IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court No.
DA 24-0026

JAMES G. ARCHER, DENISE F. ARCHER, ROGER WAGNER, ANTOINETTE WAGNER, RUTGER NIERS, LAURA NIERS and GREGORY CHAPMAN, GREGORY SMITH, LISA BRYANT,

Plaintiffs/Appellants,

vs.

GORDON TAIT and MICHELLE JANZ,

Defendant/Appellee.

On Appeal from the Montana Eleventh Judicial District
Flathead County Cause No. DV-23-640E, Hon. Danni Coffman

APPELLANTS' OPENING BRIEF

Sean S. Frampton
FRAMPTON PURDY LAW FIRM
530 West 19th Street #301
Whitefish, MT 59937
Telephone: (406) 862-9600
Facsimile: (406) 862-9611
E-mail: sean@framptonpurdy.com
Attorneys for Plaintiffs/Appellants

Bruce A. Fredrickson
Angela M. LeDuc
Taylor R. Miller
Rocky Mountain Law Partners
PO Box 1758
Kalispell, MT 59903
Telephone: (406) 314-6011
Facsimile: (406) 314-6012
Email: bruce@rmtlawp.com
angie@rmtlawp.com
taylor@rmtlawp.com
Attorneys for Defendant/Appellee

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STATEMENT OF ISSUES

WHETHER THE DISTRICT COURT ERRED IN RULING THAT A GENERAL USE EASEMENT CREATED FOR SEASONAL SHORELINE ACCESS WAS SPECIFIC FOR THE CONTROVERTED USE OF DAILY, YEAR-AROUND PRIMARY ACCESS TO A RESIDENCE.

STATEMENT OF THE CASE

The parties all own property along Whitefish Lake. Their properties are long and very steep as they descend down a heavily wooded mountain toward the lake and their homes are built at the top of the slope. A narrow road traverses across the parties' lots as it descends towards the lake and it historically provided access to the parties' shorelines. In 1986, the lot owners entered into a "Multiple Reciprocal Grants of Easements" agreement (hereinafter "Easement Agreement") to reduce to writing the existing and intended use of the roadway as access in the summertime to the shoreline. The parties have historically used the road for such purpose.

Appellees also have a house on the top of the slope but intend to build a second residence at the shoreline. Since their lot is narrow and already has a house and garage, they intend to use the seasonal shoreline access as their daily, year-round ingress and egress to their new primary residence.

Appellants filed suit claiming that Appellees' proposed use will exceed the scope of the Easement Agreement and to permanently enjoin their use beyond the

allowable scope. The District Court ruled in favor of Appellees and found the easement was specific and did not specifically limit Appellees' proposed use. (APP. 1) Appellants appeal.

STATEMENT OF THE FACTS

The parties all own Whitefish Lake lakefront property in the Houston Lake Shore Tracts subdivision. Appendix 2 is the original plat map of the Houston Lake Shore Tracts. (Exhibit 1 to Plfs' Mot. Summ. J., Docket 5, APP. 2) A copy of the plat map for the Houston Lake Shore subdivision as it exists today with the names of the property owners listed on their respective tracts is attached as Appendix 3. (*Id*, Exhibit 2, APP. 3) Appendix 4 is an overlay of the lot lines on a Google Earth image. (*Id*., Exhibit 3, APP. 4)

The Parties' properties are long and very steep as they descend toward Whitefish Lake. (*See* Aff. Archer, ¶ 4, Docket 6; Aff. Chapman, ¶ 3, Docket 17; Aff. Niers, ¶ 3, Docket 9; Aff. Smith, ¶ 3, Docket 7; Aff. Wagner, ¶ 3, Docket 8) The houses are built near to the top of the slope, several hundred feet above the shoreline. *Id*; *see also* APP. 2, 3. The terrain on each lot is heavily wooded and covered with logs and rocks as shown in the photos in Appendix 5. (APP. 5 (Exhibit 4 to Plfs' Mot. Summ. J., Docket 5); Aff. Archer, ¶ 5, Docket 6)

Traversing across each Parties' properties lies a narrow roadway, approximately 10-12 feet wide. (Aff. Archer, ¶ 4, Docket 6; Aff. Chapman, ¶ 4, Docket 17; Aff. Niers, ¶ 4, Docket 9; Aff. Smith, ¶ 4, Docket 7; Aff. Wagner, ¶ 4, Docket 8) It descends steeply from the top of the slope starting on Appellees' property and proceeds down and across the Appellants' properties approximately 815 feet to a sharp switchback. (*Id.; see also* Photos, APP. 5, Aff. Archer, ¶ 5, Docket 6) After the switchback, the roadway sits approximately 55 feet above the shoreline and levels off as it recrosses Appellants' properties approximately 640 feet before terminating at Appellees' property. *Id.* The Google Earth image in Appendix 6 is a true and accurate depiction of the easement roadway today and the items described thereon. (*Id.*, ¶ 9; Exhibit 6 to Plfs' Mot. Summ. J., APP. 6).

The roadway does not provide and has never provided access to any residence or driveway. (Aff. Archer, ¶ 6 Docket 6; Aff. Chapman, ¶ 5, Docket 17; Aff. Niers, ¶ 5, Docket 9; Aff. Smith, ¶ 5, Docket 7; Aff. Wagner, ¶ 5, Docket 8) Rather, it provides access to approximately three small sheds used to store fishing poles, kayaks, life vests, and other lake-related items. (*Id.; see also* Shed Photos, Exhibit 5 to Plfs' Mot. Summ. J., APP. 7) It also provides access, for those who have a dock, to stairs which lead down the very steep slope to the dock. (Aff. Archer, ¶ 6, Docket 6; Aff. Chapman, ¶ 5, Docket 17; Aff. Niers, ¶ 5, Docket 9; Aff. Smith, ¶ 5, Docket 7; Aff. Wagner, ¶ 5, Docket 8)

In 1986, Roger and Antoinette Wagner and the Parties' predecessors-in-interests entered into a "Multiple Reciprocal Grants of Easements" agreement (hereinafter "Easement Agreement") to define the scope of use of that roadway. (Exhibit D2, Doc. 13, APP. 8) According to Roger Wagner, the intended purpose of the Easement Agreement was to reduce to writing the existing and intended use of the roadway as access in the summertime to get to the stairs that lead to their shoreline and for the other parties to the agreement to do likewise. (Aff. R. Wagner, ¶ 6, Docket 8) The purpose of the agreement was never to access a residence or to use it year-round. *Id.*

Per the Easement Agreement, the stated scope is simply to "use" the existing road:

> 1. The parties do hereby grant unto each other a ten foot (10') easement and right of way to use and maintain the present existing private road, for motor vehicle traffic in common with each other, traversing through their respective tracts of land as shown, drawn, and laid out in Exhibit "G", attached hereto, to have and to hold the same unto the respective parties as appurtenant to their lands.
>
> 2. The parties hereto agree to share equally in the costs of expenses of maintenance and repairs of said private road as needed, **but only for summer-time use**, which shall not include snow and ice removal.

APP. 8 (emphasis added).

The remaining Appellants were not parties to the original Easement Agreement but are successors-in-interest and testified that they always understood

that the purpose of the easement was for access in the summertime to get to the stairs that led to their shoreline. (Aff. Archer, ¶ 7, Docket 6; Aff. Chapman, ¶ 6, Docket 17; Aff. Niers, ¶ 6, Docket 9; Aff. Smith, ¶ 6, Docket 7) They never understood that the purpose of the easement was to access a residence or to use it year-round. *Id.*

Further, all Appellants testified that they have historically used the easement consistent with the course and manner by which it was created. (Aff. Archer, ¶ 8, Docket 6; Aff. Chapman, ¶ 7, Docket 17; Aff. Niers, ¶ 7, Docket 9; Aff. Smith, ¶ 7, Docket 7; Aff. Wagner, ¶ 7, Docket 8) In other words, they have used it only in the summertime and only to access the stairs that led to their dock or their small shed. *Id.* They have never used the roadway in the non-summer months, nor for access to a home since no homes are accessed via the roadway. *Id.* They further testified that they have never seen any person use the easement in the non-summer months, or for any use other than described, and if they had witnessed such use, they would have objected to the use and put a stop to it. *Id.*

Appellees purchased their property in 2020 subject to the Easement Agreement. (Compl., ¶ 11, Docket 1; Answer, ¶ 11, Docket 4) At the time of their purchase, Appellees' property had improvements consisting of a large home and garage at the top of the slope, just like the Appellants' properties. (*See* Google Earth image, APP. 6)

Appellees have plans to build a new primary residence down by the shoreline and use their existing home as a guest home. (Compl., ¶ 12, Docket 1; Answer, ¶ 12, Docket 4) According to the building plans that Appellant James Archer, a professional excavator, received, the garage for Appellees' primary residence faces the lower part of the easement, meaning that they plan to use the easement as general ingress and egress to access their planned home and park in a garage served by the easement. (Aff. Archer, ¶ 10, Docket 6) Finally, Archer also understands that as part of the construction, Appellees plan to use the easement to drive heavy equipment to the lower part of their property so it can be used during construction and that they plan to have construction materials delivered via the easement. *Id.*, ¶ 11.

Appellants have testified that Appellees' proposed use will increase the burden of the easement to a greater extent than allowed and that has been historically used. (Aff. Archer, ¶ 12, Docket 6; Aff. Chapman, ¶ 9, Docket 17; Aff. Niers, ¶ 9, Docket 9; Aff. Smith, ¶ 9, Docket 7; Aff. Wagner, ¶ 9, Docket 8) The easement lies lakeward and downhill from their homes, and they can see the easement from their living rooms, kitchens, and bedrooms. *Id.* They object to Appellees using the easement for construction equipment, delivery of construction materials, or year-round access to their residence. *Id.*

STANDARD OF REVIEW

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

SUMMARY OF ARGUMENT

The District Court erred in ruling that the scope of the Easement Agreement was specific. Its language simply allowing "use [of] the existing road" is general on its face. In addition, under existing Montana law, its failure to specify allowances or limitations for the use controverted by the parties – in this case daily, year-round ingress and egress to a residence – rendered it a general easement. The District Court erred in ruling it was a specific easement that by its terms did not limit the intended use.

As a general easement, the District Court was required to account for the intended purpose of the easement, the circumstances under which it was created, and the historical use. *Guthrie v. Hardy*, 2001 MT 122, ¶ 49, 305 Mont. 367, 28

P.3d 467. The proper scope of the easement is only such as is reasonably necessary and convenient for the purpose for which it was created. *Jerde*, ¶ 11. In this case, an original party to the Easement Agreement testified that its purpose was to reduce to writing the existing and intended use of the roadway as access to their shorelines, primarily in the summertime. The intended purpose was never to access a residence since all parties to the Easement Agreement had homes located at the top of the slope. The circumstances surrounding the Easement Agreement at the time of its creation support the intended purpose since the parties, with homes at the top of the slope, needed a way to get down the steep, heavily wooded mountain to access their shoreline. The evidence in the record established that all parties, including Appellees and their predecessors, historically used the easement (1) only in the summertime and (2) to access the stairs that lead to their dock or their shed appurtenant to the use of Whitefish Lake, and (3) never for general access to a residence. The District Court erred in failing to account for this evidence in determining the scope of the Easement Agreement.

Finally, no use may be made of a right-of-way different from the use established at the time of the creation of the easement so as to burden the servient estate to a greater extent than was contemplated at the time the easement was created. *Jerde*, ¶ 11. The proposed use will increase the frequency (seasonal v. daily use), scope (access to shoreline v. main residence), and other burdens such as

heavy equipment and large construction trucks. The District Court erred in ruling that the burden will not be increased.

ARGUMENT

A. THE EASEMENT AT ISSUE IS A GENERAL EASEMENT.

1. The scope of the Easement Agreement is simply "use over the existing road" which is a general easement.

An easement is a non-possessory right to use the land of another for a limited purpose. *Whitefish Congregation of Jehovah's Witnesses, Inc. v. Caltabiano*, 2019 MT 228, ¶ 26, 397 Mont. 284, 449 P.3d 812. An easement is created by operation of law, by an instrument in writing, or by prescription. *Id.* "The breadth and scope of an easement are determined by the actual terms of the grant." *Id.*

"Where an easement is specific in nature, the breadth and scope of the easement are strictly determined by the actual terms of the grant." *Jerde,* ¶ 10; *see also* § 70-17-106, MCA "[t]he extent of a servitude is determined by the terms of the grant. . . ."

Where an easement is general in its terms, courts must look beyond the language of the deed in determining the breadth and scope of the servitude, which need only be such as is reasonably necessary and convenient for the purpose for which the easement was created." *Jerde,* ¶ 11 (citing *Mattson v. Mont. Power Co.*,

2009 MT 286, ¶ 17, 352 Mont. 212, 215 P.3d 675). Stated differently, "where 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." *Leffingwell Ranch v. Cieri*, 276 Mont. 431, 430, 916 P.2d 751, 758 (1996). To define the breadth and scope of a servitude of a general easement, a court considers "the situation of the property, surrounding circumstances, and historical use[.]" *Jerde*, ¶ 11. Further, this Court has consistently held that "in the absence of clear specifications defining scope, no use may be made of a right-of-way different from the use established at the time of the creation of the easement so as to burden the servient estate to a greater extent than was contemplated at the time the easement was created." *Id.* (quoting *Lindley v. Maggert*, 198 Mont. 197, 199, 645 P.2d 430, 432 (1982)).

In this case, the Easement Agreement did not specifically set forth the extent of the easement other than to provide that each party could use and maintain the existing roadway. Because use of the roadway is not specifically determined by the actual terms of the grant in the Easement Agreement, the easement is general in nature.

This Court has previously held on many occasions that easements with similar "access" language, and even more specific language in some instances, are

nevertheless general for the use that is controverted by the parties. For example, in *Strahan v. Bush*, 237 Mont. 265, 773 P.2d 718 (1989), this Court held that an easement that was granted "for purposes of providing ingress and egress to the above described land which easement shall be over and across the existing road" created "an easement described generally" and was "ambiguous." *Id.* at 266, 268, 773 P.2d at 719-20. The Easement Agreement in this case has similar general language.

Even an easement with specific language can be a general easement where specific restrictions are not enumerated, such as in *Mason v. Garrison,* 2000 MT 78, 299 Mont. 142, 998 P.2d 531. In *Mason*, two easements were at issue. The first was an easement "for ingress and egress to and from Flathead Lake." *Id.*, ¶ 9. The second was an easement "to use the existing dock, parking lot, swimming areas and swimming deck thereon…." *Id.* The "parking lot" referenced in the easement was used for parking and turning vehicles around, as well as for picnics, camping and other lake-related purposes by the owners. *Id.*, ¶ 13. Years later, Garrison constructed two raised gardens in the parking area and placed fences that enclosed much of the parking area. *Id.*, ¶ 14. The district court found that Garrison's gardens, fences, and dogs unreasonably interfered and obstructed with the easement. *Id.*, ¶ 15. The district court further ruled that the "easement as originally written and created . . . does not necessarily restrict the uses to which the

areas may be put, except to the extent that the uses must be reasonably necessary and convenient for the purposes for which the easement was created," and thus concluded that the Lot Owners have a "perpetual easement over the servient tenement owned by Garrison for all uses reasonably necessary, convenient and incident to enjoyment and use of the easement in accordance with the purpose for which it was created." *Id.*, ¶ 18. Garrison appealed.

On appeal, Garrison argued that the easement was specific and therefore the dominant owners' rights were "strictly limited to the uses specific in the easement." *Id.*, ¶ 19. The lot owners countered that the court properly received evidence of historic use in defining the scope of the easement because the granting language was general in nature and does not restrict the uses to which the easement may be put." *Id.* In affirming, this Court held that, "Although Garrison is correct in pointing out that the second easement refers to specific identifiable improvements which the Lot Owners have a permanent easement to use, he is incorrect in deducing, from that premise, that the plain language of the easement therefore prohibits the Lot Owners from any other uses of the lakeshore are such as launching small boats, picnicking, and socializing." *Id.*, ¶ 20. The Court ultimately held:

> The second easement, while referring to particular structures (the "dock" and "swimming deck") which the Lot Owners are entitled to use, does not expressly enumerate or otherwise restrict the

> uses to which those facilities may be put. Nor does it restrict the uses to which the easement area itself may be put….
>
> We hold that the District Court correctly determined that the second easement is general in nature, and that the extent of the Lot Owners' rights thereunder are, therefore, defined by historic use as acquiesced and consented to by the holders of the dominant and servient tenements.

Id., ¶¶ 23-24.

Thus, the rule from *Mason* is that despite specific language on some uses, an easement that does not expressly enumerate or restrict other uses is general in nature, and the extent of the rights thereunder are defined by historic use.

Guthrie v. Hardy, 2001 MT 122, 305 Mont. 367, 28 P.3d 467, followed this rationale in an easement involving a road and further held that where an easement is unrestricted in terms of scope that is controverted by the parties, it is general and the court must account for the intended purpose, the historical use of the easement by its owners, as well as the general surrounding circumstances. There, Guthrie and Krage were the servient owner of land upon which an easement existed for the benefit of Hardy who owned property adjacent and to the south. *Guthrie*, ¶¶ 5-6. The easement described in the deed said, "TOGETHER WITH an easement over and across the [legal description omitted] to a point which intersects a road presently situated on said premises and which road will provide access to the property agreed to be bought and sold." *Id.* The easement was an old narrow logging road with sharp switchbacks. *Id.*, ¶ 9. Similar to the present case, Hardy

sought to improve the easement so it would accommodate regular year-round access to his property. *Id.* Like Appellants in this case, Guthrie also had concern that the road improvements would accommodate further residential development and claimed their rights would be burdened by the planned increased use placed upon the easement. *Id.*, ¶ 12. Ultimately, the district court enjoined Hardy from improving the road or using it in any way except for access. *Id.*, ¶ 15. The district court further determined that that it was the "intention of the original grantor of the easement to limit the 'nature of enjoyment' of the use of the easement to the grantee's private use for the extremely limited purpose of temporary access if the grantee's primary access was impaired." *Id.*, ¶ 21. Therefore, the district court concluded that to "expand the use of the easement beyond the intended and actual historical use would constitute a burden upon the servient estate greater than was contemplated at the time the easement was created." *Id.* Finally, the district court concluded that the use of the road must be contained to providing access to the three residences currently owned by defendants. *Id.*, ¶ 22.

On appeal, in a discussion about whether substantial evidence supported the findings, this Court specifically focused on the nature of the road as an old logging road at the time of the grant, and then noted that Hardy intended to improve and expand the easement to include travel by construction vehicles and possibly access to new homesites. *Id.*, ¶¶ 32-33, 35-36. Ultimately, the Court affirmed the district

court's finding that Hardy's use of the easement changed to the detriment of the servient owners.

Hardy also appealed the fact that the district court considered the historical use, arguing that the easement was clear and unambiguous. *Id.*, ¶¶ 42-43. But this Court made clear that it has applied the following rule consistently with regards to easements:

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

Id., ¶ 48.

The Court ultimately held that "[t]he deed at issue here is clearly one of a general nature in terms of scope. It merely provides that it would provide 'access to the property agreed to be bought and sold' via a 'presently situated road' that was perhaps 14 feet in width." *Id.*, ¶ 49. But the real import from this holding is how this Court reconciled unrestricted language in cases where the scope is controverted by the parties and what must be accounted for by the district court:

> Indeed, we agree with Appellants that the easement *was* unrestricted--rather than restricted by specific particulars regarding scope--and therefore the intended purpose, the use of the easement by its owners, as well as the general surrounding circumstances, must be accounted for where the scope is controverted by the parties.

Id., ¶ 49.

Finally, in *Jerde*, the parties were mutually benefitted and burdened by a mutual easement for an "access easement over and across the above-described lands *on the existing trail or roadway* for ingress and egress to and from adjoining properties owned by the respective Grantors/Grantees *for the purpose of conducting farming and ranching operations and activities*." *Jerde*, ¶ 2 (original emphasis). Jerde then began using her property as a residence and Quarter Circle sued. *Id.*, ¶¶ 3-4. The district court ruled that the language in the easement granting access for "the purpose of conducting farming and ranching operations and activities" was specific and it included residential use. *Id.*, ¶ 5. Quarter Circle appealed and argued it was error for the district court to find the easement was specific. This Court held that, "Because use of the trail/road for residential purposes is not 'strictly determined by the actual terms of the grant,' the easement is not 'specific' for purposes of this particular question." *Id*, ¶ 12. As with all prior opinions, this Court reiterated that "the proper inquiry [is] to determine 'the purpose for which the easement was created.'" *Id.*, ¶ 13. Ultimately, the Court held that the easement was general in nature and the district court erred in finding it specific. *Id.*, ¶ 14.

In sum, the bare "use" language in the present Easement Agreement is similar to the easement language found in *Strahan, Mason, Guthrie,* and *Jerde* – all held to be general easements. Further, as in *Mason, Guthrie,* and *Jerde*, the present

Easement Agreement does not contain specific restrictions, and where the scope is controverted by the parties – as in this case where the issue is whether Appellees can use the road for daily, year-round ingress-egress to a residence on a road designed to serve as shoreline access – *Guthrie* held that the District Court must account for the intended purpose, use by the owners, and general surrounding circumstances. *Guthrie*, ¶ 49. Finally, going a step further under *Jerde*, where the particular use at issue is not "strictly determined by the actual terms of the grant," the Easement Agreement is not specific for purposes of this particular question and the proper inquiry is to determine the purpose for which the easement was created. Therefore, the scope of the Easement Agreement in this case as it relates to the use that is being controverted by the parties is not strictly determined by the actual terms of the grant and is general.

2. The District Court erred in ruling that the scope of the Easement Agreement was specific.

The District Court ruled that "this easement is specific" in that it "clearly creates a ten-foot roadway easement, the location of which is identified on the plat, for the benefit of the lot owners." (APP. 1 at 4) Contrary to the holdings of *Mason*, *Guthrie*, and *Jerde*, the district court further ruled that, "Had the drafter intended to limit use of the roadways to 'summertime use,' paragraph one would have limited the grant in this manner. In any event, this easement is specific, certainly as it relates to the question of whether use is limited to 'summertime' or

limits use of the roadway for lake, dock, stair, and shed access." *Id.* Later, the District Court stated, "If the intent of the easement was to be so restrictive as to prohibit any other activity other than occasional lake access during the summer, it should have so stated." *Id.* at 5.

The District Court's ruling is in error in many ways. First, the use in controversy – daily, year-round ingress-egress to a home on a road intended and historically used as occasional and seasonal access to a shoreline – is not strictly determined by the terms of the grant, does not clearly create an easement for the benefit of Appellees, and is not "perfectly clear." *Jerde.* Second, the failure to specify the limitations at issue make it a general easement, not a specific one, under the holdings in *Strahan*, *Mason*, *Guthrie*, and *Jerde*. The District Court's rationale – that any limitation must be specifically stated – not only is contrary to these cases but, if adopted, would render the entire jurisprudence on general easements unnecessary. Third, the District Court erred in identifying the controverted issue between the parties as being *when* the easement can be used (summertime) rather the proper scope of whether it can be used as daily, year-round general access to a residence where such use was never contemplated by the parties at the time of creation. For these reasons, Appellants request that this Court REVERSE the District Court's ruling.

3. The District Court erred in ruling that the easement does not restrict general ingress and egress from Defendants' property.

Under a separate heading but with almost no rationale, the District Court ruled that, "The scope and location of the easement (a ten foot roadway easement for the benefit of the lot owners) is 'perfectly clear' – there is no need for further inquiry." (APP. 1 at 4) The District Court's rationale for this ruling are two general rules from *Guthrie* but which *apply to specific easements* – "where the creating words of a deed make the scope and the location of an easement perfectly clear, there is no need for further inquiry," and "if the grant or reservation is specific in its terms, it is decisive of the limits of the easement." (APP. 1 at 5 (quoting *Guthrie*, ¶ 46)) Since the Easement Agreement is general, the rules from *Guthrie* on specific easements have no application. Thus, the District Court's ultimate ruling that general ingress and egress is unrestricted is in error.

B. AS A GENERAL EASEMENT, THE DISTRICT COURT ERRED IN FAILING TO CONSIDER THE INTENDED PURPOSE OF THE EASEMENT, CIRCUMSTANCES SURROUNDING ITS CREATION, AND HISTORICAL USE.

1. Appellees' proposed use for daily, year-round primary access to a residence overburdens the easement from its intended purpose and historical use as an occasional, seasonal access to the shoreline.

As stated above, where an easement is general in its terms, courts must look beyond the language of the deed in determining the breadth and scope of the servitude, which need only be such as is reasonably necessary and convenient for

the purpose for which the easement was created. *Jerde*, ¶ 11. Use in a particular course or manner fixes the right and limits it to that particular course or manner. *Leffingwell Ranch*, 276 Mont. at 430, 916 P.2d at 758. To define the scope, a court considers the situation of the property, surrounding circumstances, and historical use. *Jerde*, ¶ 11. "[T]he intended purpose, the use of the easement by its owners, as well as the general surrounding circumstances, must be accounted for where the scope is controverted by the parties." *Guthrie*, ¶ 49. Indeed, no use may be made of a right-of-way different from the use established at the time of the creation of the easement so as to burden the servient estate to a greater extent than was contemplated at the time the easement was created. *Jerde*, ¶ 11.

This Court has consistently limited the use of a general easement to the purpose for which it was created and had been historically used. For example, in *Leffingwell Ranch*, the plaintiff was a family ranch corporation that sued to enjoin the defendant, Elk Park Ranch, from using Miles Creek Road, which crossed the Leffingwell Ranch, as access for its new development. *Leffingwell Ranch*, 276 Mont. at 423-26, 916 P.2d at 752-54. Miles Creek Road was originally developed as an access route to the homestead on the Leffingwell Ranch. *Id.* The property that Elk Park intended to access included several more additional sections of land that were acquired after the easements were conveyed. *Id.* This Court relied on the fact that the easements have never been used to access more than two or three

homesteads and, at the time the easements were granted, the "ingress and egress" language "did not contemplate anything more than limited access by the Camps and the Curdys to their property for agricultural purposes." *Id.* at 431, 916 P.2d at 757. Thus, the Court held "Elk Park cannot access its development over the 1927 easements because the use proposed by Elk Park was not contemplated by the original parties to the easements, would be inconsistent with the historical use of the easements, and would constitute an improper burdening of those easements." *Id.* at 432-33, 916 P.2d 758.

Similarly, in *Guthrie*, the road at issue was a seasonal road that historically had sporadic use and was never intended to be used as a primary access to certain property. *Guthrie*, ¶¶ 32-33, 35-36, 40. This Court held that Hardy's intended year-round use as primary access to new homesites exceeded the intended and historical use and affirmed the district court's ruling that the intended use would constitute an overburden upon the servient estate greater than was contemplated at the time the easement was created. *Id.*, ¶¶ 21, 54.

In *Ganoung v. Stiles*, 2017 MT 176, 388 Mont. 152, 398 P.3d 282, Stiles' mother divided her property and granted the north half to her son and the south half to her daughter. *Stiles*, ¶ 3. The deed provided that they were "together with easement for access over the lands of the grantor," about the same scope as this case. *Id.*, ¶ 4. The daughter sold her parcel to Ganoung. *Id.*, ¶ 5. Historically,

there were two routes that crossed the Ganoung property to access the Stiles property. *Id.*, ¶ 7. The Court affirmed the district court's denial of Stiles' request to expand the easements to sixty feet to allow development of a subdivision on their property was not reasonable, convenient for the purpose for which the easement was created, and not historically supported. *Id.*, ¶¶ 17, 21.

In this case, Roger Wagner was an original party to the Easement Agreement and testified that its intended purpose was to allow the parties summertime access to their shorelines. (Aff. R. Wagner, ¶ 6, Docket 8) The intended purpose was never to allow access to a residence or to use it year-round. *Id.*

The circumstances surrounding the Easement Agreement at the time of its creation support the intended purpose. The property owners, all with homes at the top of the slope, needed a way to get down the steep, heavily wooded mountain to access their shoreline. (APP. 2 and 3) Since no homes were located down the slope, the intended purpose was never to provide access to a home, let alone year-round access.

Consistent with the intended purpose, the parties, including Appellees and their predecessors, historically used the easement in the particular course and manner described above. That is, they have all used it (1) only in the summertime, (2) to access the stairs that lead to their dock or their shed appurtenant to the use of Whitefish Lake, and (3) never for general access to a residence. Further, they

testified that they have never seen any person use the easement in the wintertime or for any use other than described, and if they had, they would have objected and put a stop to it.

Finally, all Appellants agree that Appellees' proposed use will increase the burden of the easement to a greater extent than was contemplated at the time the easement was created. The easement lies lakeward and downhill from their homes, and in particular, their living rooms, kitchens, and bedrooms. The proposed use will increase the frequency (seasonal v. daily use), scope (access to shoreline v. main residence), and other burdens such as heavy equipment and large construction trucks.

In sum, Appellees cannot use the easement "different from the use established at the time of the creation of the easement so as to burden the servient estate to a greater extent than was contemplated at the time the easement was created." *Jerde*, ¶ 11. Based on the testimony of the intended purpose of the easement, the circumstances surrounding its creation, and its historical use, using the easement for daily, year-round primary access to a residence overburdens the easement from its intended purpose of occasional, seasonal access to the shoreline. Appellants request that this Court REVERSE the District Court and ENTER JUDGMENT in Appellants' favor by ruling that, based on the evidence in the record, Appellees' proposed use is prohibited by the Easement Agreement.

2. The District Court erred in failing to account for the intended purpose, general surrounding circumstances, and historical use of the general easement.

Having found the Easement Agreement specific, the District Court failed to "account for" the intended purpose, the use of the easement by its owners, as well as the general surrounding circumstances, as required by *Guthrie*. For this reason, the District Court erred.

Without conducting any analysis, the District Court ruled that even if the Easement Agreement was general, the result would be the same. (APP. 1 at 5-6) The District Court's analysis is flawed in many ways. To begin with, the District Court relied on *City of Missoula v. Mix*, 123 Mont. 365, 214 P.2d 212 (1950), for the proposition that "the owner of a reserved easement may use it to the full use of the right retained" and "the owner of a servient tenement make use of the land in any lawful manner that he chooses, which use is not inconsistent with and does not interfere with the use and rights reserved to the dominant tenement or estate." (APP. 1 at 6) *Missoula v. Mix* did not address the issue of general versus specific easements. Also, while the first rule cited is correct, this case does not involve a "reserved easement." Further, while it is true that a dominant tenement may use an easement "to the full use of the rights retained," this Court has repeatedly made it clear that those rights for a general easement are determined by the intended purpose, circumstances at the time of creation, and historical use. Finally, the

District Court's reliance upon the second rule from *Mix* is misplaced because the issue in this case involves the dominant owner's use, not the servient owner's use.

The District Court next cited to *Guthrie v. Hardy* for the rule that, "As conditions change, so too may the use by the dominant tenement so long as the changes are 'evolutionary but not revolutionary.'" (APP. at 6) Two errors are apparent. First, there is no evidence that "conditions changed" other than Appellees wanting to build a second primary residence at their shoreline. Otherwise, the historical use of the easement has remained the same to this day since it was created. *See* affidavits referenced above. Second, the District Court could not possibly engage in an "evolutionary v. revolutionary" analysis without first knowing the intended purpose, circumstances under which the easement was created, and historical use.

Finally, the District Court erred in its analysis the Appellees' proposed use is "essentially the same" as what was considered at time of founding. (APP. 1 at 6) The affidavits by Appellants are contrary to this finding. Also, the District Court's conclusion is based on its reversion to a flawed analysis that the easement is specific and contains no limitations such as "no mention is made of a seasonal restriction." *Id.* Finally, the District Court's analysis focuses on only one element of burden – frequency – but is in error without focusing on the other considerations that "must be accounted for." *Guthrie*, ¶ 49.

3. The District Court erred in its interpretation of the summertime maintenance clause.

The District Court ruled that the Easement Agreement does not restrict year-round access by allowing for maintenance costs to be shared "only for summer-time use." (APP. 1 at 5)

The construction of a writing granting an interest in real property is governed by the rules of contract interpretation. *Mattson v. Mont. Power Co.*, 2009 MT 286, ¶ 18. The construction and interpretation of a contract is a question of law. *Id.* A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful. *Id.* citing § 28-3-301, MCA. When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone if possible. *Id.* citing § 28-3-303, MCA. The whole of a contract is to be taken together so as to give effect to every part if reasonably practicable, each clause helping to interpret the other. *Id.* citing § 28-3-202, MCA.

While it is true that paragraph one of the Easement Agreement is a granting clause and paragraph two is a maintenance clause, it was error for the District Court to read them separately rather taking the whole contract together so as to *give effect to every part* if reasonably practicable, *each clause helping to interpret the other*. § 28-3-202, MCA. It is reasonable to interpret paragraph one as seasonal access to the lakeshore using paragraph two which calls for shared

summertime maintenance, especially considering the road leads to the shoreline and no residences. Likewise, it is unreasonable to interpret paragraph one as allowing unlimited year-round daily use for all users but, separately and inconsistently, interpret paragraph two that the parties do not have to share costs of maintenance for use half of the year.

4. The District Court erred in "finding" construction equipment will not increase the burden.

The District Court ruled that the "burden placed on the easement from . . . pending construction access is speculative." (APP. 1 at 6-7) Yet, in *Guthrie v. Hardy*, this Court ruled that anticipated use by "various construction and logging vehicles" and "use of construction equipment on the easement road" overburdened the easement based on its intended purpose, circumstances that existed, and historical use. *Guthrie*, ¶¶ 36-37. It also seems obvious that a narrow and unimproved steep access road used by passenger vehicles would be overburdened with frequent use by multi-ton excavators, dump trucks, cement trucks, and delivery trucks.

Also, it is the District Court that is speculating on the facts. It ruled that it is "difficult to come to terms with the argument that no user has ever used the easement for any purpose other than the [sic] access the lake. The Plaintiffs clearly have sheds and stairway [sic] built along the easement. These were clearly constructed." (APP. 1 at 7) No evidence was submitted on this issue for the

District Court to make this finding, and if these facts were material to the District Court's decision, it should have requested them to determine if they were disputed. The sheds are small (APP. 7) and could have been constructed offsite and put in the back of a passenger pickup truck. The lumber for the stairway to the shoreline could have been placed in the back of the pickup truck or walked down. There is a big difference between constructing a shed or stairway by hauling some two-by-fours in a pickup truck versus heavy construction equipment.

CONCLUSION

Appellants request that this Court REVERSE the district court and ENTER JUDGMENT in favor of Appellants that Appellees' proposed use of the easement as daily, year-round access to a residence will exceed the scope of the Easement Agreement and that use, along with heavy construction equipment will unlawfully increase the burden of the easement. This Court should also ENTER JUDGMENT on Appellants' claim to permanently enjoin Appellees' proposed use.

DATED this 8th day of February, 2024

FRAMPTON PURDY LAW FIRM

By: _____
Sean S. Frampton
Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

I, Sean S. Frampton, attorney for Appellant, hereby certify that Appellant's Opening Brief complies with the Montana Rules of Appellate Procedure:

A: Document has double-line spacing and is proportionately spaced in Times New Roman text typeface of 14 points;

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DATED this 8th day of February, 2024.

FRAMPTON PURDY LAW FIRM

By: 

Sean S. Frampton
Attorneys for Appellants

CERTIFICATE OF MAILING

The undersigned does hereby certify that on the 8th day of February, 2024, a true and correct copy of the foregoing document was served upon the persons named below, at the addresses set out below their names, as indicated below.

Bruce A. Fredrickson
Angela M. LeDuc
Taylor R. Miller
Rocky Mountain Law Partners, P.C.
P. O. Box 1758
Kalispell, MT 59903-1758
Attorneys for Defendants/Appellees

[ ] U.S. Mail (first class postage)
[ ] Hand Delivery
[ ] Telecopy (facsimile)
[X] Electronic Service via E-File System

Kelly Kracker-Sletten
Frampton Purdy Law Firm

APPENDIX

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Appendix

CERTIFICATE OF SERVICE

I, Sean S. Frampton, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 02-08-2024:

Taylor Robert Miller (Attorney)
P.O. Box 1758
1830 3rd Ave E, Ste 301
Kalispell MT 59903
Representing: Michelle Janz, Gordon Tait
Service Method: eService

Bruce Allen Fredrickson (Attorney)
1830 3rd Ave. E. Ste. 301
P.O. Box 1758
Kalispell MT 59903
Representing: Michelle Janz, Gordon Tait
Service Method: eService

Angela Marie LeDuc (Attorney)
1830 3rd Avenue East
301
Kalispell MT 59901
Representing: Michelle Janz, Gordon Tait
Service Method: eService

Electronically signed by Kelly Kracker-Sletten on behalf of Sean S. Frampton
Dated: 02-08-2024