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STATE OF MONTANA
Case Number: DA 24-0520

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause Number DA 24-0520

ELGIN FABER and COLLEEN FABER,

Appellants,

-vs-

KEITH RATY, COLLEEN RATY, et al,

Appellees.

Twelfth Judicial District Court, County of Hill, as Cause No. DV-21-2016-003;
and Supreme Court Cause No. DA 21-0360

APPELLANTS' COMBINED REPLY IN SUPPORT OF THEIR APPEAL AND RESPONSE TO APPELLEES' CROSS-APPEAL

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STATEMENT OF ISSUES ON CROSS APPEAL

The Appellant/Cross-Appellee (the "Fabers") restate the issue set forth by the Appellee/Cross-Appellant (the "Ratys") as follows:

1. Whether the District Court's use of the terms "up to" as opposed to "approximately" 200 cow/calf pairs in its conclusion of the scope of the Ratys' easement is consistent with this Court's remand Order.

INTRODUCTION

The extent and frequency of the Ratys' Olson Road Easement was developed at the trial level. The District Court, however, did not amend its Second Amended Findings of Fact, Conclusions of Law and Judgment as necessary to refine the scope to be consistent with the evidence at trial or to comply with this Court's remand order. The District Court's use of the term "up to" instead of "approximately" does not constitute error and serves to establish much needed clarity of the parties' rights and obligations.

ARGUMENT

I. The Scope of the Ratys' Easement Was Argued at the Trial Court Level and on Appeal.

The Ratys err by asserting that the Fabers did not raise the issue of limiting the scope of the Ratys' Olson Road Easement to reflect its historic use before the current appeal. Appellee Ans. & Cross App. Br. at p. 5, ¶ 2; p. 6, ¶ 2, p. 13, ¶¶ 1-2; pp. 14-15. The Ratys liken their assertion to their own prior error of failing to raise

their argument that Olson Road Easement included that of being able to stop to graze their cattle. *See id.* at pp. 14-15. The Ratys are wrong, and their argument is void of merit.

The rule is well established that the Montana Supreme Court will not address an issue raised for the first time on appeal. A party may not raise new arguments or change its legal theory on appeal because it is fundamentally unfair to fault the trial court for failing to rule on an issue it was never given the opportunity to consider. *State v. Adgerson*, 2003 MT 284, ¶ 12, 318 Mont. 22, 78 P.3d 850 (internal citations omitted). That is not the case here. The Fabers are not raising a new argument or changing their legal theory. The trial court had several opportunities to consider the scope of the Ratys' easement. The issue of the scope of the Olson Road Easement was put before the district court and argued at that level and on appeal. To argue otherwise ignores the record.

The scope of the historical use of Olson Road easement, including the extent and frequency of use, was put at issue during trial. Trial testimony was subject to cross-examination. The trial testimony established that Robert "Bud" Boyce would trail cattle through the Faber Property once or twice a year. See App. 5 at 119:18-24, 124:01-07; App. 7 at 14:23-15:12; App. 8 at 11:13-24, 12:16-24. It also established that Boyce would move an approximate total of 200 cow/calf pair

through the Faber Property in any given year. App. 6 at 95:09-16; App. 8 at 26:06-15; App. 8 at 64:20-24.

The Fabers' Proposed Findings of Fact, Conclusions of Law and Order argued that if the Ratys proved the scope of their claimed easement by clear and convincing evidence, it establishes a use limited to once per year, to trail cattle from the Lower Setty Ranch to the Upper Setty Ranch, and only by horseback. App. 9 at p. 8, ¶ 4. The Fabers revised their Proposed Findings of Fact, Conclusions of Law and Order but maintained that the Ratys' predecessors' use was limited to the evidence demonstrating an average of 200 [cow-calf pairs] and that the scope of the easement would be limited to a maximum frequency of twice per year, one trip to trail cattle from the Lower Setty Ranch to the Upper Setty Ranch, and one return trip with fewer numbers in the fall. App. 10 at pp. 15-16. In the Fabers' Response in Opposition to the Ratys' Rule 52(b) and Rule 59(e) Motions they argued against the Ratys' assertion that "Boyce trailed on the Olson Road 'a couple of hundred cows with calves', as actually meaning 400 animals. The Fabers specifically argued that the evidence in the record does not support this. App. 11 at pp. 3-5.

Finally, the Fabers argued in *Faber v. Raty*, 2023 MT 227, 414 Mont. 144, 539 P.3d 1096 ("*Faber I*") that the evidence of the Ratys' predecessors use limited the frequency and extent of their use to once or twice a year and that they would

move a total of 200 cow/calf pair through the Faber Property. Ratys' App. 1 at pp. 28-29; Ratys' App. 3 at pp. 15-17.

This is not an incident where the Fabers are attempting to argue an issue not presented to the District Court as the Ratys did in *Faber I*. In its opinion, this Court correctly held that "[a]s for the Ratys' claim that the District Court erred in failing to include the historical practice of resting their cattle on the Faber Property, our review is precluded because the Ratys did not raise this issue before the District Court." *Faber I* at ¶ 51 (citing *State v. Claassen,* 2012 MT 313, ¶ 19, 367 Mont. 478, 291 P.3d 1176); *see also*, *LHC, Inc. v. Alvarez,* 2007 MT 123, ¶¶ 20-21, 337 Mont. 294, 160 P.3d 502. Unlike in the Ratys' argument in *Faber I,* the record here is replete with argument concerning the scope of the Ratys' Olson Road Easement, including its extent and frequency. The District Court addressed the issue, albeit insufficiently. What appears to be the Ratys' primary argument in response to the Fabers' current appeal is meritless.

II. This Court Remanded the Case to the District Court with Instructions for It to Amend Its Decision to be Consistent with the Historical Use Between 1948-1997. The District Court Did Not.

Mont. Code Ann. § 3-2-204(1) provides that this Court may "(…) affirm, reverse or modify any judgment or order appealed from and may direct the proper judgment or order to be entered or direct a new trial or further proceedings to be had." The statute gives the Court the power to remand a case to a lower court

accompanied by instructions that direct further action be taken in accordance with those instructions. This jurisdiction recognizes the principle that a lower court cannot ignore an appellate court's mandate (…). *State ex rel. Olson v. Dist. Ct. of Nineteenth Judicial Dist.*, 184 Mont. 346, 602 P.2d 1002 (1979). The district court errs if it fails to follow the remand directions. *Id.* at 349.

The *Faber I* Court recognized that under Montana law, the scope of the Ratys' Olson Road easement depends on when the prescriptive period ended. *Faber I* at ¶ 49. The *Faber I* Court therefore held that "(…) the Ratys' easement is properly limited to trailing approximately 200 cow-calf pairs, as established by the evidence at trial. *Id.* at ¶ 50. This Court remanded the case, instructing the District Court to "(…) conform the Amended Findings of Fact, Conclusions of Law and Judgment to reflect our holding that the Ratys' prescriptive easement is limited in scope to the historic agricultural, recreational, and residential uses of the road by the Ratys and their predecessors *between approximately 1948 and 1997*." *Faber I* at ¶ 53 (emphasis added).

The District Court did not comply with the *Faber I* Court's remand instructions. While acknowledging that the Ratys' expansion argument was reversed, the District Court did not amend its open ended finding that "(…) for ingress to and from the Upper and Lower Setty Ranch properties and other purposes as described in these *Findings and Conclusions*, including all agricultural purposes

associated with the cattle operations on said properties and the residential recreational uses that have been historically established (…)[1]" to identify specifically *what the use included* between 1948 and 1997. The *Faber I* Court held that the scope of the Ratys' easement is confined to the historic agricultural, recreational, and residential uses of the road by the Ratys and their predecessors between approximately 1948 and 1997. The record before the District Court is sufficient for it to better define the character and frequency of the Olson Road Easement based on that period as required.

As in *Brown & Brown of MT, Inc. v. Raty,* 2013 MT 338, 372 Mont. 463, 313 P.3d 179 ("*Brown II*"), the District Court's Second Amended Findings of Fact, Conclusions of Law and Judgment leaves the Fabers, and future owners, uncertain as to the uses the Ratys may make of their easement across the Faber Property because the character and frequency of the historical uses between 1948 and 1997 were not adequately defined by the District Court. *See Brown II* at ¶ 11.

The Ratys' also err by appearing to argue that the District Court found that the Ratys' Olson Road Easement encompassed trailing cattle "whenever they wanted." Appellee Ans. & Cross App. Br. at pp. 5, ¶ 1; 13, ¶ 2. That is not the case, nor could it be under the applicable law. First, the extent of a servitude is determined by the terms of the grant or the nature of the enjoyment by which it was

[1] App. 2 at p. 22, ¶ 2.

acquired. Mont. Code Ann. § 70-17-106(1). Where an easement is not specifically defined, its scope extends only to uses "reasonably necessary and convenient" for the purpose for which it was created." *Brown & Brown of MT, Inc. v. Raty,* ("*Brown I*") 2012 MT 264, 367 Mont. 67, 289 P.3d 156 at ¶ 31, (citing *Clark v. Heirs & Devisees of Dwyer*, 2007 MT 237, ¶ 27, 339 Mont. 197, 170 P.3d 927; *Leffingwell Ranch, Inc. v. Cieri,* 276 Mont. 421, 430, 916 P.2d 751, (1996); *Strahan v. Bush*, 237 Mont. 265, 268, 773 P.2d 718 (1989)). The Ratys' assertion fails to acknowledge the clear evidence in the record, which establishes limited use for trailing cattle during the relevant prescriptive period. Under relevant Montana law, the Ratys are limited to trailing cattle in the frequency and character of their predecessors in-interest.

Second, the Ratys misconstrue the findings of the District Court to argue that the scope of their easement is unlimited as it relates to trialing cattle. Neither the record nor the District Court's findings support this claim. As an initial matter, the Ratys' cite to the District Court's Amended Findings of Fact, Conclusions of Law, and Judgment. Not the District Court's *Second* Amended Findings of Fact, Conclusions of Law, and Judgment at issue. The paragraphs the Ratys' cite to also do not set forth the finding they propose[2]. Rather, the District Court held that "The

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[2] Appellee Ans. & Cross App. Br. at pp. 5, ¶ 1; 13, ¶ 2; *compare*, App. 2 at p. 9, ¶ 28; p. 16, ¶ 20.

Ratys and their predecessors have also used this route [the Olson Road] to get to and from the Upper Setty Ranch for various recreational and residential uses at the Upper Setty Ranch, including picnics, holiday parties, hunting, fishing and overnight stays at the cabin there." The District Court followed this finding with "The Ratys' predecessors used the Olson Road for ***these*** purposes under a claim of right, whenever they wanted. App. 2 at p. 8-9, ¶¶ 37-38 (emphasis added). The District Court's conclusions do not hold that the scope of the Olson Road Easement includes *trailing* "anytime they wanted", nor could it. The record is void of supporting evidence of this. Instead, the evidence that the Ratys provided at trial is that they would go up once and down up to twice a year[3] and with a maximum of 200 cow/calf pair. App. 6 at 95:09-16; App. 8 at 26:06-15; App. 8 at 64:20-24.

The scope of an easement gained by prescription is constrained by—*i.e.*, may not exceed—the character and extent of the use made of it during the prescriptive period. *Leichtfuss v. Dabney*, 2005 MT 271, ¶ 30, 329 Mont. 129, 122 P.3d 1220 (citing *Warnack v. Coneen Family Trust*, 266 Mont. 203, 217-18, 879 P.2d 715; *Kelly v. Wallace*, 1998 MT 307, ¶ 31, 292 Mont. 129, 972 P.2d 1117, and cases cited therein; Mont. Code Ann. § 70-17-106). As it relates to trailing cattle, the Ratys'

[3] App. 5 at 119:18-24; 124:01-07; App. 7 at 14:23-15:12; App. 8 at 11:13-24; 12:16-24

Olson Road easement is constrained by the character and extent (i.e. frequency)[4] of the use made of it during the prescriptive period. The *Faber I* Court correctly found that the scope of the Ratys' Olson Road relevant time period was between 1948-1997. It follows that the Ratys' scope is limited to that which they evidenced at trial during that period: once up in the spring and down in the fall for a maximum of twice a year[5] and with a maximum of trailing 200 cow/calf pair.

The District Court "need not catalogue a litany of specific activities each party may undertake"[6], but as was necessary in *Brown II*, the scope of use of the Ratys' Olson Road Easement should be adequately defined to be consistent with the character and frequency of their predecessors during the relevant time period.

III. The Ratys Cross-Appeal Invites Uncertainty, Not Clarification.

The Ratys have set forth various arguments in an attempt to expand their easement rights beyond that of their predecessors at trial, after trial and on appeal in *Faber I.* The Ratys consistently invite uncertainty to allow greater use. They now attempt to establish a foothold toward expansion by excessive grammatical breakdown of the District Court's use of the term "up to" instead of "approximately"

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[4] *Kelly* at ¶ 34 ("the frequency of use by which owners of an easement by prescription acquired their easement during the prescriptive period may limit the frequency of future use").

[5] App. 5 at 119:18-24, 124:01-07; App. 7 at 14:23-15:12; App. 8 at 11:13-24, 12:16-24

[6] *Brown II* at ¶ 14.

in reference to the maximum amount of cattle they are allowed to trail. *See* Appellee Ans. & Cross App. Br. at pp. 16-17, 19-21.

A court may subsequently interpret or clarify a prior judgment to resolve any ambiguity, imprecision, or uncertainty in the original meaning or effect as necessary to subsequently implement, enforce, or otherwise fully effect the judgment. *VanBuskirk v. Gehlen*, 2021 MT 87, ¶ 20, 404 Mont. 33, 484 P.3d 924 (citing *Meine v. Hren Ranches, Inc.*, 2020 MT 284, ¶¶ 17-20, 402 Mont. 92, 475 P.3d 748). Subsequent interpretation or clarification [of a prior judgment] *may not* expand or modify previously adjudicated rights or adjudicate new rights but "may more precisely explain or specify the original meaning or effect of the judgment or provide additional specification when necessary to implement it. *VanBuskirk* at ¶ 20 (citing *Meine II* at ¶ 19) (emphasis added). The Ratys' Cross Appeal does not seek "clarification" to resolve an ambiguity or uncertainty. On the contrary, they request this Court remand the matter to create it. Under the applicable law, however, a court cannot expand the Ratys' previously adjudicated rights. Rather, to the extent possible, the court must reasonabl*y* construe the ambiguity, uncertainty, or imprecision in harmony with the underlying evidentiary record and applicable law. *Meine II* at ¶ 22 (internal citations omitted).

The practical issue that cannot be overstated is that while the use of the term "approximate" to a reasonable person would necessarily mean a handful-more or

less. That is not the case here when the clear objective is to expand use over time. In this context could the Ratys' interpret the term "approximate" be to mean twenty? Fifty? Even one or two hundred more cow/calf pairs more than the historical use? The Ratys' claim that they could trail 300-400 cattle over the Olson Road was rejected by the *Faber I* Court. The Ratys' cross-appeal is an attempt to side-step that decision.

The motivation behind the Ratys' cross-appeal is obvious: vagueness within the District Court's conclusions is a means by which they can attempt expand their easement rights beyond what they inherited. The Ratys' efforts to expand their rights on the Faber Property was rejected in *Faber I* and their current position still stands in contravention of the applicable law. This Court has repeatedly held that it has rejected an "evolutionary" approach to defining private prescriptive easements that would allow greater use of the easement over time. *Brown II* at ¶ 13 (citing *Kelly* at ¶ 13; *Warnack v. Coneen Fam. Trust*, 278 Mont. 80, 86, 923 P.2d 1087 (1996)).

The Ratys even go as far as claiming that maintaining a reasonably accurate count "would be a headache" and invites unnecessary future disputes. *See* Appellee Ans. & Cross App. Br. at p. 21, ¶ 2. The Ratys' theory is specious and is not grounded in reality. As the Ratys are aware, cattle are a commodity. Cattle operations count their cattle before, during and after trailing them. To argue otherwise is laughable. Counting is not only possible, it ensures that each party is

not infringing the other's rights. Reasonable restrictions on the Ratys' use of the Faber Property is consistent with established law that requires the [easement holder's] use of the easement not unreasonably burden the servient tenement. *Sampson v. Grooms*, 230 Mont. 190, 195-96, 748 P.2d 960 (1988). It is well settled that the holder of an easement is not entitled to cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment. *Mattson v. Montana Power Co.*, 2009 MT 286, ¶ 47, 352 Mont. 212, 215 P.3d 675 (citing *Restatement (Third) of Property: Servitudes* § 4.10 (2000). At every turn, the Ratys have argued for vague or uncertain restrictions that invite expansion of their easement rights to the extent that it would constitute an unreasonable burden on the Faber Property. For example, Ratys attempted to expand their easement rights to grazing their cattle on the Faber Property in *Faber I* but were rejected due to their failure to raise the issue at the trial level. It's important, however, to be clear about what the Ratys' "stopping and resting" argument is: grazing. Consequently, argue against any level of clarity in regard to whether they have grazing rights. Appellee Ans. & Cross App. Br. at pp. 8-9, p. 18, ¶ 1; p. 21, footnote 4. The only incentive for opposing an express prohibition of stopping to graze is obvious: it enables them to take that they do have the ability to graze because reference to it was omitted by the District Court. Should the Ratys' argue that this is not in fact their underlying goal, then clarification

on this issue does not negatively impact their rights and no legitimate reason exists to oppose it.

The Ratys sought, and appear to continue to seek, via omission, an argument that they continue to have grazing rights upon the Faber Property after losing them when the lease ended. Allowing the holder of an access easement holder to obtain rights to graze for their benefit and to the detriment of the title holder is patently inconsistent with established easement law. *Supra*. As a consequence, it is incumbent upon the District Court that its judgment be amended to the extent necessary to clarify this issue and at least provide a level of guidance this Court endorsed in *Warnack*.

CONCLUSION

The District Court did not amend its Findings of Fact, Conclusions of Law and Judgment to conform with this Court's order that the Ratys' use of the Olson Road is confined to the historical use of the same between 1948 and 1997. The District Court should be required to provide sufficient clarity; not create unnecessary uncertainty.

DATED this 3rd day of February, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4) of the Montana Rules of Appellate Procedure, I certify the forgoing APPELLANTS' REPLY BRIEF & CROSS-APPELLEES' CROSS-APPEAL RESPONSE BRIEF is printed with a proportionately spaced Times New Roman text typeface of 14-points; is double spaced; and the word count as calculated by Microsoft Word is **3261** words, excluding Table Of Contents, Table Of Citations, Certificate of Compliance, and Certificate of Service.

DATED this 3rd day of February, 2025.

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CERTIFICATE OF SERVICE

I, Michael F. McGuinness, hereby certify that I have filed a true and accurate copy of the foregoing **APPELLANTS' REPLY BRIEF & CROSS-APPELLEES' CROSS-APPEAL RESPONSE BRIEF** to the following on in the above-referenced action, on the 3rd of February, 2025, as follows:

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