

**IN THE SUPREME COURT OF THE STATE OF MONTANA**

Supreme Court Cause No. DA 24-0231

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DAVID L. MURPHY PROPERTIES, LLC, and JOHN SCHAFFER,

Plaintiffs and Appellants,

v.

PAINTED ROCKS CLIFF, LLC, and LAKE COUNTY, a political subdivision of the State of Montana, by and through the LAKE COUNTY BOARD OF COMMISSIONERS: BILL BARRON, GALE DECKER and STEVE STANLEY,

Defendants and Appellees.

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**APPELLANTS' OPENING BRIEF**

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On Appeal from the Montana Twentieth Judicial District Court, Lake County,  
Cause No. DV-2022-143  
the Honorable John Larson Presiding

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## **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

Two issues are presented:

1. Did the District Court err in granting Painted Rocks Cliff, LLC's Motion for Summary Judgment?
2. Did the District Court err in granting Lake County's Rule 12(b)(6) Motion to Dismiss?

## **STATEMENT OF THE CASE**

Appellant John Schaffer used to be able to get his boat in and out of a Flathead Lake cove on a property that has been in his family for generations until a new neighbor blocked him with a large boat dock. John owns Appellant David L. Murphy Properties, LLC ("Murphy Properties"), which owns a parcel of real estate with Flathead Lake frontage, a portion of which is in the back of a small cove. That access is now blocked by a billionaire family from Texas which, through Appellee Painted Rocks Cliff, LLC ("Painted Rocks") owns the real estate on both sides of the entrance to the cove. Painted Rocks built a fantastically large dock that prohibits John from getting his boat in and out of the cove. That is, unless John jumps in the water to reposition the boat and drag it into the cove with a bow line. Painted Rocks' dock was built under permit from Appellee Lake County pursuant to the Lakeshore Protection Act (the "Act") and over John's objection.

Murphy Properties alleges it acquired a prescriptive easement by historical use of a ski boat to cross that portion of Painted Rocks' property which is between the low and high water marks of Flathead Lake, where its dock is built. Appellants also allege that the permit Lake County issued, and the dock as built, violate the Act because the dock blocks Appellants' historical access. Appellants finally allege that Painted Rocks' dock is a nuisance because the dock should not have been permitted under the Act and diminishes their enjoyment of the Murphy Properties' parcel.

The District Court dismissed Appellants' claims against Lake County for failure to state a claim, instead of conducting a judicial review of the lakeshore permit under Montana Code Annotated § 75-7-215 (2021). The District Court then granted summary judgment in favor of Painted Rocks on Appellants' other claims, on the basis that Appellants cannot establish that their access to the cove satisfies the adversity requirements for a prescriptive easement because Appellants' access was made under the public trust easement over Montana waters. The District Court reasoned that lack of adversity to establish a prescriptive right of use was fatal to all of Appellants' claims.

Appellants request this Court reverse the District Court and remand for entry of judgment in favor of Appellants that Painted Rocks' dock must be removed from its current location to restore Appellants' access consistent with historical use,

because Murphy Properties has its claimed prescriptive easement over Painted Rocks' property. Even without a prescriptive right, the dock interferes with Appellants' lawful navigation or other recreation, and should be removed for violating the protections of the Act. If the dock violates the Act, then it is also a nuisance because it interferes with Appellants' enjoyment of property.

### STATEMENT OF THE FACTS

Murphy Properties owns a parcel of land with Flathead Lake frontage including a portion of frontage in a small cove. Compl., ¶¶ 1 & 7 (Apdx. 1E). Appellant John Schaffer owns Murphy Properties. *Id.* at ¶ 2. John's family homesteaded this lakefront property and John's family has used this cove to access Flathead Lake since the dam was built in 1938. *Id.* at ¶¶ 6-8. There is a residence on Murphy Properties' parcel where John's uncle Bill used to live. Pls.' Resp. Painted Rocks' MSJ, Ex. B, at 68:23-69:1 (deposition of John Schaffer) (Apdx. 2C). John prefers to live there too, but has avoided it since Painted Rocks' construction started. *Id.* at 8:19-9:9:4; 96:1-19.

The access to Flathead Lake through the cove is a unique attribute of Murphy Properties' parcel. Painted Rocks owns both sides of the mouth of the cove, while Murphy Properties has lake frontage at the back of the cove. Historically, John and his family have accessed the cove frontage in a small ski boat passing through the mouth of the cove. Painted Rocks' Br. Supp. MSJ, 8

(Apdx. 2B). Now, that route is blocked by Painted Rocks' dock and a ski boat cannot maneuver the serpentine route to get in and out of the cove.

John's family has boated in and out of the cove since Kerr Dam was built. Pls.' Resp. Painted Rocks' MSJ, Ex. B at 102:10-103:13 (deposition of Schaffer)

(Apdx. 2C). Their historical uses include:

(ii) The types of uses during the entire period of use above were ingress and egress to the cove by ski boat, kayak, canoe, paddle board (but only since about 2015 due to their more recent popularity), tube, swimming, and during low water, on foot. As noted above, however, the only access which is now not possible due to Painted Rocks' Dock is by boat, which includes kayak and paddle board during low water.

(iii) Water borne uses have been primarily between May and September each year. Frequency of use is regular, but intermittent in May and September. In June, July, and August, use is weekly by several boats, with most use occurring on weekends and holidays. Foot access is intermittent from September to May, for maintenance and cleaning.

Painted Rocks' Br. Supp. MSJ, Ex. 1, at Ans. Int. 14 (Murphy Properties' responses to Painted Rocks' first discovery requests) (Apdx. 2B). Notably and in addition to their boat access, John's family also cleaned out and improved the opening to the cove, all on Painted Rocks' property, over many years. MSJ Hr'g Tr, 17:4-10, January 12, 2024 (Apdx. 2E); Painted Rocks' MSJ Br., Ex. 6 at 62:9-20; 64:9-15 (deposition of Schaffer) (Apdx. 2B). John has a small dock within the cove, and several years ago Painted Rocks' predecessor in title sent a demand to John to inform him that his dock encroached on their property and must be moved.

Painted Rocks' Br. Supp. MSJ Ex. 14 (letter from Ogle) (Apdx. 2B). Like a good neighbor, John simply moved his dock. *Id.* at Ex. 6 at 44:22-25 (deposition of Schaffer).

Painted Rocks owns parcels adjacent to Murphy Properties' parcel. Compl., ¶ 3 (Apdx. 1E). Painted Rocks bought its property around 2020. Painted Rocks' Br. Supp. MSJ Ex. 5 (Warranty Deed) (Apdx. 2B). Around the time Painted Rocks bought its Flathead Lake property, Painted Rocks had its realtor, Jeff Swenson, ask adjacent property owners including Murphy Properties, if they would sell their property to Painted Rocks. Pls.' Resp. Painted Rocks' MSJ, Ex. C, at 16:9-12, 20:12-27:7 (deposition of Langston) (Apdx. 2C). Swenson called John and told him money was no object for Painted Rocks. *Id.* at Ex. B, at 159:9-160:7 (deposition of Schaffer). Robyn Jones, who initially entered into the buy-sell agreement for Painted Rocks' property, before assigning it to Painted Rocks, saw John's dock in the cove before Painted Rocks purchased its property, but Mrs. Jones assumed that the dock was used for fishing or kayaks, canoes, or paddle boards. *Id.* at Ex. C, at 65:1-18 (deposition of Langston).

Painted Rocks hired architect, Steve Locati, to handle permitting for the dock on its Flathead Lake property, who in turn hired Dockmasters for permitting and construction. *Id.* at Ex. C, at 10:1-8 (deposition of Langston). Painted Rocks gave Locati very little direction when it came to designing or building

improvements for Painted Rocks' property. *Id.* at Ex. C, at 11:21-12:4 (deposition of Langston) & Ex. D, at 29:13-17 (deposition of Locati).

Painted Rocks applied to Lake County for a lakeshore construction permit to build its dock in January 2022, and the permit was approved by the Lake County Commissioners when they took their final action on the permit in March 2022. Compl., ¶¶ 10-11 & 25 (Apx. 1E). Lake County has promulgated regulations for the issuance of such permits under the authority of the Lakeshore Protection Act, and those regulations require that a permitted dock not interfere with navigation or other lawful recreation.<sup>1</sup> *Id.* at ¶ 23-24.

Before Painted Rocks began construction of its dock, John Schaffer communicated to Painted Rocks and Lake County that the dock might block him from accessing the lake from his cove, but John was ignored. *Id.* at ¶¶ 14-16. When the dock was built, John saw that it in fact did block his access to and from the cove. *Id.* at ¶¶ 20-21. Lake County did not consider John's ability to get to and from the cove when it issued Painted Rocks' permit. *Id.* at ¶ 29. Painted Rocks dock was completed in the summer of 2022 and is the shape of an "E" combined with an "L". The dock serves a day use pavilion on Painted Rocks' property. The Jones family do not intend to live on the property and the pavilion has no

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<sup>1</sup> The regulations are in the record as Exhibit 9 to Painted Rocks' Brief in Support of Motion for Summary Judgment, Appendix 2B.

bedrooms. Pls.' Resp. Painted Rocks' MSJ, Ex. D, at 20:4-21:13 (deposition of Locati) (Apx. 2C).

Painted Rocks says it chose its dock location for convenience. Ryan Langston testified that the “convenience of the topography” drove the dock location. *Id.* at Ex. C, at 31:5-16 (deposition of Langston). Ultimately, the decision about where to place the dock was left to Locati, the architect. *Id.* at Ex. C, at 11:21-12:4 (deposition of Langston), & Ex. D, at 29:13-17 (deposition of Locati). Locati testified that moving the dock farther from Murphy Properties’ parcel would be impacted by a “geological boulder cliff,” be a “bad design,” and impact, “[t]he functionality, convenience” of the dock. *Id.* at Ex. D, at 56:4-22 (deposition of Locati). Things like “very unstable, unlevel ground” and “deadfall, driftwood, rocks, and boulders” would have been in the way. *Id.* at Ex. D at 56:23-57:2 (deposition of Locati). John has been made to pay for Painted Rocks’ convenience by giving up his access to and enjoyment of his own property.

Locati’s selected location was intended to injure John and Murphy Properties. Locati felt entitled to do this based on his interactions with John. Locati described John’s behavior as “aggressive” and “belligerent” when John learned about the dock being built. *Id.* at Ex. D at 33:19 & 34:14-18 (deposition of Steve Locati). Locati was as aggressive as possible in locating Painted Rocks’ dock, to the point that Locati wanted to build a bridge across the entrance to the

cove. *Id.* at Ex. D at 48:22-49:19 (deposition of Locati). This bridge exposes Locati's intent with his dock design, which was to impede John's access. Locati recorded his thoughts on John's complaint about the dock location in an email. *Id.* at Ex. C, at 32:10-17, at Dep. Ex. 41 (deposition of Langston) & Ex. D, at 36:11-21, at Dep. Ex. 41 (deposition of Locati). He wrote, "Look into building a bridge across the opening of the lagoon as Mark [Jones] own's both sides and would be well withing his right to do so. as is Mark has no access to that portion of his land without fording the water". *Id.* at Ex. D, at 36:11-21, at Dep. Ex. 41 (deposition of Steve Locati). When asked about the purpose of this proposed bridge, Locati testified, "Literally, to get to the other side," denied that the intent was to lock John out of the cove, and suggested the bridge could be a drawbridge. *Id.* at Ex. D, at 48:25-49:19 (deposition of Locati). A bridge was not necessary to spite John, Locati's dock does that perfectly well.

When John spoke with the Lake County Commissioners about his concerns with the permit issued for Painted Rocks' dock, he was told, "...either you're going to sue us or Painted Rocks is going to sue us, and I believe they have a whole lot more money than you." *Id.* at Ex. B, at 111:3-8 (deposition of Schaffer).

Nevertheless, emails between the Lake County planning office and Painted Rocks' dock builder show an attempt by the County to facilitate a resolution to John's objections, which were apparently refused by Painted Rocks. *Id.* at Ex. E, at RFP 1

(Def. BOCC's. Resp. to Murphy Properties First Discovery Requests) & Ex. C, at 12:25-13:25 (deposition of Langston).

### STANDARD OF REVIEW

Orders granting motions for summary judgment under Montana Rule of Civil Procedure 56 and orders granting motions to dismiss under Montana Rule of Civil Procedure 12(b)(6) are each reviewed *de novo*, using the standards applicable under their respective rules. *Tai Tam, LLC v. Missoula Cnty.*, 2022 MT 229, ¶ 8, 410 Mont. 465, 520 P.3d 312, *Merila v. Burke*, 2024 MT 4, ¶ 11, 415 Mont. 24, 541 P.3d 770.

Montana Rule of Civil Procedure 56 allows for the entry of judgment as a matter of law if the moving party establishes entitlement to judgment as a matter of law based on undisputed facts established by a review of the pleadings, discovery, disclosures, and affidavits. “A cross-motion for summary judgment is not required for a court to enter summary judgment in the non-moving party's favor where it is apparent that no genuine issues of material fact exist.” *Lee v. Great Divide Ins. Co.*, 2008 MT 80, ¶ 11, 342 Mont. 147, 182 P.3d 41 (citing *Bitterroot Intern. Systems, Ltd. v. Western Star Trucks, Inc.*, 2007 MT 48, ¶ 38, 336 Mont 145, 153 P.3d 627).

The liberal requirements of notice pleading are still used in the application Rules of Civil Procedure 8(a) and 12(b)(6). *E.g., Anderson v. ReconTrust Co.*,

*N.A.*, 2017 MT 313, ¶ 8, 390 Mont. 12, 407 P.3d 692. “A claim is subject to dismissal under Rule 12(b)(6) if it either fails to state a cognizable legal theory for relief or states an otherwise valid legal claim but fails to state sufficient facts that, if true, would entitle the claimant to relief under the claim.” *Est. of Swanberg*, 2020 MT 153, ¶ 6, 400 Mont. 247, 465 P.3d 1165 (citing *Anderson*, at ¶ 8). “The Court takes all well-pleaded factual assertions as true in the light most favorable to the claimant.” *Id.* (citing *Stowe v. Big Sky Vacation Rentals, Inc.*, 2019 MT 288, ¶ 12, 398 Mont. 91, 454 P.3d 655). “Good pleading neither requires nor permits the pleading of the evidence upon which the pleader relies to maintain his action.” *Johnson v. Johnson*, 92 Mont. 52, --, 15 P.2d 842, 844 (1932) (internal citations omitted). “The test . . . is: Does the complaint state facts from which the court can determine that he is entitled to relief, or merely declare that the pleader is entitled to the relief demanded.” *Id.* “A pleader may allege ultimate facts from which a legal conclusion identical with such facts would necessarily follow.” *Id.*

### **SUMMARY OF ARGUMENT**

Appellants’ argument is premised upon a right to access the Murphy Properties parcel from the lake, consistent with historical uses which are distinct from general public uses. The Act prohibits lakeshore improvements from interfering with navigation or other lawful recreation which, one would think, includes a neighbor’s access to lake frontage on their own property. Murphy

Properties also established a prescriptive right to access its lake frontage at the back of the cove which is now impeded by Painted Rocks' dock. That dock is a nuisance because it violates the terms of the Act in its interference with Appellants' use of and access to the Murphy Properties parcel. The District Court decided in its 12(b)(6) order, "...that Plaintiff has failed to adequately establish a right to 'navigation' for 'recreation use' of the surface waters under the facts as alleged." Order on Mot. Dismiss, 7, (May 9, 2023) (Apdx. 1). Then, in its summary judgment order, the District Court decided that Appellants' right to use the lake was based on the public trust easement for recreational purposes, precluding the establishment of a prescriptive easement. Order on Mot. S.J., 8 (Mar. 12, 2024) (Apdx 2).

The orders contradict one another. Appellants cannot have a right to recreational use in the context of a prescriptive easement and then lose that right in the context of the Act. While use of Flathead Lake is under the public trust easement Appellants' recreational use is now hindered. Appellants also made additional and distinct historical uses of the access to the cove sufficient establish adversity for a prescriptive easement burdening Painted Rocks' property.

## **ARGUMENT**

Appellants will first address the order granting Painted Rocks' motion for summary judgment, before addressing the order granting Lake County's motion to

dismiss. This argument is organized into three sections based on the three counts in Appellants' Complaint. In the context of the summary judgment order, Appellants first address the prescriptive easement (in favor of Murphy Properties only) followed by a brief clarification of Appellants' nuisance claim. Then, in the context of the order on Lake County's motion to dismiss, the Lakeshore Protection Act is addressed.

**I. MURPHY PROPERTIES HAS A PRESCRIPTIVE EASEMENT BURDENING PAINTED ROCKS' PROPERTY BETWEEN THE LOW AND HIGH WATER MARKS OF FLATHEAD LAKE BASED ON HISTORIC USES DISTINCT FROM PUBLIC USE.**

The public trust doctrine does not foreclose Murphy Properties' claimed prescriptive easement. Painted Rocks' dock is wholly located on its private property, above Flathead Lake's low-water mark, and not within the state-owned lakebed. When Flathead Lake is at full pool, it is possible for a boat to float over Painted Rocks' private property, and that is how John and his family have always accessed the cove.

The public has a right to use Flathead Lake for recreation. "Flathead Lake is a navigable body of water." *Faucett v. Dewey Lumber Co.*, 82 Mont. 250, --, 266 P. 646, 647 (1928). The owner of land bordered by a lake owns to the edge of the lake at its low water mark. Mont. Code Ann. § 70-16-201. As with all real property, this ownership may be subject to easements, including the public trust

easement established in Article IX, § 3 of the Montana Constitution. Other than broad statements about surface waters being held in public trust in *Montana Coalition for Stream Access, Inc. v. Curran*, 210 Mont. 38, 682 P.2d. 163 (1984), which was reaffirmed in *Galt v. State*, 225 Mont 142, 731 P.2d 912 (1987), this Court and our Legislature have focused on the application of the public trust doctrine to rivers and streams, to the exclusion of lakes. Neither the Montana Constitution nor this Court's holding in *Curran* preclude a claim for prescriptive easement based on uses which are distinct from the general public.

The public's right to use private property bounded by a lake are not as well defined as the public's right to use private property bounded by a river or stream. This Court held in *Curran*, "...that, under the public trust doctrine and the 1972 Montana Constitution, any surface waters that are capable of recreational use may be so used by the public without regard to **streambed** ownership or navigability for nonrecreational purposes." *Curran*, at 53, 682 P.2d at 171 (emphasis added). The Legislature has not spoken to the rights of recreational users of lakes as it has spoken to the rights of users of rivers or streams. Public access rights between the low and high water marks for rivers and streams are defined in Montana Code Annotated §§ 23-2-301(12) & 302, but, "Nothing contained in this part addresses the recreational use of surface waters of lakes." Mont. Code Ann. § 23-2-310.

This Court recently addressed lakeshore ownership rights in *Ash v. Merlette*, which was a dispute over the conveyance of the portion between the low and high water marks of a small lake. 2017 MT 305, 389 Mont. 486, 407 P.3d 304. Montana Code Annotated § 23-2-302(1) and § 87-2-305 were cited in a reference to the public's rights to access surface waters, but these statutes address recreational use of streams and recreational fishing in rivers, sloughs, and streams, respectively. Neither statute has any application to lakes. Additionally, in that case, "...Montana's public trust easement [was] not at issue..." *Id.*, ¶ 10. *Ash* does, however, stand for the proposition that the property between the low and high water marks is privately owned. As such, that property is fair game for a private prescriptive easement, in addition to any public easement under the public trust doctrine. *Ash* supports Appellants' argument.

Just because private property is covered by water does not mean it cannot be subject to a private prescriptive easement. Easements are not just for travel over land, they are restrictions imposed on the use of land. Wind and solar easements are creatures of statute in Title 70, Chapter 17. Avigation easements may burden land to preserve air travel routes overhead. *David Casanova, The Possibility and Consequences of the Recognition of Prescriptive Avigation Easements by State Courts*, 2001 28 B.C. Env'tl. Aff. L. Rev. 399. This Court held in an eminent domain case, *Silver Bow Cnty. v. Hafer*, that an easement clearing, ridding, and

preventing the construction of obstructions to air travel on private property in the Bert Mooney airport's FAA mandated clear zone was necessary to insure the safe and unrestricted passage of aircraft and preferable to condemning the fee simple interest in the entire property. 166 Mont. 330, 532 P.2d 691 (1975). It follows that if an easement can restrict the construction of obstacles to the passage of aircraft above private real property, an easement can also restrict the construction of obstacles to the passage of boats above private real property. Such easements, when established by private uses within a publicly accessible space, including air and water, may be acquired by prescription if the use is distinct from that of the public.

The scope of a prescriptive easement is determined by, "the nature of the enjoyment by which it was acquired." Mont. Code Ann. § 70-17-106. Most Montana cases use the words, "historical use" when addressing the scope of a prescriptive easement. The scope of Murphy Properties' easement to cross Painted Rocks' property was such that John did not have to get out of his boat and drag it on a line to get it in and out of the cove, but could take the boat in and out under its own power. This is analogous to a locked gate being placed across a road, requiring a change in the manner of access from vehicular to pedestrian. Painted Rocks' dock has required John to change the manner of his access to the lake frontage in the cove.

Appellants next move to adverse and permissive use. The District Court held that because Painted Rocks did not have the right to exclude anyone from Murphy Properties' access route on the surface waters, a prescriptive easement could not be perfected against Painted Rocks. Order on Mot. S.J., 8 (Apx. 2). The District Court also stated in its Order, and in contradiction to the record, that Murphy Properties' use was permissive. These issues are addressed in turn.

**A. Murphy Properties' cove access was adverse because it was distinct from general public use.**

Murphy Properties' access to the cove can be distinguished from public recreational use as permitted by the public trust doctrine. Murphy Properties claims a private easement to access its real property, albeit for recreational purposes, which is different from public recreational use in scope and intensity. This is not a case of random boaters floating by the lake shore, but the same people in the same boats on the same route over a period of decades.

A private easement may be acquired for recreational use. Painted Rocks argued below that Murphy Properties cannot acquire an easement because its use was seasonal and recreational. Painted Rocks, however, conflates the requirements for public and private prescriptive easements by relying on cases about public easements in Murphy Properties' claim for a private easement. This Court stated in *Public Land/Water Access Assoc., Inc. v. Robbins*, "For a **public use** to be adverse,

a plaintiff must show more than generally permissive, seasonal, and recreational use.” 2021 MT 75, ¶ 41, 403 Mont. 491, 483 P.3d 1102 (emphasis added).

In *Schmid v. Pastor*, this Court explained how a private prescriptive easement is acquired based on recreational use, stating:

However, we reject Schmid's argument that the recreational use here is insufficient to give notice to the servient owner of an adverse claim and cannot, as a matter of law, create a prescriptive easement of any kind. While that may be the result in a different case, here the recreational use of Lots 15 and 16 occurred in conjunction with the residential use of co-owned Lot 14, providing a heightened notice of the use of Lots 15 and 16. Yet, this recreational use occurred on separately divided parcels, creating a clearly discrete historical use of those particular lots apart from the use of Lot 14 and establishing a separate, and narrower, prescriptive easement.

2009 MT 280, ¶ 21, 352 Mont. 178, 216 P.3d 192.

John's and his family's undisputed use of the cove, for decades, in conjunction with the residence on the Murphy Properties parcel, put Painted Rocks and its predecessors in title on notice of the claim of use at issue. Beginning with *Granite Cnty. v. Komberec*, this Court has used the words, “seasonal use by hunters, fisherman, hikers, campers, use by neighbors visiting neighbors, and persons cutting Christmas trees and gathering firewood are not sufficient to establish prescriptive use” in opinions about public recreational easements. 245 Mont. 252, 258, 800 P.2d 166, 170 (1990). Each of these opinions addresses public easements, not private easements like the one claimed by Murphy

Properties. John and the invitees of Murphy Properties are not strangers randomly passing through the area to gather firewood or fish. There is a residence on the Murphy Properties parcel and John and his family have used it to access Flathead Lake through the cove during full pool for decades. This put Painted Rocks and its predecessors in title on notice of this use and claim of right.

Use of a public road can form the basis of a prescriptive right if the use is distinct from the general public. Painted Rocks waited until its summary judgment reply brief to discuss this Court's holding in *Cummings v. Canton*, 244 Mont. 132, 796 P.2d 574 (1990), for the proposition that Appellants cannot establish that their use was adverse because the lake is available for public access, like a county road. Painted Rocks' MSJ Reply, 9-10 (Apx. 2D). The District Court cited to *Cummings* in its summary judgment order. Order on Mot. S.J., 8 (Apx. 2). Even Painted Rocks admits that prescriptive rights may be established on a public way if, "...the claimant's use is distinctive in some manner." Painted Rocks' MSJ Reply, 10 (citing Jon W. Bruce, James W. Ely, Jr., and Edward T. Brading, *The Law of Easements and Licenses in Land*, § 5:23 (Aug. 2023 update) (Apx. 2D)). The District Court did not address the distinctive nature of the Appellants' use in its summary judgment order.

Murphy Properties' use was distinct from the general public in scope and intensity. First, as in *Schmid*, Murphy Properties use was in conjunction with a

residence, providing heightened notice of the use and claim. Second, Murphy Properties did more than the general public going so far as to improve and maintain the portion of the lakebed which is owned by Painted Rocks and over which the easement is claimed. Painted Rocks statement of undisputed facts states: “Since [Murphy Properties] has owned its property, it has dredged the ‘inlet’ to the cove to allow passage by boat...” and, “Schaeffer admitted that to keep the opening to the cove open so that water would flow into it and would allow a boat to be driven in, his family would dredge the rocks out to make the entrance deeper.” Painted Rocks’ Br. Supp. MSJ Ex. 5-6 (Apdx. 2B). These activities are more than the general public engages in and exceed the scope of the public trust easement.

The facts of this case are also distinguishable from *Cummings*, because that case involved a public road, not a lake. Painted Rocks’ predecessors in title could have built a dock or other lakeshore improvement to exclude John and his family (like Locati’s bridge), but did not. An exclusionary improvement like that cannot be permitted across a county road, but if the District Court is affirmed then an exclusionary improvement can be built on a lake. This means that Painted Rocks did have the right to exclude John from that area on the lakeshore, creating a contradiction. The District Court’s ruling that Murphy Properties could not acquire a prescriptive right because Painted Rocks could not exclude John from that area of

the surface waters of the lake is contradicted by the fact that Painted Rocks dock is actually excluding John and his family from that area of the surface waters of the lake. The two concepts cannot logically co-exist.

Seasonal use of Flathead Lake is not a bar to Murphy Properties' prescriptive easement. There are good policy reasons why seasonal and recreational use may be insufficient to establish a prescriptive easement, because it can be hard for a servient tenement to have notice of an adverse claim. But in Murphy Properties' situation, the only use that can be made is seasonal because Flathead Lake is only full for a few months in the summer. John and his family made regular use of the cove access in a ski boat during the summers for decades, and in conjunction with residential use, just like in *Schmid*. They maintained and even improved the easement on Painted Rocks' property during low water.

Anyone on Painted Rocks' property could see the same people in the same boats going to and from the same place for years. Mrs. Jones even saw Murphy Properties' dock in the cove when she visited Painted Rocks' property, before it was purchased. Pls.' Resp. MSJ, Exhibit C, at 65:1-18 (deposition of Ryan Langston) (Apx. 2C).

**B. Murphy Properties' use was not permissive.**

Painted Rocks attempts to use a demand letter about removal of an encroachment sent to John by Painted Rocks' predecessor in title to support a claim

that Appellants’ use of the cove was permissive. Painted Rocks is twisting facts. An encroachment, by its very nature, is not permissive. It is adverse. This Court’s recent decision in *Faber v. Raty*, explains the difference between acquiescence, which is a passive failure of a servient estate owner to assert its rights, and permission, which is, “a grant of permission in fact or a license”. 2023 MT 227, ¶ 21, 414 Mont. 144, 539 P.3d 1096 (internal citations omitted). Permissive use is discussed at length in the context of a shared dock in *Pedersen v. Ziehl*, 2013 MT 306, 372 Mont. 223, 311 P.3d 765. In that case, permissive use was established by one of the parties saying that an encroaching dock, “...was to be shared and permissively used by each owner as a neighborly accommodation.” *Pedersen*, ¶ 16. The facts of Murphy Properties’ situation are a stark contrast, because Painted Rocks’ predecessor in title acquiesced to the location of Murphy Properties’ dock without granting permission and then demanded the dock be moved. The encroachment demand letter is evidence of adverse use not permissive use. The servient estate has the burden to prove permissive use. *Faber*, ¶ 22. Painted Rocks’ Rule 30(b)(6) deponent had no factual basis to suggest that Murphy Properties’ use of the cove was permissive. Pls.’ Resp. MSJ, Ex. C, at 63:17-64:15 (deposition of Langston) (Apx. 2C).

The location of Murphy Properties’ dock in the cove is an irrelevant red herring, because the location of the dock does not change the historical access to

the cove upon which the claimed easement is based. The location of the dock is not the issue. The concern is getting in and out of the cove.

Appellants request this Court hold that Murphy Properties established a private prescriptive easement burdening Painted Rocks' property as a matter of law based on undisputed facts showing historical use which was distinct from general public use.

**II. PAINTED ROCKS' DOCK IS A NUISANCE BECAUSE IT INTERFERES WITH APPELLANTS' ENJOYMENT OF PROPERTY AND VIOLATES THE ACT.**

The District Court ruled that a predicate to the Appellants' claim for private nuisance is establishment of the adverse use element for a prescriptive easement. Order on Mot. S.J., 8 (Apdx. 2). Painted Rocks has attempted to paint Appellants' nuisance claim as one for qualified nuisance, requiring allegations of negligence under *Barnes v. City of Thompson Falls*, 1999 MT 77, ¶ 20, 294 Mont. 76, 979 P.2d 1275, however that has never been Appellants' claim. Appellants claim that the permit under which the dock was built violates the Act, creating an absolute nuisance.

Painted Rocks relies on a response to a request for admission that Appellants are not alleging nuisance *per se*, which is true, they are not. Painted Rocks then transforms nuisance *per se* into absolute nuisance in its briefing. If Painted Rocks

wanted to ask about absolute nuisance, it should have. It asked about nuisance *per se* instead.

In *Martin v. Artis*, this Court contrasts nuisance *per accidens* (in fact) and nuisance *per se* (at law) with qualified nuisance (which is predicated on negligence) and absolute nuisance (which is not predicated on negligence). 2012 MT 249, ¶ 14, 366 Mont. 513, 290 P.3d 687. Appellants' claim is and always has been that Painted Rocks' dock could not have lawfully been permitted because it impacts Appellants' access to the Murphy Properties' parcel. Painted Rocks' dock is a nuisance because of where it is, and while it was built under a permit from Lake County, that permit was improperly granted because it allows the dock to impact Appellants' access to the cove, which violates the Act.

Appellants' nuisance claim depends on whether the permit violates the Act. If the permit violates the Act, then the dock is an absolute nuisance. and Appellants are entitled to present evidence of the impacts the dock has on their enjoyment of the Murphy Properties parcel. It bears repeating the obvious point that Painted Rocks' dock is interfering with John's and his family's use and enjoyment of the Murphy Properties' parcel. Generations of children who grew up going in and out of that cove will not be able to enjoy the same activities with their own children.

### III. THE LAKESHORE CONSTRUCTION PERMIT LAKE COUNTY ISSUED TO PAINTED ROCKS VIOLATES THE ACT

Appellants are entitled to a substantive judicial review of Lake County's final decision to permit Painted Rocks to build a dock that Lake County and Painted Rocks both knew would prevent Appellants from accessing the Murphy Properties' parcel. The Act states:

The district court may hear and decide the following cases arising under this part within the district:

- (1) a complaint and petition of a governing body or an interested person for an order to restore a lake to its previous condition or to enjoin further work in a lake;
- (2) a petition of an interested person for review of a final action of a governing body upon an application for a permit;
- (3) a petition of an interested person for review of an action of a governing body in adopting or amending regulations.

Mont. Code Ann. § 75-7-215. Lakeshore construction permits are reviewed to determine whether the permit was issued arbitrarily, capriciously, or unlawfully.

*Community Assoc. for N. Shore Conservation, Inc. v. Flathead Co.*, 2019 MT 147,

¶ 28, 396 Mont. 194, 445 P.3d 1195. Regulations promulgated under the Act:

...[S]hall favor issuance if the proposed work will not during either its construction or its utilization:

- (1) materially diminish water quality;
- (2) materially diminish habitat for fish or wildlife;
- (3) interfere with navigation or other lawful recreation;
- (4) create a public nuisance; or
- (5) create a visual impact discordant with natural scenic values, as determined by the local governing body, where such values form the predominant landscape elements.

Mont. Code Ann. § 75-7-208. Lake County’s regulations restate these statutory requirements and also protect, “...the navigational rights and safety of neighboring property owners and recreational uses of the lake...” Lake County Lakeshore Protection Regulations, § 5-3(P)(1)(a).

Appellants are interested persons under the Act. “[I]ndividuals who use and enjoy Flathead Lake...” and who find that use diminished by a structure permitted under the Act are interested persons with standing to sue under the Act.

*Community Assn.*, ¶¶ 21-22. Murphy Properties owns the real estate that cannot be accessed by boat due to Painted Rocks’ dock. Compl., ¶¶ 1, 27 (Apdx. 1E). John Shaffer, owns Murphy Properties and can no longer access the Murphy Properties’ parcel through Flathead Lake in the same manner that he has for decades. *Id.* at ¶¶ 2, 7-8. Lake County’s commissioners took final action on Painted Rocks’ lakeshore permit, which was attached to Appellants’ complaint with the Commissioners’ signatures. *Id.* at Ex. C at ¶¶ 12, 25 (Lake County Lakeshore Construction Permit).

Lake County’s permit was unlawful because it allowed Painted Rocks to build a dock that prevents Appellants from accessing Murphy Properties’ parcel consistent with their historical uses. Lake County’s permit even requires, “The applicant shall ensure that all measures necessary are undertaken to ensure that the proposed activities occur within the owner’s property boundaries or are permitted

via a recorded easement and do not negatively impact easements **or adjacent properties.**” *Id.* (emphasis added).

It does not matter whether John’s access to the cove was under a claim of prescriptive easement, or as a member of the recreating public under the public trust doctrine, Painted Rocks’ dock negatively impacts the Murphy Properties’ parcel by diminishing the use and enjoyment of the parcel. Lake County has made provision for neighbors, easement holders, and general recreational users by specifically calling for the consideration of easements in the conditions of the permit issued to Painted Rocks and further calling for the protection of navigational rights of neighboring property owners and general recreational users alike in § 5-3(P)(1)(a) of the County’s regulations. Lake County’s permit creates an interference with Murphy Properties’ easement, if this Court finds one exists. But even if no easement exists, John cannot get his boat to his own property, where he had always been able to before, which interferes with his ability to navigate and recreate.

The District Court should have performed a substantive review of Painted Rocks’ dock for compliance with the Act, Lake County’s regulations implementing the Act, and the permit itself. Appellants’ complaint alleged sufficient predicate facts to trigger a review of the permit. Appellants are interested persons using or owning Flathead Lake property. Painted Rocks’ dock was permitted by Lake

County, and Lake County made its final decision on the permit. John used to be able to access his property in the cove with his ski boat before the dock, and now that the dock is built, he cannot access his property in the cove with his ski boat.

There is an interplay between the property lines and the shoreline in the cove which makes this dispute unique which Lake County did not consider and which requires judicial action to enforce. The problem with Lake County's permit is that it appears to be based on an assumption that the property lines between the parcels owned by Murphy Properties and Painted Rocks are perpendicular to the lakeshore, but that is not correct. The way the property line crosses the cove is unique, and should have been considered by Lake County's planning staff, but apparently was not considered. Murphy Properties' high water lake frontage in the cove was apparently ignored by Lake County. That portion of the Murphy Properties now has lesser access. A key feature of the Murphy Properties' parcel has been taken away from a family that has been enjoying it for generations.

Lake County's failure to consider the Murphy Properties' cove frontage highlights the fact that Lake County has not enforced the express condition in Painted Rocks permit requiring that Painted Rocks' dock not negatively impact neighboring properties. Lake County would put the responsibility to ensure that Painted Rocks' dock does not negatively impact neighboring properties on Painted Rocks, but the permit is Lake County's, and if Lake County will not enforce its

own permit, who will? Lake County improperly attempts to punt on this issue to pit two neighbors against one another, when it is Lake County's responsibility to enforce the Act and its own regulations. That would have been done simply by considering Murphy Properties' cove frontage when it issued its permit, if only Lake County would have stood up to Painted Rocks.

Things change with time. Montana is changing. Montanans are counting on their local governments to stand up for them as changes are made. This is not to stop change from happening, but to be sure that changes comport with the libertarian ideal which is so valued here – do whatever you want with your own property, as long as what you are doing does not harm me or my use of my own property. Painted Rocks' dock flies in the face of that basic concept, and worse yet, their architect did it on purpose. Painted Rocks has imposed on John and his family part of the cost of Painted Rocks' dock, in that John and his family now find their use of the Murphy Properties parcel diminished. That is not fair, nor is it legal under the Act. The District Court should be reversed.

### **CONCLUSION**

The District Court issued two orders that contradict one another. When the District Court granted Lake County's Motion to Dismiss, it did so on the premise that Appellants had no right to recreational use. Then the District Court granted

summary judgment to Painted Rocks on the premise that Appellants have a right to recreational use under the public trust doctrine.

The District Court’s orders granting Lake County’s motion to dismiss and Painted Rocks’ motion for summary judgment should be reversed, because the undisputed facts in the record show that Appellants have established a prescriptive right to access the cove which is distinct from general public use. That right was violated when Painted Rocks built its dock under permit from Lake County, which violated the Act and interfered with Appellants enjoyment of their property. Even without a prescriptive right, Appellants’ “navigation or other lawful recreation” are significantly hindered by Painted Rocks’ dock. Lake County should have considered the impact of Painted Rocks’ dock on Appellant’s ability to use and enjoy the lake and required Painted Rocks’ dock to be built in such a manner as preserve Appellants’ access to the cove.

DATED this 14<sup>th</sup> day of June, 2024.

JACKSON, MURDO & GRANT, P.C.

By: 

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## CERTIFICATE OF COMPLIANCE

I certify that this brief is formatted with double line spacing and a proportionately spaced Times New Roman typeface in 14-point font and contains **7,119** words as calculated by my Microsoft Word application (excluding Tables of Contents and Authorities, and Certificates of Service and Compliance).

A handwritten signature in blue ink, appearing to read "M. P. Talia", is written over a horizontal line.

Michael P. Talia

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