IN THE SUPREME COURT OF THE STATE OF MONTANA
NO. DA 23-0290

ROBERT FRISK,

Plaintiff/Appellee,

v.

JOHN N. THOMAS and LORI A. THOMAS,

Defendants/Appellants,

APPELLANTS' OPENING BRIEF

On appeal from the Montana Eleventh Judicial District, Flathead County,
Cause No.: DV-2021-0000718
Honorable Amy Eddy

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STATEMENT OF THE ISSUES

1. Did the District Court err as a matter of law when it gave a portion of the property owned by Appellants John and Lori Thomas (collectively, "Thomas") to Appellee Robert Frisk without compensation by creating an "equitable easement" that entirely prevents Thomas from using a portion of their real property?

2. Did the District Court err as a matter of law when it imposed restrictions on Thomas' access to the water well that are not in the parties' Water Well Agreement?

STATEMENT OF THE CASE

This appeal arises from the District Court's orders granting Appellee Robert Frisk ("Frisk") an equitable easement over the property of Appellants John and Lori Thomas (collectively, "Thomas") and placing numerous restrictions on Thomas' access to the water well shared by the parties.

Frisk initiated this lawsuit on June 30, 2021, asserting a declaratory judgment claim for an express road easement or in the alternative a prescriptive road easement and a claim for interference with that easement. Thomas denied the allegations and asserted counterclaims for breach of contract, breach of implied covenant of good faith and fair dealing, and intentional infliction of emotional distress related to Frisk's conduct in relation to the parties' shared water well.

Thereafter, Frisk filed an Amended Complaint, asserting additional claims for collection of a fee associated with operating the shared water well and enforcement of the parties' Water Well Agreement. Thomas then discovered that Frisk's fence and a portion of Frisk's house were located on their property. Thomas filed an amended counterclaim, asserting claims for trespass and nuisance. In his reply to Thomas' amended counterclaim, Frisk asserted equitable easement as an affirmative defense.

On March 9, 2023, the District Court held a one-day non-jury trial. At the conclusion of the trial, the District Court ruled that, among other things, Frisk was required to provide access to the water well to Thomas pursuant to the parties' Water Well Agreement and associated easement; Frisk was to add John Thomas on the Flathead Electric account as an authorized user for purposes of accessing billing records for the water well; and the parties were not permitted to use the water well for personal use. The Court indicated it would issue written findings on the easement issues.

On April 14, 2023, the District Court issued Findings of Fact, Conclusions of Law and Order ("Order"). The District Court granted an equitable easement to Frisk over a significant portion of Thomas' property. The Court also imposed restrictions on Thomas' access to the water well, including that Thomas could not access the water well without providing Frisk 10-days written notice and Thomas

could only access the water well for maintenance two times a year. Subsequently, on April 25, 2023, the District Court entered a judgment reflecting the rulings set forth in the Order. Thomas timely filed this appeal.

STATEMENT OF FACTS

Frisk owns property described as 1196 Swan Hill Drive, in Bigfork, Montana ("Frisk Property"). (App. 1, Dkt. 37, Findings of Fact, Conclusions of Law and Order, p. 2, ¶ 3). Thomas owns neighboring and directly adjoining property described as 1194 Swan Hill Drive, in Bigfork, Montana ("Thomas Property"). (*Id.*, p. 2, ¶ 4). The parties' common grantors were Robert Monier and Penelope C. Monier. (*Id.*, p. 2, ¶ 6). The parties share a private driveway off Swan Hill Drive, which crosses the Thomas Property, to access their respective properties. (*Id.*, p. 2, ¶¶ 5, 14). The driveway is illustrated as a 30' road and utility easement on Certificate of Survey No. 3534. (*Id.*) Thomas has surveyed the road and determined the driveway's exact location is not in the location as drawn on Certificate of Survey No. 3534. (*Id.*)

At the time Frisk purchased his property there was an existing house located on the property that subsequently burned down in approximately 1987. (App. 2, Trial Transcript (Mar. 9, 2023) at 67:14-69:17). Frisk's house did not encroach onto the Thomas Property at that time. (*Id.*) Subsequent to his purchase of the property and prior to the original house burning down, Thomas erected a fence and

gate and planted some lilac bushes. (*Id.* at 22:4-23). After Frisk's house burned down, he began constructing a new home that was closer to the Thomas Property, a portion of which was built on the Thomas Property. (*Id.* at 122:23-123:7; App 1, p. 3, ¶ 16). Frisk built a fence and gate, which were also located on the Thomas Property. (App. 1, p. 3, ¶ 27). Since Thomas has owned the Thomas Property, Frisk has moved the fence further onto the Thomas Property. (App. 2 at 217:3-218:4). Frisk is constructing a huge add-on to his house and there is not enough space and property to work on his house, so he keeps moving the fence more onto the Thomas Property. (*Id.*)

Frisk did not receive written permission or an easement to build on the Thomas Property but instead relied on a verbal representation from his realtor of the property line. (*Id.* at 105:9-107:23). When Frisk built the fence, he used a "rifle scope" to shoot a line from property corner to property corner, thinking the corner survey marker he used for reference was his property corner. (*Id.* at 25:21-26:4). The east ending point of the fence is the northeast corner of the Frisk property. (*Id.* at 22:25-24:2; 198:22-199:9). Frisk's identification of the wrong corner pin on the west side resulted in Frisk fencing in a substantial pie shaped chunk of the Thomas Property. (*Id.*). The fencing and gate enclose approximately

6,482 square feet of the Thomas Property.[1] (App. 1, Ex. A). Frisk did not hire a surveyor to identify the property line or corners prior to building the fence and gate. (App. 2 at 107:6-8). Frisk did not hire a surveyor to substantiate his claim that the pie shaped area is his property. (*Id.* at 107:21-23). Frisk's new house encroaches onto the Thomas Property by approximately one foot. (*Id.* at 149:17-151:13). Thomas' expert, Josh Nelson, a registered land surveyor with the state of Montana, testified that it is common for existing roadways to not exactly match the location contained on a certificate of survey and that it is fairly common that fence lines do not match survey boundaries. (*Id.* at 135:14-136:9; 174:4-14).

John Thomas testified that he had the Thomas Property surveyed after the litigation commenced and learned that a portion of Frisk's house and Frisk's fence were located on the Thomas Property. (*Id.* at 193:23-195:18). He further testified that he and his wife would like to use that portion of their property but are unable to do so because of Frisk's locked gate, which is also located on the Thomas Property. (*Id.* at 194:9-24). Thomas pays the property taxes for the land on which the Frisk fence and corner of the Frisk house are located. (*Id.* at 194:25-195:5).

[1] The approximate square footage of the pie shaped area found on Exhibit A to the Order is calculated by multiplying the height of the triangle (first leg 39.1 ft.) by the length of the triangle (second leg 331.54 ft.) then divided by two. 39.1x331.54/2=6481.6 sq ft.

The parties share a water well located on the Frisk Property. (App. 1, p. 3, ¶ 16). The parties' water use, access, and maintenance are governed by a 1977 Water Well Agreement granting each party a one-fourth interest in the well and well maintenance and includes an easement in favor of Thomas for maintenance. (App. 2 at 12:15-13:11; App. 3, Water Well Agreement). There is no evidence documenting any amendment to the 1997 Water Well Agreement. (App. 1, p. 3, ¶ 21).

Frisk has blocked Thomas from using the easement to the water well and Thomas does not have practical access to the water well. (App. 2 at 195:19-25; 205:7-207:3). The Frisk Property is fenced and gated. (*Id.* at 22:4-23; App. 1, p. 3, ¶ 27). Portions of that fence, and the entire gate, are located on the Thomas Property. *See id.* Prior to trial, Frisk refused to provide a gate key to Thomas to access and maintain the water well, despite repeated requests from Thomas' counsel. (*Id.* at 92:12-93:2).

Frisk receives invoices for well use from Flathead Electric Coop ("FEC") and then calculates the well operating costs to charge Thomas. (App. 1, p. 13, ¶ 18). Frisk sent a bill to Thomas indicating Thomas owed one-fourth of the well usage fee and one-half of FEC's meter fee. (*Id.*, p. 3, ¶ 20). Thomas do not dispute they will pay one-fourth of the well usage and the meter fee. (App. 2 at

207:22-209:25; App 1, p. 3, ¶ 20). Thomas, however, wants access to the water well and the ability to confirm invoice amounts with FEC. *See id.*

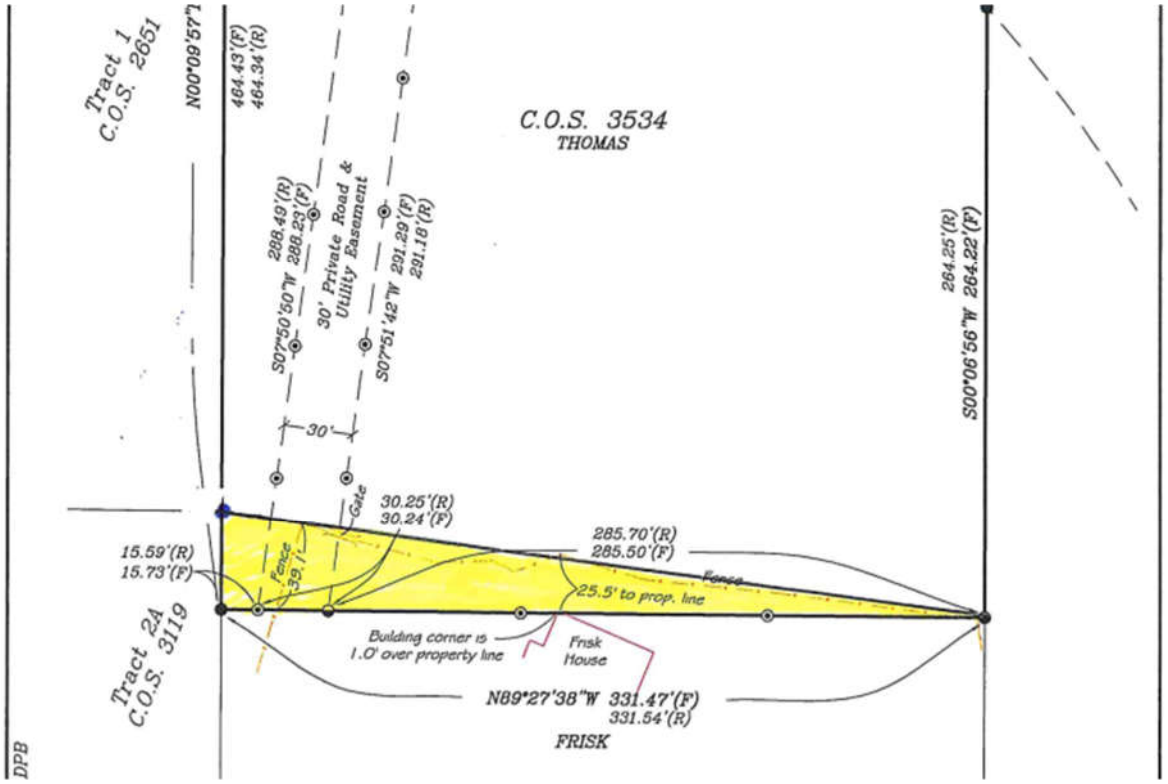
Frisk has failed to pay the FEC bill on time. (App. 2 at 93:14-94:19). When contacted by Thomas, FEC would not speak with him. (*Id.* at 210:25-211:12; *see also id.* at 219:17-220:1). Thomas could not pay the bill and could not get their water turned back on without Frisk calling FEC. (*Id.* at 210:25-211:19). Frisk runs extension cords from the well house for his personal use. (*Id.* at 210:1-24). The Water Well Agreement does not provide for such use. (App. 3).

Since Thomas acquired their property Frisk has engaged in a pattern of harassing behavior towards them. (App. 2 at 214:16-220:15). When Thomas first moved to their property, Frisk demanded Thomas tell him when they are coming home. (*Id.* at 214:16-215:8). Frisk has placed a pamphlet in Thomas' mailbox with a handwritten letter insinuating John Thomas drinks and drives. (*Id.* at 246:15-252:15). Frisk often stands at Frisk's fence line (on the Thomas Property) to agitate Thomas' dogs. (*Id.* at 246:15-248:16). Frisk also cut down a tree on the Thomas Property in 2023, without notice to Thomas or counsel and during this litigation. (*Id.* at 212:19-214:15.)

On March 9, 2023, after a one-day non-jury trial, the District Court ruled Frisk must provide Thomas access to the water well pursuant to the Water Well Agreement and associated easement. (App. 4, Dkt. 31, Minute Entry). The

District Court also ordered Frisk to add John Thomas on the FEC account and held that the parties are not permitted to use the well for personal use. (*Id.*). The District Court indicated that it would issue written findings on the easement issues. (*Id.*).

Just over one month later, on April 14, 2023, the District Court issued its written Order. (App. 1). The District Court granted an equitable easement over the portion of the Thomas Property that was highlighted in yellow on Exhibit A, which is shown below:



(App. 1, p. 9, ¶ 2; *see also* App. 1, Ex. A). Contrary to its ruling immediately after the trial, the District Court also restricted Thomas' access over the Frisk Property

to the water well and imposed the following additional conditions on Thomas' use of the water well that are not contained in the Water Well Agreement:

> (a) Absent an emergency, the Defendants may not enter the Plaintiff's property unless 10-days written notice has been given to the Plaintiff. Such notice must include the date and time the Defendants will be entering the property, the identity of any other individual accompanying the Defendants, and the specific reason entry is necessary—including a description of the particular installation.
>
> (b) Entry by the Defendants for "maintenance" of the system shall not happen more than two times per year unless both parties agree.

(App. 1, p. 9, ¶ 5; *see also* App. 3). On or about April 25, 2023, the District Court entered Judgment, which include the above rulings set forth in the Order. (App. 5, Dkt. 38, Judgment).

STANDARD OF REVIEW

A district court's conclusions of law are reviewed de novo to determine if they are correct. *Bugli v. Ravalli County*, 2018 MT 177, ¶ 7, 392 Mont. 131, 422 P.3d 131. Likewise, mixed questions of law and fact, including the district court's application of legal principles to its factual findings, are reviewed de novo. *Montana Digital, LLC v. Trinity Lutheran Church*, 2020 MT 250, ¶ 9, 401 Mont. 482, 473 P.3d 1009. Under a de novo review, this Court is not bound by the district court's conclusions and remains free to reach its own conclusion based on the record before it. *McCauley v. Thompson-Nistler*, 2000 MT 215, ¶ 18, 301 Mont. 81, 10 P.3d 794.

SUMMARY OF ARGUMENT

The District Court erred as a matter of law when it granted Frisk an equitable easement across the Thomas Property without compensation which entirely prevents Thomas from using that portion of their real property. The equitable easement theory has not been adopted in Montana. Further, the easement at issue was not created by an instrument in writing, by operation of law, or by prescription and this Court should decline to adopt an entirely new legal basis for the creation of an easement. Even if Montana did recognize equitable easements, the District Court's Order should still be reversed. By definition, an easement is a nonpossessory interest, and an equitable easement cannot be granted to Frisk for complete possession of the Thomas Property. The District Court's award of an equitable easement also violates both the Montana Constitution and the United States Constitution because it amounts to the taking of private property. And, this Court should not adopt the Restatement (Second) of Torts to create an equitable easement and even if it does, there is no evidence to support its application to this case.

The District Court also erred as a matter of law by inserting access restrictions into the parties' Water Well Agreement. Contrary to the express terms of the Water Well Agreement, the District Court limited the number of times

Thomas could access the well and imposed a notice requirement on Thomas prior to using the well.

ARGUMENT

I. THE DISTRICT COURT'S GRANT OF AN EQUITABLE EASEMENT TO FRISK IS ERROR AND SHOULD BE REVERSED.

The District Court erroneously granted Frisk an equitable easement over a significant portion of the Thomas Property. (App. 1, pp. 3-4, ¶¶ 27-36). This remedy is not supported under clear Montana law. Ultimately, the District Court simply gave a portion of the Thomas Property to Frisk without compensation by creating an "equitable easement" that **entirely** prevents Thomas from using a portion of their real property.

A. The Equitable Easement Theory Conflicts With Montana Law.

For decades, this Court has noted the equitable easement theory has not been adopted in Montana. *See e.g. Davis v. Westphal*, 2017 MT 276, 389 Mont. 251, 405 P.3d 73 (acknowledging the equitable easement theory has not been adopted by this Court); *Murray v. Countryman Creek Ranch*, 254 Mont. 432, 437, 838 P.2d 431, 434 (Mont. 1992), *overruled on other grounds by Warnack v. Coneen Fam. Tr.*, 266 Mont. 203, 879 P.2d 715 (Mont. 1994) (Turnage, C.J., concurring) (same); *Penland v. Derby*, 220 Mont. 257, 260, 714 P.2d 158, 160 (Mont. 1986) (same and refusing to consider the equitable easement theory when raised for the first time on

appeal).[2] The creation of an equitable easement here was clear error: equitable easements do not, and cannot, exist under Montana law.

Under well-established Montana law, an easement can be created only one of three ways: "by an instrument in writing, by operation of law, or by prescription." *JRN Holdings, LLC v. Dearborn Meadows Land Owners Ass'n, Inc.*, 2021 MT 204, ¶ 26, 405 Mont. 200, 493 P.3d 340 (citing *Yellowstone River, LLC v. Meriwether Land Fund I, LLC*, 2011 MT 263, ¶ 25, 362 Mont. 273, 264 P.3d 1065).[3] It is undisputed that there is no written instrument granting the underlying easement. *See* App. 1, p. 6, ¶ 5. Further, as explained below, the easement at issue was not created by "operation of law" or by prescription, as this Court has defined both of those principles.

1. The easement at issue was not created by operation of law.

This Court has defined easements "by operation of law" as those that arise from necessity or preexisting use – referred to as implied easements. *See JRN Holdings, LLC*, ¶ 26; *see also Meine v. Hren Ranches, Inc.*, 2015 MT 21, ¶ 23, 378

[2] The District Court specifically recognized that the Montana Supreme Court has never recognized an equitable easement. (App. 1, p. 6, ¶ 9).
[3] This Court has also recognized that easements may arise by condemnation or common-law dedication, but neither of those circumstances are present here. *Meine*, 2015 MT 21, ¶ 23, 378 Mont. 100, 342 P.3d 22; *Davis v. Hall*, 2012 MT 125, ¶ 19, 365 Mont. 216, 280 P.3d 261.

Mont. 100, 342 P.3d 22 (citations omitted); *Yellowstone River*, ¶ 25. But the easement here does not fall into either of these categories.

An easement by necessity requires unity of ownership and strict necessity. *Yellowstone River*, ¶ 26. These two elements must be present at the time of severance. *See JRN Holdings*, ¶ 26. "Strict necessity" means "no practical access to a public road from the landlocked parcel except across the remaining land of the grantor." *Id.*, ¶ 30. Those circumstances are not present here. The easement at issue is not an access easement. Rather, it is an equitable grant of the entirety of Thomas' interests in a piece of their property to avoid requiring Frisk to remove his encroachments. *See* App. 1, pp. 3-36, ¶¶ 27-36. Further, the underlying use did not exist at the time at the time of severance. *Id.*, ¶ 30. Common title was severed prior to Frisk purchasing his property, and the encroachments were only brought into being **after** Frisk purchased his property. *See* App. 1, pp. 2, ¶¶ 3-13; App. 2 at 22:4-23; 67:21-69:17; 122:23-123:7. Thus, Frisk could not have needed to use that portion of the Thomas Property at the time of severance.

Finally, an easement implied from existing use must be created at the time of severance. *JRN Holdings*, ¶ 27. On this record, it is undisputed that neither Frisk's fence, nor Frisk's house, encroached on the Thomas Property at the time of severance. *See* App. 1, pp. 2, ¶¶ 3-13; App. 2 at 22:4-23; 67:21-69:17; 122:23-123:7. Thus, the underlying easement cannot be an implied easement from

preexisting use. For these reasons, the easement granted by the District Court is not and cannot be an easement by implication.

2. The easement at issue was not created by prescriptive use.

A prescriptive easement requires "open, notorious, exclusive, adverse, continuous and uninterrupted use for five years." *Cremer Rodeo Land & Livestock Co. v. McMullen*, 2023 MT 117, ¶ 37, 412 Mont. 471, 531 P.3d 566. But a prescriptive easement is still an easement and must be limited to a "nonpossessory interest." *Burlingame v. Marjerrison*, 204 Mont. 464, 471, 665 P.2d 1136, 1140 (Mont. 1983); *see Habel v. James*, 2003 MT 99, ¶ 27, 315 Mont. 249, 68 P.3d 743. No such limitation exists here, and the District Court's decision makes that clear. Thomas sought mandatory injunctive relief to force Frisk's removal of his fence, gate, and home "as a remedy to cure [Frisk's] trespass onto the [Thomas] property." App. 1, p. 6, ¶ 5. The District Court granted Frisk an equitable easement in order to avoid granting Thomas their requested relief. *Id.*, p. 6, ¶¶ 5-8. Thus, as a result of the District Court's decision, a portion of Frisk's house and Frisk's fence and gate are allowed to permanently encroach on the Thomas Property and, consequently, Thomas are entirely precluded from using that portion of their property in any way. *Id.*, pp. 5-8, ¶¶ 5-13; *see also* App 1, Ex. A.

Allowing Frisk to use the Thomas Property in this way is not a recognition of prescriptive use, rather it is a finding of adverse possession. As this Court has

made clear, "'[w]here a prescriptive right to a servitude has the effect of leaving the owner with an empty fee title, the situation is not one of prescriptive right in the form of an easement.'" *Habel*, ¶ 27 (quoting *Burlingame*, 204 Mont. at 471, 665 P.2d at 1140). Thus, prescriptive use cannot provide the foundation for the equitable easement granted by the District Court.[4]

3. This Court should decline to adopt an entirely new legal basis for an easement.

Because the "equitable easement" granted by the District Court does not fit into any of the three established mechanisms for creating an easement, this Court must adopt a new method to affirm the District Court. This Court should decline to do so because doing so would run afoul of fundamental property law in Montana that has been in place for over a century private property may not be taken without the owner's consent for the private use of another. *See Beinhorn v. Griswold*, 27 Mont. 79, 69 P. 557, 558 (Mont. 1902); *see also City of Bozeman on Behalf of Dept. of Transp. of State of Mont. v. Vaniman,* 271 Mont. 514, 522, 898 P.2d 1208, 1214 (Mont. 1995); *McTaggart v. Montana Power Co.*, 184 Mont. 329, 602 P.2d

[4] Mr. Frisk cannot rely on adverse possession, either. A party claiming adverse possession must pay taxes throughout the applicable five year period. *Hart v. Hale*, 2022 MT 82, ¶ 13, 408 Mont. 258, 508 P.3d 877 (citing Mont. Code Ann. § 70-19-411). The record contains no evidence that Mr. Frisk paid the property taxes on the strip of the Thomas Property granted to him by the District Court. To the contrary, Thomas has continuously paid the taxes on the strip of the Thomas Property granted to Frisk. (App. 2 at 194:25-195:5).

992 (Mont. 1979) (eminent domain). The owner of real property has a right to demand the removal of anything, including structures, encroaching on the property. *See Olsen v. Milner*, 2012 MT 888, 364 Mont. 523, 276 P.3d 934; *Allman v. Stuart*, 158 Mont. 402, 292 P.2d 913 (Mont. 1972).[5]

B. Even If Montana Did Recognize Equitable Easements, The District Court's Order Should Still Be Reversed.

Assuming *arguendo* that equitable easements were cognizable under Montana law, the District Court's decision should be reversed for three reasons. First, the District Court ignored binding precedent precluding the grant of an easement resulting in the dominant tenement's complete possession of the underlying real property. Second, by granting effective possession of a portion of the Thomas Property to Frisk without compensation, the District Court's Order violates both the Montana Constitution and the United States Constitution. Third, this Court should not adopt the relative hardship doctrine and if it does, Frisk did not and cannot satisfy all of the factors of this doctrine.

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[5] While the Montana Supreme Court has applied an equitable *de minimis* burden doctrine to encroachments, the District Court completely failed to engage in that analysis. *See Gelderloos v. Duke*, 2004 MT 94, 321 Mont. 1, 88 P.3d 814. Further, this Court only applied that doctrine based on the unique circumstances of that case and given the landowner's "willingness to work something out" regarding the encroachments. *Id.*, ¶ 41. That is not present here and if the Court finds that doctrine should be applied in this case, the case should be remanded to allow the parties to present evidence and the District Court to engage in the appropriate analysis.

1. An equitable easement cannot be granted for Frisk's complete possession of a portion of the Thomas Property.

In Montana, by definition, an easement is a "nonpossessory interest." *Habel*, ¶ 27 (citing *Burlingame*, 204 Mont. at 471, 665 P.2d at 1140). Roughly forty years ago, this Court held that an easement cannot amount to a grant of complete possession of the underlying real property. *Burlingame*, 204 Mont. at 470–472, 665 P.2d at 1140. Such an easement is impermissible because it entirely excludes the fee owner and leaves them only empty fee title.

In *Burlingame*, Claude and Carol Burlingame (the "Burlingames") owned real property in Sanders County and entered into a contract for deed to purchase a parcel of real property. *Id.*, 204 Mont. at 466, 665 P.2d at 1137. They then discovered that a fence belonging to their neighbors, Fred and Jeannine Marjerrison (the "Marjerrisons"), encompassed approximately five acres of their property. *Id.* As a result, the Burlingames filed a quiet title action against the Marjerrisons to obtain possession of that five acres. *Id.* The Marjerrisons presented evidence that showed they had grazed cattle, harvested timber, and conducted agricultural operations on the five acres for at least forty years. *Id.* at 466-468, 665 P.2d at 1137-1138. After trial, the district court found that the Marjerrisons were entitled to a prescriptive easement to allow such use to continue. *Id.* at 470, 665 P.2d at 1140. On appeal, this Court reversed.

This Court determined that by completely possessing the five-acre parcel (as indicated by the fence separating the Marjerrisons' property from the Burlingames' property), the Marjerrisons could not characterize their use as "nonpossessory." *Burlingame*, 204 Mont. at 471, 665 P.2d at 1140. Instead, because the Marjerrisons' use was characterized as "complete possession, dominion, and use of the parcel to the exclusion of [the Burlingames]," the use was indicative of fee ownership. *Id.* This Court concluded that one cannot "acquire a prescriptive right to property which in effect usurps the ownership of the fee title without paying the taxes thereon" and, accordingly, the Marjerrisons had "acquired no interest in the property." *Id.* at 472, 667 P.2d at 1140.

Burlingame controls and requires reversal of the equitable easement granted by the District Court. Through the equitable easement, Frisk essentially came into ownership of the entirety of a portion of the Thomas Property. Just as in *Burlingame*, a fence – rather than a legal description – now draws Frisk's new property line, which result was expressly rejected by this Court.

2. The District Court's award of an equitable easement violates both Montana's Constitution and the United States Constitution.

The District Court's Order also violates both Article II, Section 29, of Montana's Constitution and the Fifth Amendment to the United States Constitution for two distinct reasons.

First, Montana's Constitution does not allow the taking of private property to effect easements for private use. Mont. Const. art. II, § 29. Indeed, this Court has held that the Constitution prohibits the taking of private property for implied easements in favor of private parties. *See McCabe Petroleum Corp. v. Easement & Right-of-Way Across Twp. 12 N., Range 23 E.*, 2004 MT 73, ¶ 23, 320 Mont. 384, 87 P.3d 479 ("Montana's Constitution does not allow the taking of private property for private ways of necessity.").

Second, the District Court's Order violates the Fifth Amendment to the United States Constitution as well. U.S. Const. amend. V. A judicial taking occurs when, as the District Court did here, "a court declares that what was once an established right of private property no longer exists[.]" *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 560 U.S. 702, 715 (2010) (plurality) (noting that state government, regardless of which branch, cannot take private property without paying for it).

C. This Court should not adopt the Restatement (Second) of Torts to create an equitable easement and if it does, there is no evidence to support its application to this case.

The District Court applied Restatement (Second) of Torts §§ 936 and 941 to determine Frisk was entitled to an equitable easement. (App. 1, pp. 7-8, ¶¶ 10-12). This was clear error for two reasons.

First, this Court has not adopted the Restatement (Second) of Torts §§ 936 and 941 or any type of relative hardship doctrine to create an equitable easement. *Davis*, ¶ 29 n. 10; *Penland*, 220 Mont. at 260, 714 P.2d at 160. Because Montana law governing the creation of easements is well-established, and because granting an equitable easement conflicts with existing Montana law, *see supra* § I.A, this Court should decline to adopt Restatement (Second) of Torts §§ 936 and 941 or any type of relative hardship doctrine in the context of easement disputes.

Second, even if Court were to find that Restatement (Second) of Torts §§ 936 and 941 or some type of relative hardship doctrine applies to this case, the District Court erred by failing to fully and properly apply this doctrine. According to the Restatement (Second) of Torts, which was utilized by the District Court to grant Frisk an equitable easement, denial of an injunction against an encroachment, after balancing of relative hardships, requires "an award instead of compensatory damages in exchange for an interest in the plaintiff's land . . . ." *See* Restatement (Second) of Torts § 941, cmt. d. In other words, in those situations where an equitable easement has been granted, the landowner who loses use of his property is entitled to be compensated for that lost property. *Shoen v. Zacarias*, 237 Cal.App.4th 16, 20-22, 187 Cal.Rptr.3d 560 (Cal.App. 2 Dist. 2015) (noting equitable easement forces a landowner to accept damages as compensation for the judicial creation of an easement over the trespassed upon property); *Proctor v.*

Huntington, 238 P.3d 1117, 1123 (Wash. 2010) (*en banc*) (holding remedy when allowing encroachment to remain is to require the trespasser to pay the fair market value for the property upon which they encroached).

Here, the District Court created an equitable easement and provided Thomas no compensation at all. This was error. The District Court granted Frisk a portion of the Thomas Property without requiring Frisk to pay for it. As explained above, this course of action amounted to a taking in violation of both Montana's Constitution and the United States Constitution.[6] And, Thomas remains obligated to pay property taxes on the portion of their own property that they are prevented from using and enjoying. Such a result is the antithesis of an equitable remedy.

The District Court also made no effort to analyze each of Frisk's encroachments on the Thomas Property. It is undisputed that both Frisk's house and fence – two separate structures – encroach on the Thomas Property. (App. 1, p. 3). The District Court improperly treated these two different encroachments as the one. As a result, the District Court proceeded to allow the private taking, through the yet unrecognized affirmative defense of "equitable easement," of

[6] Further, that conclusion was inconsistent with the requirement Montana law imposes on private eminent domain actions. See Mont. Code Ann. § 70-30-107 (requiring damages and expenses be paid by the person benefitted from private eminent domain).

approximately three percent (3%) or roughly six thousand, four hundred eighty-two (6,482) square feet of the Thomas Property without any form of compensation.

"[T]he hardship to the [trespasser] from granting the injunction 'must be *greatly disproportionate* to the hardship caused [to the landowner] by the continuance of the encroachment and this fact must clearly appear in the evidence and must be provided by the [trespasser]." *Clear Lake Riviera Cmty. Ass'n v. Cramer,* 182 Cal.App.4th 459, 105 Cal. Rptr. 3d 815, 825 (2010). The District Court erred when it failed to differentiate or address each encroachment on the Thomas Property separately – the one-foot encroachment of Frisk's house and Frisk's unauthorized fencing and gating of approximately 6,480 square feet of the Thomas Property. Rather, the District Court treated the Frisk's separate and distinguishable encroachments as one, notwithstanding the significant difference between removal of the one-foot encroachment of the house and the simple removal of the fence.

Further, Frisk presented no evidence that requiring the removal of his fence would be impracticable or create a substantially disproportionate hardship on him. And, the only evidence Frisk provided concerning any alleged hardship with respect to removing the corner of his house was that "it's going to be a lot of expense to shore up the rest." (App. 2 at 103:15-25). Frisk provided no estimate of the cost to do this and is not qualified to testify about what changes would need

to be made to his house. *See id.* Frisk's self-serving unsupported testimony is not sufficient to establish a greatly disproportionate hardship. *See also Shoen,* 237 Cal.App.4th at 22 (finding the fact that the encroacher's loss of use of a patch of land for an outdoor patio area may have resulted in a "deprivation of a substantial benefit" fell short of the "imposition of a substantial hardship" the owner would incur from losing the use of the land she owns).

In addressing a comparable situation, the South Dakota Supreme Court determined that the circuit court erred in failing to address each encroachment separately to determine whether equity would require its removal. *Hoffman v. Bob Law, Inc.*, 888 N.W.2d 569, 575-76 (S.D. 2016). In *Hoffman*, the plaintiff installed a septic system, concrete retaining wall, concrete pad for a propane tank, lamp pole and driveway. *Id.* at 575. Portions of these items encroached on the defendant's property. *Id.* The circuit court determined that the plaintiff was entitled to injunctive relief allowing the structures to remain. *Id.* The South Dakota Supreme Court determined the lower court erred in failing to evaluate the relative hardships for each individual encroachment and remanded the matter back for such a determination. *Id.* at 576-77. At the very least, this Court should do the same here.

II. THE DISTRICT COURT ERRED BY INSERTING ACCESS RESTRICTIONS INTO THE PARTIES' WATER WELL AGREEMENT.

The District Court erred when it unreasonably limited the scope of Thomas' access easement over the Frisk property contrary to the express terms of the Water Well Agreement. The Water Well Agreement provides, in pertinent part:

> PURCHASERS [Thomas] are hereby granted an easement not to exceed thirty feet in width over and across which they shall construct a suitable method of conveying the water from the well to their said tract of land, with the easement to run in a straight line from the well to the property of PURCHASERS, said easement to be for the purpose of **installation, repair and maintenance of said water line and system.** SELLERS [Frisk] hereby reserve and accept unto themselves their heirs, successors and assigns, the right to use the easement property conveyed, providing such use does not interfere with the use of the easement as necessary to carry out the above stated purposes.

App. 3 (emphasis added).

"When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone if possible…" Mont. Code Ann. § 28-3-303. "The words of a contract are to be understood in their ordinary and popular sense ..." Mont. Code Ann. § 28-3-501. Indeed, the law is well settled that the ordinary meaning of words in a contract should be given effect when brought to a court for interpretation. *See Frank v. Butte & Boulder Mining & Lumber Co.*, 48 Mont. 83, 135 P. 904, 906 (Mont. 1913) (noting that it is "beyond [the] power [of the court] to make agreements for parties or to alter or amend those which the parties themselves have made"). This is because the court "cannot rewrite the contract

entered into by the parties." *Dunjo Land Co. v. Hested Stores Co. of Wyoming*, 163 Mont. 87, 89, 515 P.2d 961, 962 (Mont. 1973).

In Montana, the construction and interpretation of a contract is a question of law. *Ophus v. Fritz,* 2000 MT 251, ¶ 19, 301 Mont. 447, 11 P.3d 1192. Likewise, whether an ambiguity exists in a contract is a question of law. *Mularoni v. Bing*, 2001 MT 215, ¶ 32, 306 Mont. 405, 34 P.3d 497; *SVKV, L.L.C. v. Harding,* 2006 MT 297, ¶ 43, 334 Mont. 395, 148 P.3d 584. "[I]f a contract's terms are clear and unambiguous, a court must apply the language as written." *SVKV*, ¶ 43; *Ophus*, ¶ 23 ("[w]hen the language of a contract is clear and unambiguous and, as a result, susceptible to only one interpretation, the duty of the court is to apply the language as written").

The District Court's Order impermissibly inserted terms into the Water Well Agreement. The Water Well Agreement does not limit the number of times per year that "PURCHASERS" (Thomas) are entitled to access the property of the "SELLERS" (Frisk) for maintenance of the well system. Further, there is nothing contained within the Water Well Agreement that requires that the "SELLERS" be given any notice of the particular individuals who are performing the maintenance, when maintenance is to be conducted, the reason that the maintenance is necessary, or "a description of the particular installation." *See* App. 1, p. 9, ¶ 5. It is well settled that the "owner of a reserved easement may use it to the full use of the right

retained." *City of Missoula v. Mix*, 12 Mont. 365, 372, 214 P.2d 212, 216 (Mont. 1950). "A servient owner's actions cannot make the easement more 'inconvenient, costly or hazardous to use.'" *Musselshell Ranch Co. v. Seidel-Joukova*, 2011 MT 217, ¶ 20, 362 Mont. 1, 261 P.3d 570. Frisk's locked gate is unreasonably and unnecessary and makes Thomas' use of the water well and associated easement more inconvenient. Further, the requirements imposed by the District Court's Order are improper and inconsistent with the applicable law. Accordingly, the District Court's restrictions on Thomas' access and use of the well should be reversed and Thomas should be allowed access and use of the well as set forth in express terms of the Water Well Agreement.

CONCLUSION

This Court should reverse the District Court's Order and the erroneous legal conclusions upon which it is based.

DATED this 2nd day of October, 2023.

By:/s/*Kelsey Bunkers*
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CERTIFICATE OF COMPLIANCE

Pursuant to M. R. App. P. 11(4)(e), I certify that Appellant's Opening Brief is typed in 14-point Times New Roman Font, a proportionally spaced typeface, and contains 6,126 words, as calculated by Microsoft Office Word.

/s/*Kelsey Bunkers*
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CERTIFICATE OF SERVICE

I, Kelsey Evans Bunkers, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 10-02-2023:

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