

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 23-0124

CRAIG BAUGH

Plaintiff and Appellee,

v.

H2S2, LLC, a Montana Limited Liability Company,

Defendant and Appellant,

APPELLANT'S OPENING BRIEF

On Appeal from the Montana Eleventh Judicial District Court, Flathead County,
The Honorable Amy Poehling Eddy, Presiding.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in denying H2S2’s *Motion for Partial Summary Judgment* and granting summary judgment to Baugh on the nature, scope, and permissible uses of the easement?
2. Did the District Court abuse its discretion in applying the *Foy* exception when granting Appellee Baugh attorney fees for his defense of Appellant H2S2’s amended counterclaims after granting summary judgment on those counterclaims when the material facts were disputed?

STATEMENT OF THE CASE

This matter is a dispute between two parties to an express easement that accesses recreational lodging property in Whitefish.

Appellant/Defendant H2S2, LLC, is a Montana limited liability company with four individual members who are residents of Whitefish: Tim Stidham, Maura Hamilton, Kelly Schmidt, and Mindy Hamilton (hereinafter “H2S2”).

H2S2 is the owner of a twenty-acre parcel of land outside of Whitefish, upon which the four members were operating a recreational vacation rental business known as BaseGlamp. Appellee/Plaintiff Craig Baugh (hereinafter “Baugh”) is an individual residing in a rural area outside of Whitefish. His property is burdened by an easement serving the property owned by H2S2.

On July 9, 2021, Baugh filed a complaint against H2S2, and applied for a temporary restraining order (TRO) prohibiting H2S2 or its invitees from accessing BaseGlamp across the easement. (Doc. 1). A hearing was held and Exhibits 1-13 were entered into evidence. (Exhibits Binder).

The District Court initially granted but then dissolved the TRO, concluding after a hearing as follows:

The grant of an easement for ‘access’ is specific. Woods, ¶14. Accordingly, the Court need not look to intrinsic [sic] evidence to determine the scope of the easement. . .The easement does not include a restriction for only residential access. Accordingly, the Court will not insert such a restriction. Woods, ¶14.

(Doc. 16, ¶¶6-7).

Subsequent to the hearing on the TRO, Baugh filed his First Amended Complaint on August 9, 2021 (Doc. 19), and on October 12, 2021, H2S2 answered and filed counterclaims. (Doc. 27). After a period of discovery, H2S2 amended its counterclaims on June 13, 2022, to include, in relevant part, counterclaims of tortious interference, civil conspiracy, and exemplary or punitive damages. (Doc.

51). Discovery and motions practice continued, including multiple filings by both parties related to discovery. (Docs. 81, 108, 121, 129).

On August 5, 2022, H2S2 filed a Motion for Partial Summary Judgment, seeking summary judgment on Baugh's claim for declaratory judgment that H2S2 overburdened the easement. (Doc. 66). The following supporting evidentiary materials were filed:

1. Exhibits 1-11, (Doc. 67).
2. Request for Judicial Notice, (Doc. 68).
3. Request for Judicial Site Viewing, (Doc. 69).
4. Affidavit of H2S2, (Doc. 71).
5. Affidavit of Brent Foley, PE, (Doc.72).
6. Affidavit of Kathleen McMahon, (Doc. 73).
7. Declaration of Donald Murray, (Doc. 74).

Also on August 5, 2022, Baugh filed a Motion for Summary Judgment, seeking summary judgment on his claim for declaratory judgment and injunctive relief regarding H2S2's use of the easement, on his claim for trespass, and on H2S2's claims for wrongful issuance of a temporary restraining order, intentional interference with prospective business advantage, and civil conspiracy. (Doc. 65).

On November 9, the District Court heard oral arguments on the cross-motions for summary judgment. Respondent's (H2S2's) Exhibit 12, which was Baugh's own traffic counts on the easement for a period of 404 days (from July 30, 2021 to October 28, 2022), was marked at the hearing. (Doc. 131).

Also on November 9, 2022, the District Court entered an Order Re: Motions for Summary Judgment, denying H2S2's Motion for Partial Summary Judgment, and granting in part Baugh's Motion for Summary Judgment. (Doc 129). The District Court's reasoning was a sharp departure from its earlier determination that the easement was specific in nature, that consideration of extrinsic evidence was not appropriate, and that use of the easement would not be restricted to residential purposes. (Doc 16, ¶¶6-7). This Order enjoined H2S2 from accessing BaseGlamp but left unresolved the question of the scope of the easement. (Doc. 129, p. 12).

On December 2, 2022, Baugh filed a Motion for Award of Attorney Fees and Costs, (Doc. 142, hereinafter "Motion for Fees") which was fully briefed prior to the Court's order granting Baugh's Motion for Fees. (Docs. 150, 155, 166).

STATEMENT OF THE FACTS

From 1993 to 2019, Baugh owned two contiguous parcels of land that were approximately 20 acres each. (Doc. 65, pp. 41, 43). In 2006, Baugh completed a boundary line adjustment with Flathead County, rotating his two parcels of land and creating access for the parcel of land that was not the site of his residence. (Doc. 65, p. 30, ¶ 4). At the time the easement that is the subject of this case was designated and built, Baugh owned both parcels. (*Id.*). The newly configured parcels and associated access to Tract 2 over Tract 1 (the parcel Baugh ultimately retained) was reflected in Certificate of Survey 17458 (hereinafter "COS"). (Doc. 24.10, Ex. 1).

The easement across Tract 1 to serve Tract 2 (hereinafter the “easement”) was described in standard terms on the COS as follows: a “20’ wide access and utility easement on existing road.” (Exhibit Binder (TRO hearing), Baugh’s Exhibit 1). The easement only serves Tract 2, it is not a shared road. Baugh designated the easement on the 2006 COS, and did not restrict the nature, manner, method, or type of access permissible on the easement. (Id.). Nor did he impose covenants or other restrictions on Tract 2 during the intervening fourteen years prior to selling Tract 2. Baugh indicated that while he understood that the easement designation was unrestricted as described in the COS, that he knew he could add restrictions later when he sold the property. Despite this understanding, he chose not to restrict the easement when he sold Tract 2. (Doc. 67.10, Ex.8, p.8).

In 2019, Baugh listed Tract 2 for sale on Zillow, without the assistance of a realtor. (Doc. 65, p.32, ¶ 12). He marketed it as having the potential for building an “extended family compound” or horse property (Id.; Doc 67, Ex. 2). It was purchased by Florian Skyland via warranty deed on October 1, 2019. (Exhibit Binder (TRO hearing), Baugh’s Exhibit 1). The warranty deed reflected and conveyed the easement for access and utilities using language identical to the easement designation on the COS. (Id.) Skyland converted the existing barn on the property to a single-family residence. (Doc. 65, p.32, ¶ 13).

In the fall of 2020, Skyland notified Baugh that he was selling Tract 2. (Doc. 67.10, Ex. 9). Baugh responded via email, asking Skyland to place covenants or restrictions to limit the permissible uses of the property. Skyland did not place covenants or restrictions on the property or upon the easement. (Id.).

During the fall of 2020, H2S2 viewed the property, undertook significant due diligence to determine if their plan to construct recreational vacation rentals on the property would be permissible, including determining that the easement of record was unrestricted. (Doc. 71, ¶¶1, 2). On October 7, 2020, approximately one year after the conveyance to Skyland that created the easement, H2S2 purchased Tract 2.

Baugh and other area neighbors became aware of H2S2's plans and objected. H2S2's attempts to resolve the neighbors' concerns were not fruitful, and a group of neighbors came together to fund litigation against H2S2 to be instituted by Baugh. (Doc. 148.01 pp. 142, ln. 13 – 143 ln. 9).

Baugh filed the present lawsuit on July 9, 2021. (Doc. 1).

Throughout 2021, until opening for business on August 1, 2022, H2S2 worked to construct geodesic domes and associated infrastructure on the property for nightly rental. (Doc. 121.1, ¶¶1, 2). H2S2 began renting the domes to recreational visitors in August 2022. (Id.). During the period of construction and for the first three months H2S2 was open, Baugh kept track of the number of vehicles traveling on the easement and other alleged impacts. His counts indicated between 7.9 and 8.2 trips

per day during the time H2S2 was open. (Doc. 124.1, Ex. 3; Doc 131; Defendant's Exhibit 12). During the time Baseglamp was open and H2S2 was renting domes, it counted trips on the easement generated by renters, and counted between 6.1 and 11.5 trips per day during the construction and brief period of operation of Baseglamp. Both parties' counts reflected a daily vehicle traffic count that is approximately equivalent to the average traffic from a single-family residence.¹ (Doc 71, ¶ 13; 126, ¶ 2).

Baugh's other observed impacts upon the easement over the period Baseglamp was under construction and then in use were: Between 3 and 5 accidental trespasses by business invitees of H2S2; two pieces of litter; increased dust; a burn pile outside of the easement confines set by a contractor; and an alleged increase in noxious weeds² that could have been caused by traffic on the easement. (Exhibit Binder (TRO hearing), Baugh's Exhibit 9). Doc. 65, pp. 34-36, ¶¶ 19, 32, 37; Doc 143.10 Ex. 7).

¹ Pursuant to ITE Trip Generation Manual relied upon by both parties' traffic experts, the daily trips associated with a single-family residence is 9.4. (Doc 67.10, Ex 7, p. 2).

² In a May 26, 2022 email from Baugh to Tim Stidham responding to Tim's offer to spray noxious weeds on Baugh's property outside the easement, Baugh stated: "I have walked the easement and found only three noxious weeds. One Knapweed and two Hawkweed, I have flagged them. (Doc 143.10 Ex 6). Baugh's subsequent affidavit paints a more dramatic picture of the increase in noxious weeds. (Doc. 65, p. 37, ¶ 37, 40).

The easement in question travels over Tract 1 at a significant distance from Baugh's residence. (Doc 235, Ex. 10; (Exhibit Binder (TRO hearing), Baugh's Exhibit 9).

STANDARD OF REVIEW

“Summary judgment rulings are subject to de novo review for conformance with applicable Mont. R. Civ. P. 56 standards and requirements.” *Kostelecky v. Peas in a Pod LLC*, 2022 MT 195, 410 Mont. 239, 256, 518 P.3d 840, 851 (citing *Dick Anderson Constr., Inc. v. Monroe Prop. Co.*, 2011 MT 138, ¶ 16, 361 Mont. 30, 255 P.3d 1257).

A district court's ruling on a summary-judgment motion is not a discretionary function which merits deferential review. Rather, summary judgment requires district courts to make a series of legal conclusions regarding the applicable law, the reasonable inferences to be drawn from the evidence in favor of the non-movant, and the application of law to the undisputed facts and reasonable inferences of fact. Such conclusions are either correct or incorrect as a matter of law. Therefore, in the context of summary judgment, a decision to categorically exclude certain evidence from consideration is not a discretionary function akin to admitting or excluding evidence at trial. Rather, this determination is a conclusion of law which we must review de novo, just as we review all other aspects of the decision to grant summary judgment.

Lorang v. Fortis Ins. Co., 2008 MT 252, ¶53, 345 Mont. 12, 25, 192 P.3d 186, 197–98 (*citations omitted*). All reasonable inferences that may be drawn from the evidence must be drawn in favor of the party opposing summary judgment. *Id.*

“A district court’s decision to award or deny attorney fees and costs under the equitable exception first announced in *Foy v. Anderson*, 176 Mont. 507, 511-12, 580 P.2d 114, 116-17 (1978), ‘is within [its] discretion and will not be overturned absent a showing of abuse of discretion.’” *Egan Slough Cmty. v. Flathead Cty. Bd. of Cty. Comm'rs*, 2022 MT 57, ¶17, 408 Mont. 81, 93, 506 P.3d 996, 1005 (quoting *Rafes v. McMillan*, 2022 MT 13, ¶16, 407 Mont. 254, 502 P.3d 674).

SUMMARY OF THE ARGUMENT

The District Court erred when it granted summary judgment to Baugh on his claims that the easement was overburdened and denied summary judgment to H2S2 on its claim for declaratory judgment that the easement could be used to access Baseglamp. The Court misapplied Montana law by disregarding the unambiguous language of the easement – a “20’ access and utility easement on existing road” - in favor of a restriction on commercial use. The Court considered extrinsic evidence of the grantor’s intent and surrounding circumstances, which was contrary to this Court’s holdings that, absent an ambiguity, an express easement must be enforced as written. The express easement was not limited or restricted in any way, and the Court should have concluded that the easement could be used for any purpose not contrary to the general purpose expressed, including for access to a recreational lodging property. H2S2’s use of the easement could not have overburdened the

easement as a matter of law. The District Court's conclusions to the contrary were based not on the evidence, but on speculation of future burden.

In the alternative, the District Court improperly disregarded admissible evidence that demonstrated Baseglamp would not overburden the easement. The District Court made several errors of law, excluding entire categories of H2S2's evidence of actual and future burden. The admissible evidence before the Court demonstrated that there would not be a substantial increase in the burden on the easement beyond what would be expected in any residential development allowable on the property. The District Court's erroneous evidentiary rulings, mistakes of fact, and failure to draw all reasonable inferences from the evidence in H2S2's favor resulted in a grant of summary judgment to Baugh that was contrary to law.

The District Court abused its discretion in awarding attorney fees to Baugh under the *Foy* equitable exception to the American Rule, because the particular facts and circumstances intended and required for the rare and limited application of the *Foy* exception plainly do not exist here. The District Court should not have granted summary judgment on the claims underlying its ruling. Moreover, Baugh, the Plaintiff/Appellee, initiated this litigation with the backing of at least thirteen litigation funders. Baugh is not an innocent party and was not forced to hire an attorney and expend fees to defend himself in a circumstance devoid of his

connection. The *Foy* exception does not apply, and the District Court's award of attorney fees to Baugh was an abuse of its discretion.

ARGUMENT

I. The District Court Erred in Determining That the Easement was “General” in Nature and Therefore Improperly Resorted to Consideration of Extrinsic Evidence to Determine the Scope of the Easement.

A. The Easement was Specific and Unambiguous and Should Only Have Been Interpreted Within the Four Corners of the Grant.

An easement that is created by written instrument is considered an express easement. *Woods v. Shannon*, 2015 MT 76, ¶10, 378 Mont. 365, 368, 344 P.3d 413, 416. The scope of an express easement is determined by the terms of the grant. *Id.* (citing Mont. Code Ann. § 70–17–106; *Clark v. Pennock*, 2010 MT 192, ¶25, 357 Mont. 338, 239 P.3d 922). “If an easement is specific in nature, the breadth and scope of the easement are *strictly determined* by the actual terms of the grant.” *Woods*, ¶10 (*emphasis in original*) (citing *Clark*, ¶25).

In 2019, this Court explicitly held that “if the originating conveyance expressed the intended purpose or use of the easement in specific terms, such as for ingress/egress, access, or roadway purposes, the permissible scope of use must be determined from the specified terms without resort to extrinsic evidence.” *O’Keefe v. Mustang Ranches HOA*, 2019 MT 179, ¶29, 396 Mont. 454, 470, 446 P.3d 509, 520 (citing *Woods*, ¶14); *Clark*, ¶ 27.

Here, the easement language at issue was designated by Baugh in 2006, appearing on a COS prepared for the purposes of creating two separate tracts of land,

both owned by Baugh. (Doc. 65, Ex.4) The easement was designated across Tract 1, to benefit Tract 2, which otherwise would not have had access. The easement designated by Baugh and depicted on the COS unambiguously reads: “a 20’ wide access and utility easement on existing road.” (Id.).

There is no dispute regarding the location of the “existing road,” or regarding the width of the easement. (Doc. 148.1, p.37 ln. 12- p.41 ln. 25). Thus, the sole remaining term the District Court was tasked with interpreting was: “access and utility easement.” This Court has repeatedly held that the word “access” used within an express grant of easement is not an ambiguous term. *O’Keefe*, ¶9 (citing *Woods*, ¶14).

“The mere fact that the parties disagree as to the meaning of a contract provision fails to create an ambiguity.” *Peters v. Hubbard*, 2020 MT 282, ¶15, 402 Mont. 71, 77–78, 475 P.3d 730, 736 (*internal citations omitted*). The “[l]anguage of a contract is ‘ambiguous only if susceptible to two or more conflicting meanings, both of which are objectively reasonable.’” *Kapor v. RJC Inv., Inc.*, 2019 MT 41, ¶26, 394 Mont. 311, 324, 434 P.3d 869, 877.

In affirming a district court’s refusal to consider extrinsic evidence in an express easement case, this Court rejected the appellant’s contention that the following grant of easement was ambiguous: “[a]n easement in an existing road for

ingress and egress to Lot 12...,” which particularly described the location and dimensions of the easement. *Woods*, ¶13. The *Woods* Court continued:

Under factual circumstances similar to those presented here, we have previously treated easements granted for the purpose of ‘ingress and egress’ as specific in nature. *Clark*, ¶27 (reversing district court determination that easement for ingress and egress was ambiguous, and concluding ‘that the easement language specifically creates a road easement’; *McCauley v. Thompson–Nistler*, 2000 MT 215, ¶49, 301 Mont. 81, 10 P.3d 794 (concluding scope of easement for ingress and egress was to be ‘determined upon the actual terms of the grant,’ and could not be limited by district court); *Mason*, ¶43 (concluding easement granting access over existing roadways for ingress and egress was ‘sufficiently specific in nature that the terms of the grant are decisive of the limits of the servitude’)...

Id., ¶14.

This Court’s holding in *Woods* is consistent with well-established limits on the judiciary’s role in resolving disputes involving written contracts. When interpreting a written instrument, the Court’s role is “simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted[.]” Mont. Code Ann. § 1-4-101. In 2020, this Court again affirmed these fundamental, well-understood limits to interpreting unambiguous easements: “If the language of a contract is reasonably susceptible to only one interpretation, the duty of the court is simply to apply the language as written.” *Peters*, ¶15.

This Court’s refusal to accept invitations to “insert what has been omitted” from an easement is consistent with a critically important public policy – the public’s reliance on written property conveyances:

As we have said, good-faith purchasers of real property are entitled to rely on publicly recorded deeds, plats, and certificates of survey pertaining to the subject property to disclose accurately all encumbrances, easements, and impediments thereon; they are not required to track down 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. 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, ¶¶19-22, 352 Mont. 401, 409–11, 219 P.3d 492, 500–01 (internal citations omitted; quoting *Olson v. Trippel*, 77 Wash.App. 545, 893 P.2d 634, 639 (Div. 2 1995)). The public policy that underpins this Court’s recognition that good faith purchasers of real estate have the right to rely on unambiguous grants of easement is also evident in its holdings refusing to insert terms in a written instrument that could have been inserted by the grantor but were not. *See e.g., Van Hook v. Jennings*, 1999 MT 198, ¶14, 295 Mont. 409, 413, 983 P.2d 995, 998 (“Had the Lelands intended to include all roads then in existence within the scope of their right of way, they could easily have done so by drafting the reservation of rights to read ‘rights of way’ over ‘existing private roads.’ This they did not do.”).

Here, the language of the easement is clear and unambiguous. It allows for the dominant tenement owner to access their property and provide utilities to the

property along an existing roadway (“access and utility easement on existing road”). (Doc. 65, Ex.4).

There is no reference to historical use, no reference to residential use, and no restriction whatsoever on the type or frequency of “access.” (*Id.*). The District Court erroneously looked beyond the four corners of the easement, **without any finding or conclusion of ambiguity in the terms of the easement.** (*Order Re: Motions for Summary Judgment* (hereinafter, “Order”), Doc. 132, pp.7-11). This is a clear misapplication of the law. The District Court’s analysis skipped over the fundamental question that dictates judicial analysis of an express easement: Is there an ambiguity that requires consideration of extrinsic evidence of the circumstances surrounding the easement? Here, there was no such ambiguity. The easement was express and specific.

This Court’s decisions regarding what terms are ambiguous in the grant of an easement has significant public policy implications. Affirmation of the District Court’s decision to label as “general” and therefore subject to interpretation based on extrinsic evidence, any express grant of easement that does not further define what the terms “access and utilities” means, would be to invite endless litigation over **routinely** used terms in Montana property conveyances.

Moreover, as fully illustrated by this case, under the District Court’s analysis, an easement grantor could grant an express easement for access and utilities, sell the

dominant tenement at a price that does not reflect any restrictions on the easement (or associated development of the property), and then claim that his intent was to restrict the easement. It is fundamental to interpretation of contracts in Montana that ambiguities in a contract must be construed against the drafter. Mont. Code Ann. § 28-3-306. Section 70-1-516, MCA, expressly provides that in transactions among private citizens “a grant is to be interpreted in favor of the grantee...” In *Van Hook*, this Court specifically rejected the district court’s conclusion that a reservation of easement rights in a deed was ambiguous because it conflicted with the grantor’s intent. *Van Hook*, ¶13. The Court noted: “Had the Lelands intended to include all roads then in existence within the scope of their right of way, they could easily have done so by drafting the reservation of rights to read ‘rights of way’ over ‘existing private roads.’ **This they did not do.**” *Id.*, ¶15 (*bold emphasis added*).

Here, as in *Van Hook*, Baugh granted an express easement for access and utilities along the existing roadway. The District Court did not find or conclude that the easement terms were ambiguous, nor could such a finding be rationally made. Under Montana law, the Court’s analysis of the scope of the easement should have ended there.

Where an easement is specific in nature, the breadth and scope of the easement are strictly determined by the actual terms of the grant. *Mason v. Garrison*, 2000 MT 78, ¶21, 299 Mont. 142, 998 P.2d 531 (citations omitted); *see also* §70-17-106, MCA “[t]he extent of a servitude is determined by the terms of the grant. ...” Stated differently, if the grant “is specific in its terms, it is decisive of the limits of the

easement.” *Mason*, ¶ 21 (citations omitted). “[I]t 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. *Creveling v. Ingold*, 2006 MT 57, ¶12, 331 Mont. 322, 132 P.3d 531; *see also* §1-4-101, MCA, the judge is “not to insert what has been omitted or to omit what has been inserted.”

Quarter Circle JP Ranch, LLC v. Jerde, 2018 MT 68, ¶10, 391 Mont. 104, 109, 414 P.3d 1277, 1281. Baugh’s grant of easement was specific in nature. There was no ambiguity. The scope of the easement was unlimited by the grant. The District Court’s analysis should have ended there. Instead, the District Court inserted a restriction Baugh had omitted.

B. The District Court Improperly Limited the Scope of the Easement to Preclude Access to Baseglamp.

The District Court’s only appropriate role in considering the facts and circumstances surrounding the use of the easement was to determine if the specific easement was being **overburdened** by H2S2’s use. Instead, the District Court considered historical use of the easement and Baugh’s claimed intent as expressed during the lawsuit to limit the **scope** of the easement to residential purposes. Order, Doc. 132, p.12. This was improper.

In the 2019 case *O’Keefe v. Mustang Ranches HOA*, this Court explicitly held:

The terms of the originating instruments of conveyance determine the permissible scope of the easement. If the originating conveyance grants or reserves an easement in only general terms, without restriction, **the permissible scope of use includes any purpose reasonably related to the general purpose expressed.**

O’Keefe, ¶29 (*emphasis added*), (citing §70-17-106, MCA; *Woods*, ¶12; *Clark*, ¶25); *Woods*, ¶14 (quoting *McCauley*, ¶¶49-50) (“Where right of ingress and egress was unrestricted by terms of grant, district court erred by limiting scope to ‘conduct of normal activities conducted with residential living.’”) “Except as otherwise limited by the terms of the instruments of conveyance, individuals entitled to use an express easement include the dominant estate owner, family, tenants, and other expressly or implicitly authorized invitees.” *O’Keefe*, ¶29 (citing *Woods*, ¶15); *City of Missoula v. Mix*, 123 Mont. 365, 374, 214 P.2d 212, 217 (1950).

This case allows for precise application of this Court’s explicit holdings in *O’Keefe*. The scope of the easement designated on the COS was unrestricted. This fact allows the dominant tenement (H2S2) to use the easement for “any purpose reasonably related to the general purpose expressed” – here, for any purpose reasonably related the general purpose of “access and utilities.” *Id.* The District Court erred when it held otherwise.

The District Court’s analysis of the permissible scope of the easement was incorrect for the basic reasons discussed above: The terms of the easement were unambiguous, and Montana law is clear that the permissible scope of use encompasses “any purpose reasonably related the general purpose expressed,” by the holder of the easement and its invitees. *O’Keefe*, ¶29, citing §70-17-106, MCA; *Woods*, ¶14.

In other words, the scope of the easement could not be limited by the District Court, unless it found that H2S2 was overburdening the easement. The District Court improperly conflated the issues of scope and burden.

The District Court reached its conclusion that the scope of the easement must be limited to exclude access to Baseglamp, by relying on “general” easement cases, *ie*: cases where there is an ambiguity in the granting instrument that requires a court to consider extrinsic evidence. A 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.” *Ganoung v. Stiles*, 2017 MT 176, ¶ 15,388 Mont. 152, 157, 398 P.3d 282, 287 (*emphasis added*).

In *Ganoung*, the location of the easement was not fixed by the granting instrument, creating an ambiguity that required the court to consider extrinsic evidence of historical use. *Id.*, ¶20 (“We rely on historical use to determine the location of an express easement when the grant fails to adequately define the location and scope.”) No such ambiguity existed in this case. By relying on *Ganoung* to consider historical use and conclude that H2S2’s use of the easement was “revolutionary” rather than “evolutionary,” the Court bypassed the preceding step in analysis of an express easement – whether there was an ambiguity in the grant that required consideration of extrinsic evidence -- and its conclusions were therefore in error.

II. The District Court's Conclusion that H2S2's Use of the Easement Overburdened the Easement was Unsupported by the Evidence Before It.

The District Court's fundamental analytical errors as set forth above regarding interpretation and scope of an express, unambiguous, and unrestricted easement for access resulted in the Court failing to utilize the appropriate analysis of determining overburden under the specific circumstances before it.

Because the easement in this case was both express and specific in nature, the floor established by Montana law regarding the allowable burden on the access and utility easement crossing Baugh's land is use by the dominant tenement owner, family, guests, and invitees, including commercial invitees. *O'Keefe*, ¶ 29 (citing *Woods*, ¶15; *City of Missoula* 123 Mont. at 374. Thus, to demonstrate overburden, the complaining party must establish, by admissible evidence, a substantial increase in burden. *Leichtfuss v. Dabney*, 2005 MT 271, ¶ 53, 329 Mont. 129, 122 P.3d 1220.

This Court has upheld limits on the burden placed on an easement, holding that a significantly expanded burden beyond what could have been contemplated by the grantor may be not permissible. *Leffingwell Ranch, Inc. v. Cieri*, 276 Mont. 421, 430–33, 916 P.2d 751, 758 (1996). However, the facts of *Leffingwell* (an express, specific easement case) stand in stark contrast to this case.

In *Leffingwell*, this Court affirmed a district court's conclusions that the dominant tenement holder of an easement for ingress and egress could not use an

easement that explicitly contemplated agricultural uses (by prohibiting fencing, requiring that the access gate be closed at all times, and providing for termination of the easement if the easement was abused) to access a 174 lot subdivision most of which was on lands acquired by the dominant tenement owner subsequent to the creation of the easement. *Id.*, at 424, 433. The Court held that such use would overburden the easement. The district court’s analysis was informed by evidence of 60 years of agricultural use of the easement, and the fact that the easement ran right through the middle of the servient tenement’s dude ranch. *Id.*

Here, the easement at issue was designated in 2006 by Baugh himself when he owned both the dominant and servient tenement. (Doc. 65, Exs.1-3). As discussed above, and unlike the easement in *Leffingwell*, the easement designated by Baugh did not contain any limitations on use, references to use, or any other restrictions. (Doc. 65, Ex.4; Doc. 67.10, Ex.8, Tr. 30:7-31-20). Baugh built a barn on Tract 2 and in 2019 listed the property for sale. He marketed the property as follows: “[a]n extended family compound or a primary residence with a separate caretakers residence or a mother-in-law residence are possible on this property...” and touted it as a horse property. (Doc. 67.10, Ex.2). Florian Skyland purchased the

property from Baugh in 2019,³ without Baugh imposing any restrictions on further development of the property. (Doc. 65, Ex.7).

In August, 2020, less than a year after he purchased Tract 2, Skyland informed Baugh that he was selling the property. (Doc. 67.10, Ex.9). In response, Baugh asked Skyland to place restrictions upon the property so that it could not be subdivided, which Skyland did not do. (Id.). H2S2 purchased the property and began to develop it into “Baseglamp,” ultimately constructing 12 camping domes upon the property pursuant to appropriate development permits. (Docs. 71, 143.10, Exs.5a, 5b; Doc. 149, ¶12).

Baugh claims that H2S2’s use of the property overburdens the easement, a contention the District Court agreed with. However, applying this Court’s analysis in *Leffingwell*, major differences are clear. In *Leffingwell*, the total number of landowners allowed legal access went from two to 174, a plainly massive -- and revolutionary -- increase in burden. *Id.* at 431. Moreover, and critically, the grantor in *Leffingwell* explicitly indicated limits upon use of the easement, established with intent of agricultural ranch use. *Id.* at 424. No such limits were imposed here by Baugh, despite having every opportunity to do so, and it is clear that Baugh

³ The easement was not granted (*i.e.*: it wasn’t actually in existence) until the dominant and servient tenements were separated, which occurred when Baugh deeded Tract 2 to Skyland in 2019, along with the grant of easement across Tract 1 as depicted in the COS.

understood that he perhaps should put them in place and was balancing that reality with the marketability of the property. (Doc. 67.10, Ex.8, Tr. 30:7-31-20).

In *Steed v. Solso*, this Court reviewed a district court's ruling that a recreational easement was not overburdened by an increase in users and potential associated traffic. 2010 MT 264, 358 Mont. 356, 363–65, 246 P.3d 697, 702–03. The appellants had argued that “the originally-granted easements favored only 2 lots for use by 5 families; now, the easements favor 15 lots with at least as many families, plus the potential use by guests and tenants.” *Id.*, ¶31. They also expressed concern about the additional noise, trash, and heavy traffic that could occur. *Id.* The district court held that the easement was not overburdened by the increase in use, a conclusion this Court agreed with. *Id.*, ¶34.

In so holding, this Court affirmed the district court's rationale that an easement could not be overburdened by speculative future uses, notwithstanding the fact that the number of easement holders had in fact increased. *Id.*, ¶32 (quoting *Lindley v. Maggert*, 198 Mont. 197, 645 P.2d 430 (1982) (“[t]he problem with defendants’ argument is that the easement has thus far not been used and there is no evidence of an increased burden. The [*Lindley*] Court continued that it ‘cannot declare the proposed use will be inconsistent with the reserved easement on the basis of speculation as to possible future uses.’”).

Comparing this Court’s analysis in *Steed* with the present case, it is important to note that here, unlike in *Steed* (and to a much greater extent, *Leffingwell*), there is no increase in the number of landowners permitted to access the easement. Like the unsuccessful appellants in *Steed*, Baugh complains that speculative future uses of the easement will create a significant burden of traffic and other associated burdens. (Doc. 1, ¶11). The District Court in this case improperly based its ruling on future, speculative development of BaseGlamp. (Order, Doc. 132, p.12); *Steed*, ¶32. The District Court erred in doing so.

The evidentiary record that the District Court relied upon to support its holdings was speculative. The Court based its holding on the potential⁴ for BaseGlamp to ultimately build up to 32 domes on the property. (Doc. 132, pp.5-6, 12). The Court thus improperly precluded BaseGlamp from using its property for *current* commercial purposes, because the potential future speculative use of the easement could overburden it and would be “revolutionary, not evolutionary.” (*Id.*, p.12). The District Court’s rulings were contrary to this Court’s holding in *Steed* and find no support in this Court’s holding in *Leffingwell*. *See also Woods*, ¶16 (“The Woodses claim that frequent, heavy traffic would cause an increased risk of

⁴ The Court persisted in relying on the potential permitted level of development despite the fact that H2S2 expressly committed to limit use of the property to the existing 12 domes. (Docs. 143.10, Exs.5a, 5b; 149, ¶12; Doc. 181, ¶1).

flooding or erosion, yet there are no allegations that such heavy use has actually occurred. We cannot address at this time whether these hypothetical future circumstances would overburden the Woodses' property.”).

Even if the Court had considered the record evidence of the current increase of burden on the easement, it could not have reached the conclusion that the easement was being overburdened based on that evidence. Rather, the sole admissible evidence of the increase in traffic on the easement demonstrated the opposite – that the burden had not substantially increased. (Ex.12, Doc. 131.10; Docs. 143.10, Exs.5a, 5b; 143.10, Exs. 3, 4; 149, ¶12; Doc. 181, ¶1). Baugh's traffic counts indicated an average of 7.94 trips per day. (Doc. 143.10, Ex.3). Baugh's own traffic expert's estimated average of 8 trips per day for two single family residences. (Doc. 65.05, Ex.23). The ITE Trip Generation Manual relied upon by both parties' experts indicates the daily trips associated with a single-family residence is 9.4 trips. Thus, the burden on the easement was demonstrably not substantially increased beyond the use expected of a single family residence. (Doc 67.10, Ex 7, p. 2).⁵

⁵ Montana's case law on overburdening is limited, and H2S2's emphasis on traffic numbers should not divert the Court from the rule, well developed in other jurisdictions, that an increase in traffic standing alone does not increase the burden on the servient tenement. In *Gutcheon v. Becton*, the Court stated: “***It is well settled that a mere increase in the volume of traffic across the access road will not constitute a per se overburdening.***” 585 A.2d 818, 822 (Me. 1991), (*emphasis added, internal citations omitted*). The Restatement (Third) of Property (Servitudes), comm § 4.10 cmt. f (2000) provides that “[c]hanges in use of the dominant estateare irrelevant, unless they also bring a change in the manner, frequency, or

It was Baugh's burden to establish with evidence that the easement was being overburdened by BaseGlamp's activities. *Leichtfuss*, ¶53. Baugh did not and could not establish a substantial increase in use of the easement, and thus he could not have satisfied his burden to demonstrate overburden. The District Court adopted Baugh's speculations and characterizations of future burden, ignoring the record evidence of actual burden. (Doc 129, pp. 5-6, 12).

III. In the Alternative, the District Court Disregarded Admissible Evidence Demonstrating Issues of Material Fact Bearing on Baugh's Claim that H2S2 Overburdened the Easement.

H2S2 contends that the District Court misapplied the law to reach its conclusion that H2S2 was precluded from using the easement to access Baseglamp. However, to the extent this Court affirms the District Court's application and analysis of the law, the District Court's conclusions were still contrary to the material evidence before it.

The District Court improperly excluded entire categories of H2S2's evidence submitted in support of its summary judgment motion. Review of the District Court's evidentiary rulings under the *de novo* standard applicable to summary

intensity of use of the easement.” This Court has recognized section four of the Restatement. *O'Keefe*, ¶ 29.

judgment rulings indicates that the Court’s decision to categorically exclude much of H2S2’s evidence was in error.

We review evidentiary rulings made in the context of a summary judgment proceeding de novo, and need not defer to the judgments and decisions of the district court, in order to determine whether evidentiary requirements for summary judgment have been satisfied. (‘[I]n the context of summary judgment, a decision to categorically exclude certain evidence from consideration is not a discretionary function[.]’).

Smith v. Farmers Union Mut. Ins. Co., 2011 MT 216, ¶15, 361 Mont. 516, 521–22, 260 P.3d 163, 168 (internal citations omitted).

A consideration in determining whether an easement is being overburdened is whether there is a substantial increase in traffic on the easement. *Leffingwell Ranch, Inc. v. Cieri; Steed v. Solso*, discussed *supra*. The District Court considered at length the potential for increased traffic on the easement in order to reach the conclusion that the easement was overburdened by BaseGlamp’s use. (Ex. 12, Doc. 131.10; 143.10, Exs.3, 4, 5d; 149, ¶2).

The Court’s analysis, however, was not only based on speculative future uses as set forth above, but also relied on erroneous evidentiary rulings,⁶ and disregarded contrary admissible evidence submitted by H2S2.

⁶ While not actually germane to the issues before this Court, the District Court made mistakes of fact that apparently partially formed the basis for in its Order granting summary judgment to Baugh. For example, the District Court stated that “Baugh purportedly reduced the width of the easement from the prior 60-foot easement in an attempt to prevent development of a subdivision.” (Doc. 132, p. 4). This was simply wrong. The 60 foot easement referenced by the District Court was an entirely

A. H2S2's Experts Testified That There Would be No Substantial Increase in Burden on the Easement Beyond What Would be Expected of Any Permissible Residential Development, Creating an Issue of Material Fact Precluding Summary Judgment.

The District Court utilized the opinion of Baugh's expert, Rick Nys, that "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 impacts of the historic single family residence uses in the area." (Doc. 132, p.6). The District Court relied upon Mr. Nys' opinions, disregarding the directly contrary opinions of H2S2's experts on this plainly material fact. This was in error.

H2S2's expert, Robert Abelin, opined that when taking into account average occupancy rates of nightly rental facilities, the annual average traffic burden would be similar to a parcel with 2-3 single family residences. (Doc. 67.10, Ex.7, p.3). Notably, this is how Baugh marketed Tract 2 in 2019 when the easement was granted to Skyland. (Id.; Doc 67, Ex. 2). The District Court did not even address this contrary record evidence which indicated no substantial increase in burden beyond what would be expected in normal development.

H2S2's land use planning expert, Kathleen McMahon, also opined that:

different easement, on a different area of the property, and had been extinguished by operation of law (merger of the dominant and servient tenements) when Baugh bought the Migallo property in 1993. The easement in this case was new - designated and built in 2006 by Baugh to access a newly configured Tract 2. The new easement was purposely designed to be far from Baugh's house and well screened by trees. (Doc 65, Ex 2, Ex 4; Doc. 148.01, p. 39).

- “[T]he traffic impacts from BaseGlamp are similar to nearby residential uses and that were promoted by the sellers of the property in real estate listings.” (Doc. 67.10, Ex.6, p.9).
- “[A] potential ‘family compound’ as envisioned by Baugh when he sold the property would have a similar impact on the easement as the BaseGlamp domes.” (*Id.*, pp.11-12).
- “The projected traffic volumes from 12-units at BaseGlamp is similar to the development of the property in three to four dwelling units. (*Id.*, p.13).

The District Court excluded the opinions of Ms. McMahon on the basis that her report “contains extensive legal conclusions as well as numerous categories that are irrelevant ...” (Doc. 132, p.3). However, a review of Ms. McMahon’s extensive report indicates that most of her opinions are not legal conclusions, and she makes no attempt to apply the facts to the law regarding the material opinions set forth above. As such, her opinions, including those set forth above, were admissible, and were directly contradictory to the “undisputed” material facts relied upon by the Court in its ruling.

To the extent this Court determines that speculative future uses are material to this case and thus the District Court properly considered them, the material facts before the District Court relating to whether the easement was overburdened were in dispute.

B. The District Court’s Disregard of the Testimony Offered by H2S2 Was in Error – the Admissible Testimony Created an Issue of Material Fact Precluding Summary Judgment.

The District Court disregarded the testimony of the individuals comprising Appellant H2S2, LLC, submitted by affidavit. (Doc. 143.10, Ex.5b). The Court ruled that the affidavit “is replete with inadmissible hearsay, inadmissible settlement communications, and other matters that are generally irrelevant to the question of the scope of the easement.” (Order, Doc. 132, p.3). However, a review of the affidavit belies the District Court’s conclusion.⁷ The affiants properly testified as to what is presently occurring on the property that was directly relevant to a proper analysis of burden. (H2S2 Aff., Doc. 71, ¶¶3, 4). They testified that they had no plans to develop BaseGlamp beyond the existing twelve domes. *Id.* Such testimony was directly contrary to the District Court’s conclusion that the future use of the easement would overburden it. (Order, Doc. 132, p.12).

The District Court also excluded the affidavit of Brent Foley, BaseGlamp’s project engineer, who stated that H2S2 had no plans to construct the 32 domes they were entitled to pursuant to the Montana Department of Environmental Quality, and that only twelve domes existed on site. (Foley Aff., Doc. 72, pp.6-8). The Affidavit was excluded on the grounds that Foley was a “hybrid lay and expert witness” who

⁷ H2S2 acknowledges that a small portion of the Affidavit contained inadmissible hearsay and that some the contextual testimony provided was not directly relevant to the issue of overburden on the easement.

was not disclosed as an expert and thus his testimony was inadmissible. (Order, Doc. 132, p.2). The Court was in error, however, as Foley had been disclosed as an expert witness by H2S2's counsel. (Doc. 48). Even if Foley was not a designated expert, his testimony should have been considered by the Court as a lay affiant with personal knowledge. Mont. R. Evid. 701. Foley's testimony should not have been excluded. Had the Court considered Mr. Foley's testimony, it would have given rise to a dispute of material fact regarding the speculative future use of the property that the District Court relied upon to reach its ultimate conclusion that the easement was being overburdened. (Order, Doc. 132, p.12 ("BaseGlamp has clear future plans to continue to expand development of the property.")). This conclusion was directly contradicted by admissible evidence.

C. The Court's Categorical Exclusion of any "Exhibits Provided or Prepared by Mr. Murray" Casts Doubt Upon the Court's Entire Analysis of This Case.

The District Court categorically excluded "any ... exhibits provided or prepared by Mr. Murray," BaseGlamp's counsel. (Order, Doc. 132, p.3). The Court made this extraordinary ruling without specifying what exhibits it was excluding. H2S2's entire case was prepared by Mr. Murray, including all exhibits and materials provided during the summary judgment proceedings. This District Court's stated exclusion of some undesignated portion of the H2S2's evidence on summary judgment was completely improper. *Smith*, ¶15. As such, the District Court's

improper and prejudicial ruling eliminates counsels’ and this Court’s ability to determine what comprises the record on appeal that was considered or relied upon by the District Court.

IV. The District Court Abused its Discretion in Applying the *Foy* Exception When Granting Baugh Attorney Fees for his Defense of H2S2’s Amended Counterclaims and Should not Have Granted Summary Judgment on Those Claims in the First Instance.

Baugh requested the District Court to award reasonable attorney fees and costs pursuant to Mont. Code Ann. §27-8-313 and *Foy v. Anderson*, 176 Mont. 507, 580 P.2d 114 (1978). (“Motion for Fees,” Doc. 142, p.1). The District Court declined to award attorney fees under Section 27-8-313, finding that “the equities do not support an award of attorney fees.” (“Order Re Fees,” Doc. 166, p.4). Instead, in an abuse of its discretion, the court improperly awarded attorney fees to Plaintiff for his defense of H2S2’s counterclaims under the equitable exception to the American Rule first announced in *Foy*, 176 Mont. at 511-12, 580 P.2d at 116-17. (*Id.*, p.5). This was also fundamentally in error because there was ample record evidence to support H2S2’s counterclaims.

The longstanding rule in Montana is that ““absent statutory or contractual authority, attorney’s fees will not be awarded to the prevailing party in a lawsuit,”” aka, the American Rule. *Slauson v. Marozzo Plumbing & Heating*, 2009 MT 333, ¶27, 353 Mont. 75, 84, 219 P.3d 509, 516 (*quotation and citation omitted*).

The *Foy* exception to this rule is only applied in “narrowly drawn,” “rare,” and “limited circumstances” which require (1) that the prevailing party has been forced to enter the litigation, through no fault of its own; and (2) such action is “utterly without merit or frivolous, and only in cases with particularly limited facts.” *Erker v. Kester*, 1999 MT 231, ¶44, 296 Mont. 123, 988 P.2d 1221; *Egan Slough Cmty. v. Flathead Cty. Bd. of County Comm’rs*, 2022 MT 57, ¶85, 506 P.3d 996; *Harding v. Savoy*, 2004 MT 280, ¶68, 323 Mont. 261, 100 P.3d 976. These limited circumstances do not exist here, and the Court’s award of attorney fees should be reversed.

“The *Foy* exception is not applicable to a plaintiff who obtained an attorney to initiate legal action.” *Tanner v. Dream Island*, 275 Mont. 414, 913 P.2d 641, 651 (1996). “*Foy* created a narrow exception to this traditional rule of law, allowing an award of attorney fees to a party who, through no fault of her own, is forced to hire an attorney to defend an action that is frivolous or utterly without merit.” *DeVoe v. City of Missoula*, 2012 MT 72, ¶25, 364 Mont. 375, 382, 274 P.3d 752, 757-58 (citing *Terra West Townhomes, LLC v. Stu Henkel Realty*, 2000 MT 43, ¶40, 298 Mont. 344, 996 P.2d 866).

Initially finding that attorney fees were not justified by Mont. Code Ann. §27-8-313, the District Court abused its discretion in awarding Baugh attorney fees pursuant to the *Foy* equitable exception. (Order Re Fees, Doc. 166, pp.2-5). H2S2

respectfully requests this Court to reverse the District Court's grant of attorney fees to Baugh.

The particularly limited facts required under *Foy* do not exist in this case, and the District Court's award of attorney fees under *Foy* was improper.

A. The District Court Abused its Discretion When it Ruled That H2S2's Counterclaims for Tortious Interference, Civil Conspiracy, and Punitive Damages Were Frivolous Based on Lack of Evidence to Support H2S2's Claims.

H2S2's counterclaims were not frivolous, because (1) H2S2 had reasonable basis to believe that its claims might prevail (*Goodover v. Lindsey's*, 255 Mont. 430, 447, 843 P.2d 765, 775-76); (2) H2S2 presented record evidence supporting its claims; and 3) the District Court's determination regarding H2S2's lack of evidence was pre-mature under Rule 56(f).

“[I]f the losing party had a reasonable basis to believe his cause might prevail, the *Foy* exception is inapplicable.” *Id.* (citation omitted).

A district court abuses its discretion in ruling on a Rule 56 motion when the party which opposes such motion establishes how the proposed and expected discovery could preclude summary judgment. *Env't Contractors, LLC v. Moon*, 1999 MT 178, ¶19, 295 Mont. 268, 273, 983 P.2d 390, 394 (citation omitted).

The District Court awarded attorney fees to Baugh based on its **earlier determination** within its Order Granting Summary Judgment to Baugh that H2S2 had provided no evidence in support of its claims. (Doc. 166, p.5 (citing Doc. 132,

pp.14-16)). Here, even the limited information H2S2 managed to obtain independent of discovery shows that Mr. Baugh and his funders engaged in a coordinated effort the objective of which was to damage H2S2's Baseglamp project. There is more than sufficient evidence to establish a *prima facie* case of tortious interference, support each element of H2S2's tort counterclaims, and demonstrate the presence of disputed issues of fact material to H2S2's claims. This evidence was presented and discussed in detail in the District Court record. (Doc. 95, pp.5-15; Doc. 8; Doc. 81.10; Doc. 94; Doc. 94.01; Doc. 102, pp. 1-6; Doc 103.10; Doc. 121 pp. 2-18).

Moreover, H2S2 was not provided relevant discovery by Baugh that supported its claims, despite the fact that the District Court had ordered Baugh to produce the discovery, and production of the discovery was pending at the time the District Court issued its order on attorney fees. The Court's finding that H2S2 had not provided evidence was issued prematurely before completion of discovery and **only five days after** the district court had ordered Baugh to provide the withheld discovery to H2S2.

H2S2 served its First Combined Discovery Requests on Baugh in May 2022. For months, Baugh failed to produce many documents that H2S2 reasonably believed would support its counterclaims and which provided H2S2 a "reasonable basis to believe [its] cause might prevail." *Goodover*, 255 Mont. at 447, 843 P.2d at

775-76. With such reasonable belief by H2S2, based on the anticipated records and email communications from Baugh, “the *Foy* exception is inapplicable.” *Id.*

Though he had not yet produced the discovery sought by H2S2, on August 5, 2022, Baugh filed a Motion for Summary Judgment, in part, on H2S2’s counterclaims of tortious interference, civil conspiracy, and punitive damages. (Doc. 65). The discovery requested by H2S2 thus became more urgent as it was necessary and relevant to prove its counterclaims. Thus, on August 19, 2022, having sought to resolve with Baugh the discovery disputes, H2S2 filed a Motion to Compel (Doc. 81) in its continued effort to gain the discovery which H2S2 reasonably believed supported its counterclaims, including Memorandums of Understanding between Baugh and his litigation funders that were identified in Baugh’s privilege log. (Doc. 148.01, Ex 2, p. 3; Doc. 124.1, Ex. 1).

The unproduced documents requested by H2S2 included 19 categories of documents identified by H2S2 including email attachments, text messages, title commitment documents, Landowner statement, the aforementioned MOU’s, multiple emails between Baugh and his neighbors and litigation funders regarding H2S2 and BaseGlamp, and other texts and emails. H2S2 contended throughout its Motion to Compel (and its Reply) that the discovery and evidence it sought was “clearly relevant to H2S2’s counterclaims.” (*Id.*, pp.4, 7; *see also* p.16 (the documents sought are “evidence supporting H2S2’s counterclaims”); p.24 (“H2S2’s

discovery sought only relevant information necessary to prove its counterclaims and to understand and respond to Mr. Baugh's claims and defenses.'')). On November 4, 2022, after the Motion was fully briefed, the District Court partially granted H2S2's Motion to Compel, specifically ordering Baugh to produce the 19 categories of documents identified by H2S2, by November 14, 2022. (Doc. 129, pp.9-10).

Just five days after it ordered Baugh to produce the discovery, however, on November 9, 2022, the District Court granted, in relevant part, Baugh's Motion for Summary Judgment, inexplicably finding that H2S2 had not produced any evidence to support its counterclaims of tortious interference, civil conspiracy, and punitive damages. (Doc. 132, pp.14-16). The District Court issued this ruling even though it had given Baugh until November 14, 2022, to produce discovery that H2S2 reasonably believed supported its counterclaims. Because Baugh failed to timely produce the requested discovery and had not yet produced it prior to the District Court order to do so, H2S2 could not have provided the Court such evidence in support of its counterclaims prior to the District Court's summary judgment ruling. Subsequently, the District Court specifically and solely relied on its premature summary judgment findings in improperly awarding attorney fees to Baugh, stating that H2S2 "came forward with no evidence" to support the relevant counterclaims. (Order Re Fees, Doc. 166, p.5). This was in error, both because there was record evidence to support H2S2's

The District Court's ruling and order on Baugh's Motion for Summary Judgment was both contrary to the record evidence before it. It was also premature under Rule 56(f), because discovery had not yet been completed due to Baugh's failure to timely produce requested discovery, and H2S2 could not have provided adequate evidentiary support for its counterclaims.⁸ This premature ruling on summary judgment in which the court determined that H2S2 had provided no evidence in support of its counterclaims was the sole basis for the District Court's award of attorney fees to Baugh under the *Foy* exception and the award of attorney fees should be reversed.

B. The District Court Abused its Discretion When it Applied the *Foy* Equitable Exception to Award Attorney Fees to Baugh who Instigated the Litigation.

Baugh initiated the underlying action when he hired an attorney and filed his initial Complaint. Baugh was not *forced* into this litigation through no fault of his own. Instead, Baugh brought the costly litigation on himself and invited all elements of the adversarial process, including H2S2's right to file counterclaims. The District

⁸ H2S2 again asserted this issue to the Court in its subsequent motion to Compel the very documents which were the subject of the court's earlier discovery order to Baugh. (H2S2's 2nd Motion to Compel, Doc. 184 ("the [court's] deadline for Mr. Baugh to produce the compelled documents was November 14, 2022. That date – November 14, 2022 was five days after the November 9, 2022 hearing on the parties' summary judgment motions and the date the Court ruled on those motions."))

Court abused its discretion when it awarded attorney fees to Baugh, pursuant to the *Foy* exception, for his defense of H2S2's counterclaims.

The Montana Supreme Court has consistently held that the *Foy* equitable exception is not applicable for an award of attorney fees to a plaintiff “who obtained an attorney and initiated a legal action.” *Tanner*, 275 Mont. 414, 913 P.2d 641, 651 (1996); see *Jacobsen v. Allstate Ins. Co.*, 2009 MT 248, ¶21, 351 Mont. 464, 470, 215 P.3d 649, 656 (contrasting other cases where the *Foy* equitable exception was applied, “*Jacobsen* was not forced into litigation.”); *Harding*, ¶69 (“where a party chooses to institute a suit against others, an award of attorney fees to the plaintiff will normally be precluded.”); *Small v. Good* (1997), 284 Mont. 159, 164-65, 943 P.2d 1258, 1261 (finding *Foy* distinguishable because plaintiffs “were not forced to hire an attorney to help them defend against wholly meritless litigation initiated by another party” and plaintiffs “freely chose to hire an attorney to begin a legal action against the defendant”); *Newman v. Wittmer* (1996), 277 Mont. 1, 12, 917 P.2d 926, 933 (denying award of attorney fees where plaintiffs “were not forced to defend a wholly frivolous litigation, rather they initiated [the] suit”); *Goodover*, 255 Mont. 430 at 447, 843 P.2d at 775 (“*Goodover*’s position as plaintiff in this litigation . . . will preclude an award of attorney’s fees under *Foy*.”).

The Court should similarly find that Baugh is not entitled to attorney fees when he instigated the instant action. The reasoning of *Foy* and its progeny to award fees without a statutory or contractual provision was that:

the parties who were awarded attorney's fees had been forced to defend themselves in actions which could not reasonably have been seen as viable, actions in which the court was used more as an instrument of harassment than as a means to settlement of a legitimate dispute.

State ex rel. Wilson, 199 Mont. at 202, 648 P.2d at 772. Baugh was not forced into this litigation, he instigated it, and H2S2's counterclaims were reasonable and viable and should not have been dismissed on summary judgment. The Court should find that the District Court abused its discretion when awarding Baugh attorney fees pursuant to the *Foy* exception.

CONCLUSION

Appellant H2S2, LLC respectfully requests this Court reverse the District Court's grant of summary judgment to Appellee Baugh and direct the District Court to enter summary judgment in favor of Appellant H2S2, ordering that H2S2's use of its easement is not restricted to exclude access to Baseglamp. H2S2 further requests that this Court reverse the District Court's award of attorney fees to Appellee Baugh, vacating the corresponding judgment and underlying grant of summary judgment, and remanding this case for further proceedings on H2S2's counterclaims.

Dated this 28th day of April, 2023.

/s/ Leah K. Corrigan
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(e) of the Montana Rules of Appellate Procedure, I certify that this Motion is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word Version 16.72 (2023) is not more than 10,000 words, excluding table of contents, table of authorities, certificate of service, certificate of compliance, and any appendix containing statutes, rules, regulations, and other pertinent matters.

Dated this 28th day of April, 2023.

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CERTIFICATE OF SERVICE

I, Leah K. Corrigan, hereby certify that I have served true and accurate copies of the foregoing Brief – Appellant’s Opening to the following on April 28th, 2023:

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