest, LLC by Warranty Deed dated April 9, 2021 and filed and recorded in the office of the Clerk and Recorder of Stillwater County under Document No. 382493. *Appellant's App. 5.*

## **STANDARD OF REVIEW**

Summary judgment is proper only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. M. R. Civ. P.

56(c)(3). A genuine issue of material fact is an issue of inconsistent fact, material to the elements of a claim or defense at issue, and not amenable to judgment as a matter of law. *Davis v. Westphal*, 2017 MT 276, ¶ 12, 389 Mont. 251, 257–58, 405 P.3d 73, 81 (citing *Mountain West Bank, N.A. v. Mine & Mill Hydraulics, Inc.*, 2003 MT 35, ¶ 28, 314 Mont. 248, 64 P.3d 1048). The party seeking summary judgment has the initial burden of showing a complete absence of any genuine issue of material fact on the Rule 56 record and that the party is thus entitled to judgment as a matter of law. *Id.* (citing *Weber v. Interbel Tel. Coop., Inc.*, 2003 MT 320, ¶ 5, 318 Mont. 295, 80 P.3d 88). The burden then shifts to the opposing party to show either the existence of a genuine issue of material fact or that the moving party is not entitled to judgment as a matter of law on the facts of record not subject to genuine material dispute. *Id.* (citing *Osterman v. Sears, Roebuck & Co.*, 2003 MT 327, ¶ 17, 318 Mont. 342, 80 P.3d 435). The court must view the Rule 56 factual record in the light most favorable to the non-moving party and draw all reasonable inferences against summary judgment but has “no duty to anticipate or speculate” regarding contrary material facts. *Id.* (citing *Weber*, ¶ 5 and quoting *Gamble Robinson Co. v. Carousel Properties*, 212 Mont. 305, 312, 688 P.2d 283, 287 (1984)).

This Court reviews a grant or denial of summary judgment de novo, applying the same criteria of M. R. Civ. P. 56 as a district court. *Hudson v. Irwin*, 2018 MT 8, ¶ 12, 390 Mont. 138, 141, 408 P.3d 1283, 1285 (citing *Lone Moose Meadows*,

*LLC v. Boyne USA, Inc.*, 2017 MT 142, ¶ 7, 387 Mont. 507, 396 P.3d 128). This Court reviews the district court's conclusions of law for correctness and the district court's findings of fact to determine if they are clearly erroneous. *Id.*

On summary judgment, trial courts do not apply a standard of proof or issue findings of fact because, at the summary judgment stage, the parties are not arguing over what happened or presenting conflicting evidence, but rather need to know which of them, under the uncontested facts, is entitled to prevail under the applicable law. In such a case, the district court judge need not weigh evidence, choose one disputed fact over another, or assess credibility of the witnesses, but must identify the applicable law, apply it to the uncontroverted facts, and determine who wins the case. *Barrett, Inc. v. City of Red Lodge*, 2020 MT 26, ¶ 8, 398 Mont. 436, 440, 457 P.3d 233, 235 (internal citations and quotations omitted).

## **SUMMARY OF ARGUMENT**

The Tract 3 Deed grants the Easement by reference to the Certificate of Survey, which clearly depicts and adequately describes the Easement according to Montana law. Therefore, Tract 3 benefits from the Easement and the District Court erred in granting Trout Creek Ranch's Motion for Summary Judgment and denying Lee Lou's Motion for Partial Summary Judgment.

## **ARGUMENT**

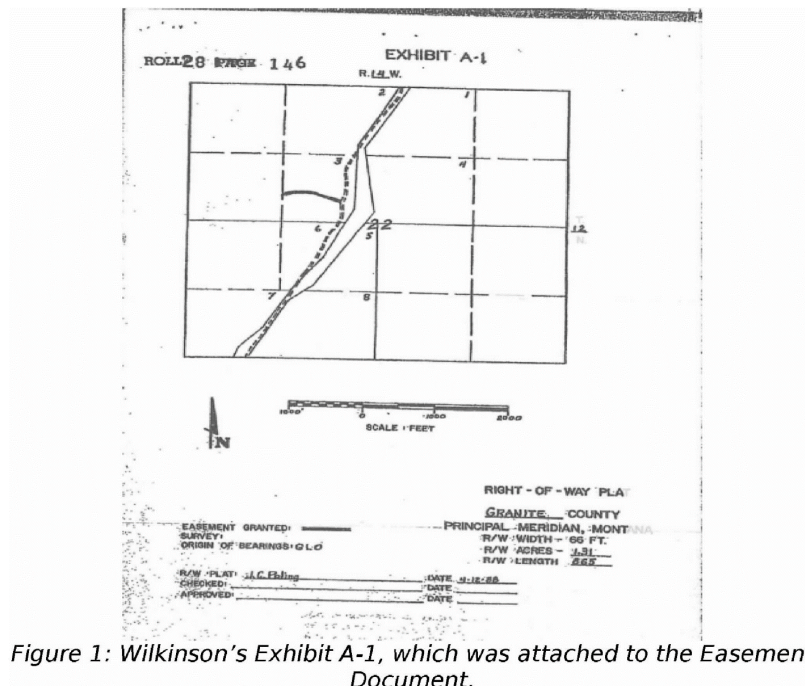
**A. The Certificate of Survey clearly depicts and adequately describes the Easement.**

A reference in a deed to a certificate of survey is sufficient to incorporate the certificate of survey into the deed. *Blazer v. Wall*, 2008 MT 145, ¶ 45, 343 Mont. 173, 192, 183 P.3d 84, 99. An explicit reference in a deed to a certificate of survey on which an easement is clearly depicted and adequately described is sufficient to establish the easement. *Id.* at ¶ 41. An easement is considered adequately described if the identities of the dominant and servient tenements are ascertainable with reasonable certainty from the transaction documents, and the transaction documents give the owner of the property being burdened by the servitude knowledge of its use or its necessity. *Yorlum Properties Ltd. v. Lincoln Cnty.*, 2013 MT 298, ¶ 18, 372 Mont. 159, 166, 311 P.3d 748, 755 (internal citations and quotations omitted).

**1. The identities of the dominant and servient tenements with respect to the Easement are ascertainable with reasonable certainty from the Certificate of Survey.**

Under Montana law, the identities of the dominant and servient estates with respect to an easement are simply defined in reference to whether the easement burdens or benefits the estate. “The benefited parcel is known as the ‘dominant’ tenement or estate, and the burdened parcel is termed the ‘servient’ tenement or estate.” *Blazer*, ¶ 24; Mont. Code Ann. § 70-17-103 (“The land to which an easement is attached is called the dominant tenement, and the land upon which a burden or servitude is held is called the servient tenement.”). In *Wilkinson, LLC v. Scott &*

*Cindy Erler*, this Court examined the following plat diagram depicting the Secret Gulch Road Easement:



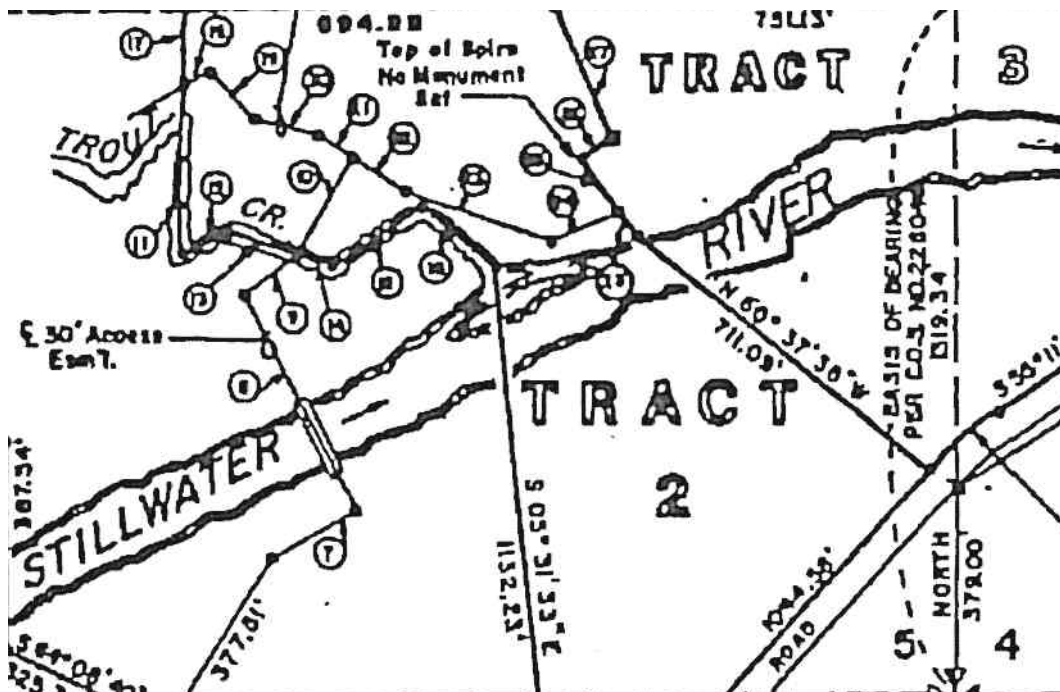
*Wilkinson, LLC v. Scott & Cindy Erler, LLP*, 2021 MT 177, ¶ 3, 404 Mont. 541, 491 P.3d 704, 710. After its examination of the plat diagram, this Court concluded as follows:

It is clear from the plat diagram, which contains a metes-and-bounds description of the dimensions, that the Secret Gulch Road Easement burdens Government Lot 3 making it the servient estate. It is also ascertainable with reasonable certainty that Government Lot 7 is the dominant estate that the Secret Gulch Road Easement benefits.

*Id.* at ¶ 13. There was nothing contained within the plat diagram that expressly identified Government Lot 3 as the servient estate and Government Lot 7 as the dominant estate by written label or otherwise. *Id.* at ¶ 14. Nevertheless, this Court reached its conclusion because no such express identifications were necessary.







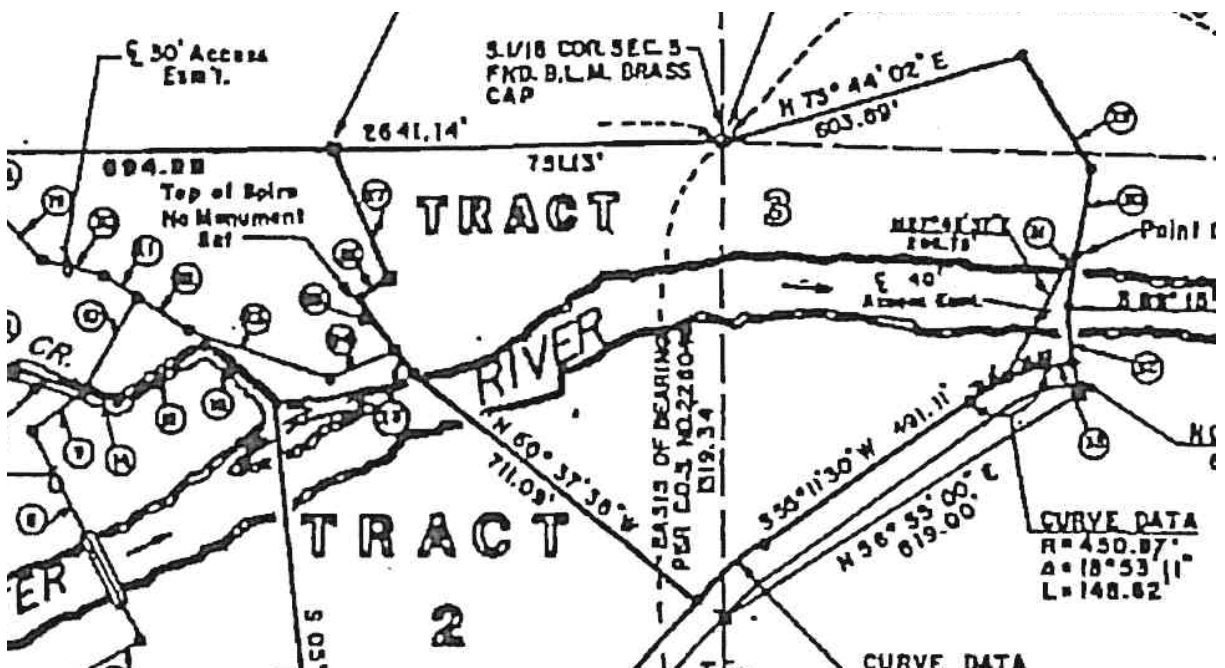
See Appellant's App. 2. The "obvious" conclusion is that the Easement benefitted Tract 3 and burdened the Trout Creek Ranch Property, thereby making Tract 3 the dominant estate and the Trout Creek Ranch Property the servient estate. Therefore, the identities of the dominant and servient tenements with respect to the Easement are ascertainable with reasonable certainty.

**2. The Certificate of Survey gives the owners of the Trout Creek Ranch Property knowledge of the Easement's use or necessity.**

The District Court did not consider the question of whether the documents of conveyance with regard to the Easement gave the owner of the servient tenements knowledge of its use or necessity because it prematurely and incorrectly concluded that the Certificate of Survey did not adequately describe the Easement. The

language in the Tract 3 Deed that described the conveyed property as “Tract 3 of Certificate of Survey No. 260286” was sufficient to incorporate the Certificate of Survey into the Tract 3 Deed. *Appellant’s App.* 3; *Blazer*, ¶ 45. The deeds for the Trout Creek Ranch Property contained the same reference. *Appellant’s App.* 6-9, 11, 13 and 14. Therefore, the Certificate of Survey became part of the documents of conveyance with respect to the Trout Creek Ranch Property and Tract 3.

A review of the Certificate of Survey reveals that the northern half of Tract 3 is inaccessible via Stillwater River Road or any other publicly accessible route because the Stillwater River bisects Tract 3.<sup>1</sup>



<sup>1</sup> Pursuant to Mont. Code Ann. § 76-3-608(3)(d), local government bodies are required to base their decision to approve or deny a proposed subdivision on whether the proposed subdivision meets certain criteria, one of which is the provision of legal and physical access to each parcel within the proposed subdivision. Mont. Code Ann. § 76-3-608(3)(d). In the absence of any contrary evidence, it is logical to presume that the Certificate of Survey was approved with the understanding that legal and physical access would be provided to Tract 3 in part via the Trout Creek Ranch Property.

*See Appellant's App. 2.* While there is a reference to a 40' Access Easement at the eastern border of Tract 3, it would not be logical to conclude that such 40' Access Easement was intended to benefit Tract 3 because such a result would implicate an easement across Tract 3 for the benefit of Tract 3, which is a legal impossibility. *Appellant's App. 2*; Mont. Code Ann. § 70-17-105. There is, however, a 30' Access Easement depicted across the Trout Creek Ranch Property to the western border of Tract 3 on the north side of the Stillwater River. Any reasonable person examining the Certificate of Survey would conclude that the Easement is used, and necessary to, access the northern part of Tract 3. Thus, any owner of the Trout Creek Ranch Property would have notice through a cursory examination of the Certificate of Survey that their property is burdened by an easement for access to Tract 3.

**B. The Tract 3 Deed references the Certificate of Survey and evidences an intent to grant the Easement.**

The Tract 3 Deed indicates that the Jennis granted, bargained, sold, conveyed, warranted and confirmed unto Roehder the following real property situated in Stillwater County, Montana:

Tract 3 of Certificate of Survey No. 260286, according to the official plat thereof on file and of record in the office of the Clerk and Recorder of said county, under Document No. 260286, containing 21.304 acres more or less,

Subject to existing rights-of-way, easements, reservations and exceptions of record...

*Appellant's App. 3.* The District Court concluded that the Tract 3 Deed “contained no reference to easement rights of any kind.” *Appellant's App. 1, p. 11.* Focusing on the “subject to” language in the Tract 3 Deed and relying upon *Blazer* and *Wild River Adventures*, the District Court ruled that the “subject to” language in the Tract 3 Deed did not create an easement. *Appellant's App. 1, p. 11.* The District Court noted that “the ‘subject to’ language was intended to indicate that Tract 3 was burdened by the 30’ easement and did not benefit from it.” *Appellant's App. 1, p. 12.* The District Court’s reasoning is flawed on two grounds.

First, the District Court’s statement that Tract 3 was “burdened by the 30’ easement and did not benefit from it” is erroneous because the 30’ easement is located on the Trout Creek Ranch Property and not on Tract 3. *Appellant's App. 2.* The only easement depicted within Tract 3 on the Certificate of Survey, and consequently the only easement by which Tract 3 could possibly be burdened, is a 40’ easement at its eastern border that appears to benefit neither Tract 1 nor Tract 2. *Appellant's App. 2.*

Secondly, the District Court was focused on the wrong language in the Tract 3 Deed. The following language appears beneath the above-referenced property description contained within the Tract 3 Deed:

TOGETHER with all and singular the hereinbefore described premises together with all tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining....

*Appellant's App. 3.* This is the language that the District Court should have examined. In *Clark v. Pennock*, this Court examined the effect of the following language in a deed:

TOGETHER WITH all tenements, hereditaments and appurtenances thereto belonging, including any water rights appurtenant to this property, including a general non-exclusive sixty-foot (60') easement for ingress to and egress from the above-described lot or tract and a general easement for public utilities across other lots or tracts described in Certificate of Survey Numbers 139926, Folio 296B for public utilities.

*Clark v. Pennock*, 2010 MT 192, ¶ 9, 357 Mont. 338, 341, 239 P.3d 922, 925. In conjunction with other language found in the deed, the Court concluded that the deed in question granted the purchaser an easement for ingress and egress to their property while simultaneously reserving an easement to the seller and its successors to access the property. *Id.* at ¶ 10. While *Clark* is distinguishable from this case on the basis that *Clark* concerned more explicit easement language, *Clark* supports the proposition that easements for ingress and egress are considered a type of property interest that may be included in a reference to “all tenements, hereditaments and appurtenances thereto belonging.” *Id.*; *Appellant's App. 3.* Furthermore, this Court has previously held that a ditch right was conveyed pursuant to similar language regardless of the fact that the conveyance instrument did not specifically mention the ditch right as an appurtenance. *Te Selle v. Storey*, 133 Mont. 1, 5, 319 P.2d 218,

220 (1957) (citing *McDonnell v. Huffine*, 44 Mont. 411, 120 P. 792; *Yellowstone Valley Co. v. Associated Mtg. Investors*, 88 Mont. 73, 290 P. 255, 70 A.L.R. 1002).

Contrary to the District Court's conclusion, the Tract 3 Deed references an easement right. Thus, the Tract 3 Deed granted the Easement by reference to the Certificate of Survey, on which the Easement is clearly depicted and adequately described.

**C. The District Court erred in its consideration of extrinsic evidence, and the quit claim deeds executed by Roehder did not extinguish the Easement.**

Through a Quit Claim Deed dated May 29, 1990 and recorded on June 26, 1990 in the office of the Clerk and Recorder of Stillwater County at Book 102, Page 578 (the "Tract 1 Quit Claim"), Roehder quitclaimed to the Coxes his interest in the following described real estate:

Tract 1 of Certificate of Survey No. 260286, according to the official plat thereof on file and of record in the office of the Clerk and Recorder of said county, under Document No. 260286, containing 21.000 acres more or less, together with a thirty-foot (30') wide easement for ingress and egress as shown on said Certificate of Survey;

Subject to existing rights-of-way, easements, reservations and exceptions of record...

*Appellant's App. 13.* Through a Quit Claim Deed dated May 29, 1990 and recorded on June 26, 1990 in the office of the Clerk and Recorder of Stillwater County at Book 102, Page 582 (the "Tract 2 Quit Claim"), Roehder quitclaimed to the Dukes his interest in the following described real estate:

Tract 2 of Certificate of Survey No. 260286, according to the official plat thereof on file and of record in the office of the Clerk and Recorder of said county, under Document No. 260286, containing 21.000 acres more or less, together with a thirty-foot (30') wide easement for ingress and egress as shown on said Certificate of Survey;

Subject to existing rights-of-way, easements, reservations and exceptions of record...

*Appellant's App. 14.* In a convoluted analysis and comparison of the Tract 1 Quit Claim Deed and the Tract 2 Quitclaim Deed to the other contemporaneously executed quit claim deeds, Trout Creek Ranch suggested that it was the intention of the parties involved in the quit claim deed transactions to deprive Roehder of an easement to Tract 3. *Doc. 25.* In making this claim, Trout Creek Ranch relied upon extrinsic evidence offered through an affidavit of Mary Ellen Duke. The District Court considered such extrinsic evidence to the extent that it "would be appropriate to consider," and noted that such extrinsic evidence provided "additional support for the determinations the Court has already made." *Appellant's App. 1, p. 13.* The District Court found the "affidavit from someone who was directly involved in the transactions at issue" offered by Trout Creek Ranch to be compelling extrinsic evidence of the intention of the parties, but declared Lee Lou's extrinsic evidence "far from persuasive." *Appellant's App. 1, p. 13.* In a series of self-serving statements, Mary Ellen Duke testified in her affidavit that "Roehder was not granted an easement to the north side of Tract 3 because he planned to build a bridge, he was rarely present in Montana, and was likely to sell out his interest in the Trout Creek

Ranch.” *Appellant’s App. 15*, ¶ 18. This is the “evidence” that the District Court considered “compelling evidence” of the parties’ intentions with regard to the quit claim deeds that were executed among the parties. *Appellant’s App. 1*, p. 13. The District Court erred in its consideration of such extrinsic evidence on two bases.

First, the District Court overstepped its role in construing instruments. “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 JP Ranch, LLC v. Jerde*, 2018 MT 68, ¶ 10, 391 Mont. 104, 414 P.3d 1277 (quoting *Creveling v. Ingold*, 2006 MT 57, ¶ 12, 331 Mont. 322, 132 P.3d 531). In the construction of an instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Mont. Code Ann. § 1-4-101. An unambiguous deed must be interpreted according to its language as written, without resort to extrinsic evidence of the grantor’s intent. *Tester v. Tester*, 300 Mont. 5, 12, 3 P.3d 109, 114 (2000) (citing *Ferriter v. Bartmess*, 281 Mont. 100, 103, 931 P.2d 709, 711 (1997)). The Tract 1 Quit Claim Deed and the Tract 2 Quit Claim Deed both refer to “a thirty-foot (30’) wide easement for ingress and egress as shown on said Certificate of Survey.” *Appellant’s Apps. 13-14*. By traditional methods of construction, the references to a thirty-foot (30’) wide easement for ingress and egress in the Tract 1 Quit Claim Deed and the Tract 2 Quit Claim Deed would



implicate a thirty-foot (30') wide easement for ingress and egress appurtenant to Tract 1 and to Tract 2, respectively. Mont. Code Ann. § 70-20-308; *Burleson v. Kinsey-Cartwright*, 2000 MT 278, ¶ 16, 302 Mont. 141, 146-47, 13 P.3d 384, 388; *Ludwig v. Spoklie*, 280 Mont. 315, 317, 930 P.2d 56, 57 (1996). While the Tract 1 Quit Claim Deed and the Tract 2 Quit Claim Deed refer to the Certificate of Survey, there is no mention of Tract 3 in the Tract 1 Quit Claim Deed or the Tract 2 Quit Claim Deed. The Tract 1 Quit Claim Deed and the Tract 2 Quit Claim Deed are not contained within the chain of title to Tract 3. "Requiring subsequent purchasers to investigate not only their chain of title but also the 'context' within which each conveyance in the chain was executed 'would be an impractical burden, perhaps an impossible one, and would virtually destroy the utility of the real estate recording system.'" *Broadwater Dev., L.L.C. v. Nelson*, 2009 MT 317, ¶ 21, 352 Mont. 401, 411, 219 P.3d 492, 501 (quoting *Olson v. Trippel*, 77 Wash.App. 545, 893 P.2d 634, 639 (Div. 2 1995)). If Roehder had wanted to voluntarily terminate the Easement for apparently no consideration, leaving the northern half of Tract 3 totally inaccessible, and build a bridge over the Stillwater River at presumably his own expense, as Trout Creek Ranch has absurdly suggested, he could not have done so through the Tract 1 Quit Claim Deed and the Tract 2 Quit Claim Deed, which purport to merely quitclaim his right, title, and interest in and to Tracts 1 and 2, which he did not own, along with 30' easements appurtenant to Tracts 1 and 2. Lee Lou "should not have

to defend their title years after the fact from claims of “[h]ere is what the documents show, but this is what was really meant.” *Blazer*, ¶ 74. This Court “will not impose a requirement under the easement-by-reference doctrine that prospective purchasers track down – perhaps decades after the fact – unrecorded extrinsic evidence in order to ascertain the use or necessity of a purported easement depicted on a plat or certificate of survey in their chain of title.” *Id.* The Tract 1 Quit Claim Deed and the Tract 2 Quit Claim Deed are meaningless with respect to the Easement. The District Court has improperly inserted modifying language into the Tract 1 Quit Claim Deed and the Tract 2 Quit Claim Deed at the absurd suggestion of Trout Creek Ranch so as to effectuate an extinguishment of an easement appurtenant to a tract of land that is not described in either deed. Such modification of otherwise unambiguous instruments is inconsistent with traditional methods of construction and constitutes judicial overreach.

Secondly, the District Court improperly engaged in evaluating credibility and assigning weight to disputed evidence at the summary judgment level. “When a reader reasonably can deduce two or more inferences from the facts, the reviewing court lacks power to substitute its deductions for those of the finder of fact.” *In re Pine Creek Fire Settlement Proceeds*, 2019 MT 20, ¶ 29, 394 Mont. 124, 445 P.3d 194 (citing *Anderson v. Deafenbaugh (In re G.J.A.)*, 2014 MT 215, ¶ 23, 376 Mont. 212, 331 P.3d 835 and quoting *Weinheimer Ranch v. Pospisil*, 2013 MT 87, ¶ 19,

369 Mont. 419, 299 P.3d 327). Ultimately, only the fact finder measures credibility and assigns weight to evidence. *Pine Creek*, ¶ 29. On summary judgment, trial courts do not apply a standard of proof or issue findings of fact because, at the summary judgment stage, the parties are not arguing over what happened or presenting conflicting evidence, but rather need to know which of them, under the uncontested facts, is entitled to prevail under the applicable law. In such a case, the district court judge need not weigh evidence, choose one disputed fact over another, or assess credibility of the witnesses, but must identify the applicable law, apply it to the uncontroverted facts, and determine who wins the case. *Barrett, Inc.* ¶ 8 (internal citations and quotations omitted). Although the District Court indicated that its consideration of such extrinsic evidence was “ultimately unnecessary to the Court’s conclusions,” its expressed bias towards Trout Creek Ranch’s alleged evidence creates suspicion with regard to the bases for its other conclusions, which are inconsistent with Montana law and cannot be supported apart from Trout Creek Ranch’s alleged evidence. *Appellant’s App. 1*, p. 13. This matter should have been resolved at the summary judgment stage because the real property records at issue here are unambiguous and can be construed as a matter of law. Trout Creek Ranch offered a factual narrative in support of its Motion for Summary Judgment based upon self-serving statements of an interested party against Lee Lou’s contention that no such factual narrative was required to construe unambiguous instruments as a

matter of law. The District Court was wrong to usurp the role of the trier of fact in evaluating Mary Ellen Duke's credibility and assigning weight to her self-serving statements at the summary judgment stage.

### **CONCLUSION**

For the foregoing reasons, the District Court erred in concluding that Tract 3 does not benefit from the Easement. The Tract 3 Deed grants the Easement by reference to the Certificate of Survey, which clearly depicts and adequately describes the Easement according to Montana law. Accordingly, the District Court's order granting Trout Creek Ranch's Motion for Summary Judgment and denying Lee Lou's Motion for Partial Summary Judgment should be reversed.

DATED this 21<sup>st</sup> day of March 2023.

By: /s/ W. Scott Green  
W. SCOTT GREEN

*Counsel for Defendant/Appellant Lee Lou, LLC*

## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I hereby certify that Appellant Lee Lou, LLC's Opening Brief is printed with a proportionately spaced, size 14 typeface; is double spaced; and the word count is 4,909 words excluding the Table of Contents, Table of Authorities, Certificate of Compliance, Certificate of Service, and Appendix.

DATED this 21<sup>st</sup> day of March 2023.

/s/ W. Scott Green  
W. SCOTT GREEN

*Counsel for Defendant/Appellant Lee Lou, LLC*

## CERTIFICATE OF SERVICE

I, W. Scott Green, hereby certify that on the 21<sup>st</sup> day of March 2023, I served a true and accurate copy of Appellant Lee Lou, LLC's Opening Brief to the following in the above-referenced action:

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## **CERTIFICATE OF SERVICE**

I, W. Scott Green, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 03-21-2023:

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Representing: Millard Cox, Mina Cox, The Mary Ellen Duke Trust, dated March 13, 1997, Trout Creek Ranch

Service Method: eService

Electronically signed by Betty Jo Bochy on behalf of W. Scott Green  
Dated: 03-21-2023