

DA 23-0290

IN THE SUPREME COURT OF THE STATE OF MONTANA

2024 MT 156

ROBERT FRISK,

Plaintiff and Appellee,

v.

JOHN N. THOMAS and LORI A. THOMAS,

Defendants and Appellants.

APPEAL FROM: District Court of the Eleventh Judicial District,
In and For the County of Flathead, Cause No. DV-2021-718
Honorable Amy Eddy, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

Kelsey Bunkers, E. Lars Phillips, Crowley Fleck PLLP, Bozeman,
Montana

For Appellee:

Richard DeJana, DeJana and Associates, PLLC, Kalispell, Montana

Submitted on Briefs: February 7, 2024

Decided: July 30, 2024

Filed:



Clerk

Justice Laurie McKinnon delivered the Opinion of the Court.

¶1 John N. Thomas and Lori A. Thomas (collectively, “Thomas”) appeal the Findings of Fact, Conclusions of Law and Order entered April 14, 2023, by the Montana Eleventh Judicial District Court, Flathead County. We restate the issues on appeal as follows:

1. *Did the District Court err when it granted an equitable easement to Frisk for a portion of Thomas’ property?*
2. *Were the District Court’s additional restrictions on the Water Well Agreement between Thomas and Frisk allowable under Montana law?*

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Robert Frisk (Frisk) owns the property located at 1196 Swan Hill Drive, in Bigfork, Montana (Frisk Property). Frisk acquired part of the property from Kenneth Monier and Penelope C. Monier in 1984 and acquired sole ownership in 1991. Thomas owns the neighboring and directly adjoining property at 1194 Swan Hill Drive, in Bigfork, Montana (Thomas Property). The Moniers also previously owned the Thomas Property and conveyed it to the Hutchinson family before Thomas acquired it in 2018.

¶3 The parties share a common private driveway off Swan Hill Drive that crosses over the Thomas Property to access their properties. Frisk had an express easement depicted on COS 3534 that did not match the actual roadway historically used by Frisk and his predecessors to access the Frisk Property. Frisk and Thomas had ongoing disagreements about the width of the easement that ultimately led to the current lawsuit.

¶4 The parties also share a water well located on Frisk’s property. There is a 1977 Water Well Agreement executed by the Moniers and the Hutchinsons that granted the

Hutchinsons a one fourth interest in the well and its water along with an easement to install the water line and access the well for maintenance and repairs. The relevant section of the agreement reads:

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. SELLERS hereby reserve and accept unto themselves their heirs, successors and assigns, the right to use the easement property conveyed, providing such use does not interfere with the use of the easement as necessary to carry out the above stated purposes.

¶5 Before purchasing the property, Frisk was shown the boundaries of the property by the realtor who was the seller's agent. This included the northwest and northeast corners, where there were pins on the corners indicating the supposed boundary line. Frisk used a rifle scope to stake out a fence line according to the pins that he believed were on his property. Frisk's neighbor at the time, Hutchison, also believed the pin placement at the time was correct and approved of the location of Frisk's fence. Frisk constructed a fence with a gate relying on the pins and the word of the realtor about where the property line was. Frisk's previous house burned down in 1987, and he constructed a new home closer to the Thomas Property, a small portion of which was revealed through a subsequent survey to have been built on the Thomas Property, encroaching about one foot.

¶6 Due to disagreements about the width of the easement on the private road, Frisk filed a lawsuit against Thomas on June 30, 2021, asking for a declaration of express or prescriptive easement for the full 30-foot road and an injunction to prevent Thomas from

interfering with Frisk's use of the road. Thomas did not contest that Frisk had an express easement on the road, but alleged Frisk did not know the actual location of the easement, the easement was not for the full 30 feet, and that Thomas had not interfered with Frisk's use of his easement. Further, Thomas asserted a counterclaim for breach of contract of the 1977 Water Well Agreement, alleging Frisk was preventing him from accessing the easement for maintenance and repairs and that Frisk refused to produce proof of actual costs incurred for the well that Thomas requested.

¶7 During this litigation, Thomas had an official survey done of the boundary between the two properties. Through this survey, Thomas discovered a portion of Frisk's fence was on his property along with a corner of the house and that the fence enclosed approximately 6,482 square feet of his property. Thomas testified he had paid the property taxes on this portion of his property but had never been able to use it and that he wished to use it. Thomas subsequently amended his answer to include a counterclaim of trespass for the portion of the fence and house on his property. Both parties additionally alleged harassment by the other party while attempting to use easements and in regular interactions.

¶8 The District Court held a hearing on May 2, 2023. The District Court then issued its Findings of Fact, Conclusions of Law and Order on April 14, 2023. The District Court first granted Frisk a prescriptive easement over 15 feet of the existing roadway. Neither party contests this finding on appeal. Next, the District Court applied the factors to consider for equitable easements from the Restatement (Second) of Torts, §§ 936 and 941, finding they weighed in favor of granting Frisk an equitable easement over the contested

portion of property. Thomas’s request for Frisk to move his fence, gate, and house was denied due to the granting of the equitable easement. The District Court dismissed Thomas’s claims of breach of contract and violation of the covenant of good faith and fair dealing but affirmed Thomas’s right to access the water well pursuant to the Water Well Agreement. Due to the historic animosity between the parties, the District Court imposed additional restrictions on Thomas’s access as follows:

- (a) Absent an emergency, the Defendants may not enter the Plaintiff’s property unless 10-days written notice has been given to the Plaintiff. Such notice must include the date and time the Defendants will be entering the property, the identity of any other individual accompanying the Defendants, and the specific reason entry is necessary—including a description of the particular installation.
- (b) Entry by the Defendants for “maintenance” of the system shall not happen more than two times per year unless both parties agree.
- (c) The Defendants are responsible to pay $\frac{1}{4}$ of the usage fee and $\frac{1}{2}$ of the meter fee.
- (d) The Plaintiff will work with Flathead Electric to add John Thomas as an authorized user on the account for purposes of confirming billing information.

Thomas then appealed the Order on May 25, 2023, to this Court.

STANDARD OF REVIEW

¶9 “The standard of review governing proceedings in equity is codified at Section 3-2-204(5), MCA, which directs that we review ‘all questions of fact arising upon the evidence presented in the record . . . as well as questions of law.’” *Mont. Digital, LLC v. Trinity Lutheran Church*, 2020 MT 250, ¶ 9, 401 Mont. 482, 473 P.3d 1009. We review a district court’s conclusion of law de novo to determine if they are correct. *Bugli v. Ravalli County*, 2018 MT 177, ¶ 7, 392 Mont. 131, 422 P.3d 131. We review the district court’s

findings of fact to determine if they are clearly erroneous. *Mont. Digital, LLC*, ¶ 9. Mixed questions of law and fact are also reviewed de novo. *Mont. Digital, LLC*, ¶ 9.

DISCUSSION

¶10 1. *Did the District Court err when it granted an equitable easement to Frisk for a portion of Thomas' property?*

¶11 Under Montana law, an easement can be created by a written instrument, by operation of law, or by prescription. *JRN Holdings, LLC v. Dearborn Meadows Land Owners Ass'n*, 2021 MT 204, ¶ 27, 405 Mont. 200, 493 P.3d 340. Easements created by operations of law arise from necessity or preexisting use and are also referred to as implied easements. *See JRN Holdings, LLC*, ¶ 27. A prescriptive easement requires “open, notorious, exclusive, adverse, continuous and uninterrupted use for five years.” *Cremer Rodeo Land & Livestock Co. v. McMullen*, 2023 MT 117, ¶ 37, 412 Mont. 471, 531 P.3d 566. Some jurisdictions recognize an equitable “relative hardship” doctrine to assess whether even in the case of a legal trespass, equity might preclude mandatory injunctive relief in limited circumstances and create an equitable easement for an unintentional, non-negligent trespasser. *Davis v. Westphal*, 2017 MT 276, ¶ 29, fn. 10, 389 Mont. 251, 405 P.3d 73 (citations omitted). Montana has never adopted this doctrine and several times we have stated this doctrine does not exist under Montana law. *See Davis*, ¶ 29, fn. 10; *Penland v. Derby*, 220 Mont. 257, 260, 714 P.2d 158, 160 (1986); *Murray v. Countryman Creek Ranch*, 254 Mont. 432, 437, 838 P.2d 431, 434 (Mont. 1992), *overruled on other grounds by Warnack v. Coneen Fam. Tr.*, 266 Mont. 203, 879 P.2d 715 (Mont. 1994) (Turnage, C.J., concurring).

¶12 The District Court thus erred in finding an equitable easement for Frisk when the equitable easement doctrine has never been adopted in Montana law. The District Court applied the Restatement 2d of Torts, § 936(1), which outlines factors a court may consider when faced with the appropriateness of an injunction and the potential of finding an equitable easement, and determined they weighed in favor of granting Frisk an equitable easement. It reasoned Frisk was an unintentional trespasser who installed the structures in good faith and Thomas would suffer relatively little hardship, but Frisk would bear a large burden moving his fence and house. However, we have never recognized the Restatement 2d of Torts, § 936(1) and have declined to adopt an equitable easement doctrine in previous cases. The relevant inquiry is whether Frisk had obtained any easement recognized in Montana law, not a balancing of burdens of the parties.

¶13 Frisk could not have obtained any easement to the disputed parcel of Thomas's property. There was never any written instrument granting an easement over this portion of the property. There can be no finding of an implied easement of necessity since the portion of Thomas's property is not required for accessing a landlocked parcel. *JRN Holdings*, ¶ 27. For a party to be granted an implied easement by preexisting use, they must show "(1) the dominant and servient tenements are severed from a common ownership ("unity of ownership"); (2) the use of the servient tenement is apparent, continuous, and reasonably necessary for the beneficial use and enjoyment of the dominant tenement at the time of severance; and (3) the parties to the deed that served the tenements intended the use to continue after the division." *JRN Holdings*, ¶ 28. Although there was

previously common ownership, the portion of Thomas's property was not used as such at the time of severance and the fence and subsequent use of this portion of the property in this manner only occurred long after severance of the two parcels. Therefore, there could be no implied easement based on preexisting use.

¶14 Frisk also did not acquire a prescriptive easement, as the District Court's allowing Frisk to use the property within his fence to the exclusion of Thomas is not an easement but effectively a granting of title. A party Seeking a prescriptive easement must prove by clear and convincing evidence there was open, notorious, exclusive, adverse, continuous, and uninterrupted use for five years. *Cremer Rodeo Land*, ¶ 37. While Frisk's use of the area has been exclusive, adverse, continuous, and uninterrupted for longer than five years, a prescriptive easement is the ability to use the property for a certain purpose, not a transfer of title.

¶15 In *Burlingame*, we rejected a similar claim for a prescriptive easement when the claimant had fenced and exclusively used the neighbor's property for over 40 years. *Burlingame v. Marjerrison*, 204 Mont. 464, 471, 665 P.2d 1136, 1140 (1983). We held an easement was a nonpossessory interest and "[w]here a prescriptive right to a servitude has the effect of leaving the owner with an empty fee title, the situation is not one of prescriptive right in the form of an easement. It has ripened into a claim for adverse possession." *Burlingame*, 204 Mont. at 471, 665 P.2d at 1140. Since the claimant in that case did not pay any taxes on the property they had been using, we held they acquired no interest in the property. *Burlingame*, 204 Mont. at 472, 665 P.2d at 1140. Similarly, there

can be no finding of adverse possession in favor of Frisk considering it is undisputed Thomas paid the taxes for that portion of his property.

¶16 While we have never recognized the equitable easement doctrine, we have previously recognized certain de minimis encroachments might not be subject to injunctive relief even if they encroach on another's property. *Gelderloos v. Duke*, 2004 MT 94, ¶ 41, 321 Mont. 1, 88 P.3d 814. In *Gelderloos*, the overhang of the roof and a corner of the house was encroaching about a foot or two across a shared property line along with fencing and landscaping encroaching more extensively. *Gelderloos*, ¶ 17. In that case, we concluded there was no prescriptive easement for the house since it amounted to total use of the property and there could be no adverse possession claim when the encroaching party had not paid taxes on the disputed land. *Gelderloos*, ¶¶ 39-40. Even though the encroaching party had no interest in the land, we concluded it would be too extreme a remedy to order the encroaching party to move or tear down their house for such a de minimis encroachment. *Gelderloos*, ¶ 41. We therefore declined, under equitable authority, to order the house be moved even though we found there was no prescriptive easement. *Gelderloos*, ¶ 41.

¶17 The District Court considered the fencing, gate, and house together, then concluded the burden of moving or tearing down the structures would be too great. The District Court could have considered the fencing and the house separately, as the cost and work required in moving the fence would be substantially less than moving the house. They are two separate encroachments and could have been analyzed as such. We conclude the fencing

to be more than a de minimis encroachment when it encompasses 6,482 square feet of Thomas's property. We also conclude it is reasonable, given the undisputable encroachment of a sizeable area of land, that the fencing and gate be removed by Frisk. Frisk accordingly should have to move his fencing and gate to reflect the actual property lines. However, the house's encroachment of one foot onto Thomas's property is de minimis. We conclude the situation is like *Gelderloos* and decline to order Frisk to move his house when it represents such a de minimis encroachment.

¶18 2. *Were the District Court's additional restrictions on the Water Well Agreement between Thomas and Frisk allowable under Montana law?*

¶19 The District Court added additional restrictions to the parties' Water Well Agreement after considering a history of animosity between the parties and disagreements about easement use for the purpose of repairs and maintenance. The Water Well Agreement granted Thomas a one-fourth interest in the well located on Frisk's property and its water, along with an easement for transport of the water and for repair and maintenance. The Agreement specifies "that each shall be liable and responsible for that share of the costs of maintenance, operation, and repairs that is the same as their fractional interest." The restrictions the District Court imposed were:

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

(c) The Defendants are responsible to pay $\frac{1}{4}$ of the usage fee and $\frac{1}{2}$ of the meter fee.

(d) The Plaintiff will work with Flathead Electric to add John Thomas as an authorized user on the account for purposes of confirming billing information.

¶20 Here, the agreement created a servitude for access and use of the well. “The extent of a servitude is determined by the terms of the grant or the nature of the enjoyment by which it was acquired.” Section 70-17-106, MCA. If granting language is general rather than specific, the scope of the easement should be determined considering the property and surrounding circumstances in a manner reasonably necessary for the purpose for which it was created. *Guthrie v. Hardy*, 2001 MT 122, ¶ 47, 305 Mont. 367, 28 P.3d 467. Unless clear language states otherwise, the use of the easement cannot exceed what was intended at the time of creating the easement to burden the servient estate to a greater extent than was contemplated during the easement’s creation. *Quarter Circle JP Ranch, LLC v. Jerde*, 2018 MT 68, ¶ 11, 391 Mont. 104, 414 P.3d 1277. “Unless 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 v. Mont. Power Co*, 2009 MT 286, ¶ 47, 352 Mont. 212, 215 P.3d 675. This requirement to not cause unreasonable damage or interfere with enjoyment is a separate requirement and “can be breached even if the easement holder is operating within the easement’s technical parameters.” *Mattson*, ¶ 55.

¶21 The purpose of the easement granted in the Well Water Agreement is clearly for the transport of water along with access for repair and maintenance of the well and piping. Frisk alleges that Thomas has abused his access to the easement several times by cutting

the locks on the gate, coming onto the property for other purposes than well maintenance, and otherwise disrupting Frisk's enjoyment of his property. While Thomas must be allowed to utilize the well and access it for repair and maintenance, the District Court determined he did not need unrestricted 24-hour access to carry out the purposes of the easement. The District Court's limitations were imposed after considering specific circumstances and the history of the parties, while still ensuring Thomas could utilize the easement for its intended purpose. *See Guthrie*, ¶ 47. The court's additional requirements for payment of usage and meter fees and adding Thomas as an authorized account user similarly are not inconsistent with the Well Water Agreement. The parties do not dispute the division of payment for the water on appeal. We therefore conclude the District Court's additional restrictions are allowable under law and do not unreasonably interfere with Thomas's easement and are consistent with the terms of the Water Well Agreement.

CONCLUSION

¶22 Montana law does not recognize the creation of an equitable easement. Frisk must cure his encroachment by removing his fence and gate from Thomas's property and placing his fence at the actual property line. The house is a de minimis encroachment and does not have to be moved. The additional restrictions imposed on the Water Well Agreement easement were reasonable considering the history of animosity between the parties and that the restrictions do not interfere with the easement's purposes.

¶23 Affirmed in part and reversed in part.

/S/ LAURIE McKINNON

We Concur:

/S/ MIKE McGRATH

/S/ JAMES JEREMIAH SHEA

/S/ DIRK M. SANDEFUR

/S/ JIM RICE