

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

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

Plaintiffs and Appellees,

-v-

LEE LOU, LLC,

Defendant/Third-Party Plaintiff and Appellant.

-v-

ROBERT A. ROEHDER, HARRIET P. LAVERAN, MINA PEABODY, and all other persons, unknown, claiming or who might claim any right, title, estate, or interest in, or lien or encumbrance upon the real property described in the Complaint adverse to Defendant/Counterclaimant/Third-Party Plaintiff's ownership, or any cloud upon their title, whether the claim or potential claim is present, contingent, inchoate or accrued.

Third-Party Defendants and Appellees.

On Appeal from the Montana 22nd Judicial District Court, Stillwater County,
Cause No. DV 21-70, Hon. Matthew Wald Presiding

APPELLEE'S ANSWER BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This appeal arises from the District Court's proper decision to uphold both record title and the original intent of the parties who created the parcels and easement at issue in this case. Judge Wald correctly applied Montana law to grant summary judgment to the "Trout Creek Owners" based on the undisputed documents in the chain of record title which show an undisputed intent to only grant the relevant 30' Easement to the other tracts in Certificate of Survey No. 260286. The District Court also affirmed what record title showed by noting the original parties who created the relevant tracts and easements provided an Affidavit supporting the Court's interpretation.

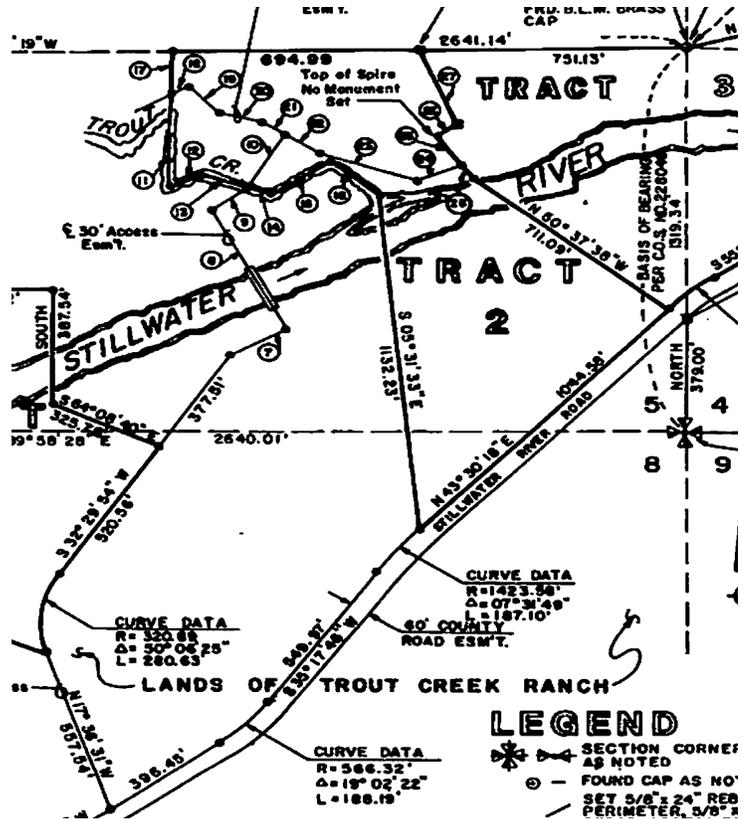
STATEMENT OF THE FACTS

The Trout Creek Ranch Partnership and its individual partners originally purchased all of the property relevant to this case from A. Joe Jenni, Jr., Callie W. Jenni, and Robert W. Jenni (the "Jennis") in 1990. (*Lee Lou's Appendix 3, at 6-8*) Prior to purchasing the relevant properties, the three sets of partners, Millard and Mina Cox (the "Coxes"), Pony and Mary Ellen Duke (the "Dukes"), and Robert Roehder, commissioned COS 260286 to create three new tracts out of the Jennis' property. (*Lee Lou's App. 15, at ¶¶ 5-6*) The three tracts were to be owned individually by each set of partners, Tract 1 to the Coxes, Tract 2 to the Dukes, and Tract 3 to Roehder. (*Id.*) Other than Tracts 1-3, the remainder of the Jennis'

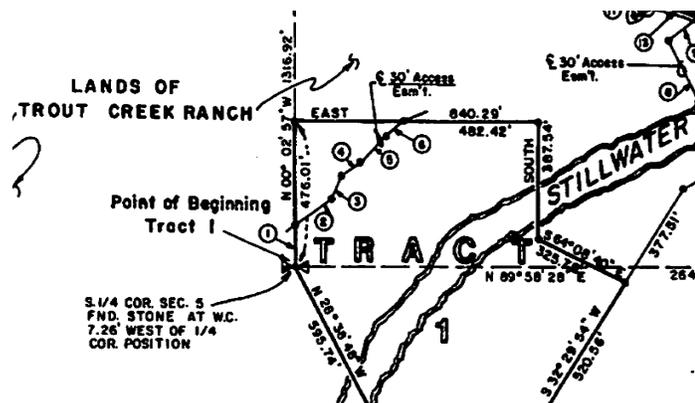
property was to be purchased by the Trout Creek Ranch Partnership. COS 260286 was finalized on January 22, 1990, while the Jennis were still the owners of the entirety of the property. (See COS 260286, Appellees' Appendix, 1).

COS 260286 depicts three separate easements:

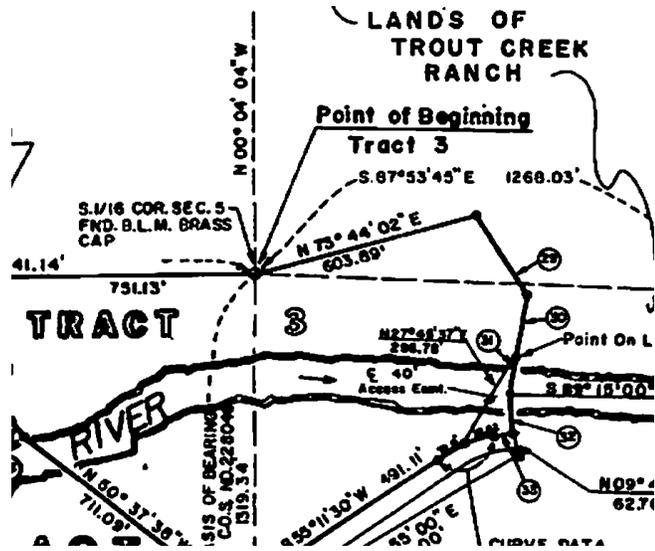
1. The "30' Easement", includes tangents 7-28 beginning at Stillwater River Road, travelling through Trout Creek Ranch, along Tract 1, up Trout Creek along Tract 2's border, across Tract 2, and then north along Tract 3 to connect to B.L.M. land. (*Id.*)



2. The "Trail Easement" is a "30' Access Easement" along tangents 1-6, connecting Trout Creek Ranch Property on either side of Tract 1. (*Id.*)



3. The “40’ Access Easement” includes tangents 29-33 and connects Stillwater River Road to Trout Creek Ranch Property north of Tract 3. (Id.)



On April 17, 1990, the deeds conveying the Trout Creek Ranch Property and Tracts 1-3 were all executed by the Jennis, consummating the sale. (*Lee Lou’s App. Nos. 3, 6-8*) Noticeably, only the Warranty Deed conveying the Trout Creek Ranch Property to the Trout Creek Ranch Partnership included the language “TOGETHER with thirty foot (30’) wide easements for ingress and egress as shown on said Certificate of Survey. (*Lee Lous’ App. 6*) Each of the three Warranty Deeds to the partners instead included language stating Tracts 1-3 were conveyed “Subject to existing rights-of-way, easements, reservations, and exceptions of record...”. (*Lee Lous’ App. 3, 7-8*) The intent of only conveying rights to the easements on COS 260286 to the Trout Creek Ranch Property and not Tracts 1-3, was so long that each partner maintained their interest in Trout Creek Ranch, they could utilize the easements. (*Lee Lou’s App. 15, ¶ 15*)

After owning the properties for a short period of time, Trout Creek Ranch and its partners agreed to grant easements to Tracts 1 and 2, because they needed access from Stillwater River Road. (*Lee Lou's App. No. 15*, ¶ 17) Tract 3 abuts Stillwater River Road, so is not landlocked. At the time, Roehder planned to build a bridge to the north side of his property, was rarely present because he lived in Europe, and was likely to sell his interest in Trout Creek Ranch. (*Lee Lou's App. No. 15*, ¶ 16, 18) So, the parties agreed not to grant access to the easement to Tract 3, and to only grant easements to Tracts 1 and 2. (*Lee Lou's App. No. 15*, ¶ 17, 19, 20.)

The parties consummated their intent via Quitclaim Deeds amongst all of the partners and owners of Tracts 1-3, which clearly grant the Coxes and Dukes, as owners of Tracts 1 and 2, their property “together with thirty foot (30’) wide easement for ingress and egress as shown on [COS 260286]...” ((*Lee Lou's App. 9, 11, 13, 14*) Noticeably, the Quitclaim Deeds executed to Roehder as owner of Tract 3, was granted without “together with” language and expressly stated Tract 3 was only granted “Subject to existing rights-of-way, easements, reservations and exceptions of record.” (*Lee Lou's App. 10, 12*)

Nowhere in record title was Tract 3 ever granted a right in the easements depicted in COS 260286. This was purposeful. The Trout Creek Owners intended the road easements to be used by the owners of the Trout Creek Ranch, to be able to

reach the various parts of the Ranch across the individual tracts, and that the Coxes and Dukes have access to Tracts 1 and 2, respectively. (*Lee Lou's App. 15*, ¶ 20)

As the partners anticipated, Roehder sold his interest in the Trout Creek Ranch a few years later, but kept his interest in Tract 3 until his death. (*Id.*, ¶ 22) Roehder was granted access to the north side of his property only by license. (*Id.*, ¶ 23) After Roehder passed away in Europe, there were disputes over his Estate, and Roehder's Estate failed to make the tax payments on Tract 3. (*Id.*, ¶ 24)

When Roehder's Estate failed to pay real property taxes, Zinvest LLC, purchased Tract 3 by Tax Deed. (*Lee Lou's Brf. at 2*) Zinvest is a sophisticated party which purchases properties via the tax deed process. (*See Trout Creek's App. 2*, emails between Zinvest LLC, through Zainya Zimmerer, and Stillwater County Treasurer¹) At that time, Zinvest was making tax payments on 43 other properties in Stillwater County. (*Id.*) After it acquired Tract 3 by Tax Deed, Zinvest transferred to Lee Lou Lee Lou, LLC, which is owned by the same individuals. (*Record Doc. # 22, Affidavit of Zainya Zimmerer dated May 11, 2022, at ¶ 4²*)

The Mary Ellen Duke Trust, The Mary Ellen Duke Trust, Dated March 13, 1997, Millard Cox, Mina Cox, Harriet P. Laveran, Mina Peabody, and Trout Creek

¹ Previously attached as Exhibit H to Record Doc. # 25, Plaintiffs' Combined Response Brief in Opposition to Lee Lou, LLC's Motion for Partial Summary Judgment & Brief in Support of Plaintiffs' Motion for Summary Judgment, dated June 1, 2022.

² Originally filed with Record Doc. # 24, Lee Lou's Motion for Partial Summary Judgment and Brief in Support, of the same date.

Ranch are all original parties, or family successors, to the creation of the relevant tracts, and the conveyances related thereto (together they are all referred to herein as the “Trout Creek Owners”). (*Lee Lou’s App. 15, at 5*) The Trout Creek Owners retain the only actual knowledge of the intent of the parties at the time of any of the relevant documents in record title. (*Lee Lou’s App. 15, at 13-14*) The Trout Creek Owners’ were granted summary judgment by the District Court on December 30, 2022, because all record title documents and their accompanying affidavit evidence the clear intent that Tract 3 was only to be burdened by the relevant easements on COS 260286, not benefitted thereby. (*Lee Lou’s App. 15, at 14*)

STANDARD OF REVIEW

The District Court’s determination on summary judgment is reviewed *de novo*, under the same standards set forth under Mont.R.Civ.P., Rule 56 as the District Court. *Singleton v. L.P. Anderson Supply Co.* (1997), 284 Mont. 40, 43, 943 P.2d 968, 970. If the District Court reached the correct result, then this Court shall uphold the District Court's judgment regardless of the reason(s) for its decision. *Id.*, at 44, 943 P.2d at 971.

SUMMARY OF ARGUMENT

The District Court correctly ruled the 30’ Wide Easement does not benefit Tract 3 because the reading the relevant conveyances and COS 260286 together, the original parties expressly granted only the Trout Creek Ranch Property, Tract 1, and

Tract 2 interests in the 30' Easement. This interpretation is clear because those three properties were granted "together with" the relevant 30' Easement. Conversely, Lee Lou's Tract 3 was only granted "subject to" the 30' Easement, meaning it is burdened by the Easement for the benefit of the Trout Creek Ranch Property, Tract 1, and Tract 2. Mary Ellen Duke's Affidavit (one of the original partners to the relevant conveyances) undisputedly confirms that same intent. The undisputed factual bases and applicable Montana law require affirming summary judgment in favor of the Trout Creek Ranch Owners.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT BECAUSE THE UNDISPUTED FACTS PROVE LEE LOU'S TRACT 3 IS ONLY BURDENED BY THE 30' EASEMENT AND HAS BEEN GRANTED NO BENEFIT THEREIN.

A. COS 260286 does not grant any easements because it does not reasonably identify any easement's scope, contains no granting language, and it cannot grant an easement because all Tracts relevant to COS 260286 were owned by the same party at the time of its recording.

Review of the relevant chain of record title in this case finds there has never been any express grant of easement rights to Tract 3 since its initial creation in COS 260286, in January 1990. To the contrary, there has been clear express grants of the 30' Easement to the Trout Creek Ranch Property, Tract 1, and Tract 2. Faced with this undisputed evidence, the District Court granted summary judgment to the Trout Creek Ranch Owners because 1) the "only legal conclusion possible based upon

these facts is that COS 260286 by itself does not constitute a conveyance that granted easement rights” (*Lee Lou’s App. 1*, at 10), and 2) the relevant “deeds, when combined with COS 260286” express “‘clear and unambiguous grantor intent’ [...] that Tract 1 and Tract 2 are dominant estates with easements over Tract 3, and that Tract 3 is the servient estate lacking such easement rights.”³ (*Id.*, at 12)

Lee Lou’s argument against this necessary conclusion is boiled down to an unsupportable argument: because there is an easement depicted on a plat including Tract 3, that easement benefits Tract 3. However, the rationale of that argument does not comply with Montana law. The District Court’s ruling based on its review and interpretation of the record title documents was correct, and should be affirmed by this Court.

1. The dominant and servient tenements are not ascertainable from just COS 260286, but it is clear from the relevant granting deeds that Tract 3 was never intended to be a dominant tenement with regard to the easements depicted on COS 260286.

Nothing on COS 260286 describes the dominant or servient tenements of the depicted easements. Thus, we need to review the relevant granting deeds to determine the scope of such easements. Yet, Lee Lou argues analysis of COS 260286 gives the “ ‘obvious’ conclusion” the 30’ Easement “benefitted Tract 3 and burdened the Trout Creek Ranch Property.” (Opening Brief at 10) In making its

³ It seems now that Lee Lou admits the Trout Creek Ranch Property enjoys use of the easements, so we will not focus on that issue:

argument, Lee Lou chooses to only embed portions of the easement depiction in its Brief and ignores those portions of the 30' Easement which don't touch Tract 3, provide no access or value to Tract 3, and have no possible connection or benefit to Tract 3 at all. This slight of hand proves the opposite of Lee Lou's argument. COS 260286, taken as a whole, simply is not detailed enough to grant any easements, particularly to Tract 3.

Review of the easements depicted and described by the 33 tangents on COS 260286 shows that none of the three separate easements would solely benefit Tract 3. The Trail Easement only benefits the Trout Creek Ranch Property and only crosses Tract 1. The 40' Easement would only benefit the Trout Creek Ranch Property and solely crosses Tract 3, connecting Stillwater River Road to Trout Creek Ranch Property. Finally, the 30' Easement does not simply lead to Tract 3, instead it connects Stillwater River Road to BLM property North of Tracts 2 and 3. If it was meant to provide access solely to Tract 3, it would end at Tract 3. Instead, tangents 25-28 run over the length of Tract 3's western border north of the river. Based on all of the above, the only logical conclusion is that the 30' Easement was originally only intended to benefit the Trout Creek Ranch Property, and to burden Tracts 1-3. The Trout Creek Ranch Property is the only property benefitted by each of the 30' Easement, Trail Easement and 40' Easement. This conclusion, of course, complies

with Mary Ellen Duke's Affidavit regarding the parties' intent at the time. (*Lee Lou's App. 15*, ¶ 11)

Later the partners of Trout Creek Ranch all executed Quitclaim Deeds to each other, in both their individual capacity as owners of their respective tracts, but as also as individual partners in Trout Creek Ranch. (*Lee Lou's App. 9-14, & 15*, at ¶ 19 and 21) Comparing the Quitclaim Deeds granted to Tracts 1 and 2 versus the Tract 3 Deeds, the parties' intent to grant access only to Tracts 1 and 2 over the 30' Easement and not to Tract 3 is unquestionable:

Example of Tracts 1-2 Quitclaim Deeds

THIS INDENTURE, made the 27th day of July, 1990, between ROBERT A. ROEHDER, a single man, of Munich, Germany, the party of the First Part and MILLARD COX and MINA J. COX, husband and wife, as joint tenants with right of survivorship, of Westport, Kentucky, the parties of the Second Part,

WITNESSETH: that the said party of the First Part for and in consideration of One Dollar and other valuable consideration (\$1.00 o.v.c.) to him in hand paid by the said parties of the Second Part receipt of which is hereby acknowledged; do hereby convey, remise, release and forever quitclaim unto the said parties of the Second Part, and to their heirs, and assigns, all right, title and interest in and to the following described real estate, situated in the County of Stillwater, State of Montana, to-wit:

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

(Lee Lou's App. 13)

Example of Tract 3 Quitclaim Deeds

THIS INDENTURE, made the 27th day of July, 1990, between MILLARD COX and MINA J. COX, husband and wife, as joint tenants with right of survivorship, of Westport, Kentucky, the parties of the First Part and ROBERT A. ROEHDER, a single man, of Munich, West Germany, the party of the Second Part,

WITNESSETH: that the said parties of the First Part for and in consideration of One Dollar and other valuable consideration (\$1.00 o.v.c.) to them in hand paid by the said parties of the Second Part receipt of which is hereby acknowledged; do hereby convey, remise, release and forever quitclaim unto the said party of the Second Part, and to his heirs, and assigns, all right, title and interest in and to the following described real estate, situated in the County of Stillwater, State of Montana, to-wit:

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 21.004 acres more or less;

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

(Lee Lou's App. 12)

Lee Lou's argument to the contrary is simply not supportable by any reasonable interpretation of these documents. There could be no other purpose for these later Quitclaim Deeds other than to grant access over the 30' Easement to Tracts 1 and 2, and to evidence that Tract 3 was burdened by the same. By that time, the Trout Creek Ranch Property (and its partners, so long as they owned it) already enjoyed access over the entirety of the 30' Easement to the B.L.M. property above Tracts 2

and 3. Such access was provided via Trout Creek Ranch Partnership's original Warranty Deed's language granting "TOGETHER with thirty foot (30') wide easements for ingress and egress as shown on said Certificate of Survey":

See legal description attached hereto as Exhibit "A", EXCEPTING THEREFROM Tracts 1, 2 and 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, TOGETHER with thirty foot (30') wide easements for ingress and egress as shown on said Certificate of Survey.

(*Lee Lou's App. 6*) This Deed also contained a reference to "easements" rather than just an easement (the later Quitclaim Deeds contained only reference to a single "easement") which further evidenced all the easements depicted on COS 260286 were originally only intended to benefit the Trout Creek Ranch Property. (*Id.*)

Lee Lou offers new authority, but it is still contrary to its position and further illustrates Lee Lou's error. In *Wilkinson, LLC v. Scott & Cindy Erler, LLP*, 2021 MT 177, ¶ 3, 404 Mont. 541, 491 P.3d 704, the relevant easement was expressly granted and conveyed by the terms "[R]elease and quitclaim unto *the Grantee, and its successors*, an easement and right of way 66 feet in width, being 38 feet on each side of the centerline". The conveyance also referred to the easement "as shown on the attached plat" to further describe the easement. *Id.* The plat involved only showed two relevant parcels, Government Lot 3 and 7, and the easement ran from Bear Gulch Road, directly across Government Lot 3, and ended on Government Lot 7. The *Wilkinson* Easement is nothing like the 30' Easement here, which twists and

turns throughout the Trout Creek Ranch Property and Tracts 1-3, and ends on BLM property. Lee Lou misrepresents the easement path shown on COS 260286 by claiming it simply goes across “Trout Creek Ranch Property to the western boundary of Tract 3...”⁴ and showing only portions of the 30’ Easement as shown on COS 260286. Most noticeably, Lee Lou cuts off that portion of COS 260286 which shows tangent 27 running along Tract 3’s western border and ending on BLM land. Tangents 25-27 all run along Tract 3’s border to provide access to BLM land. At best, the depicted path is ambiguous as to its dominant and servient estate, but any such ambiguity would be corrected by the language of the conveying documents.

Indeed, in *Wilkinson* this Court did exactly what Judge Wald did when granting summary judgment, it reviewed both the conveying document (the Easement Document) and the plat referenced therein to determine the scope of the easement:

...the description contained in the Easement Document clearly depicts Government Lot 3 as the servient estate and adjacent properties—here, Government Lot 7—as the dominant estate. We conclude the dominant and servient estates are ascertainable with reasonable certainty from the Easement Document and the plat.

Wilkinson, @ ¶ 14. Here, COS 260286’s depiction of the 30’ Easement contains essentially no information regarding the scope of the easement, including what is the

⁴ Appellant’s Brf. at 9.

servient and dominant estate. The route itself would only logically benefit the Trout Creek Ranch Property, as it leads over Tract 3 to the BLM land connecting other Trout Creek Ranch Property. *Wilkinson* lends no new authority to disturb the District Court's ruling as it also relied on the clear granting language of the conveying documents. Lee Lou's first argument still fails. As the District Court held "although Tract 3 appears on COS 2360286, the COS does not clearly show that Tract 3 is the dominant estate." (*Lee Lou's App. 1, at 9*) COS 260286 cannot, as a matter of law, be considered a conveyance of any easement rights whatsoever.

2. It would be legally impossible for COS 260286 to give notice of any easement's use or necessity because the Jennis owned all of the relevant property at the time of its recording and because Tract 3 borders Stillwater River Road, and thus, does not need access.

Lee Lou still ignores the legal impossibility of its claim that an easement was created with COS 2602876 in January 1990. If a landowner attempts to create an express easement over one parcel in favor of another, the purported interest is a nullity; at most, the servitude exists only momentarily before merging into the fee. *Broadwater Dev., LLC. v. Nelson*, 2009 MT 317, ¶ 36, 352 Mont. 401, 219 P.3d 492. (citations omitted) Since the relevant real property was all "owned entirely by the Jennis until April 17, 1990" the existence or use of an easement until the Warranty Deeds was filed is a legal impossibility. (*Lee Lou's App. 1, at 10*) *See* Mont. Code Ann. § 70-17-105. The Jennis could not own an easement over their

own land. If COS 260286 did not create an easement, the easements depicted in COS 260286 could only be created by reference in the deeds when the Jennis transferred the properties on April 17, 1990. Lee Lou cannot point to any other document that conveys Tract 3 a right to an easement, and thus, Tract 3 enjoys no such appurtenance.

Tract 3 also has no need for an easement for access. The entire southern boundary of Tract 3 borders Stillwater River Road. So, it is unclear how Lee Lou can claim the 30' Easement is necessary to access Tract 3. To start, Lee Lou only claimed “an express easement arising out of the Certificate of Survey, confirmed by the surveyor and Stillwater County”⁵ at the District Court and did not argue it had an easement by necessity.⁶ Thus, Lee Lou cannot raise such an argument now. “It is well established that [this Court] does not consider new arguments or legal theories for the first time on appeal” and is “especially wary of new arguments in the context of summary judgment.” *Pilgeram v. GreenPoint Mortg. Funding, Inc.*, 2013 MT 354, ¶ 20, 373 Mont. 1, ¶ 20, 313 P.3d 839, ¶ 20 and 24.

Even if Lee Lou made that argument with the District Court, there can be no easement by necessity. “[S]trict necessity [...] must exist at the time the tracts are

⁵ Lee Lou’s Reply to Plaintiffs’ Objection to Motion for Partial Summary Judgment and Response to Plaintiffs’ Motion for Summary Judgment, dated June 21, 2022, at 4.

⁶ This is after explaining: “An easement may be created by an instrument in writing (express easement), by operation of law (such as easements implied from necessity or existing use), by prescription, by condemnation, or by common-law dedication. *Yellowstone River, LLC v. Meriwether Land Fund LLC*, 2011 MT 263, ¶ 25, 362 Mont. 273,264 P.3d 1065.”

severed from the original ownership *and* at the time the easement is exercised." *Yellowstone River, Ltd. Liab. Co. v. Meriwether Land Fund I, Ltd. Liab. Co.*, 2011 MT 263, ¶ 46, 362 Mont. 273, 264 P.3d 1065 (citations omitted). Strict necessity refers only to when there can "be no practical access to a public road from the landlocked parcel except across lands that were formerly in common ownership" (*Id.*) and when " shutting off a tract of land and thus rendering it unusable." *Graham v. Mack* (1984), 216 Mont. 165, 175, 699 P.2d 590, 596, citing 2 *Thompson on Real Property* (1980 ed.) sec. 351. Tract 3 is not landlocked, it has always had access to Stillwater River Road.

Lee Lou is not able to support its prior arguments under Montana law or the clear and convincing undisputed facts of this case, and thus, resorts to new and equally unfounded arguments. This Court should dismiss these arguments pursuant to the undisputed facts and legal precedent above. The District Court should be affirmed.

B. The Deeds conveying Tract 3 only contain language to show it is burdened by the 30' Easement and contain no language to grant an interest in the 30' Easement.

"This Court has established, over a multitude of holdings, that "'subject to' language in a document of conveyance does not create an easement." *See Blazer v. Wall*, 2008 MT 145, ¶ 28, 343 Mont. 173, 183 P.3d 84 (emphasis added), citing *Bache*, 267 Mont. at 286, 883 P.2d at 821 (citing *Wild River Adventures v. Board of*

Trustees, 248 Mont. 397, 401, 812 P.2d 344, 346--47 (1991)) (other citations omitted). Lee Lou does not address this clear and long held rule and instead makes a circuitous argument that boilerplate appurtenance language granted the 30' Easement to Tract 3. The Court must reject such arguments as they are unfounded by law or and unsupported by facts in this case.

First, Lee Lou's claim that "the 30' easement is located on the Trout Creek Ranch Property and not on Tract 3"⁷ is completely false. As discussed above, tangents 25-27 all run over Tract 3 to provide access to B.L.M. land. Ignoring this part of the Easement's path and misrepresenting the District Court's consideration belies Lee Lou's arguments. The facts of record don't support Lee Lou's claims.

Lee Lou's second point fails for similar reasons. The record shows the attorneys drafting the deeds to all of the relevant tracts took care to expressly grant the Trout Creek Ranch Property, Tract 1, and Tract 2 rights to the 30' Easement using "together with" language, while Tract 3 was only ever granted "subject to" such rights. (*Lee Lous' App. Nos. 9, 11, 13, 14*) It is hard to imagine a more clear intent than simultaneous deeds between three separate parties, all in the exact same form, with the only exception being Tracts 1 and 2 are expressly granted their properties "together with a thirty foot (30') wide easement for ingress and egress as shown on [COS 260286]" (*Lee Lous' App. Nos. 9, 11, 13, 14*) and Tract 3's two

⁷ Lee Lou's Brf. at 13.

deeds both lack such language. The parties clearly intended that Tract 3 would only be burdened by the 30' Easement and the other tracts would benefit from it.

Lee Lou's argument that the boilerplate appurtenance language granted a right to the 30' Easement fails for all of the obvious reasons discussed above. It is clear the boilerplate provision means nothing more than its normal reference to conveyances of record because it is not part of the legal description at all. The 30' Easement also didn't even exist of record when Tract 3 was first conveyed because the Jennis still owned all of the relevant tracts. Therefore, the easement could not be created with COS 260286 as the Jennis would own interests in what Lee Lou claims is the dominant and servient estate. *See* Mont. Code Ann. § 70-17-105. Lee Lou essentially admits its theory doesn't work by stating "*Clark* is distinguishable from this case on the basis that *Clark* concerned more explicit easement language..."⁸ and its attempt to connect these cases ignores the glaring material differences in facts.

"It is axiomatic...that an easement appurtenant has not been "adequately described" when the identity of the dominant tenement has been omitted and cannot be ascertained from the documents of conveyance." *Blazer v. Wall*, 2008 MT 145, ¶ 51, 343 Mont. 173, 183 P.3d 84, citing *Lennertz v. Yohn*, 118 Ind.App. 443, 79 N.E.2d 414, 417 (1948). The "grantor's intent to create an easement burdening particular property for the benefit of another must be clearly and unmistakably

⁸ Lee Lou's Brf. at 14.

communicated.” *Blazer*, at ¶ 43 (emphasis added). COS 260286 does not clearly or unmistakably create any easement for the benefit of Tract 3.

The facts are simple here, the 30’ Easement was expressly granted to benefit the Trout Creek Ranch Property, and later Tracts 1 and 2. Tract 3 was always expressly burdened by the 30’ Easement pursuant to the language of all of the relevant deeds’ “subject to” language:

The words "subject to" used in their ordinary sense, mean subordinate to, subservient to or limited by. There is nothing in the use of the words "subject to", in their ordinary use, which would even hint at the creation of affirmative rights or connote a reservation or retention of property rights. "Subject to" wording is commonly used in a deed to refer to existing easements, liens, and real covenants that the grantor wishes to exclude from warranties of title.

Wild River Adventures v. Board of Trustees, 248 Mont. 397, 401, 812 P.2d 344, at 346-47 (1991). Lee Lou takes no effort to explain why only Tract 3 would be granted “subject to” and the other three properties would all be expressly granted “together with a thirty foot (30’) wide easement for ingress and egress as shown on [COS 260286]” (*Lee Lous’ App. Nos. 9, 11, 13, 14*) Instead, Lee Lou simply argues against the many holdings of this Court. If the Court were to accept Lee Lou’s arguments, it would overturn years of precedent which currently brings clarity to similar title issues. The District Court properly applied precedent to the relevant documents in record title and denied Lee Lou’s attempts to create granting

language, where it is clear the parties never intended to grant Tract 3 interest in the 30' Easement.

C. The District Court did not insert or modify any language related to the relevant deeds, it properly interpreted the clear written intent.

Lee Lou's confusing statement that "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"⁹ is false. That argument was never made and is not true pursuant to the undisputed facts of record. What the Trout Creek Ranch Owners rightfully argued was all of the relevant deeds are found in the chain of title for Tract 3, which provided constructive notice to Zinvest and Lee Lou, that Tract 3 was burdened by the easements depicted on COS 260286, and that Tracts 1-2 benefitted from such easements. *See e.g. Earl v. Pavex, Corp.*, 2013 MT 343, ¶ 23-25, 372 Mont. 476, 313 P.3d 154, and ¶25:

[e]very conveyance of real property acknowledged or proved and certified and recorded as prescribed by law, from the time it is filed with the county clerk for record, is constructive notice of the contents thereof to subsequent purchasers and mortgagees.

See also Mont. Code Ann. § 70-21-302(1); *see also* Mont. Code Ann. § 70-21-301.

If Zinvest and Lee Lou properly reviewed record title when acquiring Tract 3 by tax deed from under Roehder's Estate, they would have seen the clear language

⁹ Lee Lou's Brf. at 16.

in record title showing Tract 3 was only conveyed “subject to” easements in COS 260286.

Roehder could also not be deprived of something he never intended to own. It was always Roehder’s and the other original Trout Creek Ranch partners’ intent that the road easements were to be used by Trout Creek Ranch Partnership, and that the Coxes and Dukes would be able to access their homes on Tracts 1 and 2. (*Lee Lou’s App. 15, at ¶ 20*) While Lee Lou may want additional access now to maximize its return on its tax deed purchase, that was not a concern when Roehder and the other parties created the tracts, recorded COS 260286, and executed the relevant deeds providing constructive notice to the world of their intent not to provide additional easements to Tract 3. Again, Lee Lou’s argument fail to explain any rational finding, other than what the District Court already determined.

II. EVEN IF RECORD TITLE CONTAINED AN AMBIGUITY, MARY ELLEN DUKE’S UNREFUTED AFFIDAVIT IS THE ONLY RELEVANT EXTRINSIC EVIDENCE AND FULLY SUPPORTS JUDGE WALD’S RULING.

Lee Lou concludes its Brief by opining on the intents and thoughts of Robert Roehder, after it purchased Tract 3 out from under his Estate through the tax deed process. Lee Lou does so while arguing the “District Court erred in its consideration of [...] extrinsic evidence,”¹⁰ including the Affidavit of Mary Ellen Duke. Lee Lou’s

¹⁰ Lee Lou’s Brf. at 17.

hypothetical assertions of what Roehder may have wanted or not wanted are irrelevant and not facts for consideration here or by the District Court. Indeed, one would assume Roehder would not have wanted Lee Lou to now own his property, rather than it going to his daughter. However, Lee Lou also falters by claiming the Court “improperly engaged in evaluating credibility and assigning weight to disputed evidence at the summary judgment level.”¹¹

The District Court did not weigh the extrinsic evidence submitted by the parties, nor did it invade the province of the fact finder. The District Court instead discussed the obvious questions of relevance relating to the extrinsic evidence. It rightfully found that only a person with personal knowledge of the events surrounding the execution of the documents and the intent of the parties, would be the only appropriate extrinsic evidence to consider, if any. As a kicker, such evidence supported the District Court’s interpretation of the documents in record title.

“[A]n affidavit from someone who was directly involved in the transactions at issue” is useful in determining intent. Lee Lou’s submitted letter from a surveyor “not actually involved in creating COS 260286” and affidavits of Lee Lou’s owners who “provides no information that is not provided in the COS and deeds themselves” have no bearing on the intent of the documents at issue. (*Lee Lou’s App. 1, at 13-*

¹¹ Lee Lou’s Brf. at 19.

14) Mary Ellen Duke was one of the original partners in Trout Creek Ranch who was not only involved with the commissioning of COS 260286, but was a named party in most of the relevant Deeds before the Court for interpretation. (*Lee Lou's App. 1, at 13, and 15, at ¶ 2, 5-6, 14, 19-20*) Despite the obvious probative value from Mary Ellen's knowledge in determining the intent of the original documents, Lee Lou calls Mary Ellen's Affidavit "self-serving"¹² while ignoring the fact that Lee Lou initially submitted a letter of an unrelated surveyor in support of its own Motion for Partial Summary Judgment. The surveyor admittedly "was not actually involved in creating COS 260286, and nothing in his letter explains why he would have any knowledge whatsoever regarding the easements that cannot be gleaned from the documents themselves" (*Lee Lou's App. 1, at 14*) Lee Lou also submitted "self"-serving" affidavits of its owners providing recitations, and at times spin, regarding the state of record title and Google Earth photos.¹³

Mont.R.Civ.P., Rule 56(e) states that supporting and opposing affidavits in the summary judgment context "shall be made on personal knowledge, [and] shall set forth facts as would be admissible in evidence..." Affidavits made without personal knowledge and based on hearsay should not be considered on summary

¹² Lee Lou's Brf. at 16.

¹³ See Record Doc. #22, Affidavit of Zainya Zimmerer dated May 3, 2022 (filed with initial Motion for Partial Summary Judgment); and Affidavit of Brenda Zimmerer dated June 20, 2022, attached to Record Doc. #28 (Reply/Response Brief).

judgment. *PPL Mont., Ltd. Liab. Co. v. State*, 2010 MT 64, ¶ 92, 355 Mont. 402, 229 P.3d 421.

Of the extrinsic evidence submitted by the parties, only Mary Ellen Duke's Affidavit is made on personal knowledge and not based on hearsay, and thus, is the only extrinsic evidence the District Court should have considered in making its summary judgment ruling, if any. The Court did not weigh the extrinsic evidence, it considered the only evidence it should have considered under Mont.R.Civ.P., Rule 56(e). Upon such consideration, it found Mary Ellen Duke's personal knowledge of the circumstances and intent in creating the relevant tracts and easements supported the Court's interpretation of the documents. That logical conclusion is because the parties drafted the documents to comply with their intent through attorneys using language in a way this Court has defined through years of case law. The District Court's mention that extrinsic evidence supported its interpretation simply cemented a ruling already properly made.

CONCLUSION

The District Court's Order correctly applied Montana law to the undisputed facts in record title and correctly ruled the 30' Easement is for the benefit of the parties to whom it was granted by Deed based on the clear language in the conveyances of record title. The District Court also noted, correctly, that the only

legitimate extrinsic evidence based on personal knowledge, supported the Court's interpretation of the documents.

To reverse the District Court's ruling would not only be contrary to Montana law, but it would also create a quagmire of subjective tests to analyze drawings on plats, surveys, and other non-descriptive information to try to determine real property rights in this State. The Court has created good rules which require reasonable clarity to burden citizens' real property rights. Under these rules, Lee Lou makes an untenable argument which cannot be supported by the undisputed facts of record. The District Court's ruling should be affirmed and Lee Lou's appeal should be denied.

RESPECTFULLY SUBMITTED this 6th day of June, 2023.

MOULTON BELLINGHAM PC

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1997, MILLARD COX, MINA COX,
TROUT CREEK RANCH, HARRIET P.
LAVERAN, & MINA PEABODY

CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced, with left, right, top, and bottom margins of one inch; and that the word count calculated by Microsoft Word is 5,744 words, excluding the Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service.

/s/ *Brandon JT Hoskins*

BRANDON JT HOSKINS

4843-1662-2758, v. 1

CERTIFICATE OF SERVICE

I, Brandon James Tyler Hoskins, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 06-06-2023:

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