

**DA 25-0436**

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**In The Supreme Court of the State of Montana**

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CHRISTINE BROCK, AS CO-TRUSTEE OF THE DONALD D. BROCK AND JANET  
M. BROCK, CO-TRUSTEES OF THE DON AND JANET BROCK FAMILY TRUST  
DATED MARCH 24, 1998,

*Plaintiff, Appellee, and Cross-Appellant,*

v.

SHAN and DANA TOMPKINS,

*Defendants, Appellants, and Cross-Appellees.*

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Appeal from the Twenty-First Judicial District Court, Ravalli County  
Hon. Howard Recht, Cause No. DV 18-428

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**TOMPKINS' OPENING BRIEF**

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## INTRODUCTION AND STATEMENT OF THE CASE

This should have been a simple easement case, and it should have ended years ago. Instead, it has a tortured history, both procedurally and on the merits.

In 2018, Brock sued the Tompkins, alleging only that she had an “express easement” across their property on “Forgotten Lane” by virtue of Certificate of Survey 4026, even though that survey was created long after Brock purchased her property. The Tompkins moved for summary judgment and Brock responded with a cross-motion of her own. The case was stayed pending the outcome of those motions. Three years later, the district court concluded that the Tompkins were correct and that Brock had no evidence she had an express easement.

But rather than granting the Tompkins’ motion, the district court *denied* both motions and suggested several new theories to Brock, inviting her to amend her complaint while lamenting that it could not yet grant summary judgment to her on some as-yet un-pleaded theory. It then allowed her to amend over the Tompkins’ objection.

That was only the beginning. Brock then convinced Ravalli County that the purported easement was a county road, and the County went in and tore out the Tompkins’ fencing and graded the road, including a portion that had been blocked for well over a decade. That led to a federal court detour, where the County conceded—in a settlement agreement signed by the County Commissioners and then recorded—that Forgotten

Lane had *never* been a county road. Back in state district court, however, the court repeatedly insisted it was not bound by this outcome, even though it had *again* stayed the proceedings while the federal case played out.

Finally, in 2024, even though the Tompkins had asserted their right to a jury trial, the district court compelled a bench trial on two issues: Brock’s somehow still-live “express easement” claim and her newer “implied easement” claim. Ultimately, the court concluded that Brock had an “implied easement across the Tompkins’ property...as shown on Certificate of Survey 4026.”

The Tompkins appeal from that judgment following trial and from the district court’s earlier orders. Brock cross-appeals from the district court’s denial of her request for attorney fees.<sup>1</sup>

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<sup>1</sup> After the notices of appeal were filed, Brock filed a Rule 60 motion related to her attorney fee claim. More than 60 days later, the district court granted that motion. AA1-43–48. This Court subsequently vacated that order after concluding the district court lacked jurisdiction. AA1-49–51.

## ISSUES FOR REVIEW

I. Did the district court err by refusing to enter summary judgment for the Tompkins on Brock's sole claim of an express easement even after concluding that the Tompkins had met their summary judgment burden, and further err by assuming the role of an advocate by suggesting new theories for Brock to plead in an amended complaint and then allowing her to amend?

II. Did the district court err by refusing to later grant the Tompkins' motion for judgment on the pleadings and their renewed motion for summary judgment?

III. Did the district court err when it compelled a bench trial and concluded that Brock possesses an implied easement even though her property borders an undisputed county road that was established long before the properties were severed from common ownership?

## STATEMENT OF FACTS

### A. The Parties and their property.

The Tompkins' and Brock's property are in Ravalli County near the West Fork of the Bitterroot River. The Tompkins' property is Parcel 1 of Certificate of Survey (COS) 4026. They purchased the property from the Schlapmans in 2004. AA1-28.<sup>2</sup>

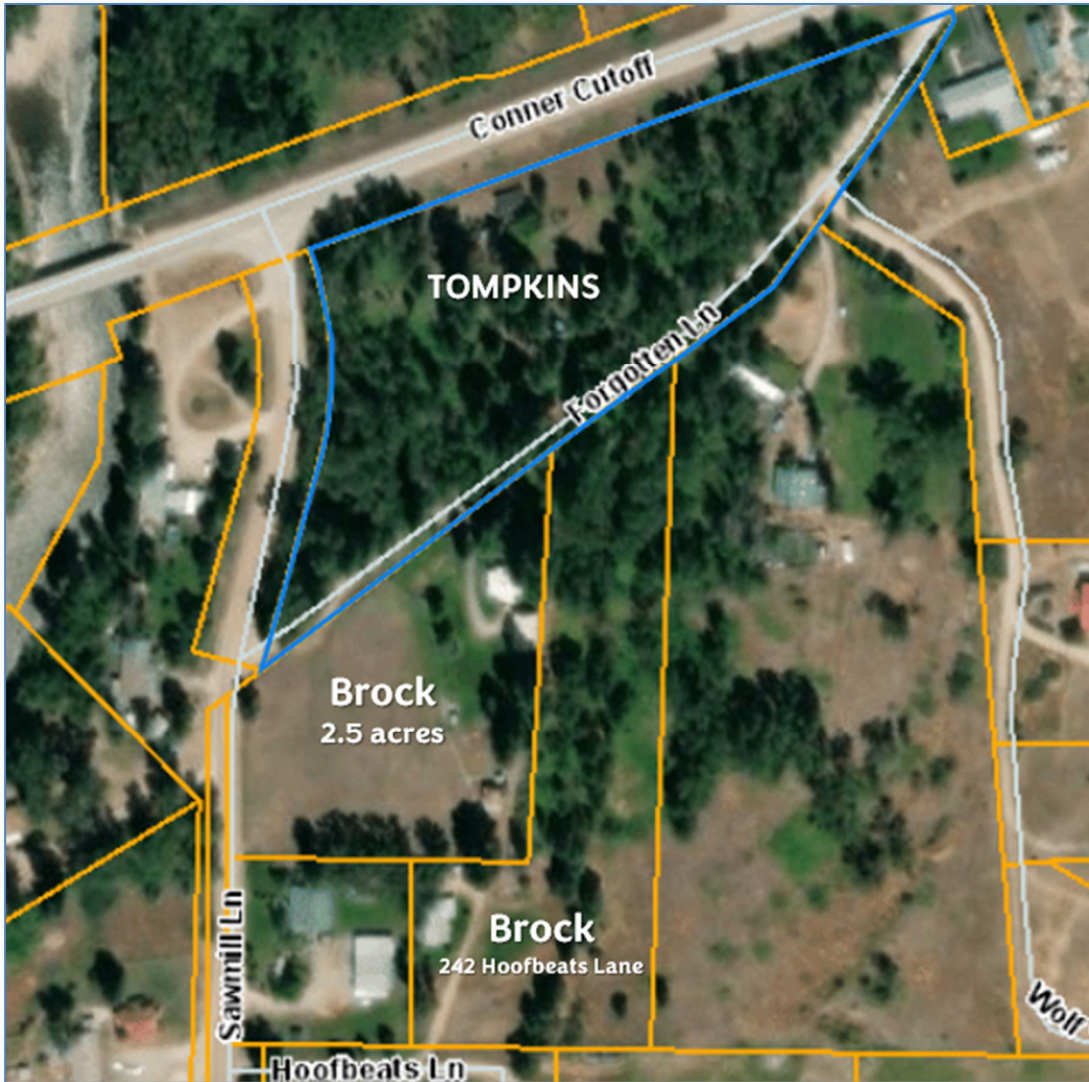
Brock owns two parcels, which are located south of the Tompkins property. Both parcels were originally purchased by Don and Janet Brock, who later conveyed it to their trust. The first, the “2.5-Acre Parcel,” was purchased in in 1976 from Dee and Alice Shook. AA1-27.

The second, the “Hoofbeats Lane Parcel”—after the road it is on—is described as Parcel B of COS 4945. It is part of a larger parcel the Brocks purchased from Robert and Elizabeth Saxe in 1978. AA1-27–28.

The relationship of the properties is below, which also shows Conner Cutoff, a state highway, and Sawmill Lane, a county road. The West Fork of the Bitterroot is on the left:

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<sup>2</sup> References to “AA1-” are to Volume 1 of the Appellants' Appendix, and references to “AA2-” are to Volume 2. References to “(Doc. \_\_)” are to the district court docket, for general reference to documents not included in the already voluminous appendices. “T.Tr.” refers to the trial transcript, which is at the beginning of Volume 2 of the Appellants' Appendix.



AA1-28.

**B. General background of the properties.**

In the late 1940s, Walter and Vivian Shook had substantial land holdings, including all the properties at issue here. But they were conveyed at different times, to different parties.

First, in 1949, Walter and Vivian conveyed a 14.3-acre parcel to Dee Shook and his wife. AA2-197. That parcel included what is now the Tompkins' property. T.Tr.19:9–20:10.

Next, in 1950, Walter and Vivian conveyed hundreds of acres to the Wilsons. AA2-199–201. The lands within that conveyance included what is now Brock’s Hoofbeats Lane parcel, T.Tr.21:15–23:8, but the parcel itself did not come to exist as separate tract of record until 1993. AA2-237; T.Tr. 64:3–18, 65:2–9.

Third, in 1952, Walter and Vivian conveyed what is now Brock’s 2.5-Acre parcel to Dee Shook. AA2-202; T.Tr.24:22:–25:11. Thereafter, Dee Shook and his wife owned both Brock’s 2.5-Acre Parcel and what is now the Tompkins’ property.

In 1961 Dee Shook, and separately, Walter and Vivian Shook, granted rights-of-way to the State for construction of a new highway and county road, which would ultimately rearrange how the properties were accessed. AA2-214–218. The granted rights-of-way included the new state highway known as Conner Cutoff, as well as the extension of Sawmill Lane to Conner Cutoff. The new part of Sawmill Lane abutted the western boundary of the 2.5-Acre Parcel now owned by Brock. AA2-198–201.

**1. Dee Shook’s parcels—now Brock’s 2.5-Acre parcel and the Tompkins parcel.**

Dee Shook owned the 2.5-Acre Parcel and the 14.3-acre parcel until 1976, at which time he conveyed the 2.5-Acre Parcel to Brock. By this point, the Shooks had already granted the rights-of-way for the county road, Sawmill Lane, which bounded the 2.5-Acre Parcel on the west,

allowing direct access to that road. T.Tr.86:8–24, 87:11–15.

In 1987, Dee Shook commissioned COS 4026, which identifies the Tompkins Parcel as Parcel 1. AA2-234. This survey also shows Dee Shook’s remaining property to the north of Conner Cutoff, as well as the lands he conveyed to the State for Conner Cutoff and Sawmill Lane. Neither the 2.5-Acre Parcel nor the Hoofbeats Lane Parcel are surveyed or legally described on COS 4026. AA2-234.

## **2. The Saxe line of title, including Brock’s Hoofbeats Lane Parcel.**

In 1973, the Wilsons sold to the Saxes “well over” 1,600 acres, including what would become Brock’s Hoofbeats Lane Parcel. T.Tr.86:16–25, 89:1–4. In 1974, the Saxes recorded COS 595, which shows the land conveyed in that transaction as 1,600 contiguous acres as a single parcel spanning parts of seven sections. T.Tr. 89:5–9, AA2-223–227. Brock’s expert agrees that COS 595 shows that huge parcel bordering both Connor Cutoff and Sawmill Lane. T.Tr.88:12–89:21.

In 1978, the Saxes created “pasture lots” shown on COS 1619. AA2-233. That year, the Saxes conveyed Parcel A of COS 1619, a 10.18-acre parcel, to the Brocks. AA2-230–232. With that conveyance, the Saxes severed the 10.18-acre parcel—which encompasses what is now the Brock Hoofbeats Lane Parcel—from common title with the Saxes’ 1,600 acres. From that 10.18-acre parcel, the Brocks subsequently divided it again. The Hoofbeats Lane Parcel as it exists today did not exist as a

tract of record until Brocks recorded COS 4945 in June 1993. AA2-237; T.Tr.64:3–18, 65:2–9. At that point, Hoofbeats Lane was in place, which provided access to that parcel. T.Tr.94:10–17; 138:9–21.

**C. The west end of Forgotten Lane is blocked by the Schlapmans, and Brocks' use of the east end was permissive.**

Sometime well before 2004, while the Schlapmans owned the Tompkins Parcel, the Schlapmans placed a large log across Forgotten Lane between Brock's driveway and Sawmill Lane. They did so because, as Brock testified, they did not want people "speeding down Forgotten Lane" with no headlights on. T.Tr.141:4–18. The log blocked vehicular access to and from Sawmill Lane at that end of Forgotten Lane for "many years"; Brock testified that she did not want it there and that "time just passed by and we never did anything about [the log], because there was no reason to." T.Tr.143:2–3, 142:21–24. Beyond the blocked west end of Forgotten Lane, the eastern end was marked with signage saying "dead end" and "no trespassing." T.Tr.143:4–12.

That continued to be the status quo long after the Tompkins purchased the property in 2004. T.Tr. 141:19–22, 142:4–12; *see also* 157:23–158:13. At that time, the Tompkins were already familiar with the property, because their primary residence is directly across Connor Cutoff. T.Tr. 151:15–152:25. They understood that Forgotten Lane was a private road. T.Tr.153:1–154:23. They also understood that the Schlapmans had granted Brock permission to use the eastern portion of

Forgotten Lane for access to her 2.5-Acre Parcel and, in fact, the Schlapmans' daughter asked if the Tompkins would continue to allow Brock's permissive use. T.Tr.154:24–154:18, 171:4–13.

Brock too recognized that her use was permissive. For example, Brock asked Shan Tompkins if he would remove the log, but he refused. T.Tr.143:4–8. She also testified that she understood that the Tompkins had long exerted control over that portion of Forgotten Lane and kept people off it. AA1-152.

Years went by with no changes. In 2016, Brock asked Shan Tompkins for permission to place gravel on Forgotten Lane, and he agreed. Brock testified that she didn't remember if she told the contractor she had permission to put gravel on the Tompkins Parcel. T.Tr.143:13–17. But the gravel contractor, Mr. Wiediger, remembered, and confirmed that Brock told him that she obtained permission from the Tompkins to place the gravel. AA1-236.

After the gravel was placed, the Tompkins were surprised to see that it went all the way to the log on the western end of Forgotten Lane. T.Tr.162:9–16. Soon thereafter, Brock tore down a section of the fence separating her property from the Tompkins' property and began to drive around the log. T.Tr.158–159, 162:1–5.

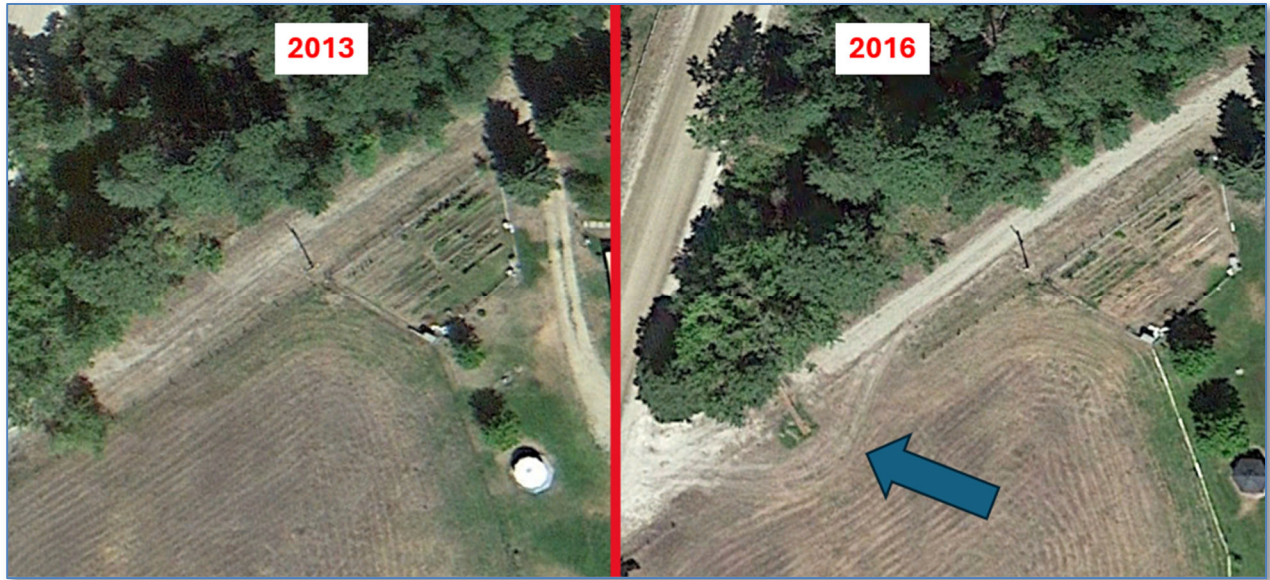
While Brock repeatedly testified that she was not “good with numbers,” she unequivocally agreed that as late as 2015, the log was still

blocking vehicular traffic. T.Tr.137:3–10.<sup>3</sup> Indeed, Brock agreed that from some point during the Schlapmans’ ownership, the log prevented vehicles from going down the section of Sawmill Lane between her residence and Sawmill Lane. T.Tr.141:19–22, 142:4–12; *see also* 157:23–158:13.

To illustrate, here are two Google Earth images that were introduced separately at trial. On the left is an image from 2013, showing Forgotten Lane disused and overgrown between Brock’s driveway on the right and Sawmill Lane, which is on the left side of the image. The image on the right is the same location in 2016, which shows that Brock had gravel placed all the way to the log on the west end of Forgotten Lane, and also shows tire tracks going through Brock’s field around the log and then returning to Forgotten Lane at Sawmill Lane:

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<sup>3</sup> Brock’s testimony on this point was somewhat inconsistent, and the district court stated that Brock was able to drive around or over the log. AA1-31. However, this same “finding” goes on to state that “because [the log] was placed Brock and Tompkins’ predecessor in interest, it was not averse [sic] to any easement or right-of-way claim either had.” This statement is obviously incorrect.



AA2-244-45.

The image below is also from the summer of 2016, right after Brock began driving around the log. The decaying log, as well as several reflectors on fence posts that are also blocking Forgotten Lane, are visible in the background of this photo, which is taken near Sawmill Lane looking east. Brock's field is on the right:



AA2-246; T.Tr.154:24–22, 157:5–159:7.

Soon after the Tompkins discovered this, they removed the log and replaced it with a post and rail fence at the intersection with Sawmill Lane and Forgotten Lane, and a gate south of Brock’s driveway. They also reinstalled a fence along their southern property boundary where Brock tore it out. T.Tr.164:4–19.

None of this interfered with Brock’s access to her driveway, and Brock concedes the Tompkins never told her she could not continue to use the eastern part of Forgotten Lane. T.Tr.164:19–166:8, 148:8–149:2.

Brock also agreed there was no dispute between the parties about Forgotten Lane until the fence was torn down. T.Tr.148:8–149:12. Moreover, the Tompkins had no intention of revoking Brock’s permission to use the eastern end of Forgotten Lane before she brought this case. T.Tr.169:18–170:2.

**D. Brock initiated this suit and consistently asserted that her right to use Forgotten Lane over the Tompkins Parcel was based on an “express easement.”**

In 2018, Brock filed a Verified Complaint asserting two causes of action. First, she requested a declaratory judgment that she had “an express easement as shown on [COS 4026] for the entire width of the platted [sic] including access to Sawmill Lane for ingress, egress, access, maintenance and utility purposes.” AA1-56. She also alleged that she was entitled to injunctive relief because Tompkins “interfered with her express easement as depicted on [COS 4026].” AA1-56. She also requested a judgment that she had an “express easement as depicted on [COS 4026].” AA1-56.

The Tompkins answered and denied the existence of an express easement, and then moved for summary judgment. They argued that Brock’s sole substantive claim for an express easement failed as a matter of law because it was based solely on the depiction of an easement on COS 4026. AA1-73.

Brock cross-moved for summary judgment. AA1-89. She agreed that her sole claim was for an “express easement.” She argued that the

Tompkins Parcel was burdened by “the 60-foot wide Road and Utility Easement as depicted on [COS 4026] which is for the shared benefit of all properties along its southern boundary.” AA1-94.

If there was any remaining doubt about her claim, her reply brief removed it. She asserted again that she had a “a 60-foot wide express easement for ingress and egress over Tompkins’ property....” (Doc. 17 at 1.) She agreed that the Tompkins’ summary judgment motion “alleges Brock does not possess an express easement,” and her own cross-motion “request[s] just the opposite[.]” (*Id.* at 2.) The case languished, and Brock eventually joined in a notice of issue, stating that a ruling would “resolve the scope and extent of the Forgotten Lane easement in question.” (Doc. 25.)

**E. The district court acknowledged that the Tompkins met their summary judgment burden, but decided to deny the motion and suggest that Brock amend to assert different easement theories**

The district court finally ruled on the Parties’ cross-motions in April 2021. AA1-4–12. It denied both parties’ motions, but not because the Tompkins failed to meet their burden. Rather, the district court recognized that the Tompkins had established that no conveyance created an express easement, stating “it is true that Brock has provided little evidence of an express grant.” AA1-12. It also recognized that the Tompkins “may be right that the evidence before the Court does not support a finding that an express easement by grant, reservation,

conveyance, or reference was created for the benefit of either of Brock's parcels," but then continued:

[N]evertheless, Tompkins' conclusion that, thus, Brock has no easement and is not entitled to injunctive relief is hasty. Tompkins may be correct that the facts do not support a finding of an express easement, but that does not mean that Tompkins must prevail as a matter of law.

AA1-10–11.

The district court then determined that while Brock expressly pleaded a claim for express easement and had moved for summary judgment on that singular issue, Brock really must have meant something different:

Examining Brock's entire submission reveals that when she uses the word "express easement" she does not use that phrase [sic] as a term of art. Instead, she uses the phrase [sic] merely to note that the 2.5-acre parcel was conveyed with an express reference to a county road, which could only refer to Forgotten Lane, and that COS 4026 expressly recognized an easement over Tompkins' property where Forgotten Lane is situated.

AA1-11.

The district court speculated about what the parties to the deed conveying the 2.5-Acre Parcel "must have believed," and then pondered other easement theories that Brock should consider. AA1-11. The court decided that, while the express easement theory asserted by Brock had failed, what Brock actually "contends" is that "her access rights predate COS 4026[.]" AA1-11. Ultimately, the district court stated:

Genuine issues of material fact exist concerning exactly what rights the public had, if any, to use Forgotten Lane; whether those rights continued after the construction of the new Conner Cutoff Road; what right Brock inherited by her acquisition of the 2.5-acre parcel; the extent of that right; if any; and whether that right pertains to the whole of Forgotten Lane or to just a portion.

AA1-12.

The district court concluded with a suggestion to Brock to “clarif[y] the basis of her claim to an easement *such that the Court can grant summary judgment to her.*” AA1-12 (emphasis added).

**F. Over Tompkins’ objection, Brock amends her pleadings to assert different easement theories**

Unsurprisingly, Brock then moved for leave to amend, proposing to incorporate “the same allegations included in the original complaint” but adding “causes of action to account for alternatives to the relief sought regarding the basis for the easement appurtenant to Plaintiff’s properties.” (Doc. 32 at 2.) Her reason for seeking to amend was the district court’s conclusion “that there is sufficient evidence supporting Brock’s claim to an easement[.]” (*Id.* at 4, quoting AA1-12.)

The Tompkins opposed. In her reply, Brock argued, again, that the justification of her proposed amendment was sought to “clarify” the pleadings “as the Court indicated was prudent.” (Doc. 39 at 2–3.) Brock also maintained that the court’s order had “clearly found there is an easement of some kind.” (Doc. 39 at 4.)

The district court granted Brock’s motion, even while explicitiy

acknowledging that Brock filed suit “seeking a declaratory judgment that Plaintiff has an express easement as shown on COS No. 4026[.]” AA1-102.

Brock’s Amended Complaint is largely identical to her original. AA1-107. The first 10 paragraphs include just two “new” facts: (1) the parties’ properties were once under common ownership, and (2) that an easement “was implied when the property was first created by the original owner of both properties, as this was the only access at the time Brock’s parcel was created...” AA1-107–11. She included additional theories, including a prescriptive easement, a “public easement,” and an implied easement. She did not expressly allege that Forgotten Lane was a county road, but asserted that it been “considered” a county road. AA1-113.

The Tompkins answered, counterclaimed, and demanded a jury trial. They asserted as an affirmative defense that any easement Brock may have had over the west end of Forgotten Lane was extinguished by reverse prescription. (Doc. 41 at 4.)

**G. Brock causes the County to remove Tompkins’ fencing, prompting suit in federal court, which results in the County conceding there is no county road.**

Without copying the Tompkins, Brock’s counsel then asked the County Attorney to determine that Forgotten Lane was a county road. The County opined that it was. AA2-242. In February 2022—when this case was already over three years old—County employees removed the

fence and gate that Tompkins had and graded Forgotten Lane. T.Tr. 165–166.

The Tompkins immediately sued Ravalli County in federal court, seeking a declaratory judgment that Forgotten Lane was never a validly created county road. They also brought a takings claim under 42 U.S.C. § 1983 and under Article II, § 29 of the Montana Constitution. *Tompkins v. Ravalli County*, No. CV 22-74-KLD (D. Mont.) (the “Federal Court Action”).

Brock was aware of the Federal Court Action and the specific relief the Tompkins sought, and Brock expressly consented to a stay of this case pending the outcome, but did not seek to intervene. (Docs. 51–52.) The Tompkins made clear their belief that the outcome of the Federal Court Action would be binding on Brock and the state district court.<sup>4</sup> (Doc. 51 at 4.)

Meanwhile, the County moved to dismiss, which the federal court denied in November 2022. *Tompkins v. Ravalli Cnty.*, No. CV 22-74-KLD, 2022 WL 17056968 (D. Mont. Nov. 17, 2022). That order contains a thorough discussion of the various ways county roads can be established in Montana, and concluded that the “County has not established as a matter of law that Forgotten Lane was ever an official county road.” *Id.*

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<sup>4</sup> Of course, if the County established that Forgotten Lane was a county road, this case would have been over, because that decision would have been binding on everyone, not just the parties. That Brock and the district court insisted the converse was not true beggars belief.

Subsequently, the County stipulated that “Forgotten Lane” where it crosses or touches the Tompkins Parcel had never been a county road and that “neither the County nor the general public have a right of access on Forgotten Lane.” (Doc. 65.)

**H. The district court denies the Tompkins motion for judgment on the pleadings and their renewed motion for partial summary judgment.**

Back in state district court, the Tompkins moved for judgment on the pleadings, because: (a) Brock’s county road theory had been resolved; (b) her express easement claim had already been adjudicated; and (c) the Amended Complaint contained no factual allegations to support a prescriptive or implied easement claim. AA2-254–64.

Opposing, Brock argued that the district court had already determined that genuine issues of fact remained and that her pleading was sufficient because she alleged the express easement was created by COS 4026. AA2-269–71. As to her implied easement theory, she argued that her 2.5-Acre Parcel and the Tompkins Parcel were severed from common ownership, and at that time, Forgotten Lane “was the only access” to Highway 93. AA2-272–73. She did *not* assert that her implied easement claim would have benefited the Hoofbeats Lane Parcel. [*Id.*] Brock also argued that her “public easement” theory was really a claim for a public *prescriptive* easement. AA2-274. More troublingly, she argued that the County’s agreement that Forgotten Lane was never a county road was not binding, and that County’s initial determination

could not be overcome unless the Tompkins could show the County followed statutory procedures for abandonment.<sup>5</sup> AA2-275–77.

Eventually, the district court held the Tompkins’ motion for judgment on the pleadings in abeyance until discovery was completed, deciding that it would later treat it as a motion for summary judgment. (Doc. 75.)

In April 2024, out of an abundance of caution, the Tompkins moved for partial summary judgment on Brock’s claims for: express easement, county road or public easement, prescriptive easement, and on her implied easement claim. They supported each argument with Brock’s deposition testimony and other evidence. AA1-123–41.

Brock opposed, but did not identify sworn testimony or admissible evidence to dispute that: (1) her use of Forgotten Lane over the Tompkins Parcel had always been permissive; (2) that she had never identified how or when the alleged implied easements arose; and (3) that no instrument created the express easement she claimed. AA2-303–36.

The district court denied Tompkins’ motion for judgment on the pleadings and motion for partial summary judgment in a single order. AA1-16. It found “there are disputed facts in this matter concerning all the issues,” but did not identify any evidence Brock supplied that could

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<sup>5</sup> The district court repeatedly raised this issue, too. But if something was never validly created as a county road, there is no way to “abandon” its status as a county road. Brock later conceded that her “Amended Complaint does not allege that Forgotten Lane is a county road.” (Doc. 83 at 5–6.)

have supported this conclusion. AA1-19.

**I. The district court bifurcates the case over Tompkins' objection.**

After that, Brock requested that the court bifurcate the case, and try certain issues to the court, rather than to a jury. The Tompkins objected, arguing that any issue of triable fact must be tried before a jury. The court nevertheless granted Brock's motion, deciding that Brock's "express, implied, and public road easement claims" should be tried to the bench. The district court concluded it would only hold a jury trial on Brock's prescriptive easement claims and the Tompkins' trespass counterclaims if "necessary." AA1-21–25.

**J. Trial—a bunch of new theories.**

Before trial, the Tompkins moved in limine. AA2-283. For one, they moved to preclude Brock's disclosed expert, Tracy Turek, because her disclosure, AA1-123–41, did not state the substance of any opinion, instead just vaguely referred to the subject matter. AA2-285. The Tompkins also attempted to obtain her opinions via interrogatory, the response to which was also inadequate. AA2-285. Further, Turek's disclosure contained inadmissible legal opinions. AA2-286–87. The Tompkins sought to exclude any testimony or evidence that Forgotten Lane was a county road because Ravalli County had already expressly agreed that Forgotten Lane had never been a county road. The motions were summarily denied. (Doc. 95)

At trial—after the Tompkins renewed their objection to a bench trial and to Turek’s testimony—Turek testified to most of the items that the Tompkins had sought to exclude, and other opinions which she *admitted* did not disclose. T.Tr.91:20–93:6. It then became clear that Brock’s theory was that a 1950 severance of title was the sole point in time at which her claimed implied easement arose. And the district court agreed, and entered its Findings of Fact, Conclusions of Law, and Order re Express and Implied Easement in March 2025. AA1–26.

#### STANDARD OF REVIEW

This Court reviews summary judgment rulings de novo, including whether a genuine issue of material fact exists and whether a party is entitled to judgment as a matter of law. *Mandich v. French*, 2022 MT 88, ¶ 15, 408 Mont. 296, 509 P.3d 6.

The Court reviews a grant or denial of a motion for leave to amend for abuse of discretion. *Mandich*. ¶ 15.

Because motions for judgment on the pleadings are decided as a matter of law, this Court reviews a district court’s decision for correctness. *Conway v. Benefis Health*, 2013 MT 73, ¶ 16, 369 Mont. 309, 297 P.3d 1200.

In reviewing a district court’s post-trial findings of fact and conclusions of law, the Court reviews findings of fact for clear error and conclusions of law de novo. *Byrum v. Andren*, 2007 MT 107, ¶ 14, 337 Mont. 167, 159 P.3d 1062.

## SUMMARY OF THE ARGUMENT

Years before Brock was allowed to amend, the Tompkins demonstrated they were entitled to summary judgment on Brock's only theory: that she had an express easement. The district court erred when it denied that motion and when it suggested that Brock should assert different claims—a suggestion the district court lacked the discretion to make, that exceeded its jurisdiction, and that resulted in the district court departing from its role as a neutral arbiter to that of an advocate. If this Court agrees, that is necessarily the end of the analysis and the Court need not reach any other issue.

But that was only the beginning. The court erred again when it refused to grant the Tompkins' later motions for judgment on the pleadings or summary judgment.

It continued to err when it compelled the Tompkins to try the case to the bench despite their timely jury demand, and when it allowed Brock's expert to testify about issues that she admitted were not in her expert disclosure.

Finally, the district court erred when it concluded Brock had established that she had an implied easement—including on the portion of Forgotten Lane that had been blocked contrary to Brock's wishes for well over a decade.

## ARGUMENT

- I. **This case should have ended in 2021 when the Tompkins demonstrated they were entitled to summary judgment on Brock’s sole claim of an express easement.**
  - A. **Brock’s express easement theory failed because her property is not shown on COS 4026 and “subject to” language in Tompkins’ deed does not create an easement.**

The determination of whether an express easement exists is a question of law. *Wiegele v. W. Dry Creek Ranch*, 2019 MT 254, ¶ 15, 397 Mont. 414, 450 P.3d 879. An easement is “a non-possessory interest in land that gives rights to a person to use another’s land for a specific purpose or as a servitude imposed on the land as a burden.” *Ganoung v. Stiles*, 2017 MT 176, ¶ 15, 388 Mont. 152, 398 P.3d 282. An easement appurtenant—one that benefits a specific parcel of land—must have both a dominant tenement and a servient tenement. *Blazer v. Wall*, 2008 MT 145, ¶ 24, 343 Mont. 173, 183 P.3d 84.

Where an easement is “created by a written instrument,” it is called an “express easement.” *Woods v. Shannon*, 2015 MT 76, ¶ 10, 378 Mont. 365, 344 P.3d 413. To create an express easement, the grantor must hold title to both the dominant and servient estates, and the severance of those estates must be made in “a written instrument of conveyance that is substantively sufficient to convey the severed estate, grant or reserve the intended easement, identify the dominant and servient estates, and indicate the nature and scope of the right reciprocally burdening and

benefitting the servient and dominant estates.” *Towsley v. Stanzak*, 2022 MT 217, ¶ 12, 410 Mont. 403, 519 P.3d 817.

The express grant or reservation of an easement may arise directly from the language of the deed, or by language in the deed referring “to a recorded plat or certificate of survey on which the easement is adequately described.” *Blazer*, ¶ 27. The latter is known as the easement-by-reference doctrine, and it is what Brock alleged in her Verified Complaint.

The requirements for the creation of an easement by reference are strict. First, the terms of the grant or reservation must be expressly stated, rather than implied. *Blazer*, ¶ 41. Second, a purported easement must be clearly depicted and “adequately described.” *Blazer*, ¶ 41. To be adequately described, the identities of **both** the dominant and servient tenements must be clear, and an easement is not adequately described if the identity of the dominant tenement cannot be determined from the documents of conveyance. *Blazer*, ¶ 51.

Brock’s express easement claim, alleging that COS 4026 created an easement benefitting her property, failed as a matter of law for at least two reasons. First, there is no writing suggesting that the owners of Parcel 1 of COS 4026 intended to burden that property for the benefit of Brock’s property. Without clear evidence of this intent from the documents purportedly creating the easement, there is no easement.

*Blazer*, ¶ 50. Second, COS 4026 has nothing to do with Brock’s property,<sup>6</sup> as evidenced by the fact that her property is not shown on it. Applying *Blazer*, this is fatal to Brock’s claims.

Here, nothing in COS 4026—or any other document—suggests that the purported easement on the Tompkins’ property was created for the benefit of Brock’s property. As a result, because nothing in COS 4026 suggests with the required “reasonable certainty” that Brock’s property is the dominant tenement, the easement is not adequately described and cannot benefit Brock’s property. *Blazer*, ¶ 56.

Brock’s express easement theory also relied upon her claim that the “subject to” language in the Tompkins’ deed created the easement claimed in her Verified Complaint. But it is well established, and this Court has “consistently held,” that “subject to” language in a conveyance, without more, cannot create an easement benefitting another property. *Blazer*, ¶ 64 (collecting cases).

The undisputed material facts show that the Tompkins were entitled to summary judgment on Brock’s express easement claim and, as a result, on her claim for injunctive relief. The district court recognized this, and it should have granted Tompkins’ motion, denied Brock’s cross-motion, and entered judgment way back in 2021.

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<sup>6</sup> Dee Shook did not own either the 2.5-Acre Parcel or the Hoofbeats Parcel in 1987, when COS 4026 was created.

**B. The district court lacked discretion to deny Tompkins’ summary judgment motion and violated the party presentation rule.**

“A district court’s ruling on a summary-judgment motion is not a discretionary function which merits deferential review.” *Lorang v. Fortis Ins. Co.*, 2008 MT 252, ¶ 53, 345 Mont. 12, 192 P.3d 186 (cleaned up). Instead, the district court must “make a series of legal conclusions regarding the applicable law, the reasonable inferences to be drawn from the evidence in favor of the non-movant, and the application of law to the undisputed facts and reasonable inferences of fact.” *Id.* (citations omitted). The district court’s “conclusions are either correct or incorrect as a matter of law.” *Id.*

The lack of discretion when deciding summary judgment is equally applicable to the evidence a court may consider in reaching its ruling. *Lorang*, ¶ 53. Only admissible evidence may be considered on summary judgment. *E.g.*, *Alfson v. Allstate*, 2013 MT 326, ¶ 11, 372 Mont. 363, 313 P.3d 107. And only relevant evidence is admissible. Mont. R. Evid. 402.

Here, the only relevant evidence at the summary judgment stage were those that were “material,” meaning that they concern Brock’s sole pleaded claim—the express easement. *E.g.*, *House v. U.S. Bank*, 2021 MT 45, ¶ 14, 403 Mont. 287, 481 P.3d 820. To determine whether Brock had an express easement, the only material facts—and thus the only relevant and admissible facts—concern “the written documents of conveyance.” *Blazer*, ¶ 54. Extrinsic evidence, such as speculation concerning how

various roads may have been used in the past, or theories the court suggested, were irrelevant and should not have been considered. *Id.*

The district court did not determine that there existed a genuine issue of material fact related to Brock's express easement claim. Instead, it refused to grant summary judgment because it believed that Brock should assert a *different* easement theory, and there existed disputed material facts for those *other* theories that Brock needed to "clarify" before the court could "grant summary judgment to her." This decision required the district court to consider and rely on immaterial and inadmissible evidence.

The order also required the district court to determine that Brock, represented by competent counsel, really meant something other than exactly what she pled and argued for, and its statements confirm that it abandoned its role as a neutral arbiter and assumed the role of an advocate for Brock. This is improper for several obvious reasons.

First, courts should not consider arguments that were not presented by the parties. *Greenlaw v. United States*, 554 U.S. 237, 243 (2008). That is because in our adversary system, "in the first instance and on appeal," courts "follow the principle of party presentation." *Id.* at 244. Under that principle, courts "rely on parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Id.*; *see also State v. Smith*, 217 Mont. 461, 484, 705 P.2d 1087, 1101 (1985), *on reconsideration*, 217 Mont. 453, 705 P.2d 1110

(1985) (“The court is not an advocate, but rather the court is a neutral and detached arbitrator insuring fair play...”).<sup>7</sup> As a rule, the judicial system is “designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.” *Greenlaw*, 554 U.S. at 244. The party presentation rule supports the principle that courts are essentially “passive instruments of government” and “normally decide only questions presented by the parties.” *United States v. Sineneng-Smith*, 590 U.S. 371, 376 (2020).

While this Court has never directly adopted the principle of party presentation,<sup>8</sup> this case presents an ideal occasion to do so. Applying a rule that enforces a court’s role as a neutral arbiter discourages the appearance of judicial bias and impropriety. *See, e.g., Draggin’ Y Cattle Co., Inc. v. Junkermier, Clark, Campanella, Stevens, P.C.*, 2017 MT 125, ¶ 35, 387 Mont. 430, 395 P.3d 497. Additionally, at no point before the district court suggested it, did Brock claim that the Tompkins were

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<sup>7</sup> *See also, e.g., State v. Zabawa*, 279 Mont. 307, 318, 928 P.2d 151, 158 (1996) (Nelson, J., concurring) (“While the temptation is often great to decide a case on the basis of the argument that ‘should have been made,’ but was not, in blind-siding an issue we run the very real risk of substituting advocacy for neutrality.”).

<sup>8</sup> Multiple Justices have recognized the principle in separate opinions. *See, e.g., Craig v. Schell*, 1999 MT 40, ¶ 50, 293 Mont. 323, 975 P.2d 820 (Gray, J., dissenting) (“This Court’s duty is to decide cases based on the issues and arguments raised by the parties.”); *Larson-Murphy v. Steiner*, 2000 MT 334, ¶ 140, 303 Mont. 96, 15 P.3d 1205 (Gray, J., dissenting, joined by Turnage, C.J.).

reading her claim too narrowly, or that she was asserting anything other than a straightforward express easement. Further, applying the party presentation rule here would not cause any harm to Brock, because she has direct access to Sawmill Lane and Hoofbeats Lane. Finally, Brock has always been represented by counsel, so the leniency sometimes afforded to pro se litigants is not at issue.

The district court erred when it denied the Tompkins' motion for summary judgment, which allowed the case to continue when it should have been over. The Court should reverse that decision and remand for entry of judgment for the Tompkins.

**II. The district court abused its discretion by allowing Brock to amend her complaint when she failed to show there were any extraordinary circumstances.**

Rule 15(a)(2) provides that a court should “freely give leave” to amend pleadings “when justice so requires.” But “this does not mean that a court must automatically grant a motion to amend.” *Mandich*, ¶ 32. Rather, as this Court has long held, amendment is not appropriate “when the party opposing the amendment would incur substantial prejudice as a result of the amendment.” *Peuse v. Malkuch*, 275 Mont. 221, 227, 911 P.2d 1153, 1156 (1996).

In determining whether an amendment would cause undue prejudice, courts should balance the prejudice suffered by the opposing party against the sufficiency of the moving party's justification for the delay. *Mandich*, ¶ 32. More, “litigants should be allowed to change legal

theories after a motion for summary judgment has been filed only in extraordinary cases.” *Bardsley v. Pluger*, 2015 MT 301, ¶ 20, 381 Mont. 284, 358 P.3d 907; *In re Thornton*, 2009 MT 367, ¶ 40, 353 Mont. 252, 220 P.3d 395 (recognizing that such amendments cause undue prejudice).

Here, Brock did not demonstrate any extraordinary circumstances. Her only justification for delay was the court’s suggestion that she try again with different easement theories. Aside from the fact that the district court should not have assumed the role of an adversary to the Tompkins, this justification does not explain why Brock did not assert these theories previously.

In *Thornton*, this Court affirmed denial of a motion to amend where the moving party claimed “newly discovered evidence” presented extraordinary circumstances to justify amendment after a motion for summary judgment was fully briefed. *Thornton*, ¶ 38. *Thornton*, however, concluded that the “newly discovered evidence” was always publicly available and “was available to [the moving party] when they filed their Complaint.” *Id.*, ¶¶ 39–40. As in *Thornton*, the facts supporting Brock’s new legal theories were always available to her. *See also Kershaw v. Mont. DOT*, 2011 MT 170, ¶¶ 25–29, 361 Mont. 215, 257 P.3d 358 (affirming a denial of untimely efforts to amend “almost one year” into the case, after a summary judgment motion had been filed, and the proposed claims could have been filed at the outset).

Brock’s decision not to assert the other easement theories in the

beginning was a strategic decision. But poor strategic decisions leading to a change in litigation strategy are not good cause for allowing amendment where the opposing party will suffer undue prejudice. *Kershaw*, ¶ 28; *Ally Fin, Inc. v. Stevenson*, 2018 MT 278, ¶ 16, 393 Mont. 332, 430 P.3d 522.

Here, the Tompkins considered the case that Brock chose to bring and developed a litigation strategy to defend against that case. Had Brock asserted different legal theories in her Verified Complaint, or even hinted that such other theories exist, Tompkins likely would have taken a different tack.

Ultimately, if allowing a party to change legal theories after the opposing party has moved for summary judgment is appropriate only in extraordinary cases, then allowing a party to change legal theories *after their own motion for summary judgment is denied* can only be appropriate in even more extraordinary circumstances.<sup>9</sup> None are present here, and the district court abused its discretion.

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<sup>9</sup> In granting Brock’s motion for leave to amend, the district court ignored that Brock had cross-moved for summary judgment. Instead, it stated only that Brock’s motion to amend “was brought after Tompkins’ motion for summary judgment was filed” and “that motion was denied because genuine issues of material fact remain for trial.” AA1-106. But Brock had moved for summary judgment too, and had even agreed that the case should be stayed, stating that it “is the belief of both parties that this case may be ruled on [the summary judgment] briefs.” (Doc. 19 at 1.)

**III. The district court erred when it denied the Tompkins’ motion for judgment on the pleadings and their renewed motion for summary judgment.**

**A. The Tompkins’ motion for judgment on the pleadings should have been granted.**

Brock had the burden of pleading the required elements of her claim. The liberal notice pleading requirements of M. R. Civ. P. 8(a) do not excuse the omission of what is material and necessary to entitle her to relief, and the complaint must state something more than what could “breed only a suspicion” that the claimant may be entitled to relief. *Anderson v. ReconTrust*, 2017 MT 313, ¶ 8, 390 Mont. 12, 407 P.3d 692.

“After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.” Mont. R. Civ. P. 12(c). A court’s consideration of a Rule 12(c) motion requires it to accept all well-pleaded factual allegations in the complaint as true and construe them in the light most favorable to the nonmoving party. *Firelight Meadows v. 3Rivers Telephone*, 2008 MT 202, ¶ 11, 344 Mont. 117, 186 P.3d 869. The court may consider certain materials: facts alleged in the pleadings, documents incorporated by reference in the pleadings, “whatever is central or integral to the claim for relief or defense,” and matters of judicial notice. *Id.*, ¶ 10.

Brock’s Amended Complaint was nearly identical to her Verified Complaint. She did not allege any facts in support of her new prescriptive easement claim; her express easement claim still relied entirely on the COS 4026; and she did not plead sufficient facts to support her implied

easement claim, much less identify what sort of implied easement she thought she had.

Brock also did not sufficiently plead a claim for prescriptive easement, public or private. The Amended Complaint does not even allege the elements of a prescriptive easement, much less facts to support those elements. It does not allege that her use of Forgotten Lane over the Tompkins Parcel was open, notorious, or exclusive, much less adverse, rather than permissive. Nor does it allege that Brock's use was for the full statutory period of five years, let alone the timeframe in which the claim accrued. Lacking sufficient facts supporting the elements of her prescriptive easement claims; judgment on the pleadings was proper.

Similarly, Brock failed to sufficiently plead the essential elements of an implied easement. There are two types of implied easements: “(1) an intended easement based on a use that existed when the dominant and servient estates were severed, and (2) an easement by necessity.” *Albert G. Hoyem Tr. v. Galt*, 1998 MT 300, ¶ 17, 292 Mont. 56, 968 P.2d 1135. “Easements by necessity are typically implied to provide access to a landlocked parcel, while easements by existing use are based on a landowner's prior use of part of his property (the quasi-servient tenement) for the benefit of another part of his property (the quasi-dominant tenement).” *JRN Holdings v. Dearborn Meadows*, 2021 MT 204, ¶ 27, 405 Mont. 200, 493 P.3d 340 (citations omitted). An implied easement arises by operation of law when the properties are severed from

common ownership, rather than by written instrument. *Id.*; *Wolf v. Owens*, 2007 MT 302, ¶ 16, 340 Mont. 74, 172 P.3d 124. Both types of implied easements require unity of ownership at the time the dominant and servient estates are severed. *JRN Holdings*, ¶ 30.

Brock’s Amended Complaint does not allege facts that, if true, would show that Montana law implies an easement over Forgotten Lane as she claims. Initially, she did not even identify which type of implied easements she alleged. Sure, she uses the word “implied” three times in the Amended Complaint, but that means nothing without sufficient factual allegations. Likewise, her allegation that an easement “was implied when the property was first created” is insufficient. *Firelight Meadows*, ¶ 18.

Moreover, while she broadly alleged that the parties’ property was commonly owned at some point in time, she does not identify when the necessary severances occurred that must be analyzed to determine whether the law will imply an easement in the first place. *See JRN Holdings*, ¶ 27. Further, she pleads facts about the severance of the 2.5-Acre Parcel from common ownership with the Tompkins Parcel, but she does not plead facts to support severing her Hoofbeats Lane Parcel from any parcel—a required element of her claim. *See, e.g., JRN Holdings*, ¶ 27.

To be certain, Brock’s response opposing the Tompkins’ motion for judgment on the pleadings *concedes* that she did not plead any facts to

support an implied easement benefitting the Hoofbeats Lane Parcel. *See* AA2-273 (arguing that she had alleged use of the 2.5-Acre Parcel since 1976, without ever addressing the Hoofbeats Lane Parcel.) The district court simply never analyzed the sufficiency of her pleadings. That is reversible error.

**B. The district court erred when it denied the Tompkins' 2024 motion for partial summary judgment.**

The Tompkins renewed motion for partial summary judgment was filed after extensive discovery and supported by evidence including Brock's deposition testimony. By then, even though the case was old enough to be in kindergarten, Brock still could identify no written conveyance creating the express easement she claimed over the Tompkins Parcel.

Brock also failed to identify any admissible evidence to dispute that her use of Forgotten Lane over the Tompkins Parcel had ever been anything but permissive. Indeed, the Tompkins motion included Brock's own testimony confirming that her only use of Forgotten Lane over a portion of the Tompkins Parcel was only by permission, and had been since the Schlapmans owned the property prior to 2004. *E.g.* AA1-152. Because her use was permissive, it could not ripen into a prescriptive easement. *Larsen v. Richardson*, 2011 MT 195, ¶ 59, 361 Mont. 344, 260 P.3d 103.

Brock also failed to demonstrate that her implied easement claim

could survive. Even at that point, Brock could not identify which type of implied easement she claimed. Instead, she used generalities, arguing that she had already “provided the history of common ownership, that the only road at the time of Separation was Forgotten Lane, as shown by a 1954 aerial photograph, and Forgotten Lane was the only access to all the lands along the roadway.” (Doc. 84 at 5.)

Brock’s contention that because a road exists must mean there is an easement is unsupported by any law—and she didn’t even try to cite any. But the law does not just imply easements at will because a road exists. Instead, this Court has “emphasized that implied easements are considered with ‘extreme caution’ and that courts are ‘reluctant’ to find such easements” because “they deprive the servient landowner of property rights by imposing a servitude through mere implication[.]” *Yellowstone River v. Meriwether Land Fund*, 2011 MT 263, ¶ 33, 362 Mont. 273, 264 P.3d 1065.

Brock was required to set out “specific facts showing the existence of a genuine issue of material fact,” rather than “mere denial, speculation, or pleading allegation.” *Cordero v. Montana State U.*, 2024 MT 167, ¶ 10, 417 Mont. 385, 553 P.3d 422. But she relied on precisely those arguments that are insufficient to prevent summary judgment. (*E.g.*, Doc. 84 at 5 (claiming that there “is no question that Dee Shook intentionally placed a [60-foot easement] over and upon [COS 4026].”.) Moreover, Brock never disputed that when the 2.5-Acre Parcel was

severed from what is now the Tompkins Parcel in 1976,<sup>10</sup> the 2.5-Acre Parcel abutted and was accessible by Sawmill Lane.

More, the Hoofbeats Lane Parcel was not part of that common ownership; it was part of the 1,600-acre parcel that the Wilsons conveyed to the Saxes, and from which, years later, the 10.18-acre parcel was severed by conveying it to Brock, who later divided it such that the Hoofbeats Lane Parcel came to exist in June 1993 when Brock recorded COS 4945. AA2-237. At that point, a parcel of Brock's own creation bordered Hoofbeats Lane—and it still does today. The law does not imply an easement over the Tompkins Parcel for either of Brock's two properties.

The Tompkins were entitled to judgment as a matter of law on each of Brock's asserted easement claims in 2024, first by virtue of judgment on the pleadings and, second, by summary judgment. The district court erred when it summarily denied the Tompkins' motions

#### **IV. Even at trial, Brock failed to establish her implied or express easement theories.**

Despite the multiple times Tompkins established they were entitled to judgment as a matter of law on Brock's shifting easement theories, the

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<sup>10</sup> Even if an easement benefitting the 2.5-Acre Parcel and burdening the Tompkins Parcel existed before it being commonly owned by Dee Shook, when it was commonly owned—and until 1976 when he severed that common title by conveying the 2.5-Acrea Parcel to Brock, any such easement over the Tompkins Parcel was extinguished by merger. Section 70–17–111(1)(a), MCA.

parties were forced to try those easement claims in a bench trial.<sup>11</sup>

**A. The district court correctly determined that no express easement existed but failed to follow through.**

The trial confirmed that the Tompkins were entitled to summary judgment in 2021. Brock offered no evidence to support anything other than her earlier regurgitated arguments. And the district court agreed, finding that: (1) COS 4026 does not identify which properties are the dominant tenement of the easement claimed by Brock, and (2) that there is no written conveyance creating the easement. It is simply inexplicable that the district court refused to enter judgment in the Tompkins' favor on this issue.

**B. The district court erred by finding an implied easement burdening the Tompkins Parcel and benefitting both of Brock's parcels.**

The district court concluded that Brock “has proven an implied easement exists for Forgotten Lane” but never identified whether it meant an implied easement by necessity or existing use. But either way, its ultimately conclusion is factually unsupported and legally incorrect. And so was its conclusion about the scope of the implied easement it found—no evidence was introduced at trial regarding the scope. As a matter of law and the facts elucidated at trial, Montana law does not imply an easement over Tompkins' property for either of Brock's parcels, especially one that is 60-feet wide.

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<sup>11</sup> The district court also erred by disallowing the Tompkins' reverse prescription defense to be tried before a jury, as they had demanded.

Crucially, the district court did not analyze the differences between Brock’s two parcels. Instead, it lumped them together and concluded that the properties were, at one point unified in title, AA1-27, and that there was a “complex conveyance” in 1950 “that separated the properties such that the properties now owned by Brock and Tompkins became separate tracts separately conveyed thereafter.” AA1-33. This finding necessarily means that the district court determined that the conveyance from Walter and Vivian Shook to the Wilsons in 1950 is the only relevant severance.

But for all the reasons identified above, the 1950 severance could not have created an implied easement that could have survived to the present day. That 1950 conveyance identified by the court was the conveyance from Walter and Vivian Shook to the Wilsons, that conveyed a block of property *specifically excepting* what would become Brock’s 2.5-acre Parcel and a 14.3-acre parcel, the latter of which would become part of the Tompkins’ property. AA2-199; T.Tr.21:15–23:8. At the time of that conveyance, Walter and Vivian Shook no longer owned the property that would become the Tompkins Parcel—they had already conveyed it to Dee Shook and his wife. AA2-198; T.Tr.19:9–20:10. Therefore, as a matter of law, the 1950 conveyance **could not** have resulted in any implied easement burdening the Tompkins Parcel and benefitting either of Brock’s two parcels. *See, e.g., JRN Holdings*, ¶ 27. The district court’s conclusion to the contrary is clear error.

Even if an easement benefitting Brock's 2.5-Acre Parcel and burdening the Tompkins Parcel somehow arose in 1950, as the district court apparently concluded, both the 2.5-Acre Parcel and lands encompassing the Tompkins Parcel came to be owned by Dee Shook and his wife by 1976. Thus, the implied easement that Brock and the district court contended came to exist in 1950 was necessarily extinguished as a matter of law, by merger. Section 70–17–111(1)(a), MCA.

Further, no implied easement can be found to benefit Brock's Hoofbeats Lane Parcel. Again, the Tompkins Parcel—what Brock claims to be the servient tenement—was within the first property severed in 1949 from Walter and Vivian's commonly owned property. After that 1949 conveyance, Walter and Vivian owned all the lands that include both of Brock's two parcels. The 1950 conveyance severed common title *between Brock's two parcels* but had nothing to do with the Tompkins Parcel because it had already been conveyed away as part of a 14.3-acre block the year before. After the 1949 conveyance, Brock's Hoofbeats Lane Parcel was never unified in title with the Tompkins Parcel. It was among the lands conveyed in 1950 to the Wilsons, and then it was conveyed to the Saxes in 1973, T.Tr.38:15–18. Later, it was conveyed to Brock in 1978 as part of a greater, 10.18-acre parcel, T.Tr.46:7–25, and finally became a tract of record when COS 4945 was recorded in 1993. AA2-237, T.Tr.64:3–18, 65:2–9. There can be no implied easement over the

Tompkins Parcel benefitting the Brock Hoofbeats Lane Parcel.<sup>12</sup>

Nor is there an implied easement burdening the Tompkins Parcel and benefitting Brock's 2.5-Acre Parcel. In 1976, Dee Shook owned the lands containing what would later become the Tompkins Parcel and the Brock 2.5-Acre Parcel in common ownership. He took title to the 14.3-acre parcel in 1949, and title to the 2.5-Acre Parcel in 1952. The conveyance of the 2.5-Acre Parcel from Dee Shook to Brock in 1976 severed that 2.5-acre parcel from the 14.3-acres of land that contain what is now the Tompkins Parcel. At that time (and still), the western boundary of Brock's 2.5-acre Parcel was bounded by Sawmill Lane. Therefore, as a matter of law, the 2.5-Acre Parcel was not landlocked and no "strict necessity" could exist such that an implied easement by necessity could be implied. *See Ashby v. Maechling*, 2010 MT 80, ¶ 19, 356 Mont. 68, 229 P.3d 1210.

For the same reason, the 2.5-Acre Parcel did not now, nor has it ever, required access from anywhere other than the county road, Sawmill Lane, because an easement by preexisting use<sup>13</sup> can only be found where

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<sup>12</sup> Brock also agreed that there is no road connecting her Hoofbeats Lane Parcel to Forgotten Lane, nor has there ever been; there's a gully (that is sometimes filled with water) thereby preventing access Forgotten Lane, which Brock agrees has *never* provided access to that property. Tr.147:4–148:7, 150:7–10.

<sup>13</sup> Notably, the district court did not make any factual findings that support the conclusion that support this type of implied easement arose, nor did it make any conclusions of law. Accordingly, this Court owes no deference to any factual finding of the lower court.

the use of the servient tenement is reasonably necessary for enjoyment of the dominant part and the use is intended to continue after division of the property. *Waters v. Blagg*, 2008 MT 451, ¶ 16, 348 Mont. 48, 202 P.3d 110. The district court made no such finding.

The 2.5-Acre Parcel was, and is, bounded to the west by a county road. Dee Shook certainly understood that the 2.5-Acre Parcel bordered Sawmill Lane because he personally *deeded that land to the State*, meaning it could not, by definition, be landlocked. The Court should not imply an easement that Dee Shook did not grant to Brock when an easement was not reasonably necessary for the use of the 2.5-Acre Parcel at the time it was severed from Dee Shook's common ownership.

At bottom, Brock irretrievably tethered her implied easement theory to the claim that it arose in 1950. The district court recognized this, which is why its findings and conclusions address only the claim of an implied easement coming into existence in 1950. But, as it turns out, the theory on which Brock built her entire implied easement case is nonsensical and the district court was wrong as a matter of both fact and law.

### CONCLUSION

The Tompkins respectfully request that this Court conclude that the Tompkins are entitled to judgment that Brock has no easement of any kind across their property.

They further request that the Court direct entry in their favor and

then remand to determine whether the Tompkins are entitled to any further relief, including on their trespass counterclaim.

November 24, 2025.

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## CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief contains 9,773 words, as calculated by Microsoft Word, excluding the caption, tables of contents and authorities, and certificate of compliance. The brief is double-spaced in size 14 Century Schoolbook typeface.

/s/ Jesse Kodadek

## **CERTIFICATE OF SERVICE**

I, Jesse C. Kodadek, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 11-24-2025:

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