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,

APPELLEE'S OPENING BRIEF

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

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ISSUES PRESENTED

1. Should Montana allow an equitable easement when a court determines that a mandatory injunction should not in equity be granted?

2. Has the District Court properly granted an equitable easement based on relative hardship in this case?

3. Has the District Court equitably enforced the well agreement?

STATEMENT OF THE CASE

Robert Frisk's [hereafter "Frisk"]complaint sought the establishment of the 30-foot roadway across the John and Lori Thomas'[hereafter "Thomas"]property and to preclude interference with the use of the roadway. (Doc #1.) An answer and counterclaim were filed (Doc #4). The Scheduling Order (Doc # 5) ended discovery on January 28, 2022. The trial was scheduled for May 6. (Doc# 13). On May 5, both counsel requested the trial be vacated and reset because of new issues (Doc# 4).

The trial was vacated because of a survey that Thomas secured.

Thomas filed their Amended Answer and Counterclaim including a claim for trespass and seeking an order compelling Frisk to move his home twenty feet beyond the new boundary shown on Exhibit A to that pleading. (Doc#18). Frisk's Reply included a claim for an "Equitable Easement" under the "Relative Hardship Doctrine" (Doc#19). In November 2023, Frisk moved the court to allow evidence on the defense of an equitable easement under the relative hardship doctrine (Doc#22). Thomas opposed this (Doc#23). The court granted Frisk's motion (Doc#24). The trial was held on March 9, 2023. The court ruled on some issues from the bench and indicated it would later make findings on the various easement claims. (T.P. 266, L. 16 - P.268, L3).

Prior to the written decision being issued, Frisk sought Order to Show Cause, which was issued (Docs #32-36). Findings and Conclusions were entered on April 14, 2023. Appellants' Appendix 1, "App 1" . The judgment was entered on April 25, 3223 (App 5).

The show cause hearing was held on May 2, 2023. No ruling has been made on that show cause or the more recent Rule 62 request which sought relief because Thomas narrowed the roadway. The lower court has determined it would prefer to await this Court's decision.

STATEMENT OF FACTS

Frisk acquired his property through a contract evidenced by an abstract of purchasers interest (Frisk Appendix Item A [FApp. A]; Trial Exhibit [Exhibit]1) , recorded on January 2, 1978. He acquired sole ownership by deed dated September 1, 1987, recorded on December 4, 1991. (Finding 12). Prior to his purchase , he was shown the property several times by Alice Galloway, the seller's agent. She showed what she said were the boundaries, including the "northwest corner", at issue here. There was a pin with a cap, a spike in the ground and a tree with " a bunch of flagging" at that corner[1]. (March 9, 2023, transcript, hereafter "T.", P.14, L. 7 – P.16, L.16; P.22 L.25 - P.23 L. 12).

William Hutchinson, a Thomas' predecessor, also located at the northwest corner for Frisk at the same point. (T. P.23, L.19-P.24, L.4). Hutchinson and Frisk had a common grantor (Finding 6). Frisk met a surveyor working on the adjacent property, who confirmed the same location as Frisk's northwest corner. (T. P.24, L.5 - P.25,L.1).

[1] These were gone when Frisk looked at the property after Thomas took his survey discussed below. (T. P.15,L25- P.16,L.16;.P.18, L.20 - P.19,L.2).

This surveyor is important as Thomas argued to the lower court, Frisk had the corner wrong because he was using a corner on the adjoining tract [COS 2651]. (See: T. P.198. L.22 -P.199, L, 25; P. 150,L. 21 - P.151,L2; Trial Exhibits J, K and R; Exhibit A to App 1).

The road: The description in Frisk's abstract of purchaser's interest (FApp A) includedt: " Together with a common easement 30 feet in width over and across the existing roadway located on the 4.048 parcel of land as described on Certificate of Survey No. 3534 (COS) for purposes of ingress and egress between the sixty (60) foot public road and the grantees above – describe property the location of this roadway easement is shown on the map attached here to as exhibit B." The map was similar to COS 3534, but not identical. The roadway depicted was not the existing roadway. The existing road was 30 feet in width. (T. P.26 L. 13 – P. 27 L. 23). Frisk was under the assumption the term "30-foot existing roadway" meant the existing road and shoulders he used from the time he entered the property through the present (T. P. 110, L. 20 – P 111, L.8.).

Frisk cleared the easement. The shoulders ran beyond the tree line. The bottom of the roadway near the entry from the 60-foot road was improved. The road was graveled from the entry to Frisk's property. He removed the snow with a borrowed grader and with his tractor and bucket. When using the latter, he would drop the snow beyond the tree line. He plowed at times to the full 30-foot width. (T.P.27, L.12 - P.30.L.1; P.31,L.7-17). Within the 30 foot roadway, Ellis who purchased from Hutchinson, asked Frisk if he could place gravel boxes within the 30 feet roadway easement. (T. P.79, L,19-P.81,L.6).

Because of the harassment from Thomas, Frisk no longer clears the road. (T.P.31,L.19- P.32,L.4). Previous to Thomas, road remained about the same including

the shoulder for years. (See: Exhibit 9A, T. P.34,L.2 - P.36, L.25). After the arrival of the Thomas, Frisk began having problems being able to use the full road and shoulder as he previously had. (T. P. 37, L.4- P.39. L. 13; Exhibits 10, 11 and 12). Even after the lawsuit was filed, Thomas moved boulders into the tree line. (T. P.39, L.19 -P.41, L. 20, Exhibits 14 thru 16A). [2]

At trial Thomas' testifying surveyor drew an approximate location of the existing roadway. Snow prevented him from seeing the shoulders on his only visit to the property. His sketch of the existing road was not to scale. (T. P152, L.11-P.153,L.5). The existing road and the surveyed road run together for about 80 feet.(T.P.152,L.2-L.10).

The fence: Hutchinson assisted Frisk by again verifing the location and pin for the northwest corner and also in building the fence. Frisk had a logger sight a line to the northeast corner. (T.P.25,L.4-P.26,L.4). Frisk commenced his fence at a point that he thought was three or four feet into his property from the northwest corner. (T. P 22, L. 4 – P. 25., L. 19). Hutchison held the tape while he and Frisk located that point. Frisk set poles along the line that he shot between the two corners. He started placing fence poles until he reached a point where there was a great deal of predominantly Shrub Maple. When Frisk got his chainsaw to clear it, Hutchinson suggested that they install the fence around the shrubs on Hutchinson's side. So, they did. Hutchison and Frisk thus established the fence line. (T. P. 63, L9 – P 60,L. 20). Later, Frisk cleared shrubs and planted the area on his side of the fence (Exhibit 40;T.P.22, L12-L.23). The fence encroached a maximum of 39.1 feet (Exhibit R).

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[2]Extensive discussion of the interference with the roadway and area for maintenance (shoulder) was offered but they are of only minor significance to the arguments herein.(T.P.42, L 10 - P.47,L. 17).

Frisk's original house burned in 1987. Frisk commenced rebuilding in 1989 at the current location. Landscaping lilacs were planted four or five years after the fence was installed. (T. P106. L. 21 – P. 107, L 20; P.22, L.4-24).

The water: The water well agreement between Frisk's grantor and Hutchison is found as FApp B,. Hutchison and his wife were the purchasers in the agreement. It provided in part: "That for valuable consideration, the adequacy and receipt whereof is hereby acknowledged by PURCHASERS, do by these presents grant, sell and convey unto said PURCHASERS" a portion of " their interest in the well, etc. The text stated the grant was from and to the Purchasers and not from the Sellers to the Purchasers. There was no grant of those rights from the "Seller" expressed in the agreement.

The agreement went on to clearly grant to the Purchasers 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 . . . for the purpose of installation, repair and maintenance of said water line and system." The Agreement required each party to share the costs of maintenance, operation and repairs based upon their proportionate interest in the well.

Frisk's rights and obligations were subject to the Water Well Agreement but were established in Exhibit 1 (See: FApp A.). These included "undivided one-fourth (1/4) interest in and to that certain water well and water well system . . . <u>BUT RESERVING</u> unto the grantors . . . all remaining right, title and interest . . . which have not been heretofore been conveyed or granted of public record to any other party." Frisk's Grantors specifically reserved all the remaining rights.

Frisk received a 1/4th interest and obligation to pay a proportionate share of the costs**.** Prior to Frisk's house burning, the power for the well was paid for through the billing for his home. Hutchinson contributed $15.00 a month for the power. After the fire, they installed a meter and agreed to split the cost equally. The other person(s) having the remaining 50% of the rights and obligations neither uses the well nor participates in the costs. (T.P.70,L.3**-** P.73,L.80). The water line was moved within Frisks property. (T.P.74,L.19 - P.76,L.17). Neither the well agreement nor Frisk's grant included the water line easement where it is presently located.

The new survey: The survey which found that the encroachment on the Thomas property was conducted after the close of discovery. Thomas' surveyors had not sent notice to Frisk of the proposed entry. Thomas on May 4, 2022, cut the lock on Frisk's gate and entered the Frisk side of the fence with surveyors. They conducted a survey and actually entered the area that is on Frisk's uncontested property (T. P. 100, L.15 - P.103, L.11). A different surveyor prepared Exhibit R. He had not participated in the survey itself or seen the property prior to the day before the trial. He was unable to see the road's shoulders because of snow. He was aware that the a road existed at the time of Frisk's purchase. That roadway was not shown or requested to be shown on Thomas' survey. (T.P.144,L.4- P.5,L.4: P.152,L.2-P.153,L.5; P.159,L16-P.161,L.14). That survey was a retracement of COS 3534.(T.P.147.L. 9-23; Exhibit R). Exhibit R shows a 39.1 foot maximum encroachment into Thomas' property, and a corner of two adjoining tracts to the property to the west, about 40 feet north of where Exhibit R, places Frisk's northwest corner. (T.,P150, L.2 - P.151,L.2). That corner of two adjoining tracts is now the northwest corner of the equitable easement.

The trial conclusion and the following events. The court made a number of oral rulings. First, she determined the parties agreed that the pretrial order supersedes all the pleadings[3]. (T.P.260,L.5-16). She noted the "equitable easement" was sought for the "house fence and property in between." (T.P.264,L.11- 13). After ruling on a number of other issues [T.P.266, L.15 - P.268, L.1], Judge Eddy expressed her concern about both the surveyed road easement and a 30-foot prescriptive easement being granted. She did not feel there should be two roads. She said if both existed, she would limit the prescriptive road to 15 feet.(T.P. 268,L.18 - P.270,L.24). She advised the written ruling would issue after 30 to 45 days. (T.P271,L.12-15)

Before the ruling issued, the court was advised of a significant issue had arisen. (Docs # 32,33). On April 10, 2023, Frisk and his counsel related the following to the Court.

> On March 27, 2023, Frisk mailed a duplicate key for the lock on the gate between the parties' properties to Mr. Thomas at 1194 Swan Hill Dr. Bigfork Mt. 59911. Subsequently on Sunday, April 2, 2023 at approximately 11:30 AM., Mr. Thomas proceeded to cut the chain on the gate into pieces, break the gate stop on the east post into four pieces and force the gate uphill into the driveway damaging the wires on the lower portion of the gate. Mr. Thomas climbed up into the landscaping and walked on the plants. Mr. Thomas left the gate open and all the pieces of the chain and gate stop in the driveway and left the gate open.
>
> That evening, Mr. Frisk made a new gate stop, got a new piece of chain and repaired the damage that Mr. Thomas had done, but left the lock unhooked. Mr. Thomas and his father-in-law returned to the gate at approximately 7:52 PM and proceeded to cut the new chain into several pieces without ever looking to see that the lock was not latched. The parties exchanged words at that time and Mr. Thomas again trampled in the landscaping claiming that he " wanted to check something else " and pretended to look at the meter again and then left, taunting Mr. Frisk and leaving the gate open.

[3]Mis-transcribed as "meetings."

> Frisk secured another piece of chain, picked up all the pieces Mr. Thomas had cut up, and put the new chain on the gate to keep it shut for security for the night. He made several trips up to the gate during the night to make sure Mr. Thomas had not returned and left the gate open. The lock was NOT latched.
>
> There have been no problems with the water well and no need to maintain or repair it.

The court set the reset a show cause hearing. (Docs# 34 and 36) The last order, dated April 14, 2023, set the show cause for May 2. The Findings, Conclusions and Order (App 1) were entered on April 14 with Judgment (App 5) entered on April 16. Thomas responded to the request for a show cause on May1. (Docs 40 &41.00).

STANDARD OF REVIEW

The standard of review governing proceedings in equity is codified at § 3-2-204(5), MCA, which directs the Court to review "all questions of fact arising upon the evidence presented in the record ... as well as questions of law." § 3-2-204(5), MCA. Findings of Fact are to be reviewed to determine if the court's findings are clearly erroneous. The District Court's conclusions of law are reviewed for correctness with de novo review to mixed questions of law and fact. The District Court's factual findings are reviewed for clear error, " 'whether those facts satisfy the legal standard is reviewed de novo. ***Mont. Digital, LLC v. Trinity Lutheran Church***, 2020 MT 250 , ¶ 9, 473 P.3d 1009 [internal citations omitted].

SUMMARY OF ARGUMENT

Frisk is seeking to have Montana recognize the relative hardship doctrine

resulting in an equitable easement. From the time Thomas claimed the right to eject him from a portion of the property, Frisk has pled the equable easement and relative hardship. In order to assure an opportunity to raise the issues, months before the trial, Frisk moved to be allowed to present evidence regarding the theories. Thomas opposed this based on a claim of stare decisis. Thomas neither argued the need for compensation, nor the possibility of a taking. Thomas neither in response to the motion nor at trial, offered evidence or raised the issues to support damages or a taking.

Equitable easements of different types already exist in Montana. When this Court previously refused to consider hardship claims, it was because the issues had not been properly developed below. This is now the opportunity to provide a remedy for when a court finds that under equity mandatory injunction cannot issue. This Court presently demands an equitable determination of whether a mandatory injunction should issue. Frisk is proposing a standard to measure that "equity" and a remedy for when the injunction is refused, the creation of an equitable interest.

The "equitable easement" sought here is often not actually an easement. It is an interest in property designed to protect the innocent encroacher. The type of interest should be determined based on the circumstances before the court.

Equity demands some standards be met to judge the relative hardship. First, an encroacher must be innocent. Second, the landowner should not suffer any real irreparable injury unless compensated. Third, the hardship to the encroacher from having to cease the trespass must be disproportionate to the hardship caused the owner. This articulated standard is better than the simple "in equity" currently used by this Court. Once the standards are met, a court can fashion an equitable remedy.

Judicial taking arguments do not prevent the creation of the equitable interest. The ***Stop the Beach*** decision cited by Thomas is a plurality decision and the discussion of judicial taking is dicta. Another problem for the claim of a judicial taking is that at this time it faces the same obstacle that existed for the relative hardship doctrine. This Court simply does not get into those significant legal theories unless they were raised below. Judicial takings was not. Since state law defines property. State law creates an interest by denying injunction – denial which is already part of our law. Further, if no evidence is offered as to the damage or the damages is minimal, damages need not be awarded.

Frisk and Hutchinson had a common grantor. The grantor's agent and Hutchinson showed Frisk his northwest corner. Hutchison conveyed to Ellis and Ellis to Thomas. No one imagined that a portion of what Frisk thought was his land would be taken away and that portion with no additional consideration added to Thomas'. A court in equity must look at the interests of the parties. Here, Frisk lost property everyone thought he enjoyed for over 40 years and that property is moved to a tract that Hutchinson, Ellis and even Thomas did not knowingly purchase requires a balancing of equities.

Frisk argues the evidence supported a 30 foot prescriptive easement but the court said she would not grant the 30 foot easement along with the record easement. The court limited the size of the prescriptive easement. That was contrary to the evidence. That **is not contrary** to equity, which is why Frisk has not appealed the issue. The net effect was delivery to Thomas of an area for their garden which was important to them. This prescriptive easement was only discussed in order to show that the determinations of the various interests are interrelated and must be considered as a single act in equity.

Frisk examines the court's rulings and Thomas's issues. The court did two things with respect to the encroachment. It denied the injunction and then awarded an equitable easement. The court denied the injunction under existing Montana law, weighing the equities. Thomas does not argue the court was wrong to deny the injunction. We are left with the equitable interest in Frisk.

Frisk evaluates the hardships as discussed by the court in its findings and conclusions demonstrating that Thomas never argued the hardship issue. For them, the only hardship below was the lack of access to land which they did not even know they acquired even though they also acquired additional land for their garden. Thomas here have not shown any finding to be unsupported by the evidence.

Other than claiming Montana ourght not adopt the releative hardship/equitable easement theory, when they contested a conclusion. they do not challenge it but rather argue for additional considerations. Thomas' argument with respect to comparing the hardships is that Frisk's encroachment should be viewed as several separate encroachments rather than one encroachment being his curtilage. The cases cited by Thomas are different factual situations and the facts found by the court are supported by the evidence.

Frisk explains the factual basis by which App. 1's Exhibit A was created. With Thomas not properly challenging findings and challenging only whether compensation should be paid, the Court should affirm the District Court's decision.

Of course, Thomas had a loss of deeded property. Thomas hardship argument is that they should have received compensation and that "the separate encroachments" should be separately assessed. Those arguments were not contrary to the court's conclusions but in addition to them. As to the issue of Thomas' compensation,

Thomas never offered evidence of monetary damage which is sufficient reason to deny compensation. Frisk compares, as the court did, the loss of his fenced yard with landscaping and portion of his house to the finding that there was "virtually no hardship" for Thomas. Again, no finding is challenged. Contrary evidence was not offered. Thomas knew before trial of the issues being raised, yet still offered no evidence of what "loss" they would suffer. The court received one piece of evidence from which a court could deduce a $3,283.98 loss, but Thomas did not use the evidence for that purpose.

The Water Well Agreement, although giving Thomas' predecessor an easement for maintenance, never gave Thomas' predecessor a right in the well due to typographical problems. The agreement did not provide the correct location of the existing waterline. It did not anticipate the power meter. The agreement imposed only 25% of the cost on each of two parties with the remainder unprovided for. Equity had to be applied to interpret the easement and well agreement. Moreover, the historic use of the easement was not a 24/7 access as sought by Thomas. Historically access was very seldom, if ever used. Thus, the court protected Frisk from harassment and smaintained historic nature of the water well agreement and easement.

ARGUMENT

I. SHOULD MONTANA ALLOW AN EQUITABLE EASEMENT WHEN A COURT DETERMINES THAT A MANDATORY INJUNCTION SHOULD NOT IN EQUITY BE GRANTED?

Frisk's reply to the amended counterclaim included affirmative defense of an equitable easement under the relative hardship doctrine. (Doc. #19). Frisk asked the

court's permission to use the defense and introduce related evidence at trial. (Doc. #22). Frisk's arguments in summary were that although the easement was not recognized in Montana, this Court's rulings on the application of equity when a mandatory injunction is sought laid the groundwork for application and the creation of the equitable easement. He then argued the concept of the "easement" as found in other states and its merits, citing numerous cases.

Thomas opposed allowing the evidence (Doc.# 23). They argued stare decisis precluded the doctrines' use based upon ***David v. Westphal***, 389 Mont 252,405 P.3d 73(2017); ***Murray v. Countryman Creek Ranch***, 252 Mont. 432, 838 P.2d 431 (1992), and ***Penland v. Derby***, 220 Mont. 257, 714 P.2d 158 (1986). Thomas cited dicta rather than the holdings of the cases. See: ***Petr. Tank rel. Comp. v. Emp. Fire and Mar***.,2008 MT 195,¶ 22, 185 P.3d 102. Thomas did not address, as they attempt to do now, the merits of the claims. They did not claim a taking. They had their opportunity and declined to use it. Frisk responded (Doc.# 23).

Other types of equitable easements have long existed in Montana. C/f: ***Michaelson v. Wardell***, 186 Mont. 278, 607 P.2d 100, 102 (1980) (implied easement by reservation); ***Johnson v. Meiers***, 118 Mont. 258, 263, 164 P.2d 1012 (1946) ("at least a right in the nature of an easement w..."); ***Schmid v. McDowell***, 199 Mont. 233, 238, 649 P.2d 431 (1982) (implied easement way of necessity not found). The concept of an equitable easement or interest should be recognized when equity precludes a mandatory injunction.

Although Montana has not yet recognized the principle, it declined to do so because the issue had not been properly raised. See: ***Penland v Derby,*** 220 Mont 257, 259-60, 714P2d 158, 159-60(1986). "We have yet to consider the application and

merits of the equitable doctrine of relative hardships under Montana law and state no view on it here." ***Davis v. Westphal***,, 389 Mont. 251, 405 P.3d 73 ft nt. 10. "*Regardless of a determination of a trespass, the grant or denial of mandatory injunctive relief remains highly discretionary dependent on the unique facts and circumstances of each case . . .Though legal title must generally prevail if the equities are equally balanced or balance against the trespasser . . . the court must carefully weigh and balance the equities in each case when exercising its broad discretion to grant or deny injunctive relief. . . Thus, though often appropriate on a balance of the equities in particular cases, mandatory injunctive relief is not available to remedy a trespassing real property encroachment as a matter of right in every case."* ***Davis at*** ¶ 29. Montana already laid the groundwork for recognizing the principle. The concept of the easement as found in other states , i.e., ***Minnwest Bank v. RTB, LLC***, 873 N.W.2d 135, 145-46 (Minn. App. 2015) ; ***Graham v. Jules Inv., Inc***., 356 P.3d 986, ¶¶ 32-41 (Colo. App. 2014); ***Wojahn v. Johnson***, 297 N.W.2d 298, 307 (Minn. 1980); ***Dundalk Holding Co. v. Easter***, 215 Md. 549, 137 A.2d 667 (App. 1958) ; ***Christensen v. Tucker***, 114 Cal.App.2d 554, 250 P.2d 660, 665-67 (1952) ; ***Golden Press, Inc. v. Rylands***, 124 Colo. 122, 235 P.2d 592, 595 (1951) ; ***Owenson v. Bradley***, 50 N.D. 741, 197 N.W. 885, 887-89 (1924) ;***Amkco, Ltd., Co. v. Welborn*** *(2001), 130* N.M. *155,* 21 P.3d *24.* and Restatement (Second) of Torts§ 941 cmt. c, d (1979).

While this Court has said one must weigh the equities in determining whether to grant or deny a mandatory injunction, other states have used different language. "When determining whether an injunction is a proper remedy, the court must weigh the relative hardship to each party." ***In Re Langholz***, 887 N.W.2d 770, 779 (Iowa 2016). This

approach is known various names: "balancing of equities" (***Scheble v. Nell*** (1962) 200 Cal.App.2d 435, 438); "balancing conveniences" (11 Witkin, Summary of Cal. Law (9th ed. 1990) Equity, 156, p. 835), and "comparative injury" (3 Powell on Real Property (1994) Easements and Licenses, 34.09, p. 34-101). The doctrine gives the court discretion to deny a mandatory injunction to remove an encroachment. This has already been recognized in Montana.

An equitable easement or interest: In those unique situations when in equity a mandatory injunction removing an encroachment is denied, the imposition of an equitable exclusive easement is a possible solution. Otherwise, what is to happen to the property? We could refer to the transferred property as an equitable interest. When the mandatory injunction is properly denied, the court has the power in equity to grant the encroacher affirmative relief by fashioning an interest to protect the encroacher's use of the disputed land. The protective interest is created in equity and is not a traditional easement. The bar to the creation of exclusive prescriptive easements does not apply. ***Hirshfield v. Schwartz***, 110 Cal.Rptr.2d 861, 91 Cal.App.4th 749, 775 (Cal. App. 2001). This interest is not an actual easement. Thomas' arguments about it not being an actual easement are correct. It is an equitable interest.

"Where there has been an encroachment on land without any legal right to do so, the court may exercise its powers in equity to affirmatively fashion an interest in the owner's land which will protect the encroacher's use, namely, a judicially created easement sometimes referred to as an 'equitable easement.'" ***Romero v. Shih***, 78 Cal.App.5th 326,355, 293 Cal.Rptr.3d 477 (Cal. App. 2022). There are various approaches taken by courts ranging from compelling a sale, to creating a right with no payment of compensation, to creating an "exclusive easement." If a court cannot find

the encroacher "innocent, " sometimes a license may be found. ***Richardson v. Franc***, 182 Cal.Rptr.3d 853, 861, 233 Cal.App.4th 744 (Cal. App. 2015). The remedy must be equitable.

An equitable interest would be created by operation of law. Operation of law is "[t]he means by which a right or a liability is created for a party regardless of the party's actual intent." Black's Law Dictionary 1265 (Bryan A. Garner ed., 10th ed.2014). In a generic sense, the term expresses the manner in which a person acquires rights without any act of his own. ***Pioneer Natl. Title Ins. Co. v. Child, Inc***., 401 A.2d 68, 70–71 (Del.1979). Here, when a court in equity cannot grant the injunction, it has already by operation of law, created an interest in the encroacher.

What is necessary to invoke the Court's power? A general statement of the requirements includes three which are determined from the facts surrounding the situation. These are stated in differing terms, but the general requirements are: 1. The encroacher must be an innocent party; 2. The effect on the landowner is not an irreparable injury and 3. The hardship to the trespasser from having to cease the trespass is greatly disproportionate to the hardship caused [the owner] by the continuance of the encroachment. ***Ranch At the Falls LLC v. O'Neal***, 38 Cal.App.5th 155, 184, 250 Cal.Rptr.3d 585 (Cal. App. 2019); ***Nellie Gail Ranch Owners Assn. v. McMullin*** (2016) 4 Cal.App.5th 982, 1003–1004, 209 Cal.Rptr.3d 658. **This requires more than then traditional issue of being "equitable."**

Based on that, a court upon refusing to grant an injunction may use its equity powers to "affirmatively fashion an interest in the owner's land which will protect the encroacher's use." The use is in equity and is not treated as a prescriptive easement. The court may charge or not charge for that interest depending on the specific cases.

Hirshfield, 110 Cal.Rptr.2d at 871, 91 Cal.App.4th at764-65. and cases cited therein. Those interests vary from court to court. They are equitable. The fundamental distinction between a protective interest in equity and a prescriptive easement is a difference in the rationales of the theories. Adverse possession and prescriptive easements show the preference for use, rather than disuse, of land. Their purpose is to reduce litigation and preserve the peace by protecting longstanding possession. Equity requires court to exercise its equity powers, with the principal concern being the promotion of justice, acting through its conscience and good faith. ***Hirshfield*** , , 91 Cal.App.4th at, 769 (Cal. App. 2001)

Thomas for the first time argue that such a grant is a "judicial taking" when "a court declares that what was once an established right of private property no longer exists[.]" citing ***Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection***, 560 U.S. 702, 715 (2010). The problem with this argument is twofold. First, the language is not precedent. It is from a plurality decision and was simply dicta in that case[4]. Judicial taking has not progressed from there. Fifth Amendment analysis applies to legislative or quasi-legislative acts. It does not apply to a decision to impose an equitable easement ***Hinrichs v. Melton***, 11 Cal.App.5th 516,

[4]Justice Scalia in dicta stated that a state court's opinion finding that an "established" property right "no longer exists" may amount to an unconstitutional taking. Justice Breyer, joined by Justice Ginsburg, concurred in the judgment but not only expressed doubts about the concept, stated judicial takings was "better left for another day." He feared the federal court would begin interfering in the "shaping of a matter of significant state interest—state property law." Justice Kennedy (joined by Justice Sotomayor) took the position that the state's "vast" power to take property, so long as it acts for a public purpose and provides just compensation, belongs only to the democratically accountable legislative and executive branches. ***Pavlock v. Holcomb***, 35 F.4th 581, 586-89 (7th Cir. 2022).

524, 218 Cal.Rptr.3d 13 (Cal. App. 2017) citing ***Loretto v. Teleprompter Manhattan CATV Corp.*** (1982) 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868

The further problem is that the development of a judicial taking argument which well could have been made below and was not, is unwise to entertain without some record dealing with it below. Just as what was said about relative hardship created equitable easements, "Furthermore it would be unwise to consider a novel theory of equitable easements without the benefit of a complete record developed at trial." ***Penland v. Derby*** 220 Mont.260, 714 P2d 158, 160 (1986).

Generally speaking, state law defines property interests. ***Phillips v. Washington Legal Foundation***, 524 U.S. 156, 164, 118 S.Ct.1925, 141 L.Ed.2d 174 (1998). This is because "[p]roperty interests . . . are not created by the Constitution. Rather they are created, and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . .." ***Bd. of Regents of State Colls. v. Roth***, 408 U.S. 564, 577 (1972). Under current Montana law, when the injunction is denied, the encroacher must have some kind of undefined interest[5]. Under state law, when the trial court creates an easement by denying an injunction, the landowner is ordinarily entitled to damages, but the court cannot award damages in the abstract. When, as here , the court expressly found that Thomas would suffer very little if any damages and when Thomas cannot point to any evidence the court missed, the court can be sustained for not awarding damages. ***Tashakori v. Lakis***, 196 Cal.App.4th 1003, 1010, 126 Cal.Rptr.3d 838 (Cal. App. 2011).

[5]The State law claims case raised by Thomas never address the equitable interest created when one cannot remove an encroacher and have no merit in this matter.

Here, that application of equity makes sense. Hutchinson purchased from the same person Frisk did. Hutchinson obviously believed and told Frisk where the northwest corner of Frisk's property was. That was the same point shown to Frisk by the common Grantor's real estate agent. It is logical to assume Hutchinson was told the same thing when he purchase. When Hutchinson sold to Ellis and Ellis sold to Thomas, the buyers and sellers did not know there was hidden property. In theory, Hutchinson and his successors bought what they were shown. In theory, Frisk bought what he was shown. Based on that Frisk loses and what Thomas gains was never anticipated. This is not to argue that deeds should be ignored. It does go to the existence of any real damage. The trial court's consideration of the conduct of the parties must be made in light of the relative harm that granting or withholding an injunction will do to the interests of the parties. ***Linthicum v. Butterfield,*** 172 Cal.App.4th 1112, 1120, 91 Cal. Rptr. 3d 698 (Cal. App. 2009). Here, the court's failure to award damages for a taking revolved on the lack of evidence offered to show damages. The fact the parties were actually buying and selling property based on the same mistaken corner supports the lack of damages.

Here the remedy fits the equity, but it may differ in another case. Any solution involving an equitable easement should be constructed to be equitably based upon the facts of each case. Thus, the taking issue is avoided.

This Court should adopt a manner of dealing with what it already allows, the refusal to grant a mandatory injunction removing an encroachment. In doing so, rather than leaving the determination to deny the injunction simply to "equity," the adoption of the relative hardship rule will provide a standard from which to act. The granting

of the equitable interest, commonly called an equitable easement should be completion of the doing equity as defined by the situation.

II. HAS THE DISTRICT COURT PROPERLY GRANTED AN EQUITABLE EASEMENT BASED ON RELATIVE HARDSHIP IN THIS CASE?

Looking at the case as a whole: The court achieved equity by looking at the case as a whole. Frisk could be appealing the limited size of his prescriptive easement and lack of the secondary maintenance easement, but when one reviews the decision as a whole (App.1), one realizes certain equities were exchanged. There is no evidence to show that prior to Thomas acquiring their property Frisk did not use the shared road to the full to the 30 feet. This was from when Frisk built the road until Thomas purchased. [T. P.27,L.7-P.30, L.1;P.46,L.14-34(Exhibit 20); P.110,L.16 - P.111, L.8; P112,L.25-P113,L.21]; P.115,L.13- P. 119,L.1(Exhibit 14)]. Ellis who purchased from Hutchinson and sold to Thomas even asked Frisk for permission to install boxes to hold road gravel within the 30 foot roadway. [T. Pg.79,L.19- P.81,L.6].

The court really had no basis to reduce the prescriptive easement, except in equity. Judge Eddy did not want to let Frisk retain the platted easement and a full 30 foot prescriptive easement over the shared easement road. Then she made clear that any prescriptive easement would be reduced not because of the evidence but because there would then be two roadways (T.P.268, L. 18 - P. 270, L. 19):

> **[The Court] Mr. DeJana, is it your position that if your client is granted a prescriptive easement for the road on the existing roadway that the surveyed 30-foot easement road easement would be extinguished.**
> **MR. DeJANA: I don't believe so, Your Honor. The case law says you can have both, and . . .**

THE COURT: Well, I just don't want there to be a situation where there's two roads, right? Okay. Thank you. . . .
THE COURT: Well, obviously I'm going to grant a prescriptive easement for the existing roadway, it's really just a question of the width -- it's really a question of the width of the roadway. And if I'm granting a prescriptive easement not following the deeded -- I'll call it the deeded easement on the Certificate of Survey it's probably going to be 15 feet, it's not going to be 30 feet because that's on the Certificate of Survey.

The court recognized the parties had stipulated that Frisk retained the platted easement [App. 1, Findings #22]. Frisk from when he purchased the property, cleared it to 30 feet for the road and shoulder. Frisk during the occupancy of Hutchinson and Ellis, used the surface as roadway and a portion of the 30 feet to dump snow including in areas beyond the tree line as part of the maintenance of the roadway. [i.e. T.P 27, L 16 - P 30, L.1 (Cleared to 30 feet, put snow on shoulder and beyond the tree line treated it as a common road that he had the right to use.); P. 31, L. 7 - P.32, L 5 (only plowed twice since Thomas purchased because he did not want the confrontation); P. 42, L. 2- 16 (Thomas placed rocks that blocked the roadway - Exhibit 16A); P.56, L. 16 - P. 57, L. 3 (Thomas cut away a portion of the road way where Frisk would dump snow)]. Thomas sought to limit the scope of the use to only what was needed rather than what was used. (T.P. 8,L.2 -21). Thomas did not know for a period 5 years prior to the start of the suit and 5 years prior to their purchase how the road was used. (T.P.225, L. 9 -P. 226, L.18, **note the references to prior discovery answers under oath).** To establish an easement by prescription, the party claiming an easement "must show open, notorious, exclusive, adverse, continuous and uninterrupted use of the easement claimed for the full statutory period **.** ***Barrett, Inc. v. City of Red Lodge***, 2020 MT 26, ¶9, 436, 457 P.3d 233 . The secondary easement

for maintenance goes with the primary to the extant evidence is offered. A secondary easement is a mere incident of the easement that is acquired by prescription. ***Laden v. Atkeson***, 112 Mont. 302, 116 P.2d 881, 883-84 (Mont. 1941); ***Mattson v. Montana Power Co.***, 2009 MT 286,¶ 37 , 215 P.3d 675.The finding by the court has not been appealed by Frisk[1]. This resulted in freeing between 2,243.5 sq. ft. (5 of 20 feet for the length as stated by the court) to 6,730.5 sq. ft. (15 of 30 feet for the length as stated in Frisk's testimony) from an easement for access and maintenance. Length is determined from the "found" length of the west boundary of Thomas's property to their new southwest corner adjoining the equitable easement set by the court. (See: Exhibit A to App 1). This provided more room for Thomas' garden as Thomas desired. (T.P. 182,L.15 - P.183,L.19; P. 186,L.9-24).

With that understanding let us examine the ruling and the appeal. The court did two things, denied the mandatory injunction and awarded an equitable easement. The court pointed out that under existing Montana law the granting of the mandatory injunction was subject to the weighing of the equities. (App1, Conclusions 5 - 7). Judge Eddy denied the requested mandatory injunction sought to make Frisk remove his house, fence and gate [and thus also his landscaping].(Conclusion #13, App1). That denial has not been argued as wrong but only as requiring additional compensation to Thomas or separating each part of the encroachment as if it were able to be separately

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[1] As noted previously, this issue has not been appealed by Frisk even though Finding 26 [The width of the prescriptive easement is 15 feet, consistent with its historical use. The Court rejects the Plaintiff's request to expand it to 20 feet as would be required to access a subdivision, as that is not within the established and historical use of the easement.] was not supported with any evidence. Thomas have not argued that the portion of the Order establishing the prescriptive easement should be set aside (Conclusion 1,App.1 pg. 9).

evaluated. We must assume the court's conclusions as to their merits stand. Thomas' arguments are limited to the need to add compensation and view each part of the encroachment as a separate encroachment. Thomas focus on the creation of the equitable easement and the well agreement. They make no suggestion as to what is to occur with the property from which Frisk cannot now be removed. With that in mind we will still address the hardship issue with respect to the creation of the equitable easement.

Judge Eddy addressed these in Conclusions 12 and 44 sic (most likely intended to be 12 (h)) [App1, page 8]. In the Conclusions which also included fact finding, the court stated:

> (12) Considering the Restatement (Second) of Torts, §§936, 941 factors, these factors weigh in favor of granting the Plaintiff an equitable easement under the relative hardship doctrine:
>
> (a) both parties have important property interests to be protected and both parties' primary residences are located on these properties;
> (b) only mandatory injunctive relief will satisfy the Defendants' interests, and only an equitable easement will satisfy the Plaintiff's interests;
> (c) there has been no unreasonable delay in either party requesting this relief as the trespass was only discovered in the course of this litigation;
> (d) there has been no misconduct on the part of either party in regard to this particular claim;
> (e) (there is virtually no hardship to the Defendants as they were unaware they owned the disputed portion of their land, believed when they purchased their property that the Plaintiff's fence reflected the property line, and rarely, if ever, visit this portion of the property. In contrast, the Plaintiff consulted the prior owner of the Defendants' property who assisted him in locating the

property line (albeit incorrectly), and in good faith built the fence, installed the gate, and built his residence.

(f) third-parties and the public have no interest in this matter.

(g) The practicalities of enforcing the requested remedy to either party are on par.

(44) It is undisputed the Plaintiff is an unintentional and non-negligent trespasser who under these particular and limited circumstances is entitled to an equitable easement over that portion of the Defendants' property as illustrated on the highlighted portion of Exhibit A, attached hereto.

Those conclusion/fact determinations are tied to Findings 27 - 36, which are supported by the evidence **.**

Thomas: We cannot ignore that they are excluded from a portion of their deeded property, even if they did not know they purchased it. The only hardship for which Thomas offered evidence was they want to now use a portion of their property they did not even know they acquired, and upon which they have to pay taxes. With the shrinking of the prescriptive easement, they acquired what they sought for enjoyment of their garden. The issue of compensation will be discussed later. (App. Brief pgs. 20 - 21). This is the only hardship argued. Thomas are not contrary to the Findings and Conclusions reached by the court. Findings 27 - 36 and Conclusions 5- 13 were not challenged by Thomas. The question is only are they supported by the evidence, and that issue was not raised by Thomas. ***See: Ashley v. Safeway Stores, Inc***., 100 Mont. 312, 322 ,47 P.2d 53(1935).

Thomas' attack the court's use of the Restatement (Second) of Torts, §§936, 941 factors but for only the failure to provide compensation. That is discussed elsewhere in this brief regarding taking and failure to awrd damages.

Frisk's hardship has been demonstrated. The court found and Thomas have not challenged the finding that Frisk built the gate, fence, and his house or that he planted between his house and the fence. These would all be lost or damaged if Thomas were granted their mandatory injunction. (Findings 30 - 34). Further, were Frisk forced to move his house, Thomas could attempt to force compliance with a 20 foot set back. (See: Doc# 18, First Amended.,P.7, ¶ 17;T.P.203,L.2-20, Exhibit N. "The trial court's exercise of discretion to determine whether to grant or deny an injunction is based on equitable principles. In exercising that discretion, the court must consider the conduct and intent of both parties in light of the relative harm that granting or withholding an injunction will do to the interests of the parties." ***Linthicum v. Butterfield,*** 172 Cal.App.4th at 1119-1120 [Here, the court found the construction started prior to the zoning but Thomas could still use these regulations to to further harass or damage Frisk]).

Here, the loss of the landscaped property and fence and damage to the house clearly well exceed the "virtually no hardship" to Thomas. (See: App.1, Findings 30 -34 and Conclusion 12 where the interests were balanced.) In this case, the potential loss of Frisk's entire curtilage was balanced against the loss of property Thomas never thought they owned, and Mrs. Thomas never saw. This is significantly different than asking removal of some furniture which were not fixtures as in ***Shoen v Zacarias*** 237 Cal. App. 4th 16,18 and 20 ,187 Cal. Rptr. 3d 560,562 and 564. Frisk's encroachment is the curtilage created within the fence line, including a portion of his home, and also most of his landscaping. There were no separate encroachments which would have to

be separately weighed against the little loss to Thomas, they were all weighed in total by the Court. This is clearly not a ***Hoffman v Law*** 2016 S.D. 94 situation (See¶¶ 7-8 and 18) with a separation of separate encroachments. Here, each of the required elements were weighed. Thomas has not challenged the factual weighing by the court. The court's factual findings support the granting of the equitable easement based upon hardship.

Should Thomas have been compensated? In response to the request to offer evidence in support of relative hardship equitable easement, Thomas below never argued the need of compensation or that the result of such evidence could be a taking. At trial, they never offered evidence directed towards compensation. That was their obligation. See: ***Hoffman v Law*** 2016 S.D. 94 ¶ 20. Failure of Thomas to offer credible evidence of the amount of damage justifies the lack of a monetary award. ***Linthicum v. Butterfield***, 175 Cal.App.4th 259, 268 (Cal. Ct. App. 2009). Yet, the court proceeded to remove what should have been an uncontested portion of the prescriptive easement. This was the equity balance.

Yet, there may be some evidence that this Court could use to provide for compensation. Defendants' Exhibit L2 was judicially noticed over Frisk's objection in an attempt to show the date of construction of Frisk's home and place him under the zoning setback. (T.P.200, L.4 - P. 201, L.25). Despite the admission of the document, the court followed the admissible evidence as to the date Frisk started construction. (Finding 32, App.1). That exhibit contains the appraisal of Frisk's property. When one reduces the value to that to a price by square foot, one finds a value of the land of $0.083 per square foot. Using the size stated by Thomas of 6,481.6 sq.ft., the value

of the adjacent land over which the easement is granted would be $3,283.98[2]. That was the only evidence of value which could remotely be said to have been offered by Thomas. This Court might choose to amend the decision to require this nominal payment by Frisk.

Exhibit A to the court's opinion explained. Although not raised by Thomas, some explanation of Exhibit A to App.1 is necessary. What is the Northwest corner of the equitable easement? One begins by reviewing Thomas' Exhibit R, their survey. The boundary on the west side of the survey showed the line between Tract 1 COS 2651 and Tract 2A COS 3119. That is the corner on the Court's Exhibit A. Frisk testified that the corner he was shown had a spike and flagging at the time he was shown it and it those were present until Mr. Thomas and his surveyors broke in Frisk's gate. At that time the flagging and pin disappeared. (T. P.15, L. 7 - P. 16,L.16). Thomas argued that the corner Frisk was shown was the corner for adjacent tracts. (T. P.198,L.20 - P.199,L.9). This was only documented corner left for the court to use.

Why did Judge Eddy run a straight line from that point to Frisk's northeast corner? She had heard Mr. Thomas claim that Frisk was able to move the fence and regularly moved it. (T. P.217, L.2 - P. 218,L.4). She made no determination regarding the truth of the statements, but by creating a straight line, she ended the ability to secretly move the fence or claim it was moved. In addition, the straight line set a clear boundary.

With the court's findings not being challenged, one can safely conclude that the court's findings stand. Thomas never challenged any findings. We are left with

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[2] The same evidence shows the loss of Frisk's house if the set back were applied would be in excess of $110,000.00.

the only claims that there should be compensation paid, but the only evidence going to that issue was accidentally introduced and this Court could make an award based upon that evidence. The Exhibit A easement created by the court was created in light of the evidence. The court should be sustained for doing equity.

III. HAS THE DISTRICT COURT EQUITABLY ENFORCED THE WELL AGREEMENT?

Mattson v. Mont. Power Co., 2009 MT 286, 215 P.3d 675 provides us with the basis for the court's actions with respect to the well access easement. "[U[nless clearly authorized by the terms of the servitude, the holder of an easement is not entitled to cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment." ***Mattson*** at ¶ 47;*see also* ***Restatement (Second) of Property****: Servitudes* § 4.10 (2000). Reasonableness "depends on the circumstances, such as the character of the servient estate, the purpose for which the servitude was created, and the use of the servient estate made or reasonably contemplated at the time the easement was created." ***Mattson*** ¶ 44. This Court has held that the preclusion from unreasonable damage "is an independent requirement on an easement holder's use of the easement. In other words, this requirement can be breached even if the easement holder is operating within the easement's technical parameters." ***Mattson*** *at.* ¶ 55. The court in its ruling on the use of the Water Well Agreement easement, enforced this requirement.

Thomas abused the access through the gate. The first time was just prior to the first trial setting. The surveyors and Mr. Thomas with neither notice nor permission entered through Frisk's gate after Thomas cut the chain. One of the surveyors came into Frisk's property beyond what the new survey said was Thomas' property to an area near Frisk's house. (T.P.100, L.15 - P.103, L.7).

Frisk's gate was breached again. He advised the court as previously stated in the Statement of Facts, P.9-10, infra [Docs # 32,33)].

The court was confronted with Mr.Thomas assuming he could enter and leave as he pleased. A hearing was held with the conflicting testimony, but the court entered judgment prior to the hearing. Because the hearing was after the decision, its contents are not at issue.(See: Transcript, May 2, 2023).

Frisk's property had historically been gated since he and Hutchinson built his fence. The gate was locked. Hutchinson had a key. Hutchinson's successor Ellis got a key. Frisk believed that Thomas was given a key at closing. Thomas denies it. Frisk held off giving them another key until they got current with the shared well expenses. Frisk is the only person who has maintained the well and system, though sometimes with the assistance of a professional. No one else, including Thomas, has done any work to maintain or repair the system or well. [T.P.90, L.2- P.92, L.16]. Thomas never requested to enter to repair or maintain the system and in fact, when entering, even numerous times the same day, they have not done any repairs or maintenance. Now Thomas want 24 hours a day access for well maintenance. (Doc#18, p.8,¶b).Thomas have still not paid past debt for the well even though they were updated on the amount at the trial. [T.,P.95,L2 -P.96,L.16; P.265,L.1-22 (stipulation and oral ruling)].

The Well Agreement cannot be used as written. Thomas's grant did not, as written, grant them or their predecessors any interest in the well. (Trial Exhibit 4).

> That for valuable consideration, the adequacy and receipt whereof is hereby acknowledged by PURCHASERS [Hutchinson, now Thomas], do by these presents grant, sell and convey unto said PURCHASERS [Hutchinson, now Thomas] five-twelfths of their interest in and to said well, casing, pump, tanks, etc., which interest would be equal to an undivided one-fourth interest in said well and related equipment, etc., and one-fourth of the **water** produced from said well." [Brackets added].

Hutchinson could not grant himself an interest in the well. He was only granted a water line easement:

> "PURCHASERS 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." (Trial Exhibit 4).

Since the grant, the location of the water line was moved. The line, repair and maintenance easements are not where described in the grant but rather down the existing roadway. The easement moved within Frisk's property.(T.P.74,L.19 - P.76,L.17).

Hutchinson received the easement for the waterline and but no interest in the well according to the agreement. The court interpreted the grant to correct the error, Hutchinson received also a 1/4th interest in the well. The agreement should have read, "**Sellers**, do by these presents grant, sell and convey unto said PURCHASERS'" The court in equity reformed the language.

The original grantors reserved the rest of the rights and required the two properties here to each bear 25% of the cost. At the time of the agreement, there was no meter used to determine the electric usage. Thus, the court had to determine what Frisk could charge for the usage and meter, because the agreement did not.

The court exercised its "equitable powers afforded courts in such matters, chose to craft a compromise solution. . . It merely equitably defined, once and for all, the scope of the easement." ***Guthrie v Hardy*** 2001 MT 122 ¶ 28, 28 P3d 467, citing ***Grosfield v. Johnson***, 98 Mont. 412, 423, 39 P.2d 660, 664 (1935). The court's imposed limitations are like the actual historic use of the easement (Statement of Facts, P. 6-8, supra]). "[W]here the grant or reservation of an easement is general in its terms, that an exercise of the right, with the acquiescence and consent of both parties, in a particular course or

manner, fixes the right and limits it to that particular course or manner." ***(Guthrie* at ¶** 51, citations omitted). Limitations such as locked gates, notice requirements and most likely reasonable times of access are equitable decisions to be made by the court. See: ***Engel v. Gampp***, 2000 MT 17, ¶ 55, 993 P2d 701.

The court with its use limitations, did not contradict the history of the easement and Well Agreement, rather confined the easement to the historical use and what is necessary to keep the peace. Historically, Frisk had maintained the well and system with no one else. Thomas never tried to maintain or repair the well but simply wanted to march in and harass Frisk. The court in equity keep the use similar to the historic use and made sure it stayed that way. The court assured that entry was not used as a pretext for harassment.

CONCLUSION

What is the relief sought by Thomas. The Notice Of Appeal said they appealed the judgment and all orders and proceedings leading to the judgment. The conclusion of their brief does not even mention the judgment but rather just address the "order." Are they asking the entire Order found as App.1 be reversed and yet, let the judgment stand (App.5)? The reversal of the Order in full sends the entire matter back to the District Court unless the Judgment stands in which case reversal of the Order is meaningless.

Should the Court decide to set aside the equitable easement, it must also set aide the other findings that tie to the equitable decision, the limitation of the prescriptive easement.

Frisk's request from the Court is simple. The court's Order (App. 1) and Judgment (App 2) should be affirmed. In doing so this Court will further and more clearly define when a mandatory injunction should be denied. It will also create a flexible equitable remedy to deal with the property that is under current law left in limbo. It will affirm doing equity.

Dated this 20th day of December 2023.

Richard De Jana & Associates, PLLC

by/s/ *Richard De Jana*

Richard De Jana Esq.
Attorney for Frisk

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4) of the Montana Rules of Appellate Procedure, I certify that the Appellant's Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Corel WordPerfect X5, is not more than 9,850 words, not averaging more than 298 words per page, excluding the Table of Contents, Table of Authorities, Certificate of Service and this Certificate of Compliance.

Dated: December 20th , 2023

/s/*Richard DeJana*
Richard De Jana, Esq.

CERTIFICATE OF SERVICE

I, Richard P. DeJana, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 12-20-2023:

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