

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0124

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CRAIG BAUGH,

Plaintiff and Appellee

v.

H2S2 LLC, a Montana Limited Liability Company,

Defendant and Appellant,

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**APPELLEE'S RESPONSE BRIEF**

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On appeal from the Montana Eleventh Judicial District Court, Flathead  
County, Montana  
Cause No. DV-21-754A

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## I. STATEMENT OF THE ISSUES

1. Did the District Court correctly conclude that H2S2's use of the access and utility easement on Baugh's property was not within the scope of the grant and will overburden Baugh's property?
2. Did the District Court correctly conclude that Baugh was entitled to the attorney's fees he incurred in defending against H2S2's intentional interference, civil conspiracy, and punitive damages counterclaims under the *Foy* exception after the court found H2S2 provided no evidence for these claims?

## II. STATEMENT OF THE CASE

This case involves an express twenty foot (20') wide access and utility easement on Baugh's property (the "Easement") located at 763 Lupfer Road in Whitefish, Montana<sup>1</sup> ("Tract 1"). Tract 1 is located in a remote, forested, rural residential area 20 minutes north and outside of city limits. In 2020, H2S2 purchased the property adjacent to Tract 1 located at 767 Lupfer Road ("Tract 2") and began using the Easement for access to develop Tract 2 with BaseGlamp, a commercial

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1. Baugh's property is more particularly described as Tract 1 of Certificate of Survey No. 17458, that portion of the Northwest Quarter of Section 1, Township 31 North, Range 23 West, P.M.M., Flathead County, Montana ("Tract 1").

“glamping” campground. Before H2S2 purchased Tract 2, the Easement was used to access a single-family residence.

H2S2 did not approach Baugh about using the Easement for its development before purchasing Tract 2 or beginning construction of BaseGlamp. After Baugh began to experience trespass on Tract 1 outside of the Easement and increased traffic, dust, and noise on the Easement by H2S2, he filed suit for declaratory and injunctive relief. H2S2 countersued Baugh and, over Baugh’s objection, later amended its counterclaims to assert tortious interference, civil conspiracy, and punitive damages claims against Baugh.

During discovery, H2S2 was compelled by the District Court to produce documents showing the extent of its development plans. Ten months after the complaint was filed, H2S2 served its first written discovery requests on Baugh, including requests aimed at Baugh’s funding of this suit that the District Court had already determined to be irrelevant. After the summary judgment motion deadline and five weeks after it received Baugh’s discovery responses, H2S2 sent a single letter to Baugh alleging deficient discovery production. Five days later, H2S2 filed a motion to compel. H2S2 did not request that the District Court postpone summary judgment under M.R.Civ.P. 56(f).

The District Court denied H2S2’s summary judgment motion and granted Baugh’s motion on Baugh’s easement and trespass claims and H2S2’s tort and

punitive damages counterclaims. The Court found that H2S2 had exceeded the scope of and overburdened the Easement and failed to present any evidence to support its tortious interference, civil conspiracy, and punitive damages counterclaims. Upon Baugh's subsequent motion for attorney fees, the District Court found H2S2's tort and punitive damages counterclaims to be frivolous and awarded Baugh his fees incurred in defending against these counterclaims under the *Foy* exception.

H2S2 limits its appeal to challenging the District Court's summary judgment and attorney fee rulings.<sup>2</sup>

### **III. STATEMENT OF FACTS**

#### **A. Background on Tract 1, Tract 2, and the Easement.**

On August 29, 1983, Baugh purchased a 20-acre property known as Lot 7, and, on August 31, 1993, purchased a neighboring 20-acre property known as Lot 8. (Doc. 65, Exs. 1-3) When Baugh purchased Lot 8, there was a 60-foot ingress and egress easement located on Lot 7's western boundary. (Doc. 65, Ex. 2) In 2006, Baugh had Lots 7 and 8 surveyed and rotated the lots by 90 degrees to create Tract 1 and Tract 2 via a boundary line adjustment, as reflected in Certificate of Survey No. 17458 ("COS"). (Doc. 65, Ex. 4; Second Affidavit of Craig Baugh, ¶ 4) Baugh

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2. Baugh notes that H2S2 did not attach original copies of these District Court orders to the *Notice of Appeal*, but rather, edited copies with certain passages highlighted by its counsel.

has lived on the property now known as Tract 1 since 1985, for 37 years. (Doc. 65, Second Affidavit of Craig Baugh, ¶ 2).

The COS depicts an express “20’ wide access and utility easement on existing road,” located near the northern boundary of Tract 1. (Doc. 65, Ex. 4) Before H2S2 bought Tract 2, the “existing road” depicted on the COS was a gravel, two-track, winding lane, less than 14 feet wide. (Doc. 65, Ex. 20; Doc. 65, Ex. 10, H2S2 Depo., Tr., p.153) Baugh used the road to selectively cut trees and firewood on Tract 2, which was undeveloped at the time. (Doc. 65, Second Affidavit of Craig Baugh, ¶ 11) Baugh intended to build a single-family home and barn on Tract 2 and either live there or sell it. (*Id.*, ¶ 4) There are no commercial campgrounds or lodging facilities in Baugh’s Lupfer Road rural neighborhood. (*Id.*, ¶ 44)

Tract 1 contains Baugh’s single-family home and is characterized by mature forest and a large meadow. (*Id.*, ¶ 19; Doc. 65.06, Ex. 28, p.8) Like Tract 1, Tract 2 is rural, remote, and forested in character, as are the few properties that surround Tract 2, which are either undeveloped or developed with single-family homes. (Doc. 65, Second Affidavit of Craig Baugh, ¶ 4; Doc. 104, Ex. 39) The area is home to grizzly bears and other wildlife. (Doc. 65.07, Ex. 29)

In 2006, Baugh received water and sewage sanitation approval from the Montana Department of Environmental Quality “for one single family dwelling” and an approach permit for a single driveway from Flathead County. (Doc. 65, Exs. 5-6)

In 2019, Baugh completed construction of a barn on Tract 2 but then decided to sell the property after he determined that he was no longer physically or financially capable of building a home on the property. (Doc. 65, Second Affidavit of Craig Baugh, ¶ 11)

Baugh listed Tract 2 for sale on his own after he was unable to find a realtor who he trusted to help him find a buyer that would be a good steward of the land and good neighbor to him. (*Id.*, ¶ 12) Baugh marketed the property as a rural residential property, not as a commercial or subdivision development opportunity. (*Id.*) Baugh interviewed a few prospective buyers for Tract 2, but ultimately decided to sell the property to Florian and Diane Skyland who assured Baugh they intended to personally reside on the property for a long time and were not interested in developing it further. (Doc. 65, Second Affidavit of Craig Baugh, ¶ 13)

After closing on Tract 2 on October 1, 2019, the Skylands converted the barn into a single-family home and used the Easement to access their home. (Doc. 65, Second Affidavit of Craig Baugh, ¶¶ 13, 15) As a result, their use produced very little traffic, dust, noise, and weeds on the Easement. (*Id.*) Mr. Skyland decided to sell the property after he and Diane separated. (*Id.*) Skyland's Tract 2 real estate listing described the rural residential nature of Tract 2, describing it as a "single family residence" and "horse property" "tucked into the woods with ultimate privacy." (Doc. 65, Ex. 19)

In the fall of 2020, Mr. Skyland told Baugh that he intended to sell Tract 2. (Doc. 65, Second Affidavit of Craig Baugh, ¶¶ 15-1) No potential buyers reached out to Baugh to discuss using the Easement differently than Skyland had. (*Id.*) On October 7, 2020, Skyland sold the property to H2S2 subject to the COS, the 2006 DEQ approvals, “all existing easements,” and all “building” and “sanitary and environmental restrictions.” (Doc. 65, Ex. 8; Doc. 65.07, Ex. 34, p. 6) H2S2 conceded that historically the Easement was “barely used.” (Doc. 65, Ex. 10, p.158; 9-12)

### **B. Background on H2S2 LLC and BaseGlamp**

H2S2 LLC d/b/a BaseGlamp (“H2S2”) consists of four members, all employed medical professionals who moved to Montana about five years ago. (Doc. 65, Ex. 10, pp. 19-22) H2S2 purchased Tract 2 for the purpose of developing BaseGlamp, an idea that formed during the pandemic. (*Id.*, pp. 28-29) H2S2’s members do not live on Tract 2, nor do they plan to. (*Id.*, p. 83) In H2S2’s *Pitch Deck PowerPoint Presentation*, BaseGlamp is described as a “year-round glamping destination for all travelers visiting Glacier National Park and Flathead Valley by providing a luxury experience in [its] geodesic domes” on Tract 2’s “20 acres of private, forested property.” (Doc. 104, Ex. 41, pp. 37, 42)

The same document, which H2S2 withheld in discovery until the District Court compelled H2S2 to produce it, states that BaseGlamp would ultimately consist

of 32 domes built in three phases and eventually host large events such as live music, bonfires, and weddings. (*Id.*, p.61) BaseGlamp is classified as a commercial campground/lodging facility by the State of Montana and Flathead County. (Doc. 104, Ex. 37; Doc. 65.07, Exs. 32-33) H2S2's domes are open to the "general public." (Doc. 71, ¶ 3)

Before beginning construction of BaseGlamp, H2S2 signed a contract with an engineering company, hired a business consultant, and created a logo, website, and social media pages; however, its members did not inform Baugh of their plans for BaseGlamp or ask Baugh for his permission to expand, improve or change the use of the Easement. (Doc. 65, Second Affidavit of Craig Baugh, ¶ 16; Doc. 104, Ex. 41, p. 39) According to H2S2's meeting notes, it decided not to tell Baugh "too much" about BaseGlamp or mess with "his side too much until we need to":

Neighbor

-yes, we need to keep this relationship amicable

-perhaps we need to introduce ourselves, open communication but not tell him too much either?

-agree to not mess with his side too much until we need to

(Doc. 65, Ex. 9)

In April of 2021, Baugh learned from a neighbor that a glamping campground might be built on Tract 2 and he became concerned about how the project would impact his property and neighborhood. (Doc. 65, Second Affidavit of Craig Baugh, ¶ 16) Around this time, Baugh began to see a substantial increase in traffic, dust, and

noise on the Easement and also began to experience equipment and people entering his property outside of the Easement without his permission, including an excavator parked on his meadow, a burn pile, spray paint and flagging, construction trucks, and pallets of building materials left on his property overnight. (Doc. 65, Second Affidavit of Craig Baugh, ¶¶ 15, 18-21, 23, 28, 31, 33, 40; Doc. 65, Exs. 12-14, 16, 18; Doc. 65.01 to -04, Ex. 21; Doc. 65.06, Ex. 28)

On May 9, 2021, H2S2 approached Baugh about its use of the Easement, informing him that it wanted to do work on the Easement and that its first phase would be 10 or 12 sites. (Doc. 65, Second Affidavit of Craig Baugh, ¶ 22) H2S2 stated that its members wanted to meet with Baugh to discuss their development plans. (*Id.*) On May 21, 2021, Baugh met with three of H2S2's members and attempted to get to know them and start a discussion about their development plans and how it would impact him and his neighbors. (*Id.*, ¶ 27) Baugh followed up on the discussion the next day; however, H2S2 never asked to meet with him again to discuss the matter further. (*Id.*; Doc. 65, Ex. 15)

On July 9, 2021, Baugh filed his complaint for declaratory and injunctive relief. (Doc. 1) Upon being served with Baugh's complaint, H2S2's members began to discuss countersuing "the ever living sh[\*!] out of him." (Doc. 101, Ex. 1, pp. 18-19) On June 13, 2022, over Baugh's objection, H2S2 amended its answer to assert tortious interference, civil conspiracy, and punitive damages claims against Baugh.

(Doc. 51) On October 29, 2021, Baugh served his first written discovery requests on H2S2. (Doc. 76, p.3) After two extensions, H2S2 electronically responded to some of Baugh's requests, but provided no documents or a privilege log in response to Baugh's requests for production (*Id.*) After multiple attempts by Baugh to meet and confer, the District Court granted Baugh's motion to compel the production of various documents, including H2S2's pitch deck presentation, financial models, and unredacted versions of H2S2's text messages, emails, meeting minutes, etc. (Docs. 43, 76)

On February 23, 2022, the District Court advised the parties during an informal discovery conference that documents relating to Baugh's funding of this litigation were irrelevant. (Doc. 129, p.5) Ten months after the complaint was filed and less than two months before the discovery deadline, H2S2 served its first written discovery responses on Baugh requesting these documents. (Doc. 129, p.3) Motions for summary judgment were filed by both parties on August 5, 2022. (Doc. 65)

A week later, on August 12, 2022, H2S2 sent its sole letter to Baugh alleging deficient discovery production – over five weeks after Baugh served his discovery responses on H2S2 and almost six months after the discovery conference with the District Court. (Doc. 129, pp. 3, 5) On August 19, 2022, five business days after H2S2 sent its letter to Baugh and a week after the parties moved for summary judgment, H2S2 filed a motion to compel discovery. (*Id.*, p.1) H2S2 filed its

summary judgment response brief on August 26, 2022, along with H2S2's affidavit alleging it had evidence, including "clear evidence," of its counterclaims. (Doc. 91, ¶ 3-6). The District Court thereafter denied the bulk of H2S2's motion to compel relating to Baugh's funding of this suit and instructed Baugh to supplement discovery as needed.<sup>3</sup> (Doc. 129, pp. 7-9) H2S2 did not appeal the Court's order on its Motion to Compel. (*Notice of Appeal*, pp. 1-2)

Despite the present suit and the District Court's warning regarding H2S2's use of the Easement, H2S2 continued to develop BaseGlamp using the Easement and built 12 domes on Tract 2. (Doc. 71, ¶ 3; Doc. 76, p.3) Both parties retained traffic engineers who agreed that BaseGlamp's first 12 domes will produce 30-44 vehicle trips per day on the Easement compared to the historical use of four trips per day. (Doc. 65.05, Ex. 23, pp.1-2; Doc. 67.10, Ex. 7, p.2) Rick Nys, P.E., a Principal Traffic Engineer retained by Baugh, concluded that the historical use of the Easement equaled four vehicle trips per day based on Flathead County's traffic data for Lupfer Road, which shows that each single-family residence on Lupfer Road

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3. Baugh located and produced ten additional documents in his fifth supplementation, including a marketing email from H2S2 forwarded to Baugh by a neighbor, four documents relating to Baugh's 2006 boundary line adjustment, and five title commitment documents relating to Baugh's sale of Tract 2 to Skyland. H2S2 did not rely on any of these documents in any subsequent motion or filing with District Court and, as such, they are not part of the record before this Court.

produces four vehicle trips per day.<sup>4</sup> (Doc. 65.05, Ex. 23, p.2) If BaseGlamp constructs 32 domes, it will produce between 90-107 vehicle trips per day on the Easement. (Doc. 65.05, Ex. 23, pp.1-2). BaseGlamp has conceded that it will build more domes on Tract 2 if there is enough public demand. (Doc. 65, Ex. 10, p.96)

Mr. Nys opined 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 traffic impacts of the historic single family residence uses in the area.” (Doc. 65.05, Ex. 23, p.5) H2S2’s traffic expert did not refute this conclusion in H2S2’s response to Baugh’s summary judgment motion. (Doc. 94.01) The District Court also noted that “even BaseGlamp’s own calculations demonstrate based on the very limited actual data generated by four sets of guests to date, each dome is generating on average 2.5 vehicles trips day—which comes to 30 vehicle trips per day,” and that “even at the low end, 30 vehicles trips per day based on 12 domes is a significant increase over the single family residence.” (Doc. 132, p. 6; Doc. 71, Aff. H2S2, ¶ 13)

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4. As Baugh’s expert opined, while H2S2’s expert compared the 30-44 trips per day BaseGlamp’s 12 domes would produce to the ITE Trip Generation Manual’s rate of 9.43 trips per day for a single-family home this data is based on a “general urban/suburban setting.” (Doc. 104, Ex. 36, p. 1). Baugh’s expert explained that because the area here is rural residential and because there are actual traffic counts on Lupfer Road available here, the “ITE and alleged Flathead County average rates are not applicable.” (*Id.*).

The District Court granted summary judgment to Baugh on his easement claims, holding that the Easement was general in nature based on the specific question presented to the court and that H2S2's use of the Easement for BaseGlamp was not within the scope of the grant based on the situation of the property, surrounding circumstances, and historical use. (*Id.*, p. 9-12) The District Court also concluded that BaseGlamp will overburden Baugh's property. (*Id.*, p.12) With respect to H2S2's counterclaims of Tortious Interference, Civil Conspiracy, and Punitive Damages, the District Court granted summary judgment to Baugh after finding that H2S2 had failed to provide any evidence of its claims. (Doc. 132 at 14-16) Upon Baugh's motion for fees, the District Court granted Baugh his attorney's fees incurred in defending against these counterclaims after determining that the claims were frivolous. (Doc. 166)

#### **IV. STANDARDS OF REVIEW**

Summary judgment is appropriate when the moving party demonstrates both the absence of any genuine issues of material fact and entitlement to judgment as a matter of law. M. R. Civ. P. 56(c)(3). This Court reviews a district court's grant of summary judgment de novo, applying the same evaluation under Rule 56, M.R.Civ.P., as the district court. *Quarter Circle JP Ranch, LLC v. Jerde*, 2018 MT 68, ¶ 7, 391 Mont. 104, 414 P.3d 1277. The Court reviews a district court's conclusions of law to determine if they are correct. *Id.*

This Court reviews a district court's evidentiary rulings for an abuse of discretion. The district court has broad discretion in determining the admissibility of evidence. *Daley v. Burlington N. Santa Fe Ry.*, 2018 MT 197, ¶ 3, 392 Mont. 311, 425 P.3d 669.

A district court has equitable power to grant complete relief, including attorney fees, absent statutory authority on a case-by-case basis. *Foy v. Anderson*, 176 Mont. 507, 511, 580 P.2d 114, 116-17 (1978). The Court reviews a district court's decision whether to grant or to deny attorney fees for an abuse of discretion. *Whitefish Congregation of Jehovah's Witnesses, Inc. v. Caltabiano*, 2019 MT 228, ¶ 24, 397 Mont. 284, 449 P.3d 812.

## V. SUMMARY OF THE ARGUMENT

For the purposes of the particular question presented here, the District Court correctly determined that the scope of the Easement was general in nature and did not include access for the development of H2S2's commercial campground and lodging facility based on the situation of the rural residential property, the surrounding circumstances, and the single-family historical use. The District Court properly found that H2S2's change in use of the Easement was a revolutionary, unreasonable, and impermissible expansion of the Easement that will continue to overburden Baugh's property given the substantial increase in traffic on the Easement compared to historical use.

Nothing in the Easement language here authorized H2S2 to cause unreasonable damage to, or interfere unreasonably with the enjoyment of, Baugh's property. The undisputed record evidence here showed that H2S2 repeatedly trespassed on Baugh's property and that its development substantially increased the amount of traffic, dust, noise, garbage, and weeds on Baugh's property to Baugh's detriment. The undisputed facts also show that the increase in traffic generated by even 12 lodgings units compared to the single-family home is substantial and will continue to overburden the Easement.

The District Court properly considered the material, admissible evidence on summary judgment and properly excluded expert legal conclusions, irrelevant testimony, inadmissible hearsay, settlement communications, and the testimony of H2S2's counsel. The District Court's finding that H2S2 failed to produce evidence of its intentional interference, civil conspiracy, and punitive damages claims was correct because H2S2 only offered the testimony of its counsel, allegations of conduct that was not wrongful, and inadmissible hearsay in support of its claims.

In granting attorney fees to Baugh on these counterclaims, the District Court properly applied the principles of the *Foy* exception in this particular case because H2S2's counterclaims were deemed frivolous and Baugh, as a counter defendant, was forced to defend against H2S2's meritless claims. Because H2S2 should have known that their claims were frivolous and because Baugh was forced to prove what

should have been obvious to H2S2 from the start, the District Court acted within its sound discretion in awarding fees to Baugh.

## VI. ARGUMENT

### **A. The District Court Properly Determined That the Easement is General In Nature For the Purposes of Determining Whether H2S2's Use for BaseGlamp was Within the Scope of the Grant.**

The District Court was correct in its determination that the Easement here is general in nature. While it is H2S2's position that its use of the Easement is unlimited, such a contention is contrary to the law governing easements. "An easement is a non-possessory right to use the land of another for a limited purpose." *Caltabiano*, ¶ 26.

The scope of an easement may be general or specific. "Where an easement is specific in nature, the breadth and scope of the easement are strictly determined by the actual terms of the grant." *Quarter Circle*, ¶ 10 (quoting *Mason v. Garrison*, 2000 MT 78, ¶ 21, 299 Mont. 142, 998 P.2d 531); *see also* § 70-17-106, MCA ("[t]he extent of a servitude is determined by the terms of the grant."). Thus, an easement with specific terms "is decisive of the limits of the easement." *Id.*

Conversely, where an easement is general in nature, the courts must "look beyond the plain language of the grant in defining the scope and breadth of the servitude." *Guthrie v. Hardy*, 2001 MT 122, ¶ 47, 305 Mont. 367, 28 P.3d 467. This Court has consistently held that "no use may be made of the right-of-way different

from the use established at the time of the creation of the easement so as to burden the servient estate to a greater extent than was contemplated at the time the easement was created.” *Leffingwell Ranch, Inc. v. Cieri*, 276 Mont. 421, 431, 916 P.2d 751, 757 (Mont. 1996) (quoting *Lindley v. Maggert*, 198 Mont. 197, 645 P.2d 430 (Mont. 1982)).

“The function of the law is to ascertain and give effect to the likely intentions and legitimate expectations of the parties who create servitudes, as it does with respect to other contractual arrangements.” Restatement 3d of Prop: Servitudes, § Scope (the “Restatement”). “A servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created” rather than “narrowly construed to favor the free use of land.” *Id.* § 4.1; *Quarter Circle*, ¶ 13 (quoting Restatement, § 4.1); *Mattson v. Mont. Power Co.*, 2009 MT 286, ¶ 49, 352 Mont. 212, 215 P.3d 675 (citing Restatement, § 4.1).

If possible, the intention of the parties is to be ascertained from the writings; however, “that is not always possible, even with specifically defined easements, as servitudes are often created by documents which lack express terms governing the many questions that may arise as to the scope or intended application of the servitude.” *Mattson*, ¶ 49 (citing Restatement, §§ 4.1 cmt. b, 4.2 cmt. a). “Perhaps

the parties did not foresee the situation that has occurred or did not incur the expense of drafting a document to cover every eventuality.” *Id.*

Both this Court’s precedent and the Restatement interpret servitudes like the Easement here in light of all the surrounding circumstances, including the situation of the property, surrounding circumstances, and historical use. *Caltabiano*, ¶¶ 34-35; *Quarter Circle*, ¶¶ 12-13; *Guthrie*, ¶ 49; *Leffingwell Ranch*, 276 Mont. 421 at 431, 916 P.2d 751 at 757; *Ganoung v. Stiles*, 2017 MT 176, ¶¶ 20-22, 388 Mont. 152, 398 P.3d 282. It is noteworthy that, despite the controlling nature of these cases and the District Court’s reliance on them, H2S2 fails to cite these cases at all or does so only in passing. If mentioned, H2S2 cobbles together quotes and misstates the facts and law from these cases, including *Leffingwell Ranch* and *Ganoung*, to erroneously argue that the District Court did not find the Easement to be general in nature<sup>5</sup> and that the overburdening of the Easement was unsupported by the evidence.<sup>6</sup>

1. *The Easement is general in nature with respect to whether H2S2 and members of the general public can use the Easement to access BaseGlamp.*

Relying on this Court’s holdings in *Guthrie*, *Ganoung*, *Caltabiano*, *Quarter Circle*, and *Leffingwell Ranch*, the District Court properly determined that the scope

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5. *Compare* Doc. 132, p. 11. (finding the easement general and not specific “for the purposes of this particular question”).

6. *Compare, e.g.*, Doc. 132, p. 5-6 (describing expert opinions of traffic impacts), 12, n. 5.

of grant for “access and utility” is written in general terms for the purpose of determining whether H2S2 can use the Easement for access to its commercial lodging campground. (Doc. 132, p.11)

In *Quarter Circle*, an access easement for “ingress and egress” on an existing trail or roadway “for the purpose of conducting farming and ranching operations and activities” was found to be general for the purposes of determining whether the easement could be used for residential use. *Quarter Circle*, ¶¶ 2-3, 12-14. The Court found that because the easement did not contain language expressly indicating that the parties intended the existing road to support residential use, the use of the existing road “for residential purposes is not strictly determined by the actual terms of the grant, [and thus] the easement is not ‘specific’ for purposes of this particular question.” *Id.*

Here, as in *Quarter Circle*, the Easement does not contain express language indicating whether the original parties to Easement intended the existing road to support H2S2’s use as a commercial lodging campground. Therefore, the District Court correctly determined that the easement is not specific for the purposes of this particular question.

This Court’s holdings in *Guthrie*, *Ganoung*, *Caltabiano*, and *Leffingwell Ranch* are likewise controlling here. In *Guthrie*, this Court found that an “unrestricted” easement for “access” was general and not specific for the purposes

of determining whether it was intended for primary and secondary access for further residential development. *Guthrie*, ¶ 49. Relevant to the Court’s holding was the fact that the appellants “failed to offer any evidence whatsoever” to show that their proposed use “was ever used or was ever intended to be used” as they claimed. *Id.*, ¶ 32. The Court also noted that the overall tone of the dominant estate in attempting to change the use of the easement was “characterized as cavalierly telling rather than courteously informing, or asking for permission to maintain, improve upon, or expand the easement in question.” *Id.*, ¶ 35.

The *Guthrie* Court held:

The deed at issue here is clearly one of a general nature in terms of scope. It merely provides that it would provide “access to the property agreed to be bought and sold” via a “presently situated road” that was perhaps 14 feet in width. Indeed, we agree with Appellants that the easement *was* unrestricted--rather than restricted by specific particulars regarding scope--and therefore the intended purpose, the use of the easement by its owners, as well as the general surrounding circumstances, must be accounted for where the scope is controverted by the parties.

*Id.*, ¶ 49. H2S2’s contention that the District Court’s consideration of historical use was improper to determine scope is a clear misunderstanding of the law. As in *Guthrie*, the Easement here is “unrestricted--rather than restricted by specific particulars regarding scope--and therefore the intended purpose, the use of the easement by its owners, as well as the general surrounding circumstances, must be accounted for” since “the scope is controverted” by Baugh and H2S2. *Id.*

In *Ganoung*, the Court determined that the scope of an “easement for access” was general for the purposes of determining whether the easement could be used to develop a subdivision when, historically, it had been used to access properties that had been held by the same family “for the common purposes of horse pasture, hunting, and recreation.” *Ganoung*, ¶¶ 16, 20-22. In *Caltabiano*, this Court also found that an easement for “access and utilities” was ambiguous and that the District Court properly relied on extrinsic evidence to determine whether the dominant estate, a church, could use the Easement for an additional point of ingress/egress. *Caltabiano*, ¶¶ 12-13, 30, 34-35.

Finally, in *Leffingwell Ranch*, this Court interpreted two “ingress and egress” easements and held that a developer could not use the easement to access its subdivision development because, historically, the “easements have never been used to access more than two or three homesteads and have only been employed for related agricultural purposes.” *Leffingwell Ranch*, 276 Mont. at 431, 916 P.2d at 757. Here, as in *Leffingwell Ranch*, based on historical use, H2S2 also cannot use the Easement to access its commercial campground development because the Easement has never been used to access more than one single-family home and it has only been employed for rural residential purposes. (Doc. 132, pp. 11-12)

Like *Guthrie*, *Ganoung*, *Caltabiano*, and *Leffingwell Ranch*, the Easement here is general for the purposes of determining whether it was intended for access to

BaseGlamp because “the language of the easement here contains no express language indicating whether the parties intended” the two-track, narrow road to be used to support a commercial campground/lodging facility. *Quarter Circle*, ¶ 12; see *Leffingwell Ranch*, 276 Mont. at 431. Additionally, as in *Caltabiano*, H2S2 received a title insurance policy that referenced the “sanitary restrictions...easements...contained or referred to on Certificate of Survey No. 17458” and excluded it from coverage at the time of H2S2’s purchase of Tract 2. *Caltabiano*, ¶ 12; (Doc. 65.07, Ex. 34, p. 6).

Therefore, H2S2 was on notice of the Easement’s existence, but failed to accept the obvious – that a 20’ wide easement on an existing two-track road less than 14’ wide and historically used to access a single-family residence in a remote, rural, residential area would not support the change in use H2S2 sought for BaseGlamp. Like *Guthrie*, H2S2’s decision not to tell Baugh about their development plans or “mess with [Baugh’s] side too much until we need to” can also be characterized as a secretive and cavalier attempt to change the use of and expand the Easement without Baugh’s permission.

While H2S2 attempts to rely on this Court’s holding in *Broadwater Dev., L.L.C. v. Nelson*, 2009 MT 317, ¶ 1, 352 Mont. 401, 219 P.3d 492 and *Van Hook v. Jennings*, 1999 MT 198, 295 Mont. 409, 983 P.2d 995, these cases are inapplicable. In *Broadwater* and *Van Hook*, the Court considered whether an easement was valid

and enforceable, which is not the question presented here. *Broadwater*, ¶¶ 1, 21 (citing *Blazer v. Wall*, 2008 MT 145, 343 Mont. 173, 183 P.3d 84);<sup>7</sup> *Van Hook*, ¶¶ 1, 5.

This Court’s precedent dictates that where a particular question is presented by the parties regarding the breadth and scope of an easement general in its terms, the court must consider “the situation of the property, surrounding circumstances, and historical use.” *Quarter Circle*, ¶¶ 12-13, 15. Therefore, the District Court properly and clearly determined that that Easement was general in nature. (Doc. 132, p. 11) The District Court then properly considered the situation of the properties, surrounding circumstances, and historical use to determine that H2S2’s use was not within the scope of the Easement. (Doc. 132, pp. 11-12)

*2. The cases relied upon by H2S2 do not apply here because the question presented here is not whether a subdivision owner may use all the roads in the subdivision for ingress and egress.*

H2S2 relies on another line of inapplicable cases concerning the scope of interior, platted subdivision roads with restrictive covenants, which do not apply to the particular question presented here. *O’Keefe v. Mustang Ranches HOA*, 2019 MT

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7. Of course, even in *Broadwater*, the Court stated that “evidence of the surrounding circumstances, including the situation of the property and the context of the parties’ agreement, may be shown so that the judge is placed in the position of those whose language the judge is to interpret.” *Id.*, ¶ 22.

179, 396 Mont. 454, 446 P.3d 509, *Clark v. Pennock*, 2010 MT 192, 357 Mont. 338, 239 P.3d 922; *Woods v. Shannon*, 2015 MT 76, 378 Mont. 365, 344 P 3d 413.

In *O'Keefe*, the issue presented was whether subdivision lot owners in the Mustang Ranches Subdivision could block the use of one of the subdivision's residential roadway easements to the exclusion of other Mustang Ranch lot owners, thereby preventing access to off-plat adjoining public lands. *O'Keefe*, ¶¶ 11, 15. The Court concluded that, pursuant to the subdivision plat, protective covenants, and deeds, the disputed roadway benefitted the other subdivision lot owners for ingress and egress to and from the adjoining public land. *O'Keefe*, ¶ 30. The Court held that "individuals entitled to use an express easement include the dominant estate owner, family, tenants, and other expressly or implicitly authorized invitees,"<sup>8</sup> but not the general public. *O'Keefe*, ¶¶ 29, 33 (citing *Woods*, ¶ 15).

In *Clark*, the issue was whether easement language limited the subdivision tract owner of Tract 15 in the Pipestone Subdivision from using only one of the two access roads in the subdivision. *Clark*, ¶¶ 2, 9. Again, the Court narrowly concluded that Tract 15's owner could use both roads because, pursuant to the conveyance

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8. For example, such invitees would include social invitees as well as "utility company service vehicles, contractors employed to build and repair a residential home, and other types of services that are necessities required to support the home." See *Picardi v. Zimmiond*, 693 N.W.2d 656, 664 (S.D. 2005).

documents, it was clear that the subdivision developer “contemplated that all tract owners would have access to their property over the roads as built.” *Id.*, ¶¶ 27, 35.

In *Woods*, the Woodses objected to the Shannon’s construction of a driveway over an ingress and egress easement on an existing road in the Arrow Islands Subdivision. *Woods*, ¶¶ 3-4. Acting pro se, the Woodses filed a petition for injunctive relief. *Id.*, ¶ 5. The Woodses argued that the Shannon’s use for “ingress and egress” was “ambiguous because it does not address such issues as whether Shannon’s *family members* may use the easement and what types of vehicles may be driven on the easement.” *Id.*, ¶ 13, 16 (emphasis added). The Court disagreed under the specific factual circumstances and the narrow question presented in that case. *Id.*, ¶ 14 (citing *Clark*, ¶ 27).

The Court held that the Shannon’s residential ingress and egress easement was “not open to use by the general public,” but that Shannon’s “family, tenants, and invitees” could use the road as long as the use “does not inflict unreasonable damage or unreasonably interfere with the enjoyment” of the Woodses property. *Id.*, ¶ 15.

In doing so, the Court cited the Restatement, Illustration 1:

1. There is an easement appurtenant to Whiteacre for ingress and egress over a private road crossing Blackacre. In the absence of other facts or circumstances, *Able*, the owner of Whiteacre, and *Able's* family, tenants, and invitees, are entitled to use the road 24 hours a day by any form of transportation that does not inflict unreasonable damage or unreasonably interfere with the enjoyment of Blackacre.

*Id.* (citing Restatement, § 4.10 (emphasis added)).

However, in this case, this Court has not been asked to declare whether H2S2's family, tenants, or invitees are entitled to use the Easement for uses associated with ordinary residential use. Rather, the question is whether H2S2 can use the Easement to access and operate BaseGlamp, a commercial lodging campground open to use by the general public. (Doc. 71, ¶ 3) For the purposes of that particular question, the Easement is general in nature and the District Court properly looked to the situation of the property, surrounding circumstances, and historical use to determine that H2S2's use of the Easement for BaseGlamp was not within the scope of the grant.

**B. The District Court Correctly Determined that BaseGlamp is a Revolutionary Change in Use that Will Unreasonably Overburden the Easement.**

In addition to clearly and correctly finding that H2S2's use of the easement did not fall within the scope of Easement, the District Court found that H2S2's use was a revolutionary, unreasonable change in use that will continue to overburden Baugh's property. (Doc. 132, p. 12) While H2S2 misrepresents the District Court's findings in this regard, the District Court was correct in its conclusions.

“In the absence of clear specifications defining scope no use may be made of a right-of-way different from the use established at the time of the creation of the easement so as to burden the servient estate to a greater extent than was contemplated

at the time the easement was created.” *Guthrie*, ¶ 48. In other words, a change in use by the dominant tenement is only allowed “so long as the changes are ‘evolutionary but not revolutionary.’” *Id.* This Court has also repeatedly held that “a substantial increase in traffic can constitute an impermissible expansion of easement rights.” *Guthrie*, ¶ 53 (relying on *Leffingwell Ranch*). The dominant estate is “not entitled to cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment.” Restatement, § 4.10.

In this case, it is beyond dispute that the “access and utility” Easement lacks “clear specifications defining scope” with respect to commercial use, nor is it disputed that BaseGlamp is “different from the use established at the time of the creation of the easement.” *Guthrie*, ¶ 48. H2S2 bought Tract 2 – a rural, remote, single family residential property in October of 2020 and, less than six months later, changed the manner of use to a commercial campground once it began construction of BaseGlamp. (Doc. 65, Exs. 8, 17, 19; Doc. 65, Second Affidavit of Craig Baugh, ¶¶ 4, 11, 15; Doc. 104, Ex. 41, pp. 37, 42)

When H2S2 bought Tract 2, the existing road easement was a winding, two-track gravel road less than 14 feet wide, significantly less than the 60’ wide easement that once existed on another portion of Baugh’s property, all of which is evidence of the fact that the original parties to the easement did not contemplate substantial traffic or intend that the Easement could be enlarged. (Doc. 65, Exs. 2, 20; Doc. 65,

Ex. 10, H2S2 Depo., Tr, p.153) However, the increase in traffic related to the construction of BaseGlamp has already resulted in multiple trespass incidents as well as a substantial increase in dust, noise, garbage, and weeds on Tract 1, which has damaged Baugh and unreasonably interfered with Baugh's peaceful enjoyment of his property. (Doc. 65, Second Affidavit of Craig Baugh, ¶¶ 17-21, 23, 28, 31, 33, 40; Doc. 65, Exs. 12-14, 16, 18, 20; Doc. 65.01 to -04, Ex. 21; Doc. 65.06, Ex. 28)

H2S2's abnormal development is ongoing, as it plans to host large events on Tract 2 and likely expand BaseGlamp. (Doc. 104, Ex. 41, p.61) The change from a property developed with a barn converted to single-family home to a commercial development of 12-32 lodging units, is clearly an abrupt, revolutionary, and abnormal change in use that is impermissible under this Court's precedent.

Further, it is clear that the increase in traffic from four trips per day generated by the single family residence to even the low end calculation of 30 trips per day generated by 12 lodging units as calculated by *both* H2S2's and Baugh's traffic experts – a 7.5 fold increase in traffic – is substantial, significant and contrary to the law governing easements. (Doc. 65.05, Ex. 23, pp.1-2, 5; Doc. 67.10, Ex. 7, p.2)

While H2S2 attempts to rely on *Steed v. Solo*, 2010 MT 264, 358 Mont. 356, 246 P.3d 697 for the first time on appeal, this case does not apply here for at least two reasons. First, *Steed* did not involve a revolutionary and abnormal change in use from a residential use to a commercial use. Second, like *Woods*, the Court found the

proposed easement usage to be speculative. *Steed*, ¶ 34; *Woods*, ¶ 16. Here, H2S2’s use is not speculative. Rather, H2S2 has an actual, defined development plan for its commercial campground, the extent of which H2S2 attempted to conceal from Baugh, both during the construction of BaseGlamp’s first 12 domes and during this litigation by refusing to produce its *Pitch Deck PowerPoint Presentation*, financial models, meeting minutes, etc. until it was compelled to do so by the District Court. (Doc. 76, pp.4, 6; *see, e.g.*, Doc. 104, Ex. 41; Doc. 65, Ex. 10, p. 96)

The impacts are also not speculative because Baugh has already experienced trespass incidents resulting from BaseGlamp as well as an interference to the peaceful enjoyment of his property due to increased traffic, dust, noise, weeds and garbage on the Easement. *Supra*, pp. 7-8, 27. And, of course, BaseGlamp’s first 12 domes will cause *at least* a 7.5 fold increase in traffic on the Easement, which is significant and consistent with H2S2’s own traffic counts to date. *Supra*, pp. 10-11, 27.

Citing to extra-jurisdictional case law, which H2S2 also heavily relied on in its summary judgment briefing, H2S2 asserts that an increase in traffic does not support a claim for overburdening and that “Montana’s case law on overburdening is limited.” (Doc. 132, p.7, n.1)

As to the former, both *Leffingwell Ranch* and *Guthrie* stand for the proposition that “a substantial increase in traffic can constitute an impermissible expansion of

easement rights.” *Id.*; *Guthrie*, ¶ 53; *Leffingwell Ranch*, 276 Mont. at 431. Here, it cannot be genuinely disputed that H2S2 has caused an increase in traffic during the construction of BaseGlamp’s first 12 domes, nor can it be genuinely disputed that its 12 domes will continue to cause a substantial increase in traffic when compared to historic use. *Supra*, pp. 10-11, 27. As to H2S2’s latter contention, Baugh does not agree that this Court’s case law is limited. It is extensive and controlling as the District Court averred. (Doc. 132, p. 7) Because the District Court was correct in its conclusion that BaseGlamp will continue to overburden the Easement, its order granting summary judgment to Baugh should be affirmed.

**C. The District Court Properly Considered the Material, Admissible Evidence in Granting Summary Judgment to Baugh and Denying H2S2’s Motion for Partial Summary Judgment.**

H2S2 next claims that its expert opinions were improperly excluded and that an issue of material fact precluding summary judgment on the easement claims exist. As to the latter, H2S2 did not oppose Baugh’s summary judgment motion or support its own partial summary judgment motion on the basis that there were material facts precluding summary judgment on Baugh’s easement claims. (Docs. 67, 90, 120) As to the former, the District Court stated that it relied on the admissible evidence submitted by both parties. (Doc. 132, p. 3) Thus, the record shows that the District Court properly evaluated “each motion on its own merits” and took care “to draw all reasonable inferences against the party whose motion is under consideration.”

*Hajenga v. Schwein*, 2007 MT 80, ¶ 18, 336 Mont. 507, 155 P.3d 1241.

1. *H2S2's traffic expert did not testify that there would be no substantial increase in traffic on the Easement compared to historical use.*

The District Court relied on Baugh's expert, Mr. Nys, who opined that BaseGlamp's 12 domes would result in a significant increase in traffic on the access easement compared to historic use. (Doc. 132, pp. 5-6) H2S2 misrepresents the record to this Court by stating that its expert, Mr. Abelin, directly contradicted Mr. Nys. (*Compare* Doc. 65.05, Ex. 23 *and* Doc. 104, Ex. 23 with Doc. 67.10, Ex. 7) Mr. Abelin did not state that the traffic impacts of BaseGlamp were not significant and H2S2 did not proffer any additional opinions by Mr. Abelin to counter Mr. Nys' opinion that BaseGlamp would cause a significant increase in traffic. (Doc. 67.10, Ex. 7; Doc. 94.01)

Indeed, as conceded by H2S2, both parties' traffic experts agreed that 12 domes would produce between 30-44 vehicle trips per day. (Doc. 65.05, Ex. 23, pp.1-2; Doc. 67.10, Ex. 7, p.2; Doc. 90, p.9, n.3) Mr. Abelin also did not dispute that this number would increase to between 90-107 vehicles per day if 32 domes are constructed. (Doc. 65.05, Ex. 23, pp.1-2; Doc. 67.10, Ex. 7) Therefore, contrary to H2S2's contention, Mr. Abelin did not opine that the impacts of BaseGlamp were insignificant compared to the rural single-family historic use on Tract 2, nor did he directly contradict Mr. Nys' express opinion that the traffic impacts were significant.

While H2S2 relies on Abelin's brief discussion of varying occupancy rates of

“nightly rental facilities,” it fails to distinguish how this would be any different from campground or resort hotels, which also have varying occupancy rates and were the “nightly rental facilities” Abelin used to calculate the trip generation rates for BaseGlamp. (Doc. 67.10, Ex. 7) As such, as Mr. Nys pointed out, “reducing vehicle trips by a percentage room occupancy is an inappropriate correlation to derive.” (Doc. 105, Ex. 36, p.4) H2S2 also attempts to confuse the issue with other potential uses that could exist on Tract 2; however, this argument should be disregarded as speculative and irrelevant, as that is not the particular question before this Court.

Therefore, the District Court properly relied on the expert opinions of both parties, as well as BaseGlamp’s own traffic counts, to conclude that BaseGlamp would generate substantial and significant increase in traffic compared to historic use. (Doc. 132, pp. 3, 6) (concluding that “even at the low end, 30 vehicle trips per day based on 12 domes is a significant increase over the single-family residence.”).

*2. The District Court properly excluded the opinion of Kathleen McMahon.*

H2S2 also contends, without any citation to legal authority, that the District Court erred in excluding the opinion of Kathleen McMahon, a land use planner, with respect to the traffic impacts of BaseGlamp and other potential uses of Tract 2. As explained by the District Court and Baugh’s motion to exclude the *BaseGlamp Road Access Easement* document prepared by McMahon, McMahon’s report primarily

contained legal conclusions<sup>9</sup> in addition to irrelevant opinions and expert opinions she was unqualified to provide. (Doc 82, p.13; Doc. 132, p.3)

For example, McMahon attempted to: 1) define “evolutionary” and “normal” development, terms of art in easement law; 2) apply Montana’s zoning statutes, easement statutes, subdivision statutes, etc. to Tract 2 and the Easement; 3) offer unqualified expert opinions regarding traffic impacts/volumes; and 4) offer confusing and misleading opinions regarding the subdivision process and other speculative and irrelevant potential uses of the property. (Doc. 82, pp. 12-13) (citing Doc. 67.10, Ex. 6)

While M. R. Evid. 702 permits testimony by qualified experts “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue,” “expert opinion that states a legal conclusion or applies the law to the facts is inadmissible.” *Citizens*, ¶ 17. While H2S2 offers only conclusory statements to the contrary, the District Court properly excluded McMahon’s report for “containing extensive legal conclusions as well as numerous categories that are irrelevant.” (Doc. 132, p.3).

*3. The District Court properly excluded portions of H2S2’s Affidavit and Brett Foley’s Affidavit.*

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9. This Court has previously upheld the exclusion of Kathleen McMahon’s reports under M.R. Evid. 702 for “primarily offer[ing] legal conclusions.” *Citizens for a Better Flathead v. Bd. of Cnty. Comm’rs*, 2016 MT 256, ¶ 18, 385 Mont. 156, 381 P.3d 555.

The District Court also properly excluded portions of H2S2's affidavit and portions of Brett Foley's affidavit, H2S2's project engineer. With respect to Foley's affidavit, the court did not exclude Foley's testimony regarding work he did on BaseGlamp. (Doc. 132, p. 2) Further, Foley did not state as H2S2 contends that "H2S2 had no plans to construct the 32 domes...." (Opening Br., p.20) Rather, Foley attested that "[t]he project *currently* consists of twelve" domes and "[t]here are no *current plans of which I am aware* for the expansion of the project beyond the 12 domes currently on the property." (Doc. 72, ¶¶ 6-8) (emphasis added). Thus, while the court did not exclude this testimony, it would not have created an disputed issue of material fact. (Doc. 132, p. 6) (finding that "even at the low end," "30 vehicle trips per day based on 12 domes is a significant increase over the single-family residence.").

With respect to its affidavit, the record shows that the District Court did not exclude these affidavits in their entirety as H2S2 asserts. Rather, the District Court properly excluded the inadmissible hearsay, settlement communications, and irrelevant matters contained in the affidavits. (Doc. 132, p. 3)

*4. The District Court properly excluded the testimony of H2S2's counsel.*

H2S2 also argues that the District Court erred in excluding H2S2's Exhibit 1. In support of its partial motion for summary judgment, H2S2's defense counsel filed Exhibit 1, a document entitled *Comparative Traffic Burdens* described by Mr.

Murray's declaration as "a most excellent document (prepared by me)." (Doc. 74, ¶ 4; 67.10, Ex. 1) Baugh moved to exclude this exhibit as well as testimony provided by Mr. Murray in H2S2's summary judgment briefing given that Mr. Murray was attempting to testify as an unqualified expert witness, with irrelevant and unsupported assumptions, and had been cautioned by the District Court about his repeated practice of testifying in H2S2's filings. (Doc. 82, p.9; Doc. 76, n.1).

Thus, the District Court did not exclude "some undesignated portion of H2S2's evidence on summary judgment," but rather, H2S2's Exhibit 1, as well as the testimony and observations provided by Mr. Murray in H2S2's summary judgment briefing. (Doc. 132, p.3) The District Court did not err in doing so. M.R.Civ.P. 56(e).

**D. The District Court Properly Granted Summary Judgment to Baugh on H2S2's Meritless Counterclaims and in Awarding Attorney Fees to Baugh under *Foy*.**

Lastly, H2S2 argues that the District Court erred in granting summary judgment to Baugh on H2S2's counterclaims of intentional interference, civil conspiracy, and punitive damages and in granting attorney fees to Baugh. However, because H2S2 failed to meet its evidentiary burden under M.R. Civ. P. 56 in response to Plaintiff's motion for summary judgment and because its claims are meritless, the District Court did not err.

*1. H2S2 failed to meet its evidentiary burden to support its counterclaims.*

For an opposing party to meet its responsive Rule 56 burden, the non-moving party must in proper form, by more than mere denial, speculation, or pleading allegation, “set out specific facts” showing the existence of a genuine issue of material fact. M. R. Civ. P. 56(e)(1)-(2). In opposing Baugh’s motion for summary judgment, H2S2 offered: 1) the speculative, unsupported, and unqualified testimony of its counsel; and 2) H2S2’s affidavit, which contained allegations of conduct that was not wrongful, allegations of conduct unrelated to Baugh, and inadmissible and irrelevant evidence. (Docs. 90-91; Doc. 132, pp. 3, 14-15).

There is no evidence to support H2S2’s counterclaims and it had no reasonable basis to believe that it could prevail on these claims. H2S2’s counterclaims of intentional interference, civil conspiracy, and punitive damages were centered on the allegation that Baugh filed this lawsuit as a “pre-text” which then required Baugh to prove the obvious: that Baugh lawfully and with justification filed this suit to protect and vindicate his legal rights regarding the Easement and his property. (Doc. 19; Doc. 51, p.13) As the District Court explained:

In the present case, Baugh had a right to act as he did in defending the scope of the easement. H2S2 provides no evidence otherwise.

In fact, in responding to Baugh’s Motion for Summary Judgment on this counterclaim, H2S2 literally provided no evidence to create a genuine issue of material fact.

(Doc. 132, pp.14-15)

Nonetheless, H2S2 argues that the District Court’s summary judgment order was improper, both because it presented evidence of its counterclaims and because the District Court’s order was premature under M.R.Civ.P. 56(f).

H2S2’s arguments belie reason. H2S2 did not file a Rule 56(f) motion in this case to postpone judgment and, in its opposing affidavit, H2S2 alleged that it had evidence, including “clear evidence,” of its counterclaims.<sup>10</sup> (Doc. 91, ¶¶ 3-6). As to its allegation that it presented evidence of its claims on summary judgment, H2S2 cites to a hodgepodge of documents in the record that both do not support its claims and are insufficient under Rule 56(e), including its motion to dismiss and its opposing affidavit which, again, the District Court found to be replete with inadmissible evidence. (Doc. 132, pp. 3, 14-15). Thus, the District Court correctly found that H2S2 failed to meet its evidentiary burden under M.R.Civ.P. 56(e).

H2S2 also falsely alleges that Baugh failed to produce discovery that supported its counterclaims. This is a patent misrepresentation to this Court tinted by H2S2’s discovery gamesmanship and abuses of record in this case. (Doc. 76, pp.6-7) As explained above, H2S2 did not request written discovery “until ten

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10. *Compare Miller v. Goetz*, 2014 MT 150, ¶15, 375 Mont. 281, 327 P.3d 483 (explaining that “M. R. Civ. P. 56(f) allows a party opposing summary judgment to file a motion and affidavit “showing that for specified reasons, it cannot present facts essential to justify its opposition.”).

months after the *Complaint* was filed and less than two months before the July 8, 2022, discovery completed deadline in the Court’s *Rule 16 Scheduling Order*.” (Doc. 129, p.3); *Supra*, pp.8-9. Yet, despite claiming that the “discovery requested by H2S2” was “necessary” to “prove its counterclaims,” H2S2 waited until August 12, 2022 – over five weeks after it was served with Baugh’s discovery responses and after the summary judgment deadline – to send a single letter without citations to authority to Baugh alleging deficient discovery production. (Doc. 81.10, Ex. 4; 129, p.7).<sup>11</sup>

The District Court had already determined that Baugh was not required to produce what H2S2 primarily sought given that H2S2 failed to show how information related to Baugh’s funding of this litigation would, in any way, prove any element of any of its counter claims. (Doc. 129, p.5) H2S2 did not appeal this determination by the court, nor would it have had any basis to do so. (*Notice of Appeal*, pp. 1-2, 5-25) H2S2’s continuing gamesmanship and false arguments are most acutely highlighted by H2S2’s continuing failure to identify *any evidence* of

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11. Additionally, in opposing H2S2’s motion to compel, Baugh cited to this Court’s precedent which upheld a district court’s determination that giving a party only four days to respond before filing a motion to compel “smacked of gamesmanship.” *Daley v. Burlington N. Santa Fe Ry*, 2018 MT 197, 392 Mont. 311, 425 P.3d 669 (explaining that this Court has “previously recognized the ‘dim view’ taken by courts to inaction or dilatory responses to asserted inadequate discovery answers.”). Here, H2S2 sent its sole letter late on a Friday afternoon and filed its motion five business days later. (Doc. 108, p. 7)

its tort and punitive damages claims – because there is no evidence that Baugh acted unlawfully, no evidence that Baugh acted without justification, no evidence that H2S2 has been damaged by Baugh, no evidence that Baugh acted with actual malice, etc.

On summary judgment, H2S2 relied on the testimony of its counsel and its affidavit alleging “clear evidence” of its claims in its attempt to prove the unprovable, both of which were insufficient to meet its responsive, evidentiary burden under Rule 56. Therefore, the District Court properly granted summary judgment to Baugh on H2S2’s counterclaims.

2. *The District Court properly granted Baugh his attorney fees under Foy.*

In *Foy v. Anderson*, 176 Mont. 507, 580 P.2d 114 (1978), the Montana Supreme Court recognized an equitable exception to the American Rule for attorney fees. “Such awards are to be determined on a case-by-case basis,” within the sound discretion of the district court, when a party had been forced to defend against a frivolous or malicious claim. *Pankratz Farms, Inc. v. Pankratz*, 2004 MT 180, ¶ 93, 322 Mont. 133, 95 P.3d 671. “It is within the discretion of the district court to determine whether a claim is frivolous and, if so, whether an award of attorney fees to the prevailing party is warranted.” *DeVoe v. City of Missoula*, 2012 MT 72, ¶ 25, 364 Mont. 375, 274 P.3d 752. “Foy establishes a rule of case-by-case application, and a case need not be on all fours with *Foy* before its principles are applicable.” *Id.*

While this Court has *generally* held that “where a party chooses to institute a suit against others, an award of attorney fees to the plaintiff will *normally* be precluded,” the Court has not held that a counter defendant can never recover fees under *Foy. Harding v. Savoy*, 2004 MT 280, ¶ 69, 323 Mont. 261, 100 P.3d 976 (emphasis added). Indeed, it is neither normal nor should it be acceptable for a party to file meritless counter claims against an opposing party and it should not be a bar for the recovery of attorney fees where a party chooses to assert frivolous counterclaims. Such an exception would not only result in a chilling effect for parties seeking to protect their property rights, but also encourage the filing of frivolous claims by retaliatory and monied defendants like H2S2 who seek to countersue “the ever living sh[\*!] out of” the opposing party. (Doc. 101, Ex. 1, pp. 18-19)

Under the facts of this case, H2S2 forced Baugh to defend against H2S2’s meritless counterclaims, which vastly expanded the scope of this case. (Doc. 76 at 3). As a counter-*defendant*, Baugh was forced to expend substantial sums of money to prove what was obvious from the start and no reasonable attorney would have seen these counter claims as a reasonable, related or viable response to Baugh’s action. As the District Court rightly stated:

As noted by the Court in its *Order Re: Motions for Summary Judgment*, H2S2 came forward with *no evidence* to support its claims for Tortious Interference with Prospective Economic Advantage, Civil Conspiracy or Punitive Damages. *See* Doc. 132, pp. 14-16. Accordingly, while the

Court cannot find the filing of the counterclaims malicious, they were frivolous based on the extensive record before the Court which revealed no evidence supporting these claims.

(Doc. 166 at 5).

In this case, justice, equity, good conscience, and this Court's precedent under *Foy* support the District Court's determination that H2S2 should bear the fees for Baugh's defense of H2S2's meritless counterclaims. Therefore, the District Court did not abuse its discretion in awarding attorney fees to Baugh.

## VII. CONCLUSION

For the foregoing reasons, Baugh respectfully requests the Court affirm the District Court's order granting summary judgment to Baugh and denying partial summary judgment to H2S2. Baugh also requests the Court affirm the District Court's order finding Baugh is entitled to his attorney's fees incurred in defending against the Tortious Interference, Civil Conspiracy and Punitive Damage counterclaims under the *Foy* exception to the American Rule.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of JUNE, 2023.

By: /s/ Michelle T. Weinberg  
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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word, is not more than 10,000 words, excluding certificate of service and certificate of compliance.

Dated this 30<sup>th</sup> day of June, 2023.

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